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THE MANAGER, THE JUDGE, AND THE EMPIRICIST:
AMERICAN ADMINISTRATIVE LAW AS A THEORY OF EXPERTISE

by

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A thesis submitted in partial fulfillment of the requirements
for the degree of
Doctor of Juridical Science

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Finally, evidence to the contrary notwithstanding, this dissertation belongs to Limor. Only I fully know why.

New York City, December 2006          Yaïr Sagy
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CHAPTER 1. INTRODUCTION

Socrates. ... Was the disciple in gymnastics supposed to attend to the praise and blame and opinion of every man, or of one man only—his physician or trainer, whoever was that?

Crito. Of one man only.

... Socrates. And he ought to live and train, and eat and drink in the way seems good to his single master who has understanding, rather than according to the opinion of all other man put together?

Crito. True.¹

A. The Arguments

Recasting the established history of the administrative process, this dissertation tells it anew in terms of expertise. On this reading, the archives of the intellectual history of public regulation in the United States chronicle a story of an ongoing struggle with the idea of administrative expertise. Indeed, from a bird’s eye view, this history could be characterized as a protracted meditation on expertise.

There is a good reason for the meditation. American theorists of public regulation² have been looking from time immemorial for the Holy Grail, for the one theory that would justify the regulatory state once and for all. They are still looking. This is not surprising. The size, shape, and form of the American administration have never ceased to be in the forefront of public debate. “In contrast to most of the rest of the world (including most democracies),” wrote Peter Schuck in Foundations of Administrative Law in 2004, “Americans have never been comfortable with the administrative state and have therefore always demanded it to be justified afresh.” “‘Why is there an administrative state?’” he observed, “has never been a merely

¹ Crito, DIALOGUES OF PLATO 45b (Benjamin Jowett trans., 1871).
² The following definition of “public regulation” will do, for now at least: “the power of the state to restrict individual liberty and property for the common welfare.” WILLIAM J. NOVAK, PEOPLE’S WELFARE: LAW & REGULATION IN NINETEENTH-CENTURY AMERICA 2 (1996). For a fuller discussion, see infra Chapter 2.
academic question; it reflects the deepest anxieties of our political culture.” I believe that the answers provided along the years to the pending foundational query revolved around several concepts of administrative expertise. These concepts are the focal point of this study.

There are two main arguments to the dissertation. The first argument concerns the various meanings of the concept of administrative expertise, as used in the past and present, both by scholars and practitioners. I will analyze the details of a prolonged debate that was waged by reform-minded lawyers, their Bar-led detractors, and a cohort of political scientists (broadly defined), in an attempt to answer the question: what were the participants talking about when they invoked an assertion of administrative expertise to support or oppose a regulatory activity? My study unveils the several models, or paradigms, of expertise that mushroomed in the formative years of federal regulation. More precisely, three models that inhere in the debate are singled out. I name them the public general manager, the judge, and the empiricist/professional paradigms. I will refer to this as the Plurality Argument. This research charts and contextualizes the progress of the paradigms in the last century. It points at their roots in the contemporary socio-economic and intellectual environment during the same period.

Concurrently, the dissertation takes a comparative look at the various concepts of expertise identified in the study and at those sponsoring them over the years. This examination lays bare a persistent ellipsis in administrative law scholarship that explicitly refused, and at least to some extent still does refuse, to heed the perspectives of other disciplines such as the political

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4 The three paradigms could be alternatively labeled as the Father (general manager), the Son (the empiricist) and the Holy Ghost (the judge). These designations capture the suggestion that, just like the Holy Trinity, the three paradigms represent one image, that of the public good, as they all are inspired by a commitment to further the public interest through regulation. See infra text accompanying note 28.

5 The intuition in singling out a triumvirate of theoretical constructs surely reflects a longstanding tendency—stretching from Plato to Max Weber—in Western culture to think of public governance in trios. Plato’s Republic needs no introduction in this context. See PLATO, REPUBLIC 433a-445e (G. M. A. Grube trans., 1992). While affinities do exist, this is not to suggest that the proposed trinity of paradigms neatly maps onto Plato’s division of the body politic into producers, guardians, and rulers (which, in turn, correspond to the three parts of the soul—the appetitive, spirited, and rational). As for Weber’s work, see infra notes 22 and 90.
sciences, which, like law, took great interest in administrative regulation. This oversight, I will show, has its price: it inculcates a limited, unrealistic understanding of administrative apparatuses among lawyers. I will refer to this as the Willful Blindness Argument.

To be sure, the two arguments are intimately connected. They are the flip-sides of the same coin. The dissertation’s opening proposition that the history of regulation can be told in terms of expertise is predicated on the understanding that the discussion about administrative expertise has multiple dimensions and encompasses a large set of fundamental administrative issues. Each paradigm of expertise can be regarded as the tip of an iceberg of underlying assumptions regarding public regulation—assumptions about the structure of the administrative machinery and the administrative process; administrative organizations’ constitutional position; the “public good”; visions of administrative justice; types of domination; and so on. The Plurality Argument points, then, to a larger number of underlying, far-reaching controversies regarding administrative regulation among those propagating divergent paradigms. Viewed in this context, the fact that for an extended period of time reform-minded lawyers and political scientists settled for different paradigms becomes highly significant. As we shall see, it indicates, among other things, that each group of scholars was impervious to the perspective of the other.

What follows next is an elaboration of the preceding curt propositions.

B. The Plurality Argument

The ultimate claim under this heading is that the numerous concepts thrown into the expertise debate over the years can be arranged around the three named paradigms of administrative competence. It will be demonstrated that the fractured nature of the expertise discourse extended not only vertically (i.e., across generations), but also horizontally. That is, a plurality of paradigms reverberated into each of the three generations of the three groups of theoreticians the study focuses on. The pro-commission side of the aisle is identified with Charles Francis Adams (the Progressive Era), James Landis (the New Deal), and Louis Jaffe (post New Deal). On the other side of the aisle, I examine the writings of Justice David Brewer, Roscoe Pound, as
well as the work of other conservative lawyers. I also survey the work of Woodrow Wilson and the members of the 1937 President’s Committee on Administrative Managements, to name but a few leading American political scientists who entered into the fray.

1. The Challenge

This study reviews, and therefore joins, a long line of accounts telling the history of federal regulation, many of which make reference to “the model of expertise.” Tradition has it that over the years only one model of expertise was set forth. During the years following World War II this reading of the history of administrative law theory has acquired the status of dogma among legal scholars, who, as a rule, based their arguments on legal sources—that is, sources written by lawyers—alone.

The dissertation challenges this convenient yet simplistic historiography and seeks to thicken lawyers’, but also political scientists’ and historians’, understandings of federal regulation. It takes an expansive look at federal regulation in order to substantiate the Plurality Argument. As part of this effort, legal literature will be reviewed alongside the work of political scientists, students of business and public administration, organization theorists, economists, and

---

6 No satisfactory definition of “conservativism,” at least in our context, can be found. The same holds true with regard to the “progressive/reformists” position. The reason is that the two groups are defined here with relation to each other. Suffice it to say that “conservative” should be understood to designate a restrictive ideological approach to regulation, which argues for limiting the pale of administrative discretion. See infra Chapter 3, where the reformist and conservative articles of faith are outlined.


8 As we shall see below, during the last generation of legal scholars a change has occurred—certainly not across the board—in this regard. Infra text accompanying note 119.
historians of regulation. Rather than working under the traditional division between political
science and legal scholarship, I seek to incorporate a multitude of perspectives into the
analysis. I suggest that we regard the contributions of legal and non-legal academia to the
American theory of public administration as forming a “unified field” of sorts. This is not to say
that it is homogenous—indeed, significant ruptures pervade it—nor that it is static, nor even
that its boundaries are well demarcated. Nevertheless, treating this diverse scholarship as one
unit allows for a more informed comparative investigation. For example, taking this broader
perspective, it will be illustrated that at no point in time was one single concept of expertise
circulating among the entire body of debaters who addressed the issue, nor even within the
inner-circle of progressive lawyers.

2. Expertise and Legitimacy

“The model of expertise” conventionally refers to a constellation of assertions regarding
administrative bodies’ unique competence, plentiful knowledge, and privileged constitutional
position that allowed them, so the theory went, to advantageously resolve socio-economic
difficulties. That being the case, it was stressed that since “persons subject to the
administrator’s control are no more liable to his arbitrary will than are patients remitted to the
care of a skilled doctor,”12 there was no reason to be anxious about the exercise of
administrative control over personal liberty. To the contrary, there were good reasons to eagerly
anticipate its salutary impact.

This line of reasoning (commonly referred to as “the model of expertise” and, here, as the
general manager paradigm) has exerted immense influence on the theory and design of the
American administrative state. It reached its zenith of influence during the New Deal, following

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10 See infra Section B.2. & 4.
11 See infra note 101.
12 Stewart, supra note 7, at 1678. See also Freedman, supra note 7, and James M. Landis, The
Administrative Process (1938), e.g., at 17 [hereinafter Landis, The Administrative Process].
a period of prosperity in the Progressive Era; though in the second half of the twentieth century it lost much of its luster in a process that will be canvassed here.\footnote{See infra Chapters 7 and 8.}

This model was not the only attempt made to legitimize agencies’ powers.\footnote{“Commissions,” “agencies,” “tribunals,” and like denominations should be regarded as synonymous throughout the dissertation; they all stand for governmental organs, constituted by an Act of Congress, to regulate a section of the “private” sphere. Cf. the expansive definition of “agency” in the Administrative Procedure Act: 5 U.S.C. § 551 (1) (1994).} Three other models were put forward since the inception of the federal administrative state. It is customary to name the mechanical/formalist model as a starting point. This model altogether eschews the legitimacy difficulty by likening the administrative apparatus to a machine, an automaton, which exercises no discretion. The administrative machinery is said to merely “transmit power, from its motor source, to the point where it is brought into contact with the raw material requiring its application.”\footnote{Adolph A. Berle, Jr., The Expansion of American Administrative Law, 30 HARV. L. REV. 430, 434 (1917).} Under this vision, “the motive power is the popular will,” while “Administration is the process of manufacture.”\footnote{Id. at 434, 435. A detailed analysis on the formalist model is conducted in Chapters 4, infra.} The next attempt to legitimate the administrative commission is dramatically different from the former for it is based on the (potential) intervention of an altogether exterior, non-executorial body—the judiciary—in the administrative process. This is the judicial review model, which anchors the legitimacy of the agencies in courts’ independent review of their actions.\footnote{See Louis L. Jaffe, The Right to Judicial Review I, 71 HARV. L. REV. 401, 405 (1958) (“we, in common with nearly all of the Western counties have concluded that the maintenance of legitimacy [of an agency’s action] requires a judicial body independent of the active administration.”). On Jaffe and the judicial review model, see infra Chapter 8.}

Finally, the pluralist/representation model was identified by Richard Stewart in 1975 in the landmark The Reformation of Administrative Law. Stewart observed that the focus of judicial review had shifted from traditional concerns about agencies’ intrusion on private autonomy to “the assurance of fair representation for all affected interest in the exercise of the legislative power delegated to agencies.”\footnote{Stewart, supra note 7, at 1712. This is not to suggest that the search for an adequate justification for the administrative process has exhausted itself with The Reformation. Indeed, nowadays it is mostly spoken of “shareholders’ participation” in the administrative process, rather than of “interests’ participation.”}
In the following chapters I argue that rather than forming a series of successive loosely-related models of legitimacy that have evolved in a series of theoretical reformations, the formalist, expertise, judicial, and representation models are variations on the same theme of administrative expertise. To illustrate, evidently there had to be a cadre of professional mechanics who kept the machine working for the formalist model to make sense.  What has not been noticed hitherto was that this was a Janus-faced model, namely, it concomitantly stipulated that a qualified driver—a professional manager—should direct the machine. The judicial review model, in contrast, could be taken to simply be based on legal expertise or proficiency. I wish to advance another interpretation of the model. On my reading, the judicial review and representation models take a pluralistic view of regulation and of expertise. The public sphere is viewed as a whole grid of distinct abilities and almost every actor (judges, commissioners, executives, legislators, etc.) is deemed to be expert in its field. The administrative process is thus perceived as an arena where the various positions set forth by these actors are negotiated.

Hence, the Plurality Argument holds that a number of concepts of expertise are peppered throughout the work of those identified with “the” model of expertise (reform-minded lawyers), those opposing it (mainly, conservative lawyers), and scholars, progressives or not, who representation.” See Shapiro, supra note 3, for a useful survey of the trail of scholarship that followed it. See also Jody Freeman and Daniel Faber, Modular Environmental Regulation, 54 DUKE L.J. 795 (2005). Still, as I shall argue below, however diverse, the post-mid-1970s scholarship, in which The Reformation was central, shared the assumption that regulation was and should be a pluralistic, responsive process. Therefore, the representation model, which is a direct outgrowth of this assumption, encompasses a foundational element that permeates the post-Reformation scholarship. See Orly Lobel, The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought, 89 MINN. L. REV. 342, 343-350 (2004).

As Gerald Frug aptly puts it, as a specialized machine, administration is “highly technical and complex device, one that would be damaged by mere layman’s tinkering.” Frug, supra note 7, at 1298.

According to Frederick Taylor, the leader of the scientific management movement, which greatly influenced the fledgling science of administration in the beginning of the twentieth century, “There is an almost equal division of work and the responsibility between the management and the workmen. The management take [sic] over all the work for which they are better fitted than the workmen …” FREDERICK W. TAYLOR, THE PRINCIPLES OF SCIENTIFIC MANAGEMENT 37 (1911).

See infra especially Chapter 8. The metaphor of a dialogue, so common nowadays in constitutional theory, may be invoked in this context, too. See generally the excellent Christine Bateup, The Dialogue Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue, 71 BROOK. L. REV. 1109 (2006). See also infra note 101.
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concocted what seems to be competing theories of administrative legitimacy (propagators of the formalist, judicial review and representation models).

The next section will demonstrate how these different visions of expertise translate into the public general manager, empiricist/professional, and judge paradigms.

3. The Paradigms

The role of technical qualifications in bureaucratic organizations is continually increasing. Even an official in a party or a trade-union organization is in need of specialized knowledge, though it is usually of an empirical character, developed by experience, rather than by formal training. In the modern state, the only ‘offices’ for which no technical qualifications are required are those of ministers and presidents. This only goes to prove that they are ‘officials’ only in a formal sense, and not substantively, as is true of the managing director or president of a large business corporation.


The paradigms are three ideal-types.23 As such, they are quite flexible and could manifest themselves with different permutations. They should, therefore, be regarded as three gravitational, rather than fixed, points of analysis. The paradigms are constructed out of the work of Progressive Era, New Deal, and postwar scholars.


(a) The Public General Manager

As indicated by its name, the public general manager paradigm is premised on a managerial concept of the regulator. This general manager is in control of the regulated industry, as a pastor is in control of his herd. As a public leader he\textsuperscript{24} never loses sight of the general public interest while taking care of the industry entrusted in his hand. Not necessarily intimately acquainted with the details of the regulated industry, his forte lies in his ability to gain an overarching, all-encompassing outlook over the industry as a whole, while being aware of various “external” factors (e.g., demands of other governmental units) impinging on its wellbeing. This outlook allows him to cautiously guide the industry to safe shores. His leadership is indeed considered necessary, especially in turbulent times. The regulator is a paternal figure: savvy, wise, and caring; steadfastly protective of the business community from outsiders and insiders who wish to harm it; yet, stern and reproachful when someone under his auspices challenges his lead.

The allure of this paradigm emanated from the fact that “[b]usiness, with its developing sense of efficiency, management, and even planning, provided the public a picture of the democrat governing himself,” writes Barry Karl of the early twentieth century. “Professional self-government was a difficult concept to define in America except by analogy; and for the moment the businessman could provide the analogy.”\textsuperscript{25}

The position of the general manager is wholly dependent on the institution he serves. Thus, advancing a shepherd-like image of expertise carries with it a strong commitment to the institutional framework within which this manager-regulator operates. Because of his close affiliation with the commission and his position of leadership, he readily comes to personify it and the commission is, likewise, identified with him; he stands for it and vice versa.

This paradigm, more than the other two, has a clear transcendental (though not in the Kantian sense) essence. As the idea of transcendence implies, any attempt at reducing (especially) this assertion of expertise to a definite formulation would reveal the ineluctability of a residual

\textsuperscript{24} As participants in the debate always referred to administrators as men, I will for the most part follow suit in order to avoid the pitfalls of anachronism.

inexplicable element lying at its heart—this something about expertise that we cannot quite close our fists over. As we shall see, this was a point of great difficulty in Landis’ analysis.26 George Gardner of Harvard Law School appears to have captured this idea in an acerbic book review of Landis’ The Administrative Process, the manifesto of the general manager paradigm.27 “[T]he claim of ‘expertness’” Gardner thundered, was essentially an assertion “of a divine power and calling to govern.”28

(b) The Empiricist/Professional

In a way, the empiricist/professional is the simplest of the three paradigms. It refers only to the bureaucrats of the agency, those core officials who are the backbone of any organization. It is about the very men who make the organizational beast tick.

One version of the paradigm is a reflection of a popularized image of scientists. The views held by the expositors of this paradigm would probably be characterized by philosophers of science as positivist à la Rudolf Carnap. Ian Hacking connects Carnap to “a tradition that speaks of ‘inductive sciences.’” His description of this tradition captures the essence of the empiricist paradigm: “Originally that meant that the investigator should make precise observations, conduct experiments with care, and honestly record results; then make generalizations … and gradually work up hypotheses and theories … if the theories stand up to subsequent testing, then we know something about the world.”29

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26 Infra Chapter 6, Section III.F.3.

27 LANDIS, THE ADMINISTRATIVE PROCESS, supra note 12.


29 IAN HACKING, REPRESENTING AND INTERVENING 3 (1983). Admittedly, there is an air of scientific realism and metaphysics about the statement. To this Carnap vehemently objected. See, e.g., RUDOLF CARNAP, THE UNITY OF SCIENCE 21-29 (1934). This is a complex philosophical subject that need not detain us. On positivism and scientific realism, see HACKING, id. at 1-31, 41-57; DAVID J. HESS, SCIENCE STUDIES: AN ADVANCED INTRODUCTION 8-14, 30-34 (1997); and SIMON BLACKBURN, TRUTH: A GUIDE 109-128 (2005). I would just note already here that the positivist worldview has its problems. For one thing, it rests on a dubious epistemology. But this for later discussion, below. See infra Chapter 6, Section III.F.1. See also PETER MUNZ, BEYOND WITTGENSTEIN’S POKER: NEW LIGHT ON POPPER AND WITTGENSTEIN (2004); ALASDAIR MACINTYRE, AFTER VIRTUE 79-81 (2d ed., 1984); and THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962).
Another version of the empiricist/professional paradigm is grounded on a straightforward understanding of craftsmanship. Consider tailors, for example. Tailors are a case in point as their craftsmanship is undisputed and was acknowledged as such at least since the guilds of the Middle Ages. The empiricist/professional paradigm, in short, contains nothing more than the attributes of craftsmanship, free-lance professionalism, or white-smocked laboratory technician. Translated into the language of administration, it represents the modern bureaucrat.30

Those known as “the scientists of administration” were the early exponents of the empiricist/professional paradigm in the beginning of the twentieth century.31 Later administrationists, however, noticed the following with regard to these empiricists/professionals: both professionals and craftsmen usually go through some process of induction prior to joining the organization. Both, as hinted, are members of professional associations as well as acknowledged institutions of training, and rely on canonic literature and accepted standards of evaluations—all standing outside the organization. This may mean trouble for organizations’ directors.32 First, there is the issue of double loyalty of the professional, both to his guild and to the organization he is part of, which may result in a conflict of interests. The flip-side of the coin may be just as troubling. As the professional is held to be “in the know” of the technical aspects of regulation, the commission may come to rely on him in a blindfolded fashion,33 thus entrusting a veto power in the hands of officials whose professional standards are oftentimes inaccessible to the uninitiated.34

30 Weber’s analysis of the rational-legal authority in general, and of modern bureaucracy in particular, as well as the work of Woodrow Wilson and Fredrick Taylor, inform this description. See notably Weber, ECONOMY AND SOCIETY, supra note 23; Woodrow Wilson, The Study of Administration, 2 POL. SCI. Q. 197 (1887); TAYLOR, supra note 20; and the sources mentioned infra note 104.

31 See, e.g., Wilson, supra note 30; Ernest Freund, The Law of the Administration in America, 9 POL. SCI. Q. 403 (1894); Frank J. Goodnow, Politics and Administration (1900); and Frank J. Goodnow, The Principles of the Administrative Law of the United States (1905).


34 According to Joel Yellin the problem became particularly troubling after the early 1970s, when the federal government came to regulate more clearly-scientific areas, such as environmental protection. Yellin argues that “… in leading us beyond the New Deal, environmentalists … have encouraged the use of sophisticated techniques distant from ordinary experience and blurred the boundaries of
The empiricist/professional paradigm is the cornerstone of the formalist model of justification of administrative power. But this paradigm is also a constitutive part of a pluralistic view of public regulation for the paradigm limits the priority accorded to the expert regulator in the administrative process in order to allow for a multi-party examination of public affairs. Assertions of “strong,” expansive expertise (commonly associated with the general manager paradigm), by contrast, are inimical to open deliberation. As Harold Laski noted in 1930, “The expert … remains expert upon the condition that he does not seek to coordinate his specialization with the total sum of human knowledge. The moment that he seeks that coordination he ceases to be an expert.” A pluralistic approach to regulation makes sense, then, only in the context of the empiricist/professional paradigm.

(c) The Judge

Courts and judges, especially for lawyers, have always presented a ready-made image of administrative bodies and regulators. Given the dominance of legal colloquists in the controversy surrounding economic regulation in the United States, it is no wonder that legal phraseology often colored the debate and judicial elements pervaded it. Thus, even the arch-critic of the Courts’ early-New Deal jurisprudence, Landis, wrote that the administrative process “lifts [the idea of the ‘supremacy of law’] to new heights where the great judge, like a conductor of a many-tongued symphony, from what would otherwise be discord, makes known through the voice of many instruments the vision that has been given him of man’s destiny upon this earth.”


35 See supra text accompanying notes 15 and 16. As we have seen, the formalist model also contains the general manager paradigm. See supra text accompanying note 20.

36 See supra text accompanying note 21.


38 LANDIS, THE ADMINISTRATIVE PROCESS, supra note 12, at 155.
The judge paradigm is naturally modeled on a judicial *modus operandi*. Although not necessarily the case, it is sometimes rooted in legal proficiency. Its inspiration comes from an idealized, orthodox perception of the methodology employed by an equally idealized common-law judge. The expert regulator’s strong points are his reliable collection of data and his ability to swiftly acquire a grasp of a regulated industry. This sage figure is said to proceed in accordance with the procedural and substantial demands of justice. He is a well-respected arbiter called upon to resolve controversies between different sectors of the regulated industry.

Four things make the judge-regulator’s involvement salutary: his instinctively-gained knowledge of the workings of the industry; his neutral, detached position; his just procedures; and his excellence in fact-gathering. His treatment of industrial problems is, therefore, superior to that of the courts, mainly because of a specialized knowledge of the industry he is able to obtain. The core of his competence lies in the exclusive access he has to this corpus of knowledge. It is presumed that all the plentiful knowledge needed for successful regulation would become available and lucid to the administrator almost simply by dint of his installment in office. Also significant is the fact that his procedures are more efficient and up-to-date than the time-honored procedures of the common law courts. His institutional position, moreover, allows him to credibly assume an unbiased posture.

Lastly, under the judge-administrator paradigm, a “weak,” non-intrusive form of regulation is readily assumed. This form of regulation was conceived by Charles Francis Adams, who

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insisted that the Massachusetts Board of Railroads Commissioners, as designed by him in the 1870s, would be left “[w]ithout remedial or coercive powers.”

It should be noted at the end of this description of the three paradigms that while they overlap at a number of points, at core they can be sufficiently differentiated. For example, both the judge and empiricist/professional paradigms assume that a regulator’s reliance on a specified corpus of knowledge informs his expertise. Yet, unlike the judge, the empiricist/professional paradigm is rooted only in a bounded professional know-how, which is potentially available to any other member of the profession, within and without the organization. The judge regulator, just like the common-law judge, is expected to attain and digest the germane knowledge, whatever it might be.

4. The Context: An Overture

The dissertation historicizes the march of the paradigms; that is, it places them in the socio-economic, political, and, most importantly, intellectual context in which they were discussed and from which, I submit, they emerged. A few words on the context in which the three-party debate regarding administrative regulation raged are in order.

42 CHARLES FRANCIS ADAMS, RAILROADS: THEIR ORIGIN AND PROBLEMS 143 (1878). For this reason, Thomas McCraw referred to the Massachusetts Board as “the sunshine commission.” MCCRAW, PROPHETS, supra note 7, ch. 1 (“Adams and the Sunshine Commission”).

43 See similarly on the relationship between the general manager and the empiricist paradigms infra Chapter 6, Section III.D.

44 This is a point of diversion between this study and Gerard Frug’s wonderful article, The Ideology of Bureaucracy in American Law, supra note 7. The latter is a critical reading of American theories of regulations with a view to exposing their shaky ideological foundations. Conducting an essentially structuralist analysis, Frug’s discussion lacks any real sense of chronology. See id., e.g., at 1284 (“the reader should not take too literally my presenting [the four models of legitimacy] in terms of an historical progression but should use the idea of historical development only as a rough guide.”). For structuralist methodology, see infra note 45. The same holds with relation to Jerry L. Mashaw, Conflict and Compromise Among Models of Administrative Justice, 30 DUKE L.J. 181 (1981), which is mentioned infra text accompanying note 92.

45 On contextual methodology, see generally William W. Fisher III, Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History, 49 STAN. L. REV. 1065 (1997), and PAUL HAMILTON, HISTORICISM (2d ed., 2003). See also PETER NOVICK, THAT NOBLE
(a) The Debate, Timeframe, Debaters

The debate about administrative regulation to be analyzed below centered on regulation of economic activities of the kind carried out in the past by the Interstate Commerce Commission (ICC) and in the present by the Securities and Exchange Commission (SEC). Traditionally regarded as a particularly aggressive case of the state’s inroad into the “private” sphere, economic regulation has been continuously challenged, in one form or another, thus producing a wealth of literature to draw on.46

DREAM: THE “OBJECTIVITY QUESTION” AND THE AMERICAN HISTORICAL PROFESSION 9-12 (1988). Dominick LaCapra, following Hayden White, has much advanced in the last generation the theory of contextualist historiography, emphasizing that “[o]ne of the most important contexts of reading texts is clearly our own.” DOMINICK LACAPRA, RETHINKING INTELLECTUAL HISTORY: TEXTS, CONTEXTS, LANGUAGE 65 (1983). See also Dominick LaCapra, Intellectual History and Its Ways, 97 AM. HIST. REV. 425 (1992), and Hayden White, Foucault Decoded: Notes from the Underground 12 HIST. & THEORY 23 (1973). Following LaCapra, it should be noted that I endorse the contextual methodology being well aware of the meritorious objection, put forward by poststructural historians, that “the context” of any event can never be fully articulated. In deciding what development in modern Western history, which took place alongside the emergence of the American administrative state, to single out in sketching the context of the regulation debate, I heeded what those taking part in the debate (seemed to have) put the emphasis on. There were surely other—general and idiosyncratic, conscious and unconscious—complimentary events that molded their views. Many of these infinite factors, however, cannot be accounted for; others had to be edited out for lack of space and/or lack of relevance to the present investigation, and also, admittedly, for lack of interest on my part. Finally, for reasons there specified, in Chapter 6 the analysis will be supplemented with textual—i.e., structural/poststructural—methodology, which is not new to the legal audience. See, e.g., Gary Peller, The Metaphysics of American Law, 73 CAL. L. REV. 1151 (1985); Jack M. Balkin, Deconstructive Practice and Legal Theory, 96 YALE L.J. 743 (1986); Amy M. Adler, Post-Modern Art and the Death of Obscenity Law, 99 YALE L.J. 1359 (1990); GUYORA BINDER AND ROBERT WEISBERG, LITERARY CRITICISM OF LAW (2000); and Jack M. Balkin, Deconstruction’s Legal Career, 27 CARDOZO L. REV. 101 (2005). See also generally, e.g., JONATHAN CULLER, STRUCTURALIST POETICS: STRUCTURALISM, LINGUISTICS, AND THE STUDY OF LITERATURE (1975); STRUCTURALISM AND SINCE: FROM LÉVI-STRAUSS TO DERRIDA (J. Sturrock ed., 1979); JONATHAN CULLER, ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM 30 (1982); and JOHN STRURROCK, STRUCTURALISM (2d. ed., 2003).

46 See JOHN KENNETH GALBRAITH, THE GREAT CRASH 1929 26 (1997) (“The regulation of economic activity is without doubt the most inelegant and unrewarding of public endeavors. Almost everyone is opposed to it in principle; its justification always relies on the unprepossessing case for the lesser evil.”).
“[T]hose who hailed” regulation by agencies and “those who hated it” were engaged in an extensive, convoluted, and sometimes acrimonious intellectual brawl, which was wide-ranging and long-lasting. The first step in rendering the debate more intelligible is connected to its periodization, as it has been ongoing for the past 130 years or so. The study’s point of departure is the Gilded Era, those prodigal, blithe years following the Civil War. The three periods of time that will be studied most systematically are those following the Gilded Era, namely, the Progressive Era, the New Deal, and the period stretching from the 1940s to the early 1970s.

The second step in unfolding the details of the debate will be to demonstrate—keeping the dangers of generalization in mind—that, with the advent of the New Deal, three fairly distinct coalitions took part in the discussion, each of which was led by a different group. First there was a party headed by pro-commission lawyers, some of whom lent a hand in the design of major pieces of legislation advanced by the FDR administration, who were the panegyrics of the administrative state—dominant members included Landis, Louis Jaffe, and others in the Brandeis-Frankfurter loop. They were commonly referred to as “the commission movement.” The second group was a coalition of anti-commission thinkers, led by conservative lawyers and coordinated by the American Bar Association, such as Arthur Vanderbilt, its president during the years 1937-1938, Louis Caldwell, who was the first chairman of the Special Committee on Administrative Law of the ABA (established in 1933), and the eminent Roscoe Pound, who had a stint as one of Caldwell’s successors as chairman of the Special Committee. The last camp comprised scholars outside the legal academy, led by political scientists, such as the three members of the President’s Committee on Administrative Management, who wrote its report in 1937; Luther Gulick, who was one of the heads of the Institute of Public Administration, established in New York in 1921; Charles Merriam, at one point the president of the American


50 See Report of the Special Committee on Administrative Law, 63 REP. AM. B. ASS’N 334 (1938) [hereinafter the Pound Report]. See generally infra Chapter 3, Section III.

51 THE PRESIDENT’S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES (1937).
Political Science Association; and Louis Brownlow, a former city manager of Petersburg, Virginia.\(^\text{52}\)

Reviewing the positions taken by the three groups of debaters from the end of the nineteenth century forward, I will argue that, generally, the reformist group oscillated between the judge and the general manager paradigms from the Progressive Era through the New Deal. Political scientists, in contrast, quite consistently adhered to the empiricist/professional paradigm, which was for many years at variance with a dominant understanding of expertise among progressive lawyers. In the postwar era, however, a number of progressive lawyers warmed to the latter paradigm, under the leadership of Jaffe. Conservative lawyers veered toward the empiricist/professional paradigm all along.

(b) Economy, Science, Government

Nascent federal regulation in the United States saw the rise to dominance of three major forces: big businesses, science and technology, and the federal government. The three were interrelated and had profound socio-economic, political, and cultural consequences for twentieth century United States. In short, they transformed the American psyche and landscape.\(^\text{53}\)

The advent of transnational corporations was the epicenter of a phenomenal industrial growth that began in the Gilded Era and carried over—with some setbacks, to be sure—well into the 1920s.\(^\text{54}\) The post-bellum American industrial revolution was spurred by new transportation, communication, and other technologies.\(^\text{55}\) The ubiquitous introduction of new technologies contributed to the popularization of the modern scientific revolution, which had reached its

\(^{52}\) For the biography of the three members of the President’s Committee, see KARL, supra note 25. For an analysis of the work of these and many other non-lawyer scholars, see infra Chapters 4 and 7. To repeat, I include under this rubric a large number of scholars who were not political scientists in the strict sense of the term, such as the historian Gabriel Kolko. See GABRIEL KOLKO, RAILROADS AND REGULATION, 1877-1916 (1965).

\(^{53}\) Infra Chapter 2.


climax two centuries earlier with Isaac Newton. Modern physics had long been pronounced as the crowning achievement of the human intellect and became a model to be emulated by other fields of intellectual inquiry. All, it seemed, wanted to approximate the natural sciences.\footnote{This tendency came to a head in the late nineteenth century with widening recognition of the scientificity of the social sciences and political science.} This tendency came to a head in the late nineteenth century with widening recognition of the scientificity of the social sciences and political science.\footnote{But there was a dark side to the accelerated processes of industrialization and scientification that brought to the fore a host of socio-economic difficulties. Amongst other things, these developments exacerbated class frictions, induced cut-throat competition, exposed the public to new hazards, made wide segments of society dependent on centralized mega-corporations, and led to vast migration (both from within and outside the continent) with the attendant breakdown of traditional social ties.} Given these transnational changes, a mounting popular demand led to federal “intervention” in the market. Progressive Era Presidents, World War I, and most dramatically the New Deal, vastly expanded the span of federal government’s operation.\footnote{Not everybody, however, welcomed the idea of a strong administrative state and, even less so, of an imperial Executive. To some, it did not bode well for American democracy as they thought it unsettled the constitutional equilibrium among the three branches of government. This concern turned into somewhat of a “hysteria” as totalitarian regimes took root around the world during the years leading up to the Second World War. Alarmed lawyers spoke of the dangers of “Executive aggrandizement” and sought refuge in courts, which they presented as...}

\footnote{See infra Chapter 4.}{56}  
\footnote{See H. Wayne Morgan, An Age in Need of Reassessment: A View Beforehand, in The Gilded Age: A Reprisal 1 (H. W. Morgan ed., 1963); Richard Hofstadter, The Age of Reform: From Bryant to F.D.R. (1955); and McGerr, supra note 55.}{58}  
\footnote{For a fuller discussion, see infra Chapter 2.}{59}  
the bastions of liberty. As a result, questions of separation of powers came to occupy central stage in legal circles and beyond.\textsuperscript{61}

The three vertexes in this triangle of vectors have clearly been continuously and hotly debated and went through quite sweeping transformations throughout the twentieth century, most forcefully at the beginning of the century but also in later decades. To illustrate, all told, the American economy prospered in the twentieth century. There were, however, major setbacks along the way. The most profound of them all, the Great Depression, brought about the New Deal.\textsuperscript{62} As the Great Crash of October 1929 unfolded, leading industrialists and financiers fell, almost to a head, from grace to shame and humility.\textsuperscript{63}

Science, too, went through nothing less than a revolution in the first decades of the century with the introduction of the concepts of relativity, uncertainty, and complementarity in the work of Einstein, Heisenberg, and Bohr.\textsuperscript{64} This revolution did not stop the natural sciences from producing novel, equally revolutionary, technologies, like the television and satellites.\textsuperscript{65} Yet, it also allowed mankind to engage in mass annihilation, produce the atomic bomb, and cause environmental catastrophes of unimaginable proportions.\textsuperscript{66} Deep shifts in popular imagery of science were thus inevitable. Science, not so long ago universally recognized as the crown jewel of humanity, became suspicious. To many, so too were scientists.\textsuperscript{67}

\begin{itemize}
\item \textsuperscript{61} See, for example, Rosenberry, supra note 40; the Pound Report, supra note 50; Caldwell, supra note 49; and THE PRESIDENT’S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, supra note 51.
\item \textsuperscript{62} See supra the sources mentioned in note 54.
\item \textsuperscript{63} Cf. supra text accompanying note 25.
\item \textsuperscript{64} See PURCELL, supra note 57. See generally KUHN, supra note 29, ch. 7; RICHARD S. WESTFALL, THE CONSTRUCTION OF MODERN SCIENCE (1977); GERALD TAUBER, MAN’S VIEW OF THE UNIVERSE (1979); and DAVID BODANIS, $E=MC^2$: A BIOGRAPHY OF THE WORLD’S MOST FAMOUS EQUATION (2001).
\item \textsuperscript{65} See Max Lerner, AMERICA AS A CIVILIZATION: LIFE AND THOUGHT IN THE UNITED STATES TODAY (1957).
\item \textsuperscript{66} See STEVE FULLER, THE GOVERNANCE OF SCIENCE: IDEOLOGY AND THE FUTURE OF OPEN SOCIETY (2000). A growing concern for environmental issues would lead to a renaissance of federal regulation in the 1970s. See Rabin, supra note 34, at 1278-1326, and Joel Yellin, supra note 7.
\item \textsuperscript{67} See Howard P. Segal, Introduction, in TECHNOLOGY, PESSIMISM, AND POSTMODERNISM 1 (Yaron Ezrahi et al. ed., 1994), and Leo Marx, The Idea of ‘Technology’ and Postmodern Pessimism, in TECHNOLOGY, PESSIMISM, AND POSTMODERNISM, supra at 11. See also Rabin, supra note 34, at 1304 (“a principal source” for the judicial activism of the early 1980s “was the heightened awareness to the
Lastly, the dramatic increase in executive powers of the President kept political scientists and lawyers busy thinking of organizational means to allow the President to effectively control the mammoth federal administration and of the place of courts (and Congress) in a rapidly changing social environment and constitutional setting. Specifically, these were the years of Sociological Jurisprudence and of Legal Realism, a time when courts’ and judges’ roles in society were critically reexamined.

It is my contention that the proposed three paradigms of expertise were the products of this complex reality. I argue that this triangle of forces charts the contours of the expertise discourse in all its variations. The continuous struggle to come to grips with the administrative beast has taken place within the confines of this triangle. Administrative expertise has always been examined with reference to the alleged need for regulation of an increasingly complex economy, fears of Executive overreaching to the detriment of the principle of the separation of powers, and (internal and external) shifting perceptions of the natural sciences. At the risk of overusing the metaphor, it can be said that as the twentieth century wore on the shape of the triangle went on changing, thus keeping the discourse of expertise alive and kicking.

Each one of the three paradigms represents a different calibration of the three vectors. The empiricist/professional paradigm is mainly an outgrowth of strong scientific/technological sentiments. The public general manager paradigm reflected the growing dominance of the chief executive officer in both government and corporations, and the judge paradigm was a counter-reaction to the same phenomenon.

problem of scientific uncertainty about risk to health and safety. The importance of this phenomenon can hardly be overstated.”).

68 This was the main concern of the President’s Committee on Administrative Management. See supra text accompanying note 52 and infra note 107.


The affinities between the three paradigms are obvious and expected. After all, they have similar intellectual origins. Notably, they all share a scientific undertone, and with good reason. The discussion in the following chapters of the dissertation demonstrates the many ways in which the rising saliency of science left its mark on the expertise discourse. In a nutshell, I show how Social Darwinism in general, and the teachings of Herbert Spencer in particular, so dominant in *fin de siècle* America, imbued the work of Charles Francis Adams, and how the turn to science during the same period played a large hand in molding “the science of administration”—a new branch of political science dedicated to the study of public organizations. I argue that Landis’ work mirrors an earlier shift in the natural sciences from Darwinism to naturalism, the essence of the shift being a move from bounded explanatory schemes to all-encompassing, reduced-to-physics explanations. Finally, I illustrate how the mayhem introduced to the sciences with the Relativity, non-Euclidean geometry and non-Aristotelian logic reverberated into the study of public administration and thence to the work of Louis Jaffe.

I now move the dissertation’s second key argument.

C. The Willful Blindness Argument

The second argument developed in the dissertation has wider implications. Lining up the different paradigms of expertise against a unified field of administration scholarship sheds light on a marked rift between the legal perspective and those of the political sciences (broadly defined) regarding administrative organizations. This rift was most clearly observable during the New Deal. While the legal perspective focused on rule of law questions, political scientists used organization theory and science of administration scholarship to bring to the fore

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71 It is impossible to discuss a case of scientification of the art of government in a Western country without at least giving a nod to the work of Michel Foucault, especially on “governmentality.” See Michel Foucault, *Governmentality, in THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY* 87 (Garham Burchell et al. eds., 1991). While my work could be said to outline a concrete story of an incremental move from “sovereignty” to “government” in a concrete historical setting, it admittedly neither does nor attempts to encompass the full scope of (federal) governmentality, mainly for it only tangentially touches upon the content of the “whole complex of saviors” (*id.* at 103 (italics in original)) driving American regulation.
institutional aspects in the life of administrative bodies. Lawyers, especially New Deal enthusiasts, on the other hand, were myopic of the internal-organizational dimension in the life of agencies. To be sure, it is not suggested that political scientists’ grasp of administration was impeccable compared to that of lawyers; still, although my discussion touches upon ellipses in non-lawyers’ scholarship, as far as lawyers are concerned the important point is this: its imperfections “provide no basis for ignoring the endeavor altogether.”

Lawyers’ disregard of political science literature had, and continues to have, adverse consequences. This, if you wish, is the moral of the study. The research shows that when it comes to theories of regulation, turning a cold shoulder to what has long been the received wisdom in the political and other sciences may prove so detrimental to lawyers’ understanding of the American administrative state as to invalidate the operational prescriptions they draw from it. In hindsight, it appears that the refusal to come to terms with the fact that the American administrative arm is a full-blown regulatory *bureaucracy* played a key role in bringing about the dethroning of the general manager paradigm of expertise associated with Landis and his peers. This refusal also accounts for the later endorsement of the more modest empiricist/professional paradigm, which had been espoused by prominent political scientists from the outset.

It is indeed remarkable that during the formative stages in the life of the American administrative state, lawyers in general, and pro-regulation lawyers in particular, were so doctrinal and self-referential in their thinking that they declined to incorporate the perspectives of adjacent disciplines. What led to this state of affairs is in many respects inconsequential. Instead, what was significant, as some of them only later came to realize, was that by the time progressive lawyers were advancing their agenda, political scientists had already pointed out typical bureaucratic features that did not sit well with the Progressives/New Deal model(s) of expertise.74

72 Notably, I think they erred in not fully considering the (internal) regulatory impact of the legal framework within which agencies operated on administrators’ behavior. See infra Chapter 7, Section V.

73 Barry Friedman, *supra* note 9, at 262.

74 For example, they demonstrated how dependent agencies were on the political branches of government, thus undermining the *raison d’être* of the independent commission. See, e.g., E. PENDLETON HERRING, PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST (1936).
1. Bureaucracy: The Elephant in the Room

The issue of bureaucracy was, as suggested, a notable example of the chasm that lay between lawyers and political scientists. Divided as they have been on other issues, the one thing uniting lawyers, friends and foes of agencies, progressives and conservatives, was an aversion to bureaucracy. Examined in the beginning of the twentieth century against the traditional “Jeffersonian-Jacksonian philosophy … which tended toward suspicion of government per se,” lawyers of all stripes clung to the notion of American exceptionalism, namely, the idea that in this respect early America was “the great anomaly” in the West. Thus, to take one example, as part of his opposition to “administrative absolutism,” “born-again” Roscoe Pound would warn in 1942, “Once established an absolute bureaucracy will not be easy to dethrone.”

It is no wonder, then, that pro-regulation lawyers rebuffed any association between agencies and bureaucracies in the face of a pronounced anti-bureaucratic sentiment in the legal community throughout the period under review. As a rule, political scientists saw things differently. Some of them might have shared the sentiment, but they did treat the

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76 Stephen Skowronek, Building A New American State: The Expansion of National Administrative Capabilities 1877-1920 8 (1982). See also Seymour Martin Lipset, American Exceptionalism: A Double Edged Sword 17-23 (1996). But cf. Novak, supra note 2, at 7 (“the cult of American exceptionalism (with its tendency to remove American identity from the stream of history) had led us to underestimate the degree to which older European ideas and institutions remained vital parts of American polity.”).


78 The Pound Report, supra note 50, at 360


80 See, e.g., Herbert Croly, Progressive Democracy 351 (1914) (1914) (“If the political experience of mankind has established anything, it has established the undesirability of ordinary bureaucratic government.”) and Laski, supra note 37, at 106, where the author speaks of the “vices of bureaucracy …”
administrative commissions as bureaucracies. Meanwhile “agencies multiplied like rabbits.” And so, to progressive lawyers in particular, bureaucracy was like an elephant in the room and their description of the ideal regulator could not take cognizance of it. This cognitive dissonance was encoded in post-New Deal legal scholarship, as it was this group of lawyers that wrote the legal historiography of the administrative state alongside the staple syllabus of American administrative law courses.

The work of administrative law professor Louis Jaffe in the post-World War II era was the exception. The final chapter of the dissertation will show how Jaffe’s thinking meandered during his academic career; how he became sensitive to observations of organization theorists, and ended up offering a more realistic model of regulation, which treated the American administrative apparatus as a bureaucracy. It may be tempting, then, to declare that the dissertation has “a happy ending,” but this temptation should be resisted.

Barry Friedman has recently made a similar juxtaposition between law schools’ normative perspective on judicial review, and the perspectives of non-legal disciplines, which are “more ‘positive.’” Reflecting a growing tenor among contemporary legal scholars, Friedman claims that “existing normative theories about judicial review are, and will remain, inadequate to the extent they continue to fail to take account of the lessons of positive scholarship.” This, I submit, was the reality in administrative law scholarship through most of its history. Thus, for example, in 1980 Robert Katzmann urged, “In restructuring the policies and processes of public

81 Infra Chapters 4 and 7.
82 LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE 20TH CENTURY 162 (2002).
83 See WHITE, supra note 7, at 114-116.
85 Barry Friedman, supra note 9, at 258.
86 Id. at 261. According to Barry Friedman, the main deficiency in the normative perspective is that it does not heed “the political environment in which constitutional judges act and … the constraints they necessarily face.” Id. id.
bureaucracies, courts should do so with sensitive appreciation of how organizations function." As we shall see at the end of this chapter, it appears that some headway has been made in the most recent generation of administrative law scholars, but there surely remains much to be done and many gaps to be bridged.

Next I would like to give a sense of the great many things lawyers turned their back to over the years. In so doing, I will also further illustrate the wide expansion of the paradigms.

2. Expertise and Beyond

The three paradigms are not just about administrative expertise. Rather, each of them is a point of reference surrounded by numerous concentric circles. Indeed, one cannot think of the regulator in isolation, cut off from the rest of society, the larger administrative system, and the principle of legitimacy sustaining it. Max Weber emphasized the deep connection between principles of legitimation, types of leadership, and administrative organization, as well as the makeup of society, when he presented his known triad of legal, traditional, and charismatic systems of domination. So is the case here.

To illustrate, the general manager and judge paradigms say very little about the structure of the commission, its internal integration, and personnel. This is because they envisage the administrative process as a one man show, run by a “leader,” to use a Weberian term, or the

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89 See 2 WEBER, ECONOMY AND SOCIETY, supra note 23, at 212-299. See also Parsons, supra note 23, at 56-86; BENDIX, supra note 88, at 298-416; and ANTHONY T. KRONMAN, MAX WEBER (1983), especially at 176-182.

90 Indeed, it is tempting to analogize between Weber’s trio of legitimate authorities and the three paradigms of expertise. Compare Section B, supra, with the sources mentioned supra note 89. The similarities between the empiricist/professional paradigm and Weber’s rational-legal model are obvious. The general manager certainly shares some traits of the charismatic leader (or even more so of the politician—see Max Weber, Politics as a Vocation, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 95 (H. H. Gerth and C. Wright Mills trans., 1958)): for instance, the sense of urgency and divergence from the traditional mode of operation. The affinity between the traditional master and the judge regulator may be the least compelling, but it exists—notably, the built-in latitude often granted to the decision-maker in both cases.
judge. The empiricist/professional paradigm conversely has a lot to say on such matters.\textsuperscript{91}

Furthermore, following Jerry Mashaw, it can be argued that each one of the three paradigms relies on a separate version of administrative justice: “professional judgment applied to one’s particular situation,” a promise for full and fair hearing, and “accurate decision-making.”\textsuperscript{92}

These three kinds of justices depend, in turn, on three procedural dispositions: examination and counseling, neutrality and passivity, information gathering.\textsuperscript{93}

Similarly, the three paradigms were premised on different visions of the body politic and the public weal. In Contested Truths, a book that chronicles rhetorical uses made in “keywords” in American politics since independence, Daniel Rodgers relates how the concept of the “common good” in its various forms (i.e., “the public interest/weal”) acquired different meanings since the turn of the twentieth century.\textsuperscript{94}

During the Progressive Era, the “public good” first came to symbolize an idealized synergetic and unified political community.\textsuperscript{95} Rodgers argues that in later years, however, a new approach emerged, as scholars began to think of society as a collection of fragments and shards; as an arena where conflicting interests vie for dominance.\textsuperscript{96} By the mid-1930s, he reports, “[t]he

\textsuperscript{91} Again, the similarities to Weber’s trilogy are striking. See supra note 90.

\textsuperscript{92} Mashaw, supra note 44, at 187, 185. See also id. at 189-190.

\textsuperscript{93} Id. at 184-190. See, however, supra note 44.

\textsuperscript{94} DANIEL T. RODGERS, CONTESTED TRUTHS: KEYWORDS IN AMERICAN POLITICS SINCE INDEPENDENCE 176-211 (1987).

\textsuperscript{95} According to William Novak this understanding pervaded nineteenth-century American society, which was “a public society in ways hard to imagine after the invention twentieth century privacy.” NOVAK, supra note 2, at 9 (emphasis in original). And Novak goes on to explain that the prevalent ethos then was that “[g]overnment and society were not created to protect preexisting private rights, but to further welfare of the whole people and community.” Id. id. But cf. JOSEPH J. ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION 204 (2000), where it is argued that Jefferson’s election as president, at the beginning of the nineteenth century, “marked the end of an era. The ‘people’ had replaced the ‘public’ as the sovereign source of political wisdom.” Ellis holds that Jefferson’s victory marked the death of the “premption … that there was a long-term collective interest for the republic that could be divorced from partisanship…” id. id.

\textsuperscript{96} Rodgers is careful not to argue that the latter vision completely elbowed out the former. He reports that “[t]he function of government was ‘to strike the equitable balance between conflicting interests,’ Roosevelt claimed when in one mood; to express the needs of the ‘whole nation,’ when in another.” RODGERS, supra note 94, at 209 (quoting 3 PUBLIC PAPERS OF FRANKLIN D. ROOSEVELT 126 (1938) (an address delivered on March 5, 1934) and 5 PUBLIC PAPERS OF FRANKLIN D. ROOSEVELT 570-571 (1938) (October 31, 1936)). See also Seidenfeld, supra note 7, at 1514, where the author argued
integrative abstractions of the nineteenth century were stuffed into the closet.” “What endured,” he concludes, “was Interests [sic].”\textsuperscript{97} That is to say that while the former approach optimistically believed that the nation could be truly united, the latter saw the public as indeed nothing more than “a many-tongued symphony.”\textsuperscript{98} While the specter of a multilingual society haunted the first generation, its successors grew fond of the idea, thus harkening back to James Madison’s not-easy-to-stomach \textit{Tenth Federalist}.

The general manager and the judge paradigms are compatible with the Progressives’ version of the public good. They stipulate that either the public welfare-oriented general manager or an agreed-upon judge would pronounce what lies in the best interest of the public, after thorough investigation and based on their expertise. Things get trickier when it comes to the third paradigm, because it brackets off the question of who should tell the organization what to do. The bureaucrat’s expertise emanates from his skillful execution of other people’s policies, whatever they may be\textsuperscript{100} and whoever may make them—the public, an elected assembly, a president, a general manager, or a judge. This dimension of uncertainty accounts for the fact that the empiricist/professional paradigm was adopted—with some modifications—by both the

\begin{itemize}
  \item \textsuperscript{97} RODGERS, \textit{supra} note 94, at 211.
  \item \textsuperscript{98} LANDIS, \textit{The Administrative Process}, \textit{supra} note 12, at 155. See \textit{supra} text accompanying note 38. See also Murray Edelman, \textit{Governmental Organization and Public Policy}, 12 PUB. ADMIN. REV. 276, 283 (1952) (“Except as an attempt to identify some group with the entire public to gain added support for its interest, the ‘public interest’ has no meaning.”), and Stewart, \textit{supra} note 7, at 1712, where Stewart explains that the representation model (\textit{supra} text accompanying note 18) is predicated on the “assumption that there is no ascertainable, transcendent ‘public interest,’ but only the distinct interests of various individuals and groups in society.” See similarly E. Pendleton Herring, \textit{Politics, Personalities, and the Federal Trade Commission, II}, 29 AM. POL. SCI. REV. 21, 30 (1935).
  \item \textsuperscript{99} Madison’s point of departure was the observation that “the causes of factions cannot be removed and that relief is only to be sought in the means of controlling its effects.” \textit{The Federalist} No. 10, at 48 (James Madison) (Clinton Rossiter ed., 1961) (emphasis in original). The very resurrection and coming to vogue of Madison’s \textit{Tenth Federalist} starting in the 1910s is telling, as it had previously “languished in almost total obscurity.” RODGERS, \textit{supra} note 94, at 185. See also id. at 210.
  \item \textsuperscript{100} The dangers of this prescription are well known. It might result in “‘obedience of corpses.’” HANNA ARENDT, \textit{Eichmann in Jerusalem: A Report on the Banality of Evil} 135 (1964). Weber, the author of the legal-rational domination regime, was expectedly “deeply ambivalent” about this regime. ROGER COTTERRELL, \textit{The Sociology of Law: An Introduction} 155 (1992).
\end{itemize}
founding fathers of American political science around the turn of the century and their descendants in the 1950s (as well as by Jaffe).  

Lastly, another, closely related issue dividing the three groups of debaters was the question of which branch of government should be regarded as the rightful depo\ctor of the public good. During the New Deal, when the controversy was in full swing, the answers were clear: political scientists assuredly pointed at the President, conservative lawyers at the judiciary, and New Dealers at the administrative commissions. Naturally, this layout reflects the groups’ different version of administrative expertise at the time.

D. The Dissertation

The dissertation proceeds as follows. Chapter 2 will lay out the political-economic context of the expertise debate in the Progressive Era, the Great War, and the New Deal. It will begin by providing a snapshot of turn-of-the-century America. Three themes will be underscored: the emergence of national corporations, early attempts to tame them, and the concurrent dominance—but not the hegemony—of the Progressive movement. Next, the discussion will focus on the first major federally regulated industry, the railroads, and highlight key elements in its history. One cannot overstate the importance that railroads, America’s first big business, have had throughout the country since the middle of the nineteenth century. A true juggernaut, they were admired by many and inspired fear in others. The chapter will also sketch the story of federal railroads’ regulation by the ICC.

The second chapter will next move on from the railroads and the Progressive Era to the Great Crash and the New Deal. It will open with a description of the Crash, which took place in the

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101 Cf. the analysis conducted in Chapter 6, Section V., and compare Chapter 4, Section IV.B. with Chapter 7, Section V. The most important modification adopted along the years, notably by Jaffe, was the addition of a popular element, either directly or through the participation of others branches of government, in the construction of the empiricist/professional paradigm. See infra Chapter 8. Put in the language of Philip Selz\ick, it could be said that Jaffe advocated a scheme of a more “responsive”—rather than “repressive” or “autonomous”—law. See PHILIPPE NONET AND PHILIP SELZ\ICK, LAW AND SOCIETY IN TRANSITION: TOWARD A RESPONSIVE LAW 16, 73-113 (1978). See also supra note 21. I make these references without getting into details just to show yet again how pervasive the span of the three paradigms is.

102 See infra Chapter 6, Section V.
hapless month of October, 1929, and depict its magnitude and profundity. The deep-seated defects of the financial markets centered in Wall Street during the “Roaring Twenties” will thus become evident. The centerpiece of the New Dealers’ reform of the financial markets was undoubtedly the introduction of the SEC. A cursory review of its establishment will be provided. The chapter will end with a discussion of the federal Administrative Procedure Act of 1946.

Chapters 3 will sketch the architecture of the debate that raged between two—heterogeneous, to be sure—groups of lawyers over the issue of regulation by agencies. First, it will present a typology of the various arguments deployed by members of the commission movement during the era under review in support of the introduction, cultivation, and proliferation of administrative commissions. The second part of the chapter will survey the several avenues of attack pursued by their detractors.

The aim of Chapter 3 is two-fold. First, by systematically exploring its intricacies, the chapter will provide a thick description of the regulation debate. Second, in so doing, the chapter will introduce a rich context for a comparative analysis of the perspective of the three main groups studied in the dissertation. It will be revealed that conservative lawyers could only bring themselves to recognize the empiricist/professional paradigm, while pro-regulation lawyers sponsored the public general manager paradigm. (The third group—the non-legal theorists—will be dealt with in the next chapter.) The chapter will thus add another layer to the intellectual context against which the study of canonical texts in the following chapters will be conducted. In particular, it will illustrate what the Landis party was up against in advocating the general manager paradigm.

Chapter 4 will turn to the non-legal camp. It will chronicle the ascendancy of the science of administration as a branch of the political science in turn of the century American academia and explores its intellectual origins. Four sources will be discussed: the Weberian Continental tradition and Professor Woodrow Wilson’s effort to “Americanize it”; Taylorism and the “management revolution”; the city manager reform movement; and, on a more general

103 Wilson, supra note 30, at 202.

104 See notably TAYLOR, supra note 20. On “the management revolution,” see ALFRED D. CHANDLER, THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS (1977),
level, the push for the scientification of the social sciences. The chapter will revolve around the period stretching from the late 1880s to the late 1930s, a period that would come to be regarded by later scholars as forming the classical doctrine in the field. The Report of the President’s Committee on Administrative Management, handed to President Roosevelt in January 1937, is commonly held to definitely formulate key tenets of the orthodoxy. It will accordingly be analyzed at some length. The chapter will portray a bifurcated perception of expertise: on the one hand, that of the empiricist-bureaucrat, and on the other, that of the general manager.

Chapters 5, 6 and 8 will be devoted to a close examination of the work of three leaders of the commission movement: Charles Francis Adams, James Landis, and Louis Jaffe. These chapters will question the accepted interpretation of their texts. In so doing, they will enrich, deepen, and admittedly complicate our understanding of the Progressives’ theory of regulation.

Chapter 5 will begin with the work of Adams, who is widely regarded as the outstanding American theoretician of regulation in the United States during the late nineteenth century. Adams was the founding father and subsequently the chairman of the Massachusetts Board of Railroads Commissioners, which was created in 1869 by an Act that he himself had authored. The mandate granted to the Board made sure it remained true to Adams’ theory of “weak” form public regulation. He believed that administrative agencies should conduct only investigatory chores for the community and pronounce their assessment to an ill-informed public. His was therefore the judge paradigm. Adams work was not, however, monolithic. At the end of the chapter, I will bring forward a different, previously unnoticed, undercurrent in Adams’ work that is more compatible with the general manager paradigm.


105 See, e.g., Herman G. James, The City Manager Plan, The Latest in American City Government, 8 AM. POL. SCI. REV. 602 (1914); Herman G. James, Some Reflections on the City Manager Plan of Government, 9 AM. POL. SCI. REV. 504 (1915); MARTIN J. SCHIESL, THE POLITICS OF EFFICIENCY: MUNICIPAL ADMINISTRATION AND REFORM IN AMERICA, 1800-1920 (1977); and KARL, supra note 25, 1-22, 89-92.

106 See supra note 57.

107 Supra note 51.

108 See supra text accompanying note 42.
Chapter 6 will explore the academic work of James Landis. It will divide Landis’ career into three periods. During the first period (1924-1934), Landis was not particularly interested in administrative agencies, but rather in “the business of the Supreme Court”\textsuperscript{109} and the study of legislation.\textsuperscript{110} The second period will be the heart of the chapter. It was during this period, which began with the New Deal and ended somewhere in the late 1950s, that Landis produced his \textit{magnum opus}, \textit{The Administrative Process}. Widely read and highly influential, to this day, the epochal book is held to present the most complete defense of commission regulation. One observer described it as “the most eloquent celebration of commission regulation ever written.”\textsuperscript{111} This is the defining text of the public general manager paradigm. The book will be analyzed at great length against a background of a unified interpretation of the manuscript, which will be challenged. It will be shown that previous readers hastened to see it as enacting only one image of expertise (the public general manager paradigm). It will also be demonstrated that folded within the book were also the judge and the empiricist/professional paradigms.

During the third and final period of his life, Landis took the legal community by surprise when, in a report he wrote at the request of President-elect Kennedy in 1960,\textsuperscript{112} he seemed to endorse the views propagated by the President Roosevelt’s Committee on Administrative Management, which he had scathingly rebuked in his book. This was not the only “stunning turnabout”\textsuperscript{113} Landis performed in the report, as he catalogued many ailments that had been plaguing the regulatory system. The chapter will conclude with a panoramic outlook on the whole of Landis’ corpus.

\textsuperscript{109} The research he conducted with his mentor, Felix Frankfurter, resulted in FELIX FRANKFURTER AND JAMES M. LANDIS, \textit{The Business of the Supreme Court: A Study in the Federal Judicial System} (1928).

\textsuperscript{110} See notably James M. Landis, \textit{Statutes and the Sources of Law}, 2 HARV J. ON LEGIS. 7 (1965). The article was originally published in \textit{Harvard Legal Essays Written in Honor and Presented to Joseph Henry Beale and Samuel Williston by Their Colleagues and Students} 213 (1934).

\textsuperscript{111} McCraw, \textit{Regulation in America}, supra note 7, at 162.

\textsuperscript{112} JAMES LANDIS, \textit{Report on Regulatory Agencies to the President-Elect} (1960).

\textsuperscript{113} McCraw, \textit{Regulation in America}, supra note 7, at 163.
Taken together, chapters 3-6 will form one unit in the dissertation, dedicated to the study of the formative years of (extensive) federal regulation. The next two chapters will move to the 1950s, which, I contend, marked the end of an era in the annals of administration in the United States. The 1950s ushered out a period when the fault line between friends and foes of regulation was quite clearly demarcated; an era when “[t]he administrative process was thought to have an inherent political or social orientation,” when “[t]here was more or less agreement as to its significance” between its supporters and retractors. The 1950s were years of intense reflection for administrative law scholars and organizational theorists; a time in which even former die-hard New Dealers gave vent to painful afterthoughts regarding regulation.

Chapter 7 will pick up where Chapter 4 left off. The chapter will examine how public regulation was theorized in mid-century political science, organization theory, history, and economics departments. Administrationists working at that time formed a post-classical body of research that was at odds with the Wilson-Taylor classical age on several key issues. Lines of division will be charted and an indicative sample of the new generation’s perspective will be offered. As we shall see, the new doctrines called into question not only the fundamentals of the classic science of administration, but also lambasted the Landis dogma of administrative expertise. Conservative lawyers, though, fare no better. To administrationists, both groups of lawyers were “at fault” for not taking a realistic look at the administrative apparatus. Thus, Chapters 4 and 7 will both point to the profound theoretical gaps between the two cohorts of scholars.

Chapter 8 will treat commissions as bureaucracies, at least to some extent. It will revolve around the scholarship of Louis Leventhal Jaffe. This prolific, original scholar was extraordinarily perceptive and imaginative among lawyers from the inception of his academic career. Like his former peer, James Landis, Jaffe also had a change of heart regarding the

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114 This is, of course, a generalization. Still, just as in any case when one attempts at differentiating one historical period from another, it is a necessary generalization.

115 Jaffe, A Reevaluation, supra note 47, at 1105.

116 See notably id. This is an article written by a prominent law professor, who had been a friend of regulation, calling for a reevaluation of the administrative process. See also Marver H. Bernstein’s, REGULATING BUSINESS BY INDEPENDENT COMMISSION (1955), a comprehensive book by a political scientist who, taking a wide retrospective view on the history of federal regulation, pilloried agencies’ many failures. Landis’ 1960 report (supra note 112) also belongs to this list.
administrative process along the years. Whereas he started off as an advocate of the general manager paradigm, Jaffe ended up adhering to the empiricist/professional paradigm (as had his colleagues in the political science departments). Pointing to problematic bureaucratic traits in the operation of agencies, this former New Dealer became the intellectual driving force behind the judicial review model, which did not square well with Landis’ vision of the role of courts in the administrative state. At the end of his “pilgrimage,” Jaffe came to embrace a pluralistic vision of the administrative process whose fulcrum was neither the administrative commission nor the judiciary. On this reading, Jaffe’s model of judicial review was not an invitation for judicial imperialism, but rather for a multi-party, open conversation on pending regulatory issues. In the chapter’s concluding section I will explain why, in my view, Jaffe paved the way for, or at least prefigured, the work of the next generation—our generation—of scholars, as exemplified in the work of Richard Stewart, Jerry Mashaw, Gerald Frug, Robert Katzmann, and others.

Having reached the present, Chapter 9 will conclude.

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118 See supra note 101.
119 I will refer to such works as Stewart, supra note 7; ROBERT A. KATZMANN, REGULATORY BUREAUCRACY: THE FEDERAL TRADE COMMISSION AND ANTITRUST POLICY (1981); Colin S. Diver, Policymaking Paradigms in Administrative Law, 95 HARV. L. REV. 393 (1981); JERRY MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY CLAIMS (1983); Frug, supra note 7; THOMAS O. MCGARTY & SIDNEY A. SHAPIRO, WORKERS AT RISK: THE FAILED PROMISE OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (1993); Lobel, supra note 18; and Shapiro, supra note 3.
CHAPTER 2. THE CONTEXT: THE TRANSFORMATION OF THE AMERICAN ECONOMY

I. From Rural to Industrial

A. The Age of Bigness

Divided as they were on vital questions relating to the administrative regulation of business, all parties to the debate between regulation enthusiasts and its skeptics had to concede that the reality in America had been fundamentally transformed in the decades following the Civil War. During the years between the Civil War and World War I, the population of the United States nearly tripled, passing the one-hundred-million line by 1917. Concurrently, the country’s character was decisively changed from agrarian to industrial, as the annual value of products manufactured in the United States increased nearly seventeen times, and the railroad network increased eightfold, practically covering the entire land. These were not the only records set during that epoch. As Wayne Morgan concisely put it, “The nation’s pent-up forces and emotions, focused by the tragic but compelling events of the 1860’s, burst forth with peace in the Gilded Age to seek wealth, power, and general material advancement.”

The post Civil War socio-economic transformation was pervasive and felt across the board. Unparallel industrialization in general, and the ascendancy of giant corporations, such as Standard Oil, American Tobacco, and United States Steel in particular, as well as the concomitant rise of the financial markets to a dominant position, heralded many changes throughout the country. As noted, the net of railroad-transportation lines had markedly expanded, as had the steel and oil industries, along with many others, to the benefit of many Americans, but most immediately and tangibly to the delight of those in the milieu of the Morgans, Vanderbilts, Carnegies, and Rockefellers, who more or less controlled the financial markets and the railroad, steel, and oil industries. Tellingly, they went down in history as “the Robber Barons.”

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1 JOHN F. STOVER, AMERICAN RAILROADS 135, 164 (2d ed., 1997).
Scorn and brutal denunciations were heaped upon the men who owned mammoth corporations and thus controlled the American economy. They seemed to have established an oligopoly. The manner in which they directed their businesses appeared dishonest and greedy, to put it mildly.\(^3\) Many thought that not only their professional, but also personal, mien—the ostentatiously lavish parties they had thrown and the estates they had possessed—run roughshod over the traditional frugal American way of living. Further, their behavior seemed tasteless and tactless given the widespread economic hardship experienced at the same time by great many Americans. “The feast of material plenty,” writes Morgan of the Gilded Era, “was set at the national table for everyone, who purchased this bonanza only at the price of bad taste, corruption in politics and economics, and dangerous refusal to face the harder and deeper facts of life.”\(^4\) The feast did not pass unnoticed; neither did the social strife that was building up in the country.

Thus, not only the gains spurred by the robust development of these businesses become apparent in an Age notorious for its “waste, corruption, and inefficiency,”\(^5\) but also the price levied on society’s economically weaker strata by the thrust of economic and geographical expansion. “The sudden appearance” of very powerful corporations, Thomas McCraw relates, “brought novel and alarming practices: degradation of human labor in such industries as steel (where immigrant laborers put in 72-hour workweeks); unscrupulous manipulation of stocks and bonds in industries such as railroads and utilities …; and abrupt losses of community control” to the giant firms serving them.\(^6\) All this was quickly translated into a litany of social tensions. First was the issue of the widening gap between farmers and the working classes and the well-to-do ring, whose ranks had expanded and whose share—or, control, many would have put it—of the economy had enlarged as well. Even as the affluence of the Robber Barons became more pronounced, the working class almost to a head did not stand to profit from the economic boom. As a result, farmers, the working class, and the plutocrats grew to be “[s]o alien in condition and outlook … [that they] almost inevitably came into conflict.”\(^7\)

\(^4\) Morgan, supra note 2, at 2.
\(^5\) Id. at 3.
\(^7\) McGerr, supra note 3, at 28.
Moreover, as the nineteenth century drew to a close, the cracks between rural and urban, industrial America could no longer be ignored. It became clear that “[t]he United States was born in the country,” yet it “has moved to the city.” But that was not all. The concurrent influx of European immigrants, who held a “thoroughly different system of political ethics” than most Americans, sent seismic waves throughout the country, especially throughout the cities, whose population subsequently increased even further. The “immigration invasion,” Richard Hofstadter asserts, brought about “a breakdown in the relative homogeneity of the [American] population,” which had been “down to about 1880 … not only rural but also Yankee and Protestant in its basic notions.”

Going back to the American process of industrialization, of note was the fact that the Barons and their associates ran a new kind of corporation, which accounted to a significant extent for the process’ acceleration. “Since the 1870s,” recounts Michael McGerr, “a constellation of circumstances—a nation-wide railway, abundant raw materials, emerging technologies, available finance capital, favorable government policies—had produce a new kind of industrial firm[s].” Such firms, McGerr elaborates, were “engaged in every aspect of an industry, from the extraction of raw materials to the production of finished goods, to marketing, sales, and services.” As suggested, the corporations owned by the moguls of the day grew in a hospitable political climate, proverbially typified by a \textit{laissez-faire} proclivity, which harbored an “artificial paradise,” where “private profits were sacred.”

To some, then, the process of American corporatization carried great promises in its wings. Others, however, saw it as a conflagration coming their way. Countless Americans were startled by the rise of large-scale corporations; some were even frightened. Bigness was widely believed to fall afoul of the American individualistic ethos, which had been consolidated throughout the (agrarian) American history. As John Tipple aptly writes, “Its size alone was sufficient to change fundamental social and economic relationships; by sheer magnitude the large industrial

\begin{itemize}
  \item \textsuperscript{8} Richard Hofstadter, \textit{The Age of Reform: From Bryant to F.D.R.} 23 (1955).
  \item \textsuperscript{9} Id. at 9.
  \item \textsuperscript{10} Id. at 8.
  \item \textsuperscript{11} McGerr, supra note 3, at 150. For a survey of some of the new technologies that swept America at the turn of the century, see id., ch. 7.
  \item \textsuperscript{12} John Tipple, \textit{The Robber Baron in the Gilded Era, in The Gilded Age: A Reprisal} 17 (H. W. Morgan ed., 1963).
\end{itemize}
corporation overshadowed the society around it.”  

And so, its supporters’ protestations notwithstanding, a great many Americans thought that the national corporation was ultimately based on premises alien to the American credo. So much so, that Tipple remarks that “the large industrial corporation was an anomaly in nineteenth-century America; there was no place for it among existing institutions and no sanction for it in traditional American values.”  

This observation was well reflected in the account offered in 1910 by Justice Harlan of the circumstances that had spurred the adoption of the Sherman Act twenty years earlier. The Justice emphatically wrote,

“All who recall the conditions of the country in 1890 will remember that there was everywhere, among the people generally, a deep feeling of unrest. The Nation had been rid of human slavery—fortunately, as all now feel—but the conviction was universal that the country was in real danger from another kind of slavery sought to be fasten on the American people, namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessities of life.”  

And then there was the rising problem of the trusts. Big as they had grown to be, countless corporations were hampered by fierce competition. “The immediate outcome” of the mushrooming of interstate corporations, Tipple notes, “was competition with a vengeance and the inauguration of a species of commercial warfare of a magnitude and violence unheralded in economic history.”  

In response, corporations repeatedly chose to merge with their competitors, thus exponentially increasing the number of high-volume and high-profile American corporations. “In New York,” noted one observer in 1868, “everything now tends to

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13 Id. at 16.
14 For example, in the anti-trust proceedings in U.S. v. United States Steel Corp. 251 U.S. 417 (1920), Justice Day explicitly rejected a frequent contention put forward by the industry that “the combination was an inevitable evolution of industrial tendencies compelling union of endeavor.” Id. at 459.
15 Tipple, supra note 12, at 18-19.
16 Standard Oil of N.J. v. U.S. 221 U.S. 1, 83 (1911) (Harlan, J. concurring and dissenting). On the Standard Oil case, see infra text accompanying notes 120, 141-149.
17 Tipple, supra note 12, at 27.
18 On the merger movement, see Milton Handler, Industrial Mergers and the Anti-Trust Laws, 32 COLUM. L. REV. 179, 179-182 (1932), and Mark Winerman, The Origins of the FTC: Concentration,
consolidation, and consolidation in the hands of able men portends as assured a success as does
the massing of troops under brilliant generals in war.” Another prevalent business strategy
was to form combinations among competitors to forestall predicaments associated with
“competition with vengeance,” or “ruinous competition,” in the parlance of the day. The run
for bigness in general, and the formation of combinations in particular, obviously did not mix
well with the ubiquitous commitment to and the belief in the merits of open, monopoly-free
competition. Here was a place where the dangers to the average American posed by “the new
giantism in the American economy” became most salient. This was “a life-or-death struggle”;
a struggle waged by corporations against their customers. Speaking of a primary
industrial mover and shaker of the era, Cornelius (“Commodore”) Vanderbilt, Charles Francis
Adams wrote in his “A Chapter of Erie,” published in 1869,

In this dangerous path of centralization Vanderbilt has taken the latest step in advance. He has combined the natural power of the individual with the factitious power of the corporation. The famous ‘L’état, c’est moi’ of Louis XIV. represents Vanderbilt’s position in regard to his railroads. Unconsciously he has introduced Caesarism into corporate life. He has, however, but pointed out the way which others will tread. The individual will hereafter be engrafted on the corporation,—democracy running its course, and resulting in imperialism; and Vanderbilt is but the precursor of a class of people who will wield within the State a power created by the State, but too great for its control.

What is this power? Adams asks himself. Here Adams, usually verbose, remains speechless. “It is a new power, for which our language contains no name. We know what aristocracy,


Charles Francis Adams, Boston II, 106 N. AM. REV. 557, 571 (April, 1868).

See McCraw, supra note 6, at 65-109, for an insightful analysis of the causes leading to the proliferation of the turn-of-the-century “trust movement,” “that is, the powerful tendency of businessmen to combine with their competitors in associations and mergers.” Id. at 65.

Hofstadter, supra note 8, at 305.

McCraw, supra note 6, at 64.

Tipple, supra note 12, at 27.

The long essay, which was originally published in the July 1869 issue of the NORTH AMERICAN REVIEW, is reprinted in CHARLES F. ADAMS, JR., AND HENRY ADAMS, CHAPTERS OF ERIE AND OTHER ESSAYS 1-99 (1871) [hereinafter Adams, A Chapter of Erie].

Id. at 12.
The Context

autocracy, democracy are; but we have no word to express government by moneyed corporations.”

B. The Progressive Era

1. The Progressives

A group of reformers known as the “Progressives,” who had acquired prominence in the social-political discourse during the period stretching from, say, the 1870s to approximately the 1910s, reacted to the anxieties of their age. Possessed, generally speaking, of a preference for free competition and a tendency toward moral indignation, many of the Progressives denounced the Gilded Age’s frivolous, reckless, and unscrupulous dealings. They aspired to tackle head-on “the harder and deeper facts of life” of the unprivileged in particular but also, maybe more than they would have admitted, of the privileged.

In a series of newspaper articles, a line of investigating reform journalists, named by Theodore Roosevelt as the “muck-rakers,” exposed some of the unwelcome consequences of industrial America. The articles reported practices like the distribution of adulterated merchandise by big meatpacking companies and unsafe medicines by pharmaceutical firms, as well as child labor and the mistreatment of employees. The various problems associated with bigness in manufacturing and financial markets were condemned as well, with a special emphasis on corrupt behavior on the part of industrial magnates. Standard Oil’s trust, the lighthearted management of gigantic insurance companies, and the manipulation of public opinion by the railroads were telling examples of key concerns of muckrakers exposing these evils, as well as of the wider Progressive reform Movement.

26 Id. at 97.
27 See HOFSTADTER, supra note 8, at 275 (“Participation in the war [World War I] put an end to the Progressive movement.”).
28 In many respects, the term “the Progressive Movement” was a misnomer. As illustrated by Robert Wiebe, it would be more accurate to think of the “Movement”—at least until 1907, he says—as a conglomerate of various local, state, and national reform movements. ROBERT H. WIEBE, BUSINESSMEN AND REFORM: A STUDY OF THE PROGRESSIVE MOVEMENT (1962), e.g., at 42-43.
29 See supra text accompanying note 4.
Two members of the band of muckrakers documenting the perils of industrialization had a more lasting influence on theories of regulation—the first advanced a local reform, while the other spoke to the whole nation.\footnote{See supra note 28.} The former reformer was Charles Francis Adams, Jr., a pioneering student of “the Railroad Problem,” and the advocate of the “sunshine commission.”\footnote{This is the term used by McCraw. See McCraw, supra note 6, ch. 1 ("Adams and the Sunshine Commission"). For a fuller discussion, see infra Chapter 5.} Under this proposal, state commissions would scrutinize the dealings of railroad companies, issue learned reports, and then leave it to the public to decide what to do with their findings. As he put it, the commissions’ pronouncement would carry “no weight other than that derived from the reason given for them.”\footnote{CHARLES FRANCIS ADAMS, RAILROADS: THEIR ORIGIN AND PROBLEMS 140 (1878) [hereinafter ADAMS, RAILROADS].} Publicity, in short, was the only remedy regulating boards would be allowed to offer. As Adams’ “sunshine commission” model quickly gained fame and was subsequently adopted by fifteen states,\footnote{By 1887, the year in which the ICC was established, it was adopted by Colorado, Connecticut, Iowa, Kentucky, Maine, Massachusetts, Michigan, Nebraska, New York, Ohio, Rhode Island, Vermont, Virginia, Wisconsin, and the territory of Dakota. ROBERT E. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSION 25 (1941).} it became obvious that he had indeed produced a “national prototype” of regulation.\footnote{McCraw, supra note 6, at 57.} Adams’ accomplishment serves as an example of one of the successful reforms sponsored by Progressives. It certainly captures reformers’ commitment to their communities, but also a sense of naïvété in the some of their approaches.

The second towering figure among muckrakers, Louis Dembitz Brandeis, needs no introduction. His role in \textit{Muller v. Oregon} (1908)\footnote{Muller v. Oregon 208 U.S. 412 (1908).} is enough to realize that Brandies was exceptionally resourceful in introducing the disheartening realities of industrial America to legal fora. Likewise, one needs only mention his \textit{Other People’s Money}\footnote{LOUIS D. BRANDEIS, OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT (1914).}—clearly an apogee of muckraking—to appreciate the far-ranging influence, well beyond legal circles, of his single-minded crusade against bigness.\footnote{On Brandeis’ analysis of the problem of bigness and its critics, see McCraw, supra note 6, ch. 3. As McCraw and a number of commentators saw it, there was much to be criticized in Brandeis approach, which, concisely put, “simply denied the possibility that size brought efficiency in any industry.” Id. at 108. See also ADAMS, RAILROADS, supra note 33, at 211, where Adams, writing forty}
Additionally, Progressives fulminated against what they thought was the dire state of American politics. To them, politics was a source of evil. They did not heed, and even denied, politics’ generative role in the American state. For them, American politics was simply corrupt. Their mission was, therefore, to purge the American government from the evil of politics. Lambasting the dubious nexus of wealth and politics, in its many manifestations, was part of the crusade.

Similarly, dominant in the string of writing stretching from Adams to Brandeis, which rebuked the harmful mores of Wall Street financiers and industrial leaders, was the argument that the jobbery exposed by muckrakers spilled over into the political sphere. A series of essays documenting widespread political corruption down from the city level right up to Congress were publicized during the Progressive Era. These essays have shed light on the close ties between businessmen and politicians, and the extent to which congressmen were serving the interest of their rich benefactors rather than the public at large. The conclusion appeared plain: “big business was not the only cause of economic inequality in America; government deserved a share of the blame, too.”

Adams’ *Chapter*, for example, is riddled with insinuations and straightforward allegation that New York judges, legislatures, and executives were bought by one faction or the other (or even by both at the same time) to better the rivals’ position in the competition over the Erie. A judge of the New York Supreme Court is reported to be accused of being “a piece of the Vanderbilt property”; of the Legislatures of New York and other states Adams says “that probably no representative bodies were ever more thoroughly venal, more shamelessly corrupt, or more hopelessly beyond the reach of public opinion”; and charges made against New York years before *Other People’s Money*, had concluded his analysis with the statement, “It is not the few great corporations which are politically dangerous, but the many log-rolling little ones.”

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39 See Martin J. Schiesl, *The Politics of Efficiency* (1977), e.g., at 73-76.
41 See, e.g., the 1906 *Cosmopolitan Magazine* article by the muckraker David Graham Philips, *The Treason of the Senate: Aldrich, the Head of It All, in The Muckrakers*, supra note 30, at 71-83.
42 McGerr, *Supra* note 3, at 175.
43 Adams, *A Chapter of Erie*, *Supra* note 24, at 22. See also id., at 78-79 and passim (allegations made against Judge Bernard of the Supreme Court of New York).
44 *Id.* at 45. See also id., e.g., at 46-47 (the affair of Mr. Representative Mutton).
Governor Flint are mentioned, “[a]s if this remarkable controversy [over the Erie Railroad] was destined to leave a dark blot of suspicion upon every department of the civil service of New York.” 45 No better illustration of the dangers posed to the American democracy by industrial “Cæsarism” 46 could be provided by Adams’ polemic, which clearly suggested that the evils unearthed in the story of the Erie must have replicated themselves in a great many other cases.

The Progressives’ highly critical view of state and federal politics was rooted in the turn-of-the-century American way of governance. As masterfully portrayed by Stephen Skowronek, during Progressives’ life-time, American government, broadly defined, was run by courts and political parties’ organizations. 47 From the Progressives’ perspective, both caused a problem. Courts, justifiably or not, were notorious for their “mechanical jurisprudence”—a term coined in 1908 by Roscoe Pound 48—which was translated into a professed dislike of progressive legislation. And political parties were in charge of a patronage system of appointment according to which countless official positions were apportioned to an assortment of hacks and cronies, who worked alongside a core of “independent” civil servants. Unsurprisingly, civil service reform movements were a significant site of a zealous progressive activity. The gist of the civil service reform movement, which was in full swing during the first two decades of the twentieth century, was the demand to abolish the patronage system. Civil service reformists fought long and hard for an extended period of time before significant progress was secured. 49

Corruption and vice, indeed, appeared to have gained a foothold at the heart of nineteenth-century American democracy. It was obvious that in such a setting government alone could not be trusted to reform itself. Remedy, Progressive reformers were certain, had to come from the people, for “they believed that, just as a sinner can be cleansed and saved, so the nation could be redeemed if the citizen awoke to their responsibility.” 50

45 Id. at 55.
46 Supra text accompanying note 25.
47 See SKOWRONEK, supra note 40, at 1-46.
49 See SKOWRONEK, supra note 40, chs. 3 and 6
50 HOFSTADTER, supra note 8, at 11.
“Capitalists, workingmen, politicians, citizens—all breaking the law or let it be broken,” thundered the editor of the progressive *McClure’s Magazine* in January 1913. “Who is left to uphold it?” they went on to ask—

The lawyers? Some of the best lawyers in this country are hired, not to go into courts to defend cases, but to advise corporations and business firms how they can get around the law without too great a risk of punishment. The judges? Too many of them so respect the laws that for some ‘error’ or quibble they restore to office and liberty men convicted on evidence overwhelmingly convincing to common sense. The church? We know of one, an ancient and wealthy establishment, which had to be compelled by a … health officer to put its tenements in sanitary conditions. The colleges? They do not understand.

“There is no one left; none but all of us,” the editors declared, and later on gloomily concluded: “We have to pay in the end, every one of us. And in the end the sum total of the debt will be our liberty.”

As these reformers saw it, then, nothing less than liberty, or more widely the American democracy, was at stake.

I should note here two things. First, liberty, of course, is a protean term. Understandably, therefore, different reformers had somewhat different perceptions of that elusive liberty that needed to be shored up. This was not the only issue that fragmented the Progressive Movement, if one could speak of a Movement. Divisions among reform groups are echoed in the historiography of the period. I will give two examples, one is Hofstadter, *The Age of Reform*, published in 1955; the other is Michael McGerr’s recent study of the Progressive Era, *A Fierce Discontent*. While both writers are aware of the multifarious character of the Progressive Movement, they differ as to its overarching ethos. Michael McGerr’s story of the Progressive Era emphasizes the communal sentiments that inspired numerous progressive reformers, such as the women who established nurseries for the betterment of the lives of unprivileged groups (such as immigrants). “The progressive middle class,” he writes, “wanted a ‘moral revolution’: reformers most wanted workers and the upper ten to become different

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51 *McClure Editorial: Concerning Three Articles in this Number of McClure’s, and Coincidence that May Set Us Thinking, in The Muckrakers, supra* note 30, at 4, 5.
52 See *supra* note 28.
53 *HOFSTADTER, supra* note 8.
54 *MCGER* *R, supra* note 3.
55 *Id., e.g., at 150, and HOFSTADTER, supra* note 8, e.g., at 6.
people, the sort who would not pursue their own interests exclusively. In calling for ‘association’ and ‘fellow-feeling,’ the progressives … wanted other Americans to transcend class differences.”

Richard Hofstadter’s more cautious rendition of the Progressive Movement, on the other hand, underscores its deep commitment to good old individualistic ideology. He contends that “[m]ost Americans who came from the Yankee-Protestant environment, whether they were reformers or conservatives, wanted economic success to continue to be related to personal character, wanted the economic system not merely to be a system for the production of sufficient goods and services but to be effectual system of incentives and rewards.” The two writers clearly touched a raw nerve in the Progressives’ thinking, which, seen from a bird’s-eye view, was far from resolving the perennial tension between the individual and the communal elements in society. This ambiguity will surface, in different forms and disguises, in the following chapters.

The second point is this: Hofstadter and McGerr may have their differences, but according to the both of them, the majority of reformers came from the ranks of the middle class, which was deeply troubled by the fin de siècle social strife in the United States. The middle class decided to step up to the mission of social reconciliation. Soon it found itself in the thick of the fight, though, primarily as the reforms it set out to achieve had a clear mainstream, middle-class edge. Their progressive zeal evinced a belief that “as they themselves have changed, so others should be changed, too” with the modernization of America. As the contemporary philosopher, William James, cynically observed, Progressives were, in the end, after a “middle class paradise.”

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56 McGerr, supra note 3, at 134.
57 Hofstadter, supra note 8, at 11.
58 As can be expected, signs of conservative, at times even racist, thinking among Progressives could be easily detected, notably, in the advocacy for pro-segregation policy of some leading Progressives. See McGerr, supra note 3, ch. 6. No wonder, then, that according to Hofstadter, referring to later years, “Somewhere along the way a large part of the Populist-Progressive tradition has turned sour, become illiberal and illtempered.” Hofstadter, supra note 8, at 20.
59 McGerr, supra note 3, at xv.
60 Id. id.
2. The Progressive Presidents

Referring to the Progressive Movement, President Theodore Roosevelt, noting contemporary problems “connected with the amassing of enormous fortunes,” said in April 1906—

At this moment we are passing through a period of great unrest—social, political and industrial unrest. It is of the utmost importance for our future that this should prove to be not the unrest of mere rebelliousness against life, of mere dissatisfaction with the inevitable inequality of conditions, but the unrest of a resolute and eager ambition to secure the betterment of the individual and the nation. So far as this movement of agitation throughout the country takes the form of a fierce discontent with the evil, of a determination to punish the authors of evil, whether in industry or politics, the feeling is to be heartily welcomed as sign of healthy life.61

This paragraph nicely presents a charitable reading of the Progressive Movement; it just as nicely captures the limitations of the Movement’s and Roosevelt’s thinking. (After all, in his speech Roosevelt made the case for complacency toward “the inevitable inequality of conditions.”).

On a different occasion, Roosevelt was more combative: “It is an absurdity to expect to eliminate the abuses in great corporations by State action. The National Government alone can deal adequately with these great corporations.”62 And sure enough, during his presidency, progressive-minded steps of federal regulation were made with a firm touch, markedly, with the enactment in 1906 of the Pure Food and Drug Act and the Meat-Inspection Act, which authorized federal agents to inspect packinghouses in order to prevent bad meat from circulating in the industry. According to its sponsor, Senator Albert Beveridge, the meat act was “the most pronounced extension of federal power in every direction ever enacted.”63

Noteworthy, too, was Roosevelt’s enthusiastic conservation policy. He added enormously to the national forests in the West, reserved lands for public use, and fostered great irrigation projects. As can be expected, this policy ran counter to the interest of large cattle and lumber companies.

For all its initiatives, Roosevelt’s administration was accused of coveting the centralization of

61 T. Roosevelt, The Man with the Muckrake, supra note 30, at 62.
63 McGerr, supra note 3, at 163 (quoting Senator Albert Beveridge, who was a Republican from Indiana).
power in the federal government. President Theodore Roosevelt’s fifth cousin, President Franklin D. Roosevelt, would incur similar, yet more violent, accusation during his term in office in the 1930s.

A more immediate successor of Theodore Roosevelt, Woodrow Wilson, sponsored a policy that led to the adoption of the 1913 Federal Reserve Act. The Act was promoted with a view to stabilizing and disciplining the banking system, hitherto controlled by the big banks, which had gone through some major crises, notably, in the autumn of 1907. In 1914, Congress went even further and passed legislation creating the Federal Trade Commission (FTC), which was empowered to monitor and halt “unfair methods of competition.”

The implications of the Roosevelt-to-Wilson string of legislation were clear-cut: the federal government had crossed the Rubicon. It had reached into what had been previously considered the sacred “private” sphere, in spite of a fierce opposition launched at it by the guardians of the ancien régime. Government intervention stretched into areas of consumers’ safety, competitive practices, banking management, and use of natural resources, to name key examples. Moreover, it was made clear that the federal government would not withdraw from the market anytime soon. At the same time, one should use caution when assessing the regulatory achievements of the Progressive Era. All told, the federal regulatory apparatus was still undeveloped and rudimentary, and the big barons of market still wielded enormous power. Yet, for all its faults, thanks to the Progressive campaign, “[a] regulatory wedge had opened”; as we shall see, future generations would exploit and broaden this crack opened in the wall.

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64 Id. at 168.
65 On Wilson’s progressive policies, see WIEBE, supra note 28, ch. 6.
67 On the establishment on the FTC, see generally Henry R. Seager, The New Anti-Trust Acts, 30 POL. SCI. Q. 448 (1915); MCCRAW, supra note 6, ch. 4; A. Lee Fritschler, SMOKING AND POLITICS—POLICY MAKING AND THE FEDERAL BUREAUCRACY (1989), especially chs. 4 and 5; and Winerman, supra note 18. Prior to the introduction of the FTC, President T. Roosevelt formed a federal Bureau of Corporations, which operated within the confines of the just-as-new Department of Commerce and Labor. The legislation establishing the Bureau bestowed initially only investigatory powers on it. See Winerman, id. at 2-3, 17-20. The Bureau, in other words, was modeled on the theory of “the sunshine commission.” See supra note 32.
68 15 U.S.C. § 45 (1994). Originally, the FTC was empowered to proscribe “unfair competition” but this phraseology was soon changed to “unfair methods of competition.”
69 MCCRAW, supra note 6, at 181.
Finally, it is worth repeating that the Progressive Movement was bitterly challenged throughout. Indeed, a large portion of the dissertation is devoted to a study of its detractors’ views.\textsuperscript{70} Bernstein’s unsympathetic assessment of Progressives’ theory of regulation should give the flavor of the challenges. “Advocates of commissions,” he writes, “have been victimized by a naïve notion of reform, by lack of sophistication in political theory, and by tendency to isolate regulatory matters from the general context of political and social problems.”\textsuperscript{71}

Next we move to a predominant source “of a fierce discontent with the evil” on the part of Progressives—the railroad problem.

C. The Railroad Problem

1. An Overview

The most dramatic illustration of the transformation the United States underwent through during the second half of the nineteenth century was undoubtedly given by the (figuratively and literally) earth-shattering ascendance of railroads. “Railroading,” McCraw writes, “influenced American society in the late nineteenth century as only television would in the late twentieth—or as the Roman Catholic Church had influenced the life of medieval Europe.”\textsuperscript{72} And he sharply adds, “Railroads affected consciousness; they influenced life itself.”\textsuperscript{73}

The phenomenal rise of railroads in America was characterized by several noteworthy traits:\textsuperscript{74}

- External Financing: Railroads expansion was made possible to a considerable extent thanks to widespread public investments in the enterprise. State and federal support was of crucial importance in the development of railroads. This support was not only granted in the form of loans. Very generous land grants aided the building of railroads and often allowed railroad companies to subsequently rake in enormous sums of money out of the sale of these lots of land.\textsuperscript{75}

\textsuperscript{70} See infra especially Chapters 3 and 4.

\textsuperscript{71} \textit{BERNSTEIN, supra} note 40, at 126.

\textsuperscript{72} \textit{MCCRAW, PROPHETS, supra} note 6, at 4-5.

\textsuperscript{73} \textit{Id.} at 5.

\textsuperscript{74} The following discussion is generally based on \textit{STOVER, supra} note 1, at 1-225.

\textsuperscript{75} \textit{Id.} especially ch. 4.
Monopoly, Internal Competition, and Combinations: The railroad industry has been always associated with issues of monopoly. During the nineteenth century railroad companies, organized as corporations, of course (after all, as noted, they have always required large capital investment), secured their charters from the states. The charters regularly included monopoly provisions. And in any event, “almost from the beginning, railroads exhibited almost unlimited economies of scale,” thus raising a question mark over the merits of competition in their case.  

The question did not remain idle. The huge trans-continental rail network was run by dozens and dozens of railroads. Efforts to streamline railroad traffic and competitive pressures led early on to consolidations among companies or to other reconfigurations in the ownership structure of different segments in the rail network. Similar pressures triggered railroads to initiate various forms of pooling with a view to meeting the challenges of never-ending rate wars.

Corruption and Hostility: Practically from the first, railroad barons were commonly regarded as greedy, unscrupulous, profiteering men. Whether due to their land-sale and stock manipulations, oppressive use of monopolistic position, corrupt handling of the public funds entrust in their hands, or other questionable practices, railroad companies were frequently a target of pervasive discontent, oftentimes particularly on the part of Western and prairie farmers.

External Competition: Railroads were never alone in the transportation business. When first introduced, carriages of many kinds were riding on an array of turnpikes and other roads, and passengers and merchandise were traveling along rivers and newly-dug canals. Later on, railroads were more severely dogged, almost to the point of destruction, by automobiles, airplanes, and pipelines.

2. The Golden Age of Railroads

The history of railroads in the United States is a story of a rise, fall, and partial recovery. The 1830s saw the first American locomotive. Few contestations notwithstanding, America was

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76 McCraw, supra note 6, at 9. See also id. at 68-74, for a helpful explanation of key terms of modern economics pertaining to the analysis of trusts. “Scale economies,” one of the terms, rests on the understanding that in some cases “the larger the operation, the greater the productive efficiency.” Id. at 70.
The Context

instantly enamored with railroads. In 1878, Charles Francis Adams wrote of the opening of a railroad line from Boston to Albany earlier in the nineteenth century, “The opening of a new railroad was in 1841 an old story. Every one had then made journeys by rail. … The world has already accustomed itself to the new conditions of [railroads’] existence, and wholly refused to gape in childish wonder at the thought of having accomplished a journey of fifty miles more or less between the rising and setting of even a December sun. The genesis of the system was complete.”77 Telling as Adams’ account is, it is difficult to imagine that one did not “gape in childish wonder” by railroads’ meteoric development after the 1840s.

The expansion of the rail network during the nineteenth century was phenomenal. To illustrate, it grew from 23 miles in 1830, to about 31,000 in 1860, 93,000 in 1880, 193,000 in 1900, and an all-time record of 253,000 in 1916 (followed by a decline to 234,000 in 1940, and a further decline later in the twentieth century).78 As a result, by the 1910s “[a]lmost the entire nation was literally within the sound of locomotive whistle.”79 This fact as well as many other indicators bore witness to a one-in-their-life-time “Golden Age” for the railroads, lasting from the Civil War to World War I.80 As the twentieth century wore along, however, the railroads faced much-heightened competition, particularly with the expansion of automobile and air transportation, which put an end to this Golden Age. The railroads would recover in the second half of the twentieth century from the blow delivered by their competitors, but they would never again approximate their former position of complete predominance.81

The railroad industry, “the earliest of the large corporations in the United States,”82 enabled the American economy to explode and connected localities of previously inconceivable distance. The enormous grid of railroads had a key role in the development of the less populated areas in the country, lying mainly west to the Mississippi River. Railroads also sustained three withering

77 ADAMS, RAILROADS, supra note 33, at 77-78, 79.
78 STOVER, supra note 1, at 134-136, and 205.
79 Id. at 96.
80 Id. at 164.
81 Id. chs. 8-10.
82 Tipple, supra note 12, at 14, 21.
war campaigns: the Civil War in the nineteenth century and the two World Wars in the twentieth. Railroads, in short, made America into a nation.\textsuperscript{83}

Sustaining the operation and extension railroad lines has always been a capital intensive endeavor. The railroad moguls knew well that in order to survive they must have a huge line of credit at their disposal. It was soon obvious that “[t]heir capitalizations far exceeded those of even the largest manufacturing companies.”\textsuperscript{84} The capital of both financial institutions and the public were harnessed for the effort, which grew even more demanding as competition increased. Thus, significant portions of the financial establishment came to be deeply invested in the enterprise, opening the door for a nation-wide financial domino effect. Railroad expansion also raised acute issues of eminent domain and labor relations—the operation and development of the industry was also labor intensive, so a raise in the salary of railroad workers, for example, had a national impact.\textsuperscript{85}

“As lines multiplied, competition increased,”\textsuperscript{86} even more so in cases of over-expansion of rail construction.\textsuperscript{87} Actually competition not only increased but became brutal; for a long period of time it was common to speak of “cutthroat competition” in the railroad business. Railroad officials, submitted Adams, “stopped at nothing.”\textsuperscript{88} To improve their position in the competition the railways companies oftentimes attempted to form an operational coalition, or combinations, with some of their rivalries.\textsuperscript{89} As competition intensified, a series of agreements were signed among competitors with a view to laying down certain common ground-rules that would bind the industry, relating, for example, to the extent to which the parties to the agreements could vouchsafe rebates to their clients. However, as in other industries, “such

\textsuperscript{83} \textit{See} Charles Francis Adams, \textit{The Railroad System}, 104 N. AM. REV. 476, 484-490 (April, 1867) [hereinafter Adams, \textit{The Railroad System}].
\textsuperscript{84} MCCRAW, \textit{supra} note 6, at 4.
\textsuperscript{85} \textit{See} Elmer A. Smith, \textit{The Application of the Antitrust Laws to Regulated Industries}, 14 I.C.C. PRACT. J. 181, 195 (1946). The railroads employed unimaginable number of worker. Thus, by the 1860s, “a time when the federal government employed only 50,000 civilians, rail corporations provided jobs for many times that number.” MCCRAW, \textit{supra} note 6, at 4. The exponential expansion in rail employment in the late nineteenth century reached a peak of over two million workers in 1920. STOVER, \textit{supra} note 1, at 162-163. Railroad labor was almost always a cause for difficulties and trouble, even during the two World Wars. \textit{See infra} text accompanying note 114.
\textsuperscript{86} ADAMS, \textit{RAILROADS}, \textit{supra} note 33, at 123.
\textsuperscript{87} CUSHMAN, \textit{supra} note 34, at 37.
\textsuperscript{88} ADAMS, \textit{RAILROADS}, \textit{supra} note 33, at 123.
\textsuperscript{89} \textit{See id.} at 149-190, for a sympathetic explanation of the mushrooming of railroad combinations.
coalitions did not work very well, suffering as many of them did from mutual distrust and the pursuit of centrifugal aims.”

Namely, the drive for competition—most railroad officials would say, the drive for survival—sapped such arrangements for the simple reason that often the shippers, a most heterogeneous group ranging from Northeast merchants to Southern farmers, would always demand rebates, or any other kind of concession, from carriers. In order to stay in the game, railroad companies capitulated, thus reneging on their agreements with their counterparts. These and like factors brought about—Adams wrote in the late 1870s—“competition run mad.”

The consequences were dire. As Adams went on to comment, with “[t]he mania for railroad construction,” typifying the years 1866-1873, “it is safe to say that the idea of any duty which a railroad corporation owed to the public was wholly lost sight of.”

It is noteworthy that these harsh words came from a man who showed much sympathy to railroads’ hardship to the point of passionately defending their need to form combinations on scale economies rationale. Adams’ analysis was made, we have seen, against a backdrop of a pervasive commitment to the ethos of the free market, which was averse, of course, to any form of combination.

That was not all. The railroads offered the public additional reasons to gripe. They were notorious for various practices of discrimination among customers. They would, for instance, offer concessions to large shippers and, even more aggravatingly, would charge more for short than long hauls. Railroads would discriminate between commodities, too. Less systematically, they would also regularly privilege one client over another. Given the fact that “[a]lready by the 1860s railroads dwarfed most other institutions in American society,” large communities throughout the United States bore the burnt of these practices. Consequently, observed Tipple, “The popular consensus was not only that this elaborate system of special rates denied the little man equal opportunity with the rich and influential, breaking the connection between individual merit and success, but that the ultimate effect was to extend further monopoly by preventing

90 Tipple, supra note 12, at 20.
91 ADAMS, RAILROADS, supra note 33, at 148.
92 Id. at 123. See also id. at 149-180 for a chronology of fierce rate-wars and fragile combinations among railroads throughout the land in the late 1870s.
93 See id. at 186-214.
94 MCCRAW, supra note 6, at 4.
free competition among businesses.” Obvious cases of mismanagement and financial scandals (as well as outrageous combinations) did not help much in appeasing a disgruntled public. “The result,” Adams noted in 1867, “is a wide-spread distrust of these bodies, springing half from instinct and half from experience.”

An outcry for state intervention followed, which resulted in the introduction of state regulation in various part of the United States. This form of regulation was limited, naturally, due to the fact that, as the Wabash Case made clear in 1886, it could not extend to interstate traffic. One might argue additionally that it was not allowed to be effective, as in several states, particularly in the Northeast, “sunshine commissions” had a mere advisory role.

Just as an illustration to how far ranging were the numerous problems associated with the railroads, one can look at the predicament of farmers at the time when railroads were having the time of their lives. As already so often emphasized, with the arrival of railroads unimaginable transformation of people and goods became all of a sudden possible; it did not take much until trans-state transportation became not just a possibility but a necessity in the national market for farmers and other sectors of the economy. The farmers, a particularly distressed sector of the economy, had a decisive role in the introduction of railroad state regulation in a wave of legislation commonly called the “Grange laws.” They repeatedly experienced severe hardship due to the vicissitudes of weather and economic conditions throughout the years. Bitterness toward what seemed to them exorbitant and discriminatory freight rates grew; demands for reduction of railroad fees usually intensified; and, to the amazements of many, eruption of waves of violence and riots ensued more than once. Regulation, again, would occasionally be introduced. Railroads, in any event, had to cave in at certain points, their

95 Tipple, supra note 12, at 21-22.
96 Adams, The Railroad System, supra note 83, at 502. The “bodies” Adams referred to here were “certain overgrown corporate bodies [that] have become the very arteries of the body politics.” They include not only railroads but also postal services, for example. Id. id.
97 See ADAMS, RAILROADS, supra note 33, at 127-146; CUSHMAN, supra note 34, ch. 2; McCRAW, supra note 6, at 17-22, 52, and passim; and STOVER, supra note 1, at 117-123.
99 See supra note 32.
100 Stove straightforwardly argues that “[w]estern farmers and the Grange had brought regulation to the railroads.” STOVER, supra note 1, at 120. On the Grange, see HOFSTADTER, supra note 8.
cooperative agreements with their peers notwithstanding. This dynamic brought several railroad companies to their knees. More than once, companies went under. This, evidently, was ruinous to their creditors, banks and, even more so, small-time investors.\(^\text{101}\)

Let this cursory history of the railroads industry suffice to show that industrialization brought loads of troubles upon America. Overall, railroads pitted shippers against carriers, rural segments of the country against industrial and commercial. Its management raised acute question of anti-trust. It was in its very nature to be associated with such concerns, as it had always been a quintessential example of a “natural monopoly” due to the clear economies of scale typifying its operation.\(^\text{102}\)

The growing dependence of wide sectors of the economy on railroads did not go unnoticed by courts. For example, in his opinion in \textit{Trans-Missouri}, Justice Peckham quotes “the very able” opinion of one of the judges in the lower court, stating—

\begin{quote}
As to the majority of the community living along its line, each railway company has a monopoly of the business demanding transportation as one of its elements. By reason of this fact, the action of this corporation in establishing the rates to be charged largely influences the net profit coming to the farmer, the manufacturer, and the merchant, from the sale of the products of the farm, the workshop and manufactory, and of the merchandise purchased and resold, and also largely influences the price to be paid by every one who consumes any of the property transported over the line of railway. There is no other line of business carried on in our midst which is so intimately connected with the public as that conducted by the railways of the country.\(^\text{103}\)
\end{quote}

The railroad, in sum, provides an excellent example, which is admittedly somewhat extreme, of the intensity and complexity of the socio-economic tensions ushered in at the national level around the turn of the century with the expansion of the economy. Moreover, the Golden Age of railroads coincided with the Progressive Movement’s glory days. The latter expectedly devoted much energy to questions of federal railroad regulation. Visiting, as we shall, the form of regulation introduced during the Progressive Era may allow, therefore, for a scrutiny of a

\(^\text{101}\) See generally STOVER, \textit{supra} note 1.

\(^\text{102}\) See \textit{supra} note 76.

\(^\text{103}\) United States v. Trans-Missouri Freight Ass’n 166 U.S. 290, 336 (1897).
seminal reform-inspired model of regulation. The case of railroads’ federal regulation is particularly noteworthy for another apparent reason—the ICC, the commission established to carry it out, was after all the first federal regulatory agency.

II. Taming Bigness

“In the early years of industrialization, the trusts seemed to be mysterious mutations, the consequences of some evil tampering with the natural order of things. They were not merely economic freaks but also sinister new political forces—powers that had to be opposed in the name of American democracy.”¹⁰⁴ Indeed, with the rise of bigness, the question became plain: would cross-country corporations adapt themselves to traditional American mores, or would it be the other way around? We need not trouble ourselves with trying to answer the question definitely. Even the perspective of hindsight does not produce easy answers. Far more important is to consider the federal government’s reaction to the challenge. This section will do that and, taken as a whole, will further clarify what concept of regulation underlies the dissertation’s analysis. An illuminating way to assess the federal mode of regulation, as it presented itself with the establishment of the ICC, is to position it against the dominant trustbusting (anti-trust) alternative to containing national industries. The need to do so in order to understand American regulation will become evident when we later see that federal administrative regulation was always weighed against the option of regulation by common law courts. The aim is to show where the two remedial avenues diverge.

But we need to cover some ground before making this comparison.

A. The Options on the Menu

According to Charles Francis Adams’ report of 1878, “[D]uring the last two years there is almost no section of the country or branch of trade which has not been ‘pooled.’”¹⁰⁵ The hardship inflicted by bigness in general, and the merger and trust movement¹⁰⁶ in particular, on

¹⁰⁴ McCraw, supra note 6, at 77.
¹⁰⁵ Adams, Railroads, supra note 33, at 180.
¹⁰⁶ See supra note 20.
many sectors of the economy could be curtailed in more than one way. What were the items on the menu of an administration that wanted to pursue this cause?

To begin with, substantial taxes could have been levied on corporations as a way of reimbursing, as it were, the community for its losses. However, as McGerr comments, at the time “Americans were not yet willing to endorse taxes large enough to make a big business small,” as was made clear by the minimalist first corporate tax, adopted by Congress in 1909.

Other options readily presented themselves in the case of railroad operation. Railroad companies could be, and were, brought to court for their practice of pooling, as well as other cases of misuse of their monopolistic status. They could, and were, regulated by state and federal commissions in the hope of assuring that only fair and reasonable rates, for all sides of the deal, would be charged. These two additional avenues did not exhaust the steps that could be taken to achieve a prosperous and fairly-run net of rails. There was also the option of a *laissez-faire* regime of some sort, which, as one scholar put it in 1915, “though … never lacked for advocates among American business men [sic], has never been tried by this country.”

“Ruinous competition” among railroads in particular illustrated to all the dangers involved in “a sublime faith in *laissez-faire*,” as Adams put it.

The government could theoretically choose to pursue the diametrically-opposed course of (federal or state) ownership of some or all railroad lines and their management by a governmental apparatus, although it seems that it was patent that adopting such policy in turn-of-the-century America would run up against a wall of opposition. Governmental management—even without ownership—of the industry was yet another option. Adams’ opposition in this regard was symptomatic of the Progressive way of thinking. As he saw it, in the case of railroads “[t]here is … a wellnigh unlimited field for jobbery,—there are perennial

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107 See Winerman, *supra* note 18, at 82 (In 1913, Senator Cummins, one of the supporters of the FTC Act, “supported a special tax rate for corporations that controlled more than one-forth of the national market, explaining it would target ‘the accumulation of so much dishonest wealth.’”).


109 See infra Section I.C.


112 Seager called this option, “government ownership and operation, or state socialism.” (emphasis in original). Seager, *supra* note 67, at 448. See ADAMS, RAILROADS, *supra* note 33, at 198-199, where he tells of one such suggestion put forward in Massachusetts, which came to nought, due to “practical difficulties and objections, both political and financial.”
opportunities for plunder.” Plunder by whom? one might have asked, and Adams was quick to
answer: “In the case in question, great interests are involved; and while citizens are honest and
indifferent, politicians are eager and corrupt.” Adams’ opposition hit a promising vein of
public sentiments, as was demonstrated by the fact that it took the United States the outbreak of
World Wars, decades after he had written these lines, to put government oversight into practice.

B. Trustbusting

It turns out, then, that only a focus on trustbusting and regulation is necessary for our
purposes, as they were the only viable mechanisms to effect federal intervention in the
business of railroads. We are primarily interested in the latter avenue, of course; thoroughly
examining the former would take us far afield indeed. A few cursory remarks on the
government’s anti-trust campaigns are in order, though, if only for the sake of providing further
illustration of the overwhelming power of fin de siècle national corporations and the complexity
attached to their regulation.

The Brown v. The Board of Education and Roe v. Wade of early-twentieth-century
America was, according to one commentator, the federal government’s resounding victory in
the Standard Oil case, decided in 1911. There the Supreme Court ordered the break-up of

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114 In December 1917, nine months after the United States entered the Great War, the federal
government took hold of the railroads under the authority vested in it by Congress. The latter passed the
Army Appropriation Act of 1916, which empowered the President to assume control of all system of
transportation in a time of war and provided for the method of compensation to be granted to railroad
owners. The railroads returned to private hands (and management) in March 1920. See generally Robert
L. Rabin, Federal Regulation in Historical Perspective, 38 STAN. L. REV. 1192, 1236-1240 (1986). During the Second World War railroads’ governmental management was not deemed necessary, except for a few days from the end of December 1943 to mid-January 1944. This was done only in the face of an imminent threat of a general strike. See STOVER, supra note 1, at 167-191.
115 Admittedly, the two denominations may be confusing, and they are here used only for the sake of
clarity, as these two options were in the end two modes of public regulation of business entities, percieved to threaten the fair operation of the market.
119 Standard Oil, 221 U.S. 1 (1911).
The Context

Rockefeller’s transnational corporation, while enunciating a “rule of reason” in the application of the Sherman Act. The case originated in a decision made by Theodore Roosevelt in 1905 to open an investigation of Standard Oil.

In Standard Oil the Court replaced a different interpretation offered by Justice Peckham, speaking for a narrow majority, in the 1897 Trans-Missouri Freight case. The latter case was the Court’s first to find a Sherman Act violation. It revolved around an association agreement among several major railroad companies. According to the attorneys for the United States government (the complainant in the lower court), the parties to the contract under review were the Atchinson, Topeka & Santa Fe Railroad Company, and no fewer than 17 other railroad companies, which provided “the only lines of transportation and communication engaged in the freight traffic … in all that region of the country lying to the westward of the Mississippi and Missouri rivers, and east of the pacific ocean.” The complex agreement, its recital declared, was designed “[f]or the purpose of mutual protection by establishing reasonable rates, rules, and regulation on all freight traffic” in the territory prescribed in it. The Court was asked to declare the agreement as illegal and void. Reversing the decision of the circuit court, Justice Peckham wrote with reference to the Sherman Act, “[D]oes the agreement restrain trade or commerce in any way so as to violate the of the act? We have no doubt that it does.” The government had carried the day.

As far as the government was concerned, satisfying as the Court’s decision in Missouri Freight was, there was nevertheless an inauspicious edge to it. The victory was secured only by the slimmest of margins. The opinion of Justice White, writing for a four-Justice minority, read both the agreement in question and the Sherman Act with some leniency. To his eyes, the

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121 On T. Roosevelt’s thoughts and policies regarding anti-trust issues, see Winerman, supra note 18, at 15-27.

122 As noticed by Chief Justice White, Standard Oil repealed yet another precedent, United States v. Joint Traffic Association, 171 U.S. 505 (1898), which also dealt with railroads combination.

123 Trans-Missouri Freight, 166 U.S. at 298.

124 Id. at 292.

125 Id. at 341.

126 See also United States v. E.C. Knights Co., 156 U.S. 1 (1985), where the Court, speaking through Chief Justice Fuller, ruled the Sharman Act did not apply to the dealings of the American Sugar
agreement embodied “only an agreement between the corporations by which a uniform classification of freight is obtained, by which the secret undercutting of rates is sought to be avoided, and the rates as stated in the published rate sheets … are secured against arbitrary and sudden changes.”127 And on a more general level White reasoned that “as trade developed, it came to be understood that, if contracts which only partially restrained the freedom of the subject or of trade were embraced in the rule forbidding contracts in restraint of trade, both the freedom of contract and trade itself would be destroyed.”128 Justice Peckham, who incidentally would author *Lochner*,129 stuck to a formal reading of the Act, as he saw great dangers in accepting White’s approach. Peckham wrote—

If only that kind of contract which is in unreasonable restraint of trade be within the meaning of the statute, and declared therein to be illegal, it is at once apparent that the subject of what is a reasonable rate is attended with great uncertainty. What is a proper standard by which to judge the fact of reasonable rates? Must the rate be so high as to enable the return for the whole business done to amount to a sum sufficient to afford the shareholder a fair and reasonable profit upon his investment? If so, what is a fair and reasonable profit? That depends sometimes upon the risk incurred, and the rate itself differs in different localities. Which is the one to which reference is to be made as the standard? Or is the reasonableness of the profit to be limited to a fair return upon the capital that would have been sufficient to build and equip the road, if honestly expended? Or is still another standard to be created, and the reasonableness of the charges tried by the cost of the carriage of the article, and a reasonable profit allowed on that? And, in such case, would contribution to a sinking fund to make repairs upon the roadbed and renewal of cars, etc., be assumed as a proper item? Or is the reasonableness of the charge to be tested by reference to the charges for the transportation of the same kind of property made by other roads similarly situated? If the latter, a combination among such roads as to rates would, of course, furnish no means of answering the question.

Refining Company, although it was controlling at the time 98% of the domestic market for sugar manufacturing, as the Company’s main business was producing sugar rather than selling it. That being the case, the Court held, its business affected interstate commerce “only incidentally and indirectly.” *Id.* at 13. Only Justice Harlan dissented.

127 *Trans-Missouri Freight*, 166 U.S. at 343.
128 *Id.* at 351.
Having enumerated this long list of open-ended quandaries, Peckham concluded—

> It is quite apparent, therefore, that it is exceedingly difficult to formulate even the terms of the rule itself which should govern in the matter of determining what would be reasonable rates for transportation; while, even after the standard should be determined, there is such an infinite variety of facts entering into the question of what is a reasonable rate, no matter what standard is adopted … To say, therefore, that the act excludes [reasonable] agreements … is substantially to leave the question of reasonableness to the companies themselves.\(^\text{130}\)

To which Justice White answered—

> this proposition absolutely conflicts with the methods of dealing with railroad rates expressly put in force by Congress in the Interstate Commerce Act, and by many of the States of the Union. … The Interstate Commerce Act especially provides for reasonable rates, and vests primarily in the commission [the ICC], and then in the courts, the power to enforce the provision, and like machinery is provided in many of the States. Will it be said that congress and other legislative bodies have provided for reasonable rates, and created the machinery to enforce them, when whether rates are reasonable or not is impossible of ascertainment?\(^\text{131}\)

I have quoted the justices at length in order to emphasize how delicate the process of evaluation involved both in anti-trust litigation and, as suggested by Justice White, in the work of the ICC was. As we shall see below, future debates regarding the merits of administrative regulation would follow the fault-lines charted by the two justices in the present case.

True, the Court would satisfy the government again in \textit{Standard Oil}, where, to recall, Justice White’s approach would prevail.\(^\text{132}\) Still, not always would the Supreme Court do so, using the considerable latitude it had reserved to itself. \textit{United States Steel}, filed under President Taft, is a case in point.

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\(^{130}\) \textit{Trans-Missouri Freight}, 166 U.S. at 331-332.

\(^{131}\) \textit{Id.} at 372-373.

\(^{132}\) See Winerman, \textit{supra} note 18, at 13-14 for an analysis of Chief Justice White’s rule of reason as it had evolved from \textit{Trans-Missouri} to \textit{Standard Oil}. 

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President Taft followed even more vigorously than T. Roosevelt the trust-busting campaign, although, to his administration’s chagrin, not always successfully.\textsuperscript{133} United States Steel was the one case that stood out among others. It opened up with a prosecution that named Carnegie, Morgan, Rockefeller, Charles Schwab, and others, as defendants.\textsuperscript{134} Speaking through Justice McKenna, the Court explained that this was a “[s]uit against the Steel Corporation and certain other companies which it directs and controls by reason of the ownership of their stock, it and they being separately and collectively charged as violators of the Sherman Anti-Trust Act…”\textsuperscript{135} This time around, however, a divided Supreme Court was not convinced by the case put forward by the government, calling for the dissolution of the giant corporation due to its violation the anti-trust legislation.\textsuperscript{136} According to Justice McKenna, “We have seen that the judges of the District Court unanimously concurred in the view that the corporation did not achieve monopoly, and such is our deduction, and it is against monopoly that the statute is directed; not against an expectation of it, but against its realization, and it is certain that it was not realized.”\textsuperscript{137} The corporation at bar, “is greater in size and productive power than any of its competitors, equal or nearly equal to them all, but its power over prices was not and is not commensurate with its power to produce.”\textsuperscript{138} “The law,” famously concluded the Court, “does not make mere size an offense.”\textsuperscript{139} Justice Day, writing for the minority, saw things differently. Noting that “the [United States] Steel Corporation was a combination of combinations by which directly or indirectly 180 independent concerns were brought under one control,” he held that the record in front of the Court “shows … that great profits to be derived from unified control were the object of these organizations.”\textsuperscript{140} The Court’s anti-trust jurisprudence was disconcerting to anti-bigness crusaders as Louis Brandeis, but not only to them. Standard Oil was widely criticized by politicians and jurists.\textsuperscript{141} To begin with, Justice Harlan, the only dissenting voice in Standard Oil, went so far as to opine

\textsuperscript{133} Winerman, supra note 18, at 28 (“Roosevelt had averaged less than six ‘antitrust’ cases per year; Taft averaged twenty.”).
\textsuperscript{134} McGerr, supra note 3, at 159.
\textsuperscript{135} United States Steel, 251 U.S. at 436.
\textsuperscript{136} Id. at 417.
\textsuperscript{137} Id. at 444.
\textsuperscript{138} Id. at 445.
\textsuperscript{139} Id. at 451.
\textsuperscript{140} Id. at 459. For later regulation of holding companies, see infra note 151.
\textsuperscript{141} See Winerman, supra note 18, at 13-15.
that the Court’s willingness “to insert words in the Anti-trust [i.e., the Sherman] Act which Congress did not put there,” was a case of “usurpation by the judicial branch of the Government of the functions of the legislative department.”\footnote{Standard Oil, 221 U.S. at 106 and 103, respectively.} Leaving constitutional concerns (strictly speaking) aside, as Rudolph Peritz explains, “[T]he Rule of Reason quickly became the pro-trust idiom that stirred public sentiments ...”\footnote{PERITZ, supra note 118, at 61.} Further, as discussed before, the elasticity of the rule, which placed wide discretion in the hands of presiding judges, was adversely remarked, especially given the Supreme Court’s putative “pro-trust” tendencies. At the same time, business on their part extended cool reception to a rule entrenching unpredictability at the heart of antitrust jurisprudence.\footnote{MCCRAW, supra note 6, at 116.}

The remedies ordered by the Court in \textit{Standard Oil}, which made the corporation’s erstwhile shareholders the owners of its successors’ shares, were also condemned. The facts of the matter were plain: following the dissolution of Standard Oil, the aggregate value of its progenies soared.\footnote{See Kovacic, supra note 120, at 1299 (“One year after the thirty-three affiliates and subsidiaries had begun their independent existence, the aggregate value of their stock has appreciated 47% during a period when the Dow Jones Industrial Average increased 7.6%. By March 1917, nearly six years after the dissolution, the value of the successors’ shares had risen nearly fourfold.”).} As Henry Seager saw it already in 1915, “there was little evidence of any benefit from” the dissolution of Standard Oil “to any class in the community except to stockholders in the dissolved combination[].”\footnote{Seager, supra note 67, at 450.} Seager noted a flaw in the remedial program structured by the Court that was certain to benefit shareholders. He wrote, “It is quite clear from this experience that formal dissolution was illusory as a remedy, unless coupled with supervision which would prevent secret understandings [among successor companies] from taking the place of open competition.”\footnote{Id. at 450.} Former President Theodore Roosevelt was disconcerted. The remedy in \textit{Standard Oil}, he charged, made the Court’s “bitter condemnation” a “farce”; it had not produced “one particle of benefit to the community at large.” In fact, “prices went up to consumers, independent competitors were placed in greater jeopardy than ever before, and the possessions of the wrong-doers greatly appreciated in value.”\footnote{17 ROOSEVELT, supra note 62, at 281 (Confession of Faith, 1912). Another major anti-trust case, which was decided two weeks after \textit{Standard Oil} was United States v. American Tobacco Co. 221 U.S.}
To people like Roosevelt and Seager, then, the anti-trust campaign as it had come to pass up to the 1910s, with its ephemeral victories and spasmodic governmental supervision, left much to be desired. No wonder that the FTC was introduced in the wake of the *Standard Oil* case, when it became clear that the business growth in the United States “had challenged classic assumptions that business efficiency was compatible with opportunity, competition, fair distribution, and political freedom, and that all could be secured by non-discretionary anti-trust adjudication.”

Regulation, some thought, might provide the needed remedy for the problem of bigness.

C. Between Anti-Trust and Regulation: An Overture

I will not embark on a detailed analysis of the various differences between an anti-trust and regulation regimes of control. I wish make merely one point in this regard. Unlike in the case of trust-*busting*, considered abstractly, the size, shape, and form of the businesses under regulation was not disputed. As Thurman Arnold observed in 1937, due to its engagement with the ideal of competition “the anti-trust laws were the answer of a society which unconsciously felt the need of greater organizations, and at the same time had to deny them a place in the moral and logical ideology of the social structure.”

106 (1911). There, too, the dissolution of the Tobacco monopoly ran into serious difficulties. See Winerman, *supra* note 18, at 31.

149 Winerman, *supra* note 18, at 96.


151 In making this generalization, I am not oblivious to the provisions of the Public Utility Holding Company Act of 1935, which granted the SEC the power to oversee breakups and dissolution of multilayered companies and simplification of other complex corporate structures. See Comment, *Federal Regulation of Holding Companies: The Public Utility Act of 1935*, 45 YALE L.J. 468 (1936) [hereinafter Comment on the Public Utility Act]. As this thorough Comment made clear shortly after the adoption of the Act, this side of the work of the SEC should be regarded as part of the anti-trust machinery employed by the federal government. See also Kovacic, *supra* note 120, at 1306-1310. On the applicability of the anti-trust legislation that was in force prior to the enactment of the Public Utility Holding Company Acts of 1935 to holding companies, see Handler, *supra* note 18, at 259-267.

observation, administrative regulation appears to have had a more realistic approach to bigness
in the sense that it was founded on the understanding that big corporations were there to stay.
More accurately, it was founded on the premise that as these powerful corporations were there
to stay, they should be regulated so as to avert, or at least attenuate, the threats posed by the
potential unruly behavior of big corporations.

Winerman captured the proposed distinction well when he wrote—referring to a 1904 report of
the Commissioner of Corporations—\textsuperscript{153} that the report “distinguished ‘anti-trust’ from ‘unfair
competition’ laws. The former futilely sought to maintain ‘a condition of competition’; the
latter accepted that combination was inevitable and regulated ‘methods of competition’ so that
the process would ‘be attended by as little injustice as may be.’”\textsuperscript{154} A flexible vehicle for the
attainment of the latter end was vital and administrative regulation, it was felt, would provide
that tool. As Seager saw it soon after its adoption, the fact that the Federal Trade Commission
Act of 1924 provided for “delegation to the Trade Commission of responsibility for securing
compliance with the law is a recognition that prevention should be made more prominent than
punishment.”\textsuperscript{155}

Having touched upon early anti-trust attacks lashed at railroad companies, the following
discussion will move one step further in exploring the essentials of railroad regulation.

D. The ICC

Much has been said over the years on the establishment and early history of the ICC, “the
prototypical federal regulatory agency.”\textsuperscript{156} In fact, great many of the sources mentioned

\textsuperscript{153} See \textit{supra} note 67.
\textsuperscript{154} Winerman, \textit{supra} note 18, at 19. See also \textit{id.} at 24-25, 41-42, 67 for restatements of this
understanding by various people. In 1915, Seager used a similar terminology. He suggested the
distinction between “enforced competition,” on the one hand, and “regulated competition” and
“regulated combination,” on the other. Seager, \textit{supra} note 67, at 448. As Hofstadter saw it, whereas the
Progressives had endorsed the former position, the New Dealers, being more realistic, had endorsed the
latter. HOFSTADTER, \textit{supra} note 8, at 314-316.
\textsuperscript{155} Seager, \textit{supra} note 67, at 457.
\textsuperscript{156} MCCRAW, \textit{supra} note 6, at 62.
throughout this dissertation have something to say on its formative years. What follows, therefore, is a brief review of the key pieces of legislation constituting the agency and defining its jurisdiction.

It was the Interstate Commerce Act of 1887 that gave birth to the ICC. The Act forbade a list of disagreeable railroads’ practices, such as pooling, rate discrimination, rebating, and charging unreasonable rates. The Commission was introduced to assist in the enforcement of these strictures. It was to be composed of five members appointed by the Present with the advise and consent of the Senate. No more than three commissioners could come from the same party, “thus defusing the fear of partisanship that had figured prominently in the debates” leading to the creation of the Commission. Although lacking the authority to fix rates, it was authorized to set aside, upon complaint, “unreasonable and unjust” rates. Its order forbidding such rates, however, could be enforced only in courts.

The Hepburn Act of 1906 was enacted not only to bring railroad regulation up to date with contemporary difficulties, but also to abate the “much bitter humiliation” the ICC suffered in the hands of the Supreme Court’s emasculating jurisprudence that made it, in the words of Justice Harlan “a useless body for all practical reasons.” Prodded by President Theodore Roosevelt, Congress passed the Act in the end of June 1906. It authorized the ICC to set maximum rates in future transactions, upon request, and provided that its orders would become effective upon release, shifting the burden to carriers to test them in court. This last step did not much improve the standing of the Commission in courts. “[T]he Hepburn Act seemed to keep

157 Several accounts of ICC’s history are indispensable: CUSHMAN, supra note 34, at 37-145; Samuel P. Huntington, The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest, 61 YALE L.J. 467 (1952), GABRIEL KOLKO, RAILROADS AND REGULATION 1877-1916 (1965), and SKOWRONEK, supra note 40, chs. 5 and 8. These accounts are elaborate, well documented, and, although they differ in key questions (e.g., what the position of the railroads with regard to the introduction of a regulatory national commission), tell a compelling story of the legislative history of the ICC’s key pieces of legislation. The following review is based, in the main, on these sources.

158 Later legislation would gradually enlarge the number of commissioners to eleven. See CUSHMAN, supra note 34, at 37-118.

159 SKOWRONEK, supra note 40, at 149.

160 CUSHMAN, supra note 34, at 65.

the commission [sic] a ward of the courts,” comments Skowronek, “allowing it to offer expert opinions for judges’ consideration but not authoritative decisions.”

Four years later, Congress passed the Mann-Elkins Act of 1910, sponsored by the newly elected President Taft. The Act’s main contribution to the federal structure of railroad regulation lay in the addition of a specialized Commerce Court to review Commission decisions. This turned out to be an abortive, short-lived experiment. The new court failed to deliver the goods its sponsors had hoped for. It was questionable whether it had speeded up litigation; most of its rulings were reversed by the Supreme Court; and it was accused of being a pro-railroad tribunal. Toward the end of 1913 President Wilson signed a bill abolishing the Commerce Court, thus ending an “inglorious” career.

The Transportation (or Esch-Cummins) Act of 1920 went on the books following the experience of partial nationalization during World War I, which highlighted the advantages (and disadvantages) associated with central management of railroads. “It may be said,” wrote Robert Cushman in 1941, “that the Act of 1920 embodied our first constructive railroad policy.” He went on to explain that the Act “represented a change from the old policy of restrictions and discipline to that of a positive governmental responsibility to see that an efficient and self-sustaining transportation system should prevail.”

First and foremost, the 1920 Act ordered the Commission to set rates (factoring in prior investments in railroads so as to ensure fair return upon the investments) and to establish minimum rates. The Esch-Cummins Act also authorized the ICC to supervise issuance of railroad securities; it relaxed previous restrictions on pooling and allowed mergers, dependant on the Commission’s approval; and required the ICC to devise a plan to systemize the entire railroad industry (a plan “for the consolidation of the railway properties of the continental United States into a limited number of systems.”)

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162 Skowronek, supra note 40, at 258.
163 Cushman, supra note 34, at 103. See generally id. 84-105. See also Skowronek, supra note 40, at 263-267.
164 See supra note 114.
165 Cushman, supra note 34, at 115. Skowronek’s attributes even greater import to the 1920 Act, which, he says, “framed a new order in the relations between state and society in industrial America.” Skowronek, supra note 40, at 283
Finally, with the Transportation Act of 1940, the ICC reached a high watermark in the expansion of its powers. Although forfeiting its authority to regulate telephone and telegraph communication, the 1940 Act entrusted the Commission with the command over inland and coastwise waterways, thus adding another item to the long list of industries already under its purview, such as the truck industry (as provided by the Motor and Carrier Act of 1935) and pipeline companies transporting oil (in accordance with the Hepburn Act of 1906).

In 1996 the ICC was abolished.

III. A Dark Age

A. Great Crash, Great Depression, and the Great Attack on Liberalism

1. The Crash

Post World War I America saw the rise of the Ku Klux Klan and Prohibition and a decline in the general “sense of optimism and cheerfulness about the eventual destiny of man that had pervaded American prior of World War I [but] had vanished with that experience.” At the same time, economic prosperity ruled in post Great-War America. The process of industrialization proceeded full speed ahead with the rise of the new dominant automobile, electronic, and chemical industries. Yet, the anti-trust crusade all but petered away. This was indicative. In more than one respect the 1920s was a carefree decade. Generally speaking, “the

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166 The Emergency Transportation Act of 1933 should also be mentioned. It was enacted in the interim period between the Esch-Cummins Act of 1920 (that is, after World War I) and the Great Depression. Coordination and efficiency of the railroad system as a whole could be reached, it was hoped, with the introduction of the Federal Coordinator of Transportation, under whose command served regional coordinating committees. The Coordinator, who, for instance, was to reduce wasteful duplications of service and facilities, was instructed to develop plans for improvements of the industry in general. ICC Commissioner Joseph Eastman was installed in office; he served until 1936, when the office was terminated. See CUSHMAN, supra note 34, at 130-141.

167 White, supra note 48, at 1013.

168 This despite of the fact that the 1920s experienced a merger movement of its own. See JOHN KENNETH GALBRAITH, THE GREAT CRASH 1929 44-45 (1997), and supra note 18. The fact that the anti-trust crusade lost much of its luster had to do, of course, with the shift in public sentiments in the “Roaring” years following the First World War. As noted by Hofstadter, during the 1920s, the conservative administrations that followed the Wilson presidency, “[u]nder the cover of public indifference, and even with a large measure of public applause … used such agency as Wilson’s Federal Trade Commission to further the process of consolidation that it had been created to check.” HOFSTADTER, supra note 8, at 285. See also id. at 312-316.
nation’s preoccupation with the underside of business practice disappeared from view, to remain out of sight until the next emergence of general economic adversity.”

Enthralled in a new sense of hedonism and myopic as many were, there was much to be mindful of at the time. Notably, later events would vividly illustrate that the way the glutting stock market had been conducting itself for a long while had been deplorable and pregnant with dangers for the future. The dangers were great indeed since the public at large and financial institutions were heavily invested in the stock exchange, which was hitherto left to its own devices. Basking in this self-regulated environment, the financial market became implicated in unsound investment practices, which eventually brought it, along with those invested in it, to their knees.

During the last days of October 1929, starting on the 23rd, the mother of all bubbles exploded when, to the plight of far too many Americans, the stock market crashed. First came “Black Thursday,” on the 24th, and then, on the 29th, “Black Tuesday”; later months saw many more “black” days. All told, by the end of October, more than 30 billion dollars in paper value had been wiped out. This was an enormous loss of American capital. To illustrate, this amount was comparable to the total sum of money the United States had spent in all World War I. For the vast majority of Americans the unthinkable had just happened: the post-World-War booming stock market—from 1921 to 1929 the Dow Jones rocketed from 60 to 400—plummeted down; what seemed to be the safest investment around fatally turned sour. The Roaring Twenties, which were fueled by increased industrialization and the introduction of new technologies, ended with a vengeance.

Economists telling the story of the Crash and its consequences lay much emphasis on the shift in public mood before and after 1929. Positive, at times euphoric, public sentiments regarding the market during the twenties were surely buttressed by a constant stream of encouraging information habitually provided by financiers, industrialists, corporate executives, journalists, and high ranking politicians—a stream that refused to subside even during the days of and those

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169 McCRAW, supra note 6, at 143.
170 Needless to say, the drama of the Crash is sketched here in the most rudimentary fashion. For a detailed narration of the eventful period stretching from the months preceding to those following the Crush, see MAURY KLEIN, RAINBOW’S END: THE CRASH OF 1929 (2001), especially chs. 8-11.
following the Crash. Furthermore, as noted by John Kenneth Galbraith in his indispensable
*The Great Crash 1929*, not unrelated was the American people’s “inordinate desire to get rich
with a minimum of physical effort.” Traditional Protestant values of frugality, savings, and
aversion to unnecessary, flagrant spending mattered less. Clearly, this desire could be easily
satisfied—the public was constantly reminded—in a booming market experiencing a substantial
increase in productivity, profitability, and consumption. The stock market posed an ideal outlet
for that purpose. Convinced “that God intended the American middle class to be rich, … the
faith of Americans in quick, effortless enrichment in the stock market was becoming every day
more evident.” And indeed, more and more people who wanted a piece of the action
purchased bonds and shares in innumerable corporations whose prospects seemed to them
excellent. The public appetite for common stocks appeared insatiable. After all, as noted, during
the prosperous years, stocks more than quadrupled in value.

As Charles Kindleberger documents well in a sweeping history of financial crises in the
Western world since the sixteenth century to the present, it is not unusual for situations such as
this to result in speculative excesses or manias, leading in turn to panics and crashes. Key in
triggering these chain reactions is the hyperbolic value attached to traded companies, which has
little to do with their estimated worth. The prevalent attitude of the late 1920s was likewise that
“[i]ncome from property, or enjoyment of its use, or even its long run worth is now academic.
… What is important is that tomorrow or next week market values will rise—as they did
yesterday or last week—and a profit can be realized.” Most investors were thus oblivious to
the inflated value of dozens and dozens of companies, not an inconsequential number of which
were formed to dupe the less savvy depositors. Generally, trade manipulations were everywhere
to be found, more and more so as the decade drew to a close. As noted by Kindleberger,

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171 See *id.*, where Klein gives a through account of this orchestrated chorus of reassurance, not
omitting the much less influential words of alarm voiced on the brink of the disaster.
172 G*ALBRAITH*, *supra* note 168, at 3.
173 *Id.* at 6-7.
174 K*INDLEBERGER*, *supra* note 66.
175 G*ALBRAITH*, *supra* note 168, at 18. The prosperity of the investment trust during the late 1920s
epitomized this attitude, as “it brought about an almost complete divorce of the volume of corporate
securities outstanding from corporate assets in existence. The former could be twice, thrice, or any
multiple of the latter.” *Id.* at 47. See *infra* note 196.
quoting from a 1923 book, “The decade of the 1920s in the United States has been called ‘the greatest era of crooked high finance the world has ever known.’”

Galbraith traces to early 1928 the beginning of “[t]he mass escape into make believe, so much a part of the true speculative orgy”; a “gargantuan insanity” took over the market, he says. Indeed, by all standards the market went berserk during that year (and in the subsequent year). 1928 saw a record in the number of shares traded in the New York Stock Exchange as well as in out-of-town exchanges (for example, in Boston, San Francisco, and Cincinnati) and a phenomenal increase in the value of many of them. Much more foreboding was the fact that that same year—and the one following it—witnessed also a huge increase in trading on margin, which was the common financial mechanism by which trade-volume expanded. It was based on options offered by various financial institutions to buy stocks on borrowed money, vouchsafed by them, while being required to pay upfront only a small portion of the acquired security’s price. Investors were naturally required to pledge some property as a security against the debt. Many would mortgage their houses for that purpose. Because people could purchase stock using a combination of (small amount of) cash and (plentiful) credit, many who otherwise would not have had the funds to play the stock market game were able to do so.

What surely made the Crash so tragic was the cross-section of society left reeling in the aftermath. “Everyone heard stories about or knew firsthand ordinary people devastated by the sudden fall from riches to rags” following the Crash, relates Maury Klein. At least in retrospection it appears evident that the stock-exchange pyramid of the late 1920s had been destined to collapse. Galbraith explains: “When prices stopped rising—when the supply of people who were buying for an increase was exhausted—then ownership on margin would

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176 KINDLEBERGER, supra note 66, at 84 (quoting WATSON WASHBURN AND EDMUND S. DELONG, HIGH AND LOW FINANCIERS: SOME NOTORIOUS SWINDLERS AND THEIR ABUSES OF OUR MODERN STOCK SELLING SYSTEM 13 (1923)).
177 GALBRAITH, supra note 168, at 11.
178 Id. at 64.
179 On the phenomenal increase in brokers’ loans, see KLEIN, supra note 170, e.g., at 178, 192, 200, 202, and passim.
181 KLEIN, supra note 170, at 219.
become meaningless and everyone would want to sell. The market wouldn’t level out; it would fall precipitately.”

To make matters worse, banks had invested their deposits—that is, “other people’s money,” as Brandeis famously put it already in 1914—in the stock market. Now that stocks were obliterated, the banks lost their depositors money. Put differently, these “other people” lost their money. The downwards spiral intensified due to the bank runs that left banks insolvent. In November 1929 alone 256 banks failed; by the inauguration of Roosevelt in March 1933, several thousands of banks defaulted. Hundreds of millions of depositors’ dollars vanished consequently. The end result was that investors from all walks of life lost their life savings while what was left in their possession was already mortgaged. Only a tiny group of investors, who were either lucky or perspicacious enough to withdraw from the market before the Crash, was not only saved, but even raked a huge profit. Joseph Kennedy, the father of a future president and, more to the point, the first chairman of the SEC, was one of these investors.

The collapse of the markets was a signal event in the history of the United States, both economically and symbolically. One thing was certain: the Great Crash made it evident that an unregulated stock market posed far-reaching perils to the American economy; left to its own devices, this market could inflict devastating losses to countless sections of the economy; it appeared that it could even bring the economy to a halt. Furthermore, it became quite clear that an unbridled market was a breeding ground for swindlers of one sort or another, eager to exploit fledgling investors. But the “speculative orgy” of the late 1920s was felt far beyond the group of direct participants in the stock market, which was in the end limited to a small percentage of the whole United States population. Rather, by then, the stock market “became central to the culture.” Referring to the same period, Klein writes, “The market replaced chatter about sex among the smart set, about books among the literati, and about baseball in cheap restaurants.”

182 GALBRAITH, supra note 168, at 24.
183 Supra note 37.
185 GALBRAITH, supra note 168, at 78 (In 1929 “only one and a half million people, out of a population of approximately 120 million …, had an active association of any sort with the stock market.”).
186 Id. at 78.
The “fever,” he adds, was to be found “everywhere.”\textsuperscript{187} Klein’s description brings to mind a passage written more than a century earlier by Lord Brougham, as he reflected on one of Great Britain’s mania-to-crash cycles of the 1810s, where His Lordship noted, “The frenzy, I can call it nothing less … descended to persons in the humblest circumstances, and the farthest removed, by their pursuit, from commercial cares. … Not only clerks and labourers, but menial servants, engaged in little sums which they had been laying up for provision against old age and sickness.”\textsuperscript{188}

To be sure, the collapse of the stock market was not conducive to sustaining the buoyant mood so typical of 1920s America. Whereas the era preceding it “inclined people to see a glass half full,” writes Klein, “their mounting apprehension after the crash led them more and more to view it as half empty.”\textsuperscript{189}

2. The Depression

The Crash of 1929 might not have been the first financial crisis to occur in the United States,\textsuperscript{190} yet it had one major distinctive character. Be the connection between the two events as it might have been,\textsuperscript{191} what made the Crash memorable is the fact that rather than recovery, a long, devastating depression followed its trail. As the decade of euphoric prosperity was ushered out, the bleak years of the Great Depression were launched. During these years one third of Americans were below the poverty line, unemployment rates rocketed (from 4% in 1929 to 25% in 1933), GNP took a nose dive (it plummeted from 104 to 41 billion dollars between 1929 and 1933), and exports and imports took a similar course (between 1929 and 1932, exports fell from 5.2 billion dollars to 1.6 and imports from 4.4 billion to 1.3).\textsuperscript{192} As for the financial markets, “The Great Crash,” writes Klein, “turned into the Great Slide as prices on the stock markets, “The Great Crash,” writes Klein, “turned into the Great Slide as prices on the stock

\textsuperscript{187} K\textsc{lein}, \textit{supra} note 170, at 190, 191. \textit{But cf. supra} note 185.
\textsuperscript{188} K\textsc{indleber}ger, \textit{supra} note 66, at 29 (quoting B\textsc{agehot’s} \textsc{historical essays} 118 (N. St. John-Ste\textsc{vas} ed., 1966)).
\textsuperscript{189} K\textsc{lein}, \textit{supra} note 170, at 241.
\textsuperscript{190} In his book, Kindleberger makes reference to least eight moments of economic crises in the history of the United States, which took place in 1819, 1820s, 1836, 1850s, 1870s, 1873, 1907, and 1920-21. \textit{See} K\textsc{indleberger}, \textit{supra} note 66.
\textsuperscript{191} On this question, see G\textsc{albraith}, \textit{supra} note 168, at 177-188.
\textsuperscript{192} \textit{See} G\textsc{albraith}, \textit{supra} note 168, at 168, W\textsc{atkins}, \textit{supra} note 184, ch. 1, L\textsc{asser}, \textit{supra} note 180, at 51 and 61, and K\textsc{lein}, \textit{supra} note 170, at 194.
market declined relentlessly for three years.” The 1929 Dow Jones record of 386, fell to 41 by July 1932, and was surpassed only in 1954.

“On the whole, the great stock market crash can be much readily explained than the depression that followed it,” opines Galbraith. It is commonly held that fundamental misdistribution of purchasing power, namely, the greatly unequal distribution of wealth between the well-off and well-to-do and the common wage earners, had an important role in bringing about the Great Depression in the aftermath of the Crash. Another factor mentioned in this regard is that, as best exemplified by investments trusts, the American corporate system was easily amenable to fraudulent dealings, above all in the stock market. The important point is the following: whatever their exact causes might have been, the Crash of 1929 and Great Depression were the ultimate demonstration that American society had been askew for a long time. Tensions between poor and rich, workers and factory managers, between, in short, the haves and the have-nots, were not fully attended to, nor were severe structural deformities in the financial sphere and the corporate system, nor the hazards of the industrial physical environment. As we have seen, former reformers, Presidents, and other public figures had addressed these and similar issues in the past, notably during the Progressive Era. The Great Depression, the culmination of a long process of neglect, made it evident, however, that not enough, if anything at all, had been done in an effort to confront such social issues directly.

Many would argue that not unlike many of his predecessors, President Hoover’s way of dealing with the economic catastrophe left much to be desired. Others would emphasize the boldness of his actions. Appraisals of his reaction may differ, but the list of steps that were taken to tackle the crisis is not disputed. Hoover advanced tax cuts and public works projects. He also launched a series of conferences that were held in the White House and attended by leaders of

193 KLEIN, supra note 170, at 274.
194 GALBRAITH, supra note 168, at 168.
196 See id. ch. 9. Others explanations exist. See id. id., and KINDEBERGER, supra note 66, at 64-68.
197 Compare GALBRAITH, supra note 168, at 140 (“… President [Hoover] was clearly averse to any large-scale government action to counter the developing depression.”) with KLEIN, supra note 170, at 245 (“Hoover had taken conspicuous steps to nudge the federal government toward a new role as caretakers of the economy.”).
different sectors of the economy with a view to committing them not to cut down salaries, nor lay off workers, nor relent in spending on expansion of economic activity. Labor leaders correspondingly agreed to refrain from striking or seeking higher wages. Just as important, the conferences served as a platform to issuing repeated declarations of confidence in the present and future strength of the American economy.\textsuperscript{199} Admittedly, in 1932, as his incumbency drew to a close, Hoover took a more aggressive measure and introduced the Reconstruction Finance Corporation (RFC). Its purpose was to facilitate economic activity by providing low interest loans to financial, industrial, and agricultural institutions. By July 1932 the RFC had lent one billion dollars.\textsuperscript{200} (The scope of its operations was greatly widened by the New Deal administration). However, as is well known, things got only worse with the passage of time: production output declined, unemployment spread, prices fell, and the stock market was no longer the horn of plenty it had been before.\textsuperscript{201}

For some, the Hoover administration’s failed response to the sudden collapse of the market and the ensuing economic hardship experienced across the board presented a lesson of its own. To Galbraith, reflecting on the whole affair centuries after the 1930s, the morale of the story is clear. Something fundamental in the government reaction to this calamity that moved from bad to worse was visibly amiss; it was plainly inadequate. He names the economic thinking of the time as a complicit partner in the debacle. “The poor state of economic intelligence,” he assuredly argues, imposed several “strait jacket[s] on policy,” notably the stern commitment to a balanced budget.\textsuperscript{202} As it turned out, Galbraith argues, “Those simple precepts of a simple world did not hold amid the growing complexities of the early thirties. Mass unemployment in particular had altered the rules. Event had played a very bad trick on people, but almost no one tried to think out the problem anew.”\textsuperscript{203} Quite evidently sharing the New Deal way of thinking, Galbraith seems convinced in arguing that the only once old dogmas were challenged, was the possibility for the recurrence of the misfortunes of 1929 diminished. Be that as it might have been, the New Deal—to which we now turn—was undoubtedly a most audacious and complex attempt to think out anew the problems of industrialization in the United States.

\textsuperscript{199} KLEIN, supra note 170, at 242-245. See supra text accompanying note 171.
\textsuperscript{200} LASSER, supra note 180, at 74.
\textsuperscript{201} See supra text accompanying note 192.
\textsuperscript{202} GALBRAITH, supra note 168, at 182, 184.
\textsuperscript{203} Id. at 184.
3. Besieged Liberalism

As a last stop on our way to the New Deal we should consider the inauspicious global events that coincided with the induction of the Franklin D. Roosevelt administration. The early 1930s made it obvious that Europe went sour, so to speak, with the rise of Italian fascism and German Nazism, accompanied by the building up of communist Russia. Democracy, Americans were reminded, was something not to be taken for granted. For it to survive, a constant effort should be made to guard against an ill-willed attempts to exploit its built-in loopholes—even more so, in times of wide economic despair, as events in Germany illustrated. This truism was hammered into the minds of Americans with the proliferation in their own country of radicalism in the form of demagoguery, communism, and even fascism. So much so, that Arthur Schlesinger, the great historiographer of the New Deal, writes, “For a moment in 1935, intelligent observers could almost believe that the traditional structure of the American politics was on the verge of dissolution. The old parties no longer appeared adequate to contain the new energies. Millions across the land were turning to new prophets of unrest.” Set in this atmosphere, it may be of no wonder that the unprecedented expansion of federal regulatory powers during the New Deal was often seen with suspicion, at time even with alarm, by Roosevelt’s opponents. As Leuchtenburg puts it, by the late 1930s, “many Americans, especially conservatives, … concurred on this one point: that the real peril to the country lay not without but within, not in the augmented power of the Axis but in Roosevelt’s consular ambitions.”

Economic hardship was experienced not only in the Untied States during the 1930s. The whole globe fell, in the words of Eric Hobsbawm, into an “economic abyss.” Germany in particular, heavily burdened by the enormous reparations levied on it by the peace settlements after World War I, was subsequently plagued by astonishing inflation and unemployment rates. It is commonly understood that the German National Socialist Workers party greatly profited from

the wide economic distress felt throughout the land. Hitler rose to power in January 1933. He soon seized absolute control of the German government. Although Hitler was not the first to form a dictatorial government in the continent—Russia under Lenin in 1917, Mussolini’s Italy starting in 1922, and Salazar’s Portugal in 1926 preceded Germany—the formation of a fascist regime in a central European country was seen as a milestone in the history of Western democracy. It emphasized the fact that an *international* assault on liberalism was well under way at that point. Hobsbawm relates the process by which the number of constitutional democracies in the whole world—from Japan to South America—declined from about 35 in 1920 to only 17 in 1938. This number declined even further in the years that followed. Nazism sparked the establishment of dictatorial regimes in other European counties, notably in Spain in 1939, and eventually led to destruction of democratic systems throughout Europe during World War II.

Critical ideological differences evidently existed among the various kinds of world-wide anti-liberal regimes. Western European fascism was based to a considerable extent on a post-1917 Red scare, for example. However, as the following discussion will demonstrate, viewed from the other side of the Atlantic Ocean, for many in the United States the events in Europe of the 1920s-1930s in particular, and global events in general, boiled down to one alarming understanding: liberal-democracy was under fierce attack and its prospects of withstanding it were not clear. Democracy as they had known it, it seemed to Americans, was not something to be taken for granted, especially once it had been demonstrated that heretical political philosophy could take root even at the heart of Europe.

4. What the Future Holds

The 1920s and early 1930s set the stage for the New Deal. They also set its agenda. The Crash pointed at an economic market that as the first order of the day needed to be taken care of in one form or another for the economy to recover. The Depression greatly enlarged the list of economic-social ailments that awaited care, but it also highlighted the despairing inability of the federal government, as deployed by the Hoover administration, to stimulate economic recovery.

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208 *Id.* ch. 4.
The Context

The rise of totalitarianism put, as noted, many on the alarm lest Hoover’s energetic successor assumed dictatorial powers. It is not surprising, then, that the FDR administration’s aggressive regulatory initiatives, advanced in the name of a New Deal, were certainly hobbled by these sentiments.\(^{209}\) The suspicion of the President “reached a point of near hysteria”\(^{210}\) when a bill for the reorganization of the federal government was introduced in 1938. The bill, which was authored by the President’s Committee on Administrative Management, provided for centralization of the Executive, so that all its different wards, independent agencies included, would be directly accountable to the President.\(^{211}\) As with his similarly controversial Court-packing initiative,\(^{212}\) the President’s antagonists stymied the reorganization bill in the name of American democracy.\(^{213}\) The atmosphere was ripe for wild imputations of Roosevelt’s alleged ambitions. “Coming at the very time that Hitler was devouring Austria,” notes Leutenburg, “such imputations intensified worry that Roosevelt was importing European totalitarianism into the United States.”\(^{214}\)

**B. The Thing We Call the New Deal**

1. The New Deal Revolution

The road cautiously laid by Presidents Cleveland, who signed the ICC Act in 1887, and Theodore Roosevelt, became a throughway during the presidency of Franklin Delano Roosevelt, the New Deal President.\(^{215}\) One cannot emphasize too strongly the profound effect “[t]he New Deal revolution”\(^{216}\) had on the history of regulation in America. The Federal

\(^{209}\) See infra Chapter 3.

\(^{210}\) LEUCHTENBURG, supra note 206, at 277.

\(^{211}\) The bill was a direct outgrowth of the President’s Committee’s Report: THE PRESIDENT’S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES (1937). The Report is fully discussed in Chapter 4, infra.

\(^{212}\) On the Court-packing episode, see LEUCHTENBURG, supra note 206, at 231-239, and CONARD BLACK, FRANKLIN DELANO ROOSEVELT: CHAMPION OF FREEDOM 404-417 (2003).

\(^{213}\) See RICHARD POLENBERG, REORGANIZING ROOSEVELT’S GOVERNMENT: THE CONTROVERSY OVER EXECUTIVE REORGANIZATION 1936-1939 (1966).

\(^{214}\) LEUCHTENBURG, supra note 206, at 279.

\(^{215}\) On the things that differentiated the Progressivism from the New Deal, see the fascinating discussion in HOFSTADTER, supra note 8, ch. 7.

\(^{216}\) Justice Stephen Breyer, In Memoriam: Louis L. Jaffe, 110 HARV. L. REV. 1205, 1206 (1997) (the quote is from a recorded interview that Jaffe gave to the Justice’s son for the young Breyer’s eighth grade school history project). The full quotation is interesting. Referring to President Roosevelt, Jaffe
Deposit Insurance Corporation, the SEC, and the National Labor Relations Board (NLRB), each with unprecedented authority,\textsuperscript{217} are notable examples of the New Deal’s flagship agencies; the Social Security Act of 1935 unequivocally illustrates its audacity.\textsuperscript{218} Lest we be misguided, a well-known characteristic of the New Deal should be mentioned at once: the multitude of reforms introduced by the New Deal did not add up to one coherent program; “as an economic movement,” it was rather, “a chaos of experimentation.”\textsuperscript{219}

Theoretically confusing as it had been, though, the end product of the New Deal was crystal clear. In a way, only when the dust had settled and the key elements of the New Deal had been put in place, could one really speak of the existence of an American administrative state. As Lawrence Friedman put it, “something new had emerged … This was the idea of strong, active government—government that could respond to the kind of crisis the Depression had brought on the country.”\textsuperscript{220} The emergence of this new thing was far from trivial—it brazenly defied long-held convictions about government-individual relationships as well as about the relationships between workers and employers, investors and investing institutions, consumers and producers, and among producers themselves. It also challenged entrenched views regarding the role of courts in the American polity. To make things even more complicated, all this was taking place against an ominous background, as ill-fated news from Europe and the rest of the globe kept pouring in. Tyranny, as we have just seen, was on the rise.

\textsuperscript{217} Unprecedented in peacetimes, to be exact. See supra note 114.

\textsuperscript{218} The literature on the New Deal is enormous. See, e.g., ROLAND EDSFORTH, THE NEW DEAL: AMERICA’S RESPONSE TO THE GREAT DEPRESSION (2000) for a comprehensive survey of the different agencies that were established and the various governmental initiatives that were executed in the first and second New deal; and for a denser account, see notably LEUCHTENBURG, supra note 206.

\textsuperscript{219} HOFSTADTER, supra note 8, at 307.

\textsuperscript{220} LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE 20TH CENTURY 162 (2002). But see id. at 170, where Friedman asserts that the “New Deal was not … a total revolution.” Rather, he says, “it was a dramatic quickening, a reaching upward, that pushed the boundaries further and further into a kind of beyond.” See also Rabin, supra note 114, at 1243-1253, 1262-1263, for a powerful statement of the innovative message introduced by the New Deal to the realm of governmental regulation, and HOFSTADTER, supra note 8, at 303 (“The New Deal was different from anything that had yes happened in the United States.”).
2. The Happy Hotdogs and the Enchanted Professor

Who were the New Dealers? Scores of lawyers went to Washington to lend a hand in the inauguration and the execution of the New Deal. In the main, several things distinguished this group: its members were urban, disproportionately Jewish and Catholic, went to elite law schools, and were relatively young, averaging around the age of 30 or so.221 “In the New Deal there was an inundation of the bright young men from the best law school,” relates Louis Jaffe, a New Dealer himself. “We thought we were important. We were always doing things.” It would be a mistake, however, to assume that this barrage of lawyers formed a one-minded group. As Jaffe elaborates, “[T]here were always fights going on … between the left wing and the right wing. Terrible fights, … particularly for the control of FDR.”222 Several of the New Deal lawyers were more successful than others in becoming part of the President’s coterie of close advisors. Those fortunate ones played a key role in designing some of Roosevelt’s epoch-defining programs, thus gaining admittance to what could be called the history-of-regulation hall of fame. In the following paragraphs I will focus on several of these high-profile lawyers.

A troika of lawyers whose influence was noted already at the outset of the new administration included James M. Landis, called “Dean of Regulators” by his biographer,223 Benjamin V. Cohen, whose biography hails as “Architect of the New Deal,”224 and “catalyst” Thomas G. Corcoran, or “Tommy the Cork,” as President Roosevelt called him.225 Different as their personal biographies had been, the three men shared a similar intellectual background: they all went to Harvard Law School and subsequently became associated with the Brandeis-Frankfurter circle. Another member of the circle was Louis L. Jaffe, whose contribution to the New Deal might have been more provincial,226 but his subsequent scholarly contribution to the

222 Breyer, supra note 216, at 1206 (To recall, Justice Breyer is here quoting a recorded interview that Jaffe gave to the Justice’s son).
224 LASSER, supra note 180.
225 Id. at 73, 193.
226 According to his own testimony given in 1969, his “pilgrimage” as a lawyer and teacher “started … in Indiana at Terre Haute some thirty-four years ago. As a lawyer for the newly-created National Labor Relations Board, I was sent to the field to track down violations by employers of their employees’ right to organize.” Louis L. Jaffe, A Pilgrimage: Reflections on a Career in Administrative Law, 45 IND. L.J. 171, 171 (1970).
The Context

understanding of the administrative revolution it ushered in proved to be exceptionally visionary.

Landis is undeniably a legendary figure in the history of American administrative law. As McCraw puts it, “[i]n the history of regulation in America, few names loom larger than that of James M. Landis.” Landis has acquired a mythological stature thanks to his prominence as a scholar, his extensive experience as a regulator, and the role he played in the design of regulation in the post-1929 era. He was a stellar student, clerked for Justice Brandeis, was appointed as the youngest dean in Harvard Law School’s history, and “[w]hile still a young man, Landis emerged as the outstanding theoretician of American regulation.” He was, as McCraw sees it, “[t]he great apostle” of the high tide of popular faith “in the ability of expert commissioners to shape business practices in accordance with the public interest,” which “Roosevelt and his era came to represent.”

Landis served as a commissioner in three agencies: first on the FTC, and later on the SEC. In 1935, he became the SEC Chairman. (Later on, in 1946 he was named the chairman of the Civil Aeronautic Board.) Landis, along with Cohen and Corcoran, played a pivotal part in the drafting of the two keystones of federal securities legislation, the Securities Act of 1933 and the Securities Exchange Act of 1934, as well as in the preparation of the highly contested Public Utility Holding Company Act of 1935. This triad of statutes, writes Lasser, was “designed to save the nation from the unregulated financial manipulations that led to the Crash of 1929 and the disastrous Depression.”

Their role in producing these pieces of legislation alone made the three national figures, incurring praises but also bitter criticism for their job; even more so when they were called to defend their handicraft in Congress. “Journalists soon singled [them] out … as the ‘Happy Hotdogs,’” relates Donald Ritchie in Landis’ biography. And Cohen and Corcoran found

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227 McCraw, supra note 6, at 153.
228 Id. id.
229 Id. at 152. Landis’ academic work is analyzed in Chapter 6, infra.
230 See Ritchie, supra note 223.
231 On the drafting of these three Acts, see McCraw, supra note 6, especially ch. 5; Ritchie, supra note 223, ch. 4; and Lasser, supra note 180, chs. 5-7.
232 Lasser, supra note 180, at 1.
233 Ritchie, supra note 223, at 43.
themselves on the cover of the *Time* magazine, above the caption “They called themselves catalysts.”234 However, the house where Cohen and Corcoran lived in the early 1930s, along with several other New Deal lawyers, was less favorably referred to by one critic as “Little Red House.”235

It was Cohen who successfully defended the Utility Act in front of the Supreme Court in 1938, having, as noted, drafted its provisions.236 Great as his contribution to the New Deal was—the two achievements just mentioned do not exhaust it—Cohen’s biography portrays its subject as a shy, introverted person. He was nothing like the energetic, cheerful, and likeable Corcoran, whom Roosevelt seemed to like and rely upon the most. This odd couple was reputed to be two of the President’s closest advisors. Conard Black opines that they were Roosevelt’s “most astute legalists.”237 And according to *Time* they constituted “with one or two more … what in President Jackson’s time was called the Kitchen Cabinet.”238

Quite unlike his associates, Jaffe had acquired his fame in the legal community primarily in the decades following World War II (a time, by the way, when Landis’ star faltered). Also a member of the Frankfurter-Brandeis bunch, he, too, clerked for Justice Brandeis and later was enlisted to the New Deal cause.239 In later years he served as an advisor to the Department of Justice when the APA was fabricated.240 Subsequently he became one of the leading lights in administrative law theory in the United States.241

234 LASSER, supra note 180, at 182 and 192-193.
235 *Id.* at 84. The critic was Rep. Fred A. Britten of Rhode Island, who was a bitter enemy of the New Deal. At some point the two were portrayed as left-wing radicals. *See id.* at 180-182.
237 BLACK, supra note 212, at 404.
238 LASSER, supra note 180, at 193 (quoting the *TIME MAGAZINE*, September 12, 1938, at 22). LASSER argues, *id.* at 182-195, that it is highly questionable whether Cohen and Corcoran were as influential as they were said to be.
239 Breyer, supra note 216, at 1205. *See also* Jaffe, supra note 226.
In a speech delivered thirty years after the New Deal, Jaffe presented his audience with an illuminating portrait of his mindset—shared by many of his colleagues, he argued—as he approached the challenges put forward by the Depression. “[M]y world view was the view of the New Dealer,” Jaffe declares at the beginning, “what we would call the liberal.” In the course of the talk Jaffe spelled out what he meant by so stating. There are five emphases, I believe, to the revealing monologue:

1. *Homo economicus*: At the beginning of the talk Jaffe posed the question, “How did we see the world?” The first answer to the question was, “Our vision was structured primarily in economic terms. Man to us was economic man, the construct of Adam Smith; the utilitarian man, the construct of Bentham …” These affirmations lend credence to Friedman’s assertion that “most of the New Dealers … believed in saving capitalism, and what they considered the American way of life.” Jaffe notwithstanding went on to say, “[B]ut above all he [Man] was the proletarian man, the Marxist man, the victim of an inherently vicious system of capitalist production.”

Notice that Jaffe’s list, *however inconsistent*, exudes optimism. It is based on a hope for a better, utopian future where everything that stood in society’s way to living a prosperous, well-coordinated, fracture-free life would be removed. As we shall shortly see, Jaffe would soon mention countervailing sentiments that permeated his community at the time.

2. Flirting with Marxism: Jaffe clearly generalizes when he mentions the strong left leaning in the thinking of the New Deal. It is difficult to imagine that Landis, for example, would have subscribed to Jaffe’s description, especially given the fact that New Dealers were often accused of advancing socialist, Marxist, and dictatorial ideas. In fact, by all indications, Jaffe himself abandoned this commitment already in the 1940s. Later in his speech Jaffe alludes to the intricate association between the New Dealers and Marxism. “Most of us were also students of

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243 FRIEDMAN, *supra* note 220, at 166.
244 Jaffe, *supra* note 226, at 171.
245 *See supra* text accompanying note 235. *See also* IRONS, *supra* note 221, at xii, 10-11.
246 On the development in Jaffe’s thinking over the years, see the sources mention *supra* note 241.
John Stuart Mill. We held to the credo of liberal democracy;” he made known to his audience, “our alliance with the committed Marxist was an uneasy one.”

3. Passionate Pessimism: it is safe to conclude already here that the emerging picture is of complexity. This was a somewhat schizoid group, we might say, in which contradictory ideas were circulating among its members and occupying the minds of many of them. This is made even more pronounced when Jaffe adds, “There was still one other aspect of our experience which we either failed or refused to relate to our active vision which clearly challenged the primacy of the economic man and its promise of amelioration.” What was this aspect? Jaffe immediately answered: “We had become passionately attached to a literature which was basically pessimistic. … T. S. Eliot, Joyce, Pound, Conard—perhaps even the great Freud himself—had taught us that Man’s predicament was irremediable.” “At the heart of our universe,” he concluded, “was darkness, evil and indifference.”

Probably reflecting his by-then matured disenchantment with the New Dealers’ “simplistic” thinking, later in the talk, as he commented on students’ fervent activity in campuses throughout 1960s America, Jaffe noted, “My analysis may seem to imply that, because the human predicament is irremediable, there are no objective reasons for protest and concern. Perhaps it does; and at bottom, that may be what I believe.” Nevertheless, he is quick to assure his listeners, “But I would not be a lawyer or a twentieth century man if I operated on so radical a premise.”

Next Jaffe turn specifically to the New Deal itself.

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247 Jaffe, supra note 226, at 171.
248 Id. at 171-172.
249 Id. at 174.
250 Id. id. Incidentally, Jaffe does not appear to be particularly sympathetic to the students’ cause. As he saw things at the time, “Most of the students, at Harvard, Columbia, and Sarah Lawrence who wear their hair long, who shout obscenities and occupy university buildings on what seems to many of us insufficient provocation, have never had a moment of financial anxiety, and are assured of good jobs when they finish being students. I suspect that it’s this very freedom from financial anxiety which is one of the factors of the immediate problems. The need to earn one’s living by the sweat of one’s brow is one of mankind’s great discipliners.” Id. id. (emphasis added). On the other hand, it may be suggested that this paragraph tells us that estranged as Jaffe had become from the left-leaning thinking of the New Dealers, Marxism left a clear mark on disenchanted Jaffe’s post-New Deal thinking.
251 Id. at 174.
4. The Malady: “The lesson of the Depression seemed obvious to the committed New Dealer,” Jaffe proclaimed as he turned to naming it: “The State had failed to curb capitalist exploitation. The State had to protect and promote collective bargaining, to provide social security, to control the credit and security markets.”

5. The Remedy: Having identified the socio-economic maladies that needed to be attended to by the Roosevelt administration, this part of the talk ended with the cure concocted by the New Dealers for the pending predicaments. Confused, fragmented, and undisciplined as their understanding of the world around them had been, New Dealers were sure in prescribing their remedy to the crisis. “The remedy was clear—” Jaffe announced, “massive governmental intervention and regulation; the establishment of administrative bodies with a permanent mandate to apply state [sic] power to the solution of our economic problems.”

Jaffe’s remarks are evidently tainted by the evils of generalization, afterthought, and simplification. And yet, it would be a mistake to outright discard them. For one thing, it gives flesh to the common and dull characterization of the New Dealers as “products of the 20th century[,] … liberal in politics[, and] … biased … toward reform and regulation.” For another, here is after all a report of an introspective New Dealer, who had given a lot of thought to the administrative process for most of his life. It is surely not be a conclusive account of the New Dealers’ perspective, even if such an account were within reach, but it does offer some insights into the confused coalescence of concepts that brought about (at least parts of) the New Deal, as seen through the eyes of this New Deal lawyer.

Jaffe’s observations should serve as a reminder to the inner fights within the Roosevelt court; of the conflicting images of the homo regulatus, so to speak; and of the fact that indeed we have

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252 Id. at 172.
253 Id. at 172.
254 IRONS, supra note 221, at 6 and 9.
255 See also Berle, supra note 195, for one celebratory manifesto of the economic philosophy of the early New Deal, as presented by a member of Roosevelt’s “brain trust.” Likewise, Thurman Arnold, who was in charge of the anti-trust program in the Roosevelt administration, provided two widely-read pieces of New Deal political thought in the mid-1930s, see THURMAN W. ARNOLD, THE SYMBOL OF GOVERNMENT (1935), and THE FOLKLORE OF CAPITALISM, supra note 152. See also IRONS, supra note 221. Hofstadter, insightful and fascinating as always, presents a brilliant characterization of the New Deal’s anti-ideologues ideology in his The Age of Reform, supra note 8, ch. 7, when he contrasts it with the Progressive Movement. Again, what interests me here, though, is the personal perspective of New Dealers themselves. Generally, the sources just mentioned do not provide it.
every reason to assume that apart from pessimism there were “other aspect[s]” of the New Dealers’ “experience which [they] either failed or refused to relate to [their] active vision.” Jaffe’s remarks should serve as a standing caveat in this study that one should not think of the underlying ethos New Deal as coherent. Nor can one assume—if only by extension at this point of the discussion—that it was inspired by a monolithic theory of regulation. I hope that the analysis to be conducted in the following chapters will substantiate the latter assertion.

3. The Forces of Discontent

The opposition to regulation by unelected commissioners, let alone the vesting of judicial powers in them, launched a sustained counter assault on the commission movement, and opponents were quick to expound their many reservations regarding the American administrative revolution. “The administrative process has been subject to almost continuous attack since its inception in America,” wrote Herbert Kaufman in 1946 following the passage of the APA. “It had entered the field as an ‘exotic,’ and those who longed for the old days assailed the process as a violation of the constitutional division of power.” During the Progressive Era, the bulk of the business community rejected the muckrakers and the movement associated with them. The hostility persisted in later years. Businessmen’s legal advisors were always part of these forces of discontent. Indeed, the fiercest opposition to the ideas and reforms of the New Dealers came from lawyers, most of them corporate lawyers. They were led by the American Bar Association.

Sharing his reflections on the assault, Justice, future Chief Justice, Harlan F. Stone stated in an address before the Conference on the Future of the Common Law (held at Harvard in 1936)—

\[ \text{The reception of the [legal] profession and the courts of … new administrative agencies has exhibited an interesting parallel to their attitude toward other forms of external change. These} \]

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257 See KENNETH CULP DAVIS, *ADMINISTRATIVE LAW* 20-23 (1951); WIEBE, *supra* note 28, ch. 8, *but see also id.* at 212-217 (“In all, the business community was the most important single factor—or set of factors—in the development of economic regulation. And a significant portion of this influence supported reform.”).
258 Ronen Shamir has conducted an in-depth study of corporate lawyers who had led the way in the fight against the New Deal during the mid-1930s. See RONEN SHAMIR, *MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL* (1995).
agencies soon became a matter of concern, not alone because of
their novelty and statutory origin, but because they were brought
into the law as means of law enforcement and as the instrument
for providing, to a limited extent, remedies for its violation, of
which the courts had possessed virtual monopoly.\footnote{259}

An indication of the Bar’s adverse view on the growth of administrative capacities in the United States was provided already in 1933, when the Special Committee on Administrative Law was created by the Bar. A sense of alert permeated the Special Committee’s reports. Presenting its first report in 1933, the Special Committee’s chairman, Louis Caldwell, having listed the numerous federal regulatory agencies, stated: “The principle problems that outline themselves in the midst of this confusion are not new. The seeds were sown years ago. Now, however, they have become acute. The significant developments of the last few months by themselves have elevated the subject of administrative law from the rank of mere importance to one of crucial importance.”\footnote{260}

Caldwell’s most famous successor was Roscoe Pound, the father of Sociological Jurisprudence whose international reputation as a legal scholar was unmatched by any other American.\footnote{261} The story of Pound’s “abrupt about-face”—that is, his dramatic change of heart from an enthusiastic support of the rise of administration to an unwavering opposition to it—was already told by Morton Horwitz, who saw the clearest evidence of the shift in the Special Committee’s report of 1938, the Pound Report.\footnote{262} Reflecting the dramatic shift, the Report was essentially a call for the Bar to fight for a return to the fundamentals of traditional court-centered rule-of-law regime; a regime, it was underscored, which must envelop and contain administrative organs. Pound was pretty much preaching to the choir in advancing this cause given the dominance of anti-administration sentiments among the Bar’s members.\footnote{263}

\footnote{260} 58 REP. AM. B. ASS’N 198 (1933).
\footnote{261} \textit{HORWITZ, supra} note 241, at 217.
\footnote{263} On the views sponsored by the Bar regarding administrative expansion during the years of the New Deal, see George B. Shepherd, \textit{Fierce Compromise: The Administrative Procedure Act Emerges}}
The Bar did not represent the whole legal community, of course. It had infuriated those reform-minded lawyers, who revoked their Bar membership, and formed the National Lawyers Guild in 1937. And generally, New Deal lawyers harshly criticized the Bar for what they regarded as its outdated position. Some did not let go of their anger towards the 1930s Bar for many years. For instance, decades after the New Deal Kenneth C. Davis opined, “The ABA of the thirties, represented by Dean Pound, was doing a great deal of harm. It was not merely conservative, but extreme conservatives were dominant in the organization.”

C. The SEC

Much has been written of the history of the SEC. This is not surprising given the sea change its installation introduced to the financial market in the United States. Post-Crash public investigations made it known that Wall Street had been no stranger to chicanery and manipulations, nor to unholy alliances and sheer robbery. So central was reform in the securities market to the newly elected president that the Securities Act of 1933 was enacted shortly after Roosevelt took office, in the period later known as the First One Hundred Days.

The gist of the Act of 1933 was captured in Roosevelt’s message to Congress requesting the legislation, where the President said, “This proposal adds to the ancient rule of caveat emptor, the further doctrine of ‘let the seller also beware.’ It put the burden of telling the whole truth on the seller. It should give impetus to honest dealing in securities and thereby bring back public confidence.” Making a more general remark, with a nod to Brandeis, Roosevelt stated, “What we seek is a return to a clear understanding of the ancient truth that those who manage banks,

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*From New Deal Politics, 90 NW. U. L. REV. 1557 (1996).* The position of anti-regulation Bar members will be discussed at great length below. See infra Chapter 3.

264 Verkuil, supra note 240, at 524.

265 See supra note 231 for a list of sources on the drafting of the SEC’s enabling Acts, and CUSHMAN, supra note 34, at 327-345.

266 Notably, the Senate’s conducted a two-year well-publicized investigation of Wall Street, from 1932 to 1934. LASSER, supra note 180, 86-88. Later on, with the introduction of disclosure duties on stock exchanges’ members, past wrongdoings on the part of high rollers in the stock exchanges were also revealed. MCCRAW, supra note 6, at 195-196.

267 For a list of the Acts signed into laws during this legislative spree, see LASSER, supra note 180, at 70-71.
corporations, and other agencies handling other people’s money are trustees acting for others.”

As can be inferred from Roosevelt’s comment, the “quintessential sunshine,” “federal blue-sky” Act of 1933 imposed the duty to disclose material information regarding traded securities, which were required to be registered with the federal agency administrating the Act at that point, the FTC. The Act was signed in the end of May 1933, thereupon the President nominated Landis to the FTC. A few days later, the President signed into law another piece of legislation aimed at disciplining the financial markets, that is, the Glass-Steagall Banking Act of 1933. The Banking Act ordered the erection of a Chinese Wall in financial institutions between investment banking and commercial banking. Later legislation would also put restrictions on margin trading.

“It was obvious at the time of its enactment that the Securities Act of 1933 was only an entering wedge, a part of a larger program,” writes Cushman. The Securities Exchange Act of 1934 was a major step towards the completion of the program. It launched into more controversial waters, as it reached into the inner-dealings of stock exchanges. In fact, in many respects the Act put the exchanges under the thumb of the federal government, as from now on their rules were placed under surveillance.

It was the 1934 Act that established a new agency to execute the reform in the securities market introduced by Roosevelt administration. It was the SEC. Consequently, the monitoring of compliance with the full-disclosure and registration duties imposed by the securities legislation was transferred from the FTC to the SEC. It was to be a five-member agency. There was a bipartisan rule of membership. Members were to be appointed by the President with the approval of the Senate, although there were no restrictions on the President’s removal power. Roosevelt stunned many when he appointed Joseph Kennedy to the agency; he would serve as


269 MCCRAW, supra note 6, at 172, and CUSHMAN, supra note 34, at 329, respectively.

270 On the Act’s past and future, see CUSHMAN, supra note 34, at 146-177.

271 It would be provided for in the Securities Exchange Act of 1934, which would vest in the Federal Reserve Board the power to regulate margin requirements. MCCRAW, supra note 6, at 179-180.

272 CUSHMAN, supra note 34, at 331.

273 The Public Utility Holding Company Act of 1935 was another key element in the same program. See supra note 151.
its first chairman from July 1934 to September 1935, when Commissioner Landis would replace him. Landis would leave the SEC to go back to Harvard in September 1937.274

VI. The APA

The early 1940s were also notable years in the history of administrative law, due to the passage of the federal Administrative Procedure Act (APA) in 1946.275 The proceedings which paved the way to APA’s enactment were a high-water mark in the long-standing controversy surrounding regulation. Although “merely” procedural, it was patently clear to all that this was a piece of legislation of tremendous importance, whose scope would potentially set the future direction of the federal regulatory endeavor. Much energy was invested in the presentation of competing bills. The legislative proceedings were not at all divorced from the ongoing debate regarding the merits and drawbacks of regulation by agencies. The two were nurturing each other. Namely, many of the arguments made in the contest between the reform-minded and their rivals found their way into the legislative process, broadly defined.

I did not find it necessary or even useful, however, to review the several APA drafts that were put forward from the early 1930s to the early 1940s, nor to analyze the Act’s provisions. An historical analysis of the APA has already been satisfactorily conducted.276 Likewise, the commentary on the APA, extensively wrought by courts and scholars,277 commands the whole syllabus of any administrative-law course. This vast literature, as can be expected, often dwells on the particulars of doctrinal issues, which should not concern us here. This is not to say that scholarship on the APA will not be featured in the discussion.

274 RITCHIE, supra note 223, at 60-78.
276 Shepherd, supra note 263.
277 See, for example, STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 24 (4th ed., 1999); Verkuil, supra note 240; and the sources mentioned infra note 278.
Commentary on the APA was available right from the beginning, when it was just passed. To the extent that it sheds light on questions of administrative competence, it surely has a place in the discussion that follows.

I. Introduction

Federal regulation has always been a political and legal hot potato in the United States. Contrasted with a “liberal mythology”\(^1\) about “a golden past that never was,”\(^2\) where the (certainly federal but also local) government was nowhere to be seen, programs to regulate sectors of the market have ran up against a wall of opposition in the legal community. The more necessary public regulation seemed to some, the more dangerous it appeared to others. The debate that grew out of this controversy is the subject of this chapter.

Overall, two parties participated in the debate: progressive, pro-regulation, and often pro-reform lawyers and conservative lawyers, who, taken as a group, championed traditional notions of constitutionalism, property rights, liberalism, and liberty.\(^3\) The polemic between the two cohorts of lawyers was about commissions’ appropriate role in the federal attempt at restoring a socio-economical equilibrium in post-“bigness” America, about commissions’ ability to effectively contribute to this attempt, and the limits that should be placed on their activities. Permeating the debate was an anxiety concerning the legitimacy deficit in the operation of regulatory commissions. This chapter critically surveys the different answers given by jurists of varied persuasions to these questions during the period of time extending from the Progressive Era to the late-1930s.

The debate was anchored in the harsh realities of unprecedented industrialization that transformed the United States during that period.\(^4\) Moreover, it was conducted against a backdrop of an established institutional governmental structure, clearly drawn political

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\(^3\) Here is the place to clarify that any “essentialist” view of the two groups—as if they had been two cohesive, homogenous associations—should be, and is, rejected. Throughout the argumentation, participants switched sides and “defected” from one group to the rival. The two groups were furthermore composed of a number of factions and thus riddled with differing commitments and ideological inclinations.

\(^4\) \textit{See supra} Chapter 2.
battle lines, a developed constitutional jurisprudence, and persistent calls for reform in government and politics. The two groups of jurists were enmeshed in a similar economic-social-political context and within one another.

There are two main purposes for the following discussion: first, to further contextualize the discourse about administrative expertise as it had developed in the history of federal regulation in the United States. As we shall see, questions of expertise were part of the larger debate, which is the subject of this chapter. I will show in what ways the debate framed the terms of the derivative discussion about administrative expertise. Second, laying out the contours of the debate will expose points of collision between the combating camps. The proposed analysis will thus expose what lawyers found exciting or disconcerting about the rise of the administrative state; what was at stake, as far as the legal community was involved, in the expertise discourse. It will illustrate what Charles Francis Adams, James Landis, and Louis Jaffe were up against and allow for an informed and critical reading of their work.

I will argue that the pro-commission campaign made the case for administrative expertise following three strategies. One strategy was to assert that the agency’s expertise grew interstitially, namely, between the cracks left open by the three “constitutional” branches. It was thus argued that administrative regulation is able to attend to the things that they could/would not do (e.g., it could review evidence inadmissible in judicial proceedings). An alternative, more audacious strategy was to argue that agencies were endowed with what can be called a sui generis expertise in the sense that they could offer a unique competence which went beyond the tripartite constitutional powers. Finally, as a general matter, commissions’ superior fact-finding and data-processing abilities were also asserted. Members of the other party, conversely, were opposed to aggrandizement of regulators’ role in government. They were reluctant to acknowledge commissions’ putative extraordinary competence and highlighted dangers implicated with the concept of administrative expertise (e.g., entrenchment of administrative “absolutism”). At the

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5 See Stephen Skowronek, Building A New American State: The Expansion of National Administrative Capacities 1877-1920 (1982), especially at 3-18, for an excellent discussion of the systematic constrains that were checking progressive reforms during the period of time under review.
conclusion of this discussion it will become clear that whereas the last group spoke in terms of the empiricist/professional paradigms, progressives, as a group, did not confine themselves to any one paradigm but rather espoused the whole three of them.

We now move to the thick of the battle between the commission movement and its opposition. First, the constellation of arguments made in support of the commission model of regulation will be reviewed, and later rebuttals offered in response to these arguments.

II. The Case For Agencies

A. Introduction

1. The Progressives’ Postulates

Diversified as they were, it can be generally said that the writers who belong to the commission movement shared three basic postulates—

1. The federal government must take active steps to promote the public good;

2. More specifically, the federal government should assume an auxiliary position in assuring the soundness of the economic and labor markets;

3. This involvement should be aimed, at a minimum, at checking big businesses’ abuses of the mechanisms of the market and the lopsided bargaining power with employees at their disposal.

That is, members of the pro-commission lobby thought that there were great advantages to be gained by governmental unprecedented, in quantity and quality, involvement in the market in light of myriad difficulties experienced by many sectors of the economy.

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6 Even Charles Francis Adams had to concede at one point that “so far as the railroad system is concerned it seems almost inevitable that the national government must, soon or late, and in greater or less degree, assume jurisdiction.” Charles Francis Adams, The Government and the Railroad Corporation, in CHARLES F. ADAMS, JR., AND HENRY ADAMS, CHAPTERS OF ERIE AND OTHER ESSAYS 414, 415 (1871). On Adams’ theory of regulation, see infra Chapter 5. On “the public good,” see supra Chapter 1, Section C.2.
(businessmen, investors, worker, etc.) with the coming of big businesses. Such an active governmental engagement would likely dissolve these difficulties, they reasoned. As one commentator put it in 1936, “Federal regulation is but the discharge by the federal government of a burden which the inevitable flow of events has thrust upon it.”

2. Key Strategies

According to the eminent administrative-law scholar, Kenneth Culp Davis, “agencies were created because practical men were seeking practical answers to immediate problems.”

What forms did the pro-commission arguments advanced by these practical men take? Pro-commission thinkers based their advocacy on three main pillars.

1. From Institutional Analysis to Interstitial Competence: first it was argued that the addition of commissions to the federal regulatory machinery had significant institutional advantages \textit{vis-à-vis} the extant governmental and business institutional configuration. This was a key strategic move in the advocacy of the commission movement, namely, the move from the inadequacy of the courts, Congress, and the Executive to manage regulatory tasks to the presentation of the administrative commission as an adequate, and thus necessary, alternative. Out of this argument grew an image of administrative agencies’ \textit{interstitial competence}.

As Samuel Dunn explicated in 1914, commissions should have what the other branches lack: “The disqualifications of Legislatures, courts, and ordinary executive officials for the regulation of business suggest some of the qualifications that ought to be possessed by the members of regulating commissions. Ability, expert knowledge, fairness in utterance and act, moral courage to resist public opinion when it is wrong, as well as to

\footnotesize{7 Comment, \textit{Federal Regulation of Holding Companies: The Public Utility Act of 1935}, 45 YALE L.J. 468, 481 (1936) [hereinafter Comment on the Public Utility Act]. \textit{See similarly Fredrick F. Blachly and Miriam E. Oatman, Administrative Legislation and Adjudication} 1-5 (1934) (“Under the compulsion of changed conditions,” “[u]nder the stress of crisis,” “Congress and the national administration have been compelled,” “the government has been forced” to act; all this “has resulted in placing upon the administrative branch of the government a great variety of function.”).}

\footnotesize{8 KENNETH CULP DAVIS, ADMINISTRATIVE LAW 10 (1951).}
enforce their duty on refractory public utilities managements when they are wrong—these are the prime essentials.”

2. Factuality: It was further asserted that regulation was at heart a fact finding operation. The uppermost importance granted to “factuality” in regulation cannot be overstated. Administrative expertise, it was repeatedly stated, was grounded first and foremost—in the words of Joseph Eastman in 1927—on “intimate and expert knowledge of numerous and complex facts, a knowledge which can only be obtained by processes of patient, impartial, and continual investigation.”

Eastman’s remarks draw attention to a connection made by pro-commission thinkers between special knowledge and the process whereby it is obtained. His message is that a commission’s expertise stems from the substantive knowledge at its disposal as well as the professional methods of investigation through which this knowledge is obtained.

3. Expertise sui generis: it was also submitted that commissions can offer an invaluable unique expertise to the regulatory effort at safeguarding the public interest. Administrative organs would not only patch up the traditional tripartite (federal) government, but also make it, actually and conceptually, better than it had been in even ideal form. Whereas under the preceding two arguments the administrator might be envisioned as a judge and/or a scientist, here he is considered an amalgam of these, a cabinet member, a schoolmaster, or indeed a general manager.

Taken together, the three strategies capture the essentials of the campaign for commission regulation. Specifically, the three paradigms of expertise were constructed out of the

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9 Samuel O. Dunn, Regulation by Commission, 199 N. Am. Rev. 205, 206 (1914).
10 See Marver H. Bernstein, Regulating Business by Independent Commission 71 (1955) (“The commission movement has been characterized by a faith in expertness and rational solution of controversial regulatory problems. Regulation has been viewed as a matter of collecting facts and of deciding issues in an unbiased way by examining the facts and applying a rule of law.”).
12 All this is not to suggest that pro-regulation thinkers did not have their share of criticism of the design or performance of the administrative apparatus. Of course they did. As we shall see, the great Landis himself took the trouble of listing quite a few of such problems toward the end of his career. See infra Chapter 6, Section IV. See also, just as another example, A. H. Feller’s enthusiastic endorsement of Landis’ book, where Feller conceded, “It is not difficult to find fault
three arguments. To recall, the empiricist/professional paradigm is based solely on the administrator’s scientific, technical, or professional training, whereas the public general manager paradigm views the regulator also as a social leader, and the judge paradigm envisages the administrative organ as a public tribunal, whose decisions are respected by all.

As suggested, the most expansive of the paradigms, i.e., that of the general manager, obviously draws heavily on the *sui generis* argument, whereas the empiricist and judge do not necessarily require the last argument in addition to the first two.\(^\text{13}\)

4. Finally, throughout the dispute, members of the commission movement made the case that comparative experience with commission-run regulation, within and without the United States, vividly illustrated the great benefits to be gained by adopting a similar model on the federal level. Britain was held up as a prototypical example.\(^\text{14}\) The experience of other European counties, notably Germany, Belgium, and France, was also drawn upon.\(^\text{15}\) Similarly, a positive assessment of the performance of several state commissions was also added to the discussion.\(^\text{16}\) Furthermore, the inherent limitations of a regime of state-by-state regulation, certainly in an era of transcontinental corporation, were obvious to all. It was felt that “[r]egulation … must be conterminous with the thing regulated.”\(^\text{17}\)

Next I will demonstrate what shape the different strategies took in the course of the debate.

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\(^{13}\) See infra Section IV.

\(^{14}\) ROBERT CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 50 (1941). Interestingly enough, Cushman noted with regard to the legislative process leading to the establishment of the ICC that although “[t]he belief prevailed … that in England railroad regulation” was a success, in hindsight it becomes clear that “[t]his was not the case.” *Id. id.*

\(^{15}\) CHARLES FRANCIS ADAMS, RAILROADS: THEIR ORIGIN AND PROBLEMS (1878), at 81-116, 200-208, and *passim*.

\(^{16}\) For the history of state regulation, especially of railroads, see *id.* as well as CUSHMAN, *supra* note 14, ch. 2; THOMAS K. MCCRAW, PROPHETS OF REGULATION (1984), at 17-22, 52, and *passim*; and JOHN F. STOVER, AMERICAN RAILROADS (2d ed., 1997).

\(^{17}\) Comment on the Public Utility Act, *supra* note 7, at 479-480.
B. From Institutional Analysis to Interstitial Competence

The institutional argument is a direct byproduct of a comparative study of the respective capabilities of the “constitutional” branches of government to promote desirable social goals. The study’s conclusion is that all three are encumbered by their own precedents and procedures to such a degree that they are unable to get the regulatory work done efficaciously. The commission-model is thus brought forward as the appropriate vehicle to fill in the widening gap. Commissions, it is proposed, will be able to much improve on the (poor) regulatory performance of the judiciary, Legislature, and the Executive. Once this proposition is established, further institutional advantages to commission-run regulation are mentioned, notably, that vesting regulatory power in agencies (rather than in the Executive) will hinder an alleged movement to unwarranted Executive aggrandizement in an age that saw a dramatic governmental expansion in the United States and abroad.

1. Courts

Propositions about the inadequacy of courts to carry out industrial regulation were of two kinds: first and foremost, as noted, institutional arguments were made, namely, arguments underscoring adverse institutional features of the common law courts. But ad hominem arguments were also put forward, that is, charges made against judges’ allegedly reactionary jurisprudence in the Progressive Era and the early New Deal.

Observers argue that common law courts are incompetent to deal with regulation for a number of reasons: courts are shackled to the conservative methodology of the common law with its overbearing precedents and often ineffective remedies. They are already

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18 See generally DAVIS, supra note 8, at §§ 3-9.
19 See supra Chapter 2, Section III.A.3.
21 Milton Handler, Unfair Competition, 21 IOWA 175, 213, 260 (1936). In contrast, Landis spoke of “the great choice of weapons” that are at the disposal of commissions. James Landis,
“overcrowded.” Their procedure is slow, burdensome, expensive and excludes classes of evidence that may be logically irrelevant and yet a corporate manager, for example, would regard as cardinal. Courts do not sit in continuous sessions; “they are not organized for vigilance.” This means that the common law system does not allow for a continuous treatment of a pending socio-economic problem. Civil and criminal procedures make it impossible for courts to take any initiative in cases that come before them and deny them of any independent investigatory powers, thus the judicial process is left totally in the hands of the interested parties. Indeed, courts’ actions are taken ex post facto.

Moreover, the common law courts’ wide jurisdiction “tends to make judges jacks-of-all-trades and masters of none” and they surely lack the background necessary to analyze

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Significance of Administrative Commissions in the Growth of the Law, 12 IND. L.J. 471, 478 (1937) [hereinafter Landis, Significance of Administrative Commissions].


23 See BLACHLY AND OATMAN, supra note 7, at 4.

24 See Dunn, supra note 9, at 205, and Robert H. Jackson, An Organized Bar, 18 A.B.A.J. 383, 384 (1932), where future Justice Jackson explains the proliferation of administrative commissions by point at the fact that the public “seeks speedy settlement, finality and freedom from the procedural contentions it pays for, but does not understand. Hence, it ousts the court of jurisdiction …”

25 See JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 33 (1938) [hereinafter LANDIS, THE ADMINISTRATIVE PROCESS]. Roscoe Pound retorted to such accusation by counterposing, “The claims made for administrative absolutism must be greatly discounted in view of what has been done in the present generation, better procedure and less expense and more dispatch in judicial justice.” Report of the Special Committee on Administrative Law, 63 REP. AM. B. ASS’N 334, 354 (1938) [hereinafter the Pound Report]. But see also id. at 359-360, where, speaking of “modes of judicial review,” Pound urges his colleagues, “[W]e must bestir ourselves to provide adequate procedural machinery. The delay, expense, and uncertainty involved in existing modes of review invite administrative absolutism.” The Pound Report was the 1938 report of the Bar’s Special Committee on Administrative Law. See infra note 134.

26 See Dunn, supra note 9, at 205-206.


29 See Handler, supra note 21, at 213.

30 See THE NATIONAL INDUSTRIAL CONFERENCE BOARD, supra note 27, at 41.

31 LANDIS, THE ADMINISTRATIVE PROCESS, supra note 25, at 31. See also Landis, Significance of Administrative Commissions, supra note 21, at 476, where Landis argues that one
technical findings.\textsuperscript{32} They therefore cannot gain a comprehensive outlook on the subject under review, especially given the large number of courts spread around the country.\textsuperscript{33} In any event their “case by case determination takes years to cover even a narrow field” and “it leaves wide lacunae.”\textsuperscript{34} Similarly, as there are many judicial instances, it is difficult to achieve a final unified legal rule that governs a particular question.\textsuperscript{35}

Just as troubling to many was judges’ “conservative habit of mind,” which “is a by-product … of the system of building law by precedent.”\textsuperscript{36} It is even asserted that this conservatism in addition to judges’ “experience as advocates at the bar” make them favor “interests of property, [and] often manifest a bias … in favor of protecting of private rights against governmental interference.”\textsuperscript{37} This disposition leads to a deadlock in several instances of public regulation, where “[n]ot only have the courts failed to develop remedies of their own … but they have frustrated the legislative efforts to cope with the problems” at bar.\textsuperscript{38} The Supreme Court’s reasoning generally “does not accord with the temper of the time.”\textsuperscript{39} To conclude, according to Thurman Arnold, “Our spiritual

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\item[32] See John Dickinson, \textit{Judicial Control of Official Discretion}, 22 AM. POL. SCI. REV. 275, 290 (1928); Marvin B. Rosenberry, \textit{Administrative Law and the Constitution}, 23 AM. POL. SCI. REV. 32, 42 (1929); and Robert M. Cooper, \textit{The Proposed United States Administrative Court, Part II}, 35 MICH. L. REV. 565, 584-585 (1937). Arguments of this order were also aired during the controversy over the need to establish a specializes Commerce Court. See CUSHMAN, \textit{supra} note 14, at 88. On the unfortunate history of the Commerce Court, see \textit{supra} Chapter 2, Section II.D.
\item[33] See Eastman, \textit{The Place of the Independent Commission}, \textit{supra} note 11, at 100.
\item[34] Handler, \textit{supra} note 21, at 259.
\item[35] See LANDIS, \textit{THE ADMINISTRATIVE PROCESS, supra} note 25, at 33 and 134.
\item[36] Harlan F. Stone, \textit{The Common Law in the United States}, 50 HARV. L. REV. 4, 10 (1936). Even Learned Hand, who thought that courts, rather than commissions, should handle regulatory duties, held that the “movement … to intrust broad powers to administrative commissions, … reflects a suspicion of courts in the end resting upon that very scrupulousness to the written word which has been their undoing.” Learned Hand, \textit{The Speech of Justice}, 29 HARV. L. REV. 617, 620 (1915).
\item[37] DAVIS, \textit{supra} note 8, at 15.
\item[38] Handler, \textit{supra} note 21, at 196. \textit{See also id.}, at 237-251, and LANDIS, \textit{THE ADMINISTRATIVE PROCESS, supra} note 25, at 97 (arguing that the Clayton Act “was literally destroyed by judicial interpretation.”).
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government today centers in the judicial system. Here is the bulwark of all the older symbols and theories both legal and economic.\textsuperscript{40}

The \textit{ad hominem} attacks of this sort on the judiciary are expansive. The judiciary’s prestige was most infamously marred during the \textit{Lochner} era\textsuperscript{41} and again in the “era prior to 1936,” it is argued, due to “a series of decisions invalidating popular social legislation on dubious constitutional grounds.”\textsuperscript{42} Further, it was maintained that court hostility to novel initiatives in the province of government manifests itself also in their refusal to incorporate the input of other disciplines into their analysis.\textsuperscript{43}

Lastly, James Landis scathingly attacks the Court for its inconsistencies\textsuperscript{44} and argues that it stipulates “standards whose application left open wide areas for differences of opinion,”\textsuperscript{45} so that even cases that do make their way to the Supreme Court do not provide sufficient guidance to litigants. But Landis goes further than that and explicitly posits the Court as an enemy of the administration itself: “the effect if not the purpose” of a recent Court’s decision overturning a SEC order,\textsuperscript{46} he scoffs, “was to breed distrust of the administrative.”\textsuperscript{47}

\textsuperscript{40} \textsc{Thurman W. Arnold}, \textit{The Symbols of Government} 127 (1935).
\textsuperscript{41} See \textsc{Felix Frankfurter}, \textit{The Government & Its Public} 44-51 (1930).
\textsuperscript{42} \textsc{Louis Schwartz}, \textit{Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility}, 67 \textit{Harv. L. Rev.} 436, 471 (1954). \textit{Cf. infra} text accompanying note 136. Non-other than Charles E. Hughes, the future Chief Justice, called in 1907, when he was the Governor of New York, for the “administration by administrative officers,” and not by courts. The reason being that “you cannot afford to have that administration by the courts,” as that might expose courts to broad public opposition. He insisted that “[w]ith the courts giving a series of decisions in these administrative matters hostile to what the public believes, and free from that direct accounting to which administrative officers are subject, you will soon find a propaganda advocating a short-term judiciary, and you will turn upon our courts … that hostile and perhaps violent criticism from which they should be shielded …” \textit{Addresses of Charles Evans Hughes} 141 (1908).
\textsuperscript{43} \textsc{Handler}, \textit{supra} note 21, at 213.
\textsuperscript{44} See \textsc{Landis}, \textit{The Administrative Process}, \textit{supra} note 25, at 115.
\textsuperscript{45} \textit{Id.} at 127.
\textsuperscript{46} See \textsc{Jones v. Securities and Exchange Commission}, 298 U.S. 1 (1936).
\textsuperscript{47} \textsc{Landis}, \textit{The Administrative Process}, \textit{supra} note 25, at 140. \textit{See also id.} at 123. This is not to say that according to the pro-commission rings courts had nothing to offer to a regulatory endeavor. Dunn, for example, prescribed in 1914 that regulator must assume “a judicial spirit” in the transacting the commission’s business. Dunn, \textit{supra} note 9, at 205. \textit{See also infra} Chapter 6, Section III.E., where I show that Landis also incorporated a noticeable judicial element into his thinking of administrative expertise.
2. Legislature and Executive

In 1689 John Locke wrote, “For the Legislators not being able to foresee, and provide, by law, for all, that may be useful to the Community, the Executor of the laws, having the power in his hands, has by the common Law of nature, a right to make use of [the Executive Power], for the good of the Society, in many Cases, where the municipal Law has given no direction, till the Legislative can conveniently be assembled to provide for it.”

Expanding on the argument, members of the commission movement argue that the Legislature is an inadequate regulatory organ for a number of by-now familiar reasons. It, too, does not sit year-round. It, therefore, cannot offer “continuous performance [and] continual inquiry and investigation,” nor “consistent policy.” Oftentimes Congress in particular cannot provide the “required careful and gingerly treatment” that the administration offers. It cannot “keep abreast of changing needs” concerning, for example, railroads regulation. Its procedures are long and wearisome. “Legislatures here[] have, year after year, found themselves more and more crushed down by ever increasing volume of public and private business,” it was noted by Charles Francis Adams already in 1868. Thus, Congress is not able to be expert in any one field due to the breadth of its diverse responsibilities and cannot deal with the “vast and painful

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51 Landis, The Administrative Process, supra note 25, at 72. See also Blachly and Oatman, supra note 7, at 4.
52 Davis, supra note 8, at 13.
53 See Handler, supra note 21, at 237.
54 Charles Francis Adams, Boston, 106 N. Am. Rev. 1, 17 (January, 1868). According to Adams, committee-work done in the halls of Legislatures does not qualify legislators to regulate, as committees “are eternally fluctuating, are not peculiarly well-informed, judiciously selected, or free from bias. As a consequence, the lobby becomes more and more powerful; greater opportunities are afforded for corruption, and legislation becomes yearly less systematic and founded less on principle.” Id. id.
detail” of railroad regulation, for instance.\textsuperscript{55} Congress obviously lacks judicial spirit. It may be over-influenced by “fly-by-night promoters.”\textsuperscript{56} And in any event, its limited avenues of agency supervision, notably through its investigation and appropriation powers, “render it an awkward instrument for the direct execution and continuous scrutiny of the policies it has prescribed.”\textsuperscript{57} Because of all this Congress, just like courts, cannot fulfill “the desire for a certain continuity of administrative policy,” nor meet the modern “demand for specialization.”\textsuperscript{58}

This line of arguments applies, at times \textit{mutatis mutandis}, to the Executive.\textsuperscript{59} It is mainly with regard to the Executive, however, that reformers’ disapproval of the part played by politics in public regulation is brought out in sharp relief.\textsuperscript{60}

3. The Remedies

(a) Administrative Justice, Apolitical Administration

According to the commission movement, courts will not reform themselves; agencies therefore have to step in and attend to the many lacunae in the operation of courts. “[T]he history of law reform,” wrote Hessel Yntema in 1934, “leaves little reason to anticipate that the judicial system itself will be able, in any fundamental way, to deal with the causes of its own inefficiency, and with sufficient promptitude and decision.”\textsuperscript{61} It was happily pointed out that the administrative agency could offer useful solutions to courts’

\textsuperscript{55} Eastman, \textit{The Place of the Independent Commission}, supra note 11, at 97.

\textsuperscript{56} L\textsc{andis}, \textsc{The Administrative Process}, supra note 25, at 61.

\textsuperscript{57} E. P\textsc{endleton} H\textsc{errington}, \textsc{Public Administration and the Public Interest} 182 (1936).

\textsuperscript{58} Landis, \textit{Significance of Administrative Commissions}, supra note 21, at 480, 476.

\textsuperscript{59} See, e.g., Eastman, \textit{The Place of the Independent Commission}, supra note 11, at 99.

\textsuperscript{60} It seems that the fact that, unlike the President, Congress has always been composed of a whole variety of members, who have not all shared one political credo, played here a role, the suggestion being that Congress’ bi-partisanship could be trusted to moderate partisan influence. Traces of the notion that multi-partisanship was an antidote to a regulating organ’s capture by one political party could be found in the history of the ICC, whose board—the enabling 1887 Act had provided—had to be bi-partisan. \textit{See infra} Chapter 2, Section II.D.

\textsuperscript{61} Hessel E. Yntema, \textit{Legal Science and Reform}, 34 \textsc{Colum. L. Rev.} 207, 228 (1934). \textit{Cf.} Hand, \textit{supra} note 36 (the courts themselves could and should mend their ways).
deficiencies, thanks, for example, to its more liberal rules of evidence,62 and the fact that the administrative process “more openly than the common law ... sees in each controversy a microcosm of social conflicts and seeks a judgment which ... can coordinate the forces of conflict into the whole structure.”63

Herbert Croly, “the leading political thinker of the Progressive movement,”64 formulated in one paragraph the many advantages to emanate from administrative—as opposed to judicial—justice. The quotation is long, but worth the effort:

The past, common-law justice has been appropriately symbolized as a statuesque lady with a bandage over her eyes and a scale in her fair hands. The figurative representation of social justice would be a different kind of woman equipped with a different collection of instruments. Instead of having her eyes blindfolded, she would wear perched upon her nose searching a forbidding pair of spectacles, one which combines the vision of microscope, a telescope, and a photographic camera. Instead of holding scales in her hands, she might perhaps be figured as possessing a much more homely and serviceable set of tools. She would have a hoe with which to cultivate the social garden, a watering-pot with which refresh it, a barometer with which to measure the social air, and the indispensable typewriter and filing cabinet with which to record the behavior of society; and be assured that our lady would be very much happier in the possession of her new tools and duties than with the old. For having within her the heart of a mother and the passion of taking sides, she has disliked the inhuman and mechanical task of holding a balance between verbal weights and measures, the real and full value of which she was not permitted to investigate.65

The contrast is stark and its conclusion clear. Unlike the judiciary, the administrative branch is new (and not old); its vision is broad and penetrating (it is not blindfolded); it is

62 See ICC v. Baird, 194 U.S. 25, 44 (1904), where Justice Day, writing for the Court announced, “The inquiry of a board of the character of the Interstate Commerce Commission should not be too narrowly constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation, and it should not be hampered in making inquiry pertaining to interstate commerce by those narrow rules which prevail in trials at common law ....”


64 BERNSTEIN, supra note 10, at 41. This does not mean, of course, that Croly subscribed to every idea pronounced by any Progressive. See id. at 43, and CROLY, supra note 28.

65 CROLY, supra note 28, at 369.
about substantive (and not mechanical) justice. But, above all, the administrative is alive. It is averse to the fixed and remote poise of the common law justice. Rather, it is like a passionate, happy mother, cultivating the garden, and attentive to the wishes of her offspring, which is society, of course. It is simple, homely, and therefore serviceable, and not over-theoretical, long-winded, and inhuman. It is, in the end, a caring, down to earth mother—not a statuesque lady. So much for the judiciary.

In the case of the purely political arms of government—the Legislature and Executive—the main proposed remedy was simple: an escape from politics.

In his discourse on the merits of administrative commissions, Landis names the following advantages of regulation by an agency as opposed to the Legislature: flexibility, efficiency,\(^{66}\) consistency,\(^{67}\) and what may be called purity and Olympian serenity. The first three characteristics may be disputable, but their meaning is self-explanatory. As for the remainder of the list, Landis provides the following glossary: first, “The agency’s compactness gives some assurance against the entry of impertinent considerations into the deliberations relating to a projected solution.” Second, Landis notes: “[I]t is easier to plot a way through a labyrinth of detail when it is done in the comparative quiet of a conference room than when it is attempted amid the turmoil of a legislative chamber or committee room.”\(^{68}\)

Likewise, in the second report he issued in 1934 as the Federal Coordinator of Transportation,\(^{69}\) Eastman insisted with regard to the Interstate Commerce Commission (ICC) that it would remain a “permanent, independent, and nonpolitical body,” and he

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\(^{66}\) “[I]t is efficiency that is the desperate need,” he writes, and flexibility is “a prime quality of good administration.” _Landis, The Administrative Process_, supra note 25, at 24, 69.

\(^{67}\) See _id_., e.g., at 113 (The ICC’s “[r]ailroad policies … have achieved a degree of permanence and consistency that they might not have possessed had their formulation been too closely identified with the varying tempers of changing administrations.”).


\(^{69}\) Joseph B. Eastman was an ICC commissioner starting from 1919. Between the years 1933 and 1936 he was the Federal Coordinator of Transportation. Later on, after Pearl Harbor he was appointed as the Director of the Office of Transportation. _See supra_ Chapter 2, Section II. B. & D.1.
went on to argue that “apart from statutory direction, it must be as removed from influence by the President, Congress, or any political agency as the Supreme Court itself.”  

Eastman was, then, as devoted to the conviction that an escape from politics was a necessity for salutary regulation as were many Progressives before him. To him, the more impartial the commission was and was reputed to be, the wider was public support of its actions likely to be, and thus the more successful it would surely be.

A somewhat different view was taken by Speaker Samuel Rayburn of the House of Representatives. Rayburn the legislator put the stress on the data-gathering services that agencies could render Congress, thus positioning the administrative branch in close proximity to the political sphere, specifically, to the Legislature. Echoing Eastman’s assertion in 1927 that commissions “can be utilized by the Congress as an expert advisory body,” Rayburn argued in 1941 that without them at its side Congress would not be able to devote itself to “vital matters.” Reiterating the assertion that Congress was too busy to handle the technicalities of regulation, he held that “[f]ar from undermining the constitutional authority of the Congress, delegation of authority to administrative agencies is one of the surest safeguards to effective legislative action. It is a procedure which conserves the vital powers of Congress for vital matters. It removes rather than

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70 Bernard, supra note 10, at 62 (quoting Federal Coordinator of Transportation, Second Report, S. Doc. No. 152, at 37 (1934)).

71 See supra Chapter 2, Section I.B.

72 See Joseph B. Eastman, A Twelve Point Primer on the Subject of Administrative Tribunals, in Selected Papers and Addresses of Joseph Eastman, 1942-1944 375, 375 (G. Lloyd Wilson ed., 1948) [hereinafter Eastman, Twelve Point Primer on Administrative Tribunals] (This is an address of Eastman before representatives of transportation industries and organizations delivered at a dinner in honor of Eastman’s twenty-five years service as a member of the ICC, held on February 17, 1944, where he said “[t]o be successful they [commissions] must be masters of their own souls, and known to be such. … Political domination will ruin [an administrative] tribunal. I have seen that happen many times, particularly in the States.”). See also Landis, The Administrative Process, supra note 25, at 59-60.

73 Cf. Bernard, supra note 10, at 141-143.

74 To whom by the way Landis dedicated The Administrative Process. Speaker Rayburn played a pivotal role in the passage of the Securities legislation of 1933 and 1934, See Donald A. Ritchie, James M. Landis: Dean of Regulators (1980), e.g., at 46, 56-59.

75 Eastman, The Place of the Independent Commission, supra note 11, at 98.
create the danger of dictatorship by providing means of making democracy work under the complex conditions of modern life.”

Adolph Berle opined similarly that when it came to problems that “require peculiar and expert handling,” “[t]he popular will cannot be expressed by Congress, because the popular will does not discover a method.” In fact, “[n]o general body can reach” the sought-after result. “It takes an expert … to formulate a [pertinent] rule.” Berle drew an unequivocal conclusion from this line of reasoning: when “the function of the general body—Congress—stopped, … that of the special body—the commission—began.” “Any other rule,” he wrote, “would mean chaos.”

(b) Not Upsetting the Constitutional Apple Cart

As suggested, a number of writers held that a commission regime had an additional advantage in store. According to Eastman, among other beneficial characteristics of independent commissions was their limbo-like constitutional position that allowed them to alleviate problems of separation of powers. “[W]here it is necessary for the Congress to impose upon some agency duties of a strictly executive character,” he maintained, “it is both logical and appropriate that an independent commission should be selected as the agency when such duties relate to its [i.e., Congress’] sphere of activity.” In other words, entrusting executive duties in the hands of independent agencies would not upset the constitutional equilibrium among the three branches of government and impede Executive aggrandizement.

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76 Quoted in BERNSTEIN, supra note 10, at 67 (Bernstein does not mention the source). Prior to the enactment of the 1887 ICC Act, some suggested that the Commission would render a valuable service to courts by orderly accumulating all the relevant facts of a matter under scrutiny. See CUSHMAN, supra note 14, at 45-61.
78 Id. id. See also id. at 446.
79 Id. at 447.
81 See supra Chapter 2, Section III.A.3.
(c) The Great Equalizer

Lastly, there was the argument that commission might catapult the less powerful elements of society toward the powerful. It was hoped that commissions would be “the poor man’s court.” Advocates of public regulation gave vent to this egalitarian consideration already in the 1880s, when the foundation of the ICC was at issue. Similar arguments were made later on, for example when the establishment of the Federal Trade Commission (FTC) was on the line.

Noteworthy also was the argument that a federal commission would make indispensable information available to “the people” who, unlike railroad companies, “have never had any parties … in their employ exclusively for the purposes of looking up the facts of the transportation question from their side of the case.” This rationale clearly applied to inter-industry disparities, too, and was brought up by debaters whose main interest was to alleviate pressures of cutthroat competitions within many industries.

C. Sui Generis Expertise

Sui generis arguments could take simple form. It could be plainly asserted that administrative agencies constitute a synergic combination of the three powers of government. Berle was an exponent of this view. Writing years before Franklin D. Roosevelt became President, he did not seem to be particularly troubled by concentration-of-power concerns. To him, a major disqualification of the three branches was that each of them was constitutionally allowed to undertake only one function out of

82 CUSHMAN, supra note 14, at 48 (quoting Representative Hermann from Oregon: CONG. REC. NO. 18, Appendix, at 35).
83 Mark Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 79 (2003). In 1936 Landis would argue, “In substance, a device is created [i.e., the administrative agency] to furnish legal aid and assistance to groups of individuals powerless themselves to act and incapable of being welded together into a unit substantial enough to bear the burden of litigation.” Landis, *Significance of Administrative Commissions*, supra note 21, at 479. See also Eastman, *Twelve Point Primer on Administrative Tribunals*, supra note 72, at 376.
84 CUSHMAN, supra note 14, at 49 (quoting Representative Peters of Kansas: CONG. REC. NO. 18, at 860).
85 *Id. id.*
three, i.e., judicial, legislative, or executive. Regulation, however, he explained in 1917, “involves all the so-called ‘three powers.’” Moreover, “in many instances the differentiation of these three functions is impossible, and instead of using the general governmental machinery we erect a specialized instrument.” Regulatory commissions, he sympathetically related, had grown out of “a realization that plenary power vested in a single body was the only way of getting” desirable social results.

There were other ways to make an argument about agencies’ unique expertise. A particularly audacious rendition of the argument is provided by Herbert Croly in *Progressive Democracy*. His is an existential rhetoric. Speaking almost in Nietzschean terms, Croly stipulates that the organization and operation of agencies “should be adapted to the making of men rather than office-holder.” Later on he adds, “The administration of a progressive democracy will need and must foreshadow a completer kind of democratic manhood.” To Croly, the administration is “an agent of democracy.” Commissions are seen therefore as social laboratories for the production of much more than “office-holder,” or “specialist[s].” They are testing rooms, where “consolidating the divided activities of the government … may be permissible and useful;” laboratories which would produce a new kind of man-regulator, with the hope that this new type would subsequently spread like fire into the democratic society at large.

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86 Berle, *supra* note 77, at 431. See also Eastman, *The Place of the Independent Commission, supra* note 11, at 95, 97 (the ICC “may, and usually does, combine aspects of all three branches.”).

87 Berle, *supra* note 77, at 431. See also Rosenberry, *supra* note 32, at 33 (“in practice a complete separation of powers was not possible … They are overlapping, and of necessity must be so.”); Justice Holmes’ dissenting opinion in Springer v. Government of Philippine Islands, 277 U.S. 189, 211 (1928) (“It does not seem to need argument to show that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments, were it ever so desirable to do so, which I am far from believing that it is, or that the Constitution requires.”); and Felix Frankfurter and James M. Landis, *Power of Congress Over Procedure in Criminal Contempt in “Inferior” Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1018 (1924) (“It is futile to draw the answer from abstract speculation”).

88 Berle, *supra* note 77, at 441.

89 CROLY, *supra* note 28, at 375. Jane Addams, whose work is discussed in another chapter, used similar rhetoric. *See infra* Chapter 7, Section II.B.


91 Id. at 375.

92 Id. at 364-365.
D. A Concluding Note: Politics

The campaign of the commission movement evidently relied heavily on unfavorable assessment of “politics.” To Berle, Eastman, Dunn, and Landis, politics was a process tainted by partiality, irrationality, feverishness, and inconsistencies. Eastman had no doubt that commissions were able to differently process regulatory questions, provided they were left to their own devices. In 1914 Croly likewise opined, referring to “experts charged with the administration of … laws,” that “[r]epresenting, as they would, the knowledge gained by the attempt to realize an accepted social policy, they would be lifted out of the realm of partisan and factious political controversy and obtain the standing of authentic social experts.” This outlook displays a somewhat restricted grasp of “politics.” It seems that to these thinkers the political is merely a manifest commitment to one’s particular party views (rather than an ideological mechanism through which state-power is exerted). That is, here politics denotes partisanship and bias. For instance, Eastman pronounced in 1927, Commission “are clearly nonpartisan in their makeup, and party policies do not enter into their activities.” Even more reassuring was Eastman’s following observation regarding commissioners: “Certainly, when once [sic] the members are selected their political affiliation cease to be of the slightest consequence.” Eastman, The Place of the Independent Commission, supra note 11, at 101.

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93 Id. at 360-361.
94 “Politics” is defined as “the art or science of political government,” according to RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY (2d ed., 2001). (“Political” is defined there, inter alia, as “exercising or seeking power in the governmental or public affairs of a state, municipality, etc.”). Thus viewed, it is simply the thing political parties are engaged in. Again, these are limited definitions, as they heed not other, more expansive and intrusive sides of the political so laboriously pointed out notably by Michel Foucault, who spoke of political technology, bio-power, and governmentality. See generally HUBERT L. DREYFUS AND PAUL RABINOW, MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 133-142 (2d ed., 1983), and Michel Foucault, Governmentality, in THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY 87 (Graham Burchell at al. eds., 1991).
95 Even more reassuring was Eastman’s following observation regarding commissioners: “Certainly, when once [sic] the members are selected their political affiliation cease to be of the slightest consequence.” Eastman, The Place of the Independent Commission, supra note 11, at 101.
96 See infra Chapter 7, Section II.
III. THE CASE AGAINST AGENCIES

A. Introduction: The Detractors

“It is a matter of common knowledge,” wrote in 1929 the Acting Chief Justice of the Supreme Court of Wisconsin, Marvin Rosenberry, “that the development of administrative tribunals has been opposed at every point, with varying success.” And Jaffe, adding some color to the picture, wrote in 1955 on the New Deal years, “[T]hose hostile to the administrative process were engaged in a concerted effort—almost a conspiracy—completely to hamper it operation.” Unabashedly revealing his own stand on the matter, Chief Justice Rosenberry spoke of the “overpowering necessity” that had led to the introduction of agencies to the legal system, and exclaimed, “If the advent and growth of administrative law in our legal system is inevitable, it is manifest that the time and energy spent to prevent it is time and energy wasted.”

Other lawyers begged to differ. This section explores the intellectual products of “the time and energy spent to prevent” commissions’ proliferation, which, some thought, led to bureaucracy. Indeed, to some it appeared that an autonomous, self-sustaining, and self-perpetuating bureaucracy was taking root in America. Bureaucracy was seen as an undemocratic phenomenon. It was “uncontrolled by law” and thus equated with “absolutism,” as former Solicitor General, James Beck, put it in 1932. In his Our Wonderful Bureaucracy, which as just noted was published before the New Deal, Beck

97 Rosenberry, supra note 32, at 36. See also infra text accompanying note 113; supra Chapter 2, Section III.B.2.; Cooper, supra note 32; and LANDIS, THE ADMINISTRATIVE PROCESS, supra note 25, at 4.
99 Rosenberry, supra note 32, at 35.
100 Id. at 36. See similarly Frankfurter, supra note 2, at 617 (“It is idle to feel either blind resentment against ‘government by commission’ or sterile longing for a golden past that never was.”).
102 See supra Chapter 1, Section C.
103 JAMES M. BECK, OUR WONDERFUL BUREAUCRACY 85 (1932).
wrote about the United States, “Indeed, few states are more socialistic.” “Russia is not more bureaucratic than America,” he reasoned. Underlying this rhetoric was a professed belief in individualism and “self-reliance.” Bureaucrats, conversely, put their “subversive power” in the service of “selfish groups.” Demonstrating the persistence of social Darwinism in the United States, Beck quoted with agreement the argument that taxes were spent “[l]argely for the support of government employees and the maintenance of public institutions for the incapable and dangerous members of society, the feeble minded, the indigent and infirm, the criminals, the deficient, the deaf, the blind, the tubercular,—and the officials.” So viewed, public officials were just like the disabled, “dangerous members of society.”

While not all retractors shared Beck’s perspective in its entirety, they all made the case that the powers and procedures of commissions should be strictly demarcated. In so arguing, opponents frequently targeted the commission movement’s arguments regarding the incompetence of courts, Congress, and executives to effectively regulate. In opposition to this claim, detractors emphasized (what they saw as) dangers associated with leaving regulation of business in the command of independent commissions. These thinkers presented an array of counterarguments with a view to demonstrating the indispensable merits of regulation by the existing branches of government in general and courts in particular.

As before, I will open the discussion with laying out the postulates—those taken-for-granted points of departure—of the case made by this coalition against unbridled creation of administrative tribunals. Contrary to their adversaries, it is quite problematic to track down this group’s analogous views regarding the first two postulates held by the commission movement. To recall, the two precepts emphasized the federal government’s responsibility in promoting the prosperity of the economic market to the benefit of as many economic players as possible (e.g., financiers, consumers, and workers). The detractors varied in this regard. They stretched the whole continuum from

104 Id. id.
105 See infra Chapter 5.
106 BECK, supra note 103, at 85 (quoting Wilbur C. Abbott, THE NEW BARBARIANS (1925)).
107 See supra Section II.A.1.
outright supporters of *laissez faire* (e.g., Justice Brewer and James Beck), going through those who had acknowledged the need for some change in kind in government’s involvement in the market (e.g., Roscoe Pound),\(^{108}\) to promoters of Grange policy, who advocated the fortification of the classic regulation-through-criminal-strictures model.\(^{109}\) Admittedly, the last sub-group certainly did not dominate the whole group (for one thing it was rural, and not urban-industrial, in its orientation), which gravitated toward a conservative center, where the very introduction of federal agencies, as part of the government’s effort to alleviate industrial tensions, was not necessarily opposed. The two ends of the continuum, on the other hand, saw great dangers in administrative regulation, albeit for different reasons, of course.

This group posited that—

1. The three branches of government mentioned in the Constitution have the ability to aptly regulate any sector of the economy. Granted, improvements in federal government’s ability to do so may be required. However, they should not undermine the three branches’ leadership in all governmental regulatory schemes;

2. Courts, in particular, should retain their pivotal role in any such regulatory scheme;

3. Commissions should be allowed, at a maximum, to perform secondary tasks in the service of the three constitutional branches of government.

We now move to the details of the debate. The analysis will follow the same structure that guided the discussion in the previous section. First, I will turn to the institutional challenge and then more directly to the question of commissions’ expertise.

\(^{108}\) See Roscoe Pound, *Administrative Law: Its Growth, Procedure, and Significance* 26 (1942) (“I recognize the need of administration, and of great deal of it, in the urban industrial society of today.”). But see infra Section III.B.1.(c), where Pound’s harsh criticism of administrative agencies is discussed.

\(^{109}\) According to Robert Cushman, Grange enthusiasts feared that “a commission would soften the force of statutory regulation, since it would have broad powers to suspend or abrogate the law. …They wished [regulation] to be specific, rigid, and drastic.” They believed in “rigorous penal provisions.” Cushman, *supra* note 14, at 50. On the Grange, see Richard Hofstadter, *The Age of Reform: From Bryant to F.D.R.* (1955).
When Lawyers Debate

B. The Institutional Argument

1. Reënter the courts

During the 1930s the Bar led a campaign arguing that the agencies’ conduct in general and procedures in particular posed a real threat to Americans’ property rights and liberty. “Curb administrative absolutism” was the battle cry of the day. The call to buttress judicial review of administrative activities was seen the cornerstone of the campaign.

(a) The Bar

Generally, in the 1930s agencies were regarded by the Bar as an integral part of the Executive.\textsuperscript{110} Their meteoric ascendancy to dominance was seen with horror as evidence for Roosevelt’s megalomaniac aspirations. Roosevelt’s Court-packing plan, initiated in the beginning of 1937, fueled these sentiments. “[T]he rise of the executive to leadership in our polity,” declared in 1942 Pound, “coincident with a movement toward personal government and executive absolutism throughout the world.”\textsuperscript{111}

These preliminary remarks should not be read to exclude more immediate interests that motivated alarmed members of the Bar. As noted above,\textsuperscript{112} Justice Stone made abundantly clear in 1936 that at stake were some other loaded issues, such as lawyers’ cartel over dispute resolution procedures in society and the vested interests of many of their clients who opposed regulation.\textsuperscript{113}

The question of the desirable pale of judicial review of administrative agencies actions was expectedly a major bone of contention between the pro- and anti-commission groups, more than in the cases of the President and Congress. Deep as the controversy ran, however, all agreed that some sort of judicial review was necessary. To be sure, the Pound Report’s unremitting call for expansive and penetrating judicial review fell on

\textsuperscript{110} “[A]dministrative bureaus and agencies … [are] parts of the executive …” The Pound Report, supra note 25. See similarly Steven G. Calabresi and Saikrishna B. Prakash, The President’s Power to Execute the Laws, 104 YALE L.J. 541, 570-584 (1994).

\textsuperscript{111} POUND, supra note 108, at 42-43.

\textsuperscript{112} Supra Chapter 2, Section III.B.3.

sympathetic ears in the Bar. Previous reports of the Bar’s Special Committee on Administrative Law were written in similar vein. In contrast, “Advocates of administrative absolutism” (to use Pound’s phraseology in the report bearing his name), being opposed to uninhibited judicial review, advocated for a deferential treatment of courts. Major contributors to the presentation of the commission movement’s position in this regard were Robert Cooper, who wrote, “The need today is for the development of [agencies’] internal control rather than the employment of the [courts’] negative restraints of an external power”; Jaffe, who called one of the bills sponsored by the Bar, “A Bill to Remove the Seat of Government to the Court of Appeals for the District of Columbia”; and Harlan Stone.

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114 Supra note 25.
115 See infra note 134.
116 A particularly sensitive question was whether judicial review should extend to agencies’ determination of facts (as well as law), and how penetrating should judicial review of factual findings be (should findings of commission be reviewed de novo?). Apart from the categories of (“‘general’) facts” and “law,” and the particularly confusing of “mixed questions of law and fact” (see Jaffe, Basic Issues, supra note 98, at 1292-1294), another controversial category was that of “constitutional facts,” which concerned threshold questions regarding the eligibility of a case to a review by an administrative tribunal. A typical case where the issue would rise was when the tribunal’s authority hinged on a particular “fact,” e.g., whether an employee-employer relation had existed between the parties, when it was settled that only a positive answer would render the relevant administrative organ competent to decide a compensation dispute between the two. See Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920); Crowell v. Benson, 285 U.S. 22 (1932); Dickinson’s thorough analysis in his article, Crowell v. Benson, supra note 22; and Louis L. Jaffe, Judicial Review: Constitutional and Jurisdictional Fact, 70 HARV. L. REV. 953 (1957). On questions of the scope of judicial review of questions of fact, see also Ernest Freund, Historical Survey, in THE GROWTH OF AMERICAN ADMINISTRATIVE LAW 32-35 (1923); Eastman, The Place of the Independent Commission, supra note 11, at 100; Louis G. Caldwell, A Federal Administrative Court, 84 U. PA. L. REV. 966, 973 (1936); Cooper, supra note 32; Nathan Isaacs, Judicial Review of Administrative Findings, 30 YALE L.J. 781 (1921); Thomas T. Cooke, Book Review, 48 YALE L.J. 925, 928-929 (1939) (a review of JAMES LANDIS, THE ADMINISTRATIVE PROCESS (1938)); and James Landis, Crucial Issues in Administrative Law, 53 HARV. L. REV. 1077, 1093-1094, 1099 (1940) [hereinafter Landis, Crucial Issues].
117 Cooper, supra note 32, at 586. See also id. at 589 n.432.
118 Louis Jaffe, Incentive and Investigation in Administrative Law, 52 HARV. L. REV. 1201, 1232 (1939) [hereinafter Jaffe, Incentive and Investigation in Administrative Law] referring to the 1937 and 1939 reports of the Special Committee on Administrative Law. Jaffe, on his own admission, moderated his views in later years. See infra Chapter 8.
119 Stone, supra note 36, especially at 24-25.
(b) Justice Brewer

Justice Brewer of the United States Supreme Court was a vociferous supporter of the view that courts were and must be the bulwark against commissions’ supposedly unconstitutional and unruly practices. Presaging central arguments that would be set forth by the Bar in the 1930s, he had fought long and hard already in late nineteenth century against what he called, the “the movement of ‘coercion.’” As the Justice saw it, this “movement” embraced two principles—both held by the Justice to undermine the full exercise of private property—namely, the right to organized labor and the desirability of economic regulation. In a speech before the New York State Bar Association in 1893, Brewer launched a most rancorous counterattack on those who “are constantly seeking to minimize the power of the courts.”

In his response Brewer first retorts that judges are capable of handling questions of regulation, just as they competently “unravel the mysteries of accounting,” for instance. “They are as well versed in the affairs of life as any,” the Justice declared. This argument would recur in the future by legal scholars and even by Justice Frankfurter. For example, in 1936 Louis Caldwell, member and a past chairman of the Bar’s Special Committee on Administrative Law, would write that he has “yet to see the case in which the alleged violation” of an administrative regulation “involved issues any more difficult than are faced daily by every court in the land.”

It is interesting to note here a different response to the accusation of insufficient technical expertise directed at judges. Consider the things Louis Schwartz wrote more than half a century after Brewer. Schwartz deflected the issue altogether by pointing at the social

120 Justice David J. Brewer, The Nation’s Safeguard, 16 N.Y. St. B.A. 37, 42 (1893).
121 Id. at 43.
122 See, e.g., Cooke, supra note 116, at 926 (“courts could … be adequately implemented to handle effectively much of the work of a judicial nature now being performed by administrative tribunals, or subordinate employees thereof…”). See similarly Hand, supra note 36.
123 Justice Frankfurter would say in 1951 “with all due regard to the expertise and expertness of the [NLRB], judges also have a good deal of experience in the world with these matters.” Louis L. Jaffe, Judicial Review: “Substantial Evidence on the Whole Record,” 64 Harv. L. Rev. 1233, 1246 (1951) (quoting Argument, at 16, NLRB v. Pittsburgh, 30 U.S. 498 (1951)).
124 Caldwell, supra note 116, at 971.
advantages secured by a “laymen” judiciary. He made the following juxtaposition, highlighting the merits of the non-specialist—

The policy decision of the commissions lie embedded in opinions rendered impenetrable by special vocabulary, masses of statistical and fiscal data, and findings on non-controverted issues. Only a few experts .... can follow development. Judicial opinions, by contrast, are focused on large issues, are widely and promptly distributed, and being written by ‘laymen’ are more likely to be intelligible to non-specialist lawyers and others.125

Going back to Brewer’s address, the next phase of his defense resolutely states that only judges can do justice. “Somehow or other men always link the idea of justice with that of the judge,” he says. “There is the tacit but universal feeling that justice, as he [the judge] sees it, alone controls the decision.” Because of this, “when anything is to be wrought out which it is feared may not harmonize with eternal principles of right and wrong, the cry is for arbitration or commission.”126 That is to say, law as a judge “sees it” is always right; not so in the case of competing organs of government.

Brewer’s addressed exudes a clear sense of alarm, if not fright, in the face of “the influx of foreign population,”127 “anarchism,” and “socialism.”128 He is wary of “the will of the majority,”129 ultimately of the “masses.”130 Brewer is certain that only courts can protect the right of property against attacks of the majority: “So it is that the mischief-makers in this movement [the movement of ‘coercion’131] ever strive to get away from courts and judges, and to place the power of decision in the hands of those who more readily and freely yield to the pressure of numbers,” he warns.132

This association between “the movement of coercion,” of which agencies were the pride and joy, and the “demands of the majority” is striking for an obvious reason: we are accustomed to thinking that the one thing that needs to be justified in the operation of

125 Schwartz, supra note 42, at 474 (emphasis added).
126 Brewer, supra note 120, at 43.
127 Id. at 46.
128 Id. at 47. See similarly Beck’s remarks supra text accompanying notes 103-106.
129 Brewer, supra note 120, at 41.
130 Id. at 47 and passim.
131 Supra note 120.
132 Brewer, supra note 120, at 43.
regulatory bodies is the fact that they are unelected. Rather than dodge the issue altogether, Brewer chose to discredit commissions in a way that celebrated the *counter-majoritarian* position of the courts. It seems that he had nothing to worry about. Brewer must have sensed that his audience shared his anxieties and would be therefore sympathetic to his view.

Brewer is not shy of spelling out what lies at the root of the anxiety: redistribution of property. “[T]he movement of ‘coercion,’” he announces, “… by the mere force of numbers seeks to diminish protection to private property.” And he goes on, “It is a movement that which in spirit, if not in letter, violates both the eight and tenth commandments [“thou shall not steal,” “thou shall not covet”]; a movement, which seeing that which a man has attempts to wrest it from him and transfer it to those who have not.” But not only do members of this movement violate the two commandments, they also challenge “the unvarying law, that the wealth of the community will be in the hands of the few.”

Brewer’s address most revealingly shed light on what was in the end of the day at stake, as he and others who shared his outlook perceived it, in the agencies-courts tug-of-war. As we shall see, future commentators would be less direct. They would couch their arguments in more doctrinal terms.

(c) The Pound Report

The Bar’s Special Committee on Administrative Law, which was first formed in 1933, issued several reports; its members changed from one year to the other. To a large

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133 *Id*. at 39.

134 For the history of the ABA’s Special Committee on Administrative Law and a review of its reports, see Caldwell, *supra* note 116, at 987-990; Jaffe, *Incentive and Investigation in Administrative Law*, *supra* note 118, at 1221-1236; and Landis, *Crucial Issues*, *supra* note 116, at 1081-1083. The Committee’s reports did not remain idle. In fact, the Bar maintained such close relationships with congressmen opposed to the expansion of administrative powers that a bill drafted by the Special Committee in 1935 was subsequently endorsed by Senator Logan who introduced it to the Senate as a “[...] Bill to establish a United States Administrative Court to expedite the hearing and determination of controversies with the United States, and for other purposes.” (S. 3787, 74th Cong. (1936)). And there were other instances of collaboration between members of the Bar and congressmen regarding “containment” bills. See, e.g., Caldwell, *supra*
extent due to the prestige of its chairman, Roscoe Pound, the Committee 1938 report shined among the several reports it had issued throughout the 1930s. At the same time, for some, probably for the same reason, it was like a red flag.\textsuperscript{135}

As in the case of Justice Brewer, the Pound Report’s is permeated by a sense of immediacy. In it, Pound makes a thoroughly-reasoned case for the urgency in bounding the growth of American administrative apparatus. In keeping with time-honored common-law precepts, the essence of Pound’s arguments was that courts should be the centerpiece of any regulatory effort. Indeed, the Report has a clear conservative edge, which is made known throughout, for instance, when Pound writes in direct opposition to views held by reformers, “There is certain advantage in caution, in not trying to keep abreast of the latest social sciences which frequently turn out to be ephemeral.”\textsuperscript{136}

“Complaint is often made that the common law is hostile to administration,” Pound posits and moves to offer a qualification for the sweeping assertion: “It would be more accurate to say that it is suspicious of administrative action and seeks to hold it … to limits fixed by law … and seeks to prevent arbitrary and capricious exercise of administrative powers as it does in case of all other powers.”\textsuperscript{137} This is, or rather should have been, the Bar’s goal, then. Pound pleads with his colleagues to join the campaign to subject administrative powers to familiar and constraining legal categories held sacred by the common law. A key premise of the Report, which accounts for its sense of urgency, is, however, that the judiciary is placed under attack with the rise of administrative agencies, whose desire is to expand \textit{ad infinitum} at the expense of the judiciary, while enjoying “an exemption from review.”\textsuperscript{138} The agencies, Pound charges, “encroach continually on the domain of judicial justice,” “[b]road as were the powers conceded” to them by the Court

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\textsuperscript{135} For example, Jaffe called it in 1939 “the most unfortunate event in the life of the Special Committee.” Jaffe, \textit{Incentive and Investigation in Administrative Law}, supra note 118, at 1236.

\textsuperscript{136} The Pound Report, supra note 25, at 349.

\textsuperscript{137} \textit{Id.} at 352.

\textsuperscript{138} \textit{Id.} 339. It would be Jaffe of all people—the same Jaffe who had said in 1939 that the Pound Report was “the most unfortunate event in the life of the Special Committee” (supra note 135)—who would state in 1954, “it is the way of the regulator to be mighty irritated by the peripheral which lies just beyond his grasp …” Louis L. Jaffe, \textit{The Effective Limits of the Administrative Process: A Reevaluation}, 67 HARV. L. REV. 1105, 1135 (1954).

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“they strove for more rope.”139 In view of this, Pound emphatically writes, “except as the bar [sic] takes upon itself to act, there is nothing to check the tendency of administrative bureaus to extend the scope of their operation indefinitely even to the extent of supplanting our traditional judicial régime by an administrative régime.”140

Pound would be just as relentless and direct in the future. He would use a similar, if not even more acerbic, rhetoric in 1942 in his Administrative Law: Its Growth, Procedure, and Significance, where he accused his rivals of believing “in supermen administrators free from checks of law or rights of judicial review.”141 He would speak once again of “administrative absolutism” and make known that he chose his words carefully, as he would also say: “In the cycle of events the world has been swinging round again to absolutism.”142

Such an intense vehemence of tone stands in need of some explanation. Patently, Pound is most troubled by the fact that the “an administrative régime” removes whole categories of cases from the judiciary to special tribunals in flat denial of the common law sacrosanct principle of the supremacy of law.143 As we know, according to this principle all government officials, like all citizens, must be placed under the general jurisdiction of the independent, orderly-standing law courts of the land.144

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140 The Pound Report, supra note 25, at 339.
141 POUND, supra note 108, at 22.
142 Id. at 28, 85. See also supra note 25.
143 See id. at 9-13.
144 See ALBERT VENN DICEY, LAW OF THE CONSTITUTION 198 (8th ed., 1915). (“‘the rule of law’ in this sense excludes the idea of any exemption of officials or others from the duty of obedience which governs other citizens or from the jurisdiction of the ordinary tribunals.”). Indeed, no legal scholar is more identified with this doctrine than Dicey, whose “conception of the rule of law acquired a permanent place in … discussions of the growth of the administrative state.” MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 226 (1992). John Dickinson was a leading exponent of Dicey’s view in the United States, especially in his ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW 124 (1927) (“… the law is seamless web. The law applicable to a given case can therefore be pronounced only by a body which knows authoritatively … the whole of the law. … [T]he law ought to be applied by an agency whose main business is to know the law, rather than to enforce some part of it.”). Dicey’s doctrine was harshly criticized along the years. See Louis L. Jaffe and
Pound also criticizes the administrative process for its lack of “any well-developed technique of determination.” “It tends to override what judicial experience has taught us are fundamental principles of securing full and fair hearing …” Also stressed is another article of faith of in common-law tradition, the one stipulating that arbiters be independent. The administrative setting, however, does not allow it, Pound insists, for the administrative decision-maker is placed within a hierarchical structure. The far-raging conclusion is, then, that administrative commissions are structurally unfit for a satisfactory exercise of judicial functions.

2. Separation of Powers

(a) Introduction

Three options were suggested in an attempt at minimizing what concerned observers saw as the immanent dangers the expansion of administrative powers. First, it was consensual among lawyers from both camps (and political scientists) that Congress must issue a clear legislative mandate to agencies. In other words, Congress must be as accurate as it can in specifying its intentions when introducing or amending the enabling act of a commission; the commission’s powers must be well marked, too. Second, conservative lawyers in particular aimed their efforts not only at underscoring the importance of meaningful judicial review of administrative agencies, but also, more generally, the constitutional principle of separation of powers. This is the subject of this section. The third option, which will be discussed in the next chapter, was primarily championed by political scientists who concerned themselves with issues of internal organization of the administration. They emphasized the import of Executive consolidation.

 Pound, supra note 108, at 5.
 The Pound Report, supra note 25, at 356-357.
(b) First Principles

The exclusive affiliation of commissions with the Executive branch, suggested by the likes of Justice Brewer and Roscoe Pound, opened a Pandora’s box of constitutional concerns. Thomas Cooke, a member of the New York Bar, publicly called in 1939 for a return to the basics of constitution thinking, saying that he “preferr[ed] less of the alleged expertness and ‘efficiency’ of the administrative tribunal, … and more of the simple justice and wise restraint inherent in the constitutional concept of separation of powers …”

To opponents of the commission movement, the vesting of the three governmental functions in one organ of the Executive (as they saw it) raised the specter of tyranny and the collapse of liberty and property rights. As Pound presented the case, he was “insisting … on safeguarding individual interests and preserving the checks and balances involved in the common law,” whereas his opponents—“those who deny that there is such thing as law (in the sense in which lawyers understand the term)” advanced “a …

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148 See supra text accompanying note 110.
149 Cooke, supra note 116, at 929. See also the 1936 report of the Bar’s Special Committee on Administrative Law: 61 REP. AM. B. ASS’N 720, 724ff. (1938).
150 “If there is anything of which we can be relatively sure after some hundred, even thousands, of years of experience with judicial machinery,” Caldwell opined in 1936, “it is that no man can be trusted to be judge in his own case.” Caldwell, supra note 116, at 973. Caldwell’s article is accordingly imbued with suspicion toward agencies’ adjudicatory proceedings. See similarly Freund, supra note 116, at 33-37; Handler, supra note 21, at 251 and 261-262; Cooke, supra note 116; Isaacs, supra note 116, at 783, 786; and Schuyler C. Wallace, Nullification: A Process of Government, 45 POL. SCI. Q. 347 (1930). Friends of the commission movements were also aware of the difficulty. Jaffe, as a notable example, wrote in 1955, “Without doubt the most acute problem of our administrative system is created by the so-called combination of prosecuting and adjudicating functions within one agency.” Jaffe, Basic Issues, supra note 98, at 1278. The concern about the commingling of the various constitutional powers remained uppermost in the minds of legal thinkers throughout the twentieth century. See THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES (2d ed., 1979) (the first edition was published in 1969). See also David SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993). Rosenberry, supra note 32, at 45, responded to such concerns by stating, “Those who are most disquieted by the growth of administrative law need have no fear that citizens who are deprived of their liberty or property by means of the ultra vires acts of administrative agencies will be without legal remedy,” as “[a]buses are quite promptly and readily corrected by legislative action, and in clear cases of ultra vires acts will be restrained by the courts.”
151 The Pound Report, supra note 25, at 343.
Marxist idea,”152 “an autocracy.”153 Similar views could be found already in the legislative history of the ICC. Albert Fink, the head of a prominent railroad pool, appearing before a congressional committee in 1886 exclaimed, “Commissions, or courts, or any body of men, who are at the same time law-makers, judges, and sheriffs, are not to be tolerated in free country.”154

Pound made in this context an original argument. In direct opposition to Berle,155 he submitted “[t]he increased tasks of the central government and new demands upon federal administration …. give rise to more rather then less need of checks upon the central authority ...”156 Pound’s explication was simple—

The more complex a society, the more and more numerous and complex the relations and groups and associations of which it is made up, the more complicated becomes the task of adjusting their conflicting and overlapping interests and clashing activities. Hence the more need of a system of balance …157

Pound found the contrary Berle theory seriously wanting. To him, any concentration of power was something to be avoided; most of all concentration in the Executive department of government. As we shall see in the next chapter, many political scientists, who shared Pound’s suspicious of agencies, thought nevertheless that concentration was the solution for their unruly proliferation.

152 Id. at 340.
153 Id. at 343. See supra note and text accompanying note 87 for the position of members of the commission movement on the matter.
154 CUSHMAN, supra note 14, at 59 (quoting S. REP. No. 46, pt. 2, at 124 (1886)). See also id., e.g., at 76-81. It was the Cullom Committee, a five-member senatorial committee commissioned in 1885 to comprehensively investigate the railroad problems. See SKOWRONEK, supra note 5, at 146-147.
155 See supra text accompanying notes 86-87.
156 The Pound Report, supra note 25, at 342.
157 Id. at 342. See also Charles A. Reich, The Law of the Planned Society, 75 YALE L.J. 1227, 1227-1233, 1244-1245 (1966). But cf. supra text accompanying note 86.
IV. Conclusion

The introduction of federal public regulation caused some commotion in the legal community during the Progressive Era. By the time of the New Deal it went haywire. Two main positions with regard to administrative commissions presented themselves. The first held that significant social benefits were likely to result from a situation where specified governmental organs—other than courts, the Legislature, and the Executive—attended to widespread socio-economic concerns. According to the second position, administrative agencies should not be allowed to assume a leading position in the administrative state.

This chapter presented a typology of the arguments exchanged between the two parties during the Progressive Era through the New Deal and highlighted their respective strategies. The review revealed some of the key concerns of those taking part in the debate: fears of redistribution of property and loss of professional hegemony, but also of the breakdown of the social fabric; the preservation of laissez faire individualism and meritocracy, but also of popular democracy; protection of judicial supremacy, of traditional ideas of justice, and of long-held judicial procedures; the constitutional principle of separation of powers and Executive (over-) empowerment. It will be interesting to compare this list with the roster of research questions that interested political scientists, economists, historians, and management and organizational theorists when they studied administrative organs during the same period. Key items on that roster will be the subject of two of the chapters below.158

But before we move on, we should address this dissertation’s research question, and ask, What concepts of administrative expertise informed the debate? Conservatives’ vision of the public regulator was, in a word, minimal. Enlisted to the cause of curbing administrative “absolutism,” they were naturally averse to assertions of strong, expansive, boundless expertise. Thus, Caldwell (who, to recall, was a member and a past chairman of the Special Committee on Administrative Law of the Bar), declared in 1936 that Congress should delegate powers to agencies parsimoniously and without “going too

158 *Infra* Chapters 4 and 7.
Delegation was warranted, he clarified, “particularly for the making of detailed regulation in highly specialized fields such as the technical operation of radio stations or the importation of honey bees or the shipment of insects—fields which require the continuous participation of experts in the making of the law.”

This approach could sustain only the empiricist paradigm.

Conversely, views expressed by the reformist camp supported the three paradigms of expertise. As I have tried to demonstrate, ideas of *sui generis* expertise fit well the general manager paradigm. And arguments about interstitial expertise could be used to support the three paradigms, for this perspective regarded the regulator as a modern, science-bound judge and/or an objective, apolitical, one-track-minded fact-collector. If the interstitial argument is framed in terms of the amalgam figure, we get to the public general manager paradigm again.

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159 Caldwell, *supra* note 116, at 968.
160 *See supra* Section II.A.2.
CHAPTER 4. THE SCIENCE OF ADMINISTRATION

The writer told them that he was now working on the side of the management, and that he proposed to do whatever he could to get a fair day’s work out of the lathes.
Fredrick W. Taylor¹

I. Introduction

In January 1937 the President’s Committee on Administrative Management (the Committee) handed to President Franklin D. Roosevelt a report entitled, Administrative Management in the Government of the United States (the Report).² The Report outlined a program to reorganize the executive branch so that it would be able to efficiently handle the many new duties entrusted to it since the beginning of the century. The three members of the Committee built on an established scholarly endeavor first developed in America some fifty years earlier. They were leading scholars in a special branch of political science, which was called early on “the science of administration,” or simply “the study of public administration.”³ By 1937, this new science had gained a respectable place in the American academia and was pursued in research institutions of its own. In a nutshell, it was dedicated to a systematic inquiry of contemporary administrative phenomenon in scientific tools.⁴

The second part of this chapter will analyze the Report. In order to enrich the analysis, in the first part, a review of the intellectual foundations of the science of administration will be provided. I will show its affinity to the Scientific Management school of thinking,

¹ FREDERICK W. TAYLOR, THE PRINCIPLES OF SCIENTIFIC MANAGEMENT 49 (1911) [hereinafter TAYLOR, SCIENTIFIC MANAGEMENT].
² THE PRESIDENT’S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES (1937) [hereinafter the Report].
³ Later on it was associated with organization theory. On the relationship between the study of public administration and political science, see DWIGHT WALDO, THE ADMINISTRATIVE STATE xix-xxi (2d ed. 1984) [hereinafter WALDO, THE ADMINISTRATIVE STATE].
⁴ For a fuller discussion, see DWIGHT WALDO, THE STUDY OF PUBLIC ADMINISTRATION 1-13 (1955) [hereinafter WALDO, PUBLIC ADMINISTRATION].
popularized in the beginning of the century by Fredrick Winslow Taylor, and to other reform movements that were part of the larger Progressive movement. We shall also see that a professed scientific undertone pervaded the new science. The review will bring to the fore foundational principles in the field: the dichotomy between administration and politics, propagated by political science Professors Woodrow Wilson and Frank Goodnow, and the mechanical perception of public and business administrations, outlined in the work of Max Weber, Taylor, and Ernest Freund.

The corpus of literature produced by these scholars during the period stretching from the 1880s to the late 1930s came to be seen later in the twentieth century as forming the orthodoxy in the modern study of administration. My focus on the work of the Committee is based on the understanding that, as one observer put it in 1958, its Report represented “the high noon” of this orthodoxy. That is to say, the Report authoritatively synthesized and thus defined the thinking of the founders of this field of inquiry. The suggestion that the Committee’s theses represented the zenith in the development of the traditional doctrine points to the fact that—as is always the case with highpoints—a descent in its hegemony soon followed. Already when the Report was released, but more so in the ensuing years, this orthodoxy would be called into question. That part of the story will be dealt with in a separate chapter.

The purpose of the investigation conducted in this chapter is to introduce a non-legal perspective to the legal historiography of the American administrative state in general, and to the study of administrative expertise in particular. Put differently, it will introduce major outer-legal aspects of the American administrative revolution. A comparison between the legal and the non-legal perspectives is, I believe, illuminating. It is bound to improve our understanding of past and present of federal administrative regulation by revealing the several competing perceptions of public administration and expertise that underlay and set the course for the administrative endeavor in the United States from the Progressive Era to the present. It also demonstrates what aspects of the administrative

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6 See infra note 141.
7 See infra Chapter 7.
process were virtually unknown at the time to lawyers, who made a conscious effort to shun the political science curriculum on public administration. Moreover, as a general matter, reading the pertinent literature written by lawyers through the prism of other doctrines, allows for a more informed assessment of the legal corpus reviewed throughout the dissertation.

My conclusion is that the perspective of classicists in public and business administration on the structure of the federal government was at variance with that of both conservative and progressive lawyers. While the former group of lawyers was fearful of Executive aggrandizement and the latter sang the praises of independent commissions, Wilson and Taylor advocated a centralized scheme of the Executive. They and their students squirmed at the thought of dispersed executorial powers floating freely within any organization, be it a factory or the government of the United States. The warring positions, in turn, evinced different views of administrative expertise: as we have seen in the previous chapter, conservatives conceded only the most rudimentary and technical expertise (the empiricist paradigm) and a dominant current within the progressive group championed a most expansive vision of administrative expertise (the general manager paradigm). Interestingly, administrationists embraced both positions. Insisting on a bifurcated structure of administration, they produced a likewise split image of the regulator: either as the general manager or as the technician empiricist.

The Chapter will first focus on the modern study of administration, before moving to a close reading of one of its most important intellectual products in New Deal America, namely, the Report. Now, the history of the science of administration has been described in detail elsewhere. Therefore, in the following pages I will only highlight several

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8 See supra Chapter 2, Section III.A.3, and Chapter 3, Section III.A.2.
9 See supra note 191.
theoretical themes that would help us obtain a rounded understanding of the Committee’s Report.

II. The Science of Administration

Two interrelated intellectual revolutions played a large hand in molding the emergent science of administration: the scientific revolution of the seventeenth century\(^{11}\) and the management revolution of the nineteenth.

A. Hard Science

1. The Run to Science

Dwight Waldo, taking a retrospective view over the study of public administration since the second half of the nineteenth century, observed, in 1955, that one of “the great historical trend[s] underlying [it] was of course the spectacular development of modern physical science and technology.”\(^{12}\) Luther Gulick, a future member of the Committee, further clarified the connection. “Public administration is … a division of political science, and one of the social sciences,” he said. And the social sciences, in turn, rest “at many points upon the physical sciences.”\(^{13}\) Why was it so important to Gulick to argue for that particular lineage? What was it in modern physical science that administrationists found so appealing?

Modern physics is synonymous with the name of Isaac Newton. The publication of his *Principia Mathematica*\(^{14}\) in 1687 was a defining moment in the history of modern

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\(^{11}\) Indeed, the insistence on the scientificity of study of public administration is important in itself for the purposes of the dissertation. It indicates that practitioners of the new field of inquiry were certain that there were great benefits to be gained in presenting their filed as “scientific.” It illustrates the oracular force of “hard” science and of those practicing it in the American academia and beyond at the beginning of the twentieth century.

\(^{12}\) WALDO, PUBLIC ADMINISTRATION, supra note 4, at 17, 18. See also infra text accompanying notes 120-122.

\(^{13}\) Luther Gulick, *Science, Values and Public Administration, in PAPERS ON THE SCIENCE OF ADMINISTRATION* 191, 191 (Luther Gulick & Lyndall Urwick eds., 1937) [hereinafter Gulick, *Science, Values and Public Administration*].

\(^{14}\) “Philosophiae naturalis principia mathematica”.
science. The book is probably the single most important scientific book ever to be published in the Western world.\textsuperscript{15} Newton and his followers erected an admirable edifice, magnificently structured yet fantastically simple, which was not based—it seemed—on any metaphysical thinking. Newton is reported to have said “\textit{hypothesis non fingo},” “I feign no hypothesis.” By that he meant: I have shown how gravity works but have not tried to explain why it works the way I think it does.\textsuperscript{16} Peter Munz writes that Newton “might have added, ‘I do not rely on what books keep telling me!’”—that is, I draw my conclusion exclusively from unbiased, direct observations—thus, pronouncing one of Enlightenment’s articles of faith.\textsuperscript{17}

Future generations would be more suspicious of such claims of pure empiricism,\textsuperscript{18} but none could argue with the fact that Newton was extremely successful in achieving the thing he did try to accomplish. As far as anybody could tell, Newtonian physics worked, notwithstanding the “reasons” underlying it. Physics had become a success story. Unsurprisingly, it became a model. If anything had aspired to be categorized as “science,” it would have to be done by the book, and that book was the \textit{Principia}.

Attempts to meet the standard set by modern physics went beyond the boundary of the natural sciences, the “hard” sciences. This was certainly true with regard to sociology.\textsuperscript{19}


\textsuperscript{16} This approach is commonly labeled as scientific “positivism.” \textit{See} IAN HACKING, \textit{REPRESENTING AND INTERVENING} 41-57 (1983), and Victor Gómez Pin, \textit{Quantum Physics and Mathematical Debates Concerning the Problem of the Ontological Priority Between Continuous Quantity and Discrete Quantity, in THE ROLE OF MATHEMATICS IN PHYSICAL SCIENCES: INTERDISCIPLINARY AND PHILOSOPHICAL ASPECTS} 33, 33-35 (Giovanni Boniolo et al. eds., 2005). August Comte (1798-1857) should also be mentioned here for his early formulation of positivism. \textit{See} 1 RAYMOND ARON, \textit{MAIN CURRENTS IN SOCIOLOGICAL THOUGHT} 59 (Richard Howard & Helen Weaver trans., 1965).

\textsuperscript{17} \textit{Peter Munz, BEYOND WITTGENSTEIN’S POKER: NEW LIGHT ON POPPER AND WITTGENSTEIN} 58 (2004).

\textsuperscript{18} \textit{See}, e.g., \textit{id.} at 58, where Munz shows the profound flaw in this view, namely, “that observation which were not guided by a prior hypothesis to guide one’s senses in a certain direction could yield nothing but confusion.” We will return to this point below when Landis’ work will be discussed. \textit{See infra} Chapter 6, Section V.

\textsuperscript{19} It was August Comte who coined the term “Sociology.” On Comte, see ARON, \textit{supra} note 16, ch. 8. Emil Durkheim has also played a major part in the constitution of the science of
At the turn of the century, political science, too, was already situated as one department in the vast field of “the social sciences.”

Of particular importance is the fact that out of the ubiquitous scientific ethos grew most of the attributes associated with Enlightenment as well as the modern notion of Western rationality. They evolved, first and foremost, as reflections of the imputed predispositions of the natural scientist. Following Newton, this figure was perceived as a true empiricist, objectively observing natural phenomena and rationally drawing unbiased conclusions. Thus, notions of objectivity, impartiality, technical-expertise, as well as the use of idiosyncratic jargon and a rational procedure of investigation were associated with science and its practitioners.

A driving force in the push for the scientification (or naturalization) of the study of social phenomenon was the unity of science thesis. Its most influential propagators were Auguste Comte in the nineteenth century and Rudolf Carnap in the twentieth. The thesis is premised on the view that physics is the crowning human intellectual achievement. It has two separate components, the first methodological and the second substantial: (1) all sciences should employ the same methodology employed in physics, and (2) at least all the natural sciences should be regarded as different branches of one science, and should be ultimately reduced to physics. A classic formulation of the thesis was presented in sociology. See, e.g., ARON, id. ch. 6, and DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY 23-81 (1990). See also infra Chapter 5, where the work of Herbert Spencer is discussed. See Walter J. Shepard, Political Science, in THE HISTORY AND PROSPECTS OF THE SOCIAL SCIENCES 424-425 (Harry E. Barnes ed., 1925), and with regard to anthropology, ROBERT LOWIE, THE HISTORY OF ETHNOLOGICAL THEORY (1937). See generally EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE 3-30 (1973).


See MUNZ, supra note 17, at 57-59.

See ARON, supra note 16, ch. 8. Comte classified the sciences according to their increasing complexity and decreasing generality in the following order: mathematics, astronomy, physics, chemistry, biology, sociology (in his later work he added, at the end of the chain, a non-metaphysical version of religion, which is devoted to the worship of humanity).

See RUDOLF CARNAP, THE UNITY OF SCIENCE (1934); DAVID J. HESS, SCIENCE STUDIES: AN ADVANCED INTRODUCTION 14-19 (1997); and HACKING, supra note 16, at 4-6.

HACKING, supra note 16, at 5. The thesis has obvious problems when taken to the extreme and forcefully imposed on the human sciences. See HESS, supra note 24, at 15-17.
the journal *Science* in 1917. “Science is therefore one,” it was unequivocally submitted, “even though reality may be complex; and the same general spirit pervades all science.”

Finally, the desire to emulate natural science in the study of human institutions was surely related to the way scientists perceived themselves, but equally so, to the way they were perceived by others. Technology and science have always been revered in America. An illustrious traveler in the early nineteenth century, Alexis De Tocqueville, wrote that “[i]n America the purely practical part of science is admirably understood, and careful attention is paid to the theoretical portion which is immediately requisite to application.” A century later Max Lerner emphatically declared: “America is a civilization founded on science and rooted in its achievements.” In other words, it paid to be classified as a “scientist,” rather than a “humanist” or an “artist,” in the United States during the first half of the twentieth century and before. To a lesser or a greater degree, the drive for scientificity was surely buttressed by such cultural dispositions.

2. Science in the Service of Administration

Although not an explicit part of the definition of unity of science thesis, the practitioners of the fledgling social sciences shared with it not only methodological principles, but also a common agenda—to achieve a better society. In the United States, at least, this was the way they presented themselves. The next quotation is indicative:

> There is not the slightest iota of choice allowed to any individual in any act or thought from birth to grave. If better and saner types of conduct are to be achieved, this must be brought about by giving the individual a better set of experiences through heredity, education and association. What these new guiding criteria of conduct shall be can only be determined by the most earnest and prolonged collaboration of natural and social scientists, each a specialist, and all dominated by the aim of social betterment.

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27 2 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 42 (Henry Reeve trans., 1948).
29 Cf. infra Chapter 8, Section III.B.
This bold statement is part of an introductory note made by the editor of a hefty tome named *The History and Prospects of the Social Sciences*, which was published in 1925 and canvassed diverse “sciences,” such as anthropology, sociology, economics, political science, and jurisprudence (in a chapter written by Roscoe Pound).\(^\text{30}\)

In the chapter devoted to political science, where special notice is given to the recent establishment of “a more concrete and definite connection between the science and art of politics, between the scholar and the man of action,”\(^\text{31}\) a link to public administration is readily made. And the writer proceeds: “We have every reason to expect that in the next generation the contact between political science and the actual operation of government will be much closer than it is to-day.”\(^\text{32}\)

The tendency to seek salvation in science for thorny issues of administrative management was not, of course, a novelty of early twentieth century America. As William Nelson relates, “Reformers in the last third of the nineteenth century turned to science to accomplish their reconstructive task … The new scientific spirit permeated every discipline related to the art of government.”\(^\text{33}\) Yet, by the first decades of the twentieth century, unlike previous periods, a “scientific” field of investigation was established, organized, and funded, armed, loaded, and eager to put its doctrines to the test of reality.\(^\text{34}\)

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\(^{31}\) Shepard, *supra* note 20, at 426. Shepard goes on to note, “This connection is found particularly in the increasing number of institutes and bureaus of research. It is found also in the employment of specialists and experts in political science in the various departments of government.” *Id.* id.

\(^{32}\) *Id.* at 441-442. *See also* Waldo, *The Administrative State*, *supra* note 3, at 20-21.


\(^{34}\) See Arnold, *supra* note 10, at 88 (“Through this network of people and organizations, a newly influential social science-public administration network was created, offering a strong executive-centered perspective on problem identification, policy design, and problem solving in the public sector. The motivation behind this establishment was the idea of social science in the public service.”).
Indeed, by that point, the science of administration had its own institutions, such as the Institute of Public Administration, operated under this name in New York since 1921 (one of its heads would be Luther Gulick, a member of the Committee), and the Public Administration Clearing House, established in Chicago in 1930, which soon became a leading center for graduate education and research in social sciences. Likewise, by the 1930’s numerous formative publications in the field had appeared (some mentioned in this Chapter). Moreover, as we shall see, the evolving science had something to show for itself, both in the private sector and in the public sector (notably, the work of city managers). Finally, the Committee was not the first to recommend reorganization of the federal government; a number of public and even private bodies had looked into the matter and come up with concrete recommendations. Its most important predecessor was the President’s Research Committee on Social Trends, which President Hoover appointed in 1929. One of the members of that committee was Charles Merriam, who would also be a member of President Roosevelt’s Committee. It was said of the former committee that “it felt itself at a turning point in American intellectual history.”

The academic community and the effective system of professional associations into which academics had been organizing themselves for almost half a century were now being asked to comment directly on problems facing the national government. It was the culmination of a complex dream, a triumph of past efforts even to have been called into existence as a group of scientists for the purpose, as the President put it in the introduction, of helping “all of us to see where social stresses are occurring and where major efforts should be undertaken to deal with them constructively.”

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35 See infra text accompanying note 135.
36 ARNOLD, supra note 10, at 87-88; KARL, supra note 10, at 113-126. See id. ch 4 for Gulick’s biography.
37 See WALDO, PUBLIC ADMINISTRATION, supra note 4, at 19-22.
38 See infra Section II.B.2.
39 See ARNOLD, supra note 10, chs. 2-4.
40 KARL, supra note 10, at 38 (quoting this committee’s report, RECENT SOCIAL TRENDS IN THE UNITED STATES v (1933)). Nothing concrete resulted from this committee’s study, which was completed in 1932, when the public was preoccupied with the Depression.
B. Business Administration

Another major force in the development of “classical” organization theory was Taylor’s Scientific Management doctrine, which he propagated starting in the first decades of the twentieth century. In 1911 Taylor published *The Principles of Scientific Management* “[t]o prove that the best management is a true science, resting upon clearly defined laws, rules, and principles, as foundation.” Taylorism greatly contributed to the professionalization of management in American industry, an intense process that started in the mid-nineteenth century.

Taylorism centered on “time and methods” study of the on-the-factory’s-ground processes of production, namely, on the measurement and assessment of factory workers’ daily routine activities, and the time required for their completion. The methodology employed in such studies involved the painstakingly breaking down the process of production to its most elemental units. Thus, for example, in one study, a lathe operation was said to consist of 183 basic tasks of which the first few were: “pick up part and move to machine, place medium part in chuck, tighten independent chuck 18-inch lathe, tighten chuck with pipe on wrench, …” This meticulous job description was supplemented by a synchronized list of time standards for the operation. So, just to complete the example, the time allocated for the first activity in the lathe operation (“pick up part and move to machine”) was 0.0049 hour.

The inquiry did not stop there. Taylorism begot physiological organization theory, which meticulously divided the human body into muscle groups while examining their durability, i.e., what activity would bring about fatigue within a given muscle group, and

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41 JAMES G. MARCH AND HERBERT A. SIMON, ORGANIZATIONS 12 (1958).
42 As noted by Yehuda Shenhav, “the management revolution” did not begin with Taylor, but was ushered in by mechanical engineers. See YEHUDA SHENHAV, MANUFACTURING RATIONALITY: THE ENGINEERING FOUNDATIONS OF THE MANAGERIAL REVOLUTION 16-36 (1999).
43 TAYLOR, SCIENTIFIC MANAGEMENT, supra note 1, at 7.
45 See generally RALPH M. BARNES, MOTION AND TIME STUDY 7-12 (3d ed., 1949).
46 STEWART M. LOWERY ET AL., TIME AND MOTION STUDY 388 (1940).
47 Id. id.
what would be this group’s required recovery time.\textsuperscript{48} A subgroup of this line of inquiry, Motion Economy, specialized in means of streamlining the process of production by stipulating the proper—most economical—use of the worker’s body and configuration of the tools and workplace. This brand of study was already pursued in the first decades of the century. Typical conclusions of such a study were:

1. The two hands should begin as well as complete their motions at the same time.
2. The two hands should not be idle at the same time except during rest periods.

... 
6. Smooth, continuous motions of the hands are preferable to zig-zag motions or straight-line motions...

... 
10. Tools, materials, and controls should be located close in and directly in front of the operator.

... 
20. Where each finger performs some specific movement, such as typewriting, the load should be distributed in accordance with the inherent capacity of the fingers.

... \textsuperscript{49}

The aim of exercises such as this, which were widely performed by Scientific Management scholars, was to restrict as much as possible the ways in which the worker could execute a designated activity. In \textit{Shop Management}, written in 1911, Taylor prescribed that “[e]ach man in the establishment, high or low, should daily have a clearly defined task laid out before him. This task should … circumscribed carefully and completely …”\textsuperscript{50} Needless to say, this, in turn, was projected to promote economic

\textsuperscript{48} \textit{See} Elton Mayo, The Human Problems of an Industrial Civilization (1933), ch. 1 (“Fatigue”).  
\textsuperscript{49} Barnes, \textit{supra} note 45, at 191.  
\textsuperscript{50} Frederick W. Taylor, \textit{Shop Management} 63-64 (1911).
efficiency, that is, the full use of all the diverse cogs in the production machine so to permit the largest average rate of production per day. At the same time, Taylor emphasized the need to provide the worker with incentives to carry out his tasks adequately.\footnote{\cite{taylor1} and \cite{gulick1}}

Significantly, Taylor made clear that for Scientific Management to work the managerial stratum in the organization would have to be intimately involved in the process of production. It would need to select the workforce, train it, guide it, closely analyze its performance, and accurately instruct it by dividing the work process into a list of discrete tasks.\footnote{\cite{taylor2}} “There is an almost equal division of work and the responsibility between the management and the workmen,” Taylor explained. “The management take [sic] over all the work for which they are better fitted than the workmen, while in the past almost all the work and the greater part of responsibility were thrown upon the man.”\footnote{\cite{taylor3}} As the last remark indicates, Taylor tried to establish a new regime—or rather, as he saw it, a regime—in the workplace that would replace the extant rule of the proletariat over the operation of the producing unit. This, he was certain, would increase productivity and profitability.

Overall, Taylor’s view of the worker is one dimensional. “One of the very first requirements for a man who is fit to handle pig iron as a regular occupation,” he opines, “is that he shall be so stupid and so phlegmatic that he more nearly resembles in his mental make-up the ox than any other type.” Note that stupidity is “one of the very first requirements”\footnote{\cite{taylor4}} for the position. So viewed, the worker is deemed to be driven only by a desire to earn as much as he can with the least effort. Faced with such a work force, management’s role becomes so much more demanding (provided it wishes to maximize the company’s output). The management has to do all the thinking for the men on the production line.

Sharing a similar managerial perspective, Luther Gulick played a key role in introducing “the administrative management theory,” as March and Simon label a new line of inquiry

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\begin{itemize}
\item \footnote{\cite{taylor1}, \textsc{Scientific Management}, supra note 1, at 33-34.}
\item \footnote{\textit{Id.} at 39-43.}
\item \footnote{\textit{Id.} at 37.}
\item \footnote{\textit{Id.} at 37.}
\end{itemize}
in the study of modern administration, they trace back to the 1920s.\textsuperscript{55} A distinctive feature of this theory was that it concerned itself with issues of coordination and departmentalization. The problem of coordination took a managerial outlook, since it is the head of the organization that had to ensure the efficient allocation of tasks among the organization’s different units and coordinate among them. The automatic, full compliance of the personnel of these units is taken for granted. Indeed, one of the important lessons that could be drawn from the experience of practitioners in the field of business administration was, “[S]pecialization without coordination was unproductive.”\textsuperscript{56} As we shall see, the concern for smooth governmental coordination resonated well with the Committee members.

In sum, we can readily see why March and Simon lump Taylorism and Gulickism together under the heading of the “classical” theory of organization. They both regard the employee as a passive instrument, a machine, at the disposal of the organization.\textsuperscript{57} As we have seen, Taylor completed the picture by depicting the management of an organization as the exact negative of the workman. Its \textit{raison d’être} was to tell employees exactly what to do. It is the management that should have the grand scheme of things in mind. The workman should and could focus only on repeating a set of mechanical actions he is directed to do. The Committee heeded well the precepts of business management.\textsuperscript{58} An explicit reference to the business world is often made in the Report. If the Report’s trajectory is pursued, we are told in a Wilsonian rhetoric, “the Government” will be “a businesslike organization.”\textsuperscript{59}

Lastly, this synopsis of some foundational elements in classical theory of Scientific Management can give us a concrete sense of the kind of outlook that was completely


\textsuperscript{56} CHANDLER, \textit{supra} note 44, at 281. In fact, it was “[t]his challenge of coordination and control that led to the development of modern factory management.” \textit{Id. Id.}

\textsuperscript{57} MARCH AND SIMON, \textit{supra} note 41, at 29.

\textsuperscript{58} On the science of administration and Taylorism, see generally WALDO, \textit{PUBLIC ADMINISTRATION}, \textit{supra} note 4, at 18-19.

\textsuperscript{59} The Report, \textit{supra} note 2, at 46; \textit{see also id. especially at 31.}
absent from the writings of legal scholars almost to a man during the Progressive Era and the New Deal.\textsuperscript{60} Lawyers seemed to be oblivious to the “internal”\textsuperscript{61} dimension of commissions’ routines—they showed little, if any, interest in questions of internal organization and concrete issues of daily administration management. I will return to this theme below.\textsuperscript{62}

C. Public Administration

1. The Classicists

Indeed, Professor Woodrow Wilson would have been more than pleased had he known how far the science of administration would have gone in the twentieth century and how influential its practitioners become, when he wrote in 1887 the seminal article, \textit{The Study of Administration}.\textsuperscript{63} Thanks to articles such as this, Wilson is regarded as “the Founding Father of public administration as a discipline.”\textsuperscript{64}

Wilson’s article is rife with criticism of contemporary practices of the American administration. “This is why there should be a science of administration which shall seek to straighten the paths of government,” he proclaims.\textsuperscript{65} The mission of this science is “to discover, first, what government can properly and successfully do, and, secondly, how it can do these proper things with the utmost possible efficiency and at the least possible cost either of money or of energy.”\textsuperscript{66} It should make government’s business “less unbusinesslike.”\textsuperscript{67} Wilson’s manuscript had set a concrete agenda for future scientists; as we shall see shortly, they have diligently followed it.

\textsuperscript{60} \textit{See supra} Chapter 3.
\textsuperscript{62} \textit{See supra} Section II.E.
\textsuperscript{63} Woodrow Wilson, \textit{The Study of Administration}, 2 \textit{POL. SCI. Q.} 197 (1887). \textit{A CENTENNIAL HISTORY OF THE AMERICAN ADMINISTRATIVE STATE} (Ralph C. Chandler ed., 1987) was published exactly a hundred years after the publication of Wilson’s article.
\textsuperscript{64} \textit{WALDO, PUBLIC ADMINISTRATION, supra} note 4, at 20.
\textsuperscript{65} Wilson, \textit{supra} note 63, at 201.
\textsuperscript{66} \textit{Id.} at 197.
\textsuperscript{67} \textit{Id.} at 201.
As noted by Wilson, the science of administration originated in the Continent, where public administration was cast in a particular (Prussian) bureaucratic mold, most famously described by Max Weber. The Continental model would be called by administrative law scholars in the United States as the transmission belt, traditional, or formalist model of regulation. Adolph Berle provided a clear formulation of the formalist model in 1917, where he wrote,

> The administrative machinery—the whole government, under this view—is not unlike the machinery which is used in mechanics to transmit power, from its motor source, to the point where it is brought into contact with the raw material requiring its application. In America the motive power is the popular will.

What was, then, the unique contribution of commissions to this mechanical process? In answering this question, Berle offered a simple distinction. “Government,” he explained, “has to do with setting the popular will to work; to supply the personal guarantee that the machinery will do its part, to supply even the cogs and belts in the general machinery.” The role of the administrative apparatus was different. “Administration,” he said, “is the

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68 Id. at 201-207. See also Ernest Freund, The Law of the Administration in America, 9 Pol. Sci. Q. 403, 405-408 (1894) [hereinafter Freund, Law of Administration].

69 See 2 MAX WEBER, ECONOMY AND SOCIETY 956-1003 (Ephraim Fischoff et al. trans., Guenther Roth and Clauss Wittich eds., 1978) [hereinafter WEBER, ECONOMY AND SOCIETY]. For Weber’s place in the history of organization theory, see MARCH AND SIMON, supra note 41, at 36-37. As is well known, Weber was not only a leading co-author but also a particularly penetrating critic of the formalist model. See ROGER COTTERRELL, THE SOCIOLOGY OF LAW: AN INTRODUCTION 149-157 (1992). On Weber’s theory of bureaucracy, see id. See also ARON, supra note 16, ch. 8; ANTHONY T. KRONMAN, MAX WEBER (1983), especially at 176-182; REINHARD BENDIX, MAX WEBER: AN INTELLECTUAL PORTRAIT 385-457 (1977); and Talcott Parsons, Introduction, in MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 56-86 (A. M. Henderson and Talcott Parsons trans., 1947) [hereinafter WEBER, SOCIAL AND ECONOMIC ORGANIZATION] (this is Henderson and Parsons’ translation to 1 WEBER, ECONOMY AND SOCIETY, supra note 69).


process of manufacture …” As can be expected, the metaphor of a machine is invoked in the Committee’s Report, too. Reiterating the importance of efficiency in government, the Committee declares that for it to be achieved, “It must be built into the structure of government just as it is built into a piece of machinery.”

The most important element in the formalist model is administration’s narrow discretion, which goes hand in hand with its hierarchical structure. “[D]iscretionary administrative power over individual right,” declared in 1923 Ernest Freund, “… is undesirable per se and should be avoided as far as may be.” Therefore, “the most important point in the development of administrative law is the reduction of discretion.”

By advancing this approach, the authors of the formalist model offered a compelling justification for administrative exercise of power in a democratic society. As the administrative process merely “transmit[s] power,” it is neutral; it is, in Weber’s phrase,

72 Id. at 435. Note that Berle’s concept of “government” subsumes both “politics” and “law” as viewed by Wilson. See infra text accompanying note 91.

73 The Report, supra note 2, at 2. It should be noted, however, that elsewhere in the Report the Committee writes, “Government is a human institution. … It is certainly not a machine, which can be taken apart, redesigned, and put together again on the basis of mechanical law. It is more akin to a living organism.” Id. at 34.

74 Interestingly, Wilson’s position on the issue of administrative discretion did not fall in line with the mechanical model. Although, being a Progressive, he vehemently denied the role of politics in the administration of public affairs (see infra text accompanying note 91), Wilson thought that regulators should have wide wiggle room in administering their duties. See Wilson, supra note 63, at 213 (“And let me say that large power and unhampered discretion seem to me the indispensable conditions of responsibility.”). In this respect, the Wilsonian theory resembles the theory of administrative expertise Landis is most associated with. See infra Chapter 6. In any other respect, though, Wilson’s understanding of the administrative process fits neatly with the formalist model.

75 WEBER, SOCIAL AND ECONOMIC ORGANIZATION, supra note 69, at 331 (“The organization of offices follows the principle of hierarchy; that is, each lower office is under the control and supervision of a higher one.”).

76 Ernest Freund, Historical Survey, in THE GROWTH OF AMERICAN ADMINISTRATIVE LAW 9, 22-23, 24 (1923) [hereinafter Freund, Historical Survey]. See similarly ERNEST FREUND, ADMINISTRATIVE POWER OVER PERSONS AND PROPERTY 98 (1928) [hereinafter FREUND, ADMINISTRATIVE POWER], where Freund argues that the consideration of flexibility, which is served by administrative discretion, should be weighed against “the higher consideration of the certainty of private right.” (emphasis supplied).
As such, it only carries out—mechanically—the orders of “the popular will.”

Also reassuring is the contention that the Weberian administration is a rational device. It is rational because it is efficient. In its orderly structure, the bureaucratic machine “is the very essence of modern efficiency.” As Weber famously said, it is “capable of attaining the highest degree of efficiency and is in this sense formally the most rational known means of exercising authority over human beings.” Thus conceived, the rationality informing the administration is purely instrumental and the administrative process is plainly value-free. “[I]n principle,” Weber explained elsewhere, “a system of rationally debatable ‘reasons’ stands behind every act of bureaucratic administration, namely, either subsumption under norms, or weighing of ends and means.”

Bureaucratic administration is “especially rational,” according to Weber, as it “means fundamentally domination through knowledge.” Administrators’ “specialized,” “technical” knowledge is thus another basic element of the formalist model. It is at this juncture that expertise—and the attendant exclusion of non-experts—are introduced to the description. As Frug aptly put it, as a unique machine, administration “is also highly technical and complex device, one that would be damaged by mere layman’s tinkering.” Wilson’s approach exemplifies the point wonderfully. He is strongly opposed to unrestricted public opinion meddling with administrative issues. Elitist as his writing is,

77 2 WEBER, ECONOMY AND SOCIETY, supra note 69, at 979. However, see id. at 1404, where Weber explained that the difference between the director and a bureaucrat lies in their respective responsibilities and not in their daily routines: “The idea that the bureaucrat is absorbed in the subaltern routine and that only the ‘director’ performs the interesting, intellectually demanding tasks is a preconceived notion of the literati ...” Id. id.


79 Frug, supra note 70, at 1299.

80 1 WEBER, ECONOMY AND SOCIETY, supra note 69, at 223.

81 See HORKHEIMER, supra note 21. More on modern Western rationality, see HACKING, supra note 16, at 1-17, and Mashaw, Conflict and Compromise, supra note 70, at 185-190. This is one of the features that distinguish rational-legal from traditional authority, which is associated with “substantive” rationality. See Parsons, supra note 69, at 63-65.

82 1 WEBER, ECONOMY AND SOCIETY, supra note 69, at 979.

83 Id. at 225.

84 Id. at 221, 225.

85 Frug, supra note 70, at 1298.
Wilson warns that “[d]irectly exercised, in the oversight of daily details …, public criticism is of course a clumsy nuisance, a rustic handling delicate machinery.” This quotation alludes to his criticism of the practice in the United States, where, in his view, Congress is too dominant in government’s affairs. But the distinction here is not only between laymen and the expert bureaucrats. It is also between the bureaucrat and the leader of the organization. According to Weber, “In the modern state, the only ‘offices’ for which no technical qualifications are required are those of ministers and presidents.” Weber goes to great lengths to differentiate between the two castes of officers, in *Economy and Society*, *Politics as a Vocation*, and elsewhere, as it cuts to the core of his analysis.

The underlying principle informing Wilson’s and Weber’s analyses is the foundational distinction between administration and politics. “[A]dministration lies outside the proper sphere of politics,” Wilson announces, “[a]lthough politics sets the tasks for administration, it should not be suffered to manipulate its offices.” As is often the case, description and prescription were often wedded in the literature on the formalist model. Under this scheme, the popular will, values, interests, politics, or any comparable term (should) remain outside the administrative machinery, and thus subjective desires are kept outside the administrative process.

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86 Wilson, supra note 63, at 215.
87 Id. at 13-14.
88 1 WEBER, ECONOMY AND SOCIETY, supra note 69, at 221-222. See also KRONMAN, supra note 69, at 176-182.
89 See, for example, id. id.; 2 WEBER, ECONOMY AND SOCIETY, supra note 69, at 1393-1405; and Max Weber, Politics as a Vocation, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 95 (H. H. Gerth and C. Wright Mills trans., 1958).
91 Wilson, supra note 63, at 210 (emphasis in original).
92 Wilson insisted that that policy “will not be the creation of permanent officials, but of the statesmen whose responsibility to the public.” Id. at 216. See generally Dwight Waldo, Politics and Administration: On Thinking about a Complex Relationship, in A CENTENNIAL HISTORY OF THE AMERICAN ADMINISTRATIVE STATE 89, 92-94 (Ralph C. Chandler ed., 1987) [hereinafter Waldo, Politics and Administration]. See also infra text accompanying notes 117 and 118 for Frank Goodnow’s formulation of the dichotomy.
93 See Frug, supra note 70, at 1312-1317. Frug persuasively demonstrates how untenable this understanding is. Id. See also NELSON, supra note 33, at 82. (“by the end of the nineteenth century the administrative process was coming to be understood, in accordance with the scientific idea of the reformers, as one that required trained experts who made decisions and otherwise
Nicholas Henry points out that the dichotomy was central in the formation of the new science, for it enabled administration scientists of that period to carve out a space for themselves within the sphere of political science. As a result, “everything that public administrationists scrutinized in the executive branch was imbued with the coloring and the legitimacy of being somewhat ‘factual’ and ‘scientific,’ while the study of public policy-making and related matters was left to political scientists.”

The exclusion of politics and the demos from the administrative process could be motivated and justified by one consideration only—the cultivation of expertise. Indeed, this model, too, regards the administrator as an expert, but under this vision, only as a technical expert. The administrator is a “specialist,” to use Weber’s term. “The management of the office follows general rules, which are more or less stable, more or less exhaustive, and which can be learned,” Weber explains. “Knowledge of these rules represents a special technical expertise which the officials possess.” It is no surprise, then, that Wilson, along with many other progressives, called for the professionalization of the civil service. The civil service reform movement was one of the hallmarks of the Progressive Era. “A technically schooled civil service will presently become indispensable,” Wilson declared in 1887. In 1933 Elton Mayo would lament the fact that the demand had not yet been met.

preformed their tasks in accordance with autonomous, abstract standards. This transformation was not completed by the end of the century ... but the direction of change had become clear ...

94 Henry, supra note 10, at 42.
95 2 WEBER, ECONOMY AND SOCIETY, supra note 69, at 1001. It is difficult not to mention here, HANNA ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1964), e.g., at 193 (“... Eichmann [was a] specialist in evacuation ...”).
96 2 WEBER, ECONOMY AND SOCIETY, supra note 69, at 958.
97 See STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 1877-1920, at 47-84, 177-211 (1982).
98 Wilson, supra note 63, at 216. Weber noted the tendency in the Continent to professionalize the administrative cadre and enlist of institutions of higher education for the mission. See 2 WEBER, ECONOMY AND SOCIETY, supra note 69, at 999.
99 See MAYO, supra note 48, at 168 (“We have developed scientific research and the training of scientists admirably; we have failed utterly to promote any equivalent educational development directed to the discovery and training of administrators of exceptional capacity.”).
This vision of administrative regulators would resurface in the future. An indicative illustration was provided in the concluding report of the famous Acheson Committee, the Attorney General’s Committee on Administrative Procedure, whose final report was released in the beginning of 1941. One section of the report reads as follows:

Administrative agencies specialize in particular tasks and they include specialists on their staffs. The staffs may become such either by experience in the specialized work of the agency or by prior technical or professional training. In many cases a principal reason for establishing an agency has been the need to bring to bear upon particular problems technical or professional skills. … [T]he various Federal administrative agencies have the responsibility for making good to the people of the country a major part of the gains of a hundred and fifty years of democratic government. …

A barrier is erected here between the administration’s staff and the “people.” It seems that whatever the agencies do is beyond the ken of the “beginner,” as the Acheson Committee put it.

2. Test Case: Municipal Reform

In charting the contours of the new science, scientists of administration not only drew on precepts of Scientific Management, but also built on, and were part of, the municipal reform movement. This movement emerged in the second half of the nineteenth century. It fostered a strong mayor system, a commission plan of city governance (under which a small commission that assumed both legislative and executive powers run the city), and the city manager model, that is, the idea of appointment of a supposedly

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102 Id. at 19.
103 For the spate of late-nineteenth- and early twentieth-century reform movements in these and other areas, see ROBERT H. WIEBE, BUSINESSMEN AND REFORM: A STUDY OF THE PROGRESSIVE MOVEMENT (1962); KARL, supra note 10, especially at 1-22, 89-92; and MARTIN J. SCHIESL, THE POLITICS OF EFFICIENCY: MUNICIPAL ADMINISTRATION AND REFORM IN AMERICA, 1800-1920 73 (1977). See also Chapter 2, Section I.B.
politically neutral city manager (and/or a commission) that was to oust corrupt and inefficient politicians who had hitherto controlled the municipal machinery.\textsuperscript{104} The various models of local governance, however different in details, had much in common. They were inspired by corporation management practices, and consequently all enthusiastically advocated the centralization of executive powers, as a reaction to the practical difficulties associated with separation of powers in city government. Students of public administration took to heart the importance of centralization for a smooth operation of government and practically became obsessed with it in early twentieth century.\textsuperscript{105}

The city managers were of a distinct mold. According to one report issued in 1915, “[A]lmost all of the city managers so far chosen are engineers.”\textsuperscript{106} This, of course, is not surprising given the housekeeping chores of municipal administration; it also squares well with the social engineering mode of the Progressive Era.\textsuperscript{107} The fact that there was only one expert manager, in cities as well as in corporations, made centralization easy, but at the same time posed serious theoretical problems.\textsuperscript{108} City managers pushed the dichotomy between policy and administration to its limit. Martin Schiesl writes of Louis Brownlow’s tenure as a city manager of Petersburg, Virginia, that he was “[g]iven virtually a free hand in both the initiation and execution of public policy.”\textsuperscript{109} This

\begin{footnotes}
\textsuperscript{104} Schiesl, supra note 103, ch. 2 (“Patronage and Power”).

\textsuperscript{105} See Herman G. James, The City Manager Plan, The Latest in American City Government, 8 Am. Pol. Sci. Rev. 602, 608 (1914) [hereinafter James, The City manager Plan]; Karl, supra note 10, at 92-113; Schiesl, supra note 103, chs. 4, 7, and 9; and Arnold, supra note 10, at 11-14.

\textsuperscript{106} Herman G. James, Some Reflections on the City Manager Plan of Government, 9 Am. Pol. Sci. Rev. 504, 505 (1915). In fact, the author of this paper calls for a change in this regard. In his view, “It is not enough that the city manager be a first class business man or manager in the ordinary sense. … [M]ore than that he must be a man of liberal training, broad point of view and comprehensive conception of the real problem of modern urban life.” Id. at 504.

\textsuperscript{107} On the engineer managerial model, see Shenav, supra note 42, especially ch. 1 (to recall, the title of his book is Manufacturing Rationality: The Engineering Foundations of the Managerial Revolution).


\textsuperscript{109} Schiesl, supra note 103, at 185. Brownlow took up the position in 1920, after serving as a Commissioner of the District of Columbia; subsequently he served as the city manager of Knoxville, Tennessee, and Radburb, New Jersey. In 1922, he became the President of the City Manager’s Association. For Brownlow’s biography and on his public-service and writing careers
\end{footnotes}
commingling of legislative (political) and executive (administrative) powers—indeed, city managers’ entanglement with political issues\textsuperscript{110}—as well as their businessmen-friendly programs did not pass unnoticed, and were censured.\textsuperscript{111}

D. Putting it All Together

Surveying the beginning-of-the-century literature of the science of administration reveals that it followed fundamental Wilsonian themes:\textsuperscript{112} first, the confidence that “public administration is capable of becoming a ‘value-free’ science in its own right.”\textsuperscript{113} Second, the strong belief that such a scientific study holds the possibility of “enthroning intelligence where hatred, prejudice and passion now hold sway.”\textsuperscript{114} Third, the insistence that “[i]n the science of administration, whether public or private, the basic ‘good’ is efficiency,” which is “the single ultimate test of value in administration.”\textsuperscript{115} Fourth, the persistence of the operative principle that reigned supreme in the realm of public administration, \textit{i.e.}, centralization, as “[a]dministration is that function of government (he was a newspaperman for some years), see KARL, \textit{supra} note 10, ch. 3. See also Brownlow’s biography, \textit{supra} note 189.

\textsuperscript{110} The criticism leveled at this practice was part of the onslaught against the alleged distinction between politics and administration, as could be seen by comparing Goodnow’s attitude (\textit{see infra} notes 117 and 118) and that of City Manager Brownlow. \textit{See} Wallace Sayre, \textit{supra} note 5, and Henry, \textit{supra} note 10, at 40-48.

\textsuperscript{111} To some, the affinity between the city-manager model and the common ethos of businessmen, who often strongly supported it, was alone a reason for criticism. \textit{See} SCHIESL, \textit{supra} note 103, \textit{e.g.}, at 178-183, and KARL, \textit{supra} note 10, at 99 ff.

\textsuperscript{112} \textit{See generally} PURCELL, \textit{supra} note 20, chs. 6 and 10. A word of clarification: in the following paragraphs I wish only to highlight mainstream ideas of the field, or at least those ideas that resonate most strongly with the Report. What follows is not an exhaustive account of the public administration scholarship from Wilson to FDR, of course. For a fuller history of the field, see the sources mentioned in \textit{supra} note 10. \textit{See also infra} Chapter 7, where later relevant developments the political science are discussed.

\textsuperscript{113} Henry, \textit{supra} note 10, at 41-42.


\textsuperscript{115} Gulick, \textit{Science, Values and Public Administration}, \textit{supra} note 13, at 192-193.
which demands for its proper exercise centralization of power and responsibility.”\textsuperscript{116} The last aspect that warrants attention is the prevalence of the politics-administration dichotomy. This dichotomy “was assumed both as self-evident truth and as a desirable goal.” At bottom, “administration was perceived as a self-contained world of its own, with its own separate values, rules, and methods.”\textsuperscript{117} Or, as Frank Goodnow wrote in 1900:

The fact is, then, that there is a large part of administration which is unconnected with politics, which should therefore be relieved very largely, if not altogether, from the control of political bodies. It is unconnected with politics because it embraces fields of semi-scientific, quasi-judicial and quasi-business or commercial activity—work which has little if any influence on the expression of the true state will.\textsuperscript{118}

Taken together, these meta-principles formed a solid platform for modern study of public administration.\textsuperscript{119}

A confident and dominant scientific overtone pervaded this field of investigation. As one scholar forcefully wrote in 1940: “Writers on public administration place much emphasis upon the possibilities and importance of discovering and applying scientific principles.”\textsuperscript{120} In keeping with the scientific approach, Gulick, for example, expected the

\begin{itemize}
\item \textsuperscript{116}James, \textit{The City manager Plan}, \textit{supra} note 105, at 602. \textit{See} ARNOLD, \textit{supra} note 10, at 22-23, where early twentieth-century progressive literature on the conception of managerial presidency is mentioned.
\item \textsuperscript{117}Wallace Sayre, \textit{supra} note 5.
\item \textsuperscript{118}FRANK J. GOODNOW, \textit{THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES} 85 (1905) [hereinafter GOODNOW, \textit{PRINCIPLES OF ADMINISTRATIVE LAW}]. \textit{See} generally HERBERT A. SIMON, \textit{ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATION} 45-60 (2d ed., 1957). As noted, the politics-administration dichotomy would be widely challenged after the Second World War. \textit{See infra} Chapter 7, Section II, and generally Wallace Sayre, \textit{supra} note 5; Henry, \textit{supra} note 10, at 40-48; and Waldo, \textit{Politics and Administration, supra} note 92.
\item \textsuperscript{119}Writing about the decade that stretched from 1927 to 1937, Henry observes that this period brought about a “new thrust of public administration: Certain scientific principles of administration existed; they could be observed; and administrators would be expert in their work if they learned how to apply these principles.” Henry, \textit{supra} note 10, at 42.
\item \textsuperscript{120}Edwin O. Stene, \textit{An Approach to a Science of Administration}, 34 AM. POL. SCI. REV. 1124, 1124 (1940). In this article, the author demands his colleagues to maintain the highest standard of a scientific discussion. Accordingly, his discussion moves from “definition” to “axioms” and thence to “propositions.” For a milder approach, see Charles E. Merriam, \textit{The Present State of the Study of Politics}, 15 AM. POL. SCI. REV. 173 (1921).
\end{itemize}
student of administration to state his claim in the following scientific formula: “Under condition x, y and z conduct A will produce B; and conduct A¹ will produce C.” It does not seem farfetched at all to imagine that it was this more pronounced scientific edge that accounted for the administration scientists’ success at that time. Henry relates that at that stage “public administration reached its reputational zenith. Public administrationists were courted by industry and government alike during the 1930’s and early 1940’s.” “Administrative [t]heory [came] of age” in the 1930’s, concluded Arnold.

E. Excursus: Administrative Discretion and Administrative Law

The formalist model of public regulation enjoyed wide currency in political science circles. Freund, a law professor who had studied law in the Continent and subsequently earned a doctorate in political science in the United States, was the most persistent exponent of the model in American legal community. Following his mentor, the eminent political scientist Frank Goodnow, Freund’s mechanical understanding of the administrative apparatus was accompanied by a distinct view of administrative law and how it should be taught. Goodnow and Freund were widely regarded already in the 1920s as the American “pioneers” of administrative law. In this case, however, it appears that priority in time did not secure a particularly lasting legacy.

Goodnow and Freund argued around the turn of the twentieth century that administrative law scholarship should put the emphasis on a systematic study of the internal side in the operation of agencies (for instance, their organization and the arsenal of remedies at their disposal).
disposal) and on the substantive law they produce.\textsuperscript{128} To them, the study of administrative law should be distinguished from that of constitutional law.\textsuperscript{129} Freund thought that law students should get a taste of political science as part of their law-school training in order to better understand administrative apparatuses.

Some of the most prominent legal scholars of the time vigorously opposed to Freund’s suggestion.\textsuperscript{130} His most successful adversary was Felix Frankfurter, whose administrative-law syllabus actually did center on constitutional questions of separation and delegation of powers and on issues of judicial review.\textsuperscript{131} In hindsight, it seems that Frankfurter carried the day and set the course for the way administrative law is taught in law schools to this day.\textsuperscript{132} This side story is fascinating, but will not be pursued here.

\begin{quote}
\textsuperscript{128} See 1 FRANK J. GOODNOW, COMPARATIVE ADMINISTRATIVE LAW 6-18 (1893) [hereinafter GOODNOW, COMPARATIVE ADMINISTRATIVE LAW], and Ernest Freund, Book Review, 46 HARV. L. REV. 167 (1923) (a review of CASES AND OTHER MATERIALS ON ADMINISTRATIVE LAW (Felix Frankfurter and J. Forrester Davison eds., 1932)). A quick look at the content of the main publications of the two scholars would well indicate what their idea of administrative law was. See GOODNOW, PRINCIPLES OF ADMINISTRATIVE LAW, supra note 118, which includes such subjects as “Methods of Organizing the Executive Departments,” “Term and Tenure of the Heads of Departments,” “Rural Local Administration in the United States,” and “Qualifications for Office.” Freund’s comprehensive survey of the field is less concerned with issues of internal organization. He devotes a large portion of the discussion to classification of administrative powers, remedies, and substantive administrative law. See FREUND, ADMINISTRATIVE POWER, supra note 76, where Freund discusses, \textit{inter alia}, the legal framework for the exercise of administrative powers under a wide range of state and federal legislation (e.g., regulations in the areas of banking, insurance, labor, religion, morals, and the use of land).

\textsuperscript{129} See Freund, Law of Administration, supra note 68, at 403-405. See also Comment, supra note 125, at 755-763.

\textsuperscript{130} See Comment, supra note 125, at 763-770, and CHASE, supra note 61, 46-59. As these sources show, Dean Ames and professor Beale of Harvard Law School were especially critical of Freund’s proposals.


\textsuperscript{132} See CHASE, supra note 61, and WHITE, supra note 131. But see also Comment, supra note 125, for the argument that it was Freund’s view which ultimately prevailed. The author based his assessment on the elaborate commentary on the administrative process that had appeared by the early 1960s, when the Comment was published. On the present state of administrative law
\end{quote}
The point of this excursus was to reveal an interesting and unexpected theoretical implication of the debates about the appropriate scope of commissions’ discretion. Additionally, it throws light on an extremely significant dimension of public regulation which had been absent from the legal arena for most of the history of administrative law in the United States. The Freund-Frankfurter contest in itself indicates that the legal community felt at the time that there was a significant chasm lying between the legal and political science prisms on public organizations, and that it should not be bridged. As suggested, the decision by leading American law schools to turn a cold shoulder to political science, when administrative law was in the making, would prove detrimental to theories of regulation that would be formulated under their roofs. Future Chapters will substantiate this argument.

III. The President’s Committee

A. The Appointment of the Committee

Professor Charles Merriam, who had already in the early twenties “established himself as the most influential political scientist in the country,” founded the Social Science Research Council (SSRC) in 1924 while being the President of the American Political Science Association. He was later a member of the National Resources Planning Board—a body that was created (under a different name) in 1933—together with Frederick Delano, the President’s uncle who was a known city planner, and Wesley C. Mitchell, an economist and a former director of the Social Science Research Council.

It was during the Board’s meetings with President Roosevelt in 1935 that Merriam set forth the proposal to conduct a study of “Management in the Federal Government.” The proposal was further developed by a team headed by Louis Brownlow, who served at the

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133 See supra Chapter 1.
134 PURCELL, supra note 20, at 17.
135 For Merriam’s scholarship and professional career and on the field of political science in his time, see KARL, supra note 10, ch. 2.
time as the chairman of the Public Administration Committee of the SSRC.\textsuperscript{136} It was sent to Roosevelt in early 1936. A series of discussions with the President ensued before the President informed Congress of the establishment of the Committee on March 22, 1936. It would be known as the Brownlow Committee, as Brownlow was appointed its chair; Gulick\textsuperscript{137} and Merriam joined as members.\textsuperscript{138}

When Roosevelt introduced the Committee’s Report to Congress on January 12, 1937, alongside a reorganization bill, he said in a message written by Gulick:\textsuperscript{139}

> Over a year ago it seemed to me that this problem of administrative management of the executive branch of the Government should be a major order of business of this session of the Congress. Accordingly, after extended discussions and negotiations, I appointed a Committee on Administrative Management, to examine the whole problem broadly and to suggest to my guidance and your consideration a comprehensive and balanced program for dealing with the overhead organization and management of the executive branch as it is established in the Constitution.\textsuperscript{140}

The very establishment of this Committee, especially in light of the considerable enlargement of the federal government, was seen as a natural step at the time. Interestingly enough, the Senate created its own committee (chaired by Senator Harry Byrd) to study reorganization schemes for the federal government in February 1936, a short time prior to the official announcement of the formation of the President’s Committee.\textsuperscript{141} Byrd also approached Brownlow and Gulick, but they declined.\textsuperscript{142} With

\begin{flushright}
\textsuperscript{136} On Brownlow, see supra note 109.
\textsuperscript{137} Supra note 36.
\textsuperscript{138} See KARL, supra note 10, at 26-28, and ARNOLD, supra note 10, at 91-95.
\textsuperscript{139} RICHARD POLENBERG, REORGANIZING ROOSEVELT’S GOVERNMENT: THE CONTROVERSY OVER EXECUTIVE REORGANIZATION 1936-1939 43 (1966).
\textsuperscript{140} S. 2700, 75th Cong., 1st sess. (1937). It should be noted that according to the phraseology of this message, when Roosevelt formed the Committee he made it clear that it would not suggest constitutional amendments.
\textsuperscript{141} The Byrd Committee relied heavily on the Brookings Institution, which had conducted a special research on its behalf and submitted to Congress a report of its own in March 1937. Its conclusions contradicted with the President’s Committee Report on several issues, such as the independence of the Comptroller General (see infra note 191). More fundamentally controversial were Brookings’s rejection of the proposition that there was a single valid theory of reorganization (it advocated a pragmatic approach) and the issue of the proper balance between
the coming of age of administration theory, reorganization, it turns out, was in vogue, and the people who were interested in it had a clear idea who should advise them on such issues.\footnote{143}

\section*{B. The Committee’s Report}
\subsection*{1. Executing the Will of the Nation\footnote{144}}

The Committee’s Report has the effective title: \textit{Administrative Management in the Government of the United States}. Unlike Landis’ exposé,\footnote{145} the Report is surprisingly simple; in fact, at times, its analysis seems even simplistic. Its overarching presumptions and its operative recommendations are presented to the reader in dry, direct tone. The Committee’s goal is likewise flatly presented: “After the people’s judgment has been expressed in due form, after the representatives of the Nation have made the necessary laws, we intend that these decisions shall be promptly, effectively, and economically put into action.”\footnote{146} This is the challenge: to ensure that the people’s judgments are effectively executed.

\footnote{142}Needless to say, President Roosevelt and Senator Byrd did not commission organization studies for the same reasons. Arnold writes that for Byrd, advocating for a reorganization study was also “a way of hedging the President’s activity.” What can be characterized at best as Congress’s ambiguity regarding the Committee’s work would have its mark on future debates on its budget (\textsc{Arnold}, \textit{supra} note 10, at 98-99) and its recommendation. \textit{See also infra} text accompanying notes 198-206.

\footnote{143}\textit{See supra} note 34.

\footnote{144}\textit{See the Report, supra} note 2, at 3. \textit{Cf.} 2 \textsc{Goodnow}, \textsc{Comparative Administrative Law}, \textit{supra} note 128, at 106 ff. (“The Expression of the Will of the State”).

\footnote{145}\textsc{James M. Landis}, \textsc{The Administrative Process} (1938).

\footnote{146}The Report, \textit{supra} note 2, at 1.
During the 1930’s—with the worldwide rise of dictatorial regimes—democratic theory of government was not only challenged, it was besieged.\textsuperscript{147} Non-democratic regimes were conceived by many to be success stories exactly because of their efficiency. They seemed able to get positive results swiftly and invigorate their people, while America was unemployed and exhausted.

As so often noted, many thought that the mushrooming of administrative agencies in the United States was a part of the malevolent global trend of Executive aggrandizement. The Committee members were aware of these charges, and took part in their rejection. They held a different view.\textsuperscript{148} In rebuttal, the Committee turned the argument on its hand and asserted that only if the executive branch’s role in government became paramount would democracy persist and the admirable goals of “the constant raising of the level of happiness, [and] the steady sharing of the gains of our Nation”\textsuperscript{149} be achieved. “Strong executive leadership is essential to democratic government today,” it pronounces.\textsuperscript{150}

To support its arguments the Committee offers a highly formalistic reading of the Constitution, which holds that there should be only three branches of government, and only one “source” of execution—the President.\textsuperscript{151} In other words, the assertion is that the President is the Executive and must be the fulcrum of any legitimate executive act. The Committee’s analysis is short and straightforward, noting that the “Constitution of the United States sets up no administrative organization for the Government,” and

\begin{itemize}
  \item \textsuperscript{147} See PURCELL, supra note 20, especially at chs. 7 and 12, and WILLIAM EDWARD LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932-1944 (1963), chs. 9 and 12.
  \item \textsuperscript{148} See Charles E. Merriam, Planning Agencies in America, 29 AM. POL. SCI. REV. 197, 208-210 (1935) [hereinafter Merriam, Planning Agencies], where the author ominously warns, “the danger is that we drift from planning, not into a blissful heaven of politics and economics, to live forever with golden harps and only an occasional Lucifer, but to a point where force mounts the throne and writes a plan in blood and steel.” \textit{Id.} at 210. See also Merriam, The Assumptions of Democracy, supra note 114, at 346-349.
  \item \textsuperscript{149} The Report, supra note 2, at 1.
  \item \textsuperscript{150} \textit{Id.} at 47.
  \item \textsuperscript{151} For an elaborate legal (textual) argument for that effect, see Steven G. Calabresi and Saikrishna B. Prakash, The President’s Power to Execute the Laws, 104 YALE L.J. 541, 570-584 (1994). The writers conclude “that Congress ... may not create inferior entities that will be constitutionally empowered to exercise the executive power without the acquiescence of the President. Once created, these agencies ... must ... be subject to Presidential superintendence ... ” \textit{Id.} at 581.
\end{itemize}
pronouncing that the “constitutional principle of the separation of powers … places in the President, and in the President alone, the whole executive power of the Government of the United States.”\textsuperscript{152} To the Committee, any other reading of the constitution is to be rejected. The Committee’s recommendations are accordingly meant to amend one unintended, but fundamental, weakness of the American governmental system, namely, that “the President’s authority is not commensurate with his responsibility.”\textsuperscript{153}

The Committee’s discussion of the provisions of the Constitution never goes deeper than that.\textsuperscript{154} Throughout the Report, the Committee’s rhetoric betrays no signs of criticism of the constitutional structure (as interpreted by the Committee), and for good political and practical reasons: if the Constitution vests “in the President alone[] the whole executive power of the Government,” the conclusion that others should be excluded from exercising executorial powers seems inevitable. It follows then that (1) no constitutional amendments are required—just as Roosevelt had wanted\textsuperscript{155}—in order to allow the Executive to better undertake its duties, and (2) that the Committee’s work should focus almost exclusively on the Executive and merely tangentially address Congress.

2. Efficiency

At times it seems that the Committee members find their mission to be bringing the gospel of efficient management to the American public. It is a \textit{sine-qua-non} means to achieving the “supreme ends of our national life.”\textsuperscript{156} So much so that the Report opens and ends with the assertion of the absolute necessity of implementing the principles of efficient management: “Efficient management in a democracy is a factor of particular significance,” it is said at the beginning of the Report.\textsuperscript{157} When we get to its last paragraph, the rhetoric is even stronger: “The forward march of American democracy at

\textsuperscript{152} The Report, \textit{supra} note 2, at 29.
\textsuperscript{153} \textit{Id.} at 30.
\textsuperscript{154} Indeed, throughout the Report the Committee simply stipulates such constitutional “truisms”: \textit{see id.}, \textit{e.g.}, at 15, 21, 29, 36-37. As Henry points out, this formalistic reading is a direct corollary of the then-entrenched politics/administration dichotomy: Henry, \textit{supra} note 10, at 40-41.
\textsuperscript{155} \textit{See supra} note 140.
\textsuperscript{156} The Report, \textit{supra} note 2, at 46.
\textsuperscript{157} \textit{Id.} at 2.
this point in our history depends more upon effective management than upon any other single factor.”

The Committee is certain (just as Wilson was, to name a notable example) that “[t]he structure as it now stands is inefficient; it is a poor instrument for rendering public service; and it thwarts democratic control. … [This is] a fact of great importance in the modern world in which nothing can continue without good management, not even democracy.” Fortunately, however, the basic principles of effective management are simple. Reflecting the deep influence of Taylorism on their thinking, the Committee members mention the following three principles: “coordination, consolidation, and proper managerial control.”

A more concrete scheme is provided in the following lines—

these canons of efficiency require the establishment of a responsible and effective chief executive as the center of energy, direction, and administrative management; the systematic organization of all activities in the hands of a qualified personnel under the direction of the chief executive; and to aid him in this, the establishment of appropriate managerial and staff agencies. There must also be provision for planning, a complete fiscal system, and means for holding the Executive accountable for his program.

3. Accountability and Popular Control

Following the last point, the Committee projects that following the adoption of its program, “the accountability of the Executive Branch may be made sharp, distinct, and effective.” By underscoring the importance of accountability, the Committee illustrates how the principles of the science of administration are conducive to preservation of

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158 Id. at 47.
159 See supra text accompanying note 65.
161 Id. at 30.
162 Id. at 2. On the importance, and some history, of governmental planning, see Merriam, Planning Agencies, supra note 148, where the author mentions his own membership in the National Resources Board, created by Roosevelt in 1934. See also CHANDLER, supra note 44, at 276, for a description of the role Taylor ascribed to a planning department in factory management.
163 The Report, supra note 2, at 43.
democracy in the United States. For a review by Congress of the Executive to be effective, the report suggest a bargain to be struck between the two players: Congress would strictly adhere to its constitutional role as a legislative and supervisory organ, and the administration would take the necessary steps to reorganize itself, pursuant to the Committee’s recommendations, so that it would become more coherent and transparent, and thus more accessible to Congressional and other supervision.\textsuperscript{164}

The bargain between the Executive and Congress is premised on a strict scheme of division of labor among the different branches of government. The message to Congress is unequivocal: once it promulgates a binding law, it should back off, as the responsibility for its realization “is and should be solely upon the Executive.”\textsuperscript{165} Congress must not meddle with the details of processes of execution. The Committee optimistically anticipates that such a dynamic would guarantee “popular control … over basic questions of policy and direction.”\textsuperscript{166} This point is of great moment. It indicates the use made in the Report of the distinction between administration and policy. As Merriam explains in a 1938 article: “Participation in the making of decisions upon basic questions is one of the protections of the amateur against the professional, of the mass against the specialized class …”\textsuperscript{167}

4. Executive Integration

Louis Jaffe believed that the formalist model of regulation as it had been presented by Freund\textsuperscript{168} smacked of laissez faire ideology, and criticized him for that.\textsuperscript{169} True, anti-regulation sentiments have often been couched—most forcefully by conservative lawyers\textsuperscript{170}—in the terminology of the nondelegation doctrine, namely, the doctrine against transfer of legislative power by Congress, supposedly by way of delegation, to

\textsuperscript{164} The Committee asserts that Congress should realize that it, too, and not only the Executive, is infected with a damaging “diffusion and dispersion of activities.” \textit{Id.} at 43.
\textsuperscript{165} \textit{Id.} at 43.
\textsuperscript{166} Merriam, \textit{The Assumptions of Democracy}, supra note 114, at 344.
\textsuperscript{167} The Report, \textit{supra} note 2, at 346.
\textsuperscript{168} \textit{See supra} text accompanying note 76.
\textsuperscript{170} \textit{See supra} Chapter 3, Section III.B.2.
another body. Jaffe forgot to note, however, that Wilson had already presented a recipe that allowed for expansive federal regulation without reverting to broad grants of discretionary powers to administrative organs. The gist of Wilson’s theory was Executive—i.e., Presidential—integration, a principle readily associated with much maligned Executive aggrandizement; Wilson was much less enthusiastic about Legislature enhancement.

As if anticipating that it would turn into a term of opprobrium in later decades, Wilson defended the principle of Executive integration, which entailed the consolidation of executive powers in the seat of the President, in terms of democratic accountability—

Public attention should be directed, in each case of good and bad administration, to just the man deserving of praise or blame. There is no danger in power, if only it be not irresponsible. If it is divided, dealt out in shares to many, it is obscure; and if it is obscured, it made irresponsible.”

In other words, Executive integration, the argument goes, would remove any doubts regarding the question of political accountability for agencies’ (mis)conduct. It would concurrently allow the bearer of this political responsibility—namely, the President—to effectively assume his political duty and be fully accountable to Congress in these

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173 See supra text accompanying note 87.

174 Wilson, supra. note 63, at 213.
regards. This line of defense, as well as many other Wilsonian arguments, would be endorsed by the Committee.¹⁷⁵

Another consideration militating against a dispersed Executive should be mentioned in this context. Arguments were made that it was not uncommon for agencies to focus their attention on the details of their industry while losing sight of the broader picture. A more troubling ramification of this state of affairs was that often the public interest was left aside in the process. Only the President, chosen in general election, could obtain a national perspective, it was maintained. “The higher unit” in an organization, Murray Edelman observes, “because of its different (usually broader) jurisdiction, may be aware of interests not adequately considered by the solution proposed at the lower level.”¹⁷⁶

The principle of centralization pervades the Report, and is replicated at all levels of the bureaucracy.¹⁷⁷ The target is “centralizing the determination of administrative policy [so] that there is a clear line of conduct laid down for all officialdom to follow ... ”¹⁷⁸ The metaphor of a feudal kingdom, where each lord has his own court and his managerial organs (i.e., those dealing with such matters as planning, finance, and personnel), but all lords are subject to the king, comes to mind. Moreover, this metaphor is especially apt since two duties of the vassal/head of department to his lord were consilium and auxilium. Similarly, although the Committee asserts that “[f]or purposes of management, boards and commissions have turned out to be failures,” it goes on to argue, “[w]hen freed from the work of management, boards are ... extremely useful and necessary for consultation, discussion, and advice.”¹⁷⁹

¹⁷⁵ See supra text accompanying note 163.
¹⁷⁶ Murray Edelman, Governmental Organization and Public Policy, 12 PUB. ADMIN. REV. 276, 282 (1952). A more elaborate discussion of the issue is to be found infra Chapter 7, Section IV.B.
¹⁷⁸ The Report, supra note 2, at 30. Following this premise, the Committee does speak of the need in geographical decentralization in the actual carrying out of the orders of executive headquarters. “In this way,” the Committee says, “the Government will be brought nearer to the people themselves.” Id. at 30.
¹⁷⁹ Id. at 30.
According to the proposed scheme, if everything is put in place, the President will be left to deal only with duties that are worthy of magisterial treatment and be relieved of trifling matters that will be vested in the executive units. This scenario depicts a Chief Executive, who is in contact exclusively with the highest-ranking officials in his administration, and whose close conclave emits executive orders, letters of nominations, etc. The Committee also proposes the establishment of a designated agency (“a National Resources Board”) to collect and analyze data for the President’s use, and explicitly attempts to significantly decrease the number of entities reporting directly to the President. After all, “[j]ust as the hands can cover but a few keys on the piano, so there is for the management a limited span of control.” Under this vision, the President is like a pilot in the cockpit, whereas on other versions, it is the (independent) administrative commission.

5. Hierarchy: The President and the Expert

Already in the Report’s first chapter, where the “White House Staff” is discussed, ample evidence is provided for the fact that the Committee assigns a completely different role to the agencies than Landis, for instance, would. The Committee’s discussion on this subject is indicative. It encapsulates its general stance toward the fundamental question of the relationship between elected officials and the professional staff by their side.

“The President needs help,” exclaims the Committee. Therefore, the Committee suggests the President be given the power to nominate no more than six assistants. These aides, it is emphasized, “would have no power to make decisions or issue instructions in their own right.” They will assist the President in obtaining information, “in making his responsible decisions,” and in seeing that his instructions are transmitted to the

180 “Executive direction and control of national administration would be impossible without the use of this device [i.e., ‘Executive orders’]”—Id. at 18.
181 Id. at 25.
182 Id. at 29. See also id. Section V.
183 Id. at 31.
184 Cf. Chapter 6, Section III.C.
185 The Report, supra note 2, at 5.
186 Id. id.
relevant entity. These aides, who “would remain in the background,” “should be men in whom the President has personal confidence and whose character and attitude is such that they would not attempt to exercise power on their own account. They should be possessed of high competence,\textsuperscript{187} great physical vigor, and a passion for anonymity.”\textsuperscript{188}

Interestingly, one of the two volumes of Brownlow’s autobiography, published in the mid-1950s, was entitled \textit{A Passion for Anonymity}.\textsuperscript{189}

The Committee’s view of the administration is hierarchical, then. It presents two parallel dichotomies when the sub-presidential apparatus is canvassed: between policy-determining positions (which are also the \textit{managerial} posts) and administrative positions (which involve consultation and \textit{technical} assistance). Thus, the political ↔ administrative binary was translated in the debate into the managerial ↔ scientific/professional dichotomy. It is, in short, a division between the high and low and also between the many and the few: “The positions which are actually policy-determining … are relatively few in number.”\textsuperscript{190}

\textsuperscript{187} Indeed, the subservient role allotted to run-of-the-mill government administrator does not prevents the Committee from prescribing, “Democratic government today … requires personnel of the highest order—competent, highly trained, loyal, skilled in their duties by reason of long experience, and assured of continuity and freedom from disrupting influences of personal or political patronage. To meet this requirement the merit principle should be extended to all except the highest governmental positions.” \textit{Id.} at 7. \textit{See also supra} note 77, and \textit{cf.} \textit{WEBER, SOCIAL AND ECONOMIC ORGANIZATION}, \textit{supra} note 69, at 335 (“In the modern state, the only ‘offices’ for which no technical qualifications are required are those of ministers and presidents.”). For the history of nineteenth-century federal practice and theory of appointing officials, see \textit{NELSON}, \textit{supra} note 33, at 22-30, 119-125, and \textit{SKOWRONEK}, \textit{supra} note 97, at 47-84.

\textsuperscript{188} The Report, \textit{supra} note 2, at 5 (emphasis supplied). Initially the Committee proposed the institutionalization of a White House secretariat with specifically assigned duties. However, this was the only major recommendation Roosevelt rejected. Therefore, the Committee came up with the six-assistant scheme. \textit{ARNOLD, supra} note 10, at 103-104.

\textsuperscript{189} \textit{2 LOUIS BROWNLOW, THE AUTOBIOGRAPHY OF LOUIS BROWNLOW: A PASSION FOR ANONYMITY} (1958). This volume is dedicated to Brownlow’s public service. The first volume, where he speaks of his childhood and earlier career as a newspaper reporter, was named \textit{A Passion for Politics}. \textit{See 1 LOUIS BROWNLOW, THE AUTOBIOGRAPHY OF LOUIS BROWNLOW: A PASSION FOR POLITICS} (1955).

\textsuperscript{190} The Report, \textit{supra} note 2, at 8.
6. Independent Agencies

The Committee deals directly with administrative agencies at several points in the Report. And when it does so, the same argument that connotes efficiency with almost absolute presidential control over all levels of the Executive presents itself. From the Committee’s vantage point, agencies present a clear problem: “Without plan or intent, there has grown up a headless ‘fourth branch’ of the Government, responsible to no one, and impossible to coordinate with the general policies and work of the Government,” it famously thundered. “As they grow in number,” it went on “[the President’s] stature is bound to diminish. He will no longer be in reality the Executive, but one of many executives.” Yet, their abolition is not proposed. Deprived of independence they could become quite useful.

Following this line of argument, not only does the Committee recommend the arrangement of 12 major executive departments, which would form the American cabinet, but it also insists that the President should assign to these departments all the administrative agencies. This would be done as part of the President’s on-going responsibility to reorganize the administration when circumstances demand it.

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191 Id. at 30, 37 (emphasis in original). The Committee repeatedly refers to the independent agencies in those terms—see also id. at 29, 36, 46. At one point it also speaks of “the multitude of agencies now floating around.” id. at 42. Similarly, the Report mentions among the extant “defects” in the President’s “over-all control” of the government’s fiscal management “the vesting in the Office of the Comptroller General, which is not responsible to the President, of the settlement of claims, the final determination concerning the uses of appropriation, and the prescribing of administrative accounting system.” Id. at 15. The Committee’s discussion of this point brings into sharp relief the importance it attributes to a unitary governmental structure; see id. at 20-23; and cf. Bowsher v. Synar 478 U.S. 714 U.S. 714 (1986), where the constitutional position of the Comptroller General is reviewed by the Court.

192 See supra text accompanying note 179.

193 The Report, supra note 2, at 31-33. But see also id. at 36-38, where the need to ensure agencies’ neutrality when they perform judicial functions is recognized. The Committee does believe likewise that some agencies should be accorded “semi-autonomous” status within departments—id. at 35.

194 Congress has recognized the President’s responsibility in this field at war and in peace—see the War Power Act of 1941, which was enacted a few days after the Pearl Harbor attack, and the Reorganization Act of 1977, where Congress authorized President Carter to reorganize the federal administration by preparing a suitable plan that would be submitted to Congress for a “passive” (a legislative-veto) review. (The vehicle of legislative veto was declared unconstitutional in Immigration & Naturalization Service v. Chadha, 462 U.S. 919 [1983]). For Franklin D. Roosevelt’s reorganization authority, see infra Section III.C.
The concept of independent commissions was, and would be, anathema to other political scientists as well. Indeed, insisting on the merits of Executive integration, they failed to see “the practical necessity of preserving administrative autonomy” that supporters of commissions’ independence, here per Robert Cooper, were arguing for. Speaking of a series of key independent commissions, Albert Langeluttig opined in 1930,

the general grant of executive power carried with it the *sine qua non* of efficiency, the untrammeled control by the President of his subordinates, including the [ICC], the [FTC], the Federal Reserve Board, and the others. These agencies have too much executive power to be allowed a position of ultimate independent of the President. … [I]ndependent boards dealing with such vital national concerns as those above named should be in no position to stand out indefinitely against the President’s leadership toward what he conceives to be desirable.

This statement captures well a dominant current in the Report, written seven years later.

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197 Albert Langeluttig, “The Bearing of Myers v. United States upon the Independence of Federal Administrative Tribunals”—A Criticism,” 24 AM. POL. SCI. REV. 59, 65 (1930). It was also critically pointed out that the concept of agencies’ independence was associated with a practice of judicialized *modus operandi*, of which Marver Bernstein was highly critical. MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION (1955), e.g., at 29, 34, 29, 58. Bernstein insisted that this phenomenon, pervasive among commissions, led to some of the more debilitating consequences in the operation of agencies, such as passivity (which promotes public apathy), indefinite course of action, and the absence of long term perspective in its thinking. See id. at 179-182 and see also Carl I. Wheat, The Regulation of the Interstate Telephone Rates, 51 Harv. L. Rev. 846, 881-882 (1938).
C. The Report’s Impact

The Committee submitted its Report to the President in the beginning of 1937, that is, after the November elections to the White House. We know that Roosevelt approved the final draft of the Report prior to its release and that it received very wide distribution. The President asked the Committee to have its recommendations put into a draft bill. Accordingly, when he presented the Report and a reorganization bill to Congress, Roosevelt informed it that he had “endorse[d]” the Committee’s program. Roosevelt went on to say, “No important advance can be made toward the major objectives of the program without the passage by Congress of the necessary legislation.” One might expect that this President, just re-elected in a landslide victory, would get what he wanted from an overwhelmingly Democrat Congress in no time. Surprising as it may sound, this did not happen.

What ensued was a bitter skirmish between Congress and the President over the implementation of the Committee’s plan. This was mainly a result of growing fears that Roosevelt had a mania for power, as—his opponents (some Democrats included) felt—was vividly manifested in Roosevelt “Court-packing” plan, that had brought havoc to his camp. As a result, much to the chagrin of the members of the Committee, its proposals were debated in a particularly acrimonious environment. As Brownlow saw it, “The Reorganization bill was merely a pawn” in the “campaign” against Roosevelt. And Leuchtenburg report that “[t]he unreasoning suspicion of President Roosevelt reached a point of near hysteria in the debate over the reorganization bill in 1938.”

Having suffered defeat in 1938, the President introduced an “extremely mild” bill in 1939. This one, at last, went through. The Reorganization Act of 1939 “delivered to the

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198 ARNOLD, supra note 10, at 104, 107, 117. See also supra note 188.
199 Supra note 140.
200 LEUCHTENBURG, supra note 147, ch. 8.
201 See generally POLENBERG, supra note 139.
202 LEUCHTENBURG, supra note, at 231-238.
203 POLENBERG, supra note 139, at 181 (quoting a letter Brownlow sent the President on April 11, 1938).
204 LEUCHTENBURG, supra note 147, at 277. See also ARNOLD, supra note 10, at 107-117.
205 POLENBERG, supra note 139, at 184.
President the bare bones” of his reorganization bill of 1937.\textsuperscript{206} Indeed, from Roosevelt’s perspective, it was far from being a perfect law, but it did grant reorganization authority to the President for a two-year period (subject to qualifications) and it allowed him to employ six assistants. Roosevelt swiftly moved to make use of the reorganization power bestowed on him and created the Executive Office of the President.\textsuperscript{207}

This was not the end for the Committee’s recommendations. Some recommendations had a more delayed effect. For instance, the Ramspeck Act of 1940 brought about 95 per cent of the civil service under the jurisdiction of the Civil Service Commission with 85 per cent career positions, thus solidifying the stature of professional officials.\textsuperscript{208} Furthermore, later decades saw the realization of some other key proposals of the Report. A notable example is the transformation underwent by the Office of Management and Budget (OMB) with President Reagan’s Executive Orders 12,291 and 12,498, which made it into a general managing agency of sorts within the Executive.\textsuperscript{209}

IV. Conclusion

A. Two Groups of scholars

The President’s Committee did not come from nowhere. It was a product of an orthodoxy its members had had a hand in formulating. This orthodoxy, described in the first part of this chapter, was authored alongside some of the canons of pro- and anti-regulation lawyers, discussed in the previous chapter. The three groups had very different views regarding the role of the President, the executive officer, in enforcing congressional legislation. Administrationists advocated a centrifugal Executive, conservative lawyers

\textsuperscript{206} ARNOLD, supra note 10, at 114.

\textsuperscript{207} Id. id.

\textsuperscript{208} Van Riper, supra note 10, at 19. For the Committee’s view on the matter, see supra note 187. The Civil Service Commission was first created in 1871, ceased to exist in 1875, and resurrected in 1883. Id. at 13-16.

dreaded the idea, and reform-minded lawyers called for a centripetal administrative apparatus.

Thus, the Committee, for example, spoke of the President as the “center of energy.” After Einstein, Energy is a buzzword for gravitational force (as illustrated in the-most-famous-of-all formulas, $E=mc^2$). The President is so powerful that, like a black hole, he absorbs all light around him. Therefore, it is only natural that, as the Committee put it, his aides, distinguished by their “passion for anonymity,” “would remain in the background,” that is, they would stay in the dark. In endorsing this approach, the Committee found itself uncomfortably tucked between the two groups of lawyers. By advocating Executive enhancement it alienated the conservatives, but it could not satisfy the reformers either.

Conservative lawyers in particular saw centralization as a menace to democracy. The multiplicity of agencies, lamented in 1936 Louis Caldwell, a former Chairman of the Bar’s Special Committee on Administrative Law, led to “the ever-increasing centralization in Washington.” In the face of Roosevelt’s “imperialistic” presidency they were strongly opposed to so-called Executive aggrandizement. Lawyers that they were, they sought refuge in courts. Under this approach it was the task of courts to attend to the general, national interest. According to Louis Schwartz, “[J]udges rather than commissioners should shape the outlines of our national economy policy, where Congress has not stated its will.” This statement leaves one to wonder what role was envisioned for the CEO of the federal government under this scheme. Rejecting the approach of both conservative and progressive lawyers, administrationists conversely held that nothing—certainly not independent commissions—should stand in the way of the Chief Executive Officer in efficiently carrying out “the will of the Nation.”

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  \item \textit{Supra} text accompanying note 162.
  \item Louis G. Caldwell, \textit{A Federal Administrative Court}, 84 U. PA. L. REV. 966, 971 (1936).
  \item We have seen ample examples of that. \textit{See supra} Chapter 3, Section III.B.1.
  \item Louis Schwartz, \textit{Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility}, 67 HARV. L. REV. 436, 473 (1954). Wading into the anti-trust-regulation debate, another scholar reasoned in 1951 that “the court … has the responsibility for enforcing the basic economic law of the Sherman Act. This is especially true since agency outlook may tend to parochialism.” \textit{Note, Judicial Application of Antitrust Law to Regulated Industries}, 64 HARV. L. REV. 1154, 1158 (1951).
  \item \textit{See supra} note 144.
\end{itemize}
The fact that in this respect, students of administration took an altogether different view of the administrative process than both groups of lawyers is significant. In making this point, I do not suggest that the first perspective is “better” or “truer” than the latter, but only that both perspectives, standing alone, miss part of the picture. As this dissertation focuses on the lawyers’ side of the equation, in the following chapters I will demonstrate what the price pro-regulation lawyers in particular paid for their myopia.

To be sure, conventional organization theorists were afflicted with their own myopia. Members of the Committee felt assured in rejecting lawyers’ perspectives, as they regarded themselves as scientists. Duly representing their trade, the three members were certain that their object of study was amenable to scientific observation and were faithful to classical traits of their science, notably, to the division between politics and administration. Later generations would attack this dichotomy as well as two others pillars of the science; the notion of immutable scientific principles of administration and the priority granted to efficiency. The Committee seemed impervious to these concerns. It defined and adhered to the traditional principles of the field. In hindsight, one scholar remarks that the Report “was the last recommendation that the executive branch be organized along purist classical lines.”

Formulating authoritatively the orthodoxy in its field was the Committee’s great achievement. James Landis, it turns out, was not the only scholar who had made a significant, lasting theoretical contribution to the theory of the administrative process in the midst of the New Deal. Jaffe was wrong, then, in pronouncing in the mid-1960s, “Landis spoke for all of us who had been deeply committed to the New Deal and who had been intimately associated with the administrative process.” This Chapter introduces one other group of just as devoted New Dealers who had a very different idea of the administrative process.

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215 See Friedman, supra note 90, at 262.
216 See, e.g., KARL, supra note 10, at 65.
217 See supra note 118 and text accompanying note 115. See generally infra Chapter 7.
218 Van Riper, supra note 10, at 15.
B. Two Visions of Expertise

A separation between two visions of administrative expertise permeates the Report, following the classical literature on business and public administrations. It is a division between an anonymous workman/bureaucrat and management or the head of the bureaucracy—“the man deserving of praise or blame,” in Wilson’s phrase. The lower stratum is depicted as possessing a technical competence; it is certainly not fit to exercise discretion that goes beyond the technicalities of its profession—nor, it is submitted, should it trespass its narrowly tailored bailiwick. This is not to say that under this vision there are no gradations within the work force. Hierarchy is after all one of the key features of Weberian rational administration. The crux of the matter, however, is that a clear line is drawn between two castes of office holders, the Brahmins and the pen-pushers. Stratified as it may be, the sub-managerial caste is not to cross that line. What Brahmins can do pen pushers cannot. One is the mirror image of the other.

Thus, in strict opposition to the technicians in the organization, the higher caste is the very apex of the pyramid. It is the brain of the administration. Those occupying the highest echelons are the “directing mind,” the “moving spirit” of the organization. Their jurisdiction is boundless. Indeed, they are deemed competent to regulate the whole wide world.

220 Supra note 174.
221 See supra note 75.
222 2 Weber, Economy and Society, supra note 69, at 1403.
223 Elton Mayo exclaimed in 1933, “The world over we are greatly in need of an administrative élite who can assess and handle the concrete difficulties of human collaboration.” Mayo, supra note 48, at 177.
CHAPTER 5. ADAMS, SPENCER, AND THE RAILROAD PROBLEM

Progress ... is not an accident, but
a necessity.
Herbert Spencer

I. Introduction

A. The Arguments

This chapter explores the work of Charles Francis Adams, Jr., the Bostonian aristocrat who devoted his life to the study of the railroad industry at a time when its development was in full swing and the revolution that would follow on its heels loomed large. He was born in 1835 and died in 1915. Adams is remembered as the father of a distinct model of regulation. It was a model of “weak” regulation to be carried out by investigatory, “sunshine” commissions. Introducing it to the American polity was his great contribution to the practice and theory of regulation in the United States. The model was a success in turn-of-the-century America. It was put into use not only in Adams’ home state but also in many other states across the Union. As we shall see, the sunshine model is an as-close-as-it-gets approximation of the judge paradigm.

The chapter will thrash out the model’s details. I will argue that in order to make sense of it, one has to heed well the lively intellectual environment in Adams’ Boston during the

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1 HERBERT SPENCER, SOCIAL STATICSTOGETHER WITH MAN VERSUS THE STATE 32 (1892) (1950) [hereinafter SPENCER, SOCIAL STATICS].
2 See supra Chapter 2, Sections I.A. & I.C.
4 As noted in Chapter 2, by 1887, the year in which the ICC was established, it was adopted by Colorado, Connecticut, Iowa, Kentucky, Maine, Massachusetts, Michigan, Nebraska, New York, Ohio, Rhode Island, Vermont, Virginia, Wisconsin, and the territory of Dakota. ROBERT E. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSION 25 (1941).
second half of the nineteenth century. These were the years when America was enthralled with theories of evolution and their prophets. First among them was Herbert Spencer, who was a major intellectual force in the United States at the time. I will demonstrate the many ways in which Adams’ views on state regulation followed the essentials of Spencer’s system of thought, which will be briefly canvassed in the course of the discussion. I will show how useful and enlightening it is to read Adams through the lens of Spencerism, without, to be sure, losing sight of Adams’ biography as well as the socio-economic upheaval in soon-to-be-fully-industrialized America, as well.

In the last part of the chapter I will illustrate that Adams was really less convinced that a weak regulation would do in an age of industrialization than previous commentators believed. It appears that, at bottom, Adams, not unlike many others, was at sea as to what should be done in the face a phenomenal rise of railroads, America’s first big business. Adams, it will be argued, was willing at some point to relinquish the model of regulation most identified with him for a more robust approach to state regulation—something more in the vicinity of the public general manager paradigm. And so, if I am successful, at the end of the road a complex, less assured, and even perplexed Adams will reveal himself. Indeed, how could he not have been puzzled when the “old New England” gave way—right in front of his very eyes—to something alarmingly new?

B. The Aristocrat Reformer

Adams was an American aristocrat, being the grandson of John Quincy Adams, the sixth President of the United States, whose own father, John Adams, was the second President of the Union. Charles was a prolific, gifted writer and a keen student of the history of

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6 See Richard Hofstadter, Social Darwinism in American Thought (1955). As demonstrated by Hofstadter, traces of evolutionary thinking were everywhere to be found in the American academia. For an example particularly relevant to our discussion, see Woodrow Wilson, The Study of Administration, 2 Pol. Sci. Q. 197 (1887).

7 See infra note 60 and text accompanying notes 75-76.

North America, its industrialization, and, most important for our purposes, its railroad industry. A son of Massachusetts, he was a true partiote local and wrote lengthy essays outlining ways to bolster Boston’s precarious position in the national market through a reform in its transportation system. Adams emerged to the public scene first as a muckraker, having published a series of articles analyzing the evils inflicted both on the public at large and on railroad lines due to unbridled dishonest management and pressures of savage competition, so common in the industry. Adams’ A Chapter of Erie in particular was and still is considered a masterpiece. It is an acid, meticulous description of devious and degrading turf war among railroad “Titans” over the Erie Railroad (the provider of a thoroughfare between New York City and the Great Lakes) as well as their profiteering style of management. Adams tarred and feathered the modus bellum, if you will, of by-then household names, such as Cornelius Vanderbilt, the proprietor of the New York Central, and his rivals in the competition, Daniel Drew, James Fisk, and Jay Gould, all “adventurers … without character and without credit, who possess themselves of an artery of commerce more important than was ever the Appian Way.” He opened the story by dramatically exclaiming, “No better illustration of the fantastic disguises which the worst and most familiar evils of history assume as they meet us in the actual movement of our own day could be afforded than was seen in the events attending what was known as the Erie wars of 1868.” The Erie wars vividly demonstrated to what lengths big corporate owners would go to in order to outdo their competitors, and how enthusiastically political figures would be drawn into the battle scene. Put in this context, Adams’ alarming conclusion

10 On the muckrakers, see supra Chapter 2, Section I.B.
11 Charles Francis Adams, A Chapter of Erie, in CHARLES F. ADAMS, JR., AND HENRY ADAMS, CHAPTERS OF ERIE AND OTHER ESSAYS 1, 22 (1871) (1869) [hereinafter Adams, A Chapter of Erie].
12 Id. at 3.
13 Id. at 2-3.
that the corporate system revealed in the report “threatens the central government.” might have very well seemed warranted.\textsuperscript{14}

Swimming against the stream, the remedy Adams proposed was not, however, to trust-bust the railroads. Convinced that “[c]ombinations of capital and labor which amount to monopolies can alone satisfy the present enormous requirements of modern society,”\textsuperscript{15} he went for a different route. Adams advocated the introduction of weak regulation to be carried out by state commissions, which would serve only as advisory bodies. Adams succeeded in his effort and was the founding father and consequently the Chairman of the Massachusetts Board of Railroads Commissioners, which was created in 1869 by an act authored by Adams himself. As he saw it, the Board’s sole purpose was to enlighten the public and inform it of unpalatable consequences of rapid industrialization and omnipresent combinations.\textsuperscript{16} This model of regulation gained national recognition.\textsuperscript{17} Adams, it became obvious, had devised a “national prototype” of regulation.\textsuperscript{18}

\section*{II. The Adams System}

\subsection*{A. The Crusade}

In his work, Adams, just like Spencer, lays the first principles, or natural laws, of the transportation revolution (“A community must go back to first principles,” he writes of Boston\textsuperscript{19}); principles that explain the past and hold the future.\textsuperscript{20} Adams’ work, as he

\begin{itemize}
\item \textsuperscript{14} \textit{Id.} at 96.
\item \textsuperscript{15} Adams, \textit{The Railroad System, supra} note 8, at 502. \textit{Cf.} Justice Holmes’ history-making dissenting opinion, written thirty years after Adams’ \textit{Chapter} while Holmes was still a member of the Supreme Judicial Court of Massachusetts, in Vegelahn v. Gunther, 167 Mass. 92 (1896), where he noted, “[I]t is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination … Whether beneficial on the whole, \textit{as I think it}, or detrimental, it is inevitable, unless the fundamental axioms of society, and even the fundamental conditions of life, are to be changes.” (emphasis added)
\item \textsuperscript{16} CHARLES FRANCIS ADAMS, RAILROADS: THEIR ORIGIN AND PROBLEMS 140 (1878) [hereinafter ADAMS, RAILROADS: THEIR ORIGIN AND PROBLEMS]. (The Board’s “decision carried no weight other than that derived from the reason given for them.”).
\item \textsuperscript{17} \textit{Supra} note 4.
\item \textsuperscript{18} MCCRAW, \textit{supra} note 3, at 57.
\item \textsuperscript{19} Adams, \textit{Boston I, supra} note 9, at 25.
\end{itemize}
himself sees it, is the work of a scientist. For example, in one of many articles in which he argues for the inapplicability of the laws of competition to the railway system, he claims to have established an “axiom in railway economics,” referring to the phenomenon of economies of scale.\textsuperscript{21} As we shall see, according to Adams, railroad commissioners must also walk in path of the prototypical scientist (as he conceived it).

Adams’ survey of the railroad system of his days begins with the understanding that railroads had played havoc with the “old New England.” “The revolutions of these few years,” he wrote in 1867 of the previous twenty years, “have swept away the last vestiges of colonial thoughts and persons.”\textsuperscript{22} As much as Adams’ style was hyperbolic at times, his analysis was often truly prescient. He relentlessly hammered into his readers’ minds the profound, irreversible influence steam transportation had and would surely have on their lives. Seismic changes, he argued, would be felt not only in backwoods around the world, with the exploration of uncharted territories, but also here at home, in the metropolis. As previously remote localities drew close with the coming of railways, a one-directional movement was certain to evolve; a movement that would sweep food and commodities, men and nations, ideas and artifacts: “The tendency of steam has universally been towards the gravitation to the center,—toward combination and concentration of forces, whether intellectual or physical.”\textsuperscript{23} It has already “nationalized people and cosmopolized nations.”\textsuperscript{24}

To be sure, there would be a dark side to the pull of human centralization propelled by railroads. To Adams, it was responsible for moral corrosion and erosion of long-held

\begin{itemize}
\item \textit{Cf.} \textit{See} HERBERT SPENCER, FIRST PRINCIPLES 281 (De Witt ed., 1958) [hereinafter SPENCER, FIRST PRINCIPLES] (“… knowledge has obviously not reached its limits until it has united the past, present and future histories into a whole.”).
\item \textsuperscript{21} Charles Francis Adams, Railway Commissions, 2 J. SOC. SCI. 233, 234 (1870) [hereinafter Adams, Railway Commissions]. (“Trade and commerce obey a law of gravitation of their own, just as much as water. In obedience to its law, water will always run down hill; and so trade, in obedience to laws which patient study will discover, will always flow down the steepest decline; and by the steepest decline is meant through the most convenient and cheapest outlet and inlet.”).
\item \textsuperscript{22} On economies of scale, see infra note 76.
\item \textsuperscript{23} Id. at 484. \textit{See also} id. at 489 (“Thought draws to intellectual centres as trade draws to commercial centres, and all are railroads centres.”).
\item \textsuperscript{24} Id. at 484.
\end{itemize}
political principles. In one of the most elitist parts of his writing, Adams proclaimed that the increase in trade results in “those portentous accumulations of the evil humors of society which men call railroad centres,” and warned that “[a]lready [steam] has accumulated a populace in the city of New York, in whose hands the principle of self-government has become a confessed failure.”

Reading Adams instantly reveals that in his eyes he was engaged in a missionary cause. Adams the muckraker was sorrowed and driven to action by “the deep decay which has eaten into our social edifice.” It is for this reason that he did not put much stock on legislative remedies offered in vacuo, that is to say, on measures not backed by a committed public. Adams various publications were set to bring about public awakening. A credible exposure of the far-ranging repercussions of, and interests involved in, the spread of railways around the globe constituted the first stop on his mission: before any form of action could have been taken with regard the railroad problem, “the first preliminary is to induce the community to realize the true magnitude of the question involved.” But that was not enough. A more trying task was to make the public realize that “[i]t must disabuse itself of many fixed ideas, and first among them is … the idea that the railroad system is nothing more than a dividend-realizing monopoly

25 Id. at 490 and 492. It seems certain that Jane Addams’ acerbic criticism of the elitist mien of many Progressives was directed at rhetoric such as this. See infra Chapter 7, Section II.B., and JANE ADDAMS, DEMOCRACY AND SOCIAL ETHICS (1915).
26 Adams, A Chapter of Erie, supra note 11, at 94.
27 “It is well to reform the currency, it is well to enact laws against malefactors; but neither the one nor the other will restore health to a business community which tolerates successful fraud, or which honors wealth more than honesty.” Id. at 95. Rather, “[t]he only remedy lies in a renovated public opinion; but no indication of this has as yet been elicited” Id. at 98. Interestingly enough, only a year later he would say that “now, at last, the community is awakening to a consciousness of the fact that … its best interests [have been] jeopardized.” Adams, Railway Commissions, supra note 21, at 235. Cf. HERBERT SPENCER, 2 THE PRINCIPLES OF SOCIOLOGY 661 (1900) (1892) [hereinafter SPENCER, THE PRINCIPLES OF SOCIOLOGY] (“… political institutions cannot be effectually modified faster than the characters of citizens are modified; and … if greater modifications are by any accident produced, the excess of change is sure to be undone by some counter-change.”).
28 Adams, The Railroad System, supra note 8, at 480.
of certain joint-stock companies.” Rather, as he labored at showing, railroads “are, in fact, trusts held by individuals for public uses.”

Overall, these remarks should be seen, it seems to me, as an appeal to the public to come to terms with the true nature of the centripetal forces of modernity as well as the true nature of the prototypical agents of these forces, the railroads. Under this frame of thought, combinations among railroads (and other industries) were only to be expected. Adams asserted from the beginning that “[c]ombinations of capital and labor which amount to monopolies can alone satisfy the present enormous requirements of modern society.” Bleak as this prediction was—“giant corporations are far more likely to combine to rob the community,” he also wrote—it rested on a deep belief that now “[e]verything is done on a grand scale and by intricate machinery, so that competition, theoretically free, is practically impossible.”

This rule, he emphasized, applied all the more to the railroad industry. Adams was the great commentator on the effects of economies of scale on the railroad business. He succinctly observed in 1870 that “competition and the cheapest possible transformation are wholly incompatible.” This being the case, he wrote eight years later, it was

29 Id. at 480.
30 Adams, Railway Commissions, supra note 21, at 234. It was well established in the common law already in the early nineteenth century that “common carriers” were normally obliged, unlike most other businesses, to serve pretty much every client that knocked at their door. Certain restriction were obviously drawn. See ICC v. Baltimore Ohio R. Co, 145 U.S. 263, 275 (1892) (“Prior to the enactment of the [ICC Act of 1887] … railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable.” (Brown J., for the Court)). See also JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENT WITH ILLUSTRATIONS FROM CIVIL AND FOREIGN LAW 533 (5th ed., 1851). (“One of the duties of common carriers is to receive and carry all goods offered for transportation by any person whatsoever upon receiving a suitable hire. This is the result of his public employment as a carrier …”).
32 Id. id.
33 Id. id. See supra note 15. Cf. infra text accompanying note 79.
34 McCRAW, supra note 3, at 9. See also id. at 68-74, for a helpful explanation of key terms of modern economics pertaining to the analysis of trusts. “Scale economies,” one of the terms, rests on the understanding that in some cases “the larger the operation, the greater the productive efficiency.” (Id. at 70).
35 Adams, Railway Commissions, supra note 21, at 234 (emphasis in original).
erroneous to accept “as an axiom[] that in all matters of trade, competition, if allowed perfectly free play, could be relied upon to protect the community from abuses.”  

36 As a matter of fact, “while the result of other and ordinary competition was to reduce and equalize prices, that of railroad competition was to produce local inequalities and to arbitrarily raise or depress prices.” 37 “This is,” Adams made known through his copious writings, “the Railroad Problem.” 38

B. Weak Regulation

What, then, was to be done? Having practically ruled out the option of state ownership of railroads, 39 Adams put forward the proposition that the state should harbor and legalize railroads’ associations: “A confederation, or even a general combination among all railroad corporations having some degree of binding force, might, therefore, … not improbably prove the first step in the direction of a better and more stable order of things.” This should be done, he went on to assert, under three conditions: “it must be legal; it must be public; it must be responsible.” 40 And he made clear that the government should stay as much as possible out of the dealings of such confederations. “The confederation,” he contended, “would be a responsible one, with power to enforce its own decisions upon its own members.” 41

In accordance with this approach, Adams was quite consistently going only so far as calling for the creation “in the various States[] of bureaus of railroad statistics,” which “should be permanent” and work “under the superintendence of competent commissioners.” 42 This proposition most probably seemed reasonable to his contemporaries as it coincided with the coming of age of statistics in Europe and the

37 Id. at 119.
38 Id. at 81.
39 See supra Chapter 2, Section II.A.
41 Id. at 200.
42 Adams, The Railroad System, supra note 8, at 497. Later Adams would call for the establishment of a “National Bureau.” See infra note and text accompanying note 89.
United States.\textsuperscript{43} These bureaus, Adams further clarified, would “collect information from all civilized countries,” as well from railroad corporations.\textsuperscript{44}

Embryonic as this timid measure was, it did contain the core of the theory of regulation Adams was most associated with. First, it was based on the realization that the democratic machinery as it then stood was ill-equipped to tackle the immense challenges of industrialization. “At present” he would write in 1871, “our government occupies the impossible position of a wooden liner exposed to the fire of modern artillery.”\textsuperscript{45} The introduction of a new state organ, the sunshine commission, to the governmental landscape was therefore of the utmost importance. In 1868, when the Massachusetts Board was incubated, Adams would pronounce, accordingly, the dawn of “a new phase of representative government.”\textsuperscript{46}

Second, the proposal captured Adams’ fervent confidence in the absolute necessity of an orderly collection of objective information as a preliminary to a beneficial (state) regulation. To him, information was key to success: “When such a bureau exists, and not till then, may some intelligent railroad legislation be hoped for,” is the way he put it. “Until that time comes, the most important material interests of the community are in perpetual dangers of experimental legislative tinkering.”\textsuperscript{47} And third, regulation conducted by bureaus of statistics could not be anything but weak regulation, whose motto would be captured in Abraham Lincoln’s dictum of 1864, “Let the people know the facts, and the country will be safe.” Adams demanded nothing further.

Finally, Adams insisted that the Massachusetts Board members would be left “[w]ithout remedial or coercive powers”\textsuperscript{48} for yet another reason. He thought it would create the condition necessary for them to command the confidence of all sides to a controversy, railroads, of course, included. Adams, who would call for the legalization of “regulated

\textsuperscript{43} See MENAND, supra note 5, at 177-195.
\textsuperscript{44} Adams, The Railroad System, supra note 8, at 497.
\textsuperscript{46} Charles Francis Adams, Boston I, supra note 9, at 19.
\textsuperscript{47} Adams, The Railroad System, supra note 8, at 498 n.
\textsuperscript{48} ADAMS, RAILROADS: THEIR ORIGIN AND PROBLEMS, supra note 16, at 143.
Adams, Spencer, and the Railroad Problem

combination,“ took pride in fact that “the railroad corporations have never appeared in opposition to [the Board] as a body.” This was not surprising given the fact that by the account of Chairman Adams, he and his colleagues were “under the necessity of cultivating friendly relations with the railroad officials.”

Having canvassed the essentials of his approach to regulation, I wish to offer a particular interpretation of key elements in the extensive body of literature produced by Adams. As noted, I propose we read it through the lens of the theory of evolution encapsulated in the work of Herbert Spencer. The suggestion made here is not that Spencer, and Spencer alone, could account for all the details in the Adams theory, nor that Adams’ approach to regulation incorporated every detail of Spencerism. Rather, Spencerism is brought forward as a useful and instructive frame of thought, which was in vogue in the late nineteenth century, in light of which it made sense to recommend arming the powers that be with an unassuming sunshine commission. Most important, the proposed reading would enable us to better grasp what model (or models) of expertise underlay Adams’ thinking. Whatever his “actual” sway on Adams might have been, the reference made to Spencer thickens, by contextualizing further, our analysis as it pays tributes to the scholarly bon ton of the second half of the nineteenth century.

A good place to start the analysis is by calling attention to Adams’ belief in the power of social concentration and the virtues of the Enlightenment. These two themes and the use they were put into reverberate into his thinking throughout. While the Enlightenment is an all too familiar term, in the next paragraphs I will dwell on the theme of social concentration.

49 See supra Chapter 2, Section I.C.
51 ADAMS, RAILROADS: THEIR ORIGIN AND PROBLEMS, supra note 16, at 140.
52 As Immanuel Kant authoritatively defined the Enlightenment and Michel Foucault was one of its greatest critics, it is appropriate to refer to Immanuel Kant, What is Enlightenment?, in IMMANUEL KANT, ON HISTORY 3 (Lewis White Beck trans. and ed., 1963) (the piece was originally published in 1784), and Michel Foucault, What is Enlightenment?, in THE FOUCALTE READER 32 (Catherine Porter trans., Paul Rabinow ed., 1984).
III. Toward Concentration

A. Adams and the Laws of Nature

In one of his appeals to his fellow Bostonians, Adams explained why a commission would be more suitable an investigator of the railroad problem than any individual. “Wielding all the influence of a community, having every source of information thrown open to them, such officials [i.e., commission members] become the recipients of light from all quarters, and can, if they be competent, concentrate the scattered rays into a powerful focus.”\(^\text{53}\) In a democracy, however, this was easier said than done: “To establish such a system amid the ebbs and floods of a democratic form of government is not easy. … The difficulty lies at the foundation of American polity; it is the difficulty of concentrating as one force all possible forms of mind and phases of interest.”\(^\text{54}\)

Illustrative is the fact that in an article published more than a decade before *Railroads: Their Origin and Problems* went to press in 1878, Adams, speaking of the movement of centralization in the newspaper business, wrote, “The newspaper press is the engine of modern education; and that press, obeying the laws of gravitation, is everywhere centralized,—the rays of light once scattered are concentrated into one all-powerful focus.”\(^\text{55}\) It seems, then, that Adams reverted to the idea of concentration (and focus) to convey an image of regulation as a confluence of forces dedicated to one goal; it was a conception of regulation as a prism through which a concentrated communal activity can be made effective. Hence, in *Railroads* Adams had this to say of his Massachusetts Board of Railroads Commissioners, “The board of commissioners was set up as a sort of lenses by means of which the otherwise scattered rays of public opinion could be concentrated to a focus and brought to bear upon a given point.”\(^\text{56}\)

Thus viewed, regulation was conceived of as a natural part of the modern movement of “gravitation of the parts to the centre,—toward the combination and concentration of

\(^{53}\) Adams, *Boston II*, supra note 9, at 558.

\(^{54}\) Adams, *Boston I*, supra note 9, at 15.

\(^{55}\) Adams, *The Railroad System*, supra note 8, at 489. Reading this description, the analogy to black holes, from which even light cannot escape, comes to mind.

forces…“57 Just as railroads were drawn to combinations, so, on the other side, regulatory boards would concentrate public “forces.” In that sense regulation was portrayed as a modern phenomenon. The analogy made between public regulation and journalism indicated the remedy proposed by Adams to the railroad problem—i.e., publicity. So did the recurring image of gravitation.58 The process, it was emphasized, was inevitable. “We must follow out the era on which we have entered to its logical and ultimate conclusion, for it was useless for men to stand in the way of the steam-engines.” “No human power,” he concluded, “can stop it.”59

This sense of determinism, in fact the whole analysis, was plainly based on a blunt deferral to the directives of nature, as interpreted by Adams. As suggested, this interpretation has striking affinities to the work of Spencer. It is difficult not to detect the footprints of Spencer’s teachings or, at least, of some rendition of American Social Darwinism,60 in various parts of Adams’ writings, especially when the all-encompassing movement of concentration (or gravitation) is specified. This analysis undeniably mirrors the basics of Spencer’s First Principles, published in 1862, to name one of his substantial

57 Supra note 23.
58 There is one problem with the usage the concept of gravity in the context of a regulatory board. For, in the case of the Boston Board, if we follow Adams’ analysis, the pull of gravitation is exerted by those who are concurrently expected to be pulled themselves, namely, the members of the community.
59 Adams, The Railroad System, supra note 8, at 495.
60 See generally Hofstadter, supra note 6. Social Darwinism applies to any theory that draws on ideas of evolution and natural selection, or comparable terms, in the explanation of social phenomena. So viewed, Spencer was undoubtedly a major figure in Social Darwinism thinking. See, e.g., 1 HERBERT SPENCER, PRINCIPLES OF BIOLOGY 444 (1864) [hereinafter SPENCER, PRINCIPLES OF BIOLOGY] (“This survival of the fittest, which I have here sought to express in mechanical terms, is that which Mr. Darwin has called ‘natural selection,’ or the preservation of favoured races in the struggle for life.”). The natural inclusion of Spencerism under the head of Social Darwinism is not to imply that Herbert Spencer and Charles Darwin did not differ on substantial issues in their respective descriptions of evolutionary processes. They did. Suffice it to say that Spencer was Lamarckian, namely, he believed in the inheritance of acquired traits, psychological features included. Darwinism rejects this idea. The writing of the British biologist Richard Dawkins has been especially useful in expounding and popularizing Darwin’s ideas. See, e.g., RICHARD DAWKINS, THE BLIND WATCHMAKER (1986). A final clarification: however outstanding, Darwin and Spencer were only two out of a host of theorists of evolution in the nineteenth century. Other notable exponents of such theories were Jean-Baptiste Lamarck (1744-1829) and August Comte (1798-1857). See 1 RAYMOND ARON, MAIN CURRENTS IN SOCIOLOGICAL THOUGHT (R. Howard & H. Weaver trans., 1965), ch. 2.
publications. A short excursion into Spencer’s system of thought is therefore warranted, especially given the fact that, although unparalleled in intellectual influence in America during the second half of the nineteenth century, during the twentieth century Spencer fell into such disfavor that contemporary commentary on his work is rarely to be found.

B. Herbert Spencer

In a revealing statement included in his autobiography, the steel tycoon Andrew Carnegie tells of the profound impression that Darwin and Spencer had on him when he was first introduced to theories of natural evolution. Carnegie, who was one of Spencer’s closest friends and greatest supporters in the United States, reminisces, “I remember that light came as in a flood and all was clear. Not only had I got rid of theology and the supernatural, but I had found the truth of evolution.” This description brings to mind a line from a poem that was written by Alexander Pope upon the death of Isaac Newton in 1727: “Nature, and Nature’s Laws hid in Night./ God said: Let Newton be! And All was Light.” Carnegie’s enthusiasm was not unique among the literati and the business community in the United States. Spencer’s dominance had been so pronounced during the Gilded Age that Richard Hofstadter proclaims, “The generation that acclaimed Grant as its hero took Spencer as its thinker.”

Just dipping a toe at the ocean of Spencer’s scholarship, it should be first noted that Spencer was audacious enough to propose that the past and future annals of the whole wide universe, literally speaking, from dust to flora and fauna to the planets to the human physique, psychology, and organizations, could be explained by a cycle of evolution and dissolution. According to Spencer, the transition from one phase to the other is directed by shifts in the balance between motion and consolidation in a given system—the more movement there is, the less solidified the system is, and vice versa. A move in the first direction is evolutionary and in the second dissolutionary.

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61 See SPENCER, FIRST PRINCIPLES, supra note 20.
62 See HOFSTADTER, supra note 6, especially ch. 2 and passim.
63 ANDREW CARNEGIE, THE AUTOBIOGRAPHY OF ANDREW CARNEGIE 327 (1920).
64 HOFSTADTER, supra note 6, at 34.
As Spencer saw it, “[T]he general history of every aggregate is definable as a change from diffused imperceptible state, to a concentrated perceptible state and again to a diffused imperceptible state; every detail of the history is definable as a part of either the one change or the other.”\(^{65}\) And again, with regard to evolution (or “growth”), “[A]ll sensible existences must, in some way or other and at some time or other, reach their concrete shapes through processes of concentration.”\(^{66}\)

Furthermore, Spencer asserts that an evolutionary process—“the processes of concentration”—involves a movement from homogeneity to heterogeneity, the latter being the more stable condition. “As we now understand it,” Spencer writes, “Evolution is definable as a change from incoherent homogeneity to a coherent heterogeneity, accompanying the dissipation of motion and integration of matter.”\(^{67}\) Anything homogeneous is unstable, he argues, as its (standardized) various parts are exposed to different pressures/forces (depending, for example, on their position in the system), and are therefore sure to develop differently.\(^ {68}\) This process brings about differentiation, which produces a heterogeneous, inner dependent, thus stable, system. The force of the argument is readily realized by the fact that Spencer prophetically predicted that on the political level the process would result in the formation of a “European federation,” during a century when Europe was splintered by jealousies and strife.\(^ {69}\)

Spencer is probably most renowned for his assured application of the laws of evolution on human socialization. His elaborate scheme of social development—of social progress, as he persistently put it—obviously cannot be outlined here. I believe it sufficient to

\(^{65}\) SPENCER, FIRST PRINCIPLES, supra note 20, at 288.

\(^{66}\) Id. at 308 (emphasis in original). While its thrust is captured in these comments, the process of evolution, as described by Spencer, is much more complex, of course. For example, it includes “secondary redistributions” or secondary cycles of evolutionary processes. See id. especially ch. 15.

\(^{67}\) Id. at 359.

\(^{68}\) To illustrate, Spencer writes with regard to the formation of planet Earth: “Were the conditions to which the surface of the Earth is exposed, alike in all directions, there would be no obvious reason why certain of its parts should become permanently unlike the rest. But being unequally exposed to the chief external centre of force—the Sun—its main divisions become equally modified: as the crust thickens and cools, there arises that contrast, now so decided, between the polar and equatorial regions.” Id. 407. As noted, Spencer argued that the same dynamics is at play when it comes to protozoa and human associations alike. See id. 410 ff.

\(^{69}\) Id. at 317.
touch upon Spencer’s theory about the evolution of societies from “the military type,” to the “the industrial type,” as outlined in *The Principles of Sociology*. The former, he explains, is typified by status and fixed castes; it is a society rife with armed conflicts and governed by a despot. Its despotic nature is reflected in the extensive and intrusive schemes of personal regulation, which mandate compulsory co-operation among members of society. Clashes between rival societies result, evidently, in the victory of the group best organized along the lines of the ideal-type military type.

The industrial society, contrariwise, is ruled by a regime of contracts. It is pacific. It is dedicated to the preservation of individual autonomy. It seeks to interfere with the lives of citizen to the least extent possible, thus allowing for the natural flow of their personal evolution, which is mirrored in overall social evolution. A devout Lamarckian, Spencer was certain that such a society would produce better human beings. That is, independent, kind, and honest citizens, who would—and this may sound surprising—embrace altruism, but only out of choice, obviously. Thus as much as individualism must reign supreme, social order is not jeopardized, he insisted. To the contrary.

As surely as the tree becomes bulky when it stands alone, and slender if one of a group; as surely as a blacksmith’s arms grown large …; as surely as a clerk acquires rapidity in writing and calculation; …—so surely must the human faculty be moulded into complete fitness for the social state; so surely must evil and immorality disappear; so surely must man become perfect.

To conclude, “Progress, therefore, is not an accident, but a necessity.”

To be sure, Spencer’s vision of progress is that of an extreme libertarianism. He was after all a staunch believer in natural rights, *laissez faire*, and minimal government. It was Spencer who coined the principle of “the survival of the fittest” in his *Principles of Biology*, published in 1864. A decade earlier he had written of the physically and mentally “unfit” members of society, “Why the whole effort of Nature is to get rid of

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70 *See* SPENCER, *THE PRINCIPLES OF SOCIOLOGY*, supra note 27, chs. 17 and 18.
71 *SPENCER, SOCIAL STATICS*, supra note 1, at 32.
72 *Id. id.*
73 *See supra* note 60.
such—to clear the world of them, and make room for better.” Chilling statements of this sort are peppered throughout his *Social Statics*—a lengthy exposition of the dangers involved with state interference with the business of individuals, where nature’s “purifying” elimination is exhorted. Under this vision, any kind of state regulation (or even charity) is obviously viewed with deep suspicion, most with horror, to such extent that Spencer vehemently opposed any form of welfare reform. To Spencer, state regulation was an extreme case of extraneous intervention in the natural course of human evolution.

It is difficult to exaggerate how influential Spencer was in the United States during the second half of the nineteenth century, transcending even Darwin’s impression on the American mind. As Hofstadter put it, “In the three decades after the Civil War it was impossible to be active in any field of intellectual work without mastering Spencer.” Hofstadter’s explanation for Spencer’s unmatched stature is insightful:

> Spencer’s philosophy was admirably suited to the American scene. It was scientific in derivation and comprehensive in scope. It had reassuring theory of progress based upon biology and physics. It was large enough to be all things to all men, broad enough to satisfy agnostics … and theists … It offered a comprehensive world-view, uniting under one generalization everything in nature from protozoa to politics.

Spencer was endorsed by men with the highest business and academic credentials. Thus, as a notable example, William Graham Sumner, one of the greatest American sociologists, was an avid Spencerian and a strong believer in social Darwinism. As we

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74 SPENCER, *SOCIAL STATICS*, *supra* note 1, at 205.
75 HOFSTADTER, *supra* note 6, at 33.
76 *Id.* at 31. Indeed, Spencer’s theory could be viewed as one attempt at bridging between ideas of evolution and natural selection, on the one hand, and a broader naturalistic world-view, on the other. Namely, a shift from taking Darwinism as an explanatory device applicable to large variety of natural phenomena to cataloging it as one (major) manifestation of the overarching laws of nature, alongside with, say, Maxwell’s laws of electricity. The latter naturalistic perspective is more “extreme” with regard to human phenomena as, in its fullest expression, it reduced them to mechanical terms. The shift was fully felt after the turn of the century. See EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* 8 (1973). I will come back to this theme when we discuss the work of James Landis. See infra Chapter 6, Section I.D.
77 See PURCELL, *supra* note 76, at 8-9, and HOFSTADTER, *supra* note 6, ch. 3.
have seen, so was Carnegie.\textsuperscript{78} Both Carnegie and Sumner propagated similar views regarding business ethics. The former, demonstrating his devotion to the laws of natural selection, spoke of the law of competition in clear Spencerian terms. “[W]hether the law be benign or not,” he declared in 1889, “we must say of it …: It is here; we cannot evade it; no substitutes for it have been found; and while the law may be sometimes hard for the individual, it is best for the race, because it ensures the survival of the fittest in every department.”\textsuperscript{79} And Sumner on his part echoed Spencer’s law of concentration when he wrote in May 1902, “Industry may be republican; it never can be democratic.” Noting an industrial drift over into “oligarchies or monarchies,” he commented that they allowed “the captain[s] of industry” to “direct the enterprise in a way which produces more, or more economically. This is the purpose for which the organization exists, and success in it outweighs everything else.”\textsuperscript{80} Lastly, the imprint of Spencer’s robust individualism on the legal discourse of his time was made known by Holmes’s famous reprimand in \textit{Lochner} that “the 14th Amendment does not enact Mr. Herbert Spencer’s Social Statics.”\textsuperscript{81} Holmes, it is almost needless to say, was also an admirer of Spencer.\textsuperscript{82}

\textbf{IV. Spencerism and Adams}

\textbf{A. Concentration Again}

Adams’ probable reliance on Spencer should come as no surprise, then. He even explicitly mentioned Spencer in \textit{The Railroad System}.\textsuperscript{83} This is not conclusive evidence, of course. But the point still remains: like Spencer, Adams attempted to conceptualize the multifaceted reality of railroaded America through overarching laws of a movement of concentration.

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\textsuperscript{78} Supra text accompanying note 63. See also Chapter 2, Section II.D.1.
\textsuperscript{79} Andrew Carnegie, \textit{Wealth}, 148 N. AM. REV. 654 (1889).
\textsuperscript{80} William G. Sumner, \textit{Consolidation of Wealth: Economic Aspects}, 54 \textit{THE INDEPENDENT} 1036 (May, 1902).
\textsuperscript{81} \textit{Lochner} v. New York, 198 U.S. 45, 75 (1905) (Holmes J., dissenting).
\textsuperscript{82} \textit{HOFSTADTER}, supra note 6, at 47.
\textsuperscript{83} Adams, \textit{The Railroad System}, supra note 8, at 490 (“Herbert Spencer says that it would require a volume to trace through all its ramifications the contingent effects of the everyday act of lighting a fire. These effects are imperceptible, but the influence of steam locomotion as applied to trade is as apparent as it is infinite.”). See also infra text accompanying note 19.
Therefore, as noted, according to Adams the gravitational movement manifested itself not only in the modern configuration of the industrial universe, but also, concurrently, in the sphere of public governance. See supra text accompanying note 70. “To succeed,” he declared, “centralization is necessary; diffusion insures failure. This principle applies as well to the labors of commissioners as to the material efforts of the individuals.”

In accordance with this principle and due to mainly structural reasons that render Legislature’s treatment of complex economic issues ineffectual, as Adams conceived it, there was a noticeable tendency “in London, in Washington, and in Boston,” first to confer on parliamentary committee the power to investigate such issues, and now on commissions. “[L]egislation is passing through a new phase,” Adams wrote in 1868. The commissions established in America and in England are “the germs of a new system, springing out of a great necessity,—a new phase of representative government.” In other articles Adams makes the natural next steps and preaches the establishment of a “National Bureau,” because of the limited, local reach of the existing State commissions, which are only “temporizing expedients,” a mere layout on the way. This move to national regulation was but a logical upshot of the movement of concentration.

B. Remedies in an Age of Evolution

Speaking of the Massachusetts Board of Railroads Commissioners, Adams noted with satisfaction, “Undersignedly the Massachusetts legislators had rested their law on the one

See supra text accompanying note 70. Adams, Boston I, supra note 9, at 19. See infra Chapter 3, Section II.B.1. See also Adams, Railway Commissions, supra note 21, at 235.

See Adams, The Government and the Railroad Corporation, supra note 45, at 426, where Adams argues that discretion should be conferred on commissions due to legislative bodies’ institutional inadequacy to execute general laws. See supra Chapter 3, Section II.B.2 for an elaborate discussion of this theme in the Progressive tradition.

Adams, Boston I, supra note 9, at 19. Id. at 18.

Adams, Railway Commissions, supra note 21, at 235.


Compare to Spencer’s idea of the “European federation,” supra text accompanying note 69.
great social feature which distinguishes modern civilization from any other of which we have a record,—the eventual supremacy of an enlightened public opinion.” “That secured,” he proclaimed, “all else might safely be left to take its own course.” 92 This proposition takes us back to Adams’ intentional refusal to endow the Board with any coercive powers. It was left for the citizenry to pull the chestnuts out of the fire, based on the fruits of the Board’s investigation, should they choose to do so. In 1870 he accordingly censured an early proposal to found a national railroad commission for “[i]t sought to regulate corporations and confer powers on a comptroller, when what was really wanted was only information, and the conclusions derived from careful study.” 93

Framing the issue in Spencerian terms is instructive. The question Spencer poses at the end of *The Principles of Sociology* is, what steps, if any, an educated observer—acknowledging the inalienable laws of evolution, as outlined by Spencer—should take to reform the society she is part of. After all, such an observer knows where her society—being always and of necessity placed at some point on the cycle of evolution-dissolution—is heading. She knows, too, that there is not really anything that can be done to derail it from nature’s preordained course. The question is deep. It demands the critic to justify her methodology, as well as the morality informing her conclusions. Spencer, for once, is almost hesitant when he broaches the subject.

As reality unquestionably illustrates, Spencer admits, his ideas are “much in advance of the time.” The Spencerian observer, therefore, cannot expect to leave a real mark on the course taken by her peers. Rather than fall in complete despair, Spencer modestly argues, “All that can be done by diffusing a doctrine much in advance of the time, is to facilitate the actions of forces tending to cause advance.” This statement begs another question, which is, “to facilitate” how, given the fact that “[t]he forces themselves can be but in small degree increased”? Well, the prophet at the gate might, if she is extremely lucky, hinder her society from going down doomed roads. In Spencer’s words, “[S]omething may be done by preventing mis-direction of” the “forces tending to cause advance.” 94

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94 All the quotations in this paragraph are taken from *Spencer, The Principles of Sociology*, supra note 27, at 666. See also supra note 27.
Spencer gave a telling, but certainly not surprising, example of one of the effects he would like his work to have on contemporary England. The subject was the current “multiplication of political agencies,” which emanated from “the broad vague form of sympathy with the masses, [which] spends itself in efforts for their welfare.” This was regrettable, Spencer informed his readers. “Led by the prospect of immediate beneficial results, those swayed by this sympathy are unconscious that they are helping further to elaborate a social organization at variance with that required for a higher form of social life, and are, by doing so, increasing the obstacles to attainment of that higher form.”

Here was a case where, in Spencer’s eyes, his society was taking a wrong turn by violating everything he had been advocating for. And yet, by his own account, Spencer’s motivation in publishing *The Principles of Sociology*, which includes some of his most programmatic essays, was unpresumptuous. All he hoped for was to lead the advocates of welfare and regulation “to consider” their actions in light of his observations. “To deter here and there one from doing mischief by imprudent zeal,” he wrote in the book’s closing sentence, “is the chief proximate effect to be hoped for.”

Adams, writing in a similar vein toward the end of *Boston II*, where he took great pains to outline a program to buttress Boston’s commercial standing, humbly commented, “What is now asked for is discussion.” Simple extrapolation from this stance to the sphere of public regulation would indeed lead to the view that commissions should only put in front of the public certified data for consideration, thus potentially “deter[ing] here and there one from doing mischief.”

95 SPENCER, THE PRINCIPLES OF SOCIOLOGY, supra note 27, at 666. To recall, the lower form of social organization is the “militant type of society,” which is characterized by expansive and penetrating “public regulation”; whereas the higher form is the “industrial type of society,” which “produce[s] that greater individuality and more extended voluntary cooperation.” Id. id. See generally id. 17 & 18.

96 See, e.g., id. ch. 2.

97 SPENCER, THE PRINCIPLES OF SOCIOLOGY, supra note 27, at 666.

98 Adams, *Boston II*, supra note 9, at 591.
C. On the Importance of Scientific Investigation

This is the flow chart underlying the model of the sunshine commission: Adams, who attributes a normative character to a universal thrust of gravitation, believes that [Step 1] a social demand, which leads to concentration of (governmental, i.e., public) powers, would yield concentration of (inquisitorial, scientific) resources [Step 2], entrusted in the hands of non-politicians, whose findings would unquestionably enlighten legislators (and the public) [Step 3] and point at the right actions to be transacted (out in the world) [Step 4]. Note that in fact the movement is circular—from the outside inside and then from the inside out—but surely not repetitive. The chart is simple and systematic; its direction is Spencerian, thus, purportedly scientific, inevitable, and progressive.99

Scientifically-minded as Adams was, he was averse to what he regarded as futile experimentation. We have already seen that in 1867 he lamented the fact that “the most important material interests of the community are in perpetual dangers of experimental legislative tinkering.”100 No, he was insistent that lawmakers should always legislate “in obedience” to a commission-certified “natural law.”101 Crucially important, he was likewise confident that at any rate and in all contexts, in the end, the decrees of science would be heeded to. Here he was, even if unwittingly, a true student of Spencer. He reasoned, for example, that “[p]eople may say, and legislators may enact, what they please; the stern logic of taxation will at last convince us that there is a science of revenue.” Adams was certain that there would be a time when the laws of this science worked their way “through the pockets into the heads of the people.”102 The message was thus clear: the community would be much better off if it came to grasp the immutable natural laws governing its affairs (1) as soon as possible, (2) prior to taking uncalculated heuristic steps, and (3) preferably by utilizing the serviced afforded by a board of his design. Taking to heart the conclusions of the scientific sunshine commission, as a perquisite to action, was therefore the first order of the day.

99 Supra note 53.
100 Supra note 47.
101 See infra text accompanying note 114.
102 Adams, Boston II, supra note 9, at 590.
So strong was Adams’ confidence in the power of social enlightenment and the substance and procedures of quantitative science—the Enlightenment’s vehicle—that he urged his city not to construct another railroad line to better its competitive stance vis-à-vis New York, but rather to put its trust in “enlightened management” and consolidation of the existing lines. Speaking of the difficulties of Boston, which was then falling from favor as a leading commercial hub, he held that “some scientific direction can alone save the day.” The tools to infuse the scientific perspective to the democratic discourse were “[c]ommissons—advisory bodies”; they “might scientifically study and disclose to an astonished community … the remedies no less than the causes of obstructions.” The advantages that might follow from this course of action were enormous and sweeping; it “might go far to remedy an especial inherent defect in all representative governments.” It might put an end to useless rant of Legislatures and committees and “introduce order into … chaos.” As so often stipulated by reformers, this plan was said to essentially substitute facts for baseless formulae in the business of government. In that respect, Adams’ approach was not unique.

To Adams all this is wonderful. His calculus is simple: instead of “[w]ork hitherto badly done, spasmodically done, superficially done, ignorantly done, and too often corruptly done,” the new phase ushered in by regulation heralds a state of affairs where this work will be “reduced to order and science by the labors of permanent bureaus” that will conduct “that deep study of causes and concentration of resources which can alone retrieve the future of Boston”; the results of this research will be “placed … before legislatures for intelligent action,” the same legislatures that have “the honest desire to be...

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103 Id. at 576. It can be suggested that this argument presaged Brandies’ more famous position in the “Advance Rate Case,” presented to the ICC in 1910, where Brandeis put forward the proposition that there was no justification to grant railroad companies an increase in their freight rates, for the needed additional resourced they had been looking for could have become readily available to them if the railroads had followed the precepts of “scientific managements” and render their internal management effective. McCRAW, supra note 3, at 91-93.

104 Adams, Boston I, supra note 9, at 17.
105 Id. at 16.
106 Id. id.
107 See infra Chapter 6, Section III.D.4.
enlightened, and not mystified.” The proposal is, then, to supplanted a centrifugal regime based on biased, fragmented, and unreliable data, which yields, in turn, unintelligent and reckless legislation, with a new order where a reliable, competent, trustworthy, and permanent body—backed by a concentration of social forces—would yield scientific, i.e., objective and indisputable, data, which would, in turn, provide a platform for an informed “open discussion.”

D. Scientific in What Way?

Thus, a scientific study of non-political advisory bureaus, Adams was certain, was key to successful tackling of vexing social problems in a democratic society. Adams’ grasp of scientificity was, however, rather crude and unsophisticated. This limited understanding molded his idea of the sought-after commissioners.

Consider Adams’ description of the procedure employed by a commission “of scientific men” that had been formed by the Boston gentry to study the ailments of the city’s Harbor. “They went quietly to work,” he reported in 1868 in an admiring tone, “and studied currents, measured canals, [and] observed the tidal flood.” Only then had they presented their conclusions to the consideration of their fellow citizens. By endorsing this method of investigation, Adams indicated that the true mission of the commissions of his design was to serve as public tribunals for the evaluation of disputed data.

Yet, at the same time, Adams expected this public tribunal to provide the community, at the end of its fit of data-collection, “with laws ascertained, [and] with a system defined.” Elsewhere he commanded England for producing a taxation system, following—we are to assume—such processes as that prescribed by Adams, which “has finally been reduced to a science.” This seamless leap from quantitative facts to the laws of reality and, more doubtful still, to normative conclusions is a remarkable sleight-
of-hand commonly performed by reform minded thinkers.\textsuperscript{113} “Whatever is attempted,” Adams commented with regard to Boston’s ossified channels of trade, “let it be attempted knowingly and systematically, in obedience to some natural law.”\textsuperscript{114} To the question of the genealogy or authorship of these laws he paid no attention. His assumption must have been that a gifted fact finder would have no trouble observing the natural law configuring the collected data; he expected that the underlying law would be writ large on it. The fallacy of this nonchalant approach is obvious. In 1930 Harold Laski would remind the expert that “every judgment he makes not purely factual in nature brings with it a scheme of values which has no special validity about it.”\textsuperscript{115} “Every expert’s conclusion,” Laski went on, “is a philosophy of the second best until it has been examined in terms of a scheme of values not special to the subject matter of which he is an exponent.”\textsuperscript{116}

False or not, the rationale underlying Adams’ analysis is worth fleshing out. It is maintained that once commissioned, public boards acquire unmediated access to the laws of nature. Note that Adams does not prescribe that administrative tribunals merely collect raw data to be reviewed, as is, by the public. Indeed, that might be a very technical task, as the case of the Boston Harbor Commission illustrates. Rather, under his vision, public boards would first undertake the collection of data and then announce to the public what natural law could explain it. One might wonder what makes the group of people composing the commission any different from any comparable group of people presented with the germane raw data. One virtue of the Adams theory is that it is able to provide a ready-made answer to this conundrum lying at the heart of the search for the legitimacy of administrative commissions. The answer being that the public board is a center of gravitation for social energies. It is the apogee of the social process of concentration. Put

\textsuperscript{113} I will get back to this point below when James Landis’ work will be analyzed. See infra Chapter 6, Section V.

\textsuperscript{114} Adams, \textit{Boston II, supra} note 9, at 591.

\textsuperscript{115} Harold J. Laski, \textit{The Limitations of the Expert}, 162 HARPER’S MONTHLY MAGAZINE 101, 102 (1930). As will be noted \textit{infra}, already when Laski wrote this line, there were those who argued that even a so-called “purely” factual finding “brings with it a scheme of values.” See \textit{infra} Chapter 8, Section III. In 1962 Thomas Kuhn would give this view a definite formulation: THOMAS S. KUHN, \textit{THE STRUCTURE OF SCIENTIFIC REVOLUTIONS} (1962). See also LUDWICK FLECK, \textit{GENESIS AND DEVELOPMENT OF A SCIENTIFIC FACT} (Thaddeus J. Trenn and Robert K. Merton eds., Frederick Bradley and Thaddeus J. Trenn trans., 1979) (1935).

\textsuperscript{116} Laski, \textit{supra} note 115, at 104.
in more concrete terms, it could be argued that the tribunal’s authority, public standing, judicious disposition, and scientific methods allow it to patiently grasp the meaning of the data at its disposal. This answer makes complete sense in the framework of the Adams Spencerian approach. It is for this reason that I argue that Adams’ regulatory mechanism displays the judge paradigm.

The question remains, though, whether Adams’ work in its entirety was fully committed only to this paradigm. After all, it seems unreasonable that such a manifold body of literature would be so tightly coherent. Indeed, I show in the next Section that it was not. In order to do so we need first to move from science to the regulator.

E. The Doctor Regulator

In his testimony in front the Cullom Committee, a five-member senatorial committee chosen in 1885 to comprehensively investigate the railroad problems, Adams indicated that his idea of the right regulator was of an M.D. “I have always thought,” he asserted, “that if Congress would provide for a commission of men who were at once honest, intelligent and experienced, whose business it should be to observe this question very much as a physician would observe the progress of disease, the result of their observation might be of value in leading gradually to the building of legislation.”

At first it appears that a medical doctor would be the right person to become a member in an Adams commission. In keeping with his idea of weak regulation, the doctor-regulator is expected only “observes” the disease. As a doctor as he is well versed with hard-core scientific methods of investigation, committed to the betterment of the wellbeing of his fellow citizens, careful in practicing his profession, and well aware of the heavy burden that is placed on his shoulder.

Note, however, that the association made between an administrator and a physician is not trivial. A physician, after all, habitually reverts to intrusive physical intervention in the

118 CUSHMAN, supra note 4, at 47 (quoting S. REP. 46, 49th Cong., 1st Sess., pt. 2, at 1208 (1886)).
course of exercising his profession. This fact leaves one to wonder how entrenched Adams was in his belief in the “observant” commission. Is it farfetched to read this metaphor of the judge-administrator as indicating that Adams had his own doubts regarding the effectiveness of weak regulation in a strong market?

V. The Other Adams

A. Strong Regulation

In 1867 Adams stated, “It is rapidly becoming throughout the world—and the more rapidly the better—a cardinal principle of polity, that the more the functions of government can be reduced, the better.”\footnote{Adams, The Railroad System, supra note 8, at 508. Herbert Spencer could not have put it better!} Such a statement could be expected from an exponent of the sunshine commission, a man with strong Spencerian leanings. Nonetheless, The Government and the Railroad Corporation, published four years later, he was more accommodating. Still being adamant about “the great principle of limited governmental ownership,” by now, however, Adams was willing to treat the railroads as an “exception” to the rule, holding that “the task of supervising in some way the railroads of a modern State does constitute one of the necessary functions of government.”\footnote{Adams, The Government and the Railroad Corporation, supra note 45, at 416, 417. By then Adams had also moderated his views regarding the option of some form of governmental ownership of railroads compared to his harsher assertions included in The Railroad System, supra note 8, at 507-509. See also supra note 30 on the special duties of common carriers in the common law tradition.} The Government and the Railroad Corporation could be seen as an outlier in Adams’ writing because of its openness to the possibility of making regulatory commissions a powerful player in the railroad domain. It opens with the assertion that “neither competition nor legislation have proved themselves effective agents for the regulation of the railroad system,” and moves to point at another “more effective” mechanism.\footnote{Adams, The Government and the Railroad Corporation, supra note 45, at 414.} Readers of this piece were in for a bit of a surprise, since this time Adams did not settle for “a renovated public opinion,” as he did just two years earlier in A Chapter of Erie,\footnote{Supra note 11.} but advocated the
introduction of what seemed to be—Adams did not provide a detailed blueprint—a lock, stock, and barrel regulatory agency.

The article is premised on the understanding that the practice of special legislation, tailored for the needs of a particular railroad, which was commonly submitted through private bills, was a corrupting form of regulation. But, on the other hand, Adams laid down “a principle that no general law can be framed which will meet the exigencies of a whole railroad system in all its manifold details.”

Being caught between the Scylla of corrupt and misguided private-interest legislation and the Charybdis of the impracticality of generals laws in the case of railroads, Adams proposed that the Legislature would enact general laws (thus circumventing the dangers of corruption) and leave “the judicial and discretionary action under the general law” in the hands of “tribunals specially created to take cognizance of them.”

Adams makes clear that he is well aware of the full consequences of entrusting an administrative board with discretion. “[I]ngenious statute machinery, without a man inside of it, will only result in certain failure,” he declares. Another great railroad regulator, Joseph Eastman, who would be a leading promoter of the public general manager paradigm, would declare similarly seven decades later: “Good men can produce better results with poor law than poor men can produce with good law.”

Expansive delegation appears now to be a commonsensical solution to Adams.

Adams is going out of his way in this piece to ensure the full potency of regulatory boards. He insists that commissioners, who “should … be brought up to … an equality … with the judges of our courts,” should also “be clothed with all the necessary powers and be put forward as if the members were fully competent to represent the interests of the State.” At least at first blush, this expansive proposition seems to be clearly at variance with the sunshine-commission theory. It is difficult to know what to make of it. Adams,

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124 Id. at 426 (emphasis added).
125 Id. at 428-429.
at any rate, would not repeat it in his 1878 retrospective book *Railroads*, where he would revert to the theory of weak regulation. There he still noticed with satisfaction that the “only appeal provided [by the Massachusetts Board] was to publicity.” It should be noted, however, that a number of Adams’ renditions of his ideal administrator depict a clearly strong-commission regulator. As we shall next see, this is so even in articles that advocate the model of weak regulation.

**B. The Man Regulator**

Speaking of his conception of the ideal regulator, Adams brings forward in *Boston I* a metaphor of a schoolmaster, rather than of a physician: “For once, let reflection precede action,” he beseeches Bostonians. “The community must go back to school, and it only remains to find the schoolmaster.” Schoolmastering “would task the best ability of the best men,—men who can analyze and deduce, combine and infer,—men gifted with instinct and sagacity no less than reason,—men who command the confidence secured by past success, and the wisdom derived from long experience.” Adams was not alone, of course, in so asserting at the time. For example, during the House debate over the bill produced by the Cullom Committee, Representative Hitt of Illinois made the case for the establishment of a federal railroad commission that would be run by “five wise, able, experienced men of reputation, commanding general confidence.”

The image of a schoolmaster wonderfully illustrates the commanding, even commandeering, stature Adams’ “best men” were expected to acquire. A schoolmaster’s main task, be it noted, is not to directly teach and guide pupils, but to supervise the school’s various activities. She is also required to see to it that it is efficiently operated. A schoolmaster, therefore, does not have to be an outstanding educator in order to succeed—in fact, it would be better at times if she were a gifted general manager. Yet, as it is a school that is entrusted in her hands, it is advisable to appoint a well-respected member of the community who would command the confidence of the school’s “clients”

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129 See supra Section IV.E.
130 Adams, *Boston I*, supra note 9, at 19.
131 CUSHMAN, supra note 4, at 46. For similar statements, see supra Chapter 3, Section II.C.
for the job. For all these reasons, a schoolmaster is an ideal personification of the general manager paradigm.

The breadth of qualities prescribed to a schoolmaster-regulator indicates that again we come to the point where a reformer’s recommendation for a troubled industrialized nation was simply: choose the right men. Adams says so in totidem verbis. Confronting the obvious question of what reason there is to believe that commission members would not deviate from the ways of the righteous, as (according to Adams) so many legislators do, he unabashedly answers: “They may do so, but somewhere and at some point, put on all the checks and balances that human ingenuity can devise, we must come back and rely on human honesty at last.” “All in such cases,” he exclaims, “depends upon the men.”

Similarly, yet again we come to the point where in advancing the view that “[a]ll … depends upon the men,” a reformer is essentially telling his audience: I and my peers are “the men.” This was plainly the case with Adams, who, when his proposed legislation was debated in the Massachusetts Legislature in 1869, “actively pursued the commission post by asking influential friends to intercede on his behalf.” Adams eventually succeeded in acquiring the coveted position. His run for it tells us something about his perception of the experience needed for the job. After all, he was at the time “a man of thirty-four who had tested personal success only in the fleeting context of military glory” during the Civil War.

An astute, opinionated, and thoroughly-informed student of the railroad business as he was, he had to show for a merely thin record, if only because of his age. It was difficult to credit him at the time for having a “long experience” in anything actually, nor for “past success” in any business. Incidentally, in the years following his retirement from a ten-year commissionership, Adams did not prove himself to be a particularly savvy president of the Union Pacific Railroad, which he became in 1884, nor as a successful real-estate investor.

133 McCraw, supra note 3, at 18.
134 Id. at 17.
135 See Nagel, supra note 3. Adams self-appreciation must have been great indeed, as he wrote at some point that the proposed commission should be composed “of such men in material life as Story was in law, Mann [(1796-1859) an influential education reformer] in education, and
So we are left with Adams the man. Indeed, if there was one thing, it seems, Charles Francis Adams could successfully vouch for it would be his social standing and reputation. In the end, to him, a would-be commissioner’s prior spoils and financial achievements, or, just as important, previous knowledge of the regulated industry, were inconsequential.\textsuperscript{136} This way of thinking was not at all alien to Adams’ contemporaries, as shown by Cushman. “Impartiality, or at least neutrality,” Cushman writes, “was looked upon as more important than expertise. There was no suggestion that men of specialized training ought to be placed on the commission. It was assumed that the commissioners would acquire in their complicated tasks through experience.” It was “honesty and fairness” which were believed to be “so essential to adequate railroad regulation.”\textsuperscript{137} As we shall see in the next chapter, this description befits the general manager.

\section*{VI. Conclusion: Adams the Undecided}

Along the years, Adams embraced two postures of regulation, then: the aloofness of the sunshine commission, which puts its trust in publicity only, versus the fully armed, “fully competent to represent the interests of the State”\textsuperscript{138} commission. As I hope to have shown, it would be erroneous to speak here of a shift, or evolution, in his thinking from the first posture to the second. The chronology of their expression would not allow it. The duality reflects, I believe, an anxiety shared by many at the time, triggered by the tension

\textsuperscript{136} Bache [(1806-1867) a known Superintendent of the US Coast Survey] in science.” Adams, \textit{Boston I}, supra note 9, at 25.

\textsuperscript{137} This statement should be read with a grain of salt. It is more than likely that in Adams’ mind one’s possession of some property, for example, was a prerequisite for the job. Cf. Eastman, \textit{supra} note 126, at 376. ("It is not necessary for the members of the tribunals to be technical experts on the subject matter of their administration. As a matter of fact, you could not find a man who is a technical expert on any large part of the matters upon which the [ICC] finds it necessary to pass.").

\textsuperscript{138} \textit{CUSHMAN}, supra note 4, at 63. \textit{See similarly infra} Chapter 6, Section III.B. for a list of sources vindicating this observation. It should be noted that Cushman offers these remarks apropos the demand voiced prior to the enactment of the ICC that the Commission would be bipartisan. Thus, it was thought that the laudable traits listed above “could be guaranteed only by preventing partisan domination.” \textit{Id. id.} Adams, on the other hand, does not mention such concerns in his writings about Massachusetts. Be that as it may, the point here is to emphasize which personal traits were held up as desirable in the case of potential commissioners.

\textsuperscript{138} \textit{Supra} note 127.
between the looming larger and larger need to regulate by public organs the dealings of mega-corporation, on the one hand, and the ingrained conviction in “the great principle of limited governmental functions,”¹³⁹ on the other.

As we have seen, early on Adams pronounced that the “revolutions” New England went through with the rise of the railroads “have swept away the last vestiges of colonial thoughts and persons.”¹⁴⁰ One thought, nevertheless, was not so easily swept away in the process, as Adams’ own writing evidenced. That is, the idea that government should be parsimoniously structured, and should stay out of the so-called private sphere, “leaving … persons and interests to rely solely on themselves.”¹⁴¹ Adams’ two perceptions of state regulation were the result of two different calibrations of two competing vectors: the one pointing in the direction of “old New England,”¹⁴² the other toward the bustling metropolis of the industrial revolution—each vector with its attached moral and sentimental paraphernalia.¹⁴³ In these circumstances, the weak agency seems like a suitable solution.

The truth of the matter was, however, that even the addition of a minimal sunshine board to the governmental arsenal entailed exactly that, namely, an addition to the governmental arsenal, minimal as it might have been. More fundamentally, as Adams himself confessed, state governments were steeped to their eyebrows in the inner-operation of the railroad business from the outset, be it in the form of charters or other forms of private legislation. “It is scarcely an exaggeration to say,” he maintained in 1871, “that our legislatures are now universally becoming a species of irregular boards of railroad direction.”¹⁴⁴ This reality, Adams figured, begged the following conclusion: given states’ intimate implication with the routine management of the industry—given the fact that “[q]uestions of the purest detail … are regularly brought before”

¹⁴⁰ Supra note 22.
¹⁴² Supra note 22.
¹⁴³ As noted, Adams was well aware of the fact that the wonderful process of locomotion was intimately connected with “the deep decay which has eaten into our social edifice.” Supra note 26.
legislators\textsuperscript{145}—it would be worthwhile to rationalize this system of regulation, especially considering politicians’ notorious demeanor. The first step was to make it transparent to the public by a \textit{novum civitatis organum}, a novel state organ. Adams, it appears, was groping with the question whether it had been wise to stop there. After all, once the necessity of this first step was conceded, and provided that in actuality corrupt legislators went on legislating, the door was already wide open to the introduction of far more robust administrative regulation. The arguments made in support of the first level of regulation could easily sustain the tenability of the second level as well, with some minor modifications.

Yet, Adams hesitated. He was, in a word, conflicted, probably as he was attached to the “old,” and yet also aware of the inevitable coming of the “new,” New England. This tension obviously carried over to the question of the desirable degree of state involvement in the railroads business: should the prevalent \textit{laissez faire} regime, which meant \textit{ne laissez pas l’état faire}, persist with the addition of a new statutory agency, or should such agency be made “fully competent to represent the interest of the State”? Under the first alternative it is spoken only of “the public interest” that the same public should, if it so desires, to take care of;\textsuperscript{146} under the second, it is referred to “the interest of the State” that the same state should guard.

Framing this dilemma in Spencerian terms is illuminating. It has already been established that the sunshine commission theory squares well with Spencer’s recommendation to the enlightened thinker, who is aware of what is about to happen and appalled by what is currently happening around her. The recommendation is to “diffuse[]” the veritable knowledge in an attempt “to deter here and there one from doing mischief by imprudent zeal.”\textsuperscript{147} This is the task of a sunshine commission, whose only weapon is publicity. In the case at hand, however, it may be argued that the call for the erection of a strong regulatory apparatus is also a direct derivative of the grand evolutionary process, as expounded by Spencer. The turn to commissions, as shown by Adams, is but a natural (and necessary) echelon in the ladder of social evolution; the latest avatar of the all-

\begin{flushleft}\textsuperscript{145} \textit{Id. id.} \textsuperscript{146} \textit{See supra} note 58. \textsuperscript{147} \textit{SPENCER, THE PRINCIPLES OF SOCIOLOGY, supra} note 27, at 667.\end{flushleft}
pervasive march of concentration. The essence of concentration, we were also told, is the convergence of previously dispersed social forces into one focus. Thus, under this scheme, commissioners “become the recipients of light from all quarters, and can, if they be competent, concentrate the scattered rays into a powerful focus.”

Translated into the language of social coercion, on this reading, commissions—those focal points of social gravitation—are expected to wield a wide range of (state) powers in the name of their constitutes. This more aggressive form of regulation, it turns out, may also be sustained by the basic premises of evolutionary thinking. The dilemma, as is often the case, was one of choosing between two competing approaches to public regulation.

This duality points at an issue left open in Spencer’s political philosophy. It can be phrased in the question, How could the enlightened tell if the future is still to come or already here? Going back to the example of the European Federation, a contemporary Spencerian may wonder whether its current formation is “it,” or rather it has not gotten “there” yet. The answer given to the question would determine what should be expected of an existing European organ. The quandary applies equally in the case of administrative agencies. It appears that Adams’ confusion emanated from the fact that he was not sure whether a commission-run regulatory regime—being the lynchpin of “a new phase of representative government”—was a natural result of the march of political concentration. Should it, he wondered, be backed by all the might of—indeed, stand for—the state?

Indeed, Adams artfully raised some difficult questions throughout his career, often for the first time. Yet, he was undecided as to which way the resolutions should fall. His legacy therefore is not exhausted in theorizing the sunshine commission, which reflects only one, albeit predominant, strand in his analysis. Rather, what Adams bequeathed to future generations of regulation theorists was a series of ambiguities to mull over; ambiguities between established traditions and novel reforms, intrusion versus abstention, and centralization and decentralization in the structure of government; ambiguities, in the end, between the judge and the general manager paradigms.

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148 Supra note 53.
149 See supra note 69.
150 Adams, Boston I, supra note 9, at 19.
CHAPTER 6. THE METAPHYSICS OF JAMES LANDIS

I. Introduction

A. Three-Part Saga

Much has been said of James McCauley Landis’ place in the history of regulation in the United States.\(^1\) This chapter is dedicated to the study of Landis’ scholarly contribution to the field. The full gamut of his academic publications will be canvassed. While undoubtedly occupying the bulk of the discussion, along the way reference will also be made to the work of some of his contemporaries. Landis’ career will be divided into the following three (somewhat overlapping) periods.

1. At the inception of Landis’ career his main interests lay in the study of “how business come to the Court and the manner of its disposition,”\(^2\) and in the analytical study of legislation. Having been named the first Professor of Legislation at the Harvard Law School,\(^3\) Landis made it his business to reprimand the legal profession in general, but courts in particular, for ignoring legislation and limiting their interest to the study of judge-made common law. Landis’ early work, which stretched from 1924 to 1934, manifested a strong leaning towards Legal Realism. It advocated courts’ deference to Congress or in the least a system of co-operation between the two branches. “Essential to the proper scope of judicial review over legislation,” he wrote in 1931, “is a sense of respect for the legislature’s conclusions.”\(^4\)

2. Starting in the mid-1930s until his death in 1964, Landis focused his attention more directly on issues of administrative regulation. Elaborating on his previous critical assessment of the role played by courts in frustrating progressive legislative intent, Landis carried over the analysis to a more general level by conducting a comparative

\(^1\) See supra Chapter 2, Section III.B.2.
\(^2\) Felix Frankfurter and James Landis, The Business of the Supreme Court at October Term, 1930, 45 HARV. L. REV. 271, 271 (1931) [hereinafter Frankfurter and Landis, The Business of the Supreme Court at October Term, 1930].
\(^3\) DONALD A. RITCHIE, JAMES M. LANDIS: DEAN OF REGULATORS 35 (1980).
institutional study in which he critically examined the (in)adequacy of the three “constitutional” branches of government to constructively regulate sectors of the economy. This study led him to underscore the necessity of entrusting wide discretion in the hands of administrative agencies. The conclusion of his analysis was that in many incidents the judiciary, in particular, should pull out and let the agencies do their job—they were simply better equipped to carry out regulatory chores, as it is in their expertise. What are exactly the ingredients of this “expertise” will be parsed out below, but I would like to argue already here that on my reading of Landis, not only does a notion of expertise permeate the administration of his making, but it also marks the dividing line between the administration and the other branches of government. In short, it gives life to all of them—each one and its own designated sphere of expertise.

Landis was all but positive that he was able to provide a sufficient justification for the erection of an omnipresent administrative apparatus in recent time—not at all a trifling matter, given his formidable opponents. As he saw it, criticism leveled at agencies derived from a formalistic reading of the Constitution that found no authorization in it for a fourth (administrative) branch. Landis published several articles to this effect throughout the years. Undoubtedly, his most influential and ever-lasting contribution to the theory of administrative regulation was presented in his 1938 book, *The Administrative Process* (“the book”). A close reading of it will stand, therefore, at the center of the chapter.

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5 See supra Chapter 3, Section II.B.

6 See supra Chapter 2, Section III.B.3 and Chapter 3, Section III. Of importance is the fact that Landis mentions in this context not only “worthy lawyers,” but also the President’s Committee on Administrative Management (see infra notes 7 and 30), which, he says, sided with these adversaries. JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 4 (1938) [hereinafter LANDIS, THE ADMINISTRATIVE PROCESS]. See also id. at 47 and 88. On the President’s Committee’s work, see supra Chapter 4.

7 The President’s Committee famously said of independent agencies, “Without plan or intent, there has grown up a headless ‘fourth branch’ of the Government …” THE PRESIDENT’S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES 30 (1937) [hereinafter the Committee’s Report].
The Metaphysics of James Landis

*The Administrative Process*, hailed by one leading historian as “the most eloquent celebration of commission regulation ever written,” contains Landis’s Storrs Lectures at Yale Law School. It is widely considered a piece of robust advocacy for the entrusting of expansive regulatory powers in the hands of administrative agencies. As Louis Jaffe explained, according to Landis agencies’ authority derives “from an assumed comprehensive body of expertise available for the implementation of legislative grants of authority.” Later on, indeed, until today, the book became synonymous with claims of administrative expertise. Since its publication, legal scholars have frequently and copiously referred to and cited the book in this and related contexts. The book came to symbolize a distinct epistemic moment in the theory of regulation. Thus, Jaffe wrote in the mid-1960s, “Landis spoke for all of us who had been deeply committed to the New Deal and who had been intimately associated with the administrative process.” The lectures, he added, “became inevitably a celebration, a defense, and a rationalization of the magnificent accomplishment in which [Landis] had played so brilliant a role.” A decade later, Jaffe wrote in a similar vein, “Dean Landis’ famous

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9 The lectures took place in January 1938; see RITCHIE, supra note 3, at 84-86.


12 L. Jaffe, *James Landis and the Administrative Process*, 78 HARV. L. REV. 319, 320 (1964) [hereinafter Jaffe, James Landis]. The bulk of the article, written almost thirty years after the book went into print, presents nevertheless a critical assessment of the views expressed by Landis in the book; views that, as noted, Jaffe shared at the time. See also A. H. Feller, *The Quasi-Judicial, Quasi-Legislative Agencies*, 27 SUR. GRAPHIC 620, 620 (1938), where Feller wrote, “Here are the words of one who is both scholar and administrator; a philosopher who himself labored in the vineyard.”
lectures, *The Administrative Process*, espoused a paradigm of broad delegation which was the icon of the New Deal.”

Curiously enough, voluminous as it is, commentary on the book seems to be of one mind regarding its “meaning.” A book of this stature deserves—actually, it demands—to be revisited occasionally; even more so, in the face of such unity among its interpreters. Reëxamining an entrenched interpretation of any book is a tall order. It may also seem presumptuous, or, worse still, superfluous. After all, one may ask, Is there anything new and interesting to say about it? I think there is. It seems to me that former readers were not attentive enough to the book’s richness and complexity. In this chapter I would like to embark on a *textual* as well as contextual analysis of the book with a view to exposing its many layers and bringing out and assessing the various components of the expertise model(s) propagated in the book.

3. Finally, the “Landis Report,” composed in 1960 at the behest of President-elect Kennedy. There Landis takes a retrospective look on the administrative apparatus as it had come to pass since the New Deal. Much less exuberant and buoyant in spirit than the book, the Report pillories many predicaments that afflicted federal agencies in the preceding decades and calls for agencies’ deference to the Executive.

The proposed re-reading of this diverse literature yields several insights into the theory of American administrative law in general and the work of a towering administrative law scholars in particular. It shows, for example, that clear conservative undertones permeate Landis’ thinking. More specifically, Landis might have intended to give rise to an administrative state that would rely on a *novum organum*—the administrative agency—

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14 See infra Section I.C.
15 *JAMES LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT* (1960) [hereinafter The Landis Report]
16 A few later publications, written in an even more acidic vein, will be also reviewed. See infra Section VI.
but this organ, again according to his lights, was supposed to be a mere assemblage of the traditional forms of governmental control in one entity.\textsuperscript{17}

This chapter’s expansive commentary will expose some of his overlooked inconsistencies, but also themes running through Landis’ manifold corpus of literature. Specifically, the following discussion will show that in each of the three periods of his career Landis considered a different branch of government the reliable repository of the public interest: first Congress (and not the courts), then administrative agencies (and not the Executive, nor Congress, nor the courts), and finally the President (and not the administrative branch).

I will argue further, though, that critical and wary of the courts as he was, Landis remained the whole time—and more than he would have openly acknowledged, I suspect—a true believer in the judicial vocation and in the spirit of the common law, as he perceived them. At the same time, I will demonstrate that turbulent as his history and that of the regulatory machinery was, Landis remained throughout his torturous scholarly journey a devout believer in the great potentials embedded in the regulatory endeavor and in the regulator of his design.

B. Plurality of Paradigms

Landis’ conception of administrative expertise, especially as prescribed in the book, brings questions of commissions’ legitimacy to the fore. Landis does not seem to be particularly impressed by a majority show of hands when questions of expertise are debated.\textsuperscript{18} At any rate, Landis does not seem to put too much trust in the “mass.”\textsuperscript{19} He demands that regulators follow suit. Actually, it is the very concept of expertise that demands it. At the heart of any conceivable model of expertise lies the exclusion of non-

\textsuperscript{17} Tellingly, Landis saw with a jaundiced eye the New Deal’s more daring experiments in regulation, such as the National Industrial Recovery Act (NIRA) of 1933. \textsc{Landis, The Administrative Process}, supra note 6, at 57-59, and 87.

\textsuperscript{18} This was another reason for Landis’ dislike of the NIRA. See \textit{id. id.} To be sure, this is not the only case where Landis criticizes agencies’ performance. See also \textit{id.}, e.g., at 68, 75, 78, 104, and 106.

\textsuperscript{19} \textit{Id.} at 61. See also \textit{id.} at 43.
experts from the process of deliberation invested in a few selected decision-makers, who are thus deemed to be experts. As Laski stated it in 1930, “The expert, in short, remains expert upon the condition that he does not seek to coordinate his specialism with the total sum of human knowledge.” “The moment that he seeks that coordination,” Laski concluded, “he ceases to be an expert.”

As we have seen, already Socrates, more than two millennia ago, held that view:

Socrates. …Was the disciple in gymnastics supposed to attend to the praise and blame and opinion of every man, or of one man only—his physician or trainer, whoever was that?

Crito. Of one man only.

…

Socrates. And he ought to live and train, and eat and drink in the way seems good to his single master who has understanding, rather than according to the opinion of all other man put together?

Crito. True.

Encapsulated in this dialogue are both the countermajoritarian difficulty related to administrative regulation as well as Landis’ answer to the challenge. When it comes to regulation, Landis is adamant that the “single master” must be the administrative commission of his design—a commission that has plenary knowledge of that which it is to regulate; a commission, which is able to objectively assess the problems of a stranded industry and confidentially guide it to safe shore. It should be said at once that this vignette falls in line with the public general manager paradigm, which is associated with the book more than with any other source, and rightly so. Indeed, it is the most dominant paradigm of expertise advocated in the book. But, I submit in this chapter, it is not alone.

The picture becomes more complicated when Landis introduces the requirement that agencies’ expertise be “observable” to courts, lawyers, and the legal community in general, but also to Congress, and the Executive, that is, to the non-expert organs of

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21 Supra Chapter 1, at n.1.
22 Crito, DIALOGUES OF PLATO 45b (Benjamin Jowett trans., 1871).
government. The idea is that a commission’s proceedings have to smack of professionalism before a reviewing body gives it deference. This is typically achieved by a showing that administrators follow well-established, settled scientific, or at least professional, procedures. However, under this description, regulators are men of “average capabilities,” technicians, or foot soldiers, rather than commanders-in-chief. This is the empiricist/professional paradigm, of course. Lastly, by allowing, if not demanding, the legal discourse to assume a commanding position in the work of the agencies themselves, Landis incorporates a judicial model of regulation into his analysis, thus committing himself to the judge paradigm as well.

The plurality of paradigms in the book has gone unnoticed thus far. If nothing else, then, this chapter will fill in a lacuna in the understanding of a foundational book in the history and theory of regulation in the United States. Thus, while I unreservedly accept the dominance accorded to the book in the intellectual history of American regulation by previous scholars, I show that there are many more reasons to regard it as an outstanding achievement. Indeed, it is the contention of this dissertation that, all told, the various analyses of “the model of expertise,” as they have taken shape throughout the years, boiled down to the three paradigms endorsed in the book, that is, the public general manager, empiricist/professional, and judge paradigm. I am close to saying, consequently, that the orthodoxy revered The Administrative Process (almost) for the wrong reasons.

The chapter will sequentially follow Landis’ work. The ensuing sections, accordingly, nest in a rough chronological order. As noted, the bulk of the discussion will revolve around the book, which, I believe, presents the most lucid and thorough treatment of the concept of administrative expertise offered by a legal scholar to this day.

But first, a word about the chapter’s methodology and the intellectual context of Landis’ work.

\[\text{\textsuperscript{23}}\text{Infra note 186.}\]
\[\text{\textsuperscript{24}}\text{For an outline of the three paradigms, see supra Chapter 1, Section B.}\]
C. Textual Analysis: The Symbols of Government

Contextual historiography, as noted in Chapter 1, will direct the discussion in this chapter, too. Accordingly, Landis’ personal biography, his diverse experience as a regulator, and the intellectual environment against which he worked will be well heeded. However, unlike the rest of the dissertation, the central part of this chapter centers on the reading of one complex text. A more demanding interpretive methodology is, therefore, in order. Grasping the book’s richness and detecting its lacunae require one to reach for the texts’ non-temporal as well as temporal dimensions. Namely, in order to make sense of Landis’ writings the contextual analysis will have to be joined by a textual methodology.

As part of the close reading conducted in this chapter, at several points in the discussion, primarily in the section dealing with the book, I will conduct linguistic and literary analyses. The aim of this exercise is to expose Landis’ work fundamental assumptions

25 See RITCHIE, supra note 3, and McCRAW, PROPHETS OF REGULATION, supra note 11, chs. 5 and 6.

26 Indeed, it may be suggested that it was Landis’ own experience as a commissioner that inspired his great faith in the potential contribution of an agency’s competent staff to the administrative process. In the first year after its establishment, the staff of the Securities and Exchange Commission (SEC) had to deal with incredible workload, as so many corporations and exchanges had to be registered for the first time. Thus, according to Landis, everybody, the commissioners and their able staff, accountants, and statisticians, worked very hard, all infused with a shared spirit of common mission. Landis was very impressed by his staff; he said there were “very able people in there, and extremely hard work … Some of them worked around the clock in order to meet the deadline, which they did. But that was the kind of aura and atmosphere under which people worked. There was no question about hours or anything of that nature. There was a tremendous enthusiasm to see that these pieces of legislation would work, and work to the benefit of the financial community as well as everybody else.” McCRAW, PROPHETS OF REGULATION, supra note 11, at 184 (quoting Landis’ verbal memoir, done in 1963 and 1964 for the Columbia University Oral Research Office, at 225-227). Landis makes explicit references at various points in the book to his experience as an administrator: see, e.g. LANDIS, THE ADMINISTRATIVE PROCESS, supra note 6, at 55, 68, and 75.

27 See infra Section I.D.

28 As noted in Chapter 1, the methodologies employed in this chapter originated in structuralist and poststructuralist theories, which have long been introduced to the legal academia by great number of legal scholars. See, e.g., Gary Peller, The Metaphysics of American Law, 73 CAL. L. REV. 1151 (1985); Jack M. Balkin, Deconstructive Practice and Legal Theory, 96 YALE L.J. 743 (1986); Jack M. Balkin, Nested Oppositions, 99 YALE L.J. 1669 (1990); Amy M. Adler, Post-Modern Art and the Death of Obscenity Law, 99 YALE L.J. 1359 (1990); GUYORA BINDER AND ROBERT WEISBERG, LITERARY CRITICISM OF LAW (2000); and Jack M. Balkin, Deconstruction’s Legal Career, 27 CARDOZO L. REV. 101 (2005).
and undergirding structure. As will become evident below, the following analysis is particular with words. It focuses on allegories, footnotes, and quotations. Etymologies will be introduced, too. Maybe above all, the analysis closes in on dichotomies set forth in Landis’ numerous publications.

One might suggest that this choice of methodology stands in need of explanation. I believe it is warranted and even natural given the fact that Landis clearly concerned himself with issues of rhetoric. He was not alone in this. Landis’ wrote the book in an age highly sensitive to figures of speech, metaphors, and symbols. For instance, reflecting on the Court’s early 1930s jurisprudence, Thurman Arnold remarks in The Symbols of Government,

The action of the Supreme Court emphasized a new set of symbols; it dramatized the fear that a government which assumed responsibility for gaps left by the failures of industrial feudalism was gradually pushing on toward a Russian or a German culture. The word-symbols for this idea—regimentation, bureaucracy, fascism, and communism—were what the Court was credited with saving us from.  

And Jaffe, referring to The President’s Committee on Administrative Management, whose report was released in 1937 (the Committee),

bitterly noted, “[T]he Committee has presented almost no proof to support its violent, unmeasured condemnation of the independent commissions.”

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30 See supra the President’s Committee’s Report, supra note 7. For an analysis of the Report, see supra Chapter 4. To recall, in its report, the Committee proposed a highly centralistic reorganization plan, whereby the President, in person or through his executive office, would effectively command the whole federal administrative apparatus—indeed, independent agencies’ included—and all parts of the Executive.
31 Louis L. Jaffe, Incentive and Investigation in Administrative Law, 52 HARV. L. REV. 1201, 1242 (1939) [hereinafter Jaffe, Incentive and Investigation in Administrative Law]. See also id. at 1239-1240; Louis L. Jaffe, Book Review, 42 COLUM. L. REV. 1382 (1942) (a review of ROSCOE POUND, ADMINISTRATIVE LAW: ITS GROWTH, PROCEDURE AND SIGNIFICANCE (1942)) (criticizing Pound primarily, but also his opponents—Jaffe explicitly counts himself among them—for their rhetoric); Joseph B. Eastman, The Place of the Independent Commission, 12 CONST. REV. 95, 102 (1928) [hereinafter Eastman, The Place of the Independent Commission]; and KARL N. LLEWELLYN, THE BRAMBLE BUSH 9-10 (1960) (1930). On the heated debate and hyperbolic rhetoric exchanged between conservative and progressive lawyers, see supra Chapter 3.
So viewed, Landis’ focus on issues of style appears natural. “It interests me that … [administrative law] is an area where epithets and encomiums play such a part,” he wrote in the beginning of a 1940 article, entitled Crucial Issues in Administrative Law.\textsuperscript{32} Throughout the book, Landis took great pains to differentiate between his party and that of his opponents on the basis of the disparate language used by the two groups. He said that his enemies—the adjective is not frivolously invoked here—lash out “hysterically”\textsuperscript{33} in “unguarded language,”\textsuperscript{34} “language hardly indicative of academic restraint,”\textsuperscript{35} at agencies. Should the proposal set forth in the book be accepted, he prophesied, instead of a “battle”\textsuperscript{36} between the courts and the agencies, there would be “that rivalry that attends the academic scene, where a passionate desire for truth makes for recognition and not resentment of achievement.”\textsuperscript{37}

Moreover, it could be suggested that Landis’ own rhetoric should be meticulously scrutinized, if only because he was one of many who attempted at deconstructing the established constitutional discourse of their time by challenging the strictly-tripartite reading of the Constitution. Lastly, the interpretation of “serious,” mainstream legal treatises through the prism of literary/linguistic analyses may seem affected only if one is oblivious to the fact that (especially) in the book, written following the traumatic events of 1929, Landis provides his account—his story—of the emergence of the American administrative state. “[S]tories, especially those used in legal and ritual settings,” writes the historian Sarah Maza “are the means whereby social actors attempt to impose fixed meaning on social experience in the context of a crisis in which meanings have become indeterminate.”\textsuperscript{38} The interpretations proposed in the chapter are designed indeed to

\textsuperscript{32} James Landis, Crucial Issues in Administrative Law, 53 HARV. L. REV. 1077, 1077 (1940) [hereinafter Landis, Crucial Issues in Administrative Law].
\textsuperscript{33} LANDIS, THE ADMINISTRATIVE PROCESS, supra note 6, at 47, referring to the Committee.
\textsuperscript{34} Id. at 139 (adverting to Justice Sutherland’s opinion in Jones v. Securities and Exchange Commission, 298 U.S. 1 (1936)). Landis writes thus of the Justice’s opinion: “Such an outburst indicates that one is in the field where judicial temper has fled.” Id. at 139.
\textsuperscript{35} Id. at 4, referring again to the Committee.
\textsuperscript{36} Id. at 136.
\textsuperscript{37} Id. at 54.
\textsuperscript{38} Sarah Maza, Stories in History: Cultural Narratives in Recent Works in European History, 101(5) AM. HIST. REV. 1493, 1500 (1996).
attend to the book’s attempt to enact a particular story of the rise of the federal administrative commissions.

D. Intellectual Context: An Age of Experimentation

1. Naturalism

Naturalism\textsuperscript{39} was at the zenith of its influence in the United States during the half century stretching from, say, the mid-1880s forwards.\textsuperscript{40} It was an epoch, enamored with Darwinism\textsuperscript{41} and Pragmatism;\textsuperscript{42} the period of the rise of the great universities and of the scientific ethos and the decline of seminaries and theology; an era that saw the academization of philosophy at the expense of “amateur” thinkers,\textsuperscript{43} and the rapid scientification in the study of social phenomenon.\textsuperscript{44}

Naturalism swept the legal academia in the beginning of the twentieth century.\textsuperscript{45} It overtly and happily accords priority to observable facts over conjunctures. A naturalistic

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\textsuperscript{39} See infra text accompanying and note 45.
\textsuperscript{40} See EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE (1973), especially at 3-39, and, on naturalism in the legal thinking of the time, at 83-91.
\textsuperscript{41} See RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT (1955). See supra Chapter 5.
\textsuperscript{43} See KUKLICK, supra note 42, at 97-110. Kuklick writes, id. at 107, that “[t]he amateur men of letter who were a force to be reckoned with in the middle of the nineteenth century suffered as much as professional theologians.” Ralph Emerson was one of those “amateurs” who were pushed aside by the likes of John Dewey. See also Generally THOMAS L. HASKELL, THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE (1977).
\textsuperscript{44} See supra Chapter 4, Section II.A.1.
\textsuperscript{45} A clarification: the terms naturalism (and empiricism) lend themselves to various interpretations. There is obviously no need to conclusively define these interrelated terms here. All that is needed, it seems to me, is to interpret them consistently. I chose to follow Edward Purcell’s definition not because it is the most cogent, but because his work will be heavily drawn on in the following paragraphs. Purcell’s analysis is based on the understanding that “Scientific naturalism” stands for the following two principles. (1) A rejection of absolute thinking: “No a priori truths existed, and metaphysics was merely a cover for human ignorance and superstitions.” (2) Scientificty: “Only concrete, scientific investigations could yield true knowledge, and that knowledge was empirical, particular, and experimentally verifiable.” See PURCELL, infra note 40, at 3. A definitive formulation of a naturalistic Realist viewpoint, see Hessel E. Yntema, Legal Science and Reform, 34 COLUM. L. REV. 207 (1934), and Walter W. Cook, Scientific Method and
approach prides itself in not reverting to metaphysical, non-experimentally-verifiable
formulae when explicating a given phenomenon. Simply put, a naturalistic perspective
demands that previously held convictions be cleansed of every trace of metaphysics. This
is to be done by exposing them, as any theory, to a strict factual examination.46

This mood was ripe for experimentation, at least in the mind of the intelligentsia, in most
areas of life—certainly, in the business of government. In an influential book of the mid
1930s, Thurman Arnold wrote, “The question that confronts the student of government is
what kind of a social philosophy is required to make men free to experiment—to give
them an understanding of the world, undistorted by the thick prismatic lenses of
principles and ideas, and at the same time undamaged by the disillusionment which
comes from the abandonment of ideas.”47 No wonder, then, that according to Richard
Hofstadter “as an economic movement,” the New Deal was “a chaos of experimentation.”48
The lifeblood of naturalism is, after all, experimentation.

Landis’ analysis is infused with naturalism. His naturalistic analysis relates a local
occurrence (the emergence of the administrative enterprise) to a grander scheme of things
(the process of natural evolution, for example). This connection, if established, is
supposed to prove the inevitability of what at first appears to be a mere local occurrence.
Specifically, the overall naturalistic perspective serves at least two purposes. First, it
naturalizes, and thus neutralizes and legitimizes, the emergence of the administrative
process in the American polity. Second, it dictates, even necessitates, pivotal institutional
features in the operation of agencies, which are meant to guarantee their healthy
development to the benefit of society. The former will be called “the Natural Selection

46 This proposition has its problems, of course. See infra Section III.D.4, and text
accompanying note 333.
47 ARNOLD, supra note 29, at 258-259.
The Metaphysics of James Landis

Argument,” and the latter “the Chemical Interaction Argument.” The two arguments cut the naturalistic perspective into two: the former takes the view that the administrative process should be likened to a living organism, while the latter holds that it is best described in the terms of elementary physics.

The division between the two arguments has several noteworthy dimensions: temporal, political, and personal. These various dimensions differ with regard to questions as to how robust the administrative process should be, how political the model regulator should be, and how much initiative he is expected to exert. I believe that the book’s oscillation between the two arguments mirrors an intellectual move, which occurred in the first centuries of the twentieth century, from strict Darwinism to across-the-broad naturalism. In the words of Edward Purcell, during these decades “[e]mphasis on evolution itself … gave way to broader naturalism that saw Darwinism not as an analogy but as an example of both careful empirical methodology and nonteleological, nonmetaphysical approach to human knowledge.”

2. The Fact/Theory Dichotomy

As we shall see, the distinction between fact and theory permeates the book’s analysis. Although at times the Landisian defense of administrative commissions sounds pretty cacophonous, the many dichotomies that circulate in it gravitate towards this meta-dichotomy. This polarity has an assortment of incarnations. It is closely related to the

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49 See infra Sections III.B.1 and III.C.1, respectively.
50 PURCELL, supra note 40, at 8. See supra Chapter 5.
51 It is interesting to refer here to Jacques Derrida’s hugely influential Plato’s Pharmacy, where Derrida attacks Plato’s preference for speech over writing. See Jacques Derrida, Plato’s Pharmacy, in DISSEMINATION 61 (Barbara Johnson trans., 1981). See also JONATHAN CULLER, ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM (1982); STRUCTURALISM AND SINCE: FROM LÉVI-STRAUSS TO DERRIDA (J. Sturrock ed., 1979); TERRY EAGLETON, LITERARY THEORY: AN INTRODUCTION 79-130 (2d ed., 1996); and JOHN STRURROCK, STRUCTURALISM (2d ed., 2003). The reference is interesting Derrida’s analysis begins with Plato’s assumption that speech is more immediate and direct in the speaker’s mind than writing, which relies on external media, is. This line of reasoning parallels the naturalistic assumption regarding the priority of facts over theory. If we follow the analogy, under the Platonic tradition, facts equal speech (whereas writing equals theory). This analysis should serve as first indication that the fact/word polarity rests on unsound foundations. See infra Section III.F.1.
following pairs: speech and act, saying and doing, word and reality. The affinity between these pairs is readily evidenced by the etymology of the word “fact,” which is derived from the Latin verb *facere* which means “to do.” According to Landis, the first concept in these pairs is the realm of commissions, while the second is that of the organs enveloping it.

The dichotomy between talk and action runs deep in the United States.⁵² “It has been one of our boasts since the beginning of this century,” wrote Daniel Rodgers in 1987 in a section entitled “Words and Acts” at the outset of his *Contested Truths*, “that Americans did not go for abstract thinking.”⁵³ And Rodgers quotes in this context one observer who commented in the late 1950s, “If you want to know what a politician is up to, watch his feet, not his mouth.”⁵⁴ This matter-of-fact position was held in high esteem, within and without legal circles, in the first few centuries of the twentieth century, when academic were keen on replacing stale absolutes with factual data.

And then there was Roscoe Pound’s Sociological Jurisprudence⁵⁵ and “law in books” v. “law in action”⁵⁶ in the Progressive Era, and Arnold’s “Spiritual vs. Temporal Government”.⁵⁷ at the time of the New Deal and Legal Realism. Generally, this approach was typical of the “constructive,” as opposed to the “deconstructive,” side of Legal Realism, as depicted by Gary Peller.⁵⁸ According to this brand of Legal Realism, Peller...
explains, “Determinacy could be achieved by focusing on the objectively observable tangibles presented in [pending legal] cases, which determined the true similarity or difference that legal categories obscured. Legal activity then could be seen as determinate to the extent that it was a derivative function of these facts.”

In other words, according to this view, only observable, objective facts, rather than words, categories, and other theories, could ensure determinacy. They also ensured, Arnold insisted, moral clarity. “Society is able to suppress its moral instincts,” he wrote in a passage written in a beautiful prose, “by looking at the suffering of its unfortunate members through the darkened windows of fundamental economic theories.” Thus, in endorsing the words/things dichotomy, Landis was a man of his time.

As we shall see, the book’s complex structure is manufactured by two underlying theme outlined in the section, namely, the book’s naturalistic viewpoint and the dichotomy between act/fact/reality and speak/theory/word.

I now move to Landis work.

II. Prologue: The Business of Courts

Beginning in 1924, the year of his graduation from Harvard Law School, Landis introduced himself to the legal community in a series of articles that focused on two topics: (1) a study of the mechanics of the federal judiciary, which he conducted with Felix Frankfurter, and (2) the tension between the common law tradition and modern legislation.

This literature introduces two emphases to the present investigation: first, it bears testimony to Landis’ long-standing understanding that certain historical processes had brought about a new era, which called for a radical change in the way lawyers think of

possibility of neutral generality, so far as it was ruled by objective reality.” Id. at 1225-1226. Cf. Purcell’s similar characterization of theoretical differences between Karl N. Llewellyn and Jerome Frank. PURCELL, supra note 40, at 81-86. See also HORWITZ, supra note 11, at 208-212 (“Realism: Critical or Scientific?”), and Joseph William Singer, Legal Realism Now, 76 CAL. L. REV. 467, 467-477 (1988).

59 Peller, supra note 28, at 1242.
60 ARNOLD, supra note 29, at 125.
social changes, the appropriate relationship between citizenry and government, and, ultimately, the law itself. Generally, Landis does not shy away from a longue durée style of writing. He has a strong sense of a modern zeitgeist. He mentions in the book “[t]he interdependence of individuals in our civilization,” and, as a baseline for the rise of expertise, opines that “[t]he world of today as distinguished from that of even a hundred years ago is one of many professions.” Landis and Frankfurter spoke similarly of “an age of specialization” in their The Business of the Supreme Court.

Second, contemporary courts, led by the Supreme Court, came to symbolize for Landis the forces of reaction. It is in this context that his affinity to Legal Realism is most salient. To him, courts’ “conservative tendencies” had first to be eradicated for the law “to cope adequately with the problems raised by rapidly changing civilization.” By naming several traits, embedded in the common law tradition, that checked any substantial progress in this regard in the foreseeable future, Landis prefigured future institutional analyses, which he would bring to center stage later on in his writing.

As a young scholar Landis had often collaborated with his former professor, Felix Frankfurter. The two jointly published a number of manuscripts. The focal point of their joint venture of the second half of the 1920s was a close study of the business of the Supreme Court; a study whose main interest is the evolution of jurisdictional dispensation within the federal judiciary since 1789 to 1925. A second series of articles followed. It

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61 At one point Landis explicitly talks of “the temper of the times.” Landis, The Administrative Process, supra note 6, at 141.
62 Id. at 46. Landis writes that this interdependence “magnifies too greatly” the cost of inefficiency in “the art of government.” Id. id.
63 Id. at 154. See also id. at 118 (“these days of specialization”).
65 Landis, The Study of Legislation in Law Schools, supra note 4, at 435.
66 The two published already in May 1925 an article dealing with mechanisms to alleviate problems of coordination among the several legal regimes of the several States (particularly, “the Compact Clause” of the Constitution: U.S. Const. Art. I, Sec. 10). See Felix Frankfurter and James Landis, The Compact Clause of the Constitution—A Study in Interstate Adjustments, 34 Yale L.J. 685 (1925).
67 The joint venture resulted in 1928 in the publication of an important book, Frankfurter and Landis, The Business of the Supreme Court, supra note 64. The book’s eight chapters had been individually presented in the Harvard Law Review, beginning in June 1925. See 38
examined the business of the Court in the wake of the Judiciary Act of 1925, an act that greatly limited the Court’s jurisdiction in the face of a steady growing in its business. In the last piece in this string of studies, the appointment of a new Chief Justice (Hughes) and a new Justice (Roberts) to the Court was noted and it was insisted that “[a] critical estimate of the work of the present Court must reckon with these new personal factors.”

Concurrently, Landis, writing alone, drummed home the message that legislation as lawyers had known it in the past has gone through transformation in recent history. So much so, he was sure, that the advent of this new phase in the history of legislation warranted a reconfiguration of the extant body of law so that legislation’s primacy as a legal source would be acknowledged and acted upon. While preaching to law school professors, too, his main audience was the Supreme Court.

Legislation has much advanced in recent times, Landis claims in one essay. It “represent[s] a … wide[] and comprehensive grasp of the situation.” It is better drafted than in the past, more systematic, handled by expert draftsmanship, and attuned to pending social needs. Furthermore, democratic legislation does not suffer from legitimacy deficit, and is better informed than common law judges who customarily draw on “an outmoded age and a narrower experience.” As such, lawyers and courts have much to learn from it, rather than stubbornly adhere to the view that “the statute[] [is] merely … the voice of the majority, and seemingly only as durable as that majority. It

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68 Frankfurter and Landis, The Business of the Supreme Court at October Term, 1930, supra note 2, at 272. See also Felix Frankfurter and James Landis, The Supreme Court under the Judiciary Act of 1925, 42 HARV. L. REV. 1 (1928), and The Business of the Supreme Court at October Term, 1928, 43 HARV. L. REV. 33 (1929).

69 See Landis, The Study of Legislation in Law Schools, supra note 4, at 433.

70 James M. Landis, Statutes and the Sources of Law, 2 HARV. J. ON LEGIS. 7, 13 (1965). The article was originally published in 1934 in HARVARD LEGAL ESSAYS WRITTEN IN HONOR AND PRESENTED TO JOSEPH HENRY BEALE AND SAMUEL WILLISTON BY THEIR COLLEAGUES AND STUDENTS 213 (1934) [hereinafter Landis, Statutes and the Sources of Law].

71 See infra text accompanying note 325.

72 Landis, The Study of Legislation in Law Schools, supra note 4, at 437. See also id. at 436, and infra text accompanying note 96.
simply states its commands and pleads no reason for its cause.”73 In truth, Landis maintains, this animus manifests an aversion to policies endorsed in the acts of Congress and it is buttressed by lawyers’ deep-rooted reluctance to look beyond the confines of doctrinal legal reasoning even when faced with novel challenges. “Student, lawyer, teacher, judge tend to narrow their horizon to their material,” he asserts.74 It is in this sense that they are conservatives, and not up-to-date with the demands of heavily industrial society. As first order of the day, therefore, “law must be made to look outside itself.”75

“Throughout its history,” Landis and Frankfurter comment “the Supreme Court has called for statesmanship.”76 Yet, Landis notes elsewhere, “Statesmanship is impossible without a broad vision, unattainable as long as the focus is simply the single case.”77 In The Business of the Supreme Court the authors go one step further and argue that a broad vision “come[s], except in the rarest instance, from wide experience.” “Only the poetic insight of the philosopher,” they conclude, “can replace seasoned contact with affairs.”78

As we shall repeatedly see throughout, Landis’ future analyses will put much emphasis on experience as a vital element in sound regulation.

Already at this stage of his academic career Landis believed that courts’ role in industry regulation should be carefully demarcated due to their judicial imperialism and “barbaric rules of interpretation”;79 they must learn to heed well the intent of the Legislature when interpreting them; and in any event they should be deferential to Congress.80 In 1924, in what I believe to be his first legal publication, which he co-authored with Frankfurter, the

73 Id. at 433. Landis argues that in so doing, lawyers and judges ignore the important role legislation had played in the development of the common law. See also Landis, Statutes and the Sources of Law, supra note 70, at 8 (“Much of what is ordinarily regarded as ‘common law’ finds its sources in legislative enactment.”).

74 Landis, The Study of Legislation in Law Schools, supra note 4, at 435.

75 Id. at 435.

76 FRANKFURTER AND LANDIS, THE BUSINESS OF THE SUPREME COURT, supra note 64, at 317.

77 Landis, The Study of Legislation in Law Schools, supra note 4, at 435.

78 FRANKFURTER AND LANDIS, THE BUSINESS OF THE SUPREME COURT, supra note 64, at 317.


80 Id. id (“strong judges prefer to override the intent of the legislature in order to make laws according to their views …”).
writers told the Supreme Court in a language typical of the time that (a) in handling the issue of separation of powers, “It is futile to draw the answer from abstract speculation”; 81 and (b) that Congress is “that branch of government upon which is cast the primary responsibility for adjusting public affairs.” And they go on to note, “The accommodations among the three branches of government are not automatic. … Certainly, in the first instance Congress must mark metes and bounds.” 82

However, in the last piece in this line of articles, Landis presented a more nuanced vision of the relationship between Congress and the judiciary. While ascertaining that Congress is “a supreme court of appeal constantly busying itself with correcting the aberrations of the judicial process,” he argued that “[a] decent respect for the legislative process would strike a more favorable balance between legislative and judicial development of law,” 83 and also mentioned the “interdependence” between the two. 84 These remarks somewhat refine Landis’ consistent demand that courts give deference to the legislature. The vision of co-operation between the two branches better reflected Landis admission that “the search for pragmatical truth carries us naturally to seek for wisdom in many sources of experience.” 85

As suggested, the articles published in this period—certainly, those dealing with legislation—were Landis’ most Realist work, at least in the sense that they underscored judges’ latitude in deciding cases. 86 They evinced a deep belief that, to use Horwitz’s words, legal rules do not “produce the kind of certainty and predictability traditionally identified with the rule of law.” 87 Landis declares that at times “[M]axims … seem more honored in their breach than in their observance.” 88 He accordingly rejected the

82 Id. at 1016.
83 Landis, Statutes and the Sources of Law, supra note 70, at 23 (emphasis added).
84 Id. at 25.
85 Id. id.
86 On Landis complex relationship with Legal Realist ideas, see RITCHIE, supra note 3, at 31, 36-38. See also HORWITZ, supra note 11, at 184-185.
87 HORWITZ, supra note 11, at 219.
88 Landis, The Study of Legislation in Law Schools, supra note 4, at 440.
Blackstonian “faith of a full-fledged system of common law.”\textsuperscript{89} Additionally, in 1928 he and Frankfurter would write in a Legal Realist vein that regulation of railways and other utilities “turns fundamentally not upon any settled and easily applied legal rules but upon judgments of policy resting on an understanding of economic and industrial facts.”\textsuperscript{90} This observation led Landis to emphasize the inevitable personal factor associated with interpretation and enumeration of rules of laws.\textsuperscript{91} Here, maybe more than in his later writings, Landis explicitly endorses Holmesian pragmatism. He writes, “If it be true that law reflects and should reflect experience rather than logic, legislation born of such an urge demands careful and sympathetic consideration.” Even more telling is his acknowledgement, already noted, that “[o]ur prevailing philosophy makes us less certain that we have seized upon universals, and the search for pragmatical truth carries us naturally to seek for wisdom in many sources of experience.”\textsuperscript{92}

Finally, the first signs of an institutional analysis of the capacities of courts were to be found already in Landis’ early scholarship. Thus, for example, Frankfurter and Landis commented at one point, “Courts can deal only with controversies fit for them to handle. Congress cannot thrust upon courts the task of fixing schedule of freight rates any more than Congress can avoid the unpleasant duty of framing a tax by passing it on to courts.”\textsuperscript{93}

Landis’ early work, taken as a whole, can be depicted as an effort to re-define courts’ place in modern America. In grappling with this issue, Landis expressed a general dissatisfaction with courts’ personal, but also institutional, disposition toward non-traditional measures deployed with a view to regulating an industrialized, diversified, and polarized society. It should be noted, however, that throughout their joint venture, Landis and Frankfurter appeared to be open to the possibility that “[n]ew facts … [would] find a

\textsuperscript{89} Landis, Statutes and the Sources of Law, supra note 70, at 10. See also Landis, The Study of Legislation in Law Schools, supra note 4, at 442.

\textsuperscript{90} F\textsc{rankfurter} and L\textsc{andis}, The Business of the Supreme Court, supra note 64, at 153.

\textsuperscript{91} See id. at 310, and Landis, The Study of Legislation in Law Schools, supra note 4, at 437.

\textsuperscript{92} Landis, Statutes and the Sources of Law, supra note 70, at 25. This argument is part of Landis’ call upon judges to open their horizons to the inputs of legislation.

\textsuperscript{93} F\textsc{rankfurter} and L\textsc{andis}, A Study in Separation of Powers, supra note 81, at 1021-1022.
ready access” to the trained lawyer and the Court. Landis was still hoping that the Court would acknowledge that in treating “subtle conflicts of economic forces,” “wisdom in political adjustment, talent for industrial statesmanship must be joined.” By so doing, he thought, the Court would rejuvenate the muffled spirit of the common law.

The thing that bothered Landis the most was that courts did not follow what he considered to be the true common law tradition. In Statutes and the Source of Law—an essay castigating courts’ dismissive treatment of, and limited reliance on, legislation—Landis noted, “Historically statutes have never played such a confined role in the development of English law. Instead, much of what is ordinarily regarded as ‘common law’ finds its source in legislative enactment.” In other words, Landis thought that for courts to stay up to date with modern demands of government, they should seriously engage with modern legislation in the “true” spirit of the common law, which had been stifled by an ossified judiciary. So viewed, courts’ disregard of legislation was nothing less than an act of betrayal in the venerable tradition of the common law, at least as depicted by Landis.

This line of attack would recur in the book. It is important as it evinces a strong conviction that the common law mechanism could take care of great many social ailments and could certainly reach salutary results, if only it were properly handled, if only its tradition were dutifully observed. Landis, again, was hopeful that lawyers would mend their ways. Yet, being aware of the need in immediate remedy, the vehicle of legal change—of progress—he had in mind at this phase was legislation. Back then, Landis did not directly address administrative agencies at all. Still, as we shall shortly see, his censure of orthodox legal thinking offered clear indications of the kind of pragmatic arguments he would raise in future discussions regarding administrative regulation.

Now, we turn to the book.

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95 Frankfurter and Landis, The Business of the Supreme Court, supra note 64, at 318.
96 Landis, Statutes and the Sources of Law, supra note 70, at 8.
97 See infra text accompanying notes 214-219.
III. Landis and the Administrative Process

A. Introduction: A Thick Description of Expertise

Traces of the public general manager, empiricist/professional, and judge paradigms are found in the book, albeit in descending frequency. The book highlights three fundamental disparities among the three paradigms, not yet commented upon in this study.\textsuperscript{98}

First, each of the paradigms envisages a somewhat different habit of thought. The judge paradigm envisions an expert who is standing on the shoulders of giants. The expert thus learns to appreciate the importance of meticulous, studious, and comprehensive problem solving mechanisms. It accordingly mandates a progressive, slowly-but-surely process of indoctrination. While sharing this perspective, the empiricist/professional paradigm imagines an almost timeless, decontextualized professionalism. This image negates the temporal dimension in the content of the acquired expertise. To illustrate, one could be an excellent physicist without troubling oneself with a thick description of the reality out of which a set of equations emerged. The general manager is the most interesting paradigm in this respect. Here professionalism is based on a rich personal experience. As such, the paradigm does not easily lend itself to a simple, linear narrative. It is more appropriate to think of its production in evolutionary,\textsuperscript{99} Darwinian terms, which open a wedge for the inclusion of discontinuities and continuities, mutations and familial affinities in the account given to the upbringing of expertise, and correspondingly in the experts’ habits of mind.

Second, the three patterns of professional development introduce the consideration of potency to the analysis. The intuition here is that whereas the Darwinian scheme (that of the general manager) is projected to produce an enterprising agent that is adapted to its surrounding, the mechanic (i.e., the empiricist/professional) pattern is likely to result in a flat, atomistic, and automated subject. According to the first, regulators are freely self-
created and world-creating people, while according to the second, they are governed (even if not entirely) by contingency. The progressive, incremental process whereby the judge paradigm emerges begets the agent-subject that is a medial product. That is, an improvement on past regulating entities, which is stuck in a rut of past-generations’ design.

And third, two out of three patterns of development — those of the general manager and the empiricist/professional paradigms — map on to the book’s two visions of the historical process leading to a widespread federal regulation in the United States, which are captured in the Natural Selection and Chemical Reactions Arguments. 100

In the following sections Landis’ diverse conceptions of administrative expertise will be presented step by step; each section revealing a different facet of it. I will conclude the discussion by focusing on several soft points in Landis’ analysis, while showing how the two facets of naturalistic explanation — natural selection and chemical reaction — collapse onto each other. Thus, while my reading of the book may deepen our understanding of administrative expertise (or, assertions thereof), it will surely call to question the coherence of the concept, at least as it is presented by its greatest apostle.

B. The Public General Manager

1. The Natural Selection of the Manager

According to the book, the incompetence of the “constitutional” branches of government to handle the demands of modern times brought about the introduction of agencies to the American scene. The book’s rendition of the rise of agencies in the United States is quite simple. It is clearly a story of natural selection. It falls in line with Eastman’s assertion, “The independent commissions are the evolutionary product of public need.” 101 This is the evolutionary story as it is presented in the book: in the face of external stimuli, for

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100 See supra text accompanying note 49.
example, “[t]he pressure for efficiency,”\textsuperscript{102} government has to react. A battle evolves among the existing governmental organisms, under the understanding that the organ best suited to accommodate the new needs would be pronounced the natural\textsuperscript{103} selection. At the end of the battle it is readily realized that the only alternative is to turn to the service of expert agencies, which pop up as the competition unfolds. It is a vigorous process as “[t]he demand for the assumption by government of the responsibility to direct and control enterprise increases day by day in intensity.”\textsuperscript{104} Following the allegory, the end-product of evolution is a new, separable, viable, and fully capacitated organ; an organ that is essentially a mutation of its ancestors. This resultant expertise is likewise \textit{sui generis}.\textsuperscript{105}

As Landis notes at one point—

> the administrative differs not only with regard to the scope of its powers; it differs most radically in regard to the responsibility it possesses for their exercise. In the grant to it of that full ambit of authority necessary for it in order to plan, to promote, and to police, it presents an assemblage of rights normally exercisable by government as a whole.\textsuperscript{106}

What are, then, the details of the fight out of which the administrative commission rises triumphant and the general manager paradigm presents itself?

2. The Difference Between Doing and Talking

A large part of Landis’ attempt at finding a place under the sun for the administrative is connected with the dichotomies acting/doing, practical/theoretical, and so on.\textsuperscript{107} The first concepts in these pairs are attributed to the agency, while the latter to the forces of

\textsuperscript{102} LANDIS, THE ADMINISTRATIVE PROCESS, supra note 6, at 46 (emphasis added). See also id. at 10, 112 (political—that is, “bad”—pressures), and at 46 (good pressure: “the pressure for efficiency”).

\textsuperscript{103} The adjective “natural” resurfaces repeatedly in the book. See, \textit{id.}, \textit{e.g.}, at 26, 92, and 111.

\textsuperscript{104} Id. at 122.

\textsuperscript{105} See supra Chapter 3, Section II.C.

\textsuperscript{106} LANDIS, THE ADMINISTRATIVE PROCESS, supra note 6, at 15 (emphasis added). This is a recurrent argument in the book. See also \textit{id}. at 2, 10, and 111.

\textsuperscript{107} See supra Section I.D.2.
tradition. Already in 1924 Landis admonished the courts for “think[ing] words instead of things.”\textsuperscript{108} Now, in the book he contrasts arguments that emanate form “logic-chopping,”\textsuperscript{109} or advanced by “theorists,”\textsuperscript{110} on the one hand, to “practical,” “pragmatic,”\textsuperscript{111} and realistic\textsuperscript{112} arguments, ones that are based on what happens in the “world,”\textsuperscript{113} on the other hand. Landis distinguishes between discourses spoken “in terms of reality,” and those expressed “in terms of political dogma or of righteous abstractions.”\textsuperscript{114} He is certain that the latter attitude produces dire results. Thus, for example, he writes that the Clayton Act, “which was heralded as labor’s Magna Charta … was literally destroyed by judicial interpretation.”\textsuperscript{115}

This juxtaposition of the theoretical versus the practical has a personal dimension. On this side of the divide stand Landis and his allies, and on the other bank, those who draw “too readily upon words,”\textsuperscript{116} namely, the Committee members (who worked in the service of the President)\textsuperscript{117} alongside with those who are drawn to “finely spun logomachy which is the delight of lawyers and judges.”\textsuperscript{118} Landis clearly tries here to distance himself from legal practitioners, or at least from a certain brand of lawyers and judges, and their traditions.\textsuperscript{119}

\textsuperscript{108} Frankfurter and Landis, A Study in Separation of Powers, supra note 81, at 1023.
\textsuperscript{109} Id. at 23.
\textsuperscript{110} Id. at 24.
\textsuperscript{111} Id. at 28.
\textsuperscript{112} Id. at 64.
\textsuperscript{113} Id. at 153.
\textsuperscript{114} Id. at 97.
\textsuperscript{115} Id. at 88.
\textsuperscript{116} See supra note 30.
\textsuperscript{117} LANDIS, THE ADMINISTRATIVE PROCESS, supra note 6, at 48. Harvey Pinney argued similarly in response to the Committee’s “strong language,” “Independence … should be judged by its fruits—not by theoretical abstractions applicable in bygone era to a different area of government action.” Harvey Pinney, The case for Independence of administrative Agencies, 221 ANNALS OF AM. ACAD. POL. SOC. & SCI. 40, 47 (1942).
\textsuperscript{118} See also LANDIS, THE ADMINISTRATIVE PROCESS, supra note 6, at 75 (“The pressing problem today is to get the administrative to assume the responsibilities that it properly should assume. … The easiest course is frequently that of inaction. A legalistic approach that reads a governing statute with the hope of finding limitations upon authority rather than grants of power with which to act decisively is thus common.”).
The same rationale is at work with regard to the Executive. “[T]he art of regulating an industry,” Landis proclaims, “requires knowledge of the details of its operation.” Later he writes of the advantage of placing new governmental duties “in the hands of a select, compact group of individuals,” rather than entrusting them to “the officials of an existing branch of government.” The thing to be gained by so doing is that “it is impossible to conceive of much in the way of an over-all directional effort deriving from the titular heads” of a governmental department. “What does derive,” Landis goes on to specify with regard to the latter option, “is too frequently atmosphere, not policy, and atmosphere that may bend unduly the shaping of policies by those who have a first-hand acquaintance with the facts.” How different is the representation of the two options. Particularly striking is the fact that the administrators are referred to as “individuals,” rather than “official” and “titular heads”; the first are able to have “a first-hand acquaintance with the facts,” whereas the second are able only to create a distorting and removed “atmosphere.” Intangible atmosphere is juxtaposed against concrete facts. Once again we meet the contrast between high-sounding chatter and brute facts.

According to Landis, Congress, and not the administrative commission, should be the arena where—to use a term famously invoked by Justice Scalia in *Romer v. Evans*—*Kulturkampf* takes place. The Legislature’s function is to process “those postulates

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120 *Id.* at 23.
121 *Id.* at 25.
122 *Romer v. Evans* 517 U.S. 620, 636 (1996) (Scalia J. dissenting). The term, which could be translated as “culture struggle” (kultur + kampf, as in *Mein Kampf*), originated in European religious wars. Indeed, Landis assigns a key role to Congress in his schema. It appears that he tries to put forward a viable boundary to its sphere of operation, which would replace the Court’s jurisprudence of his time, without discarding the nondelegation doctrine altogether. In this regard my reading of Landis’ approach to the *Schechter* doctrine is different from that of Morton Horwitz. In A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) the Court struck down the NIRA Act of 1933 as it provided for an unconstitutional delegation of legislative powers from Congress to an administrative agency. Whereas Horwitz maintains (HORWITZ, supra note 11, at 217) that “[a]n important part of *The Administrative Process* was devoted to attacking the delegation theory,” I think that that was not the whole story. I believe that the book was attacking only *the way the doctrine was implemented by the Court*. Actually, on this reading, the doctrine, properly applied, has an important role in the constitutional Landisian scheme. See infra Section III.E.3. See also Landis, Crucial Issues in Administrative Law, supra note 32, at 1102 (“When in *Schechter Poultry Corp. v. United States*, the Supreme Court of the United States declared the National Industrial Recovery Act unconstitutional, it expunged from the statute book
[that] have … enlisted the loyalties and faiths of classes of people.”

It should first intercept the popular will and then synthesize and translate it into a coherent legislative edict, thus pointing the agencies to a certain direction, leaving the latter to devise the right road map. By so doing, Congress confers on the ensuing administrative action “that finality and moral sanction necessary for enforcement.”

As can be readily seen yet again, the dichotomy thought/action is replicated in the form of the contradiction between “faiths” (to be processed by Congress) and enforcement (to be taken care of by agencies). Landis’ persistent referral to agencies in dynamic terms goes hand in glove with his storyline of their rise to dominance (the Natural Selection Argument). They both exude a sense of potency so central in the general manager paradigm. They give the clear impression that regulatory bodies, through regulators, will simply get the work done.

Finally, it is difficult to conceive of active, on-top-of-things, fully-adaptive administrative bodies in anything but political terms. Indeed, under the Darwinian description commissions’ proximity to Congress is underscored. Moreover, and even more telling,

an act that was bound to fail of its high purpose because behind it was none of that understanding essential to the effectiveness of reform.”), and infra text accompanying notes 209 and 306.


124 Adolph Berle nicely captured this idea when he wrote in 1917 that when “the function of the general body—Congress—stopped, … that of the special body—the commission—began.” Adolph Augustus Berle, Jr., The Expansion of American Administrative Law, 30 HARV. L. REV. 430, 439 (1917).

125 LANDIS, THE ADMINISTRATIVE PROCESS, supra note 6, at 60. A similar position with regard to Congress was taken recently in the course of the debate following the Bush v. Gore case (531 U.S. 98 (2000)). There, the argument was applied with regard to the division of labor between Congress and the courts. See Elizabeth Garrett, Institutional Lessons from the 2000 Presidential Election, 29 FLA. ST. U. L. REV. 975, 975 (2001): “[T]he Bush-Gore election concretely illustrates that institutional design is a crucial consideration in determining which part of the government is best suited to render particular decisions. When institutions must become involved in majoritarian political decisions such as the selection of a President, it may be better to rely largely on the political branches than on the judiciary … This allocation of decisionmaking authority is preferable because of the greater democratic credentials of Congress.”

126 See supra text accompanying notes 122-125.
The Metaphysics of James Landis

Landis remarks at one point that “[f]rom major political and social trend [agencies] cannot and should not be immunized.”

3. The Paradigm

The two visions of the administrator as a chief-in-command and its image as a civil servant or a pen pusher are recapitulated time and again in the book. The first is best described in the following telling passage. It reads:

One of the ablest administrators that it was my good fortune to know, I believe, never read, at least more than casually, the statutes that he translated into reality. He assumed that they gave him power to deal with broad problems of an industry and, upon that understanding, he sought his own solutions.

What are the paradigm’s building blocks?

(a) Public Manager, Public Leader

According to Herbert Croly, the expert-regulator is a “custodian” of social programs. He stands for the state. It is “[t]he state, in the person of its … commissioners,” that regulates. And yet the regulator is expected to “lift[] out of the realm of partisan and factious political controversy.” After all, the expert is committed to scientific methods, as “[h]is authority, in so far as it exists, is essentially scientific.” I have already noted that, for Corly, the administrative expert is the forerunner of the “democratic manhood”

127 James Landis, Significance of Administrative Commissions in the Growth of the Law, 12 IND. L.J. 471, 480 (1937) [hereinafter Landis, Significance of Administrative Commissions].
128 LANDIS, THE ADMINISTRATIVE PROCESS, supra note 6, at 75. Landis does not tell us who the administrator is, but adds, “Limitations upon his powers that counsel brought to his attention, naturally, he respected.” Id. id. This admission is noteworthy for another reason: it brilliantly captures Landis’ idea of a perfect legislation—ultimately one that the administrator does not really need to be bothered with, he just has to know that it is out there.
130 Id. at 364.
131 Id. at 361.
132 Id. at 373.
species and certainly not a just an “office-holder” or “specialist.” He is also “a promoter and propagandist.” The expert is, in a word, a leader. According to Croly,

The ability to deal with men, to meet practical emergencies, to adapt a rule to a situation, to cooperate with non-office-holders rather than merely to order them about, to envisage a program or a law in its actual operations among men and women—abilities of this kind are more necessary to an administrator than to any one else.

(b) General Manager

One of the ways in which this paradigm is presented in the book is particularly remarkable for it is made with reference to the management of business. At one point Landis opines that “[t]he direction of any large corporation presents difficulties comparable in character to those faced by an administrative commission.” After the Transportation Act of 1920, Landis similarly pronounced, “The policies [the ICC] must formulate must now be directed towards broad and imaginative ends, conceived in terms of management rather than police.”

133 Id. at 375-376. See supra Chapter 3, Section II.C.
134 CROLY, supra note 129, at 361.
135 Id. at 375.
136 George Gardner warmly embraces Landis’ analogy of commissions to corporations in a flamboyant, almost rancorous book review of “Squire” Landis’ The Administrative Process. Gardner, however, made a particular use of it. To him, commissions, just like private corporations, were non-governmental enterprises. “[T]hese alphabetical commissions” he writes, “are not new departments of government but new enterprises with which the general government has to deal.” Gardner, supra note 11, at 340. And he explained: “Like corporations … each is chartered to provide for carrying on some kind of business; they may be created in any number and with any combinations of powers; they appear not according to any fixed principle but in response to particular problems; and each is managed by a board of directors from which all internal authority stems.” Id. at 340-341.
137 LANDIS, THE ADMINISTRATIVE PROCESS, supra note 6, at 10. Jaffe would later on reject this analogy, arguing that “it is not in my opinion sound to compare the Government to a large corporation. Relative to government a corporation is a single-purpose organization. Our federal establishment must take account of vast congeries of interests.” Louis L. Jaffe, Basic Issues: An Analysis, 30 N.Y.U. L. REV. 1273, 1277 (1955) [hereinafter Jaffe, Basic Issues]
138 See supra Chapter 2, Section II.E.
139 LANDIS, THE ADMINISTRATIVE PROCESS, supra note 6, at 13 (emphasis supplied). See also id. at 11-12 (“when government concerns itself with the stability of an industry it is only intelligent realism for it to follow the industrial rather than the political analogue. It vests the
This is a pregnant analogy in post-1929 America. The demand for the regulation of many “industries with sickness,”¹⁴⁰ in the wake of the Big Crash, showed that this corporate-style model of governance was far from flawless. It did not guarantee beneficial results; it had not in the past. Still, what Landis has in mind is a “more comprehensive, [and] more responsible”¹⁴¹ mega-management of a whole industry (for example, the railroad) by the appropriate agency. This kind of management would attend both to the “public needs” as well as to “achieving the best possible operation of the [industry].”¹⁴² Landis will reiterate this formula in later years.¹⁴³ So will others.¹⁴⁴

(c) The Thing We Cannot Fathom about Expertise

E. Pendleton Herring conducted a survey among acting and retired commissioners in which he asked them to portray an image of the ideal commissioner. The opinions expressed in the survey were included in a book dedicated to federal commissioners, which was published in 1936.¹⁴⁵ The story told in the survey was of an unbiased, well rounded, open-minded, and good-natured commissioner; a commissioner who would “keep open mind for facts”; a man who would “posses[] a broad understanding of men

necessary powers with the administrative authority it creates, not too greatly concerned with the extent to which such action does violate the traditional tripartite theory of governmental organization.”)

¹⁴⁰ Id. at 14.
¹⁴¹ Id. at 13.
¹⁴² Id. at 13.
¹⁴³ Thus, in 1961 Landis called for “the development of procedures of a non-judicial nature that are more readily adaptable to the resolution of issues arising in complicated administrative proceedings. … [F]or the issue in these cases is fundamentally that of reaching a sound business judgment that takes into account the public interest.” James M. Landis, Perspectives on the Administrative Process, 14 ADMIN. L. REV. 66, 73 (1961) [hereinafter Landis, Perspectives on the Administrative Process]. Complains of agencies’ overjudicialized procedures were common in the 1950s. See BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION (1955), at 29, 34, 58, and passim. See also Carl I. Wheat, The Regulation of the Interstate Telephone Rates, 51 HARV. L. REV. 846, 881-882 (1938) (“In rate making, time is always of the essence, and certain of the state commissions are today making notable progress in the development of informal regulatory machinery.” (emphasis in original)).
¹⁴⁴ See Pinney, supra note 118, at 44 (“Regulation as Management”).
¹⁴⁵ E. P. HERRING, FEDERAL COMMISSIONERS: A STUDY OF THEIR CAREERS AND QUALIFICATIONS (1936) [hereinafter HERRING, FEDERAL COMMISSIONERS]. See also JAMES W. FESLER, THE INDEPENDENCE OF STATE REGULATORY AGENCIES 8-9 (1942) for a shorter compilation of various views on the matter.
and affairs, judicial poise, industry of high order and patience in the study of details … [as well as] broad and analytical mind.” 146 This was the way commissioners, in essence, saw themselves. 147 Landis, we must remember, was also a commissioner more than once. 148

The hodgepodge description assembled by Herring brings into sharp relief a pivotal characteristic of the paradigm at issue: its definition would always be elusive, expansive; in fact, almost hollow, and never hermetic.

Take, for example, Carl Wheat’s analysis of the administrative process, which was published in the year of the book’s publication. 149 Wheat was of the opinion that only a holistic outlook can render a regulatory effort successful. As he wrote in 1938, for a regulatory agency (in this case, the FCC, the agency in charge of setting interstate telephone rates) “to keep fully abreast of the factual operating situation” in the field entrusted to its regulation, an effective administrative machinery should be developed. In order to achieve this goal, he goes on to explain,

The appropriate process of experience and training for those who are to give effectiveness to the scheme of

146 HERRING, FEDERAL COMMISSIONERS, supra note 145, at 90-91.
147 This may account for the fact that another conclusion was that “[t]he specialist is not the best commissioners.” Id. at 91. (We will return to this theme below—see infra text accompanying note 194.) “The man holding to hard and fast theories and dominated by his pre-conceptions as to social and economic policies is the man to avoid,” Herring wrote in his presentation of commissioners’ views. Id. at 92. One must bear in mind the fact that most of appointed commissioners had not been specialists in the area they came to regulate. See infra Chapter 7, Section IV.A.1.
148 Landis’ remarks about the able administrator that he was so lucky to come across indicate that the general manager administrator is not to be confused with a run-of-the-mill lawyer. See id. at 31 (“… incredible areas of fact may be involved in the disposition of a business problem that calls not only for legal intelligence but also for wisdom in the ways of industrial operation.”). See also Landis, Perspectives on the Administrative Process, supra note 143, at 67. In this 1961 article Landis said, among other things, “I cannot stress too emphatically the need inherent in the administrative process for the utilization of disciplines others than law.” This is clearly a Realist argument, as best exemplified in Oliver W. Holmes, The Path of the Law, 10 HARV. L. REV. 457, 474 (1897), where Holmes famously said, “I look forward to a time when the part played by history for the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them. As a step toward that idea it seems to me that every lawyer ought to seek an understanding of economics.” See also Roscoe Pound, The Place of Procedure in Modern Law, supra note 55, at 63, and Hessel E. Yntema, The Rational Basis of Legal Science, 31 COLUM. L. REV. 925 (1931).
149 Wheat, supra note 143, at 883.
regulation in this field must be such as will develop understanding in spheres which cannot be the individual concern of law school, or of schools of economic, or of business administration, or of engineering. Here, as in many other fields of the interaction of business and government, there must be developed a special body of public administration …

“It has been the considered view of the writer,” he concludes, that a beneficial telephone-rate regulation is dependent on “the establishment, under proper direction, of”—

[A]n integrated and fully co-ordinated group of men trained and experienced in all the interrelated fields of appropriate inquiry—a group freed from responsibility for the details of routine administration, but charged collectively with full responsibility for the development of all types of basic factual data, for the continuous scrutiny of all phases of this complex problem, and for the fundamental ‘research’ which seems so essential to its solution.

Several facets of the prowess Wheat was advocating for are noteworthy. Notice first that according to Wheat a confluence of several perspectives is to form a whole new, synergic understanding out of which appropriate administrative aptitude should emerge. It is also suggested that administrative competence is ultimately to be located in an intimate fraternity that is “charged collectively with the full responsibility” of regulation. Hence, as in the case of the resultant “body of public administration,” so, too, the resultant expertise could not be traced down to, or induced from, its constituents (be it the individual commissioners or law, economic, etc.). Under this depiction the unique body of knowledge as a whole is the epicenter of the expertise fraternity as a whole.

Second, the tally of “concerns” that are to be thrown into the melting pot of competence is of interest. Apart from the expected more technical or routinized doctrines mentioned—engineering, accounting, and possibly even business administration—two more open-ended fields are also listed, namely, law “and even … public policy.” The admittance of the latter two to the regulatory frame-of-thought introduces elements of discretion into public administration.

\[150\] Id. id.
\[151\] Id. id.
\[152\] I name law as one less-technical field, as it is quite obvious that Wheat would abhor a mechanical legal thinking.
On the other hand, it seems that it is not unbounded administrative freedom which is here sponsored. It is prescribed that regulators be placed “under proper direction,” and would have “full responsibility” of the regulatory solution. However, the boundaries of this outside direction are not well marked. After all, the college of experts is asked to be responsible “for the development of all types of basic factual data.” This unique description brings to mind the oft-cited adage of Chief Justice Hughes, made in 1931, describing the unscrupulous administrator’s prayer: “Let me find the facts for the people of my country, and I care little who lays down the general principles.”

Additionally, it is only fitting that the body of knowledge that should guide agencies, the “special body of public administration,” would be the outgrowth of a process of training, which is obscure and impermeable to the outside world. As a result, as one can have only a limited access to this exclusive body of wisdom, it is quite clear that external “proper direction” would, and should, not be too demanding.

To conclude, Wheat’s perception of expertise—a term, by the way, he does not use—is drenched with loopholes to the point that it is awfully hard, if not impossible, to come up with an aptly-put job description of the ideal regulator. This is a point of great moment. I will return to it below.

I believe that Herring best captured both the thrust but also the insufficiency of the various accounts given of the general manager paradigm. He wrote in 1936,

> We want good men but we are unable to define virtue. … We do not know just what sphere is proper for these commissions. We dare not make them purely expert bodies because we distrust experts; we dare not lease them to lawyers because we recognize the limitations of the legal approach; we dare not place men of vision because we know not where their vision will take them.

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154 See infra Sections III.F.3 and V.

155 HERRING, FEDERAL COMMISSIONERS, supra note 145, at 96.
What to do, then? Herring did not provide a clear-cut answer, but did insightfully point at “the possibility of regulatory commission composed not of technicians, lawyers, or well-intentioned laymen but a Commission of Commissioners.”

C. The Empiricist/Professional

1. Chemical Reaction

Studying the administrative phenomenon, Landis does not suffice himself with the evolutionary approach, but rather supplements it with a more mechanical view, which is commensurate to the empiricist/professional paradigm. This other view envisages regulators as separate particles in the administrative system, over which they have little control.

Under Landis’ vision, the administrative process is so natural that there is no need for exterior intervention in order to get to “informed and balanced [agency’s] judgments”, no external rules should be allowed to interfere with the process. It is usually advisable to bar outside forces—notably, politics—from “intrud[ing] into that experiment” which is the agency itself: they should not be allowed to impinge upon the agency for they might derail the natural course of the administrative process.

This line of arguments indicates that Landis rests the arc of this plot on the assumption that if you left the regulatory decision to those few who are really doing the job on the

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156 Id. at 97.
157 LANDIS, THE ADMINISTRATIVE PROCESS, supra note 6, at 99. Landis argues that it is also conducive to public accountability. This is one noticeable example where Landis seems to be oblivious to the dangers of agencies’ capture, which thrives the most when a commission is isolated the most from other governmental units and the public. See infra Chapter 7, Section III. Interestingly, in The Business of the Supreme Court, Landis and Frankfurter mention with some emphasis in the context of the legislative history of the short-lived commerce court the following argument made by Senator Hardy of Texas: “Environment affects us all. Our opinions gradually take a tinge from our association. … [W]hen you get your court set aside for the trial of one class of cases only, with the representatives of the United States, far removed from the people, upon one side, and the representatives of the great railroads … on the other, after a while your impartial judge begins to see things in a little different light from what he did before.” FRANKFURTER AND LANDIS, THE BUSINESS OF THE SUPREME COURT, supra note 64, at 161 (quoting 45 CONG. REC. 5162). On the commerce court, see supra Chapter 2, Section II.E.
158 LANDIS, THE ADMINISTRATIVE PROCESS, supra note 6, at 87.
159 See id., e.g., at 75 and 112.
ground, their intimate knowledge of the subject-matter—indeed, the subject-matter itself—would dictate the right decisions. Landis’ great belief in the determinacy of facts and even greater fear of the introduction of “impertinent” considerations to the administrative process is based on the assumption that they are liable to distort the unmediated perception of the facts out of which—by way of magic—agency directives would impulsively emerge. Like a scientific positivist, he seems convinced, in short, that if (only) the right data were analyzed, the right results would surely follow. Surely, in so hypothesizing, Landis circles the wagon around administrative bodies.

The Chemical Reaction Argument has a pivotal role in substantiating the empiricist/professional paradigm. “[E]xpertness,” Landis declares, “springs only from that continuity of interest, that ability and desire to devote fifty-two weeks a year, year after a year, to a particular problem.” These are the two key components in his definition: (1) Regulators’ “continuity of concern” of commission business. Elsewhere Landis speaks of regulators as “men ready to devote their life” to regulation, and goes so far as to stipulate that “in the final analysis it will be seen that the term ‘independence’ is but synonymous with the professional attitude of the career man in government.” (2) The “single-mindedness of devotion to a specific problem.” Landis insists that, without fail, both elements yield the most beneficial and efficacious agencies. He contends that due to judicial conservatism, “[t]here was … hesitation by the Congress to wait for the viewpoint of the judiciary to tally with the growing conceptions that an administrative agency might evolve [the effect—Y.S.] as a consequence of its continuing concern with the well-being of industry [the cause—Y.S.].” The same goes for the second factor: “as an agency of government confined to a fairly narrow field [the cause—

160 See also id. at 87 (“The agency’s compactness gives some assurance against the entry of impertinent considerations into the deliberations relating to a projected solution.”).  
161 See supra note 45.  
162 See supra text accompanying note 100.  
163 LANDIS, THE ADMINISTRATIVE PROCESS, supra note 6, at 23.  
164 Id. at 120.  
165 This is a repeated theme in the book. See also id. e.g., at 26, 96, and 144.  
166 Landis, Significance of Administrative Commissions, supra note 127, at 477.  
167 Id. at 481.  
168 LANDIS, THE ADMINISTRATIVE PROCESS, supra note 6, at 35. See also id e.g., at 27, 30, and 87.  
169 Id. at 96.
Y.S.], its singleness of concern quickly develops a professionalism of spirit [the salutary effect, which, in turn, induces a second, even more desirable, effect—Y.S.]—an attitude that perhaps more than rules affords assurance of informed and balanced judgments.  

2. Time and Politics

The mechanical approach to the administrative process has institutional ramifications. According to a Supreme Court decision of 1910, the powers of the ICC “are expected to be exercised in the coldest neutrality.” Landis, endorsing this dictum wholeheartedly, prescribes in the book that agencies should be guarded, for instance, from “the turmoil of a legislative chamber or committee room,” which prevents “that calmness of atmosphere in which wise administration flourishes.” The ideal settings are “control rooms where the touch of a button releases power or enjoins its surge.” Under this vision the only contact the administrators situated in the control room (a setting of a laboratory also comes to mind) would have with the outside world would be through the touch of a button. It is a detached connection to the world, as Landis makes clear when he states that “[t]he administrative is not open to the broad range of human sympathies to which the judicial process is subject.”

Indeed, walking through the halls of the edifice erected by Landis, one gets an eerie feeling that something is out of the ordinary. Soon you realize that it is devoid of “life.”

\[Id.\] at 99.
\[LANDIS, THE ADMINISTRATIVE PROCESS, supra note 6, at 70. Cf. Henry R. Seager, The New Anti-Trust Acts, 30 POL. SCI. Q. 448, 461-462 (1915) (“Heretofore the bugaboo of monopoly has confused the public mind. Responsive to every demagogic arraignment of the octopus, public opinion has coerced our lawmakers into an attitude with reference to trust legislation which has been emotional rather than rational.”).
\[LANDIS, THE ADMINISTRATIVE PROCESS, supra note 6, at 140. There is symmetry between this claim and the arguments discussed above, supra text accompanying notes 33-37, where Landis urged participants in the grand debate regarding regulation to exercise restraint and not to use “unguarded language.” This symmetry illustrates the deep connection between the “general” administrative project and the project of writing the book.
\[LANDIS, THE ADMINISTRATIVE PROCESS, supra note 6, at 122.
\[Id.\] at 99. Curiously, this is presented as one safeguard “against the rise of arbitrariness in the imposition of administrative penalties.” Id. at 98.
The unavoidable result of Landis’s architecture is that the world ("reality") is left “outside.” All that Landis wants to regulate has to remain outside of the administrative laboratory in order for the agency to cure “the ills of the industry.” A member of an agency-in-the-control-room should have/has a very limited knowledge of the “outside” world. At the hands of the regulator the world/reality/industry has to be and is turned into a very thin signifier.

This conclusion has a temporal dimension. Landis, it was noted, criticizes certainly the courts for being out of sync with modern times; at the same time, dispersed in the book are various indications that Landis maintains that the legislative and executive are too modern for his liking. They are too quick to internalize popular demands. Landis expresses the view that “[i]t is easier to plot a way through a labyrinth of detail when it is done in the comparative quiet of a conference room than when it is attempted amid the turmoil of a legislative chamber or committee room.” If this is the case, then, surely agencies should not be too quick to respond to popular demands, and they should not be too energetic. The questionable record of NIRA, for example, could be explained by the many “factors [that] intruded into that experiment,” Landis argues, one of which was that “[t]he passion for energetic action was too fierce to permit time for the play of disinterested expertness.” Agencies, it turns out, should also work under a separate time zone. This conclusion brings us back again to the interplay between politics and administrative regulation.

Landis’ last remark lends credence to the hypothesis that for him the political is anathema—the political being the thing that “enlist[s] the loyalties and faiths of classes of people.” There is plenty of evidence in the book to support this proposition. “In [some] fields,” Landis asserts at some point, “the administrative suffers … because of its closeness to the political branches of government. Division within the administrative will thus either tend to follow political lines or be believed to follow them, and the latter is

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176 Id. at 13. Landis invokes medical jargon several times in the book. See id. at 16, 17, and 46.
177 Id. at 33-34, 96-97, and 141.
178 Id. at 69-70.
179 Id. at 87.
180 Supra note 123.
almost more destructive of its position than the former." Thus viewed, politics is (and must be) lodged in the organs enveloping the agency, namely, the Legislature, Executive, and contemporary courts. These organs are to be blamed for trying to force the administrative into becoming political by, for example, devising a political organizational design of agencies. Landis is quite clear, therefore, that once the ends are declared, Congress must withdraw. For instance, he warns against unguarded attempts by congressmen to go out of line and unduly try to influence an agency, while—justifiably—reviewing its budget. This scheme of things allegedly enables the agencies to perform their duties in a calculated and methodical way, as they enter the picture only after the political debate has been settled.

3. The Paradigm

The empiricist/professional paradigm is straightforwardly presented already toward the end of the first chapter of the book, when Landis compares two possible ways of presenting cases dealing with possible breaches of a security-acquisition rule:

The presentation of these and other cases by one body [here: the FTC—Y.S.], rather than by a heterogeneous

181 LANDIS, THE ADMINISTRATIVE PROCESS, supra note 6, at 59-60.
182 However, Landis does advocate the adoption of legislative veto techniques in some cases. Id. at 77-79. The manner in which Landis presents this proposal is telling. Lest one thinks that it means that Congress should have a substantial role in the process, Landis explains that the proposed technique of legislative veto will accord “the imprimatur of the Congress upon its [the administration’s] action.” Id. at 79. “Imprimatur,” in Latin, means “let it be printed”; it is a mark of approval of a finished piece that is put, once it is completed, for approval; to revert to Landis’ terms, it is a mark put “upon” the action. By the same token, Landis stipulates that it is the administrative’s role to decide when to invite the legislature to get a (small) piece of the action, as the technique of a legislative veto “permits the administrative to call upon the legislature to assume some of the responsibility attendant upon action.” Id. at 78. On the vehicle of legislative veto, see the known Chada case: Immigration & Naturalization Service v. Chadha, 462 U.S. 919 (1983), where the Supreme Court held that it unconstitutional.
183 LANDIS, THE ADMINISTRATIVE PROCESS, supra note 6, at 60-61. See also id. at 101-102. For Landis’ view that it is desirable to remove administrative commissions from the Executive, see infra text accompanying note 252.
184 LANDIS, THE ADMINISTRATIVE PROCESS, supra note 6, at 56-60. Cf. supra text accompanying notes 126-127. See also infra Section III.F.2.
185 It is hinted elsewhere in the book as well: see LANDIS, THE ADMINISTRATIVE PROCESS, supra note 6, at 76.
group of individual claimants or even by district attorneys with varying sympathies and abilities, permits the development of consistency in approach to such problems, as well as the creation of effective routines of investigation and examination. The deep significance of these factors has been aptly phrased by Gerard Henderson in his observation that “…the science of administration owes its being to the fact that most government affairs are run by men of average capabilities, and that it is necessary to supply such men with a routine and ready-made technique …”.

This is a startling series of statements. It is clear that, as Jaffe put it, “they are offered by Landis not to discount his glowing picture of administrative potentiality but rather to spur agencies on to even greater accomplishments and to secure for them the fullest measure of power to overcome these latent threats to their effective action.” However, according to Jaffe, be that as it may, Henderson’s views pull in the opposite direction, they “add up in essence to the traditional wisdom concerning the routine conservatism of bureaucracies.” Further analysis of Landis’ passage reveals even further how material this passage is.

Consider primarily Henderson’s “observation.” Reading Henderson’s words, the first question that comes to mind is: where did a “science of administration” come from all of a sudden? When the book was written, the science of administration was associated with political scientists, notably the Committee members, whom Landis takes great pains to vehemently criticize throughout.

By subscribing to Henderson’s approach Landis comes as close as it gets to adopting the Committee’s vantage point on the administrative process, which indeed assumes that administrator are “men of average capabilities,” who

\[\text{Id. at 40-41 (quoting GERARD C. HENDERSON, THE FEDERAL TRADE COMMISSION 328 (1924)) (emphasis added). See also Nebolsine, supra note 11, at 930 (“our administrative agencies, in the long run, will be operated by people of average ability.”).}\]

\[\text{To be sure, the invocation of the empiricist/professional paradigm is not just an unfortunate slip-of-tongue. See similarly LANDIS, THE ADMINISTRATIVE PROCESS, supra note 6, at 57 (“In the business of governing a nation—to paraphrase Gerard Henderson again—we must take into account the fact that government will be operated by men of average talent and average ability and we must therefore devise our administrative processes with that in mind.”).}\]

\[\text{Jaffe, James Landis, supra note 219, at 323.}\]

\[\text{On the science of administration and the President’s Committee, see supra text accompanying note 35, and Chapter 4.}\]
must be routinely shown the exact way of doing things. Regulators, opined Henderson in the lines (that Landis chose to omit) following the just-quoted paragraph, should also be “confine[d] … to a formal procedure.” These constraints, Henderson goes on to note, “may indeed at times clip the wings of genius, but … will serve to create conditions under which average men are more likely to arrive at just results.”

Read in conjunction with the depiction of agencies in the control room, the empiricist/professional paradigm appears natural: could the cold, detached agency-in-the-control-room have produced any other regulator than a grey, routine guy? Another circle is thus completed. Now, it is the grey, lifeless world, the same world that needs to be regulated, that is projected into the administration and its personnel.

This is, then, the contour of administrative expertise as portrayed in this part of the discussion. Expertise emerges out of acquaintance with the facts relevant to the case at issue. It is best cultivated in a detached, apolitical setting. To ensure these laudable outcomes, the regulator should be entrusted with a well-demarcated and limited sphere of operation. He should also be secluded from the mayhem of the political process.

D. Between the Two Paradigms

In his last public address, entitled A twelve Point Primer of the Subject of Administrative Tribunals, which was delivered in February 1944 (a month before his death), Joseph Eastman addressed the question whether a regulator was required to be a technician in order to succeed. His answer was negative. Eastman declared, “It is not necessary for the members of the tribunals to be technical experts on the subject matter of their administration. As a matter of fact, you could not find a man who is a technical expert on any large part of the matters upon which the [ICC] finds it necessary to pass.”

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190 See infra note 30.
191 HENDERSON, supra note 186, at 328.
192 See supra text accompanying note 174.
could not have set the general manager and empiricist/professional paradigms apart more clearly.

Herring’s abovementioned study revealed that this approach for the makeup of the ideal regulator was common among commissioners. Thus, Herring reports that one ICC commissioner noted, “… I do not regard it as at all essential that one should have an experience in the technicalities of freight rates any more than in the mechanics of locomotive engine. The Commission has employees who are experts in these various departments from whom the Commissioner with the analytical mind can get the necessary technical details. His is the duty of broadly applying the technical knowledge to his administrative, quasi-legislative, quasi-judicial work.”

Note the unknown commissioner’s contrast between technical expertise of the commission’s “employees” and “the analytical mind” of “Commissioners,” who take a broad view of things.

We have encountered the double vision of regulators—as technical experts and/or as “regulation experts”—when Taylorism and classical science of administration were discussed. This double-sided portrayal of the expert is the result of an underlying tension between subordination and independence in the operation of agencies. Indeed, as suggested above, one way of contrasting between the two models of expertise provided in the book is to suggest that the public general manager paradigm regards the agency officials as a full, active, and independent agent, while the empiricist/professional paradigm constructs him as a subject. The agent-subject split spills over into the relationship between regulator and regulated and reenacts the tension between subordination (of the regulated industry) and agency dependence (on the industry).

The book straddles the two options throughout, thus championing a seemingly irreconcilable position. As much as Landis may try to dismiss the role played by the human factor in the agencies’ affairs, these are human desires and perspectives that drive...

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194 HERRING, FEDERAL COMMISSIONERS, supra note 145, at 91.
195 Supra Chapter 4.
196 See infra Chapter 7.
the administrative process. Man, regulated and regulator, who all along remains at the heart of Landis’ arguments, is thus constructed as an unsettled concept. This is an inevitable consequence of the great opacity surrounding the general manager paradigm. Landis’ position on this regard may attest to Landis’ wise appraisal of the human condition, but it does pose a fundamental problem to some key arguments made in the book. For one thing, it completely undermines the inside/outside dichotomy, on which the Chemical Reaction Argument is based.\footnote{Actually, it altogether overwhelms the naturalistic overtone of the book. \textit{See infra} Section III.F.1.} More troubling, from Landis’ point of view, is the fact that it is quite difficult to advertise a model of expertise whose focal point is a fragmented regulator.

Finally, as we have seen,\footnote{\textit{See supra} text accompanying notes 178-179.} like the regulators, the temporal dimension in the operation of agencies, as presented in the book, is unsettled, too. It is Janus-faced. Landis advances two competing images in this context, which lead to the conclusion that the administrative branch has to do some juggling: it should be on top of modern development, yet it must be sound and composed. It should not be moved by “varying tempers,”\footnote{The ICC’s “[r]ailroad policies … have achieved a degree of permanence and consistency that they might not have possessed had their formulation been too closely identified with the varying tempers of changing administrations.” \textsc{Landis, The Administrative Process, supra} note 6, at 113.} but not to the point of becoming irrelevant and stagnant. It should be consistent but not outdated. Thus, Landis allots a special time frame to the administrative, which is expected to know the ins-and-outs of present-day industry, but not to become political. It should follow a pace of its own.\footnote{This is yet another dimension of the estrangement of the administrative from the lived experience of the “common man.” \textsc{Landis, The Administrative Process, supra} note 6, at 8. On agencies’ encasement, see \textit{infra} Section III.C.2.}

\section{E. The Judicial Paradigm}

\subsection{1. The Judicial Revisited}

Landis provides a quite familiar litany as he enumerates many predicaments that have to be taken into account when the option of regulation by the courts (and not by the
administration) is contemplated. We have reviewed this list, so there is no need to rehash it again.\textsuperscript{202} One quite unexpected argument made by Landis in this context is noteworthy, though. It shows that however critical was Landis of the institutional and personal sides of contemporary judiciary, he still thought that there was something to be learned from the judiciary when regulating the market. Although he berates the current judiciary’s performance in recent history, he does not suggest the altogether doing away with its \textit{modus operandi},\textsuperscript{203} as this nemesis of the administrative, too, has a place in Landis’ overarching, eschatological view of history.

Thus, for example, Landis stipulates that “[t]he positive reason for declining judicial review over administrative findings of fact is the belief that the expertness of the administrative, if guarded by adequate procedures, can be trusted to determine these issues as capably as judges.”\textsuperscript{204} Namely, rather than suggesting a distinctive standard with regard to administrative “findings of facts,” Landis incorporates an idealized notion of the judicial standard of fact-finding into his defense of administrative autonomy. Here is a point where the judicial is evidently not antithetical to the administrative, but rather its \textit{alter-ego}. This suggestion is based on the recognition of a distinct legal/judicial/lawyerly expertise.

Law, for Landis, is the realm of the judiciary. Landis has a simple definition of the relationship between “law” and “courts”: what judges \textit{ought to do} is law. This interdependence is based on a particular understanding of legal/judicial/lawyerly expertise, as Landis makes clear by emphasizing: “\textit{Our desire to have courts determine questions of law is related to a belief in their possession of expertness with regard to such questions. It is from that very desire that the nature of questions of law emerges. For, in the last analysis, they seem to me to be those questions that lawyers are equipped to}

\footnotesize{\begin{itemize}
\item \textsuperscript{202} \textit{See supra} Chapter 3.
\item \textsuperscript{203} \textit{Let alone a more enlightened judicial attitude, manifested by Justice Brandeis to whose minority opinions Landis repeatedly refers in the last chapter of the book. See LANDIS, THE ADMINISTRATIVE PROCESS, \textit{supra} note 6, at 124, 134, 141-142, 151 n.41, and 153.}
\item \textsuperscript{204} \textit{Id.} at 142.
\end{itemize}}
Not only does Landis unequivocally stipulate here the pervasiveness and determinacy of the category of expertise in his proposed scheme.

A more nuanced relationship between the judicial and the administrative is portrayed at another point in the book, where Landis, while still calling upon the courts to be deferential to agencies, concedes that deference should be given deferentially and not across the board. Rather, he writes, “difference in treatment should be accorded to findings of fact by different administrative officials, because of differences in the facts and in the qualities of the administrative to be expert in finding the facts.”

This proposition is striking: if it were to be put in place, the courts would become the ultimate evaluators of expertise. In these lines Landis leaves in the hands of courts an important preliminary question when faced with a challenge to an administrative action: is the agency under review structurally able to expert in the relevant subject-matter and is it making use of this potential? Only when the answer is positive, should courts be deferential. To be sure, if that were the case, they should not withdraw completely from the scene, but rather ought to limit themselves to truly “legal” questions, that is, questions which are, according to the court’s own judgment, in its expertise. No wonder, then,
the role Landis assigns to law, as conceived by courts, is of “commanding discipline.””

Similarly, in the end of the book, in its very last paragraph, Landis lets loose and prophetically writes:

Such difficulties as have arisen have come because courts … assume to themselves expertness in matters of industrial health, utility engineering, railroad management, even bread baking. The rise of the administrative process represented the hope that policies to shape such fields could most adequately be developed by men bred to the facts. That hope is still dominant, but its possession bears no threat to our ideal of the “supremacy of law.” Instead, it lifts it to new heights where the great judge, like a conductor of a many-tongued symphony, from what would otherwise be discord, makes known through the voice of many instruments the vision that has been given him of man’s destiny upon this earth.

This “supremacy clause” vividly shows that with all his bitter condemnation of the courts, Landis would like to preserve the supremacy of law, which is in the realm of courts, in his brave new world. All this leads to the conclusion that “in the last analysis,” it is the destiny of “the great judge,” who, as we have seen, is proficient (only) in answering “questions that lawyers are equipped to decide,” to be the ultimate conductor of public affairs.

2. The Judge Regulator

A more daring reading of the “supremacy clause” suggests a different relationship between the judicial and the administrative. This interpretation is premised on the understanding that Landis needs the judiciary, for at least two purposes: first, as a launching board to offering a vision of a better future to be constructed on its failings; and second, to associate this vision with a blissful past—the judiciary’s past. Simply stated, for Landis, the administrative, and not the contemporary Court, is the “true”

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210 LANDIS, THE ADMINISTRATIVE PROCESS, supra note 6, at 154.
211 Id. at 155.
follower of the common law tradition.\textsuperscript{212} It is only appropriate, therefore, that the pledge of “a better livelihood has, since the turn of the [twentieth] century, been made to rest upon the administrative process.”\textsuperscript{213} This assertion rests on the view that it was to a large extent courts’ aberrancy that called for the emergence of a new discipline, the administrative, and a new disciple, the administrative expert, who would be the future true adherent of the common law tradition.

“In contract, in tort, in negotiable instruments, in trusts—the body of our law is judge-made and represents the successive reactions to \textit{practical situations of a professional class} that was nurtured in the same traditions and was subject to the limitations of the same discipline,” Landis relates.\textsuperscript{214} But so much for the glorious past, as Landis goes on to state: “That class has had pride in its handiwork. Nor can one deny its right to pride. But the claim to pride tends, especially in the hands of lesser men, to be a boast of perfection.”\textsuperscript{215} In 1915 Judge Learned Hand made a similar argument. Speaking of the legal profession in general but of judges in particular, he declared, “If they forget their pragmatic origin, they omit the most pregnant element of the faith they profess and of which they would henceforth become only the spurious and egregious descendants.”\textsuperscript{216}

The conclusions Hand and Landis draw from this shared observation are, nevertheless, very different. Noting the “movement … to intrust broad powers to administrative commissions,” Hand reasons that “[s]uch functions should more properly lie with courts, who by training and experience ought to be better fitted for their discharge.”\textsuperscript{217} Hand obviously believes—as Landis will hope at some point\textsuperscript{218}—that courts could be brought back to their senses. By the New Deal, however, Landis is much more skeptical. Rather than wait for courts to mend their ways, he put his trust in administrative commissions. Surely hoping to capitalize on the rhetorical move, he connects between the two institutions, courts and commissions, in an ingenious way. It is the grand past of the

\begin{footnotesize}
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\item[212] See supra text accompanying note 96.
\item[213] LANDIS, \textit{THE ADMINISTRATIVE PROCESS}, supra note 6, at 122.
\item[214] \textit{Id.} at 135 (emphasis added).
\item[215] \textit{Id.} at 135.
\item[216] Learned Hand, \textit{The Speech of Justice}, 29 HARV. L. REV. 617, 619 (1915).
\item[217] \textit{Id.} at 620.
\item[218] See supra text accompanying note 95.
\end{enumerate}
\end{footnotesize}
common law courts that Landis wants to harness to the regulatory enterprise; the practically-oriented disposition, we were just told, is rarely to be found in contemporary judiciary, but it had been prevalent in the past. The administrative can revive it. Read in conjunction with the “supremacy clause,”219 this argument leads to the conclusion that Landis sees the potential of the administrative becoming a more-advanced, purer version of the judicial; of it being truer than the courts currently are to the adjudicatory mission; ultimately, of the administrative being “the great judge” of the future.220

Landis unabashedly subscribes to a progressive historiography at several junctures in the book. A narrative of the move from darkness—a landscape barren of strong agencies—to light (or at least to a light at the end of the tunnel)—that is, a more regulated society—is scattered throughout. Nothing less than “the dream of better ways of living”221 is at stake, Landis ascertains. His plan has the potential of promoting “an enlightened long-term development of law and administration,”222 whereby averting “unhealthy atmosphere of concealment.”223 This approach is best suited for the judge paradigm, as under this image the acquisition of expertise is gradual and incremental, and its trajectory is assuredly progressive.

Likewise, as it is now the destiny of the administrative process to progress society, as “[s]o much in the way of hope … for the realization of claims to a better livelihood has, since the turn of the [twentieth] century, been made to rest upon the administrative,”224 even the history of the administrative branch must be progressive. The effect of this equation between the progress of “civilization” and the history of the administrative is that the latter stands for the former. Hence, for Landis, more regulation is an unambiguous indication of the progress of civilization.

Admittedly, the judge paradigm of expertise did not dominate the book and it appears that in later years Landis rejected key features of it. Thus, in 1961 he called for “the development of procedures of a non-judicial nature that are more readily adaptable to the

219 See supra text accompanying note 38.
220 See id.
221 LANDIS, THE ADMINISTRATIVE PROCESS, supra note 6, at 122.
222 Id. at 35.
223 Id. at 46.
224 Id. at 122.
resolution of issues arising in complicated administrative proceedings. … [F]or the issue in these cases is fundamentally that of reaching a sound business judgment that takes into account the public interest.”

3. And Expertise to All

“[F]rom the standpoint of affording conceptions of liberty real meaning,” says Landis, “one can ask little more than to have issues decided by those best equipped for the task.” The dividing lines between the several branches of government in their handlings of issues that impact the public, Landis holds, must be demarcated according to a test of competence. Notably, as we have seen, expertise is the criteria for the appropriate limits of judicial interference with administrative issues. But something even more basic is stated here: the translation into reality of the Constitution in general, and of constitutional rights in particular, should be made subservient to the category of expertise. Expertise is thus made part of the requirement of Due Process.

In Landis’ brave new world each of the four branches of government has its bounded sphere of operation, which is conterminous to the reach of its expertise. The assessment of each branch’s expertise is made according to its practices, procedures, methods of analysis, institutional design, and the constitutional safeguards put on its independence.

So, to begin with, Landis explicitly speaks of legal/judicial expertise (“Our desire to have courts determine questions of law is related to a belief in their possession of expertness with regard to such questions”). In fact, he chides courts for overstepping their sphere of expertise in passing upon the constitutionality of administrative decisions. Congress, likewise, has a particular role in Landis’ scheme. It should be, we have seen, a playground for kulturkampf. The book also implies that the function of the other

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225 Landis, Perspectives on the Administrative Process, supra note 143, at 73.
226 Id. at 153.
227 See supra note and text accompanying note 209.
228 See supra note 208.
229 See supra note 205.
230 See supra text accompanying notes 205-211.
231 Supra text accompanying note 122.
political branch, the Executive, *qua* political branch, is to focus on solving questions of high politics with executorial tools. The prototypical executive activity is handling foreign and security affairs; allocation of funds by the treasury is also an appropriate example.

Upon reflection, however, it becomes evident that Landis’ design leads to a somewhat paradoxical result, as whereas Landis allots *policing* tasks to the Executive, he stipulates that agencies should pursue *policy*-making assignments. By the same token, it seems that Landis assigns to the courts the handling of those simple cases that are “triable in a simple manner,” while the bulk of the other cases is sent to the administrative. The complex liaison between the Legislature and the administrative was also noted. It is noteworthy that as a result of all this, the administrative agencies’ staff is left with the lion’s share of the actual operation of the administrative state.

F. Dichotomies Revisited

Having laid out the nuts and bolts of the concepts of administrative expertise encapsulated in Landis’ (and a number of his contemporaries’) scholarship, I would like to highlight some of his arguments that do not seem to work. These arguments are pivotal in his theory. Therefore, if I am correct in the following analysis, Landis’ entire theory might be at jeopardy.

...
1. Naturalism and Fact/Word

It is more complex than it seems to differentiate between fact and theory. Landis’ naturalist orientation, his aversion to theory, and the great weight he places on facts are paradoxical, of course, as naturalism, however one chooses to define it, is a human theory. Speaking of the multi-functional agency (i.e., an agency empowered to exercise more than one “kind” of state-power—judicial, executorial, and legislative), Landis writes in the course of listing the various checks on it, that “[a]n ultimate check is, of course, the right to judicial review.” Still, he goes on to note, “despite the outcry against the combination [of functions,] … over the past few decades … judicial review has been narrowed [by legislation] rather than broadened.” Landis’ conclusion is the following. “[T]he protest of theories against the absence of checks is contradicted by the course of practical legislative judgments which are limiting the checks that now exist.” As is often the case in the book, the practical trumps theory; actual findings falsify existing theory. Nevertheless, these findings are “legislative judgments,” namely, the embodiments of legislators’ theories about the world. Therefore, this process of falsification produces yet another—presumably better, but always tentative—theory. As

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237 As suggested before (supra note 52), the law/fact binary was significant when it came to questions of judicial review. There, too, jurists occasionally pointed out the difficulty in drawing a fine line between the two categories. See Louis L. Jaffe, Administrative Procedure Re-Examined: The Benjamin Report, 56 HARV. L. REV. 704, 726-730 (1943), and Jaffe, Question of Law, supra note 208, at 239-245 (1955).

238 See supra note 197. See also infra text accompanying and note 333.

239 LANDIS, THE ADMINISTRATIVE PROCESS, supra note 6, at 100. For similar approach, see DAVIS, supra note 54, § 6, and Jackson, supra note 54, at 384 (“But if lawyer’s animosity against the administrative method is well grounded, why does it make progress each year?”).

240 LANDIS, THE ADMINISTRATIVE PROCESS, supra note 6, at 101. See also DAVIS, supra note 54, at 10-11. Cf. Pound competing theory of the same phenomenon, which he presented in a report he wrote as the chairman of the American Bar Association Special Committee on Administrative Law: “Current demand for exemption of administrative commissions … from control by the courts … do not wholly reflect advantages of administrative absolutism or inherent defects in judicial justice. In large part the reasons are historical, growing out of bad adjustment between courts and administration which was a legacy from the contests between common law courts and the crown in seventeenth-century England, …” Report of the Special Committee on Administrative Law, 63 REP. AM. B. ASS’N 334, 351-352 (1938).
demonstrated by Thomas Kuhn, it is not fact that falsifies theory, but rather it is one theory that challenges another theory. 241

Likewise, Landis’ attempt to alienate himself from proverbial legal writing is futile. His affiliation with Legal Realism being what it is, Rodgers’ following remark regarding the Legal Realists captures well the fallacy in this attempt. “For what was their pragmatism,” Rodgers rhetorically asks, “their hard-boiled, skeptical talk, but words with the trail of past arguments all over them.” 242 “The new Dealers had their own ideas, to be sure,” he writes elsewhere in his book. 243

Indeed, it is awfully difficult to point at the idiosyncratic place in which Landis tries to position his project. In what ways is it dissimilar to other legal treatises in the field of administrative law, or, even worse, to courts’ judgments? Even from Landis’ perspective,

241 This one way of conceptualizing the gulf between Carl Popper, a staunch believer in the principle of experimental falsification, and Thomas Kuhn, who described science as a quilt of paradigms. See HESS, supra note 45, at 22-27. Paradigms, Kuhn famously argued, are conceptual prisms through which reality is examined. So elastic and tenuous in nature, they can accommodate even what seems in hindsight as the most potentially-radical facts. See THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962). See also infra text accompanying notes 332-336.

242 RODGERS, supra note 53, at 210.

243 Id. at 205. See also supra note 51. The same holds true with regard to agencies. One does not have even to address Jacques Derrida’s much debated aphorism “il n’y a pas de hors-texte” (there is no outside-the-text) in order to show that all that Landis expects the agencies to do is to emit legible diktats, just like the other three branches of government, hoping that people would follow them. Still, one might insist, even though the agency can offer similar words to those offered by the other branches of government, its distinctive treatment of words differentiates it from them. Under this theory, we could think of agency’s internal monologue as a place and time of complete harmony between the agency’s thoughts and its full comprehension of these thoughts. This is the “internal-monologue argument.” See the sources mentioned supra note 51. Equally, with respect to the agency, the argument could go along these lines: in the governmental sphere only the agency can have an internal monologue, since it does not articulate an utterance for other governmental entities to comprehend, but rather the utterance is for itself to grasp. Courts, Presidents, and the Legislature, conversely, air decisions to be carried out by other entities—agencies, for example—that have first to receive and interpret them. It is in the mind of the regulator that we find the total fit between words and meaning; the place where this meeting-of-the-(one)-mind occurs is the site of administrative exceptionalism. Yet, Derrida has resolutely shown (Derrida, supra note 51) that arguments such as this run into grave problems for a plain reason: the agency—again, just like any other governmental branch—converses with others as well as with itself in the proverbial (governmental) parlance. This conclusion, I should note, does not mean that the agency is “just like” the other branches. But it does follow that the attempt to single out the agency within the government matrix based on the fact/word dichotomy is futile. Landis’ agencies use “facts” and “words” interchangeably, and their parole is part and parcel of the American archi-governmental-writing.
what is not “theoretical” in the book? Quite astonishingly, it was Landis himself who, having raised a number of general questions regarding the administrative agency (such as their composition and relationship with the other governmental branches), wrote: “Some broad philosophical answer to these questions seems almost imperative now that the administrative process has grown” so tremendously.\footnote{244} And sure enough, Landis provides in the book typologies of agencies;\footnote{245} elaborately discusses the appropriate limits of delegation of powers to agencies;\footnote{246} takes part in a heated debate regarding the role of courts in the emerging administrative state;\footnote{247} and surveys sundry remedies that are, and should be, at the disposal of the agencies.\footnote{248}

2. Policy/Politics

The divorce between politics and policy is put forward in the book with the understanding that agencies should engage only with policy. In most cases “the administrative suffers … because of its closeness to the political branches of government.”\footnote{249} The separation is between the place where social power-struggles are conducted (politics) and the meticulous systematic process of materializing beneficial social goals (policy).\footnote{250} It resurfaces frequently in the text.\footnote{251} For example, when Landis champions the independent agency (\textit{i.e.}, an agency, like the FTC and the SEC, whose heads the President cannot remove without cause), he explains why it is important to maintain a separation between the executive and the administrative: “The reasons for favoring this form seem simple enough—a desire to have the fashioning of industrial policy removed to a degree from political influence. At the same time, there seems to

\footnote{244} Landis, The Administrative Process, supra note 6, at 17-18.  
\footnote{245} Id. at 19 \textit{et seq}.  
\footnote{246} See id. chapter II.  
\footnote{247} See id. chapter IV and \textit{passim}.  
\footnote{248} See id. chapter III.  
\footnote{249} Supra note 181.  
\footnote{250} See supra text accompanying note 123.  
\footnote{251} See also Crolly, supra note 129, at 360-361. (Administrative experts, “[r]epresenting, as they would, the knowledge gained by the attempt to realize an accepted social policy, they would be lifted out of the realm of partisan and factious political controversy and obtain the standing of authentic social experts.”).
have been a hope that the independent agency would make for more professionalism than that which characterized the normal executive department.”

Furthermore, in his *Significance of Administrative Commission*, Landis notes, “In seeking to make them different to a degree from the ordinary political agency, the hope seems to have been that the policies that they have been authorized to pursue will survive the ordinary vicissitudes of politics.”

Interestingly, Landis does maintain here that policies are distant from politics only “to a degree.” This is an obvious indication that the dichotomy is precarious.

Surely, it is difficult to accept a straightforward refusal to acknowledge the role played by politics in the shaping of policies. I have suggested that in his description of the general manager paradigm Landis acknowledges, although hesitantly, the political role of the administrative. Similarly, given what he says, though not in as many words, on the

252 Landis, The Administrative Process, supra note 6, at 111. Landis acknowledged elsewhere that there had been times in the past where, on account of “political pressures,” regulation of a particular sector had been left to a department of government, rather than conferred on a commission. “Here and there, it is true, that a few of the new regulatory functions of government have been handled through the routine of the existing governmental department … sometimes, as was true of the regulation of stockyard, because political pressures were such as to place regulation in the hands of agency then deemed more amenable to the interest of those who were to be regulated.” Landis, Significance of Administrative Commissions, supra note 127, at 473. This is essentially a capture argument (or at least an acknowledgement of its plausibility), which, to the best of my knowledge, is mentioned in the book only here. The only other time Landis refers to such an argument—again, as far as I can tell—is in the Landis Report. See infra note 289. As we shall see infra Chapter 7, Section III, arguments regarding commissions’ capture by regulated industries were everywhere to be found starting in the late 1940s and 1950s. See notably Samuel P. Huntington, The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest, 61 Yale L.J. 467 (1952), Bernstein, supra note 143, and Gabriel Kolko, Railroads and Regulation 1877-1916 (1965). See also McCraw, Regulation in America, supra note 111, and Daniel J. Gifford, The New Deal Regulatory Model: A History of Criticisms and Refinements, 68 Minn. L. Rev. 299 (1983). Jaffe was exceptional in legal circles in addressing the issue at an early stage. See Louis Jaffe, An Essay on Delegation of Legislative Power I, supra note 123, at 359, and, more elaborately, Louis L. Jaffe, The Effective Limits of the Administrative Process: A Reevaluation, 67 Harv. L. Rev. 1105 (1954). On Jaffe’s work, see infra Chapter 8.

253 Landis, Significance of Administrative Commissions, supra note 127, at 475-476.

254 See also supra text accompanying note 127.

255 Landis, Significance of Administrative Commissions, supra note 127, at 480-481 (“Unquestionably, whereas the ebb and flow of political dominance has on occasion brought about an equal ebb and flow in the policies of the executive departments, the administrative agencies have pursued a more even course.”).

256 Supra text accompanying notes 126-127.
ineluctability of the inclusion of personal perspective in judicial proceedings, it is difficult to see how an administrative judge, the prime embodiment of the judge paradigm, could escape this predicament. In fact, Landis mandates that he acquire, through proper training, “a proper bias” to the issues presented to him.

A good place to see how Landis actually allows politics to infiltrate the administrative process is in the context of a grant of power from Congress, a political body, to an agency, a policy body. “[I]t should be remembered,” says he, “that the objectives which frequently characterize political action may not be too discernable.” And he goes on to note:

Legislation by the democratic method has this tendency. Wise and honest public men may become jointly interested in the need for altering the trend in a particular industry. They will agree that, basically, the public interest ought to be the governing factor in that industry’s future activities, but, for various reasons, they will hold conflicting opinions as to how that public interest can best be served. Legislation, which thus is forced to represent a compromise, does so by the use of vague phraseology.

Reading this description, it is not clear how a subject-matter becomes apolitical once it is transmitted from a wise and honest legislator to a wise and honest regulator. The vague language of the legislation embraces indecision regarding the political issues at stake. How, then, could the determination of vague legislation by an agency not be marred by politics? Or, as succinctly put by Jaffe, “[A] political conflict [cannot] be avoided by relegating a problem to the care of an agency and invoking the talisman of ‘expertise.’”

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257 See supra Section II.
258 See LANDIS, THE ADMINISTRATIVE PROCESS, supra note 6, at 103-104 (“The adequate development of [agencies’ trial examiners] would provide judges who have, as they should have, an understanding of the general policy of the administrative, indeed a proper bias toward its point of view, and yet, by having been entirely disassociated with the earlier phases of the proceeding, have no personal interest in its outcome.”) (emphasis added)).
259 Id. at 51. A query: how can one tell, then, when an administrative action is political?
260 Id. id.
261 Jaffe, Illusion of Ideal Administration, supra note 10, at 1190. Jaffe openly acknowledged that regulation was a political business already in 1955. See Jaffe, Basic Issues, supra note 137, at 1283 (“Most rule-making involves the weighing of a complex of considerations, many of them of the kind we call political …”). See also Pinney, supra note 118, at 40.
Landis can maintain both that commissions are impartial bodies of regulation and, at the same time, set to manage politically charged issues only if, for some unknown reason, in their hands muddy political issues dissolve and become amenable to cold, detached analysis. The argument that administrative agencies have the touch of Midas is based on the premise that compared to the three branches of government, an administrative regulatory body is a unique site that allows for a calculated and composed treatment of even the most burning issues of the day. However, even if that were the case—and it is not—the story of Midas poetically illustrates the unwelcome consequence of attaining such a seemingly privileged position, namely, the isolation that comes along with it.262

It is clear therefore that the sharp distinction between politics and policy is untenable and thus cannot serve as a criterion to distinguish the administrative from the other branches of government.

3. Elusive Expertise

We have established that according to Landis, expertise is based on an intimate acquaintance with facts, out of which regulations should emanate. But we still do not know how this transition from facts to administrative conclusions is to come about. Landis does not give an account of that process. It appears as though he believes that the mere wallowing (or basking) in the relevant facts for a considerable length of time is bound to get the aspiring regulator “there.” This explains, it seems to me, the great importance Landis attributes to experience for “the acquisition of new expertness.”263 In fact, Landis equates experience with expertise.264

There is an etymological justification for this stance. Expertise, experience, and even experiment, are all derived from a common Latin verb, *experiri*, which means “to try, to learn by trying.”265 Traces of the familial connection between expertise, experience, and

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262 See supra text accompanying note 174.
263 LANDIS, THE ADMINISTRATIVE PROCESS, supra note 6, at 28.
264 See id. id. See also id. at 149.
265 The verb is derived from the Indo-European root *per*, out of which grew great many words in the European languages, such as “empiric” and “attempt,” “peril” and “fear,” and even “pirate.” “To interpret” is also derived from this root. THE AMERICAN HERITAGE DICTIONARY OF
experiment can be readily found in the book. This is not at all surprising given the epoch during which it was written. Landis speaks of “the play of disinterested expertness,” and of “the experience under” the National Industrial Recovery Act of 1933 (NIRA) as an “experiment.” Jaffe, likewise, would define expertness as “accumulated and specialized experience.” It appears that the etymological affiliation among the three words is based on the assumptions that experience breeds expertise, and experiments engender experience. However justified these assumptions may be, relying only on them in an attempt at justifying the claim for a unique administrative expertise is highly problematic. They certainly have a commonsensical lure, but the difficulty remains: they do not show how one moves from A to B and from there to C. Nor does Landis. Indeed, Landis, who prides himself on crisp administrative professionalism, is unable to provide a definitive response to the question at hand: what makes his general manager administrator such an expert in regulating the market that the contending branches of government must withdraw from the regulatory arena? In order to answer this question, Landis, I submit, had to revert to metaphysics.

INDO-EUROPEAN ROOTS 65-66 (Calvert Watkins ed., 2000). It arrived to English via the Latin compound “negotiator, go-between.” This list is illuminating, I think. It tells us something about experts’ license to experiment, but also about the dangers associated with the grant of such permission. It sheds light of the roles of (administrative) experts as interpreters of the legal doctrine, reality, and their own role and place in the constitutional system. Furthermore, the word pirate alludes to the thorny issue of agencies’ abstruse, off-shore legal standing in a tripartite constitutional structure.

266 See supra Section I.D.
267 LANDIS, THE ADMINISTRATIVE PROCESS, supra note 6, at 87.
268 Id. id. See also RITCHIE, supra note 3, at 78 (exact source not given) (“To me,” Landis said with reference to the new mechanisms of stock market regulation, “it is one of the boldest experiment that has ever been undertaken by our nation.”).
269 Jaffe, Question of Law, supra note 208, at 267.
270 Interestingly, Herbert Croly, who was a prominent Progressive political theorist, prescribed that administrative commissions would be the guardians of stability in the political system, thus allowing the legislators and executives to indulge in experimentation. “Just as the executive and the legislature would be concerned primarily with the more tentative and experimental part of the social program, so the administration would be concerned primarily with its comparatively permanent aspects,” is the way he put it. CROLY, supra note 129, at 360. Just as revealing, at some point he said that the legislator “has become an inventor.” Id. at 362. This view is compatible with the Weberian ideal-type bureaucracy. See supra Chapter 4, Section II.C.1.
271 This argument holds true particularly with regard to the general manager paradigm. While there is certainly some opacity also to the expertise of judges and professionals (what really makes one a good tailor?), they more readily lend themselves to “positivistic” description.
Landis’ failure can be analyzed from yet another angle. Clearly, for him, the attribute of expertise is instrumental. Landis does not advocate the glorification of “theoretical” expertise, namely, of expertise per se. Expertise, as we have repeatedly seen, is a cure for a modern predicament. One gets a clear sense, then, that what Landis is glorifying is the ends expertise is supposed to serve, which are, above all, efficiency and flexibility. “[I]t is efficiency that is the desperate need,” he writes, and flexibility is “a prime quality of good administration.” Yet, no real effort is made in the text to elucidate these two terms either. Landis’ account seems to be oblivious to the protean nature of the two terms. The failure to specify more fully the ends administrative expertise is projected to serve severely limits our ability to grasp what this expertise is about. The concept of expertise is thus left with an opaque, inaccessible core.

The book is the most thorough attempt to conceptualize the unique expertise of the public general manager. It best illustrates therefore that any attempt at threshing out the essentials of such an assertion of expertise would reveal the ineluctability of a residual inexplicable element lying at its heart—this something about expertise that we cannot quite close our fists over. It lends credence to George Gardner’s observation that “the claim of ‘expertness’” was essentially an assertion “of a divine power and calling to govern.”

Curiously, Landis seems to be “aware” of the fact that the cure-all medicine he prescribes in the book for modern illnesses is actually a nostrum. Traces of this line of thought can be found in Landis’ discussion of judicial supervision over agencies. At one point, Landis relates parts of the story of the SEC’s “pricking out [by regulations] the content of the statutory concept of ‘manipulative, deceptive and fraudulent’ devices” in the sale of securities, as provided for in the pertinent SEC Act. Then, he turns to the courts, where he writes that “in three recent cases the Supreme Court of the United States indulged in

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272 LANDIS, THE ADMINISTRATIVE PROCESS, supra note 6, at 24. Efficiency is repeatedly invoked in the book: see id., e.g., at 9, 46, and 55.
273 Id. at 69. Elsewhere in the book (id. at 98) Landis speaks of “such qualities as flexibility and expertness” (emphasis mine), as if he does not think that the second is dependent on the first.
274 See supra Sections III.F.3 & V.
275 Gardner, supra note 11, at 339.
276 LANDIS, THE ADMINISTRATIVE PROCESS, supra note 6, at 147.
talk to the effect that the promulgation of such regulations in order to have validity must be buttressed by findings of facts.”

Namely, the Court ordered agencies to explicitly spell out the factual data that led to the adoption of certain regulations. “How far this suggestion should be taken seriously is a matter of considerable doubt,” Landis comments, and goes on to explain his reasons for stating so:

Rules of this character are themselves evidence of administrative judgments that the particular conduct embraced by them does normally promote fraud and deceit. A further recital to that effect would be a matter of mere formality. The evidence upon which the conclusions that lead to the adoption of such rules rests is rarely of a type that is legally admissible … In the main it consists of opinions of men acquainted with the practices of the securities markets. … But the ultimate judgment of the administrative rests on considerations that evolved out of a wide range of experience and observation and out of its study of security practices. To set them forth in detail would make a treatise on practices in … [that] market rather than a limited series of recitals.

Here, of course, is the rub. What Landis essentially is telling his audience is that it is impossible to give an account of the thought process that produced a given administrative resolution. Note that the only (unrealistic) alternative Landis can think of is the agency writing down a treatise specifying all the germane facts spawning the rules in question, i.e., the practices of the regulated market. Hence, while the outcome “evolves out of a wide range of experience and observation and out of … [a] study of securities practices,” only the last component can be accounted for; what is certainly beyond any doubt is the fact that this “wide range of experience and observation” cannot be canvassed in a “legally admissible” manner.

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277 Id. at 148.
278 Id. id.
279 Yet, elsewhere in the book Landis names recitals that accompany congressional legislation as one significant means “of grasping the legislative thought”: Id. at 67, but cf. id. at 149 n.38.
280 Id. at 148-149 (emphasis added). The cases are: Panama Refining C. v. Ryan, 293 U.S. 388 (1935); Schechter, 295 U.S. 495 (1935); and United States v. Baltimore & Ohio R.R. Co., 293 U.S. 454 (1935). I should note in passing that Landis does not miss this opportunity to differentiate himself and his regulators from the courts in the passage at hand: courts “indulge[] in talk” that it is not even clear whether it “should be taken seriously,” whereas the regulators are experienced and “acquainted with the practices of the security market,” thus, they know what they are talking about and their talk is of substance.
This point deals a serious blow to the whole Landisian naturalistic approach for at least two closely-related reasons: first, as it fails to meet the transparency requirement embedded in a naturalistic-scientific approach. That is to say that it must provide an explanation that any practitioner in the field would be able (a) to follow, and thus (b) to arrive at the projected conclusions; secondly, here, in his rage at intrusive courts, Landis debunks the conception that the right facts alone would somehow yield the right conclusions; after all, he acknowledges the central role played by a persistent residual “experience” in the administrative process. Alas, what this experience is, remains in the end a inscrutable, it appears—for this reason Laski said in 1930 that the expert “practices a mystery.”\footnote{Laski, supra note 20, at 104.}

Clearly, the whole Landisian enterprise is at stake in the passage; yet it is not James Landis’ momentary inattentiveness that should be “blamed” for its far-reaching outcomes—it is, \textit{inter alia}, the “fault” of the separation between fact and theory and its role in the discussion. To recall, according to the text’s reasoning, the dichotomy fact/theory is based on the claim of a tangible difference between the two: the one begins where the other ends. It follows that facts, the bread and butter of the agency, are—by (Landis’) definition—placed in a theory-less world. This holds true also to other permutations of the dichotomy, such as action/inaction and practical/theoretical. Therefore, as “theorizing” is opposed to “doing,”—that is, as theory is equated with useless chatter (associated with \textit{inaction}) and diametrically opposed to the practical action—nothing should be said about the conditions that brought about the administrative action. Nothing of substance could be said about the administrative process that led to the administrative action under review.\footnote{Cf. Landis’ discussion, \textit{LANDIS, THE ADMINISTRATIVE PROCESS}, supra note 6, at 28, where he states: “[B]lue print symmetry is a poor substitute for realism in organization.” Indeed, Landis is hoist with his own petard for the obvious reason that his is also a “theoretical” discourse.} Not unlike the “early” Wittgenstein, who most famously said in the \textit{Tractatus} “whereof one cannot speak, thereof one must be silent,”\footnote{\textit{LUDWIG WITTGENSTEIN, TRACTATUS LOGICO PHILOSOPHICUS} 157 (C. K. Ogden trans., 1922).} Landis holds that whatever is said about this action is useless. It turn out, then, that the
seeds of the silence surrounding the category of expertise had been planted from the outset.

IV. Epilogue: Disenchantment?

On December 21, 1960, Landis handed to then President-elect John F. Kennedy a detailed report appraising the performance of federal administrative agencies. Landis conducted a general survey of the field along with a specific study of a number of key agencies, such as the ICC, FTC, the Federal Power Commission (FPC), the Civil Aeronautics Board (CAB), and the Federal Communications Commission (FCC). The Report concluded with a series of recommendations. Its contents tells us a lot about Landis’ assessment of the course taken by the federal administrative apparatus in the preceding two decades and about his understanding of administrative expertise, commissions’ relation to other branches of government, and their internal structure—an issue that had not troubled him hitherto—during the last years of his life.

Interestingly enough, Landis devotes a large portion of the discussion to Congress’ and the President’s control of agencies, but does not say in this occasion what role courts should play in the administrative state. The Report clearly indicates that Landis was

284 This was not the first report Landis wrote at the behest of JFK. In June 20, 1952, he handed to then-Representative Kennedy a REPORT ON THE CAPITAL TRANSIT CO. (1952). That report reviewed contending claims regarding the rates charged by Capital Transit, the transit corporation serving the District of Columbia at the time. This investigation took Landis again to the realm of public utilities, a subject he was well versed with as one of the drafters of the Public Utility Holding Company Act of 1935. Kennedy was at the time the Chairman of the Public Utilities, Insurance, and banking Subcommittee of the Committee on the District of Columbia.


286 Having written the Report, Landis became a special presidential assistant in charge of regulatory policy. In this capacity he promoted the various reorganizations plans outlined in the Report. Due to substantial congressional and lobbyist opposition, he was only moderately successful in this effort. See Ritchie, supra note 3, at 179-186. See also McCraw, Prophets of Regulation, supra note 11, at 220-221.

287 If I am not mistaken, the only reference to courts is made in the Report in conjunction with Landis’ denunciation of agencies’ unsound ethical behavior. See The Landis Report, supra note 15, at 36 (“Never before recent time in the history of the administrative process have the federal court been compelled to return administrative decision to the agencies, not because they have
not particularly pleased with the way in which federal agencies had conducted themselves and had been dealt with by others during the 1940s and 1950s. The issues he found most distressing were agencies’ delays in disposing their business, the unsatisfactory quality of appointed commissioners, and instances of dubious ethical conduct on the part of regulators (susceptibility to “ex parte presentations,” in particular). He even mentioned—albeit, half heatedly and only in passing—the problem of industry capture. Landis also lamented the dearth in agencies’ long-term planning and the poor shaping of policy. At times, Landis’ wording is highly critical of agencies. Infringements of ethical codes are for him “cancers,” and elsewhere he asserted that “the lag in the administrative disposition of its business approaches a national scandal.”

For him, the ramifications resulting from this litany are writ large on agencies’ poor performance, particularly on their inefficient handling of regulatory chores. Also noteworthy is the contention that the deterioration in the quality of personnel, “both at the top level and throughout the staff,” led to “the absence of leadership at the top,” which, in turn, brought about a situation where “the staffs have captured the commissions…” As we shall see in the next chapter, practically all of these distressing phenomena had been pointed out and discussed by political and other scientists long before 1960.

Landis’ recommendations revolve around the need to draw an able cadre of regulators to run agencies (for example, by devising an attractive compensation schemes and enacting long tenure to commissioners). Also emphasized is the necessity in centralizing the administrative apparatus, from top to bottom. Landis prescribes the upgrading of commission chairmen’s standing so that it would be comparable to that of the President in terms of the wide scope of powers they could exert in the management of agencies.

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288 Id. at 53.
289 Id. at 70 (“Industry orientation of agency members is a common criticism, frequently expressed in terms that the regulatees have become the regulated.”). See supra notes 157 and 252.
290 Id. at 4-35.
291 Landis, Perspectives on the Administrative Process, supra note 143, at 71.
293 Id. at 12.
294 Id. e.g., at 68. See also infra text accompanying note 316.
Landis believes that such re-organization of agencies would turn them into more efficient bodies. Under this scheme, a chairman would “take the lead in the formulation of policies[,] .... [a]ppoint all personnel[,] and] have complete authority as to the internal organization of the agency.” This, Landis argues in a language reminiscent of the Committee’s Report, “would permit the centralization of responsibility for the operation of the agency in a manner whereby its operation can be far more easily evaluated by the Congress, the President and the public.” Concomitantly, Landis recommended that the President, via an “Office of Oversight,” would assume full control of regulatory bodies, issue necessary reorganization plans to that effect, and be granted the authority to appoint agencies’ chairmen, who would serve at his pleasure. As we have seen in Chapter 4, when the Committee’s Report was discussed, this approach is most compatible with the empiricist/professional paradigm. This paradigm was already invoked by Landis, but certainly did not occupy central stage, in the book. In the last chapter of his life, however, Landis seemed to all heartedly embrace it.

The most striking feature of the Report is Landis’ in effect endorsement of the core of the Committee’s plan. He insists on the desirability in centralization of the entire administrative apparatus to a point where it is managed directly, but also indirectly, by the President. But why the President? After all, Landis specifically speaks at some point in the Report of “the morale-shattering practice of permitting executive interference” in agencies’ business. Why was Landis not satisfied with the call for the empowerment of agencies’ heads so that their independence would remain secured? Landis’ exposition leaves much to be desired. He writes that the necessary commissions’ re-organization “can be accomplished best and most expeditiously by the Executive.”
Landis explains his position based on two reasons: first, “His constitutional responsibility to see that the laws are faithfully executed calls upon him to do so”; and second, “The Executive … is less beset by the vested interests in bureaucracy that too often find support from members of the Congress.” Surely, the first argument, reasonable at it may seem, undermines the very idea of the independent agency, which was so dear to Landis in the book. It straightforwardly lodges all agencies in the Executive. The second argument sounds conjectural and dubious in the least.

Be that as it may, I would argue that underlying the drive to centralization is the idea that the President is the trusty defender of the general public interest, rather than regulatory bodies, independent or not. Organization theorists pointed out in the 1950s that as agencies zoomed in on a particular field, they tended to parochialism. They reasoned that only the President could re-introduce the broader picture and grasp the overall public interest. It could be argued that in principal Congress and courts could take care of that. However, in a book review, published in 1963, Landis admonished the Congress and courts for their mishandling of regulation. “[T]he basic fault, if any,” for the dire state of the FCC he wrote, “must be placed on the Congress, which refuses to face the problem of establishing standards” to guide the commission. Courts, too, have to take the blame for they, too, failed to guide agencies, and for “hav[ing] accepted that a [legislative] standard such as ‘public interest’ is enough to override their former decisions against the unconstitutional delegation of legislative power.” The last statement is remarkable, of course. Here, after all, is Landis beseeching the courts to exhume and vigorously apply the Schechter rule. (Although, in making this remark, Landis was actually directing his arrows at Congress.) Only two years before, in an address before the Administrative


302 Id. id.
303 See supra text accompanying note 252.
304 At some point Landis speaks also of the Executive’s superior ability to coordinate among agencies. The Landis Report, supra note 15, at 77.
305 See Murray Edelman, Governmental Organization and Public Policy. 12 PUB. ADMIN. REV. 276, 282 (1952) (“The higher unit, because of its different (usually broader) jurisdiction, may be aware of interests not adequately considered by the solution proposed at the lower level.”). For a fuller discussion see infra Chapter 7, Section IV.B.
307 Supra note 122.
308 Landis, Book Review, supra note 285, at 599.
Law Section of the American Bar Association, delivered in St. Louis in August 1961, Landis stated, “I submit that it is far wiser to permit the agencies, out of their experience, to evolve those standards [‘governing the degree of delegation’] than to try to fasten certain standards upon them by legislative fiat.”

Lastly, in 1963 Landis practically called for agencies’ restraint, emphasizing that “[l]aw can promote but it can also impede.” He even went so far as to declare that “the administrative agencies should make a better demonstration of their much vaunted expertise … The courts, the bar and the public might then tender them the respect they were intended to deserve.” Harsh words indeed, especially who had been the foremost speaker of that “much vaunted expertise.”

One can only speculate where his mounting criticism of commission would have taken Landis had he not died in 1964. Still, I would argue that the Landis Report did not signify “a stunning turnabout,” as argued by McCraw, in Landis’ thinking. The list of concerns and suggestions mentioned in the Landis Report illustrates, I think, that although deeply disappointed by the state of the regulatory branch, Landis’ belief in the importance and tenability of successful regulation had not faltered along the years. At the beginning of the Report he writes, “[Agencies’] continued experience is obviously essential for effective government. The complexities of our modern society are increasing rather than decreasing.” A year later he would exclaim that the administrative process “is a lusty infant, growing in vigor and force. Its ability to further out democratic society and hold together the forces of private enterprise to work for the general good, is the great issue at stake.” Indeed, even in his later pronouncements it is difficult to discern a wavering faith in the potential of the administrative process in a democratic society, nor in its vehicles, i.e., agencies and those who direct them. Likewise, although he goes so far as to speak, in the context of the FPC, of the “breakdown of the administrative process,”

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311 *Id.* at 601. See also RITCHIE, *supra* note 3, at 188, and *supra* text accompanying note 208.
312 McCraw, *Regulation in America*, *supra* note 111, at 163.
Landis is still confident that “the prime key to the improvement of the administrative process is the selection of qualified personnel. … As long as the selection of men for key administrative posts is based upon political reward rather than competency, little else that is done will really matter.” Landis is similarly still certain that a long tenure would instill a sense of “devotion to a career.” Harkening back to the crest of the administrative process, he is confident as ever that it would create an environment where “expertise would have a better chance to develop and the sense of security would inculcate the spirit of independence.”

V. Conclusion: The Metaphysics of James Landis

Regarded as a whole, Landis’ scholarship is exceptionally versatile. First concerning himself with a salvo at anti-progressive courts, Landis later moved to a thorough study of the modern phenomenon of federal regulation and the causes that had called for its introduction. During the last years of his life, however, he took the legal community by surprise when he made a leap of faith into the arms of doctrine he had formerly rejected—that of one of his once arch-rivals, the Committee. The position onto which he then retrenched called for the subordination of administrative agencies to the control of the Office of the President, thus debunking his once trenchant call for agencies’ independence.

Versatile as it was, several themes did run through Landis’ impressive corpus of literature. To begin with, Landis kept a running quarrel with the judiciary during most of his life. He took great pains to expose its inadequacies to handle, and prejudices against, administrative regulation. Still, it was a passionate battle. It was an emotional rivalry probably because, at heart, Landis was a staunch believer in the great role the common

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316 Id. at 66.
317 Id. at 68.
318 See infra note 30.
law and courts could and should play in a modern state—if only they were guided by the prescience and astuteness of Holmes and Brandeis.\footnote{See supra note 203. Frankfurter and Landis dedicated their THE BUSINESS OF THE SUPREME COURT, supra note 64, to Justice Holmes. The dedication reads as follows: “To Mr. Justice Holmes who, after twenty-five terms, continues to contribute his genius to the work of a great court.”}

Another, more general factor was also at play here, I think. “The tradition of all the past generations weight like an alp upon the brain of the living,” wrote in dismay Karl Marx in The Eighteenth Brumaire of Louis Bonaparte—

\begin{quote}
At the very time when men appear engaged in revolutionizing things and themselves, in bringing about what never was before, at such very epochs of revolutionary crisis do they anxiously conjure up into their service the spirits of the past, assume their names, their battle cries, their customs to enact new historic scene in such time-honored disguises and with such borrowed language.\footnote{KARL MARX, THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE 9-10 (Daniel De Leon trans., 3d ed., 1919) (1852).}
\end{quote}

Both the general manager paradigm and, even more so, the judge paradigm are rooted in legal proficiency. True, under the former vision, the regulator is expected to rise above any one discipline pertinent to the solution of a pending problem. Yet, Landis is consistent in implicitly and explicitly insisting that the legal is always a relevant perspective to be taken into account. Even apropos the able administrator, the apotheosis of the general manager paradigm, Landis comments that “[l]imitations upon his powers that counsel brought to his attention, naturally, he respected.”\footnote{Supra note 128. Notice also Landis’ following remark: “incredible areas of fact may be involved in the disposition of a business problem that calls not only for legal intelligence but also for wisdom in the ways of industrial operation.” Supra note 148.} James Landis was indeed a “Dean of Regulation,” as Donald Ritchie put it, but he was also, and even more so, Dean Landis of Harvard Law School.\footnote{Landis became in 1937 the youngest dean in the school’s history. Landis took up the position that he held for a decade when he was just 37 years. RITCHIE, supra note 3, at 79.} So, it seems, just like his mentor and co-writer, who harshly criticized the Court for many years only to become later Justice Frankfurter, Landis never divorced himself from the courts and the rest of the legal community.
Viewed from a different angle, his stance had a significant advantage. Lawyers were a major target-audience in all Landis’ essays. They found themselves in a tough spot with the advent of the administrative state. Being accustomed to common law courts, lawyers felt at sea in proceedings conducted in agencies, especially when it came to administrative rulemaking.\(^{323}\) Regardless of Landis’ motives, not severing his ties with the legal community, nor advocating others to act differently—let alone, his becoming the dean of a leading law school—signaled that he was incorrigibly hopeful that he would eventually be able to win lawyers over.\(^{324}\) This hope in itself might suggest that what Landis was aiming for all along was the deliverance of the administrative state to the hands of (enlightened) lawyers, or, even more so, to demonstrate that it was still in their hands.

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Another theme running through Landis’ diverse writings is his acute concern for the public interest in the face of recalcitrant financial market, monopolies, and reactionary forces within and without the legal arena. I suggest we read his scholarship with an eye on the question: which branch of government is the true depositor, and thus the trustworthy guardian, of the public interest? Along the years, Landis gave three answers to the question. These answered, I believe, set the course of his developing thinking.

First Landis put his trust in Congress, as a representative body. For example, in *The Study of Legislation in Law Schools*, while addressing “the maxim that statutes in derogation of the common law must be strictly construed,” he stipulated, “That such attitude is contrary to the intrinsic conception of responsible self government seems obvious …” This is so for an evident reason. “The currents of public opinion, changes in the postulates of our civilization, express themselves in the legislative chamber …”\(^{325}\)

Later, with the New Deal, he was certain that powerful, independent agencies were the ones to safeguard the public interest, and no longer Congress. Now he derided “the

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\(^{323}\) See MCCRAW, PROPHETS OF REGULATION, *supra* note 11, and HORWITZ, *supra* note 11, at 222.
\(^{324}\) Just like in the case of courts. See *supra* text accompanying note 95.
\(^{325}\) Landis, *The Study of Legislation in Law Schools*, *supra* note 4, at 436.
turmoil of a legislative chamber.” In a wonderful remark included a 1937 article, Landis commented, “As the public finally determined to place itself in the driver’s seat with reference to some of the major problems of its life, it created these new mechanisms of administration to serve its ends.” The message was clear: it was the public who was sitting all along in the driver’s seat, not unelected agencies.

Finally, writing at the request of a son of a friend, a soon-to-be President of the United States to whom he had been “something of an honorary uncle” for many years, Landis turned to the Executive for solace. Whereas in the book he spoke of the debilitating effect of “the varying tempers of changing administrations” on regulatory tribunals, he now put his trust in the head of the administration. Disappointed by the turn for the worse taken by the administrative enterprise after the New Deal, Landis of the 1960s thought that a clear guidance from the head of the Executive can salvage it. Always suspicious of courts, and convinced that Congress is too malleable a body to allow for consistency in regulatory policies and an adequate attention to regulatory organs, Landis now opines that the President is the solution. After all, the President is democratically elected by the country as a whole. He is thus committed to the welfare of the whole country and not only to one region or to a particular interest. Moreover, the President’s constitutional obligation to see to it that the laws of the land are faithfully executed renders natural his control of regulation conducted under Congress’ directives.

It may be suggested that the shift from Congress, to commissions, and finally to the President is reflected in the three models of administrative expertise encapsulated in Landis’ book. A world where Congress is the protector of the public interest and courts are the protectors of the Constitution is a heaven for the judge paradigm. This paradigm is related to the (“quasi-”) judicial function of agencies; it treats them as a vicarious judicial branch erected to work in tandem with their master, the Legislature. So viewed, agencies

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326 Supra text accompanying notes 172-173.
327 Landis, Significance of Administrative Commissions, supra note 127, at 473.
328 RITCHIE, supra note 3, at 168. Landis was a close friend of the Kennedys, and remained in close contact with Joseph P. Kennedy throughout his life. At some point, Landis even worked for “Joe Senior.” See id. at 158-159, and passim.
329 See supra note 200.
serve only as an auxiliary arm of Congress. Their ken of authority is accordingly carefully delimited.

Landis’ second position, which had its heyday during the New Deal, can be described as evolution of the first in the sense that now agencies are regarded both as a vicarious judiciary and a substitute Legislature (as well as executors). Under the new vision, similar to the monad of seventeenth-century philosopher G. W. von Leibniz, commissions are the indivisible embodiment of the three other branches of government. At this point, the focus of attention has shifted from containment of unbridled authority to achievement of right results. The general manager paradigm thrives in this environment. Just as the agency’s structure transcends the traditional constitutional distinctions among the several branches of government, here the regulator is able and expected to transcend any one discipline, his sole leitmotif being the good of the society as he defines it.

The Landis Report deflates, so to speak, the general manager paradigm. Now one is in a Weberian world of divisions and subdivision, hierarchies and chains of commands, strict procedures and full accountability. This is world of the empiricist/professional paradigm, where ultimately only one person, who is outside of the administrative system and whose powers are greater than the total sum of powers invested in the apparatus, is free to exercise expansive discretion. This person is the President, of course.

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If at all Realist, as suggested, Landis was evidently veering towards the constructive side of Legal Realism. At the same time, enamored as he was with facts—thus aligning himself with flourishing empiricism around him—Landis could not let go of metaphysics, i.e., of the Idealism so typical of the previous Progressive generation, even when the New Deal was in full swing. What is more, his very staunch belief in the determinacy of facts was a just-as-clear case of metaphysical thinking. As Alasdair Macintyre phrased a staple objection to empiricism, “[p]erceivers without concepts, as Kant almost said, are

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330 See supra especially Section II. See also WILLIAM FISHER III ET AL., AMERICAN LEGAL REALISM 130-135 (1993).
331 See supra note 58.
332 See RODGERS, supra note 53, at 176-211.
blind.” This truism did not escape the minds of some New Dealers. Thus, Walter Cook spoke of the “recognition of the extent to which all our thinking is based upon underlying postulates of which frequently we are entirely unaware but which color all our mental processes …” Jaffe would embrace this view, applying it more directly to administrative expertise. He would knowingly speak of “the law-making aspect of fact-finding processes,” and argue that

[it] is particularly pronounced in administrative fact finding; for we have a fact finder who combines expertness and responsibility for policy making. His experience tends to beget rules for drawing inferences, his devotion to the purposes of the statute tends to beget presumptions for resolving doubtful questions in favor of his theory of statutory purpose.

Later commentators would reiterate the same message.

It took Landis the humiliation of being deposed from the chairmanship of the CAB by President Truman under pressure of the regulated industry, a score of other personal

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334 Walter W. Cook, Scientific Method and the Law, supra note 45, at 306. See also Laski, supra note 20, at 102. See also Charles A. Reich, The Law of the Planned Society, 75 Yale L.J. 1227, 1247 (1966) (“[S]cience knows very little about what makes people happy or what adds to the richness and satisfaction of life.”). See similarly Schwartz, supra note 208, at 472-473.

335 See Jaffe, Incentive and Investigation in Administrative Law, supra note 31, at 1244-1245.

336 Jaffe, Question of Law, supra note 208, at 245.

337 See, e.g., Charles E. Lindblom, The Science of ‘Muddling Through,’ 19 Pub. Admin. Rev. 79, 82 (1959) (“evaluation and empirical analysis are intertwined.”). See also Reich, supra note 334, at 1242 (“Is not ‘expertise’ merely another term for knowledge of facts outside the record plus built-in predispositions? Is not the administrator who is free of such contamination also free of any claim to be an expert?”). See also infra Chapter 7, Section V.C., where the shortcomings of human rationality and cognitive abilities are discussed in the context of the ideal regulator.

338 Landis served on the CAB from June 1946 to December 1947, when Truman declined to renew his appointment. When the two men met, President Truman told Landis that when he
tragedies, and the manifest failure of many agencies to reconsider his Idealism. Still, even then he did not totally cave in; even then he had high hopes that the administrative process, put in the hands of able people, would gain its rightful place in the American polity.

Taking a panoramic view on Landis’ various essays, it is evident that, changing as his theories had been, he believed all along in the great promise of regulation by “qualified” administrators. He had never forsaken his conviction that agencies properly construed could live up to the high expectations of those who had envisaged them as powerhouses of social progress. At bottom, Landis believed throughout in an idealized image of an able regulator, failing to notice the many uncertainties and pervasive metaphysical thinking lying at the core of his very own concept of expertise. His personal experience as a commissioner must have informed this conviction. This, I believe, was the core, fulcrum, and pride and joy of Landis’ metaphysics. It was best expressed by Landis’ co-author of the securities legislation of the early 1930s, Tom Corcoran, in the course of his testimony on the Securities Exchange Act of 1934 at the House Commerce Committee in 1934. The following dialogue took place on that occasion between Corcoran, as a representative of the Roosevelt administration, and one of the House Committee members:

Mr. Mapes: The law ought to be made to apply to all alike and I hate the idea that some man can go on to an administrative official and get something done and another fellow on the street cannot.

Mr. Corcoran: You have to have the power to make rules and regulations in every administrative body. The answer is to pick good men on your commissions.

Mr. Mapes: Well, that sometimes is no answer at all.

became President he had been told, “you’ll have to be a son-of-a-bitch half the time.” “This is one of the times,” Truman said. RITCHIE, supra note 3, at 153.

Landis went through divorce in 1947, was an alcoholic, and when he had gone to serve as the CAB chairman he left behind a law school in disarray. RITCHIE, supra note 3, at 138-139.

See supra text accompanying notes 313 and 316. See supra Section III.F.3. See supra note 26. On Thomas Corcoran, see Chapter 2, Section III.B.2.
Mr. Corcoran: It is the ultimate answer to any governmental problem.  

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It would be left to Louis Jaffe, a former companion of Landis, to grapple with Landis’ theories of regulation in the postwar era. As we shall see below, Jaffe would slowly but surely distanced himself from Landis’ metaphysics. Yet, continuities between the two scholars exist.

Jaffe, on the other hand, came to advocate a pluralistic, inclusive view of the administrative process; a process whose boundaries were more amorphous. To Landis the recognition in diversity of expertise allowed for a comfortable disengagement among the branches. As Jaffe saw it, it allowed for a rich and multifaceted public dialogue.

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346 Infra Chapter 8.
CHAPTER 7. POST-CLASSICAL PUBLIC ADMINISTRATION

If ideas are to be taken seriously, there must be genuine concern for their embodiment in action, and especially in the routines of institutional life.

Philip Selznick

I. Introduction

A. New Generations, New perspectives

This chapter focuses on the literature on administrative commissions produced from the late 1930s to the late 1960s by political scientists (organization theorists included), sociologists, economists, and historians. Most of the literature presents itself as descriptive; at least some of it is clearly propositional. Out of a vast corpus I have selected several exemplar studies that question the fundamentals of classical science of administration. Moreover, they also cast serious doubts on the essentials of the proverbial Progressive Era and New Deal thinking on administrative regulation—best exemplified in the work of James Landis—that is, its perception of the expert regulator and the independence of agencies.

Therefore, the chapter should be read with an eye on the previous chapter. It demonstrates the perils of ignorance on the part of lawyers, who did not heed the insights of those scholars who concerned themselves with public administration while lawyers were debating the New Deal. True, the majority of researches that will be canvassed below date after the New Deal. However, they usually build on information and studies available already the 1930s. The crucial point is that the insights offered by this group of academics heralded the demise of the New Deal general manager paradigm by the 1950s

2 See supra Chapter 4.
3 See supra Chapter 6.
and 1960s and defined the term for undermining its dominance. It thus paved the way for the reign of the empiricist/professional paradigm.\textsuperscript{4}

Overall, the findings of the various sources mentioned in the chapter could be catalogued according to the following criterion: do they further or undermine the integrity of administrative organizations? To illustrate, members’ identification with the organization falls under the first category, while the phenomenon of capture under the second. The dichotomy I propose is predicated on the understanding that at any given moment an administrative organ is simultaneously subject to both centripetal and centrifugal forces—the one solidifying coherence the other pulling it apart.

The dichotomy demonstrates how \textit{both} camps of lawyers, pro- and anti-commissions,\textsuperscript{5} blundered in their disregard of political scientists. Progressives discounted the pull of disintegrative forces while conservative overlooked those dynamics pulling the administration together, maintain its integrity, and potentially ensuring its faithfulness to its mandate. Granted, the bulk of the literature is dedicated to disintegrative factors, but contrary phenomena are also pointed out along the way.

\textbf{B. Synopsis}

Dwelling, as we shall, on the details of the numerous studies, it is easy to lose sight of “the big picture,” i.e., of the overall configuration of arguments and counterarguments. For that reason, before I move forward to the studies themselves, I would like to preset a synopsis or a road map of key findings of some of them by way of introduction. What were the lessons offered by post-classical students of public administration?

The nascent science of administration that prided itself of its scientificity and realism seemed to the new generation to have betrayed these standards. Students of administration came to question the teachings of the great classicists Max Weber, Woodrow Wilson, Frederick Taylor, and Frank Goodnow for the utmost emphasis they had placed on instrumental efficiency. With the passage of time, a number of scholars

\textsuperscript{4} For a short description of the general manager and the empiricist/professional paradigms, see Chapter 1, Section B.

\textsuperscript{5} See supra Chapter 3.
came to regard the field of public administration as too obsessed with efficiency at the 
expense of democratic and humanitarian values. By the late 1960s a new value was 
placed on a pedestal. It was “‘social equality’ and its favorite means to achieve this value 
[was] ‘participation.’” To recall, Wilson conversely abhorred the prospect of popular interference with the business of administration.⁷

The conventional distinction between politics and administration also fell under the axe of hindsight. The distinction had been under fire already in the 1930s. By the 1950s it “was ostensibly abandoned by nearly all.”⁸ Here the post-classicists took issue as well with the reform-minded progressives and New Dealers. Their indictment against the commission movement opens with the unequivocal assertion, “Regulation is and always will be an intensely political process.”⁹ Studies demonstrating the many ways in which politics found its way into the work of commissions substantiated the proposition. The second section in the indictment is propositional. It is asserted that regulation would better be political to be both legitimate and efficient; that the participation of the political branches of government (especially the President) in the administrative process would rectify the democratic deficit in the operation of agencies; and, just as significant, that commissions’ reliance on the President would be an antidote to their capture by the regulated, as it would shield them from predatory industries.

The phenomenon of agencies’ capture by the regulated sectors dominated the field around the mid-century. Both its inescapability and its dire consequences were critically assessed. In drumming home the message that regulation by commissions was ineluctably political and prone to capture, political scientists did not only shed light on the inner

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⁷ See Woodrow Wilson, The Study of Administration, 2 POL. SCI. Q. 197, 215 (1887). (“Directly exercised, in the oversight of daily details …, public criticism is of course a clumsy nuisance, a rustic handling delicate machinery.”).
working of major departments of the American bureaucracy—an important contribution in itself—but also brought to the fore agencies’ dependence on the other branches of government, the regulated industry, and the public. The findings of such analyses naturally challenged the theory supporting the institution of the independent commission.

That was not all. Historians, political scientists, and sociologists criticized the commission movement for other reasons. Addressing head-on the issue of expertise, they brought forward a series of studies illustrating organizational and personal hurdles forestalling the attainment of administrative expertise. Under this heading, scholars asserted that, generally speaking, commissioners were not the experts they had been projected to be, but rather a quite unimpressive bunch. On a more general level, by pointing out cognitive limits of rationality and the perennial deficiency in available information, they showed the inherent limits of administrative competence.

And now to the studies themselves.

II. Regulation and Politics

The most salient rupture between the classical and post-classical generations of administrationists revolved around the administration-politics distinction. As noted, Woodrow Wilson and Frank Goodnow were adamant that one could and should distinguish between the two. Later scholars begged to differ.

A. Regulation Is Political

According to James Fesler’s study of independent state regulatory agencies, published in 1942, their independence “is more a myth than reality. And like many other myths it has a sinister effect, for it lulls the public into a false confidence in the Olympian judgments of the ‘independent’ agencies, and diverts attention from the influences that are constantly at work.” In response to this strong claim, Marver Bernstein unequivocally

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10 JAMES W. FESLER, THE INDEPENDENCE OF STATE REGULATORY AGENCIES 61 (1942). See also the provocative study, GABRIEL KOLKO, RAILROADS AND REGULATION 1877-1916 (1965),
asserts, “This finding applies fully to the national commissions.”\textsuperscript{12} The “external” influences “constantly at work” the two authors had in mind were of two kinds, industrial (i.e., undue influence of the regulated), which is commonly referred to as “capture,”\textsuperscript{13} and political, which is the focal point of the present discussion.

The main argument leveled at the Wilson school and the commission movement in the present context is that agencies cannot escape from politics as they are awarded the power to regulate highly contested—thus, highly political—issues, such as railroad tariffs.\textsuperscript{14} Agencies, members of this group insist, are “de facto political entities.”\textsuperscript{15} E. Pendleton Herring likewise pointed at the impracticality of any notion of a non-political regulation when in 1936 he wrote, “Administrators cannot be given the responsibilities of statesmen without incurring likewise the tribulations of politicians.”\textsuperscript{16} This assertion seemed to have relied on the conclusion of his earlier study of the Federal Trade Commission (FTC) during the 1920s, where he had written that “[t]he Commission could not remain ‘independent’ of the new political climate surrounding it, and even its experts were eventually affected by the storm in which their superiors were principals.”\textsuperscript{17}

Scholars of this persuasion argue that the President and members of Congress leave the clearest fingerprints of political intervention in commission-made regulation. It is noted, for example, that the President might direct the agency not only by appointing favorable commissioners,\textsuperscript{18} but also through an array of other formal and informal ways, such as by designating commissions’ chairmen, approving commissions’ appropriation requests, which will be discusses in Section III.C, \textit{infra}. Charles Reich, writing in 1966, maintained similarly that “the central myth of our present administrative law” was “the belief that decisions … are not choices between values.” Charles A. Reich, \textit{The Law of the Planned Society}, 75 \textit{YALE L.J.} 1227, 1236 (1966).

\textsuperscript{12} \textsc{Bernstein, supra} note 9, at 144.

\textsuperscript{13} This is the subject of Section III, \textit{infra}.

\textsuperscript{14} \textsc{Bernstein, supra} note 9, at 280 (“Regulatory activities of the government are part and parcel of the political process and are affected by the over-all political environment. … It cannot be isolated from the web of economic and political relationships.”).

\textsuperscript{15} \textsc{Louis G. Caldwell, A Federal Administrative Court, 84 U. PA. L. REV. 966, 971 (1936).}

\textsuperscript{16} \textsc{See E. P. Herring, Public Administration and the Public Interest 138 (1936) [hereinafter Herring, Public Administration].}

\textsuperscript{17} E. Pendleton Herring, \textit{Politics, Personalities, and the Federal Trade Commission, II, 29 AM. POL. SCI. REV. 21, 24 (1935).}

\textsuperscript{18} \textsc{See supra} Section IV.A.1.
recommending the commission to transact a particular policy, and issuing Executive Orders.\textsuperscript{19} Congress, too, may wield considerable power on commissions through legislation, the appropriation process, Congressional investigation, and informal contacts between members of Congress and commissioners.\textsuperscript{20} Surely, this approach to regulation is squarely opposed to the progressive vision of regulation as a non-political, objective, and purely expertise-driven operation. Viewed from their antagonists’ prism, progressives’ error in this respect was foundational.

To be sure, all this had not been unknown already during the period leading to the 1887 Interstate Commerce Commission (ICC) Act, when it was argued that the Act’s requirement that the Commission’s board would be bi-partisan would turn it into “the football of politics.”\textsuperscript{21} Future commentators would indeed confirm the accuracy of such prophesies. Thus, Thomas Austern, writing in 1963, observed that “[a]t the agency level, the requirement of a bipartisan commission or board often accentuates the basic problem of politics.”\textsuperscript{22}

Lastly, it would be absurd to argue that progressives did not realize that commissions followed and enforced particular, almost always controversial, policies. In fact, for them that was the whole point in making agencies the linchpin of governmental regulation. From their perspective, however, in “favor[ing] one interest as against another”\textsuperscript{23} commissions did not necessarily cross the border form the objective and purely rational to the political realm. As we have seen, Woodrow Wilson, himself a progressive, proclaimed this exact view.\textsuperscript{24} To progressives, discretion could be exercised objectively,

\begin{footnotes}
\item For these and others avenues of presidential influence on commissions, see Bernstein, supra note 9, at 106, 131-134. See also Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245 (2001).
\item Bernstein, supra note 9, at 131-137 and 151.
\item Robert E. Cushman, The Independent Regulatory Commission 53 (1941) (quoting Representative Campbell of Ohio). As noted by Cushman, others thought that this requirement would protect the ICC from becoming an arm of the ruling party. See supra Chapter 2, Section II.D.
\item Herring, Public Administration, supra note 16, at 134 (1936) (emphasis in original).
\item See Wilson, supra note 7, at 210 (“administration lies outside the proper sphere of politics.” (emphasis in original)).
\end{footnotes}
that is, apolitically. Robert Cooper, for example, warned in 1937 from “confusing partiality and bias with the exercise of administrative discretion.”

B. Regulation Should be Political

The controversy between traditionalists (and progressive lawyers) and the post-classical political scientists was brought to a sharp relief especially when the question whether regulation should be political was at issue. Here the two generations held diametrically opposed views: whereas the founders cherished the dichotomy between (external) politics and (internal) administration, the generation of the 1950s would hear nothing of it.

No one, neither progressives nor their critics, argued that the President’s occasional meddling with regulation was not political, nor that Congress’ supervisory power was not likewise wrought out of a political process. There were those, however, who were not alarmed by this fact. To them, the President and Congress are, and should be, an integral part of the administrative process as the representatives of the public at large. They held that progressives’ conception of the administrative process was vulnerable to charges of usurpation. “Only in a totalitarian society is the general welfare a matter of private, non-political concern,” wrote Bernstein. The underlying assumption informing this approach was that agencies should take cognizance of “actual” public sentiments in devising their policies.

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26 It also encouraged parochialism. See supra Section IV.B.

27 BERNSTEIN, supra note 9, at 161. The last argument should be differentiated from the capture thesis, which stipulates that a major danger resulting from an apolitical vision of the administrative process is that it “cuts the commission’s staff off from popular contacts and political strength and makes them more subservient to the demands of the regulated groups.” Id. at 118. The problem of capture will be explored below. See infra Section III.

28 It seems tempting to take this approach to its logical conclusion and suggest that some involvement of publicly elected representatives—better still, of the public itself—in actual, “on the ground” regulatory processes be a *sine qua non* for their validity. In 1975 Richard Stewart from Harvard Law School would posit that administrative law jurisprudence in the United States came to a similar conclusion. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1669 (1975).
One of the fiercest salvos on the commission movement along these lines was launched already in 1915 by Jane Addams in her book, Democracy and Social Ethics. Addams was the founder of Hull House in Chicago, an epoch-defining progressive institution. She was nevertheless relentless in her criticism of what she saw as armchair programs of progressive reformers. What singles out this criticism was that Addams did not shy away from conducting a personal, *ad hominem* attack on these reformers. It was clear that she resented what seemed to her as their detachment and elitism.

It is self interest that is driving progressive reformers, she argues. It seems to her that they are not sympathetic to the plight of regular Americans. Addams’ position is different. “[W]e,” she declares, “count only that man merciful in whom we recognize an understanding of the criminal.” Detached, unsympathetic reformers simply cannot mobilize social change, even if they want to.

To be sure, reformers’ aloofness is writ large on the particular goals they campaign. In this context, Addams passes harsh judgment on the proliferation of administrative agencies—

reform movements, started by business men and the better element are almost wholly occupied in the correction of the political machinery and with a concern for the better method of administration, rather than with the ultimate purpose of securing the welfare of the people. … This accounts for the growing tendency to put more and more responsibility upon executive officers and appointed commissions at the expense of curtailing the power of direct representatives of the voters.

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29 Jane Addams, Democracy and Social Ethics (1915).
30 See Michael McGerr, A Fierce Discontent: The Rise and Fall of the Progressive Movement in America (2003), at 35 and *passim*.
31 She says about this brand of reformers: “The man who chooses to stand aside, avoids much of the perplexity, but at the same time he loses contact with a great source of vitality.” ADDAMS, *supra* note 29, at 45.
32 Laski would make a similar argument in 1930. He would argue that the expert is unable to understand “the plain man”: “What he knows, he knows so thoroughly that he is impatient with the men to whom it has to be explained.” Harold J. Laski, The Limitations of the Expert, 162 Harper’s Monthly Magazine 101, 104 (1930).
33 ADDAMS, *supra* note 29, at 9. See also id. at 272-273.
34 *Id.* at 222-223.
Obviously, Addams sees the reformers’ regulatory agenda as anti-democratic. Democracy, for her, is much more than the classic, liberal vision of democracy, a regime approximating *laissez faire* ideology. She rails against the concept of democracy as merely “a sentiment which desires the well-being of all men, [or] as a creed which believes in the essential dignity and equality of all men,” regarding democracy “as that which affords a rule of living as well as a test of faith.”

Therefore, in opposition to progressives’ customary portrayal of politicians, Addams stresses that they are, for her, the rightful leaders of the community. “Would it be dangerous to conclude,” she asks, “that the corrupt politician himself, because he is democratic in method, is on a more ethical line of social development than the reformer, who believes that the people must be made over by ‘good citizens’ and governed by ‘experts’?”

The argument is, in short, that reformers who advocate the surrender of vast regulatory powers to commissions rob the politicians and, more importantly, their constituents of their ability to have a say in the formulation of important regulatory policies. Laski would write similarly in 1930, “What can be done is not what the expert thinks ought to be done. What can be done is what the plain man’s scheme of values permits him to consider as just.” Heed well again Addams’ emphasis on the moral and ethical implications of a system of regulation by experts. Note also the insinuation that in propagating this system reformers opt for the easy solution, as they save themselves the trouble of politics: the pushing and shoving, the handshakes, visitations and like chores. Her message to “reformers” is loud and clear: if you can’t stand the heat, get out of the kitchen!

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35 *Id.* at 6.
36 *Id.* at 270. See also *id.* at 243.
III. Capture

A. Introduction to the Problem of Capture

The denunciation of progressives’ viewpoint on public regulation, which was derided as unrealistic, did not end with the charges of its undemocratic implications. The call for an escape from politics in public regulation has an additional menacing outcome in store, it was argued. As Paul Appleby wrote in 1949, “taking things out of politics” means “taking things out of popular control.” The call for the isolation of the administrative process “is a frequent device of special-interest groups to effect the transfer of governmental power away from the large public to the special-interest small publics.”

Special interest groups wisely revert to this device, as experience has shown that it led to commissions’ growing reliance on the regulated, which may result in regulators’ subordination to the wishes of the industry rather than their commitment to promote the public good. So viewed, regulation may be good, in fact very good, for business. This is the phenomenon known in the legal and political science literature on public administration as “capture.”

Viewed through the prism of capture, the independent commission is an institute benefiting primarily the industry. “As a device to protect and promote the interests of the regulated groups,” Bernstein holds, “the independence of commissions takes on a more realistic meaning. It becomes easier to understand why the independence of regulatory commissions has come to acquire a sacred inviolability.”

The 1950s saw a spate of writings on capture. They were based on (what appeared to be) a wealth of corroborative evidence collected during the preceding decades. In the

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39 See Paul Appleby, Policy and Administration 162 (1949).
40 Bernstein, supra note 9, at 138.
42 Later on, during the 1960s, political scientists made broader claims, arguing that capture “applied not only to commissions but to the entire American polity.” McCraw, supra note 41, at
following pages I will single out four outstanding accounts. The selected pieces where written between 1952 and 1969. My review aims to demonstrate the many ways in which administrative agencies are dependent on “their” industry, which is always resilient, resourceful, and combative. In fact, this literature reveals how dependent agencies are on the political branches of government and the public at large, too, thus presenting a complete parallelogram of forces in the regulatory field. Two of the accounts base their arguments on the history of the ICC\textsuperscript{43} and the other two take a more general view on the history of regulation in the United States.

B. Samuel Huntington: The ICC’s Road to Doldrums

In 1952, Samuel Huntington, then Instructor on government at Harvard, published an analysis on the fluctuations in ICC policies throughout the years, based on “agency support theory.” Huntington’s linear argument fundamentally rests on a not uncommon approach among political scientists to regulation. The administrative world is in on-going race for survival in Huntington’s view. The results of the race at any given moment are contingent on the question of how politically powerful each contender’s support base is. “If an agency is to be viable,” Huntington explains, it has to “maintain a net preponderance of political support over political opposition.”\textsuperscript{44} An agency, which is a bureaucratic organ, cannot perpetuate itself; it cannot survive without meaningful external support. As Murray Edelman put it, “We may take it as the key feature of any constituency that it can cripple or kill an agency.”\textsuperscript{45}

Grounding his analysis on an unmatchable array of sources,\textsuperscript{46} Huntington demonstrates the complete correlation that existed between the rise and fall of railroads in the

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178. Such claims regarding the mechanics of the American polity, in which regulation is only a part, are too broad indeed to be discussed in the present context.

\textsuperscript{43} See supra Chapter 2, Section II.D.

\textsuperscript{44} Samuel P. Huntington, \textit{The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest}, 61 YALE L.J. 467, 470 (1952).


\textsuperscript{46} This did not prevent others from criticizing the article. See McCraw, \textit{supra} note 41, and Louis L. Jaffe, \textit{The Effective Limits of the Administrative Process: A Reevaluation}, 67 HARV. L. REV. 1105, 1108 n.5 (1954) [hereinafter Jaffe, \textit{A Reevaluation}].
transportation market and that of the ICC’s “position of leadership”\textsuperscript{47} in the field of transportation regulation. His main argument is that this change was brought upon the ICC due to its unwise reliance, since the end of World War I,\textsuperscript{48} on railroads alone as its sole source of political support. He painstakingly illustrates the symbiotic relationships that have developed between the two along the years following the War.\textsuperscript{49} (According to Edelman the ICC has effectively served the railroads “as their spokesman.”)\textsuperscript{50} This policy made the ICC dependent on the vitality and dominance of railroads, while alienating many others: non-railroad (i.e., air, water, and motor) carriers, shippers, and their political sponsors within and without Congress, as well as opposing agencies, which came to command broader support bases than the ICC. Now, as the railroads’ dominance was being seriously challenged with the ascendancy of alternative forms of transportation, the ICC “may be said to suffer from marasmus,” a term taken from the terminology of Pathology, which means, “A gradual and continuous wasting away of the bulk of the body from some morbid cause.”\textsuperscript{51} The moral of the story is clear: “Successful adaptation to changing environmental circumstances is the secret of health and longevity for administrative as well as biological organism.”\textsuperscript{52} In other words, the agency is to be captured or to perish.

C. Gabriel Kolko: The Railroads’ ICC

The historian Gabriel Kolko rewrites the history of the ICC. His argument is more radical than that of Huntington. Kolko shows the inevitability and inherency of capture given the

\textsuperscript{47} Huntington, \textit{supra} note 44, at 469.  
\textsuperscript{48} Huntington argues that before the Great War, the ICC relied on a shippers-farmers coalition. As we shall shortly see, this proposition runs counter to Gabriel Kolko’s history of the early years of ICC regulation. Whereas the latter argues that the railroads controlled the ICC from the very beginning, according to the former, the ICC’s policies during the years leading up to World War I brought about the “domestication” of the carriers. \textit{Id.} at 471. Following his theory, Huntington asserts that the ICC was wise in shifting its source of political support from farmers to railroads in the 1910s, as “[c]ontinued reliance upon the old sources of support would have resulted in decreasing vitality.” \textit{Id.} at 472.  
\textsuperscript{49} \textit{Id.} at 473-481.  
\textsuperscript{51} Huntington, \textit{supra} note 44, at 470 and 470 n.11.  
\textsuperscript{52} \textit{Id.} at 470.
forces to which nascent agencies are exposed. This is what he set out to do in his controversial book, *Railroads and Regulation, 1877-1916*, published in 1965.\textsuperscript{53} The book was said to have “exerted a unique powerful influence” “[o]ver much of the literature of ‘capture.’”\textsuperscript{54} In it, Kolko makes the case that it is erroneous to speak of the “capture” of the ICC by the railroads, as such rhetoric alludes to a primordial period of complete independence, which has never existed. Kolko’s contrary thesis is that from its inception, the ICC has been above all a tool in the service of the railroad industry. The industry, he argues, actually sponsored the ICC’s establishment, so that it would perform housekeeping tasks that the industry could not manage by itself.\textsuperscript{55}

“Historians,” Kolko opines in the introduction to his book, “as a result of their comprehensive assumption about the general nature of federal regulation and Progressivism, naturally assumed [that] railroads opposed federal regulation.” In direct opposition to this indeed prevalent assumption, Kolko ambitiously argues, “It is … a mistake to regard the Commission and the railroads as antithetical. … Cooperation and sympathy rather than hostility and conflict are the dominant themes in the relationship between the Commission and the railroads.”\textsuperscript{56}

In putting forward his interpretation of the circumstances that led to the foundation of the ICC, Kolko entered a longstanding fray regarding the question of who should be credited for the birth of the Commission: the farmers, merchants, small shippers, oil producers, general consumers, or another group? Kolko’s contribution lies in introducing an unexpected candidate for the “job,” the railroads.\textsuperscript{57} In order to substantiate his views, Kolko presents a fascinating rendition of the ICC-railroads relationship since the ICC’s

\textsuperscript{53} KOLKO, supra note 11.

\textsuperscript{54} McCraw, supra note 41, at 164.

\textsuperscript{55} Kolko argues that in the 1870s railroads moguls realized that they could not discipline themselves, at a time when self-discipline was certainly in order: “In [a] context of declining income, fixed costs, growing competition, and imminent bankruptcy, the leaders of American railroads naturally attempted to stop secret rebates, rate cutting, and over-expansion that threatened them all.” KOLKO, supra note 11, at 8. Yet, as we have noted infra Chapter 2, Section II.D., however laboriously leaders of the industry had tried to refine the hard edges of the competition among different railroad companies, all the numerous mechanisms introduced to that end (mainly, the organization of pools) came to naught.

\textsuperscript{56} KOLKO, supra note 11, at 84.

\textsuperscript{57} For a survey of some competing theses on this question, see KOLKO, supra note 11, ch. 1.
early years. The gap between the wording of the ICC Acts on the one hand, and the actual execution of their provisions by the Commission, and more generally, the ICC’s overall carriers-oriented policies on the other, are emphasized throughout.

D. Murray Edelman: Regulation as Pipe Ceremony

Murray Edelman’s point of departure is similar to that of Huntington. In his investigation of the National War Labor Board in World War II, he states at the beginning of the discussion, “The analysis that follows is based upon the assumption that all governmental activity is the resultant of the interplay of group interests.”

Edelman’s article offers two contributions. First, in outlining a theoretical analysis of the conditions that allow one group, and not its rivals, to safely capture a regulating agency—the circumstances that allow it to make the agency an instrument at its disposal, without stirring public discontent—Edelman’s rich discussion demonstrates how the public, the regulated, and policy makers are dependent upon and sustain each other. The details of the analysis should not detain us here. It is noteworthy, though, that agencies’ complete surrender to industry is taken for granted throughout the discussion.

Given the considerable benefits that are bestowed on the industry by the commission, a policymaker has to preempt and allay any potential public protest. Edelman’s second contribution lies in highlighting the social function regulation performs exactly at this juncture. It is “the very creation and continued functioning of the agency” that sends a message that is “solace for very anxious people.” And he adds, “This is precisely the function performed in more primitive societies by the rain dance, the victory dance, and the pipe ceremony …” Thus, agencies “create and sustain an impression that induces acquiescence of the public in the face of private tactics that might otherwise be expected

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58 As we have just seen, Huntington’s rendition of the early history of the ICC is squarely opposed to Kolko’s reading of the period, as is Bernstein’s version. See Bernstein, supra note 9, e.g., at 77-78. However, as we have also seen, Huntington’s analysis of the ICC’s policies after World War I falls in line with Kolko’s overall theory.

59 See infra text accompanying and note 63.

60 Edelman, Public Regulatory Bodies, supra note 45, at 276.

61 Id. at 759.

62 Id. at 761.
to produce resentment, protest, and resistance.” They enable the organized groups involved to “use their weapons with minimal anxiety about counterattack.”

E. Marver Bernstein On Administration and Its Undramatic Nature

1. Introduction

In his influential, rich book, *Regulating Business by Independent Commission*, Bernstein, “the most prominent regulatory agency theorist” of the 1950s, offered a distinct contribution to the study of capture. Bernstein provides “a survey of the entire field” and “set the terms for the critical attack that followed in the 1960s.” Bernstein argues that capture is an intrinsic part of the normal “life cycle,” as he famously called it, of regulatory commissions.

The “life-cycle” hypothesis grew out of Bernstein’s wider research question, which could be concisely stated as: have regulatory agencies lived up to the expectations of those who had a hand in their establishment? Bernstein answers this question negatively. In order to get there, he takes a broad look of the independent agency, while critically examining its role in the overall governmental machinery and aiming to provide “a more realistic concept of the process of governmental regulation.” Although his discussion is meant to focus on the independent agencies, Bernstein’s sweeping discussion clearly relates to non-independent agencies, too. Typical to the 1950s, his analysis of public regulation clearly lacks the air of optimism permeating the literature written by New Dealers, notably Landis’ *The Administrative Process*.  

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63 *Id.* at 759. Such an interpretation is bound to underscore the many gaps that exist between the lofty ideas expressed in legislation and other media and the actual results of regulation. *See id.* 750-754. *Cf.* KOLKO, *supra* note 11, at 5 and 232.


65 Gifford, *supra* note 41, at 313.


67 *See infra* text accompanying note 95.

68 BERNSTEIN, *supra* note 9, at 7. The need for a “realistic” study of the regulatory process is emphasized throughout. *See, e.g., id.* at 279 (“There need no apology for attempting to formulate a realistic approach to the regulatory process.”). *See also id.* at 126-128.

69 *See, for example,* SELZNICK, *supra* note 1, at x, where Selznick admits that he had embraced “a pathos of perssimism,” and notes further that he believes “that corruption of ideas is
2. The Life Cycle of Regulatory Commissions

“While the experience of each commission has unique elements,” writes Bernstein, “the history of commissions reveals a general pattern of evolution more or less characteristic of all.”70 This general pattern manifests itself in the form of a “natural life cycle” of agencies.71 Drawing on an array of sources, Bernstein argues that the life cycle of commissions consists of four periods: Gestation, Youth, Maturity, and Old Age. In other words, he chronicles the process whereby the agency is bound to perish.

(a) Gestation

The first phase is the one in which the constitutive enabling regulatory statute is conceived and delivered. As many as twenty years frequently lapse until such a statute is produced.72

(b) Youth

In its youth, the commission begins to become acquainted with its own potential, albeit in an inhospitable environment. This phase is typified by a noticeable discrepancy in the regulated field. While the commission is just testing the water, the regulated industry, well-organized, funded, and connected, is able to effectively obstruct the regulatory effort.73
“[T]he agency ordinarily begins its administrative career in an aggressive, crusading spirit.” It is effused with a “spirit of youthful vigor.” Ambition runs high and “commissioners are urged to define their role in expansive rather than restrictive terms.”\textsuperscript{74} However, the commission soon realizes that the industry that has lost in the first round (by not preventing legislation) is most certainly not willing to step down. Rather, it embarks on a series of legal and political battles.\textsuperscript{75} The regulated industry quite skillfully attempts to shift the gravitational center of regulation from the administration to the courts and Congress. It also tries to meddle with appointments of commissioners. Indeed, the annals of important agencies, such as the first of them, the ICC, demonstrate that it is not uncommon for an appointed commissioner to come from the ranks of industry or to acquire a senior position in industry upon leaving the commission.\textsuperscript{76} This revolving-door syndrome is yet another manifestation of capture, of course.

Public support is also of great moment in the life of commissions. “If the agency is to act in the public interest,” Bernstein asserts, “it must do so while it still commands public support and can count on sympathetic political leadership both in the Presidency and in Congress.”\textsuperscript{77} Herring’s study of the FTC supports this observation,\textsuperscript{78} as does Michael McGerr’s study of Progressive Era food, drug, and conservation reforms.\textsuperscript{79}

Even an agency founded on the waves of popular support soon finds out that this source of support swiftly disappear for a variety of reasons, such as politicians’ reluctance to enter the murky waters of contested regulation and the fact that groups that had pushed for regulation during the gestation period experience “a climatic peak” upon the passage of the legislation, which is followed by their retreat.\textsuperscript{80} Namely, even such an engaged public suffers from a short attention span. For these and other reasons, “the new

\textsuperscript{74} Id. at 80. Indeed, there is a somewhat problematic tension between Bernstein’s description of the shy, new-born commission among the grown-ups of the industry on the one hand, and on its vital and aggressive operation at that same “age,” on the other.

\textsuperscript{75} See Bernstein, supra note 9, at 95 ff.

\textsuperscript{76} Id. at 82-83 and 185. See also Edelman, Public Regulatory Bodies, supra note 45, at 757.

\textsuperscript{77} Bernstein, supra note 9, at 81.

\textsuperscript{78} See Herring, Public Administration, supra note 16, at 116.

\textsuperscript{79} See McGerr, supra note 30, at 160.

\textsuperscript{80} Bernstein, supra note 9, at 82. See also Edelman, Public Regulatory Bodies, supra note 45, at 750.
commission may be left in splendid isolation until some new crisis attracts public attention and regulation again becomes a vital public issue.” 81 It is only natural, then, that the commission would find comfort to its solitude in the hands of the regulated industry. Interestingly, the public may be justified in maintaining this aloof posture, according to Bernstein, who maintains—somewhat generally—that “[l]ack of concern with administration” is an outgrowth of “its undramatic nature.” 82

(c) Maturity

Capture sets in to the fullest during the mature phase in the life of an agency. The grip of the industry is then especially tight since these are the years when the agency is in a settled position. It has successfully withstood the political tests of its youth and gained the needed experience to capably regulate the field. Therefore, on the one hand, it has assumed by now a managerial position, and on the other, it is stuck in a rut; it is plagued, Roscoe Pound wrote already in 1938, by a “tendency … to fall into perfunctory routine.” 83

By this stage of its development, the agency’s perspective has much broadened: as Harvey Pinney aptly described it, “Regulation has gone beyond prevention … and is becoming ever more concerned with securing full utilization of the factors of production …” 84 By now, the agency is viewed as an integral, essential part in the industrial grid. It “becomes part of the status quo.” 85

At the same time, the agency loses much of the energy and vitality of its youth. It is, as Jaffe put it, stricken by “arteriosclerosis.” 86 Samuel Huntington’s study of the chronicles of the ICC provides vivid illustration for the consequences of a process of administrative deterioration. During its years of decay after World War II, he argues, the ICC “become a

81 Bernstein, supra note 9, at 83.
82 Id. id.
84 Harvey Pinney, The case for Independence of administrative Agencies, 221 ANNALS OF AM. ACAD. POL. SOC. & SCI. 40, 41 (1942).
85 Bernstein, supra note 9, at 87.
86 Jaffe, A Reevaluation, supra note 46, at 1109.
defender of the status quo. … [I]t has maintained an outdated, formalistic type of procedure. It has been slow to introduce the most simple and accepted new techniques of modern management. It has failed to develop effective devices for representing the public interest.”

The combination of the agency’s two characteristics—its nested position in the industrial field and habitual, dull mode of operation—turn it into an isolated entity, embedded in the details of its industry and “[c]ut off from the mainstream of political life.”

Entrenched in its own perspectives and precedents it loses sight of the general public’s point of view. Kolko, for example, writes that “by the end of [Theodore] Roosevelt’s presidency, the I.C.C. had broken into routinized pattern of adjudicating the problems of the railroad industry without concern for the larger interest of a public not immediately involved in the day-to-day issues preoccupying the railroads, Commission, and the wealthier shippers.”

It is noteworthy that according to this account, it was not long before the ICC neared old age. (President Theodore Roosevelt stepped down in 1909, merely twenty-two years after the formation of the ICC). Being in a state of seclusion and motivated by self-interest, the agency is open only to the perspective of the industry, on whose support alone it can rely. It follows that “it is unlikely that the commission, in this period, will be able to extend regulation beyond the limits acceptable to the regulated groups.”

Finally, the stagnant agency suffers from chronic problems of backlog and delay in its operation. This exacerbates its tendency to fight past wars, and there is no talk of

87 Huntington, supra note 44, at 507.
88 BERNSTEIN, supra note 9, at 87. Independent agencies are more prone to seclusion, of course. “Independence is a device to escape popular politics.” Id. at 101.
89 KOLKO, supra note 11, at 168. See also id. at 233-234. According to Bernstein, “The approach of a mature commission is heavily judicialized. It routinely devotes most of its time to adjudication of individual cases. Any latent ability to reconsider regulatory objectives and formulate programs of action is buried under a burden of cases awaiting decision.” BERNSTEIN, supra note 9, at 89. See also Carl I. Wheat, The Regulation of the Interstate Telephone Rates, 51 HARV. L. REV. 846, 882 (1938). Even Landis called upon agencies in 1961 to develop “procedures of a non-judicial nature [that] are more readily adaptable to the resolution of issues arising in complicated administrative proceedings.” James M. Landis, Perspectives on the Administrative Process, 14 ADMIN. L. REV. 66, 73 (1961).
90 BERNSTEIN, supra note 9, at 87.
forward-looking planning in it.\textsuperscript{91} It becomes apparent to all, Congress and the Executive included, that the commission is a failing business. Lack of confidence in it leads to budgetary decline, which makes it practically impossible for the commission to mend its ways.\textsuperscript{92} Thus, the commission is simply left to its own meager devices. Drawing on the experience of the ICC, among other agencies, Bernstein bleakly concludes, “The close of the period of maturity is marked by the commission’s surrender to the regulated.”\textsuperscript{93}

\textbf{(d) Old Age}

The last phase in the life of a commission is of debility and decay. The several maladies, which in its maturity weighed it down and turned it into a captive in the service of the regulated, still afflict the commission. In fact, their debilitating effect is more severely felt. Further budgetary decline and its crippling effects ensue. Bernstein quotes in this context a 1951 report of one Congressional committee that speaks of “the tendency of the independent regulatory commission not to die, but to fade away.”\textsuperscript{94}

\textbf{3. Conclusion}

What is the meaning of this story of evolution, or devolution, in the life of agencies? For Bernstein the answer is plain and simple: “The weight of evidence suggests strongly that the commission form has failed to develop its presumed advantages.”\textsuperscript{95} Just as clear is the reason for this state of affairs, namely, commissions’ persistent policy of distancing themselves from the President and Congress. Bernstein points at the obvious correlation between the agency↔regulated axis and agency↔other-branches-of-government axis:

\begin{itemize}
  \item \textsuperscript{91} On the problem of planning, see Huntington, \textit{supra} note 44, e.g., at 508. For other sources dealing with the problem, see \textit{infra} Chapter 8, n.6.
  \item \textsuperscript{92} See Jaffe, \textit{A Reevaluation, supra} note 46, at 1118.
  \item \textsuperscript{93} BERNSTEIN, \textit{supra} note 9, at 90. Bernstein’s description of the maturity phase (and of the youth period) is crippled by a fundamental underlying tension. It is difficult to comprehend how the mature commission is both an (active) manager (and not just a policeman) and a (passive) hostage in the hands of the industry.
  \item \textsuperscript{94} \textit{Id.} at 93 (quoting \textsc{Senate Subcommittee of the Committee on Labor and Public Welfare, Report, Ethical Standards in Government, S. Doc., 82d Cong., 1st Sess. 60 (1951))
  \item \textsuperscript{95} \textit{Id.} at 250.
\end{itemize}
whenever one axis grows in importance in the work of the commission the other recedes. In short, the pull of the political branch and the industry wax and wane alternately.

As can readily be seen, this study’s underlying motivation is the confutation of the “naïve” 96 view that regulation is a self-contained, isolated process. To Bernstein, it is clear that only the protection of the President may salvage the regulatory endeavor. On this point he in full agreement with orthodox science of administration. 97 One rationale underlying this approach is that capture is a dangerous, divisive contingency as far as the overall regulatory machinery is concerned. Subjecting agencies to the control of the President is meant to counteract and forestall this destructive force. 98

F. The Common Denominator

It turns out that divided as the four scholars were on the history of federal regulation in the United States (on the history of the ICC in particular), they did share a broad theoretical understanding of the utmost influence upon, if not control of, the policies of bureaucratic organs exerted by external interest groups.

The challenge that capture theses pose to commission-movement theorists is obvious; it is also difficult. As McCraw writes, “The Kolko model argued not only that ‘capture’ inhered in the system from the first, but also that the American political economy made the design and subsequent behavior of commissions inevitable, and therefore predictable.” 99 True, reformists could not have shared with Kolko the benefits of hindsight. Yet, being part of the discussion that produced the legislation discussed by Kolko, they could have had at least an inkling as to who stood to benefit from railroad regulation. Indeed, one does not have to entirely believe the theses of Kolko, Bernstein, Huntington, and Edelman in order to appreciate the advantages offered to the railroad industry by the introduction of federal regulation, given the shape that regulation had

96 See id. at 26, 76, and generally ch. 5.
97 See supra Chapter 4, Section III.B.4.
98 Edelman set forward the following “Proposition”: “Fairly rigid separation of subordinate agency from its superior agencies gives the interests represented by the subordinate a relatively stronger position.” See Edelman, Governmental Organization, supra note 50, at 282-283.
99 McCraw, supra note 41, at 165.
taken along the years. The frequent symmetry between Commission policies and the industry’s needs, as well as the familiarity between the Commission and industry officials could have served as telling indications for the precarious, or even untenable, vision of a neutral and removed administrative agency.

Lastly, all this is not to say that the capture theory is impeccable. In fact, scholars in the 1970s began to cast doubt on its explanatory power. Critics argue that capture theorists were oblivious to internal forces within the agency that may offset the pull of capture. As Jaffe explained—

The regulated—their interests and the pressures they exert—are very significant components in the power complex, but the theory focuses on them to the exclusion of other components. It ignores as well the truth in the Landis thesis that there are significant inputs from a bureaucracy as such: expertness, tradition, stability and an organization one of whose values is the rationalized exercise of power.100

IV. Problems of Expertise

A. The Lack-of-Expertise Assault

A recurrent observation put forward by different commentators along the years was the following: all told, they said, experience has shown that commissions did not expert in regulation. Put differently, contrary to starry-eyed reformers’ projections, the commission incubator had not produced prodigies.101


101 Arguments of this order obviously bracketed off a more fundamental question regarding the tenability of the conception of administrative “expertise” as such. Thus, the arguments that will be analyzed in this section are an exercise in phenomenализm. Their aim was to expose an alleged gap between the (plausible) idea of expertise and its (pathetic) incarnation is reality. Note further that the argument that will occupy us here was not that agencies’ performance has proved to be detrimental to the market—such an assertion would call for an all-out attack on the very idea of governmental regulation. Rather, it was argued more specifically that, for one reason or another, the people who carried out the regulatory enterprise failed to impress their critics. While the latter argument clearly rested on an adverse judgment of agencies’ performance, as suggested,
“Like the climate of Los Angeles, theoretically this concept of expert commission is perfect,” Louis Caldwell mused in 1936. “Sometimes, it is true, experts are appointed, but no more than you would expect under the law of averages.”102 Complaints about the low caliber of commissioners had attended the administrative apparatus in the United States from the outset. Charles Adams observed already in 1871 that commissions “have almost invariably been made up of very inferior and, not seldom, corrupt men.”103 Even in his eulogist review of Landis’ book, George Nebolsine, a member of the New York Bar and lecturer at Yale, conceded that there is no reason to expect a future change in this regard—Nebolsine spoke of “a realization that our administrative agencies, in the long run, will be operated by people of average ability.”104

While Caldwell, Nebolsine and other lawyers were quick to set forth arguments such as this, generally it was left for political scientists to systematically explore possible reasons for commissioners’ alleged mediocrity. According to Marver Bernstein, who bases his arguments on a large variety of sources, it is the result of a number of reasons, which I will group under two headings: those relating to the politics of commissioner appointment processes and others reasons that typify the post-appointment period.

it was not necessarily taken to the possible conclusion that regulation per se is destined to produce unfavorable results. Assessments of actual effects of regulation—that is, of the business results of agencies’ intervention in the market—are not part of the ensuing analysis; indeed, they are not part of the dissertation as a whole. This clarification is meant to explain why a whole body of mostly critical literature assessing governmental regulation of the private market is absent from the dissertation. There is the sizeable economic-analysis-of-regulation literature, which ordinarily focuses only on regulation’s end-results. Ample references could be found in McCraw, supra note 41; Gifford, supra note 41; STEPHEN G. BREYER, ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 4-14, 28-32(4th ed., 1999); and Sidney Shapiro, Pragmatic Administrative Law, Issues in Legal Scholarship: The Reformation of Administrative Law, article 1, 10-14, 22-23 (2005) (http://www.bepress.com/ils/iss6/art1).

102 Caldwell, supra note 15, at 971.

103 Charles Francis Adams, The Government and the Railroad Corporation, in CHARLES F. ADAMS, JR., AND HENRY ADAMS, CHAPTERS OF ERIE AND OTHER ESSAYS 414, 428 (1871). See also the Pound Report, supra note 83, at 345, and BERNSTEIN, supra note 9, at 112 (“on the whole commissioners have not inspired confidence as outstanding public servants and vigorous defenders and promoters of the public interest.”).

104 George Nebolsine, Book Review, 48 YALE L.J. 929, 930 (1939) (reviewing JAMES LANDIS, THE ADMINISTRATIVE PROCESS (1938)).
1. Getting Appointed

Two thirds of appointed commissioners come from the legal ranks, reported Bernstein in 1955; “[t]he remaining commissioners have generally been businessmen, bankers, legislators, engineers, editors, or publishers.” And in any event, “Only a small portion of commissioners have had previous experience in regulated industries.” This might have accounted for the Thomas Austern’s poor assessment of commissioners. “[N]ot all of those appointed to administrative agencies or boards are beacons of competence or legal training,” he wrote in 1963.

Bernstein notes in this context a series of hypotheses as to why Presidents so commonly appoint mediocre commissioners. The underlying theme in Bernstein’s analysis is the following: as there are a large number of commissioners serving on innumerable commissions, it follows that (a) there are countless appointments to be made, and (b) in the majority of cases the appointment of one commissioner to a big commission-board would not make a huge difference anyway. As a result, the commissions system provides the President ample opportunities to engage in lucrative political quid pro quo.

E. Pendleton Herring’s 1936 study of federal commissioners supports Bernstein’s thesis. Herring asserts that, although effective, the presidential appointment process is “almost casual in its lack of system.”

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105 Bernstein, supra note 9, at 106. For the predominance of lawyers among commissioners, see also McCraw, supra note 41, at 136. But cf. Adams, Railroads: Their Origin and Problems 133-134 (1878), where Adams, speaking on state commissioners, wrote, “Farmers, land-surveyors, men of business and politicians were selected.”

106 Austern, supra note 22, at 63-64. See also Milton Handler, Unfair Competition, 21 Iowa 175, 252 (1936), and Bernstein, supra note 9, at 104.

107 The Bar’s Special Committee on Administrative Law noted in 1934 that “appointments to administrative tribunals are all too generally classed as patronage …” 59 Rep. Am. B. Ass’n 539, 546 (1934).

108 See E. P. Herring, Federal Commissioners: A Study of Their Careers and Qualifications 96 (1936). See also id. at 77-80. I should note briefly one response offered to these charges by pro-commission thinkers. Marvin Rosenberry, for example, presents in this context a dynamic picture. Readily acknowledging that “[n]aturally (but quite unfortunately) the major positions often become political plums,” he goes on to say “that men so elected, who are permitted to remain in office, often grow and develop into skillful administrators …” Marvin B. Rosenberry, Administrative Law and the Constitution, 23 Am. Pol. Sci. Rev. 32, 45 (1929). See also Joseph B. Eastman, The Place of the Independent Commission, 12 Const. Rev. 95, 101.
2. Post-Appointment

With time it became obvious that on average commissioners’ tenure was short, sometimes very short. Thus, for example, as of 1949, the average tenure of commissioners on the Securities and Exchange Commission was only three years. According to Milton Handler, this leads to a miserable result: “A rapid turn-over of commissioners … contributed [its] share to the frustration” “of the development of the expert and specialized tribunal which Congress contemplated.”109 Moreover, recurrent short terms in office open the door to the greater political weight on commissions’ policy, with the frequent need to re-appoint commissioners. It also frustrates stability and continuity of policy,110 exactly the things commission-run regulation was meant to achieve.111 The conclusion of the foregoing analysis was simple: the commission habitat had proved to be inimical to the cultivation of expertise.

B. On the Perils of Parochialism

Political scientists’ appraisal of cases where a commission was regarded “expert” was often not positive, either. A number of political scientists have argued that a whole set of problems was introduced to the regulatory scene, when an agency demonstrated—against all odds, maybe—sufficient competence to be regarded as expert in its field. The main accusation here was that experts had a parochial view of their regulatory mission.

“Efficient knowledge,” wrote in 1925 Alfred North Whitehead, the British philosopher, “is professionalised knowledge, supported by a restrictive acquaintance with useful subjects subservient to it.” “This situation has its dangers,” he declared. “It produces

(1928) (“Certainly, when once [sic] the members are selected their political affiliations cease to be of the slightest consequence …”).

109 Handler, supra note 106, at 252. Yet, cases of extended tenures of commissions were to be found, too. Notably, the average tenure on the ICC was thirteen years. BERNSTEIN, supra note 9, at 108.

110 BERNSTEIN, supra note 9, at 107-109.

111 See supra Chapter 3, Section II.B.
minds in a groove.”

Bernstein, James March, Herbert Simon, and even Louis Jaffe would hold a similar view. As these writers conceive it, expertise (or professionalism, in March and Simon) is based on a focus on only one aspect of phenomenal reality, rather than on a balanced, panoramic outlook.

It was further argued that the problem of parochialism is exacerbated by expert intolerance for outside intrusion into their allotted territory (by politics in particular). Harold Laski published in 1930 an article entitled, The Limitations of the Expert, which is a tirade against the seemingly innocuous concept of expertise. “There is, in fact, no expert group,” he bitterly notes, “which does not tend to deny that truth may possibly be found outside the boundary of its private Pyrenees.” Consequently, “the perspective of totality is lost.” Adequate regulation of industry, however, necessitates a synoptic outlook, Laski asserts. In order to promote societal objectives, a regulator has to be committed to a cooperative, open-minded attitude. He has to take into account the full gamut of relevant considerations, technical and political.

It was further argued that specialization has an adverse organizational dimension, for “[p]rofessionalization implies specific formal training and thus substantial homogeneity of background. It implies formal regulation of job performance…” Therefore, “[t]o the...

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113 Bernstein takes issue with Landis on this point. In response to the Landis’ positive description of the merits of commissions’ “singleness of concern,” (Landis, The Administrative Process, supra note 69, at 99), Bernstein turns these words against Landis. It is, again, precisely the “singleness of concern” of expert regulators he finds so vexing. Bernstein, supra note 9, at 117.
114 See James G. March and Herbert A. Simon, Organizations 185 (1958) (“Daily routine drives out planning.”).
115 Louis L. Jaffe, Judicial Review: Question of Law, 69 Harv. L. Rev. 239, 275 (1955) (“The very subordination of the agency to judicial jurisdiction is intended to proclaim the premise that each agency is to be brought in harmony with the totality of the law … ”).
116 A similar version of the argument was that the commission movement’s adherence to the dictum that regulation should be kept out of politics—that is, out of touch with popular sentiments—greatly accentuates the problem. See supra Section II.
117 See, for example, Bernstein, supra note 9, at 117-118.
118 Laski, supra note 32, at 103. Two decades later Judge Wyzanski would voice a similar view in United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 346 (D. Mass. 1953): “one of the dangers of extraordinary experience is that those who have it may fall into the groove created by their own expertise. They refuse to believe that hurdles which they have learned from experience are insurmountable can in fact be overcome by fresh, independent mind.”
119 Laski, supra note 32, at 104, 106.
extent that a job is professionalized, techniques and standards of performance are defined by the other members of the profession.”¹²⁰ These other members—the regulators of the profession—are more often than not to be found outside the organization. Expertise, then, has the potential to divide the organization.

Edelman closes the circle when he highlights the effect of specialization of the separate subunits of the organization on subsequent policies of its head. According to Edelman, being well aware of their subordinates’ superior acquaintance with the relevant facts, general managers become anxious. This “may lead them to ever more rigid insistence upon uncritical adherence to the roles and policies they know.”¹²¹ Already Weber noted the problem—

The problem is always who controls the existing bureaucratic machinery. And such control is possible only in a very limited degree to persons who are not technical specialists. Generally speaking, the trained permanent official is more likely to get his way in the long run than his nominal superior, the Cabinet minister, who is not a specialist.¹²²

V. The Bureaucrat: Three Levels of Analysis

The last item in the review is a synoptic book that concentrates on the man-administrator and studies “organizational behavior”¹²³ in the most penetrating way. It tells the story of organizations through the eyes of the workmen and bureaucrats.

A. Introduction: The Lay of the Land

In a book by the title Organizations,¹²⁴ published in 1958, James March and Herbert Simon provided “a brilliant summarization of developments in organization theory.”¹²⁵

¹²⁰ March and Simon, supra note 114, at 70. See also id. at 161.
¹²¹ Edelman, Public Regulatory Bodies, supra note 45, at 758.
¹²³ See March, supra note 8.
¹²⁴ March and Simon, supra note 114.
The writing of the book, cited until today, took place under the auspices of the Graduate School of Industrial Administration in the Carnegie Institute of Technology. The book’s all-encompassing title alone, as well as its scope of interest, suggests that it deals with the full gamut of issues associated with the administration of modern bureaucratic organizations, private and public. The book draws on findings and theoretical propositions of sociologists, economists, psychologists, and political scientists as well as, of course, the accumulated wisdom of organization theory scholars. Legal theory “proper,” however, is absent.

It is noteworthy that although March and Simon’s survey offers an analysis of many influential theories of “formal organizations,” the two authors explicitly refuse to give a definition of the sort of formal organizations they are dealing with in this book. At the same time, although they musingly say that “the world has an uncomfortable way of permitting itself to be fitted into clean classifications”—an interesting comment coming from authors of a book with clear scientific presumptions—they do provide four examples of formal organizations: the U.S. Steel Corp., the Red Cross, a corner grocery store, and the New York State Highway Department. This list, too, bears testimony to the book’s far-ranging interest span.

In one of the first sections of the book, March and Simon present the following observation:

Propositions about organizational behavior can be grouped in three broad classes, on the basis of their assumptions:

1. Propositions assuming that organization members, and particularly employees, are primarily *passive instruments*, capable of performing work and accepting directions, but not initiating action or exerting influence in any significant way.

2. Propositions assuming that members bring to their organizations *attitudes, values, and goals*; that they have to be motivated or induced to participate in the system of organization behavior; that there is incomplete parallelism between their personal goal and organization goals; and

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125 Gifford, *supra* note 41, at 315.
126 MARCH AND SIMON, *supra* note 114, at 1.
that actual or potential goal conflicts make power phenomena, attitudes, and morale centrally important in the explanation of organizational behavior.

3. Propositions assuming that organization members are decision makers and problem solvers, and that perception and thought processes are central to the explanation of behavior in organization.\(^{127}\)

The book analyzes the three phases of organizational behavior analysis, as the authors stipulate that “[t]here is nothing contradictory among these three sets of assumptions. Human beings are all of these things and perhaps more. An adequate theory of human behavior in organizations will have to take account” of all of the three sets.\(^{128}\) The following discussion should be read against the legal literature on administrative apparatuses. It will illustrate some of the central elements in the (actual) operation of agencies hardly considered by the legal scholars whose work I have reviewed thus far.

B. The Human Factor

The essentials of the first phase in the development of the organizational theory—the classical phase, which was dominated by the mechanical approach of Max Weber, Woodrow Wilson, and Frederick Taylor—were analyzed in a previous chapter.\(^{129}\) Later generations of scholars posed new questions and collected empirical evidence with a view to discovering what made the bureaucracy tick and what steps should be taken for it to tick more robustly. What were, then, the new questions posed by organization theorists?

A paradigmatic shift followed the classical period. Generally, organizations were now perceived to be in a constant struggle between—mainly internal—centrifugal and centripetal forces. Example of divisive forces abound. Reflecting the influence of psychology on political sciences,\(^{130}\) the fact that employees’ personal preferences might

\(^{127}\) *Id.* at 6 (emphasis in original).

\(^{128}\) *Id.* id.

\(^{129}\) *See supra* Chapter 4.

\(^{130}\) *See generally* EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE 96-102 (1973). *See also* WALDO, THE

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obstruct the realization of the chief executive’s production plan, was emphasized. March and Simon stipulate that “individual members of an organization come to it with a prior structure of preferences—a personality, if you like—on the basis of which they make decisions while in the organization.” It would an exaggeration to suggest that under this heading the employee was not treated as an instrument of production—this school’s pretensions notwithstanding—and yet clearly here the employee was viewed as an active agent, having the ability to get in the way of the process of production. Accordingly, conflicts among individuals in the organization and among organizational subunits, as well as factors that impact employees’ motivation to abide by their superior’s directives were studied. Great emphasis was placed also on extra-organizational factors (e.g., general economic conditions)—obviously out of the reach of the organization—that also bear on the worker’s motivation.

On the other hand, the authors also deal with forces that preserve the integrity of the organization. For instance, “contagion” within the group is one such factor; identification of members of the organization with it is another. Weber argued similarly that in the modern bureaucracy “entrance into office … is considered an acceptance of a specific duty of fealty to the purpose of the office … in return for the grant of a secured existence.” March and Simon underscore the importance attached to cultivating an employee’s identification with the organization and discuss factors that affect their level

 Administrative State, supra note 6, at xv (“after World War II, … behavioralism [sic], an impulse and determination to make political science a genuine science, was at its height.”).

131 See Simon, supra note 8, at 58 (“[The administrator] may (and usually will) have his own very definite set of personal values that he would like to see implemented by his administrative organization … ”).

132 March and Simon, supra note 114, at 65.

133 See generally id. chs. 4 and 5.

134 Id. at 56 (“Norms for production rates evoked in an individual worker tend to reflect the behavior of adjacent individuals … doing the same work.”) (emphasis in original).

135 2 Max Weber, Economy and Society 959 (Ephraim Fischoff et al. trans., Guenther Roth and Claus Wittich eds., 1978). This theme runs through Weber’s writing on modern bureaucracy. Id. at 1404 he writes, “An official who receives a directive which he considers wrong can and is supposed to object to it. If his superior insists on its execution, it is his duty and even his honor to carry it out as if it corresponded to his innermost conviction.” (In the case of agencies we can think of the popular will as the “superior”). See also Max Weber, Politics as a Vocation, in From Max Weber: Essays in Sociology (H. H. Gerth and C. Wright Mills trans., 1958), especially at 95, and supra text accompanying note 100.
of identification with the organization. They argue that, for example, the longer one remained in the system and/or the more prestigious it was, the more he would identify with the organization.

C. Limits of Human Rationality

The last stage in the development of organization theory closes in even further on the organizational man. Here the interest of the organization theorist is in analyzing the cognitive limits on the rationality of the bureaucrats. (The familiar concept of bounded rationality may clarify the aims of this line of research.) This is a crucial point. Here, I argue, the legal literature on agencies was particularly myopic.

The discussion under this rubric puts an emphasis on factors that mold the perceptual conception of the organization man. March and Simon argue in this context, “What a person wants and likes influences what he sees; what he sees influences what he wants and likes.” But a more fundamental argument is advanced under this heading. It is flatly asserted that rarely can we be fully rational. As individuals, Simon declared in 1945, we cannot reach “any high degree of rationality.”

Charles Lindblom, an economist from Yale, would put forth a similar view in his short, seminal 1959 article, where he set out to demystify a prevalent prescription of administrative decision making. The holders of this view expect agencies to follow what Lindblom calls “the Root,” or a “Rational-Comprehensive” method, namely a procedure “starting from the fundamentals anew each time …” To this, Lindblom counterpoises a rivaling method, the “Branch,” which is a “Successive Limited

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136 See generally MARCH AND SIMON, supra note 114, at 65-81 and 150-158.
137 Id. at 74-75. See also supra note 134.
138 For the use made in it, see id. at 190 and 203ff.
139 Id. at 151.
140 SIMON, supra note 8, at 79. Simon’s explanation is the following: “The number of alternatives [‘a single, isolated individual’] must explore is so great, the information he would need to evaluate them so vast that even an approximation to objective rationality is hard to conceive.” Id. id.
Comprehensions” method, which “continually build[s] out from the current situation, step-by-step, and by small degrees.”142

It may be suggested that Lindblom launches in the article a two-prong attack on the comprehensive method: descriptive and prescriptive. First he shows its utter impracticality, arguing that commissions can (and actually do) only operate under the percepts of the branch method. The scarcity-of-information problem is central to this argument. Having so argued, he bolsters his position by arguing for the desirability of the latter option. What makes his discussion relevant and enlightening is the emphasis Lindblom puts on various insurmountable constrains that narrow the scope, yet ensure the success, of any regulation, broadly defined.

Two factors restrict the span of policy maker’s perspective when she is faced with a complex problem, according to Lindblom. First, being human, there are limits to her “intellectual capacities”;143 second, there are, likewise, limits on the available information at her disposal. As Daniel Gifford put it, “because information is a scarce commodity, decisionmakers cannot collect all relevant information. Administrators must, therefore, act in a state of partial ignorance and uncertainty.”144

Taken together, the two factors point at the relevance and feasibility of a branch method, in sharp contradiction to a root method, as the former is much less information-intensive and accordingly more manageable. There are additional advantages to the former approach: for instance, it makes it easier for an administrator to quickly respond to unfavorable consequences of her policies. A branch method is more conveniently handled not only in theory. Based on “common observation” regarding “Western democracies,”145 Lindblom assuredly claims that policy calls are made “in the margin.”146 Administrators, he argues, “largely limit their analyses to incremental or marginal differences in policies

142 Id. at 81.
143 Id. at 84.
144 Gifford, supra note 41, at 316. See also SIMON, supra note 8, at 81-84.
145 Lindblom, supra note 141, at 84.
146 Id. at 82. To be sure, an incremental mode of operation does not eliminate administrators’ wiggle room. Id. id. (as “[e]ven if all administrators had at hand an agreed set of values, objectives, and constrains, and an agreed ranking of these values, objectives, and constraints, their marginal values in actual choice situation would be impossible to formulate.”).
that are chosen to differ only incrementally … because they desperately need some way
to simplify their problems.”\textsuperscript{147}

Lindblom goes so far as to argue for the benefits of ignorance in the work of the
administrator. He defends and celebrates the practice of ignoring important potential
consequences of possible policies, as well as the values attached to unattended
ramifications. Lindblom asserts that if this appears to disclose a shocking shortcoming of
a methodology of the branch method, it can be replied that, even if the exclusions are
random, policies may nevertheless be more intelligently formulated than through futile
attempts to achieve comprehensiveness beyond human capacity.\textsuperscript{148} Namely, to succeed
regulators have to be ignorant at least to some degree; they should certainly not aspire to
approximate the superb, relentless fact-collectors progressives and New Dealers expected
them to be. In this case, ignorance—and not knowledge—is power.

\textbf{V. Conclusion: The Professional Paradigm Again}

Post-classical theorists of administration have marshaled an impressive array of evidence
and propositions to debunk what they thought were the unwarranted, naïve, and
unrealistic teachings of Wilsonians and Landisians alike.\textsuperscript{149} They have presented the
administrative commission as anything but detached from its environment. They have
struck at the core of progressive image of administrative expertise and counterpoised in a
tough-minded, matter-of-fact manner that it was utopian, describing administrators’
potentially-conflicting internal but also extra-organizational allegiances. However, they
have also, admittedly to a lesser extent, pointed at internal dynamics that counteract
separatist tendencies that threaten an administrative body’s cohesion, whereas
conservative lawyers had betrayed almost no recognition of commissions’ \textit{esprit de
corps}.

\textsuperscript{147} \textit{Id.} at 84.
\textsuperscript{148} Lindblom, \textit{supra} note 141, at 85.
\textsuperscript{149} At the same time, the literature reviewed in this chapter should be criticized, I think, for
not fully considering the (internal) regulatory impact of the legal framework within which
agencies operated on administrators’ behavior. The normative side of legal strictures
attending the work of administrators is given only scant attention, if at all, in the analysis.
So what was the final score? Which group suffered the most from the post-classical salvo, the lawyers or the classicists? All told, lawyers as a group did not fare well. They were pronounced as unrealistic, aloof thinkers. “Lawyers are perhaps guiltier than other professional groups of judging regulatory matters within the framework of their own narrow experience,” is the way Bernstein put it.150 Landis’ *The Administrative Process* is featured in this context by Bernstein following the introduction, “One of the typical ‘lawyer’ views is that of James Landis.”151 Tellingly, no other lawyerly publication is mentioned. Indeed, there is no doubt that the positions of New Deal lawyers were pounded the most by this generation of political scientists.

When it comes to orthodox science of administration calculating the score is more complicated. The post-classicists rejected foundational tenets of the orthodoxy, above all the division between politics and administration. Here the alleged error is also that of progressive lawyers. This slip is baffling, as “the impossibility of separating regulation from the general political and social setting should have been apparent to those who had an awareness of the forces and social movements that were transforming American society”152 in an age of fundamental changes in industrial processes and economic organization. This myopic perspective derives from the fact that in progressives’ writings “[t]he ability of expert staff of commissions, as well as commissioners, to avoid favoritism to private parties and to remain aloof from the regulated interest is taken for granted.”153

Nevertheless, as much as new generations of scholars prided themselves for improving on their predecessors’ unrealistic perspective on public administration, at least in one important respect they did not deviate from the classicists’ conclusion. Like Wilson and Weber, when scholars like Herring, Bernstein, March, and Simon talked of expertise they had “technical competence and skill” in mind. They talked, in short, of the professional paradigm.154

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150 Bernstein, supra note 9, at 118.
151 Id. at 119.
152 Id. at 252.
153 Id. at 284.
154 Id. at 114 (emphasis added).
Having analyzed the affairs of the Federal Radio Commission, Herring, for instance, argues, “Expertise can only apply to scientific problems … it ensures a grasp of technical limitations and possibilities.” It follows, then, he goes on to claim, that “it does not contribute to a positive elucidation of the public welfare. Here even the expert must rely upon his fallible judgment and his integrity.”^155 By the same token, while Bernstein’s arguments may possibly be classified as “descriptive” (they are seemingly based on observations that demonstrate the perils of expertise in a regulatory setting), he does not shy away from drawing a strong normative claim from them. Here Bernstein follows Max Weber’s formalist model to the letter—

Expertness in commission appears to be most valuable and acceptable when the following conditions are approximated: (a) the scope of the problem is narrow; (b) the task of collecting data and analyzing facts is difficult and complex; (c) discretion is severely limited; (d) the task involves the application of settled policy to regulatory situations and does not concern the formulation of basic regulatory policy; and (e) Congress has defined the public interest with sufficient clarity to guide the direction and content of public policy.\(^\text{156}\)

The profile of expertise that emerges out of the list is that of a professional engineer, a technician; it is a profile of a natural scientist or any person who is a member of a “practical” profession. Throughout his discussion, Bernstein mentions in this context lawyers, economists, engineers, medical doctors, public health specialists, social workers, and experts “in administration,” who have “the skills of management.”^157 In short, for his generations of administrationists, the expert is the one who is called upon merely to fix a technical problem or to oversee the operation of a complex machine. Read, however, in conjunction with the study of March and Simon, the resultant conclusion is that one has to be wary when relying on the findings of the professional-regulator even under this limited understanding of expertise.

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^155 HERRING, PUBLIC ADMINISTRATION, supra note 16, at 166 (emphasis in original).
^156 BERNSTEIN, supra note 9, at 117. Following this recipe, Bernstein is quick to clarify, “The work situation in commissions rarely fulfills these conditions.” Id. id.
^157 Id. at 124. See also id. at 118.
What did the future hold? Would lawyers remain impervious to outside perspectives on public administration? In 1981 Colin Diver, openly acknowledging his debt to Lindblom, introduced the “synoptic” (root) and incremental (branch) methods of policymaking processes to the legal community.\textsuperscript{158} To recall, Lindblom’s article went to press in 1959, that is, twenty-two years earlier. As we shall see in the next chapter, Louis Jaffe was quicker to incorporate political science perspectives into his legal writings. In that too he was exceptional.

\footnote{\textsuperscript{158} Colin S. Diver, \textit{Policymaking Paradigms in Administrative Law}, 95 \textit{Harv. L. Rev.} 393 (1981). Taking a view of the cathedral, he argued that after first method had reigned supreme from the New Deal until the mid 1960’s, a shift to the synoptic model took place. See id. at 408-410.}
CHAPTER 8. LOUIS JAFFE: THE REALIST OF REALISTS

[W]ho in older society was such a godsend, in the future will be a public danger.
Alfred North Whitehead

I. The Reformation of Louis Jaffe

A. Introduction

Louis Leventhal Jaffe was undoubtedly one of the most original and prolific legal scholars in mid-century America. He started off as an avowed New Dealer and retired in 1976 as one of the most penetrating critics of the administrative process. The purpose of this chapter is to track Jaffe’s shifting views of the ideal regulator as they evolved from the New Deal, through the 1940s and 1950s, until the 1970s. My conclusion is that the reformation of Jaffe reflected and contributed to the demise of the general manager paradigm and the rise of the empiricist paradigm of administrative expertise.

Jaffe is most identified with a particular justification for the administrative branch, which eclipsed the expertise model, even if not entirely. This justification held that the judiciary’s independent review of regulatory bodies legitimated their habitual intrusion into the “private” market. In advancing the new model, Jaffe seemed to have joined a prestigious list of scholars who had done penance already in the 1930s, in the face of burgeoning tyrannical regimes throughout the world, renouncing their previously-held (progressive) convictions. The list was long and included such unlike companions as Roscoe Pound, Jerome Frank, and possibly Felix Frankfurter. Rather than arguing that Jaffe had simply followed suit, as was previously asserted by Morton Horwitz, I would

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2 See infra Section II.A.
3 See infra Section III.A.
like to present in this chapter a more nuanced account of Jaffe’s intellectual journey along the years.

I will argue that rather than relapse into traditional notions of the rule of law or even natural law, Jaffe sought to transcend the dichotomy between the New Dealers’ theory of regulation, which mandated that independent commissions should lead the way in the administrative state, and Roscoe Pound’s court-centered approach to regulation. Taken as a whole, his post-New Deal scholarship put forward a pluralistic, even fragmented, vision of the administrative process, where courts but also the Legislature and Executive had a share in the active handling of regulation. Under this scheme, administrative commissions were to form (only) one part, however important, in the overall jigsaw of regulation. This vision, I will argue, was premised on a thin conception of expertise most readily associated with the empiricist paradigm.

At least in retrospect, Jaffe’s circuitous journey was not surprising. Always complex and multilayered, assertive yet cautious, and, above all, reflective, Jaffe was ambivalent about Landis’s neat vision of administrative expertise from the outset. Public regulation was too compound a phenomenon to be explained away in four- or five-word sentences, Jaffe repeatedly insisted, often couching his arguments in paragraph-long sentences.

B. The Thesis

In what follows I wish to advance a particular explanation for the trajectory of Jaffe’s intellectual journey. It is predicated on the understanding that, however significant, the mounting sense of dissatisfaction with agency performance during the 1950s and in the


6 For example, as one scholar noted in 1983, “One significant ramification, empirically demonstrated by the pitiable performances of the FTC [the Federal Trade Commission] and FPC [the Federal Power Commission] during the 1950s, is that administrative agencies may lack the superior planning abilities claimed by Landis in the 1930s.” Daniel J. Gifford, The New Deal Regulatory Model: A History of Criticisms and Refinements, 68 MINN. L. REV. 299, 318 (1983). The problem of planning was noted even by Joseph Eastman, the legendary Interstate Commerce
following decades cannot alone account for the direction of that journey. After all, this dissatisfaction led different scholars to different conclusions. Rather, explanation should be sought somewhere else. As a first-order matter, I suggest we position Jaffe against the postwar intellectual environment in the United States. As will be demonstrated, this environment itself was shaped by dominant currents in the natural and social sciences, which came to fruition at that time.

Edward Purcell has persuasively argued that the introduction of a new physics by Albert Einstein and Niels Bohr profoundly unsettled long-held scientific dogmas—and indeed, it gave rise to a new logic—and made relativistic, probabilistic, and skeptical thinking into

Commission [ICC] Commissioner, in the mid-1930, and by Marver Bernstein. See, e.g., CLAUDE MOORE FUESS, JOSEPH B. EASTMAN: SERVANT OF THE PEOPLE 125 (1952), and MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 61, 176-179 (1955). See also ROBERT E. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSION 120-122 (1941) for earlier comparable, albeit much more critical, views. To be sure, this was not at all a trifling problem. On the importance of research-work for the success of agencies, see, e.g., Carl I. Wheat, The Regulation of the Interstate Telephone Rates, 51 HARV. L. REV. 846, 882-883 (1938). No better indication could be found of how far-ranging the criticism directed at agencies was already in the 1950s than in James Landis’ most unflattering assessment of the records of all the key federal agencies, included in his 1960 special report to President-elect Kennedy. JAMES LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT (1960). See supra Chapter 6 Section IV.

Wide public criticism of commissions and public regulation carried over to the decades following the 1950s. According to a group of leading administrative law scholars, “Public distrust in regulation and the administrative process began to disintegrate after the 1962.” STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 24 (4th ed., 1999). Starting in the late-1970s a noticeable trend of deregulation swept the field. See id. at 28-32. Yet somewhat ironically, the decade stretching between 1965 and 1975 “represented the most creative [period] in Congress since the New Deal.” Id. at 25. This was the decade of the “rights revolution,” when consumers’ interest, workers’ safety, environmental and equal employment concerns were attended to with such newly-formed agencies as the Consumer Product Safety Commission (1973), Occupational Safety and Health Administration (1973), United States Commission for Civil Rights (1957, 1960), and the Environmental Protection Agency (1970). See also Robert L. Rabin, Federal Regulation in Historical Perspective, 38 STAN. L. REV. 1189, 1278-1326 (1986), and Joel Yellin, Science, Technology, and Administrative Government: Institutional Designs for Environmental Decisionmaking, 92 YALE L.J. 1300, 1300-1305 (1983).

A comparison between Jaffe’s and Landis’ post-New Deal approaches should serve as conclusive evidence in this regard. See supra note 6.

“Relativism” may be a confusing term, especially in the philosophy of science. See DAVID J. HESS, SCIENCE STUDIES: AN ADVANCED INTRODUCTION 34-39 (1997). It is customary to differentiate between “epistemic relativism,” which holds that “knowledge is rooted in a particular time and culture … and does not mimic nature,” and “judgment relativism,” which asserts that “all forms of knowledge are ‘equally valid,’ and … we cannot compare different
a *bon ton* across the board in the American intelligentsia.\(^\text{10}\) It also accounted for some of the developments in political science that were noted in the previous chapter.\(^\text{11}\) Although relativism was initially accused of spreading confusion when the Second World War was on the horizon, eventually the War produced an appealing relativistic justification for Western democracy. This celebrated diversity, pluralism, experimentalism, and tolerance as opposed to the dogmatic, absolutist thinking of Nazis and Soviets.

I believe that Jaffe’s move from the optimistic Landisian conception of the able administrator to the much more modest and wary vision of the regulator as a merely technical expert—the move from the public general manager to the empiricist/professional—could be most persuasively explained in light of the downfall of assured Newtonian determinism and the ascent of Einsteinian relativism in the social sciences, which was followed by a heightening sense of disenchantment with science and technology in the mid-century. As I shall show below, contrary to what meets the eye, in making this shift in thinking Jaffe did not endorse the themes of classical science of administration, but rather the terms used by post-classical organization theorists.\(^\text{12}\)

There are two ways to get at this chapter’s thesis:

*First*, by arguing, as I will, that during the 1950s, as scores of American academics scorned dogmatic thinking, Jaffe found himself openly revolting against the metaphysical thinking underlying the theories of his former co-New Dealer, James Landis. The

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\(^{10}\) See Edward A. Purcell, Jr., *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* 47-114 (1973).

\(^{11}\) See *id.* especially ch. 6 and 10.

\(^{12}\) See supra Chapter 4 and Chapter 7.
The lynchpin of Landis’ metaphysics was his notion of bigger-than-life administrative expertise. The writings of this “born again” Jaffe were conversely much more circumspect regarding the expertise of agencies. The understanding that probabilistic, and not deterministic, thinking animated the administrative process obviously unsettled the very core of the Landisian concept of administrative expertise—indeed, of all assertions of expertise. It exposed the pivotal role played by non-specialized knowledge—in Progressives’ parlance, “politics”—in regulation.

Indeed, benefiting from key insights of organization theorists, whose own studies also reflected the prevalent scientific zeitgeist, Jaffe came to believe that the administrative process was steeped in politics. He now regarded agency-run public regulation as an endeavor conducted by non-expert agents, assisted by mere technical experts. On his new understanding, at the heart of public regulation lay a process whereby knowledge produced by technicians was put to such uses as directed by the (political) leadership of the agency. This image led Jaffe to essentially discard the whole notion of a distinct administrative expertise, that is, a unique expertise, which (1) went beyond the technical expertise that informs the professional core of the agency, and (2) was substantially different from that of other branches of government. Hence, having negated administrative expertise, Jaffe was left with the empiricist/professional paradigm.

Second, endorsing the relativistic justification of democracy (and acknowledging that regulation was a political business), Jaffe prescribed a pluralistic mechanism of regulation, which was open to all branches of government. In so holding, he clearly rejected the New Dealers’ prototypical scheme of the division of labor within the administrative state, which accorded a commanding position to administrative commissions. One should note that on this reading of Jaffe’s work, the contribution of the courts to the administrative apparatus is but one, albeit central, element in the overall administrative process. Further, the pluralistic worldview was premised, almost of necessity, on a limited conception of agency expertise for the plain reason that a robust, open conversation could be had only if the relevant knowledge informing it were deemed

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13 See supra Chapter 6, Section III.B.3.(c).
14 See PURCELL, supra note 10, at 95-114.
accessible to all colloquists. Assertions of “strong,” expansive administrative expertise, however, are essentially warning signs; they tend to narrow the scope of deliberation; they are then inimical to a pluralistic approach to public regulation.\[15\] And so Jaffe arrived at the empiricist paradigm from this angle, too.

As can be readily seen, the first perspective could be more easily characterized as descriptive than the second, which relies more explicitly on a normative argument. Specifically, the first is based on a relativistic epistemology, the second on a relativistic justification of democracy.\[16\] Taken together, the two angles connect Jaffe’s views regarding the place of administrative agencies in a democratic society with his post-New Deal idea of the expertise of the commissions. Viewed from both angles, the lesson Jaffe appears to have drawn from the Cold War, Einstein, and Legal Realism was that only an open and critical exploration of public issues has a chance to bring about beneficial outcomes.\[17\] It is easy to see how in advancing this view Jaffe’s work has set the course for future legitimations of the administrative state and introduced principal items to our research agenda that are pursued to this day.\[18\]

Finally, viewed from the two perspectives, Jaffe reveals himself as the realist of realists when it came to public regulation. For, unlike most lawyers, but like political scientists around him, he treated administrative organs as complex organizations, that is to say as bureaucracies.

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\[15\] I am far from arguing that Jaffe’s vision was of unbridled, everything-goes democracy. Conservative tones could surely be found in his writings, too, of course. See, e.g., supra Chapter 2, Section III.B.2.

\[16\] The proposed distinction parallels the difference between “epistemic relativism,” and “judgment relativism.” See supra note 9.

\[17\] To Jaffe, “beneficial” as seen through the prism of progressive thinking. See infra text accompanying note 148.

II. Jaffe and the Administrative State

A. A Theory of Legitimacy

Slowly but surely distancing himself from Landis’ expansive model of expertise in the 1940s and 50s, Jaffe came to embrace a competing model for legitimizing the federal administrative apparatus. It was the judicial review model, which he advocated in a long series of publications to be reviewed in this chapter. As Jaffe probably had hoped, his model did indeed ruffle Landis’ neat vision of public regulation.

The gist of the model was that the courts’ independent review of agencies provided the needed footing for anchoring administrative actions. More accurately, given the fact that review is not always sought or granted, Jaffe argued that it is the presumption of reviewability that did the trick. That was the way he put it in 1958:

The guarantee of legality by an organ independent of the executive is one of the profoundest, most pervasive premises of our system. Indeed I would venture to say that it is the very condition which makes possible, which makes so accessible, the wide freedom of our administrative system, and gives it its remarkable vitality and flexibility.

Jaffe seems to be well aware of the fact that a judicial review model would sound much more reasonable if it could be shown that extant legal doctrines allowed courts to effectively supervise administrative agencies. That is what he set out to do, among other things, in a 1957 two-part article entitled The Right to Judicial Review, where he demonstrates how the history of judicial review in the common law tradition in England


\[20\] See, e.g., Louis L. Jaffe, The Right to Judicial Review I, 71 HARV. L. REV. 401, 405 (1958) [hereinafter Jaffe, The Right to Judicial Review I] (“we, in common with nearly all of the Western counties, have concluded that the maintenance of legitimacy [of an agency’s action] requires a judicial body independent of the active administration.”).

\[21\] See id. at 423 ff.

\[22\] Id. at 406.
and the United States and the Court’s relevant contemporary jurisprudence led to this conclusion.\(^{23}\)

Hence, in a historical irony, during the 1950s Jaffe found himself explaining away inherent “flaws” in the judicial process, previously pointed out by his colleagues as part of the New Dealers’ rivalry with the judiciary. Courts’ irregular review was one such deficiency.\(^{24}\) While not denying the fact, now Jaffe rebuffed this critique by stating, “[I]ts availability is a constant reminder to the administrator and a constant source of assurance and security to the citizen.”\(^{25}\) What is more, now it is Jaffe who harkens back to the principle of the rule of law, whereas previously, in the thick of the New Deal fight, it was Pound who held it high against “administrative absolutism.”\(^{26}\)

It should be stated at once, though, that Jaffe does not base his arguments in support of the judicial review model on an apolitical, neutral understanding of public regulation. On the contrary, he has no doubt that regulation is a thoroughly political endeavor.\(^{27}\) Allotting a substantial role for courts in the execution of this endeavor is not expected, nor is it meant, to make the process less political. In other words, his is not an idealized view of the judicial process as objective and apolitical.\(^{28}\)

As was amply shown in previous chapters, the introduction of federal administrative regulation triggered a protracted, bloody turf war between the judiciary, which had traditionally played a leading role in supplementing the Executive in the execution of legislative fiats, and fledgling agencies that came to supplant courts in many areas.\(^{29}\)


\(^{24}\) See generally supra Chapter 3, Section II.B.1.

\(^{25}\) Jaffe, The Right to Judicial Review I, supra note 20, at 408.

\(^{26}\) Report of the Special Committee on Administrative Law, 63 REP. AM. B. ASS’N 334 (1938), e.g., at 339, 349, and passim. See generally supra Chapter 3, Section III.B.1.

\(^{27}\) See, e.g., Louis L. Jaffe, Basic Issues: An Analysis, 30 N.Y.U. L. REV. 1273, 1283 (1955) [hereinafter Jaffe, Basic Issues], and Jaffe, Illusion of Ideal Administration, supra note 5.

\(^{28}\) See Louis L. Jaffe, Impromptu Remarks, 76 HARV. L. REV. 1111 (1963). Writing a decade after Brown v. Board of Education, Jaffe opined that “the Court should be made aware that each and every bold policy decision will bring it into the political arena.” Id. at 1112.

\(^{29}\) See Harlan F. Stone, The Common Law in the United States, 50 HARV. L. REV. 4, 16 (1936), where speaking of the “reception of the [legal] profession and the courts of … agencies,”
Thus, by advancing the view that it was the jurisdiction of courts over agencies that rendered administrative regulation legitimate, Jaffe was taking a clear stand in the institutional battle. Significantly for our purposes, this stand had just as clearly indicated a growing sense of unease regarding Landisian grand assertions of administrative expertise. Indeed, it is only to be expected that the direction of Jaffe’s intellectual journey along the years would have had significant implications on his evolving perspective of administrative expertise.

B. Jaffe’s Change of Heart

The change between Jaffe the New Dealer to Jaffe the prophet of judicial review has already been documented by Horwitz, so I need not address myself to carefully tracing the development in his thinking between the 1930s to the early 1970s. A few comments will do.

A comparison between Jaffe’s early and late articles reveal a quite remarkable change. Gradual as it had been, I believe that it was during the 1950s that the change became undeniable. In the 1930s, Jaffe was calling for courts to show “sympathy and tolerance” to agencies and to give them “complete power to devise [their] mode of action.” His general attitude during the 1930s towards various devices put forward to check administrative discretion was captured in the adage, “Unnecessary machinery is a clog on

Stone noted, “These agencies soon became a matter of concern, not alone because of their novelty and statutory origin, but because they were brought into the law as means of law enforcement and as the instrument for providing, to a limited extent, remedies for its violation, of which the courts had possessed virtual monopoly.” See generally supra Chapter 3.

Great many of Jaffe’s articles were included in LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965) [hereinafter JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION]. I focus my attention on Jaffe’s various articles, rather than on the book, to give a sense of time in the development of his thinking.


democratic government.” In 1951, contrariwise, he thought that the known *Hearst* case was nothing less than “heresy.”

Already in 1941 we find Jaffe reprimanding opponents as well as proponents of the Roosevelt administration for their “indiscriminate” attacks on their rivals. In 1943 Jaffe more clearly positioned himself on a middle ground between the combating groups, when he called for “a truce.” “There is no longer … need of overlabored, ultradefensive justifications of the administrative process in which its expertise and capacity is given credit beyond its claim on our common and individual humanity,” he wrote. The last remark is significant for it indicates that having openly expressed a tone of reservation regarding the commission movement’s model of expertise, Jaffe was willing to shift his loyalties in the administrative-judicial tug-of-war. In a number of articles published throughout the 1950s he would hammer home the importance of wide availability of judicial review as “the necessary premise of legal validity.” By 1970 he thought that courts’ role had been “of the greatest importance for the cause of reform.”


Louis Jaffe, *Judicial Review: “Substantial Evidence on the Whole Record,”* 64 HARV. L. REV. 1233, 1258 (1951) [hereinafter Jaffe, *Substantial Evidence on the Whole Record*]. See NLRB v. *Hearst Publication, Inc.*, 322 U.S. 111, 131 (1944), where the Court held that “[W]here the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court’s function is limited.”

Jaffe, *Report of the Attorney General’s Committee*, supra note 5, at 401. But cf. id. at 406 (“I do not mean to deny that there are deficiencies in their procedure, but I do deny that they are attributable to the completely conscious lawlessness with which the agencies, or some of them, are charged.”).


*Id.* at 705. I believe that Jaffe’s *Basic Issues*, published in 1955, could also be read as advocating a medial position regarding the scope of judicial review in the continuum set by the New Dealers and their more persistent opponents. See Jaffe, *Basic Issues, supra* note 27, at 1291-1296.


Jaffe got to a virtual point of no return in 1954, as he reflected upon “the thinking of the thirties”\textsuperscript{10} and arrived at unfavorable conclusions, which he cared to publicly announce. “We have, perhaps, succumbed too easily to the siren song of regulation,” he wrote of those years.\textsuperscript{41} Now he realized that that vision had been myopic. It had not taken stock of “the character and psychology of our administrators … and of the special attitudes developed in the regulator by the fact of regulation itself.”\textsuperscript{42} Dominant among the phenomena Jaffe had in mind in stipulating was the problem of capture, of which, as we have seen in the previous chapter, political scientists had a lot to say.\textsuperscript{43} Elsewhere he went so far as to openly assert that experts are rarely motivated by pure professional consideration. Rather, he claimed, “In most cases the administrative action will be as much determined by power drives and legal attitudes as it is by technical considerations”; judicial review is needed, therefore, to protect the individual “against the pretensions of the merely expert.”\textsuperscript{44}

But it was not only the judiciary that was invited by Jaffe to take part in the overall federal project of regulation as a means to hedge “pretensions of the merely expert.” As suggested, the Legislature and Executive were also called to shoulder the endeavor. In his view, an administrative agency could not “be expected to put into effect a program of continuous reform, that is, to resolve novel conflicts without a new legislative mandate.” “Basic reform is not a matter of technique or expertise,” Jaffe explained. “It calls for a redistribution of power; only the legislative and the executive branches can hammer out the resolution of major power conflicts.”\textsuperscript{45}

\textsuperscript{10} Louis L. Jaffe, \textit{The Effective Limits of the Administrative Process: A Reevaluation}, 67 Harv. L. Rev. 1105, 1119 (1954) [hereinafter Jaffe, \textit{A Reevaluation}].
\textsuperscript{41} Id. at 1134.
\textsuperscript{42} Id. at 1107.
\textsuperscript{43} Id. at 1135. \textit{Supra} Chapter 7.
\textsuperscript{44} Louis L. Jaffe, \textit{Judicial Review: Question of Law}, 69 Harv. L. Rev. 239, 261 (1955). Note that already in this article (id. at 261) Jaffe advocated an essentially \textit{Chevron} position, which would be pronounced by the Supreme Court three decades later. (“The court … should test each exercise of power in terms of statutory purpose. But in great many cases the court will grant that any of one of two or more proposed answers is consistent with the statute. … In such a situation agency choice should stand.”). \textit{See} Chevron, Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).
\textsuperscript{45} Louis L. Jaffe, \textit{James Landis and the Administrative Process}, 78 Harv. L. Rev. 319, 324 (1964) [hereinafter Jaffe, \textit{James Landis}].
That was not the end of it. Not only was Jaffe less assured of regulators’ superior expertise compared to that of judges by the mid-1950s, he also thought that commission should be deferential to “proposed [businesses’] management decisions.”\textsuperscript{46} In 1970 he would go further and simply state, “[W]here regulation is intensive it inevitably tends to usurps the function of management.”\textsuperscript{47} His conclusion already in 1955 was plain: “We should, in short, look for … the least we can get along with and the most effective for our urgent need.”\textsuperscript{48} Jaffe has indeed gone a long way from the time when he, along with Landis,\textsuperscript{49} had thought that “[i]f some regulation was good, more was even better.”\textsuperscript{50}

Lastly, Jaffe broke ranks with Landis most violently by forcefully arguing that administrative commissions had always been doing politics. In a 1973 article by the telling title \textit{The Illusion of the Ideal Administration} he repeatedly rebuked Landis for making two “unteachable” assumptions, namely, “the existence in each case of relevant value-free concepts, and an administration located at any given moment of time outside the political process, that is to say, outside or insulated from the power structure.”\textsuperscript{51} All this is not to say that Jaffe has become an enemy of regulation by the end of the 1950s. Indeed, his recent strong pronouncements did not stop him from stating in 1955, that “if there is to be any regulation at all, it must be carried out under broad delegations.”\textsuperscript{52}

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\item \textsuperscript{46} Jaffe, \textit{A Reevaluation}, supra note 40, at 1128. This stance was based on the understanding that “[t]he dynamism of American industry presents peculiar problems for a regulatory scheme under which government makes decisions in the area of management but does not accept managerial responsibility.” \textit{Id.} at 1127 (italics in original).
\item \textsuperscript{47} Jaffe, \textit{Agencies in Perspective}, supra note 39, at 566.
\item \textsuperscript{48} Jaffe, \textit{A Reevaluation}, supra note 40, at 1135.
\item \textsuperscript{49} JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 24 (1938) (“If the administrative process is to feel the need for expertness, obviously, as regulations increases, the number of our administrative authorities must increase. The most superficial criticism which can be directed toward the development of the administrative process is that which bases its objections merely upon numerical growth.”).
\item \textsuperscript{50} Jaffe, \textit{A Reevaluation}, supra note 40, at 1135. \textit{See also} Jaffe, \textit{James Landis}, supra note 45, at 322, where Jaffe ridicules the approach holding that “the remedy for unsuccessful bleeding is more bleeding.” As we have noted, Jaffe’s words could have been equally directed at classical science of administration. \textit{See supra} Chapter 4.
\item \textsuperscript{51} Jaffe, \textit{Illusion of Ideal Administration}, supra note 5, at 1187.
\item \textsuperscript{52} Jaffe, \textit{Basic Issues}, supra note 27, at 1285.
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tempted to catalogue developments in his thinking into sequential neat positions. Jaffe thrived in complexity. Taking this caveat into account, it is still true that in 1973 he would say, “I believe that general delegations are not the prescriptions for successful administration …”

III. The Coming of Relativism

A. Intellectual Hegira in Legal Circles

The advent of the federal administrative enterprise had been always beset by powerful opponents. The fact that by the 1950s Jaffe occasionally sided with these forces of opposition was remarkable, but, as suggested, not unique. Jaffe was not alone in having profound second thoughts regarding what he now saw as his generation’s over-optimistic, frivolous, and overconfident understanding of public regulation before and during the New Deal. The list of repentant lawyers was long and grew longer as the Cold War proceeded. A movement of backpedaling swept the American academia. Purcell and Horwitz provide a panoramic account of “an intellectual hegira,” which started already in the 1930s, away from crude empiricism and relativism in law and the social sciences. Pound, who was mentioned earlier, and Robert Hutchins are two notable examples in the field of law. Legendary also is Karl Llewellyn’s 1950 foreword to his Bramble Bush, originally published in 1930. By his own admission, in the new foreword Llewellyn sought to correct an erratum included in book’s earlier edition consisting of “thirteen short words” only: “What these officials do about dispute is, to my mind, the law itself.” Short as this statement had been, it had captured an avowed motto of many Legal Realists, the great Holmes included. By 1950, however, Llewellyn wrote of

53 Jaffe, Illusion of Ideal Administration, supra note 5, at 1196.
54 See infra Chapter 3, Section III.
55 PURCELL, supra note 10, at 141.
56 Jaffe, Illusion of Ideal Administration, supra note 5, at 115-231.
57 See supra text accompanying note 26.
58 See PURCELL, supra note 10, at 139-147.
59 KARL N. LLEWELLYN, THE BRAMBLE BUSH 9, 8 (1960).
60 See Oliver W. Holmes, The Path of the Law, 10 HARV. L. REV. 457 (1897).
himself, “The young fellow who wrote [the book] just isn’t here any more …” It seems that Llewellyn spoke for a whole generation in these short words.

And then there were Felix Frankfurter and two of his followers, Landis, and Jaffe. Putting Landis, whose 1960 Report was just discussed, aside, Frankfurter’s conservative turn was noted within the first decade to his appointment to the Supreme Court in 1939. By 1951 the shift could not be denied. Professor Frankfurter, the ur-administrative-law professor at Harvard, had declared in 1927, “It is idle to feel either blind resentment against ‘government by commission’ or sterile longing for a golden past that never was. Profound new forces call for new social inventions, or fresh adaptations of old experience.” Justice Frankfurter, however, reverted to “Poundian rhetoric” when in NLRB v. Universal Camera, decided in 1951, he urged reviewing courts to take a harder look at the decisions of agencies and “assume more responsibility for the reasonableness and fairness of Labor Board decisions.” “Congress,” he further noted, “has imposed on [reviewing courts] responsibility for assuring that the Board keeps within reasonable grounds.”

Even more closely connected to questions of administrative expertise were certain remarks made by the Justice in the course of the oral arguments in NLRB v. Pittsburgh, also handed down in 1951. There the government urged that the same standard be apply when courts review either a judgment based on a jury verdict or an administrative decision (as in both cases the doctrine was formulated in terms of “substantial evidence”). Frankfurter denied the analogy, pointing out that “[w]hen you deal with a jury, you introduce a popular element into the administration of law.” However in the other case,

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61 LLEWELLYN, supra note 59, at 7.
62 See supra Chapter 6, Section V.
63 Louis L. Jaffe, The Judicial Universe of Mr. Justice Frankfurter, 62 HARV. L. REV. 357 (1949) [hereinafter Jaffe, Mr. Justice Frankfurter].
65 HORWITZ, supra note 4, at 237.
66 Universal Camera Corp. V. NLRB, 340 U.S. 474, 490 (1951). See Jaffe, Substantial Evidence on the Whole Record, supra note 34. It would be foolish to argue that starting in the early 1950s Frankfurter became agencies’ foe. The picture is, as always, much more complex. See, e.g., Justice Frankfurter’s dissent in NLRB v. Highland Park Mfg. Co., 341 U.S. 322 (1951). My point here is only to highlight Frankfurter’s general change of mood, as best expressed in Universal Camera.
“with all due regard to the expertise and expertness of the [NLRB], judges also have a good deal of experience in the world with these matters.” Frankfurter’s assertion touched upon a tricky point in the commission movement’s campaign. Arguing, as it did, for agencies’ unique expertise because of their accumulated experience with a given subject-matter opened the door to a counter assertion, based on empirical findings, regarding the comparative experience of contending institutions (or agents). Other lawyers had made similar claims already in the 1930s and even before. Now, at any rate, it seemed to Frankfurter that administrative experts’ special experience, and consequently expertise, might not be so special, after all.

It appears that Frankfurter’s remarks, short as they were, did signify, to use his own oft-cited opinion in *Universal Camera*, a distinct new “mood.” What was this mood about? Was it simply the result of an upsurge of patriotism in the postwar era in the face of superpower conflict? It appears that while patriotism and even jingoism were part of the story, there was much more going on.

B. Lessons of War

Jaffe was taken aback by Frankfurter’s novel mood—harkening back to “Mr. Justice Frankfurter’s respect for ‘expertise,’”—yet, he was not speechless. Rather, Jaffe, who would in later years occupy Frankfurter’s seat of administrative law professorship at Harvard, provided a telling rationalization for the Justice’s new loyalty. Frankfurter, he fondly argued, was a dedicated soldier in the national mission against sectarianism in the United States. “His fear is not of authority but of the breakdown of authority,” Jaffe

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68 Jaffe, *Substantial Evidence on the Whole Record, supra* note 34, at 1246 (quoting Argument, p. 16, NLRB v. Pittsburgh, 30 U.S. 498.).
70 *Universal Camera*, 340 U.S. 487. It was to be expected, therefore, that Justice Frankfurter—reversing the opinion of the much esteemed Circuit Judge Learned Hand—would think that “Congress expressed a mood” in the Administrative Procedural Act of 1946 and the Taft-Hartley Labor Act of 1947; this mood, he said, “must be respected” by expanding the scope of judicial review. *Id. id. See also* NLRB v. Universal Camera Corp., 179 F.2d 749 (2d. Cir. 1950).
71 Jaffe, *Mr. Justice Frankfurter, supra* note 63, at 376.
maintained. True, Frankfurter would go to great lengths to preserve national unity, which depended, among other things—he was certain—on the vitality of the federal government’s various arms. He would even go so far as to take a restrictive stand when speech against the judiciary was on the line. In one pertinent case, Frankfurter reasoned, “[J]udges are … human and we know better than did our forefathers how powerful is the pull of the unconscious and how treacherous the rational process. While the ramparts of reason have been found to be more fragile than the Age of Enlightenment had supposed, the means of arousing passion and confusing judgment have been reinforced.”

Jaffe subscribed to Frankfurter’s assertion, as he shared his anxiety. Using a more animated language, Jaffe wrote on the eve of the 1950s, “[R]ationalisms take as many forms as the self-interest which they so often mask, and the truth that prevails in the market place may rest on a pedestal of corpses.”

As indicated by Frankfurter’s and Jaffe’s rhetoric, their mood during the 1950s was shaped by both the realities of the Cold War—which, as Americans saw it, demonstrated to what unjust use could rationality be put—and the horrors of the Second World War, which had revealed in the most gruesome way what had become of modernity and the value it placed on rationality and liberalism. In other words, Frankfurter and Jaffe, like Pound before them, were reacting to what they regarded as destructive attacks on core values of Enlightenment. Frankfurter and Jaffe were expressing their qualms at a time when two notable émigrés to the United States, Theodor Adorno and max Horkheimer, wrote lamentably on the pernicious development of rationality and the project of Enlightenment. Their indeed epoch-defining 1947 book *Dialect of Enlightenment* opens with the chilling lines, “In the most general sense of progressive thought, the enlightenment has always aimed at liberating men from fear and establishing their sovereignty. Yet the fully enlightened earth radiates disaster triumphant. … Knowledge, which is power, knows no obstacles: neither in the enslavement of men nor in compliance

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72 *Id.* at 410.
74 *Pennekamp*, 328 U.S. 357 (Frankfurter J. concurring).
75 Jaffe, *Mr. Justice Frankfurter, supra* note 63, at 410.
with the world’s rulers.” That same year Horkeimer published another book by the telling title *The Eclipse of Reason*. Reexamining Western rationality meant—or was triggered by—skepticism towards natural sciences, the lifeblood of Enlightenment. Here again it seemed that rather than advancing humanity and instilling a sense of security in society, Western science provided the means for efficient control of human beings and their minds. And as suggested by Frankfurter’s opinion in *Pennekamp*, scientific investigation of the human mind by psychologists introduced unsettling insights. With the unfolding of World War II it became clear that science could do a great deal of harm.

Indeed, the massive deadly use of technology during World War II was bound to change the way Americans came to see science. After all, the vast majority of Americans encountered the scientific revolution through the practical instruments that it, directly or indirectly, produced. Until well into the twentieth century, in the minds of Americans “science” connoted *practical* science practiced by practical men, rather than a merely theoretical activity. “Indeed, until Hiroshima the average American’s conception of a ‘scientist at work’ was either the self taught Thomas Edison or a white-coated industrial chemist—not an academic at all.”

To make a very tortuous story short: as the twentieth century proceeded, it became obvious that technology, the locomotive of modernity and “progress,” was not (only) a success story. Alongside lauded accomplishments such as the increase in longevity and diverse leisure technologies (above all, radio and later television), evidence of the evils of technology was accumulating at an alarming pace and in monstrous dimensions: the Holocaust, Hiroshima, and environmental disasters were quintessential examples.

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77 *Max Horkheimer, Eclipse of Reason* (1947).

78 *Supra* text accompanying note 74.


80 Howard P. Segal, *Introduction, in Technology, Pessimism, and Postmodernism* 1-10 (Yaron Ezrahi et al. ed., 1994). According to Max Lerner, the reackoning was two sided: “[t]he
C. The Structure of A Scientific Revolution

But even before science was beset by skepticism directed at it from the outside, it had been plagued by internal self doubt. It was science itself that was caught in a bind already on the eve of the Second World War. Purcell, who, as noted, conducted a detailed study of major trends in twentieth century intellectualism in the United States, tells that story. Like an ellipse, his study has two foci: natural sciences and political theory. Around the first Purcell draws the story of the transformation that naturalism underwent when Euclideanism and Aristotelian logic were put to question primarily by Einstein’s General Theory of Relativity, Heisenberg’s Uncertainty Principle, and Bohr’s Principle of Complementarity. While not undermining Americans profound belief in naturalism and Pragmatism, Purcell persuasively illustrates how the whole gamut of sciences were disrupted by the undermining of key precepts of the good old Euclidean geometry and Newtonian physics. This could only be expected, given the pivotal role Newtonian physics had played in the construction of Western science. The transformation was fundamental, as Thomas Kuhn explains: “Just because it did not involve the introduction of additional objects and concepts, the transition from Newtonian to Einsteinian mechanics illustrates with particular clarity the scientific revolution as displacement of the conceptual network through which scientists view the world.”

Specifically, as the total solar eclipse of 1919 confirmed Einstein’s revolutionary theory, it became clear that, to use the words of Einstein himself, axioms in geometry scientist’s pride of specialization buttressed the wall he had built between what was being fashioned in the realm of science and what was happening in the ‘unscientific’ realm of human relations. It took the atom bomb to shatter that wall and jolt American scientists into a sense of responsibility about the new world they had been so instrumental in shaping.” Max LERNER, AMERICA AS A CIVILIZATION: LIFE AND THOUGHT IN THE UNITED STATES TODAY 237 (1957).

81 For a glossary of the terms “naturalism” and “positivism,” see infra Chapter 6.
83 See supra Chapter 4, Section II.A.1.
85 See generally the helpful and accessible GERALD TAUBER, MAN’S VIEW OF THE UNIVERSE (1979), and DAVID BODANIS, E=MC²: A BIOGRAPHY OF THE WORLD’S MOST FAMOUS EQUATION (2001). See also KUHN, supra note 84, ch. 7; RICHARD S. WESTFALL, THE
and scientific principles, “are to be taken in a pure formal sense …” “These axioms,” he famously declared in 1922, “are free creations of the human mind.”

And thus, it became apparent that not only was it impossible for inductive methods to sustain ethical judgments (as shown by scientific naturalism), but neither could deductive methods. Moreover, as if to add insult to injury, the substance of Einstein’s and Quantum Physics theories elbowed out (Newtonian) determinism and replaced it with probabilistic world view. Later on, Einstein thought that he and colleagues had unleashed a destructive golem. He spent the rest of his life in an attempt to recoup it, but to no avail.

The second focal point in Purcell’s study has to do with the impact non-Euclidean geometry and non-Aristotelian logic had on the way people thought about democracy in the United States. Purcell argues that the impact on jurisprudence and social science was profound. How could it not be? The new scientific theories dramatically cut the cord between geometry and logic they had be known for two millennia on the one hand, and “reality” on the other. The new doctrines ushered in a world in which, within hard sciences, more than one internally-consistent perspective could be “true.” Kuhn would speak of this in 1962 in terms of “incommensurability” and “paradigms.” Kuhn’s theories themselves demonstrated that the advent of the new physics not only cast doubt on what had heretofore been mathematical and scientific truisms, but also allowed for a fresh look on the sociology of the scientific process and its constructive role in the production of a scientific theory, or any human theory for that matter.

Influential as his theses were at the time, the essentials of the Kuhn theory had antecedents in Ludwick Fleck’s 1935 book *Genesis and Development of a Scientific Fact,*

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87 What motivated Einstein, among other things, was a strong belief in the unity of science hypothesis, which was discussed supra in the context of the coming of the science of administration. See supra Chapter 4, Section II.A.1.
88 PURCELL, supra note 10, at 61-73.
89 KUHN, supra note 84.
where it was argued that every scientific fact is rooted in a particular “thought collectives,” and “thought styles.” Already by the 1930s, then, non-Euclideanism established cultural mores as beyond rational criticism and suggested the possibility of any number of new and different systems that would be logically valid. By the early thirties the most fundamental epistemological assumptions of American intellectuals rejected the idea that any prescriptive ethical theory could possess rationally compelling authority.

Indeed, whether or not one accepts the storyline put forward by Purcell—changes in physics triggered comparable changes in the humanities and social sciences—the important point is this: the first half of the twentieth century saw an explosion of pragmatic, non-foundational thinking and “relativist” theories throughout the American academia and beyond.

As noted, law was no exception in this respect. A distinct stripe of Legal Realism was particularly receptive to the new perspective. Walter Cook flatly declared in 1927 in the face of (his reading of) “classical,” or “orthodox” legal thinking, “We have reached the era of relativity.” And in 1934 Felix Cohen noted, “Recent studies, both in logic and in

91 PURCELL, supra note 10, at 73.
93 Jerome Frank’s Mr. Justice Holmes and Non-Euclidean Legal Thinking, 17 CORNELL L.Q. 572 (1932) is mentioned by Purcell in this context. Purcell could have referred at this point also to JEROME FRANK, LAW AND THE MODERN MIND (1949) (1930). See id. e.g., at 7 (“In fields other than law there is today willingness to accept probabilities and to forgo the hope of finding the absolutely certain.”).
95 Cook, supra note 82, at 306. Cook made clear that “[b]y this is not meant the specific theories of Einstein or others, commonly associated with the term, but a point of view which whatever may happen to specific doctrines, seems destined to remain as a permanent achievement in human thought.” Id. id. See also Walter Wheeler Cook, The Logical and Legal Bases of the Conflict of Law, YALE L.J. 457 (1924).
ethics have made it clear that any claim that ‘logic supports’ any legal rule … must be false.” “Rules of logic,” he explained, “can no more produce legal or moral doctrines than they can produce kittens.”

All this excitement was taking place against a tumultuous background. Totalitarianism was making headway throughout Europe, and authoritarian regimes seemed to benefit greatly their constituents. Two responses followed. The first reaction to the spread of despotism was an attack against relativism for infusing lethargy, skepticism, and confusion among Americans. This conviction was shared by Catholic and other conservative-leaning thinkers. Thus, for example, one political scientist opined in 1941, “There can be little doubt that totalitarianism has greatly profited from the value-emptiness which has been the result of positivism and relativism in the social sciences.”

It was at this environment of the 1930s and 1940s that the “intellectual hegira” to concepts reminiscent of natural law and to traditional values of liberal democracy took place. Given the harsh realities of these decades, it is no wonder that this onslaught on “value-free” empiricism and “debilitating” relativism was making remarkable inroads into the heart of the literati. Even Jerome Frank, l’enfant terrible of jurisprudence, sought to atone in 1949 when he publicly announced in a preface to sixth printing of Law and the Modern Mind, “I do not understand how any decent man today can refuse to adopt, as the basis of modern civilization, the fundamental principles of Natural Law …” Frank’s good intentions notwithstanding, as is well known, the call for a returns to basic American values resulted with McCarthyism.

On the other side of the divide, there were those who pointed out the merits of a relativist theory of democracy, which celebrated diversity, experimentation, and healthy criticism of the powers that be. Laying the foundations for a new naturalistic justification for democracy, members of this group accentuated the absolutist-relativist dichotomy with a view to empirically demonstrating that absolutism in philosophy went hand in hand with

97 Arnold Brecht, Book Review, 35 AM. POL. SCI. REV. 545, 545 (1941).
98 Supra note 55.
99 FRANK, supra note 93, at xvii.
totalitarianism, as was in the cases of Nazi Germany and the Soviet Union, thus undermining their critics’ contrary assertion. The equation made between democracy, free thinking and experimentation was the crux of this new justification. Democracy was justified because, like science, it was not committed to any one value-theory or dogma. In 1939 John Dewey enthused, “Freedom of inquiry, toleration of diverse views, freedom of communication, the distribution of what is found out to every individual as the ultimate intellectual consumer are involved in the democratic as in the scientific method.” And the great American theologian of the mid-century, Reinhold Niebuhr, declared in 1944 in a typical Niebuhrian “non-utopian” tone,

The reason this final democratic freedom is right … is that there is no historical reality, whether it be church or government, whether it be the reason of wise men or specialists, which is not involved in the flux and relativity of human experience; which is not subject to error and sin, and which is not tempted to exaggerate its error and sins when they are made immune to criticism.

This justification for democracy would only hold water though, it was soon realized, if democratic societies were committed to a very particular series of underlying values. Notably, it was concluded that “[d]emocracy required a kind of unity to endure.” It took the skepticism of the 1960s for Americans to come face to face with the conservatism and dogmatism underlying their own sense of unity.

Purcell argues that the division between “relativist,” naturalistic and the “absolutist,” natural-law-inspired orientations dominated political and social thinking in the United States up to the end of the 1950s. Ultimately it was the former view which emerged triumphant. When the Cold War was in high pitch, Americans made ample use of the binary, arguing that dogmatism and absolutism ruled in the Soviet Union while the

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100 PURCELL, supra note 10, at 235-266.
102 See EYAL NAVEH, REINHOLD NIEBUHR AND NON-UTOPIAN LIBERALISM: BEYOND ILLUSION AND DESPAIR (2002). On Niebuhr’s complex, yet fascinating, justification of liberal democracy, see id. at 88-91 and passim.
104 PURCELL, supra note 10, at 215. However, Purcell adds, “[I]t was a pragmatic, relativistic, cultural unity and not a theological, ethical, or absolute unity.” Id. id.
United States cherished social experimentation, diversity, and freedom. “Relativist
democratic theory and the cold war,” concludes Purcell, “were mutually reinforcing.”

A significant point of agreement between relativists and traditionalists should be noted.
Opponents of “excessive empiricism” pressed upon the point that for a scientific
investigation to make any sense it must be premised on a set of preferences. To this
relativist thinkers did not object. Reinhold Niebuhr, to name one example, would
insightfully write in 1941, “We know that the freedom of the human spirit over the flux
of nature and history makes it impossible to accept our truth as the truth.” “Knowledge of
the truth,” he said, “is … invariably tainted with an ‘ideological’ taint of interest.” This
understanding was key in Niebuhr’s theology, which placed “the truth”—i.e., God’s
absolute truth—beyond the reach of human being. To him, a belief in absolutes was
nothing short of sinful.

It is worth noting on our way back to the debate regarding federal regulation that the
notion of a definable “public interest,” so cavalierly used in debates concerning
regulation, could be easily viewed as an exemplar of such a priori, and hence suspicious,
absolutes. The political scientist E. Pendleton Herring gave a definitive formulation for
this view already in 1935. “The public interest in any given situation,” he noted, “can be
interpreted only in terms of certain group interests. The selection of the groups whose
welfare is to be identified with the general welfare depends upon the policy to which a

105 Id. at 239. See also id. at 200-202, 265-266.
106 Id. at 182-183, 240-241.
107 See supra Chapter 1, Section C.2, and generally DANIEL T. RODGERS, CONTESTED
particular administration is committed.”

Following this approach, Jaffe noted in 1973, “Indeed, the criticism of the administration must be recognized as themselves a component of the political process, and critics’ invocation of the ‘public interest’ as a standard with readily discoverable content should be viewed as but a useful tactic in the political debate.” Jaffe took this piece of wisdom to heart when it came to his own positions as well.

Viewed in this context, it seems that not only the publication time of Fleck’s *Genesis and Development of a Scientific Fact* (1934) was indicative, but also Kuhn’s *The Structure of Scientific Revolutions* (1962). It is in this context that I suggest we evaluate Jaffe’s change of heart.

### IV. A Thin Description of Administrative Expertise

#### A. Disenchantment

Jaffe’s growing disillusionment in the course of his academic career with the high hopes of administrative agencies, so pervasive during the New Deal, was undeniable. At the end of the voyage he could not believe that he and his companions had ever thought of the administrative commission as the powerhouse of social transformation. Necessary as they still were, Jaffe wrote in 1964, administrative agencies should carry out mainly “day-to-day tasks.” The fact the Jaffe has consistently chipped away at agencies’ acknowledged purview of expertise to the “benefit” of the other branches of government alone was indicative of the notion of administrative expertise underlying his analysis.

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111 Jaffe, *Illusion of Ideal Administration*, supra note 5, at 1191.

112 See id. at 1197: Previous descriptions of the administrative process “may express a political bias, as may be true of this attempt to correct them.”

113 See infra Section II.B. See generally Rabin, supra note 7, at 1278-1287.

First and foremost, it evinced a sense of suspicion toward agencies’ alleged unique expertise.\textsuperscript{115}

As part of Jaffe’s change of heart in the mid-twentieth century, he of all people stated, “Give an agency a decently defined mandate, adequate funds, its due quota of ‘men of average capability’ and it will do a good job; in its way, as good as, let us say, Congress, the judiciary, and the run-of-the-mill executive bureaucracies.”\textsuperscript{116} To make things crystal clear he went on to state, “I do not think … that the administrative agency has—as contrasted with what Landis would call the executive—a unique power for achieving reform or giving direction to our economy.”\textsuperscript{117}

Just as significant, by inviting courts, legislators, and executives\textsuperscript{118} to puncture the thin membrane surrounding administrative commissions, Jaffe expected them to expose the bare necessities, the core, of administrative expertise, if there were any. As Jaffe must have known, issuing such an invitation amounts to sounding the death knell for administrative expertise. For, we have already seen, as Harold Laski noted in 1930, “The expert … remains expert upon the condition that he does not seek to coordinate his specialism with the total sum of human knowledge. The moment that he seeks that coordination he ceases to be an expert.”\textsuperscript{119} At bottom, Jaffe’s recipe was to remove the question of coordination from the hands of the expert.\textsuperscript{120}

What Jaffe understood—and Landis suppressed—was that a system of checks and balances allows for only a limited sphere of expertise, if any. To take one example, apart from the assumption that regulators could err, the very idea of (meaningful) judicial review implies that regulators’ decisions can be reviewed by others—the greater the

\textsuperscript{115} Cf. Rabin, \textit{supra} note 7, at 1304: “a principal source” for the judicial activism of the early 1980s “was the heightened awareness to the problem of scientific uncertainty about risk to health and safety. The importance of this phenomenon can hardly be overstated.”

\textsuperscript{116} \textit{Id. id.} Jaffe is here quoting Gerard Henderson’s study of the FTC, where it is asserted that “most government affairs are run by men of average capabilities.” \textsc{Gerard C. Henderson, The Federal Trade Commission} 328 (1924).

\textsuperscript{117} Jaffe, \textit{James Landis, supra} note 45, at 324.

\textsuperscript{118} See infra text accompanying notes 144-145.

\textsuperscript{119} Harold J. Laski, \textit{The Limitations of the Expert}, 162 \textsc{Harper’s Monthly Magazine} 101, 105 (1930).

\textsuperscript{120} Here Jaffe was a true student of political science classicists Frederick Taylor and Luther Gulick. \textit{See supra} Chapter 4. \textit{But see infra} note 121.
reviewable scope, the more check and balance there is. However, as suggested by Laski, the greater the scope is, the smaller the reputed expertise. Jaffe was pleased with this result. He was wary of absolute, metaphysical assertions of the sort Landis had made with regard to the expert administrator. It seems that during the Cold War Jaffe, like Dewey and Niebuhr, believed that the more cacophonous the institutionalized conversation was allowed to be, the more relativist, and thus the freer, society was. Taking into account the problem of perspective—that is, the fact that human knowledge is “invariably tainted with an ‘ideological’ taint of interest”—a multi-vocal process of deliberation was also projected to produce salutary social ends. Importantly, this line of reasoning depended on a modest, quite technical perception of administrative—and any other—expertise.

B. The Body of Expertise

“Most rule-making,” Jaffe explained in 1955,

involves the weighing of a complex of considerations, many of them of the kind we call political, the judgments to be made are judgments of more or less, of feasibility, of prognosis. Ordinarily such decisions are the product of the staff—the technical officers embodying special knowledge and continuity of experience—and the political officers who must rely on the technical experience of the staff, but temper and direct it.

The significant thing about this statement is the exact specification of the locus of expertise within the administrative organ. The expertise, Jaffe holds, resides with the agency’s “staff,” i.e., “the technical officers” of the agency. They “em-body” it.

It is the staff that possesses the “special knowledge” of the relevant subject-matter and that is able to enjoy the benefits of “continuity of experience.” These possessions segregate “the staff” from the “political officers,” who are the commissioners. At the same time, the latter group does not remain hopelessly in an inferior position, being

121 At this point Jaffe diverged from orthodox science of administration, whose first article of faith was Executive enhancement and the exclusion of the other branches of government from executive duties.
122 Supra note 107.
123 Jaffe, Basic Issues, supra note 27, at 1283.
totally dependent on experts. Although lacking “technical experience,” the political officers are deemed competent to perform tasks of higher order than those preformed by the agency’s staff. After all, the staff’s experience is merely “technical.” Such experience and the knowledge that grows out of it are not enough to resolve questions of “judgment” entrusted in the hands of the agency. Incidentally, this description reveals what the “political” is for Jaffe (at least in the present context), namely, all that is outside the pale of specialized knowledge.

This presentation surely belittles whatever technical expertise Jaffe is still willing to attribute to the staff. It also illustrates how important it is now for Jaffe that political considerations do intrude into the administrative process. This is not surprising. When questions of public regulation, often charged and ideological, are on the line, a relativist thinker would surely become suspicious of judgments put forward under the veil of expertise as undisputed truth. And indeed, according to Jaffe, the political officers (the commissioners) are to “temper and direct” the staff’s technical knowledge. In other words, they should dilute, qualify, or soften it by throwing into the process “many” other considerations “of the kind we call political.” Whereas the expert staff is to master specialized knowledge, commissioners are distinguished by possessing a modular, general faculty, which can be employed at an infinite variety of regulatory settings.

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124 As Joel Yellin sees it, chances are that this scheme is not feasible with the coming of environmental regulation (see supra note 7): “… in leading us beyond the New Deal, environmentalists … have encouraged the use of sophisticated techniques distant from ordinary experience and blurred the boundaries of institutional authority, thereby reopening the question of how to assure effective independent oversight of technological decisions.” Yellin, supra note 7, at 1305. With all his realism, Jaffe did not address this difficulty. See also Judge Wald’s honest opinion in Sierra Club v. Costle, 657 F.2d 298, 410 (D.C. Cir. 1981): “We have adopted a simple and straight-forward standard of review, probed the agency's rationale, studied its references (and those of appellants), endeavored to understand them where they were intelligible (parts were simply impenetrable), and on close questions given the agency the benefit of the doubt out of deference for the terrible complexity of its job. We are not engineers, computer modelers, economists or statisticians, although many of the documents in this record require such expertise and more.”

125 But see supra note 124.

126 See infra text accompanying note 150.

127 Cf. Louis Schwartz, Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility, 67 HARV. L. REV. 436, 474 (1954), where the author makes a similar argument with regard to judges and administrative experts: “There is a sense in which
One could argue that two models of competence permeate Jaffe’s description. On the one hand, we have an adequately trained and well experienced mechanic, so to speak, and on the other, a gifted driver.\textsuperscript{128} Two things should be said about this proposition. First, this bifurcation of the administrative process signifies in itself a departure from a Landisian parental, do-it-all model of expertise. Bifurcation of the regulatory process deals a withering blow to a model of administrative expertise, as it does not allow for any distinct competence in the process, which is in any way different from the staff’s technical expertise. Under this vision, one could only speak of a unique expertise of “staff,” whose technical knowledge is to be found in standard professional manuals, and whose unique experience, for all its worth, is made subservient to the direction of political officers. The commissioners, on the other hand, are conceded to be political actors. This admission would be heretical, of course, to Eastman, Landis, and many other members of the commission movement as well as to Woodrow Wilson,\textsuperscript{129} but not to post-classical political scientists.\textsuperscript{130}

Second, and more important, admitting that commissioners make political decisions amounts to openly stating that it is presumptuous to speak of a special expertise they embody or that guides them. If anything, in Jaffe’s frame of reference, a politician is the antonym of an expert. We have seen the repeated assertion made in particular by Progressives\textsuperscript{131} that the concept of the disciplined, specialized expert regulator is diametrically opposed to the idea of the politician. Jaffe did not digress from this view. There was one fundamental difference between his and the orthodox thinking of the Progressives in this regard, though: to Jaffe the political, so conceived, was a blessing,

\textsuperscript{128} As we have noted, Taylor had spoken somewhat similarly of the workman and management. \textit{See Frederick W. Taylor, The Principles of Scientific Management} 35-38 (1911), and \textit{supra} Chapter 4.
\textsuperscript{129} \textit{See supra} Chapter 3, Section II.D., and Chapter 4, Section II.C.1.
\textsuperscript{130} \textit{See supra} Chapter 7.
\textsuperscript{131} \textit{See supra} Chapter 2, Section I.B.1.
rather than anathema—it might not ensure expertise, but it did allow for robust processes of deliberation regarding the burning issues of the day.\textsuperscript{132}

C. The Most Realist Among the Realists

In later years, Jaffe became more entrenched in his new position. By the mid-1960s, in his 1964 article devoted to James Landis’ legacy, he openly rejected the idea “that the administrative agency has … a unique power for achieving reform or giving direction to the economy.”\textsuperscript{133} Taking a retrospective view in 1970, he characterized as “absurd and a-historical” the “notion so sedulously cultivated by many of us during New Deal days that agencies, because they were experts, could go on spinning out of their own guts a continuing series of miraculous solutions.”\textsuperscript{134}

The last remark alludes to a growing tenor in Jaffe’s thinking towards the end of his career. He became more and more aware that agencies would not be able to “spin out of their own guts” much-needed solutions not only because of the limitations of their expertise, but also due to the institutional setting within which they operate. With the passage of time, he concerned himself more and more with agencies’ “political weakness,”\textsuperscript{135} their inevitable reliance on the Executive (appointments) and Congress (budget), but also the industry (capture), for their survival.\textsuperscript{136} He also noted the influence of public opinion on agencies’ success.\textsuperscript{137} Again, we have seen that these themes were long discussed by what I call post-classical political scientists and organization theories. Going beyond questions of capture, he likewise addressed issues relating to commissions’

\textsuperscript{132} See, e.g., supra text accompanying note 123. Incidentally, to the objection that judgment-making processes are similar in the cases of commissioners and judges, Jaffe answers that a commissioner’s “decisions cannot be and should not be conceived as the decision of a judge. To do so not only confounds and misconceives the rule-making process but the judicial process as well.” And he further explains: “The devising of an arrangement for marketing milk (for which a hearing must be held) bears little resemblance to an adjudication in any other sense than that the agency must weigh the pros and cons of a variety of solutions suggested by a variety of interests. So must a legislature and its committees.” Jaffe, \textit{Basic Issues}, supra note 27, at 1283.

\textsuperscript{133} Jaffe, \textit{James Landis}, supra note 45, at 326.

\textsuperscript{134} See also Jaffe, \textit{Agencies in Perspective}, supra note 39, at 567.

\textsuperscript{135} Jaffe, \textit{A Reevaluation}, supra note 40, at 1131-1132.

\textsuperscript{136} See generally Jaffe, \textit{Agencies in Perspective}, supra note 39.

\textsuperscript{137} See Jaffe, \textit{Illusion of Ideal Administration}, supra note 5, at 1198.
internal organization,\textsuperscript{138} and personnel.\textsuperscript{139} He pointed out common unwelcome outcomes of organizational decision-making dynamics, such as what he called already in 1954, agencies’ “arteriosclerosis.”\textsuperscript{140}

Yet, above all, Jaffe was exceptional among lawyers in his heightened sensitivity to the personal dimension of regulation.\textsuperscript{141} From a relatively early stage he insisted that a regulator “develops a presumption in favor of regulation”;\textsuperscript{142} he also pointed out other troubling phenomena, such as the revolving-door syndrome in the career of regulators.\textsuperscript{143}

It was this rounded perspective on regulation that led him to speak most plainly in the early 1970s of regulation as a political business, and to further argue for a limited role for agencies in public industrial regulation. If it is political, he reasoned, why not let the political institutions deal with it more aggressively and lead the way? “The stuff of great public policy controversies is basically political and can only be solved in the political arena.”\textsuperscript{144} In 1965 he accordingly stated, “The grant of general powers, however justified, implies a responsibility for close legislative attention to the course of administration.”\textsuperscript{145}

Jaffe thus became, albeit belatedly, compared to political scientists around him, the most realist among the Realists when it came to regulation. By “realist” I mean simply that he went further than other jurisprudents in rejecting idealized visions of public regulation and its mechanics, held primarily by lawyers (but also by the orthodox administrationists).\textsuperscript{146} As this dissertation demonstrates, more often than not lawyers had looked at agencies from the top, unheeding the lower echelons of the administrative

\textsuperscript{138} Jaffe, Basic Issues, supra note 27, at 1281-1282.
\textsuperscript{139} Jaffe, Jaffe, Illusion of Ideal Administration, supra note 5, at 1189.
\textsuperscript{140} Jaffe, A Reevaluation, supra note 40, at 1109. See also Jaffe, Agencies in Perspective, supra note 39.
\textsuperscript{141} Cf. the analysis of Landis’ work in Chapter 6, Section, supra.
\textsuperscript{142} Jaffe, A Reevaluation, supra note 40, at 1113. Cf. Max Weber’s and Adolph Berle’s mechanical description of administration, supra Chapter 4, Section II.C.1.
\textsuperscript{143} Jaffe, A Reevaluation, supra note 40, at 1132 (“many commissioners look upon their term of office as a novitiate for a business career …”).
\textsuperscript{144} Jaffe, Agencies in Perspective, supra note 39, at 567.
\textsuperscript{145} JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, supra note 30, at 41. See also supra text accompanying note 45.
\textsuperscript{146} This is not to say that conservative lawyers and orthodox public and business administration theorists did not differ on key issues. To recall, a major bone of contention between the two groups was the issue of Executive integration. See supra Chapter 4, Section IV.A.
process. Jaffe, conversely, attended to the actual workings of the administrative process. He was open to the possibility of examining it from the perspective of the organization and the agent on the line of production. Viewed through this prism, the process revealed itself to him as political in the plainest sense of the word (that is, having to do with political parties’ power struggles).

Jaffe applied his realism to his own thinking. By putting much stress on personal predilections and political preferences in the carrying out of regulation, it was Jaffe himself who indicated the limitations of his judicial review model. In 1970 he declared, “[J]udicial activities continue to be of great importance in stimulating and guiding the agencies in their new endeavors. But ultimately the conflict of interests which lie at the bottom of the great controversies must be resolved by the more particular political process represented by administrative and legislative power.”\textsuperscript{147} This was the end-point in the reformation of Louis Jaffe: under the present vision, administrative agencies’ importance lie no more in the distinct expertise they are able offer to society, but rather in the political services they render it.

D. The Jaffe Alternative

In 1970 Jaffe reminisced that “[i]n the fifties and sixties the political roles of agency and courts were reversed. The agencies often expressed conservative, sometimes reactionary, power.” Hence, unlike in the past, “[t]he courts now used their authority to curb reaction.”\textsuperscript{148} As first reaction to this comment one can speculate that to a small or large extent, it was Jaffe’s disappointment with agencies that motivated him to rescind “the thinking of the thirties.”\textsuperscript{149} Be that as it might have been, this comment leads to the realization that one could never be sure that a given branch of government—be it the administrative arm or the judiciary—would not express at some point in time reactionary power. The remarks evidence Jaffe’s dynamic thinking. It attests to his acute realism regarding institutional and political processes, a sensitivity to their mercurial nature, and

\textsuperscript{147} Jaffe, \textit{Agencies in Perspective, supra} note 39, at 569.
\textsuperscript{149} \textit{Supra} note 40.
awareness of the occasional vicissitudes in the balance of powers among branches of government. To him, therefore, only a dynamic remedy against reaction was conceivable—only an open conversation could work.

I believe that Jaffe’s extensive work on the interplay between courts and agencies should be regarded as one (undoubtedly central) part in a larger project, whose aim was this: to create the conditions necessary to ensure that agencies’ inputs are diluted, as it were, in a wide pool of competing political, personal, and practical considerations to be presented by all agents of government and possibly even directly by the public at large.

And what about the independent agencies, whose raison d’être is institutional disengagement with the other branches of government? On the face of it, given the fact that some of the most important agencies are independent (e.g., the FTC and the SEC), they seem to pose a major roadblock to my thesis about Jaffe’s idea of open governmental colloquium in the business of regulation. To recall, one of the precepts dearest to Landis, “who spoke for all of us who had been deeply committed to the New Deal,” as Jaffe put it, was that administrative commissions should remain as independent as possible from extraneous interventions. This is the tradition out of which grew Jaffe. He, however, had other thoughts about the concept of independence. Jaffe insisted already in 1955, “In no case is independence absolute nor should it be. Every organ of government in a democracy—even the Supreme Court—is bottomed on representativeness. If the Commission [here: the ICC] has for decision an issue no one—least of all the President—should be silenced. The Commission’s independence lies in its power to choose, not in its power to hear.”

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150 See infra text accompanying note 126.
151 Jaffe, James Landis, supra note 45, at 320.
152 See, e.g., LANDIS, supra note 49, at 111.
153 Jaffe, Incentive and Investigation in Administrative Law, supra note 33, at 1240. I have already noted that in so holding Jaffe was advancing a vision of “responsive,” rather than “repressive” or “autonomous,” law. See PHILIPPE NONET AND PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD A RESPONSIVE LAW 16, 73-113 (1978).
V. Conclusion: Beyond Landis, Pound (and Wilson)

At first it may appear that Jaffe’s change of heart replicated Pound’s earlier about-face. Both men devoted much energy to issues of judicial review of administrative commissions and had their doubts about administrative expertise. Morton Horwitz’s analysis of Jaffe’s work goes along these lines, as he traces Jaffe’s retreat back to Pound’s “legalistic and proceduralized vision of the administrative process.” Yet, I believe that one has to distinguish between Pound’s (and potentially Frankfurter’s) backpedaling toward traditionally-held legal convictions and Jaffe’s “pilgrimage.”

Concisely put, I think that Pound’s was a move back to an old form of absolutist thinking, whereas Jaffe was gradually distancing himself from a later form of absolutism—that of the Landisian expertise (as well as from Wilson’s distinction between politics and administration). Jaffe’s was, in this sense, a transcendental move, going beyond Pound’s reaction (Wilson’s recipe for administrative inaction) and Landis’ pro-action positions.

According to Jaffe, however profound, judicial control over agencies was not to stifle their creativity. His idea of a model of judicial review was not motivated by a desire to crush the administrative apparatus, which he and his colleagues had labored to buttress during the New Deal. The premium Jaffe now placed on judicial scrutiny of administrative decisions emanated from a change in his thinking regarding Landis’ notion of strong expertise and not from a regression in his progressive thinking. Progressive administrative regulation should go on, he thought. Nevertheless, it should be framed in post-New Deal (and post-classical) terms, which had no room for blunt assertions of expertise. It should also be institutionally restructured vis-à-vis the judiciary, the other branches of government, and the citizenry.

Whereas the essence of the Pound option was the time-honored principle of the supremacy of law and of courts (and that of the Wilson legacy was the seclusion of the administration), Jaffe’s was a relativistic and thus pluralistic model of public regulation.

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154 Horwitz, supra note 4, at 217.
155 Id. at 238.
156 Supra note 148.
157 See supra text accompanying note 22
158 See supra text accompanying note 148.
The “later” Jaffe championed the institutionalization of an on-going, healthy exchange among executives, legislators, regulators, and judges on pending issues. And so, in the end it was Jaffe, the prophet of the judicial review model, who watered down a principle traditionally held to enshrine courts’ supremacy. Reflecting dominant currents in his zeitgeist, in so stipulating he has deliberately thrown out a real sense of administrative expertise with the bath water.

VI. Postscript: Jaffe in the Twenty-First Century

Before we move to the concluding chapter of the dissertation, I would like to briefly demonstrate in what ways Jaffe’s realism set the course for administrative law scholarship since the 1970s to this day. I will highlight two closely-related dominant themes that run through the post-Jaffe research agenda, which is typified by a growing tendency to (1) regard administrative regulation as a multi-party, decentralized, participatory process and emphasize its pluralistic, clearly political nature, and (2) analyze the operation of agencies in straightforward political science terms.

(1). Since the mid-1970s administrative law scholars have been thinking of the administrative process in terms of interest group competition. Seminal in this development was the publication in 1975 of The Reformation of American Administrative Law, where Richard Stewart made the case that courts had shifted their attention from traditional concerns of personal autonomy to “the assurance of fair representation for all affected interest in the exercise of the legislative power delegated to agencies.” Stewart went on to argue that this transformation was premised on the “assumption that there is no ascertainable, transcendent ‘public interest,’ but only the distinct interests of various

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159 As we have seen in the previous chapter, according to Dwight Waldo by the late 1960s a new value was advanced by administrationists. It was “‘social equality’ and its favorite means to achieve this value [was] ‘participation.’” DWIGHT WALDO, THE ADMINISTRATIVE STATE xvii (1984).
161 Stewart, Reformation of Administrative Law, supra note 18, at 1712. It should be noted that Stewart thought that courts would not be able to ensure full representation to all interested parties before agencies for a variety of reasons, which need not concern us here. See id. at 1764-1768.
individuals and groups in society.”¹⁶² Later scholars pointed out that the reformation of the 1970s was followed by counter-reformation in the 1980s,¹⁶³ and today there is talk of yet fresher “schools of thought within legal academia [which] are … introducing a new regime for a new century.”¹⁶⁴ The “myriad of recent scholarly theories” view the administrative process as “democratic experimentalism,” “outsourcing regulation,” “regulatory pluralism,” “communicative governance,” “negotiated governance,” “interactive compliance,” and “nonrival partnership.”¹⁶⁵

So viewed, the political nature of the administrative process could not be denied. As Stewart put it a decade and a half after the Reformation, “The growth of the national regulatory welfare state … has spawned … factional domination. By an irony of inversion, Madison’s centralized solution to the problem of faction has produced Madison’s Nightmare: a faction-ridden maze of fragmented and often irresponsible micro-economic politics within government.”¹⁶⁶

(2). The work of Jerry Mashaw, Robert Katzmann, and other law professors represent the second outstanding development in the scholarship of the last generation, namely, lawyers’ tendency to come to grips with the fact that administrative commissions are bureaucratic organizations. Thus, for example, in 1983, Mashaw, having conducted extensive “field work” that included interviews and observations, publish Bureaucratic Justice: Managing Social Security Disability Claims.¹⁶⁷ Tellingly, the study opens with the question, “Is it possible to integrate the normative concerns of administrative law with

¹⁶² Id. at 1712.
¹⁶³ Shapiro, supra note 18, at 10-24.
¹⁶⁵ Id. at 346-347 (adopting the name “Renew Deal” and mentioning these and other designations). Cf. supra note 153. Pronouncements of revolution should always be taken with a grain of salt. One should not forget that the centerpiece of the early New Deal was the National Industrial Recovery Act of 1933, which could be characterized by most of the abovementioned designations. (As we know, the Act was pronounced unconstitutional in A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)).
¹⁶⁷ JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY CLAIMS (1983). This book was preceded by JERRY L. MASHAW ET AL., SOCIAL SECURITY HEARINGS AND APPEALS: A STUDY OF THE SOCIAL SECURITY ADMINISTRATION HEARING SYSTEM (1978) (the study was conducted by six law professors).
the positive concerns of organizational theory?"\textsuperscript{168} Katzmann likewise conducted a thorough investigation of the Federal Trade Commission, where he examined its organization, decision-making mechanisms, case selection processes, dynamic of internal exchange among various units within of the commission, and relationship with external actors, such as the President, Congress, and interest groups.\textsuperscript{169} Indeed, work such as this (as well as the fact that the author is a political scientist by training)\textsuperscript{170} demonstrates how blurred became to many the boundary between legal and political science study of the administrative apparatus in the United States.\textsuperscript{171}

This is not to say that this transformation has been complete, nor universal (nor that it should be).\textsuperscript{172} But it is safe to say that the disjuncture between the legal and political science perspectives on the operation of administrative bodies has been narrowed, maybe even significantly. Jaffe, I am certain, would have been pleased.\textsuperscript{173}

\textsuperscript{168} \textsc{Mashaw}, \textsc{Bureaucratic Justice}, supra note 167, at ix.

\textsuperscript{169} \textsc{Robert A. Katzmann}, \textsc{Regulatory Bureaucracy: The Federal Trade Commission and Antitrust Policy} (1981).

\textsuperscript{170} See also \textsc{Robert A. Katzmann}, \textit{Note, Judicial Intervention and Organization Theory: Changing Bureaucratic Behavior and Policy}, 89 Yale L.J. 513, 537 (1980), and \textsc{Robert A. Katzmann}, \textsc{Institutional Disability: The Saga of Transportation Policy for the Disabled} (1986).

\textsuperscript{171} See, \textit{e.g.}, \textsc{Colin S. Diver}, \textit{Policymaking Paradigms in Administrative Law}, 95 Harv. L. Rev. 393 (1981); Frug, \textit{supra} note 19; \textsc{Thomas O. McGarity & Sidney A. Shapiro}, \textsc{Workers at Risk: The Failed Promise of the Occupational Safety and Health Administration} (1993); and Lobel, \textit{supra} note 164.

\textsuperscript{172} \textit{Cf.} \textsc{Barry Friedman}, \textit{The Politics of Judicial Review}, 84 Tex. L. Rev. 257 (2005).

\textsuperscript{173} I do not think, however, that Earnest Freund, for example, would have been so pleased. As we have seen, \textit{supra} Chapter 4, Section II.E., Freund hoped that law schools would introduce law students to the perspective of political science and structure their administrative law courses accordingly. It is not clear whether this last step has been taken yet.
CHAPTER 9. CONCLUSION

[Law must be made to look outside itself...]
James Landis

Since the Progressive Era and continuing to this day, scholars (and judges) have been debating the question of whether courts, the President, Congress, or even the public at large should give deference to “expert” agencies. What have these scholars been talking about when they spoke of “expertise” in the context of regulation? This was the foundational question of my dissertation. At the end of the road, my short answer is (and as can be expected in a dissertation written under the auspices of a law school): well, it depends. It depends on which group of scholars and on what era we are talking about.

A more elaborate answer would go along these lines: generally, scholars have been talking about three different things, that is, about three paradigms of expertise: the public general manager, which regards the regulator as a business leader, who cares about the public interest; the judge, where the administrator is a shrewd, efficient arbiter; and the empiricist/professional, according to which the regulator is a technician, a bureaucrat.

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In thus answering the question, the dissertation shows that the established historiography of American administration is severely lacking. For contrary to the accepted claim that a single model of expertise existed during the history of American administrative law, as just noted, there were in fact the three named paradigms of expertise. It turns out, moreover, that all three paradigms had concrete influence on the design of the federal administrative machinery: the judge paradigm was responsible for Adams’ “weak” form of regulation during the Progressive Era; the general manager paradigm captured the ethos of the New Dealers; and the empiricist/professional paradigm explains the way many of us think today of the administrative process.

By failing to observe this plurality of paradigms, the literature on public administration has missed something fundamental about the administrative process. For it has been demonstrated throughout the study that the paradigms of expertise put forward here are not merely about regulators’ unique competence, but are rather the epicenter of an entire constellation of propositions about the structure, procedures, guiding principles, constitutional position, and even the history of the administrative process.

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As we have seen, the three paradigms were, to a large extent, an outgrowth of the multifaceted context in which they were conceived. The timeframe canvassed in the dissertation—the past 130 years or so—was the period in which the United States resolutely rose to the status of a global superpower. But it has not been a walk in the park. The federal administrative apparatus took root in the United States at a time when the American economy and sciences underwent dramatic transformations, a period when people began to speak of an imperialist presidency. The many scholars mentioned in the preceding chapters mirrored these changes along with a host of other closely related issues. Thus, as notable examples, they responded to novel currents and undercurrents in jurisprudence (e.g., Formalism, Realism, Lochner, Standard Oil, and Universal Camera) and the twists and turns of the regulatory endeavor itself along the twentieth

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5 Universal Camera Corp. V. NLRB, 340 U.S. 474 (1951).
century (e.g., the impact of “weak” regulation on the railroad industry, the rise and 
marasmus\(^6\) of the Interstate Commerce Commission, the National Industry Recovery Act of 1933, and the introduction of the Environmental Protection Administration in 1970). It was to this complex reality of changing economy, greater reliance on technology, increase in federal powers, and a splintered legal community that Charles Francis Adams, Woodrow Wilson, Adolph Berle, Frank Goodnow, Felix Frankfurter, Louis Caldwell, Roscoe Pound, Marvin Rosenberry, Thomas Corcoran, Carl Wheat, Luther Gullick, James Landis, Louis Jaffe, Philip Selznick, Marver Bernstein, Charles Lindblom, K. C. Davis, James March, Murray Edelman, Richard Stewart, Jerry Mashaw, and many others reacted in writing about public regulation.\(^7\) The dissertation, in turn, is based on the corpus of literature produced by these scholars.

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This study has tracked the march of the paradigms since the Progressive Era, a time when it first became clear to all that federal regulation was a force to be reckoned with, to this day. Throughout the discussion I have highlighted continuities, but also discontinuities, in the evolution of theories of administrative legitimacy and expertise in the United States.

As a general matter, the dissertation shows that paradigms, just like old habits, die hard. They stick around. Consider, for example, the judge paradigm. As we have seen, Adam devoted most of his energies to expounding this paradigm. Although no other future scholar would devote that much attention to the paradigm, it would not disappear from sight. It would recur, for instance, in the work of James Landis. Similarly, although the postwar generation of scholars, taken as a whole, tarred and feathered the public general manager paradigm, it would be a mistake to suggest that it fell into total disuse. Far from it.\(^8\)

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\(^6\) See supra Chapter 7, Section III.D.

\(^7\) They were obviously reacting to other contingencies, as well. This list is not exhaustive, as it cannot be. As noted, in Chapter 1, “the context” can never be fully accounted for. By singling out the enumerated factors, I wished only to highlight those forces that, as far as I can tell, \textit{were} on the minds of the scholars whose work is reviewed in the dissertation.

\(^8\) See supra note 2.
Conclusion

Taking a wide retrospective look at the whole field, the following picture emerges of the historical process:

The menu of paradigms was set from the first. The three paradigms were articulated already in the Progressive Era. Adams wrote in a manner compatible with the judge and even the general manager paradigm, while Woodrow Wilson outlined the parameters of the empiricist/professional paradigm. Yet only the judge paradigm was fully developed at this time through Adams’ “weak” form of regulation. The work of beginning-of-the-century political sciences elaborated on Wilson’s preliminary work, but ran into a wall of opposition—the general manager paradigm was on the horizon.

With the advent of the New Deal, in the aftermath of the Great Depression, it was evident that the judge paradigm would not do. As this paradigm faltered the general manager paradigm rose to dominance and came to be fully articulated by reform-minded New Dealers. This more robust paradigm of expertise drew fire from many quarters. Conservative lawyers, who had been always wary of the rise of the administrative state, geared up and greatly intensified their salvos on administrative commissions. Concurrently, some of Wilson’s followers, who styled themselves “scientists of administration,” lambasted independent administrative commissions in the name of the principle of Executive integration, that is, the dictum that the President should have unbridled control over the entire administration. They were eager to deprive administrative agencies of any leadership in the administrative process, just as the conservative lawyers were.

But the coalition between the two groups of detractors was an uneasy one for while both groups worked under the same paradigm (the empiricist/professional), they maintained divergent outlooks on several aspects of the administrative process. They differed on especially three issues: first, the leading lights of the science of administration were keen supporters of the New Deal. Indeed, one of the major findings of this research is that different New Dealers endorsed different models of regulation and paradigms of expertise. Not all of them subscribed to the general manager paradigm. The second consideration that divided conservative lawyers and political scientists was that from the perspective of the former group, political scientists were calling for Executive
aggrandizement. These lawyers were vehemently opposed to this in the face of what they saw as “a movement toward personal government and executive absolutism throughout the world.” They instead thought that agencies should be curbed by the courts, not by the Executive. Finally, scientists of administration spoke of the administrative apparatus in terms of bureaucracy, thus becoming the rightful exponents of the empiricist/professional paradigm. Lawyers, nevertheless, wherever their loyalties lay, showed little interest in the fledgling science of administration. They remained generally impervious to the teachings of non-legal disciplines and kept to themselves. It was left, therefore, for the political scientists to bring the empiricist/professional paradigm to (theoretical) fruition.

In the postwar era even pro-commission lawyers would warm to the latter paradigm due to a host of reasons: commissions’ poor performance and a growing tenor of skepticism about their abilities, but also the introduction of plainly technical schemes of workplace and environmental regulation; scientific uncertainty, but also great technological advancements; anti-idealism but also persistent progressivism. No better illustration can be provided for the paradigmatic shift that the mainstream legal community underwent around the mid-century than the fact that by 1960, Landis himself had become part of this intellectual hegira away from the general manager paradigm.

Then there was the Louis Jaffe campaign. At first sight, Jaffe seems to have simply joined camp with the rest of the legal community in endorsing the most minimalist paradigm of expertise. Jaffe, however, was no simple thinker. He and several other lawyers would take the empiricist/professional paradigm one step further and advocate for a pluralistic regulatory process, where (technical) experts were part of a worldwide web of various kinds of expertise. This was an unexpected development as this new outlook was clearly at odds with that of the Executive-integration school, the natural habitat of the empiricist/professional paradigm. Interestingly, the pluralistic approach had antecedents in the work of James Landis, the great prophet of the general manager paradigm.

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Conclusion

Yet, what made Jaffe’s pilgrimage exceptional was his revolutionary battle against lawyers’ habit of keeping to themselves. He thought of commissions as bureaucracies. He heeded well what administrationists had to say about the Landis theory. They did not like what they saw in it, to put it mildly. Jaffe similarly grew disenchanted with the general manager paradigm for exactly the same reasons that had led other non-lawyers to reject it. The main significance in Jaffe’s transition to the empiricist/professional paradigm lay, then, in the fact that it heralded a new awareness among legal scholars to non-legal perspective on administration. Prominent legal scholars followed Jaffe’s lead, thus producing administrative law as we know it today.

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The Jaffe revolution has not been completed, however. The legal and the political science horizons have not yet merged. That being the case, the question becomes: how should we proceed from here? I believe that the gap between the disciplines should be further bridged, but I do not think that the two horizons should eventually merge. Rather, let law bring its focus on the normative side of regulation to the discussion while political science, history, economics, sociology, cultural studies, philosophy, and any other relevant discipline that comes to mind bring their perspectives and thence let the discussion lead the discussants where it may. As this study shows, the benefits to be gained by discarding doctrinal self-reference, within and without law, are great indeed.