

## THE ERA OF DEFERENCE: COURTS, EXPERTISE, AND THE EMERGENCE OF NEW DEAL ADMINISTRATIVE LAW

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*The first two terms of Franklin Roosevelt's presidency (1933–1941) were periods of great administrative innovation. Responding to the Great Depression, Congress created scores of new administrative agencies charged with overseeing economic policy and implementing novel social welfare programs. The story of the constitutional difficulties that some of these policy innovations encountered is a staple of both New Deal historiography and the constitutional history of twentieth-century America. There has been very little writing, however, about how courts and the New Deal–era administrative state interacted after these constitutional battles ended. Having overcome constitutional hurdles, these administrative agencies still had to interact with the judiciary in their day-to-day operations. This Article examines this interaction. In particular, it shows how Roosevelt's appointees to the federal bench changed administrative law so as to dramatically diminish the role of the judiciary in the administrative process. The New Dealers espoused what I will call a "prescriptive" vision of policymaking in which expert administrators implemented the policy desires that emerged from the democratic process. There was little room for courts in this vision of policymaking. This era of judicial passivity was short lived, but it firmly defined the role of expertise in the administrative state and created the model of judicial deference that would be both emulated and reacted against as administrative law developed during the rest of the twentieth century.*

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## INTRODUCTION

In 1904, the Ohio Valley Water Company (“Ohio Water”) paid \$3,900 for nine acres of property at the tip of Neville Island, a small sliver of land in the middle of the Ohio River about four miles northwest of Pittsburgh.<sup>1</sup> Two of the nine acres were dry land, and Ohio Water built a pumping station there. The remaining seven acres were wetlands made up mostly of a sandbar where the company sank its wells. Having thus improved the land, Ohio Water informed the Pennsylvania Public Service Commission (“PSC”) that the land was now worth no less than \$100,000. According to the company, drawing Ohio River water up through the sandbar purified the water, rendering it particularly potable. Ohio Water, therefore, possessed a unique and valuable piece of land.

Ohio Water had to report the value of its land to the PSC because the Commission needed this information to determine what rates Ohio Water would be allowed to charge its customers. Rate-making was a tricky business. Since the late 1890s, the Supreme Court of the United States had required rate-making agencies to set rates at a level that would allow public utilities to receive a reasonable return on their investment.<sup>2</sup> Rates that did not allow such a return were confiscatory and, as such, violated the Due

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1. A detailed description of the facts surrounding the dispute between the Ohio Valley Water Company and the Pennsylvania Public Service Commission can be found in the Pennsylvania Supreme Court’s opinion, *Borough of Ben Avon v. Ohio Valley Water Co.*, 103 A. 744, 747–49 (Pa. 1918), *rev’d*, 253 U.S. 287 (1920).

2. *See e.g.*, *Smyth v. Ames*, 171 U.S. 361 (1898). For a contemporary, encyclopedic discussion of rate-making and rates of return, see ROBERT P. REEDER, *THE VALIDITY OF RATE REGULATIONS* (1914).

Process Clause of the Fourteenth Amendment. Thus, to determine whether a particular rate was constitutional, a court had to determine whether it would allow a company to receive “a just and reasonable return upon the fair valuation of its property.”<sup>3</sup> Accordingly, the more a company’s property was worth, the more it could charge its customers.

Unfortunately for Ohio Water, the Pennsylvania PSC did not think the Neville Island property was worth \$100,000. Indeed, the Commissioners did not think it was worth even half that much. According to the PSC, the reason such tasty water flowed from Ohio Water’s wells was not because of some special property of the sandbar. The water was of high quality because the company was not pumping Ohio River water at all. Its wells had gone down through the sandbar into a slowly flowing aquifer that ran under the Ohio River, known to geologists as the Wisconsin Glacial Flow (and to the residents of Pittsburgh as “The Fourth River”).<sup>4</sup> Since the flow could be accessed along the Ohio River at least to the Ohio border and throughout Neville Island, there was nothing particularly unique or valuable about the sandbar. Lower value meant lower rates.<sup>5</sup>

Facing such financial hardship, Ohio Water appealed the PSC’s valuation to the Pennsylvania Superior Court, which reversed the Commission.<sup>6</sup> After reviewing the evidence submitted to the PSC, the Superior Court ordered the agency to fix the company’s rates based on the higher valuation of the Neville Island property.<sup>7</sup> The PSC, in turn, appealed the Superior Court’s decision to the Pennsylvania Supreme Court.

At issue in this appeal was not the substance of the debate over the value of Ohio Water’s wells. Instead, the litigants debated one of the most basic issues confronting those who study the administrative state: what is the proper relationship between courts and agencies?<sup>8</sup> Indeed, it is the dispute over this issue that makes this case, which ended up in the United States Supreme Court in 1920 under the moniker *Ohio Valley Water Co. v. Ben*

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3. *Ben Avon*, 103 A. at 747.

4. According to “Mr. Hice,” the state geologist who testified before the PSC, the aquifer produced water of “excellent quality.” *Id.* For information about the Wisconsin Glacial Flow, see Carnegie Library of Pittsburgh, *The Point: The Underground River*, [http://www.clpgh.org/exhibit/neighborhoods/point/point\\_n77.html](http://www.clpgh.org/exhibit/neighborhoods/point/point_n77.html) (last visited Aug. 31, 2007).

5. The dispute between the PSC and the Ohio Valley Water Company was not only about the value of the wells on Neville Island. The company asserted that the PSC undervalued several other aspects of the business: certain pipelines, the “going value” of the business, and the amount of certain interest payments and brokerage fees. *Ben Avon*, 103 A. at 748–50.

6. *Ben Avon Borough v. Ohio Valley Water Co.*, 68 Pa. Super. 561, 593 (Super. Ct. 1917), *rev’d*, 103 A. 744 (Pa. 1918), *rev’d*, 253 U.S. 287 (1920).

7. *Id.* at 584.

8. *See Ben Avon*, 103 A. at 745–46 (discussing the principles governing the relationship between courts and agencies).

*Avon Borough*,<sup>9</sup> such a good place to start an inquiry into the shifting relationship between the judiciary and the administrative state during the New Deal.

Progressives and their New Deal-era descendents demanded that courts stay out of the administrative process. Judges, they argued, did not possess the expertise necessary to understand the issues that agencies had to address, issues like the hydrological features of the Ohio River Valley. When courts thrust themselves into the administrative process—as the Pennsylvania Superior Court did in this instance—they would, at best, make a hash of the situation by applying legal doctrines rooted in otherworldly abstractions while ignoring the practical necessities of the particular public policy at issue. At worst, Progressives and New Dealers argued, courts would simply impose outcomes on agencies favoring the vested interests that the administrative state was designed to tame. In an increasingly complex, industrialized society, agencies had to be allowed to exercise their expertise without judicial interference.

This was certainly the PSC's position, and the Pennsylvania Supreme Court readily signed on. According to the court, determining the value of property for the purpose of setting rates was a complex and technical process "which calls for the exercise of a sound and reasonable judgment upon a proper consideration of all relevant facts."<sup>10</sup> Because rate-making was "not a matter of formulas," "[m]uch must be left to the sound discretion of the appraising body, the tribunal appointed by law and informed by experience, for the discharge of these delicate and complex duties."<sup>11</sup> An understanding of the comparative expertise between a court and an agency was the key to allocating power between the two:

It was assumed perhaps by the Legislature that the members of the Public Service Commissions would acquire special knowledge of the matters intrusted [sic] to them by experience and study, and that . . . they would prove efficient instrumentalities for dealing with the complex problems presented by the activities of these great corporations. It was not intended that the courts should interfere with the commissions or review their determinations further than is necessary to keep them within the law and protect the constitutional rights of the corporations over which they were given control.<sup>12</sup>

Accordingly, courts were to be deferential when they reviewed agency actions. Was the agency's action "reasonable" or "based on very substantial

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9. 253 U.S. 287 (1920).

10. *Ben Avon*, 103 A. at 750.

11. *Id.*

12. *Id.* at 746 (quoting *People ex rel. N.Y. & Queens Gas Co. v. McCall*, 113 N.E. 795, 796 (1916)).

evidence”?<sup>13</sup> Was its behavior “not arbitrary or capricious”?<sup>14</sup> Courts were not to substitute their judgment for that of the agency. Because that had clearly happened in this instance—the PSC’s valuation of the Neville Island property was “beyond question . . . warranted,”<sup>15</sup>—the Pennsylvania Supreme Court overturned the Superior Court’s decision and reinstated the PSC’s valuation.<sup>16</sup>

The PSC’s victory, however, was short-lived. The company appealed the Pennsylvania court’s decision to the United States Supreme Court, which tersely overturned the state court’s opinion. Since an improper valuation of a regulated company’s property could result in a constitutional violation, “the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts.”<sup>17</sup> The Pennsylvania Superior Court had behaved properly, independently reviewing the facts that had been submitted to the Public Service Commission. The Pennsylvania Supreme Court, on the other hand, had ignored its duty by deferentially reviewing the agency’s action for mere reasonableness. The expertise of the agency did not warrant any deference.<sup>18</sup>

For progressive proponents of the administrative state, the Supreme Court’s ruling in *Ben Avon* was a nightmare come to life.<sup>19</sup> Was the Court really suggesting that courts not defer to agencies even on technical, factual issues that could not possibly be within the expertise of the judiciary? How could a court possibly justify second-guessing the state geologist of Pennsylvania and several “[o]ther practical men, speaking from experience” as to the ultimate source of the water that the Ohio Valley Water Company pumped out of its wells on the sandbar of Neville Island?<sup>20</sup> Why have an administrative state at all if courts were going to do all the work over again, but badly? Or was that the point? Had courts become the agents of interests who sought to undermine the efficiency and expertise of agencies in the name of protecting their property rights and elite status?

Decided in 1920, *Ben Avon* was not a case generated by a New Deal-era administrative innovation. However, the objections to *Ben Avon* took on a new urgency with the advent of the Great Depression and the election of

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13. *Id.* (quoting *New York ex rel. N.Y. & Queens Gas Co. v. McCall*, 245 U.S. 345, 351 (1917)).

14. *Id.* (quoting *McCall*, 245 U.S. at 351).

15. *Id.* at 748.

16. *Id.* at 750.

17. *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 289 (1920).

18. *See id.* at 291.

19. For negative reactions to *Ben Avon*, see the sources listed in FELIX FRANKFURTER & J. FORRESTER DAVISON, *CASES AND MATERIALS ON ADMINISTRATIVE LAW* 464 n.7 (2d ed. 1935).

20. *Ben Avon*, 103 A. at 748.

Franklin Roosevelt. Roosevelt's landslide in 1932 brought with it a commitment to administrative government on an unprecedented scale. *Ben Avon* and its progeny represented an allocation of power between courts and the administrative state completely inconsistent with the Roosevelt administration's strategy for combating the economic crisis.

The 1930s thus became a crucible for the reconceptualization and reconstruction of this relationship between agencies and the judiciary. Forces seeking to expand administrative autonomy clashed with those seeking to ensure that agencies remained firmly under the control of courts. While this clash was certainly political—generally speaking, it pitted supporters of the New Deal against its opponents—it was also an intellectual conflict about the role of expertise in modern government. A crisis of the Great Depression's magnitude gave policymakers with a commitment to expertise-based administration a powerful weapon to dislodge the judiciary from its role protecting property and economic liberty from administrative agencies. Consequently, by the end of the 1930s there had been a dramatic change in the relationship between courts and the administrative state. Courts were placed in a position frankly subservient to the administrators whose task it was to rationalize and reform the failing economy through the application of scientific expertise.

This Article recounts the details of this narrative for two distinct historiographical reasons. The first is to address a hole in the existing historical literature of the New Deal. In the past ten years, there has been a marvelous effervescence of legal-historical scholarship about the New Deal.<sup>21</sup> The bulk of this scholarship, however, has focused on constitutional law. This, in and of itself, is not surprising. Constitutional law holds pride of place in the popular and academic imagination. Additionally, one of the major legacies of the New Deal was the redefinition of liberalism in a manner that shifted its focus from economic liberties to other rights including freedom of expression, and the equal protection of ethnic, religious, and racial minorities. It is an obvious impulse, therefore, to try to discern the law's role in this process, which requires a thorough study of New Deal-era constitutional law. Historians, however, have long acknowledged that the rise of the fed-

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21. See, e.g., 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 255–311 (1998); BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998); PETER H. IRONS, *THE NEW DEAL LAWYERS* (1982); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 98–289 (2004); WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* (1995); RONEN SHAMIR, *MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL* (1995); G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2000); Barry Friedman, *The History of the Counter-Majoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971 (2000); Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 YALE L.J. 2165 (1999); Colin Gordon, *Rethinking the New Deal*, 98 COLUM. L. REV. 2029 (1998).

eral administrative state during the New Deal was another crucial and arguably preeminent component of the modern legal and political order.<sup>22</sup> Why then has there been so little work done on the invention and transformation of administrative law during the New Deal?<sup>23</sup>

This obvious lacuna is made even more perplexing by the increasing subtlety with which the administrative state itself is being examined. Scholarship produced under the rubric of “American political development” or “historical institutionalism” has broadened the way in which the administrative state has been portrayed.<sup>24</sup> In particular, scholars have demonstrated that the emergence of the administrative state was not simply the process of political actors implementing the desires of their constituents for more state control over the economic and social order. The nature of the emerging administrative state was shaped by the way these political impulses were refracted by existing institutional structures, both constitutional and bureaucratic in nature.<sup>25</sup> Scholars have examined how federalism, for example, determined the way that policymakers implemented the political desire for

22. See, e.g., LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 3–4 (2002); KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 271–77 (1989); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 193–246 (1992); WHITE, *supra* note 21, at 94.

23. There are some exceptions to this neglect. See HORWITZ, *supra* note 22; WHITE, *supra* note 21; George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996); Jessica Wang, *Imagining the Administrative State: Legal Pragmatism, Securities Regulation, and New Deal Liberalism*, 17 J. POL’Y HIST. 257 (2005). None of these authors, however, discuss the doctrinal changes that are the subject of this Article.

24. There has developed a vast bibliography regarding the so-called “new” political history. For the basic premises, nicely outlined, see Theda Skocpol, *Bringing the State Back In: Strategies of Analysis in Current Research*, in *BRINGING THE STATE BACK IN* 3 (Peter B. Evans et al. eds., 1985). Two germinal writings are STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920* (1982), and J.P. Nettl, *The State as a Conceptual Variable*, 20 WORLD POL. 559 (1968). For a nice selection of articles written in the new institutionalist mode, see *FEDERAL SOCIAL POLICY: THE HISTORICAL DIMENSION* (Donald T. Critchlow & Ellis W. Hawley eds., 1988); *THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES* (Margaret Weir et al. eds., 1988); and *STRUCTURING POLITICS: HISTORICAL INSTITUTIONALISM IN COMPARATIVE ANALYSIS* (Sven Steinmo et al. eds., 1992). For book-length examples of this type of scholarship, excellent monographs include BRIAN BALOGH, *CHAIN REACTION: EXPERT DEBATE AND PUBLIC PARTICIPATION IN AMERICAN COMMERCIAL NUCLEAR POWER, 1945–1975* (1991); DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928* (2001); and BARTHOLOMEW H. SPARROW, *FROM THE OUTSIDE IN: WORLD WAR II AND THE AMERICAN STATE* (1996). For various sympathetic critiques of institutionalism, see Daniel R. Ernst, *Law and American Political Development, 1877–1938*, 26 REVIEWS AM. HIST. 205 (1998); Ira Katznelson, *The State to the Rescue? Political Science and History Reconnect*, 59 SOC. RES. 719 (1992); and Reuel Schiller, “*Saint George and the Dragon*”: *Courts and the Development of the Administrative State in Twentieth-Century America*, 17 J. POL’Y HIST. 110 (2005).

25. SKOWRONEK, *supra* note 24, at 10–18; Nettl, *supra* note 24, at 564–66, 569–71; Margaret Weir et al., *Introduction: Understanding American Social Politics*, in *THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES*, *supra* note 24, at 3, 16–27.

social welfare programs,<sup>26</sup> and how agencies generated certain political pressures while insulating themselves from others.<sup>27</sup>

Unfortunately, the one institution that these state-building scholars have neglected is the judiciary.<sup>28</sup> This fact motivates my second historiographical purpose: There is a need to build a bridge between this institution-focused political history (which ignores courts) and the new legal history of the New Deal (which ignores administrative law). This Article is a modest attempt to do so.

My thesis is simple. New Deal policymakers subscribed to what I will call a *prescriptive* vision of how public policy should be made. Expert administrators and a strong executive were best equipped to address a given societal problem and efficiently implement a solution. The democratic process identified social problems at the most general level. It was then the job of experts to discern the best way to solve a particular problem and implement the appropriate policy. Inexpert, inflexible, rule-bound courts were to recognize their proper role by allowing agencies to act with minimal judicial interference. By 1940, the federal judiciary had accepted this prescriptive model of policymaking and its reduced role in it.

My argument proceeds as follows: First, in Part I of this Article, I will draw a simplified, thumbnail sketch of the relationship between courts and agencies in the years before the New Deal. I will then, in Part II, discuss in some detail the debate that took place during the 1930s about the proper role of the courts in a polity that increasingly recognized the importance of administrative agencies for addressing the economic and social dislocations caused by the Great Depression. In Part III of this Article, I will demonstrate how administrative law changed during the 1930s to reflect the beliefs of those in this debate who asserted that courts should play as small a role as possible in the new, bureaucratic state. Finally, in Part IV, I will return to my two historiographical points. The extreme judicial deference to administrative agencies that marked the late 1930s and early 1940s was short-lived. But the story of its emergence is an excellent example of the importance of understanding the intersection between changes in administrative law and the development of the administrative state. The intellectual and political currents that shaped administrative law in the 1930s and 1940s defined the role that courts would play in the administrative process. As such, they helped to channel the development of bureaucracies and define the scope of their powers during the immense burst of state building that was the New Deal.

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26. See, e.g., Ann Shola Orloff, *The Political Origins of America's Belated Welfare State*, in *THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES*, *supra* note 24, at 37.

27. CARPENTER, *supra* note 24, at 3–4, 15–18, 30–33, 363–67.

28. See Schiller, *supra* note 24. As John D. Skrentny has written, scholars have recently begun to address this neglect. See John D. Skrentny, *Law and the American State*, 32 ANN. REV. SOC. 213, 220–28 (2006).

## I. ADMINISTRATIVE LAW BEFORE THE NEW DEAL: A BRIEF OVERVIEW

Discovering the exact nature of the relationship between courts and agencies in the years prior to the New Deal is a daunting task. There existed no single statute that defined this relationship at either the federal or state level. Instead, there was a hodge-podge of different statutes and common law doctrines that could be used to challenge administrative actions.<sup>29</sup> Contemporary scholars including Ernst Freund, the *pater familias* of the discipline we now call administrative law, recorded the use of a host of common law doctrines to challenge agency actions: damage actions in tort or contract; writs of mandamus, certiorari, quo warranto, prohibition, and habeas corpus; as well as injunctions and declaratory judgments.<sup>30</sup> Additionally, the statutes that established administrative agencies frequently provided for some form of judicial review of final administrative action.<sup>31</sup> Finally, as the *Ben Avon* case illustrates, the Constitution itself sometimes required judicial oversight of agencies.

As if this vast variety of methods of obtaining judicial review of administrative action were not confusing enough, different procedural mechanisms dictated differing degrees of judicial oversight. In New York, for example, certiorari review required courts to overturn agency actions if “findings of fact [we]re not supported by competent proof or [we]re against the weight of the evidence,” while mandamus was required only if courts found agency action to be “palpably illegal.”<sup>32</sup> In Massachusetts, writs of prohibition could only be issued against an agency that had acted in “clear excess of jurisdiction,” while quo warranto actions generated de novo hearings before a court.<sup>33</sup> Statutes requiring judicial review frequently stated that administrative action had to be supported by “substantial evidence,” though this standard meant different things in different contexts.<sup>34</sup>

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29. E. Blythe Stason, *Methods of Judicial Relief from Administrative Action*, 24 A.B.A. J. 274 (1938).

30. ERNST FREUND, *CASES ON ADMINISTRATIVE LAW* 330–642 (2d ed. 1928); see also KENNETH C. SEARS, *CASES AND MATERIALS ON ADMINISTRATIVE LAW* 1–205 (1938); E. BLYTHE STASON, *THE LAW OF ADMINISTRATIVE TRIBUNALS* 498–601 (1937).

31. For an encyclopedic list of such statutory language, see E. Blythe Stason, “*Substantial Evidence*” in *Administrative Law*, 89 U. PA. L. REV. 1026, 1027–28, nn.3–20 (1941).

32. 9 N.Y. STATE CONSTITUTIONAL CONVENTION COMM., *PROBLEMS RELATING TO JUDICIAL ADMINISTRATION AND ORGANIZATION* 786–88 (1938).

33. SEARS, *supra* note 30, at 26 (quoting *Kevorkian v. Judges of the Superior Court*, 3 N.E.2d 742, 743 (Mass. 1936)); cf. *Att’y Gen. v. Sullivan*, 40 N.E. 843, 844 (Mass. 1895). For a clear illustration of contrasting state systems of judicial review, including California’s particularly Byzantine common law system, see FERREL HEADY, *ADMINISTRATIVE PROCEDURE LEGISLATION IN THE STATES* 98–118 (1952).

34. See Stason, *supra* note 31, at 1035–39.

Additionally, courts changed the intensity of their review of agency action depending on what exactly the agency was doing. Review of factual determinations might be less rigorous than review of legal determinations. Review of the application of facts to legal standards might fall somewhere in between.<sup>35</sup> On the other hand, as *Ben Avon* illustrated, certain facts might be reviewed de novo. Courts also drew a distinction between reviewing quasi-judicial acts and quasi-legislative acts.<sup>36</sup>

Despite these mind-numbing combinations (and the considerable sympathy they evoke for the practitioners who had to deal with them), it is possible to generalize about the way courts treated agency decisions. In subject matter areas that were clearly within traditional notions of the police power, courts gave agencies considerable discretion. By the 1920s, courts consistently deferred to agency actions with respect to public health,<sup>37</sup> customs and postal regulations,<sup>38</sup> the administration of veterans' pensions,<sup>39</sup> and various licensing regimes.<sup>40</sup> The same was true of the actions of taxing agencies,<sup>41</sup> the Patent and Trademark Office,<sup>42</sup> the Federal Land Office,<sup>43</sup> and the Bureau of Immigration.<sup>44</sup>

On the other hand, for types of regulation that touched on subject matter at the outer edge of the police power, judicial review was more exacting. As *Ben Avon* demonstrated, the federal courts were happy to insert themselves into the rate-making process. The main federal agency involved in rate-making was the Interstate Commerce Commission ("ICC"). Initially, the judiciary was deeply hostile to this agency, limiting its jurisdiction and its remedial powers, and reviewing its rate-makings with a fine-toothed comb.<sup>45</sup> By 1920, however, the courts and the ICC seem to have settled their differ-

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35. See FREUND, *supra* note 30, at 714–19; E.F. Albertsworth, *Judicial Review of Administrative Action by the Federal Supreme Court*, 35 HARV. L. REV. 127, 149–51 (1921); Nathan Isaacs, *Judicial Review of Administrative Findings*, 30 YALE L.J. 781, 781–83 (1921).

36. STASON, *supra* note 30, at 80–82; see also FREUND, *supra* note 30, at 1–46.

37. *Zucht v. King*, 260 U.S. 174, 176–77 (1922).

38. Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1, 37–43 (2000).

39. *Silberschein v. United States*, 266 U.S. 221, 225 (1924).

40. Schiller, *supra* note 38, at 43–51.

41. *Phillips v. Comm'r*, 283 U.S. 589 (1931); *Williamsport Wire Rope Co. v. United States*, 277 U.S. 551 (1928); *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915).

42. *Postum Cereal Co. v. Cal. Fig Nut Co.*, 272 U.S. 693 (1927).

43. Albertsworth, *supra* note 35, at 140–41.

44. LUCY E. SALYER, *LAW'S HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* 179–244 (1995).

45. ARI HOOGENBOOM & OLIVE HOOGENBOOM, *A HISTORY OF THE ICC: FROM PANACEA TO PALLIATIVE* 32–38 (1976); SKOWRONEK, *supra* note 24, at 248–67.

ences, and the judiciary placed itself in a considerably more deferential posture.<sup>46</sup>

The federal judiciary did not, however, place itself in the same position with respect to state rate-makers or other federal agencies. Not only did the Supreme Court require lower courts to pick through the details of agency valuations—as it did in *Ben Avon*—it also imposed particular techniques on agencies for determining value, and even picked among competing economic theories of what value was.<sup>47</sup> At issue in these cases was not simply the fact that the courts overturned many agency determinations, although they did.<sup>48</sup> Instead, these cases illustrate that courts had no compunction about second-guessing agencies on a host of issues that were clearly within the agency's expertise: what formula was best for determining the rate of return, what was a reasonable rate of return, and how much was a given piece of property worth.

The judiciary's assertion of control over the Federal Trade Commission was even more dramatic. The Federal Trade Commission Act of 1914, which created the FTC and gave it the power to define and prosecute unfair

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46. For Supreme Court cases in this vein, see *Akron, Canton & Youngstown Railway Co. v. United States (The New England Division Case)*, 261 U.S. 184 (1923), and *United States v. Atchison, Topeka & Santa Fe Railway Co. (The Intermountain Rate Cases)*, 234 U.S. 476 (1914). See also HOOGENBOOM & HOOGENBOOM, *supra* note 45, at 97–98; 2 I.L. SHARFMAN, *THE INTERSTATE COMMERCE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE* 384–393 (1931). Skowronek suggests that the judiciary's deferent attitude was the product of the emergence of an “era of administrative justice” during the 1920s. SKOWRONEK, *supra* note 24, at 267. The contrasting attitude of the federal courts to state rate-makers and other federal agencies, such as the Federal Trade Commission (“FTC”), suggests that this explanation is incorrect. Robert Rabin argues, more plausibly, that the federal courts simply took a more deferential posture because they did not have the institutional resources to review all of the ICC's work. Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 *STAN. L. REV.* 1189, 1233–36 (1986). Finally, scholars of agency capture, most famously Gabriel Kolko, might suggest that the ICC was so thoroughly controlled by the industries it was supposed to regulate that they did not need courts to check the agency's power. Indeed, Kolko argues that when the Supreme Court weakened the ICC in the late 1800s it “did enormous damage” to the interests of the railroads. GABRIEL KOLKO, *RAILROADS AND REGULATION, 1877–1916*, at 80–83 (1965).

47. Even a brief perusal of contemporary articles and notes demonstrates the detail that the Court went into when reviewing the methods that agencies used when valuing property. See, e.g., Irston R. Barnes, *Federal Courts and State Regulation of Utility Rates*, 43 *YALE L.J.* 417 (1934); Edwin C. Goddard, *The Evolution and Devolution of Public Utility Law*, 32 *MICH. L. REV.* 577 (1934); Willard John Stone, Jr., Comment, 34 *MICH. L. REV.* 100 (1935); Note, *West v. Chesapeake & Potomac Telephone Co.: The Index Method of Rate Valuation in the Supreme Court*, 49 *HARV. L. REV.* 297 (1935). For an excellent review of the controversy within the Supreme Court and among professional economists as to how value should be defined for the purposes of rate-making, see Stephan A. Siegel, *Understanding the Lochner Era: Lessons from the Controversy over Railroad and Utility Regulation*, 70 *VA. L. REV.* 187 (1984).

48. Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 *B.U. L. REV.* 881, 908–18 (2005); Michael J. Phillips, *How Many Times Was Lochner-Era Substantive Due Process Effective*, 48 *MERCER L. REV.* 1049, 1069–72 (1997).

trade practices, allowed for judicial review of agency decisions.<sup>49</sup> Agency findings of fact were to be “conclusive” if “supported by testimony.”<sup>50</sup> In practice, however, the courts showed no deference to the agency at all. The Supreme Court explicitly stated that courts, not the Commission, were to define unfair trade practices.<sup>51</sup> Furthermore, even the specific factual findings of the agency were largely ignored by courts, prompting the leading scholar of the agency to write in 1924 that “a search of the opinions of Circuit Courts of Appeals and of the Supreme Court does not reveal a single case” where “the findings of the Commission have in any way affected the decision of the court.”<sup>52</sup> “[T]he Commission,” he continued, “has become little more than a subordinate adjunct of the judicial system.”<sup>53</sup>

Right on the eve of the New Deal, in February of 1932, the United States Supreme Court gave the proponents of prescriptive government further cause for worry. In *Crowell v. Benson*, the Court applied the principles of *Ben Avon* to the Longshoremen’s and Harbor Workers’ Act, a federal statute that created a system of worker’s compensation for injuries on the nation’s navigable waters.<sup>54</sup> Benson claimed, among other things, that the Act was unconstitutional if it was not read to allow a *de novo* determination of facts by the federal district court that reviewed the findings of the agency that administered the statute.<sup>55</sup> In his opinion for the Court, Chief Justice Hughes spoke of the importance of judicial deference to administrative fact finding.<sup>56</sup> However, when it came to finding the most important “fundamental or ‘jurisdictional’”<sup>57</sup> facts, the federal courts retained their full measure of fact-finding authority.<sup>58</sup> The fundamental or jurisdictional facts in a workers’ compensation case were whether there existed an employer–employee relationship in the case at issue and, for a federal compensation commission, whether the injury took place on navigable waters.<sup>59</sup> Thus, a federal court retained the ability to review these facts—the main facts in a case under the Act—*de novo*. Any other holding would “sap the judicial power as it exists

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49. Federal Trade Commission Act of 1914, ch. 311, § 5, 38 Stat. 717, 719–20 (1914).

50. *Id.* at 720.

51. *FTC v. Gratz*, 253 U.S. 421, 427 (1920).

52. GERARD C. HENDERSON, *THE FEDERAL TRADE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE* 336 (1924).

53. *Id.* at 102.

54. *Crowell v. Benson*, 285 U.S. 22 (1932).

55. *See id.* at 36.

56. *See id.* at 46–47.

57. *Id.* at 54.

58. *Id.* at 56–57, 60–61.

59. *Id.* at 54–55.

under the Federal Constitution, and . . . establish a government of a bureaucratic character alien to our system.”<sup>60</sup>

*Crowell v. Benson* became something of a *bete noire* for the proponents of prescriptive government. Writing in 1932, John Dickinson, who went on to be assistant secretary of commerce and head of the Justice Department’s Antitrust Division in the Roosevelt administration,<sup>61</sup> laid out a parade of horrors:

[I]t seems clear that substantially all issues of importance committed to the decision of administrative tribunals and which affect personal or property rights are . . . capable of being translated into issues of constitutional fact. . . . [T]he result would be to subject all [such] administrative determinations . . . to a retrial on new evidence in the reviewing court.<sup>62</sup>

The effect of *Crowell*, if read broadly, could thus be “nothing short of a revolution not merely in the precedents, but in the organization . . . of the whole existing administrative system of police regulation, state as well as federal.”<sup>63</sup> This would be a death blow to prescriptive government, which required judicial passivity in the face of a robust administrative state. Instead, *Crowell* would dictate that “all state procedure under the police power which does not provide an opportunity for [judicial] re-examination must be unconstitutional under the Fourteenth Amendment.”<sup>64</sup>

Felix Frankfurter agreed. As he wrote in a typically melodramatic letter to Justice Stone shortly after *Crowell* was decided,

I am again in mourning. Indeed[,] . . . *Crowell v. Benson* make[s] me wonder whether law is really my beat. . . . Before I had read the opinion I could hardly have believed that disciplined legal minds would reach the conclusions which the majority reached. That the Chief should have . . . determined the result in *Crowell v. Benson*[] confronts one with the necessity of saying to oneself, “Either his mode of legal reasoning or mine is without warrant.” Truly, but for the dissents . . ., I should feel that I had no business to spend my life in public law, since my own understanding of those matters is so different from that of the Court.<sup>65</sup>

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60. *Id.* at 57.

61. IRONS, *supra* note 21, at 12; George L. Haskins, *John Dickinson, 1894–1952*, 101 U. PA. L. REV. 1, 9–11 (1952).

62. John Dickinson, *Crowell v. Benson: Judicial Review of Administrative Determination of Questions of “Constitutional Fact,”* 80 U. PA. L. REV. 1055, 1078–79 (1932).

63. *Id.* at 1079.

64. *Id.*

65. Letter from Felix Frankfurter to Harlan Fisk Stone (Feb. 29, 1932) (on file in Box 13 of the Harlan Fisk Stone Papers, Library of Congress, Manuscript Collection). Gary Rowe brought this letter to my attention by showing me an excerpt from it in Gordon G. Young, *Public Rights and the*

According to Frankfurter, the Court's decision in *Crowell v. Benson* represented the antithesis of what the proper relationship between courts and the administrative state should be:

As to *Crowell v. Benson*, it is really too bad. The result seems to me the evil offspring of the *Jensen* and the *Ben Avon* cases. It is the result of a very jejune, unreal conception of administrative law. To make the issue of employment more jurisdictional than any other fact upon which liability depends is to turn these matters into a game much more sterile than the speculations of the Schoolmen.<sup>66</sup>

For future New Dealers, *Crowell v. Benson* was thus an awful specter, haunting their dream of expert-driven, prescriptive policymaking. Many New Deal statutory innovations would involve agency adjudications that required the finding of facts relevant to a given agency's jurisdiction and the constitutionality of that agency's actions.<sup>67</sup> Thus, like *Ben Avon*, *Crowell* would have to be exorcised before the administrative state could address the needs of society unhindered by the inexpert ministrations of the courts.<sup>68</sup> Consequently, as Franklin Roosevelt ascended to the presidency in 1933, a number of thinkers both within his administration and outside of it began to articulate a theory of administrative law that would define the proper relationship between courts and agencies in an activist, prescriptive state. Roosevelt would draw on this theory as the federal government attempted to rescue America from the Great Depression.

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*Federal Judicial Power: From Murray's Lessee Through Crowell to Schor*, 35 *BUFF. L. REV.* 765, 775 (1986). Dan Ernst was kind enough to provide me with a copy of the entire letter.

66. Letter from Felix Frankfurter to Harlan Fisk Stone, *supra* note 65. The *Jensen* case that Frankfurter refers to is *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917). In *Jensen*, the court held that the United States Constitution prohibited a state workers' compensation statute from applying to an injury inflicted upon a longshoreman while he was unloading cargo from an ocean-going ship. *Id.* at 217. The Court reasoned that the state's assertion of jurisdiction violated both the Commerce Clause and Article III, Section 2 that vests admiralty jurisdiction in the federal courts. *Id.* at 214–15, 217. Justice Holmes's dissent in *Jensen* is the source of one of his most famous bon mots: "The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign . . ." *Id.* at 222 (Holmes, J., dissenting).

67. Consider, for example, the staples of the so-called first New Deal, the National Recovery Administration and the Agricultural Adjustment Administration, both of which had the power to punish businesses that violated wage, price, or production guidelines. See ANTHONY J. BADGER, *THE NEW DEAL: THE DEPRESSION YEARS, 1933–1940*, at 87, 152 (1989). Other New Deal agencies more traditionally associated with the second New Deal, such as the National Labor Relations Board or the Security and Exchange Commission ("SEC"), had similar powers. *Id.* at 134–46; THOMAS K. MCCRAW, *PROPHETS OF REGULATION 192–203* (1984). Of course, despite its rejection of associationalism and, for the most part, business self-regulation, the SEC was actually a product of early days of the New Deal. MCCRAW, *supra*, at 168–81.

68. For other critiques of *Crowell*, see WALTER GELLHORN, *ADMINISTRATIVE LAW: CASES AND COMMENTS* 944 n.9 (1940).

## II. NEW DEAL ADMINISTRATIVE THEORY AND ITS DISSENTERS

The theory of New Deal administrative law was not formulated in a vacuum. Instead, it emerged from a political and philosophical debate between two groups of policymakers and politicians. New Dealers sought to expand the reach of the administrative state and curtail the role of the courts. Their opponents portrayed these actions as threats to constitutional government and attacks on individual liberties. At worst, they were the first steps towards totalitarianism. Supporters of the Roosevelt administration viewed these claims as absurd—mere scare tactics employed by reactionary elites. In the short run, the New Dealers won this debate. Contemporary political culture was not sympathetic to those who endorsed the status quo. The economic crisis of the 1930s demanded that the government take action. In such a context, the proponents of prescriptive government were able to establish a theoretical foundation for an administrative law regime that pushed courts to the margins of the administrative process.

### A. *Expertise and the New Deal*

The notion that expertise should be used to formulate public policy was hardly an invention of the New Deal. Indeed, Progressive reformers of the 1910s and 1920s proffered expertise as the solution to a host of problems disturbing the social order at the beginning of the twentieth century. They believed that the scientific method could be applied to these problems.<sup>69</sup> Technocratic experts, having arrived at a solution to a given problem, should be allowed to implement it.<sup>70</sup> Central to this faith in expertise was the idea that administrative experts needed the flexibility to shape governmental responses to individual problems. Static laws had to be replaced by adjustable, context-specific guidelines. Accordingly, courts would have to take a back-seat to expert administrative agencies.<sup>71</sup>

An economic crisis of the magnitude of the Great Depression only heightened these demands for prescriptive government. Potential solutions ranged from marginal tinkering with the free market—voluntary planning councils, for example—to wholesale transformations of the political and

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69. See JAMES T. KLOPPENBERG, *UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT, 1870–1920*, at 270, 385 (1986); ROBERT H. WIEBE, *THE SEARCH FOR ORDER, 1877–1920*, at 150 (3d prtg. 1968); Daniel T. Rodgers, *In Search of Progressivism*, 10 *REVIEWS AM. HIST.* 113, 126–27 (1982); Dorothy Ross, *Modernist Social Science in the Land of the New/Old*, in *MODERNIST IMPULSES IN THE HUMAN SCIENCES, 1870–1930*, at 171, 187–88 (Dorothy Ross ed., 1994).

70. See, e.g., HORWITZ, *supra* note 22, at 224; KLOPPENBERG, *supra* note 69, at 385; WIEBE *supra* note 69, at 160.

71. See, e.g., HORWITZ, *supra* note 22, at 222–25; KLOPPENBERG, *supra* note 69, at 270–71, 385, 391; WIEBE, *supra* note 69, at 145, 150, 160–63; Rodgers, *supra* note 69, at 126–27.

economic structure of the United States.<sup>72</sup> What all these remedies had in common, however, was an emphasis on prescriptive government. More planning—be it by an industry group, an administrative agency, or a fascist dictator—was necessary. To many intellectuals and policymakers, the Depression proved that laissez-faire capitalism was a failure.<sup>73</sup> Only some degree of centralized planning could control what the New Dealers saw as the socially destructive tendencies of free market capitalism.<sup>74</sup>

This prescriptive conception of government filtered into legal scholars' beliefs about the role the judiciary should play in the policymaking process. Legal thinkers of the 1930s—their thought forged in the fires of Franklin Roosevelt's battle with the Supreme Court over the constitutionality of many pieces of New Deal legislation—rejected any role for the courts in the policymaking process.<sup>75</sup> Judges were, at best, inept meddlers in prescriptive government and, at worst, a reactionary force struggling to preserve laissez-faire capitalism in the face of obvious obsolescence. Accordingly, the vision of the judiciary that went with the prescriptive state was a profoundly minimalist one.

One does not have to venture very far in an exploration of the prevailing conceptions of the proper role of the state in the New Deal before encountering an historiographical obstacle. Some historians of the Roosevelt administration have postulated the existence of two New Deals: a corporatist, cooperative New Deal typified by the National Industrial Recovery Act and advocated by Raymond Moley, Rex Tugwell, and Adolph Berle—the so-called “Brain Trust”—and a trust-busting, class-conscious New Deal of Felix Frankfurter and his “happy hot dogs,” Tommy Corcoran, James Landis, and Ben Cohen, embodied in the National Labor Relations Act.<sup>76</sup> Beliefs about the proper role of the state in policymaking, however, were

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72. In this Article I will only discuss a small subset of the literature. For examples of expertise-based solutions to the Great Depression that range from mildly statist to frankly totalitarian, see the sources quoted in Reuel E. Schiller, *Policy Ideals and Judicial Action: Expertise, Group Pluralism, and Participatory Democracy in Intellectual Thought and Legal Decision-Making, 1932–1970*, at 51–65 (May 1997) (unpublished Ph.D. dissertation, University of Virginia) (on file with author).

73. See *infra* notes 78–89 and accompanying text.

74. See *infra* notes 90–107 and accompanying text.

75. See *infra* notes 108–118 and accompanying text.

76. Arthur Schlesinger, Jr., first canonized the idea of the two New Deals in his three-volume history of the Roosevelt administration. 1 ARTHUR M. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE CRISIS OF THE OLD ORDER* (1956); 2 ARTHUR M. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE COMING OF THE NEW DEAL* (1958); 3 ARTHUR M. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE POLITICS OF UPHEAVAL* (1960). The idea that there was a split in the policymaking philosophy had been stated earlier by a participant from each of the two alleged New Deals. RAYMOND MOLEY, *AFTER SEVEN YEARS* (1939); RAYMOND MOLEY WITH ELLIOT A. ROSEN, *THE FIRST NEW DEAL* (1966); cf. JOSEPH P. LASH, *FROM THE DIARIES OF FELIX FRANKFURTER* 54 (1975) (quoting Letter from Thomas Corcoran & Ben Cohen to Felix Frankfurter (June 18, 1934)); WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL* 149–51 (1963).

consistent across both “New Deals,” if two are thought to exist.<sup>77</sup> New Dealers from 1933 to 1939, from Rex Tugwell to James Landis, envisioned the government as a profoundly prescriptive entity. Experts would formulate policy, agencies would implement it, and courts would stay out of the way.

The Roosevelt administration’s vision of policymaking was based on three premises. First, the Depression proved that laissez-faire capitalism no longer worked in the United States. Second, there were objectively correct solutions to the Depression that could be arrived at through expert investigation. Third, these solutions, which would replace discredited laissez-faire capitalism, would entail a concentration of planning power in the federal government. The government was to become a prescriptive entity, managing the economy through incentives and direct control.

The Great Depression profoundly shook intellectuals’ faith in unregulated capitalism. As Rex Tugwell, one of Roosevelt’s inner circle of advisors, wrote, the Depression sent a distinct message: “The jig is up. The cat is out of the bag. There is no invisible hand. There never was. If the depression has not taught us that, we are incapable of education.”<sup>78</sup> Unfettered capitalism had revealed itself to be destructive. Not only did it result in “shoddy” goods and “adulterated” food, but the Depression demonstrated that free market enterprises were not even able to keep their own houses in order.<sup>79</sup> Tugwell argued that rather than passing along their profits to workers through higher wages, corporations speculated, overexpanded, or hoarded their profits in massive, unutilized reserve pools.<sup>80</sup> Felix Frankfurter concurred: “We have been assuming a continuing validity for the economic theories of pioneer America while fact has been steadily undermining theory.”<sup>81</sup> He went on to define the problems of contemporary capitalism: “poverty amidst plenty” and technological innovation without “wider

77. If the bifurcated New Deal has not met its demise it has certainly come under attack. See BADGER, *supra* note 67, at 94–108; ELLIOT A. ROSEN, *HOOVER, ROOSEVELT AND THE BRAINS TRUST: FROM DEPRESSION TO NEW DEAL* 115–23 (1977); Otis L. Graham, Jr., *Historians and the New Deals: 1944–1960*, 54 *SOC. STUD.* 133, 133–40 (1963). Alan Brinkley considers both the corporatist initiatives of the early 1930s and the regulatory and antimonopoly initiatives of the mid-1930s to be the product of the same reform—liberal influences. ALAN BRINKLEY, *THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR* 4–6 (1995). The change in the nature of the New Deal, he argues, came after 1938 when liberalism dropped its critique of capitalism and replaced it with a commitment to Keynesian economics and individual liberties. *Id.* at 6–8, 266–68.

78. REXFORD G. TUGWELL, *THE BATTLE FOR DEMOCRACY* 14 (1935).

79. See REXFORD G. TUGWELL, *THE INDUSTRIAL DISCIPLINE AND THE GOVERNMENTAL ARTS* 195 (1933).

80. For Tugwell’s beliefs about the causes of the Depression, see TUGWELL, *supra* note 78, at 187–92. See also BERNARD STERNESHER, *REXFORD TUGWELL AND THE NEW DEAL* 11–25 (1964).

81. FELIX FRANKFURTER, *What We Confront in American Life* (1933), reprinted in *LAW AND POLITICS* 334, 336 (Archibald MacLeish & E.F. Prichard, Jr. eds., 1939).

diffusion of purchasing power.”<sup>82</sup> In the face of these facts, he asked, “Do I not report accurately . . . a growing disbelief in the fairness of our capitalistic scheme and even in its capacity to achieve its purposes?”<sup>83</sup> Indeed, laissez-faire was considered so obsolete by the 1930s that James Landis wrote merely of its “remnants.”<sup>84</sup>

The most notable, and scholarly, example of administration intellectuals interring laissez-faire was Adolph Berle and Gardner Means’s 1933 book *The Modern Corporation and Private Property*.<sup>85</sup> Berle, a Columbia law professor and member of Roosevelt’s Brain Trust, and Means, an economics professor also at Columbia, spent the vast majority of *The Modern Corporation* demonstrating that a large portion of American capital had moved from individual ownership into publicly financed corporations. As this occurred, Berle and Means argued, ownership of these corporations became so diffuse that corporate management began to exercise complete control over a vast majority of American capital.<sup>86</sup> Berle and Means then detailed the legal methods by which this divergence between ownership and control was preserved.<sup>87</sup> Because ownership and management had been separated, the incentives that drove capitalism in the past—profits, competition, individual initiative—were no longer applicable.<sup>88</sup> The result was that competition no longer regulated the market:

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82. *Id.* at 336–37.

83. *Id.* at 339.

84. JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 10 (1938). Landis explained: “[A]s the demands for positive solutions increased and, in the form of legislative measures, were precipitated upon the cathodes of governmental activity, *laissez faire*—the simple belief that only good could come by giving economic forces free play—came to an end.” *Id.* at 8.

85. ADOLPH A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (rev. ed., Harcourt, Brace & World 1968) (1932). When it was published in 1932, *The Modern Corporation* made a huge splash. Reviewing it in the *New York Herald Tribune*, Charles Beard proclaimed it to be the most important book on “American statecraft” since “the immortal Federalist.” Charles Beard, *Who Owns—and Who Runs the Corporations?*, N.Y. HERALD TRIB., Feb. 19, 1933, § 10, at 1. Stuart Chase, writing in the *New Republic*, declared it to be “epoch shattering.” Stuart Chase, *Ticker Tapeworms*, 73 NEW REPUBLIC 279, 299 (1933). The *Yale Law Journal* fawningly reviewed the book not once, but three times. Jerome Frank, Book Review, 42 YALE L.J. 989 (1933); Nathan Isaacs, Book Review, 42 YALE L.J. 463 (1933); Norman L. Meyers, Book Review, 42 YALE L.J. 997 (1933). In one of these reviews, Jerome Frank wrote that *The Modern Corporation* ranked with *Wealth of Nations* as the first detailed description in admirably clear terms of the existence of a new economic epoch.” Frank, *supra*, at 989. For a nuanced interpretation of *The Modern Corporation*, see Dalia Tsuk, *From Pluralism to Individualism: Berle and Means and 20th-Century American Legal Thought*, 30 LAW & SOC. INQUIRY 179 (2005).

86. BERLE & MEANS, *supra* note 85, at 66 (“Ownership of wealth without appreciable control and control of wealth without appreciable ownership appear to be the logical outcome of corporate development.”).

87. *Id.* at 127–288.

88. *Id.* at 9 (“The explosion of the atom of property destroys the basis of the old assumption that the quest for profits will spur the owner of industrial property to its effective use.”).

Today competition in markets dominated by a few great enterprises has come to be more often either cut-throat and destructive or so inactive as to make monopoly or duopoly conditions prevail. Competition between a small number of units each involving an organization so complex that costs have become indeterminate does not satisfy the condition assumed by earlier economists, nor does it appear likely to be as effective a regulator of industry and of profits as they had assumed.<sup>89</sup>

Laissez-faire capitalism, Berle and Means argued, was dead, its principles inapplicable to the economic institutions of the 1930s.

Having identified mindless obeisance to outdated notions of capitalism as the problem behind the Depression, intellectuals within the Roosevelt administration set about devising solutions. They began this search with a conviction that these solutions could best be arrived at through expert examination of the problem. Raymond Moley, the third member of the Brain Trust, wrote to Roosevelt in 1932 that “reasoned planning and expert persuasion” were at the heart of solving the country’s crisis.<sup>90</sup> This theme of expertise permeated the thought of intellectuals within the administration. It was usually coupled with the idea that there was an objectively correct solution to the country’s problems. “[A]s knowledge increases and ultimate common interest becomes manifest, rules of fair play are made,” wrote Henry Wallace in *New Frontiers*, his 1934 ode to expert planning in agriculture.<sup>91</sup> Tugwell was also convinced that expert planners, plucked from universities and placed in Washington, would be the country’s saviors: “The university is a place for learning and for renewal. It is the source on which government must depend for inspiration, for criticism, for expert service; the source, also, of that political economy out of which the new industrial state must be forged.”<sup>92</sup>

Frankfurter and Landis echoed these sentiments. Frankfurter wrote repeatedly and with great admiration of expertise in the British civil service.<sup>93</sup> “Rulers,” he believed, must be “educated for the tasks of government.”<sup>94</sup> Government was simply too complicated to be left to well-intentioned ama-

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89. *Id.* at 308.

90. ROSEN, *supra* note 77, at 147 (quoting Memorandum from Raymond Moley to Franklin Roosevelt (May 19, 1932)).

91. HENRY A. WALLACE, *NEW FRONTIERS* 285 (1934).

92. TUGWELL, *supra* note 78, at 96; *see also* TUGWELL, *supra* note 79, at 91–108, 218–19 (noting the benefits of experts and the need for industry-specific knowledge within government); *cf.* WALLACE, *supra* note 91, at 42–43 (critiquing the private sector’s control over Washington, which stifles change).

93. Felix Frankfurter, *Two Young Men Go to Washington* (1936), *reprinted in* LAW AND POLITICS, *supra* note 81, at 241–43; FELIX FRANKFURTER, *THE PUBLIC AND ITS GOVERNMENT* 139–44 (1930) [hereinafter FRANKFURTER, *THE PUBLIC AND ITS GOVERNMENT*].

94. FRANKFURTER, *THE PUBLIC AND ITS GOVERNMENT*, *supra* note 93, at 133.

teurs: “Compelled to grapple with a world more and more dominated by technological forces, government must have at its disposal the resources of training and capacity equipped to understand and deal with the complicated issues to which these technological forces give rise.”<sup>95</sup> Indeed, government without expertise was a recipe for demagoguery. Only “quiet, detached” experts could separate “facts from fiction” and determine “what [was] proof and what surmise.”<sup>96</sup> This process would generate a politics designed “to reach the mind rather than to exploit feeling.”<sup>97</sup> Similarly, Landis saw expert administration as the only possible way for government to regulate the modern economy effectively:

With the rise of regulation, the need for expertness became dominant; for the art of regulating an industry requires knowledge of the details of its operation, ability to shift requirements as the condition of the industry may dictate, the pursuit of energetic measures upon the appearance of an emergency, and the power through enforcement to realize conclusions as to policy.<sup>98</sup>

New Deal intellectuals’ emphasis on the importance of experts implied a need for a prescriptive form of government in which these experts dictated the proper policies to be implemented by the state. When these same thinkers turned their attention to the actual implementation of policy, this implication became explicit. The Depression could only be overcome through a concentration of planning power. “[C]oncentration of responsibility in a modern society,” Tugwell wrote in the *New York Times Magazine*, “is indispensable.”<sup>99</sup> The president must have powers “comparable to that of a trusted private executive.”<sup>100</sup> Landis devoted his book, *The Administrative Process*, to promoting the concentration of power in administrative agencies: “In the grant to [an administrative agency] 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.”<sup>101</sup>

Programmatically, this call for a concentration of authority meant increased governmental control of the American economy. Since the new corporate form was not conducive to efficient use of American capital, Berle and Means suggested that “the ‘control’ of the great corporations . . .

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95. *Id.* at 151.

96. *Id.* at 153.

97. *Id.*

98. LANDIS, *supra* note 84, at 23–24; *see also id.* at 26, 28.

99. Rexford G. Tugwell, *The Ideas Behind the New Deal*, N.Y. TIMES MAG., July 16, 1933, at 1.

100. *Id.* at 17.

101. LANDIS, *supra* note 84, at 15.

develop into a purely neutral technocracy, balancing a variety of claims by various groups in the community and assigning to each a portion of the income stream on the basis of public policy rather than private cupidity.”<sup>102</sup> Moley called for the government to force industry to distribute its surplus capital.<sup>103</sup> Tugwell, the most messianic of the Brain Trust, called for a vast variety of government controls of industry, including public control of prices and the allocation of capital.<sup>104</sup> Wallace cast the government in a similar role in agricultural planning.<sup>105</sup> Landis and the Frankfurter protégés, Cohen and Corcoran, involved themselves in equally prescriptive, if less grandiose endeavors. Landis set up the Securities and Exchange Commission and all three men drafted most of the New Deal’s legislation regulating public utilities and the securities markets.<sup>106</sup> The late thirties also saw the passage of legislation mandating centralized planning of the coal and oil industries and allowing continued self-regulation of small business even after the collapse of the National Recovery Administration.<sup>107</sup>

### B. *Expertise and the Courts*

The concept of expertise also loomed large in New Deal-era thinking about the role of the judiciary in the prescriptive state. Legal thinkers focused on the relationship between courts and the primary institutional manifestation of prescriptive government, the administrative agency. Courts, these thinkers believed, should stay out of the administrative process as much as possible because they did not possess the specialized knowledge necessary to second-guess expert administrators. Courts applied general rules that were inappropriate for the practical nature of the administrative state. According to Frankfurter, requiring judicial review of administrative acts took judges out of their proper element and involved them in “matters of fact and opinion not peculiarly within the special competence of judges.”<sup>108</sup> Since judges were not experts in a particular field, they lapsed into inappropriate factual analysis when they reviewed administrative opinions. They “tortured” individual fact patterns “into universal molds which

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102. BERLE & MEANS, *supra* note 85, at 312–13.

103. ROSEN, *supra* note 77, at 140–43.

104. TUGWELL, *supra* note 79, at 189–219.

105. WALLACE, *supra* note 91, at 19–27, 225–68.

106. BADGER, *supra* note 67, at 99–102; BRINKLEY, *supra* note 77, at 48–64; MCCRAW, *supra* note 67, at 168–209.

107. BADGER, *supra* note 67, at 97.

108. FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT, *supra* note 93, at 50–51 (discussing judicial review of “social-economic legislation of the states,” which, like review of administrative action, often pitted judicial inflexibility against governmental experimentation).

do not fit the infinite variety of life.”<sup>109</sup> Prescriptive administration was “law in the making.”<sup>110</sup> Its effectiveness would be crippled if courts imposed a “premature synthesis[] of sterile generalization unnourished by the realities of ‘law in action.’”<sup>111</sup>

The boldest call for judicial passivity in the face of administrative expertise was made by Landis in *The Administrative Process*. Landis envisioned the conflict between administrative agencies and courts in heroic terms. It was a titanic battle between “St. George” (agencies, “eternally refreshing [their] vigor from the stream of democratic desires”) and the dragon (courts, “majestically girding [themselves] with the wisdom of the ages”).<sup>112</sup> As if his choice of allegory did not tip his hand enough, Landis explicitly called for a recognition of the primacy of administrative agencies in the governmental process. Courts simply did not have the expertise required to judge the actions of administrative experts. General legal principles were not appropriate for the adjudication of the disputes that arose in a modern economy. Instead, these disputes required “pragmatic” solutions based on “practical,” contextual judgments.<sup>113</sup> Because courts were not equipped to make such judgments, “areas of government formerly within their control have been handed over to administrative agencies for supervision.”<sup>114</sup> This was entirely appropriate, wrote Landis. In the prescriptive state, experts made policy decisions. Review of these decisions should be minimal:

The power of judicial review under our traditions of government lies with the courts because of a deep belief that the heritage they hold makes them experts in the synthesis of design. Such difficulties as have arisen have come because courts cast aside that role to assume to themselves expertise in matters of industrial health, utility engineering, railroad management, even bread baking.<sup>115</sup>

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109. Felix Frankfurter, *The Task of Administrative Law*, (1927), reprinted in *LAW AND POLITICS*, *supra* note 81, at 236.

110. *Id.*

111. *Id.*

112. LANDIS, *supra* note 84, at 123.

113. *Id.* at 33. Landis stated,

[T]here are certain fields where the making of law springs less from generalizations and principles drawn from the majestic authority of textbooks and cases, than from a ‘practical’ judgment which is based upon all the available considerations and which has in mind the most desirable and pragmatic method of solving that particular problem.

*Id.*

114. *Id.* at 123.

115. *Id.* at 154–55. For other assertions of administrative primacy based on expertise, see J.F. Davidson, *Administration and Judicial Self-Limitation*, 4 *GEO. WASH. L. REV.* 291 (1936); Charles Grove Haines, *Effects of the Growth of Administrative Law upon Traditional Anglo-American Legal*

Considering Landis's logic, it is not surprising that he recommended minimal judicial review of administrative action. Issues of fact determined by an agency would be unreviewable.<sup>116</sup> Landis also suggested that issues of law not be reviewed by a court unless the issue fell within the expertise of the judiciary rather than that of the administrative agency; that is, unless it was a question "*that lawyers are equipped to decide.*"<sup>117</sup> Though he did not provide any examples that sprang from this rather tautological definition, he strongly implied that most legal definitions within regulatory statutes (for example, "unfair methods of competition" in trade regulation or "manipulative, deceptive or fraudulent" practice in securities regulation) should be outside the courts' reach.<sup>118</sup>

### C. *The Conservative Response*

These calls for judicial passivity in the face of an increasingly powerful administrative state did not go unanswered. As Congress and the Roosevelt administration extended the powers of the federal government to a larger portion of the American economy than ever before, people who objected to the substance of the New Deal agencies began objecting to the procedures they used as well. Leading this attack was the American Bar Association. In May of 1933, the ABA created the Special Committee on Administrative Law ("Special Committee"), which was to examine the field and propose appropriate legislation.<sup>119</sup> Over the next six years, the Special Committee issued annual reports that were highly critical of the expertise-based rationale for the administrative state.<sup>120</sup> The "administrative absolutism" wrought by the New Deal, the Special Committee claimed, was dragging the United States down the road towards totalitarianism.<sup>121</sup> Expertise was analogized unfavorably to various forms of English despotism:

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*Theories and Practices*, 26 AM. POL. SCI. REV. 875 (1932); and Marvin B. Rosenberry, *Administrative Law and the Constitution*, 23 AM. POL. SCI. REV. 32 (1929).

116. See LANDIS, *supra* note 84, at 140–43.

117. *Id.* at 152.

118. *Id.* at 146–51.

119. On the history of the Special Committee, see Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 219–23 (1986), and O.R. McGuire, *The American Bar Association's Administrative Law Bill*, 1 LA. L. REV. 550, 550–52 (1939). See also George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1569–75 (1996).

120. See, e.g., O.R. McGuire, *Federal Administrative Action and Judicial Review*, 22 A.B.A. J. 492 (1936) [hereinafter McGuire, *Federal Administrative Action and Judicial Review*]; O.R. McGuire, *Proposed Reforms in Judicial Reviews of Federal Administrative Action*, 19 A.B.A. J. 471 (1933).

121. Roscoe Pound used the phrase "administrative absolutism" when he chaired the Special Committee. See *infra* at note 126.

We recall King John, the epitome of administrative justice perverted to selfish ends, faced by the barons on the field of Runnymede—later the King against Parliament—the courts of equity, representing the King’s conscience, against the courts of justice—and the King against colonists who were to lay down their lives to establish the principle of representative government.<sup>122</sup>

Similarly, the decay of the notion of a strict separation of powers was seen as a portent of authoritarian rule.<sup>123</sup> As O.R. McGuire—the chairman of the Special Committee from 1933 to 1937 and again in 1939—wrote, “Should our present tri-partite system continue to weaken, we are faced with the only possible alternatives of anarchy or the introduction of the final phase of Utopianism, a form of government on the Russian, Italian or German models—and let no one tell you the contrary.”<sup>124</sup>

The 1938 Annual Report of the Special Committee was its best articulated attack on administrative expertise.<sup>125</sup> With Roscoe Pound as chair of the Committee that year, it was also the most influential. Pound’s report was as much a polemic as it was an analysis of contemporary administrative law. Indeed, throughout the report, Pound refused to use the term “administrative law,” preferring instead to call the vision of administrative procedure advocated by theorists such as Landis “administrative absolutism.”<sup>126</sup> According to Pound, expertise was a myth. Citing that most hated of New Deal agencies, the National Labor Relations Board (“NLRB” or “the Board”), as an example, Pound argued that the subjects of administrative inquiry were contentious and political and thus not susceptible to resolution by experts.<sup>127</sup> More importantly, he claimed that the personnel within administrative agencies were unable to protect themselves from the political currents that flowed around them.<sup>128</sup> Indeed, many agencies were established for explicitly political purposes: to place a “particular subject . . . under the control of some particular group or interest.”<sup>129</sup> Without the life tenure or a tradition of

122. Charles B. Stephens, *To What Extent Should the Decisions of Administrative Bodies Be Reviewable by the Courts?*, 25 A.B.A. J. 543, 544 (1939).

123. McGuire, *Federal Administrative Action and Judicial Review*, *supra* note 120, at 492–93.

124. O.R. McGuire, *Administrative Law and American Democracy*, 25 A.B.A. J. 393, 394 (1939); *see also* Arthur T. Vanderbilt, *The Place of The Administrative Tribunal in our Legal System*, 24 A.B.A. J. 267 (1938).

125. *Report of the Special Committee on Administrative Law*, 63 ANN. REP. A.B.A. 331 (1938).

126. *E.g.*, *id.* at 342–46.

127. *Id.* at 343–44. The report stated that “[t]he professed ideal of an independent commission of experts above politics and reaching scientific results by scientific means, has no correspondence with reality.” *Id.* at 359.

128. *Id.*

129. *Id.* at 344.

independence of the federal judiciary, administrative officials “tend to feel that they are appointed to reach a particular end of some one class or interest and intentionally direct their determinations accordingly.”<sup>130</sup>

Rejecting expertise, Pound believed that, left unchecked, the inherently political nature of the administrative process would lead to a lawless, totalitarian society that stripped individuals of their rights. Since an administrative agency acted as rule maker, prosecutor, judge, and jury, proceedings before the agency were nothing more than a meaningless formality whose purpose “from end to end is . . . to give effect to a complaint.”<sup>131</sup> Often agencies skipped the hearing process altogether or made decisions based on evidence that was not on the record.<sup>132</sup> Even when they made decisions on the record, it was filled with opinions, hearsay, and even “gossip.”<sup>133</sup> Furthermore, the record was often irrelevant because administrative officials made decisions based on their own prejudices.<sup>134</sup> Adding to the arbitrary nature of the process was the fact that agencies were not bound by the principle of *stare decisis*.<sup>135</sup> Essentially, Pound argued that the problem with administrative agencies was that they were not enough like courts.

Considering its diagnosis of the problems with the administrative state, the Special Committee’s recommendations were not surprising. Only by insisting that agencies follow “the rule of law” could “the guaranteed rights of individuals” be preserved.<sup>136</sup> Thus, the Committee called for intense judicial review of agency adjudications. Courts would review both the legal issues addressed by the agency and the sufficiency of the factual evidence.<sup>137</sup> The Committee also suggested that Congress pass a uniform code of administrative procedure.<sup>138</sup> If “legalizing” the administrative process reduced the efficiency of agency adjudications, so be it. This was the key point of the Special Committee’s Report. Administrative law had to recognize, as criminal law did, that the societal interest in effective administration had to bow before the imperatives of personal freedom.<sup>139</sup>

Conservatives in Congress responded positively to the Special Committee’s 1938 Report, introducing legislation in April of 1939 that sought to

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130. *Id.* at 349.

131. *Id.* at 351.

132. *Id.* at 347.

133. *Id.* at 348.

134. *Id.* at 348–49.

135. *Id.* at 356.

136. *Id.* at 342–43.

137. *Id.* at 361–62.

138. *Id.* at 362–68.

139. *Id.* at 357.

implement many of its recommendations.<sup>140</sup> This legislation, known as the Walter-Logan bill after its House and Senate sponsors, was debated heatedly over the next year, until it was passed and then vetoed by President Roosevelt.<sup>141</sup> Not surprisingly, Walter-Logan's proponents' arguments closely paralleled the Special Committee's Report. Expertise, they argued, was a myth. So called "experts" were nothing more than "theoretical zealots" who were "immoderately partisan toward the objectives they str[o]ve to reach."<sup>142</sup> They were considered either starry-eyed academics with no real world experience unfit to be "turned loose" from universities "to make over our Government as best suits them,"<sup>143</sup> or pawns of certain "'pressure groups' that insisted they be placed in such positions."<sup>144</sup>

Walter-Logan's supporters claimed that such partisan manipulation of the law, without democratic accountability or recourse to the courts, was leading towards totalitarianism. O.R. McGuire, who had reassumed his position as chair of the Special Committee after Pound's tenure ended, argued before the House Judiciary Committee that the bill represented a long needed cure to the "forc[ed] . . . acceptance of the Roman theory [of government] in which the Executive becomes supreme—a reversion to the primitive type of government resulting in the condition obtaining in Germany, Italy, and Russia today."<sup>145</sup> Similarly, the congressional debates were full of statements comparing the New Deal to fascist and communist

140. Shepherd, *supra* note 119, at 1598–99; *see also* WHITE, *supra* note 21, at 116–21.

141. The passage of Walter-Logan does not, in and of itself, suggest that New Dealers had abandoned the prescriptive model of policymaking. The election of 1938 was a terrible one for the Roosevelt administration. The Democrats lost eighty-one seats in the House and eight in the Senate. Furthermore, Roosevelt had been unable to purge the southern wing of the Democrats of candidates he considered unreliable. *See* BADGER, *supra* note 67, at 268–70; LEUCHTENBURG, *supra* note 76, at 271–72. Accordingly, Walter-Logan was passed by a Congress that was the least aligned with Roosevelt and the New Deal since FDR's initial election. That said, the bill's passage indicates that by the end of the 1930s, even some New Dealers were less sympathetic to purely prescriptive models of policymaking than they had been earlier in the decade. This was the beginning of a trend that would accelerate in the 1940s and come to fruition in the postwar period. *See* Reuel E. Schiller, *Reining in the Administrative State: World War II and the Decline of Expert Administration*, in *TOTAL WAR AND THE LAW* 185–206 (Daniel R. Ernst & Victor Jew eds., 2002).

142. 86 CONG. REC. 4591 (1940) (statement of Rep. Hancock); *see also id.* at 4600 (statement of Rep. Reed).

143. *Id.* at 4533 (statement of Rep. Cox); *see also id.* at 13,677 (statement of Sen. King).

144. *Id.* at 4544 (statement of Rep. Rees) ("Nearly all of those who have been appointed in the last few years secured their places as political appointees."); *see also id.* at 4531, 4533 (statement of Rep. Cox).

145. *Administrative Law: Hearing on H.R. 4236, H.R. 6198, and H.R. 6324 Before the H. Comm. on the Judiciary*, 76th Cong. 33 (1939) [hereinafter *House Hearings*].

governments<sup>146</sup> and accusations that administrative agencies were being used to advance the totalitarian ambitions of John Lewis or Franklin Roosevelt.<sup>147</sup>

Walter-Logan was considered a remedy to this slide into administrative absolutism because it protected against arbitrary government action. Walter-Logan's supporters, therefore, compared it to the Bill of Rights.<sup>148</sup> Like the Special Committee, they believed that efficiency and expertise had to bow before legal mechanisms that they claimed protected individual liberties. By forcing administrative agencies into traditional "legal" molds—separation of powers, judicial review, rules of evidence, mandatory cross-examination—the bill would promote fairness and eliminate arbitrary action.<sup>149</sup> This, in turn, would protect the citizens from abusive agencies. "There must be adequate checks upon administrative action," Senator William King claimed, "if liberty is to survive."<sup>150</sup> If these checks made the administrative process more inefficient, so be it. "A noted sage once observed that democracy is like an old scow," Congressman Everett Dirksen noted on the final day of the House debate:

It does not move very fast nor very far at one time, but it never sinks. I prefer these attributes of an old scow with the security which it tends to give to democratic processes as against the totalitarian superfluous liners of the Old World with an impetuous captain giving orders for full speed ahead, no matter what happens.<sup>151</sup>

#### D. Courts, Democracy, and Expertise

To New Dealers, the idea that courts, of all institutions, could be expected to protect and promote democratic interests was laughable. To the contrary, the Supreme Court's embrace of substantive due process and its restrictive reading of the Commerce Clause indicated a profound judicial hostility towards democracy. New Dealers and their allies believed that the Court was acting as a super-legislature, striking down legislation according to its own political interests and biases. Judicial review had become nothing more than the judiciary's defense of existing property rights and economic

146. Consider Congressman Hawks' comparison of the SEC to the Gestapo, 86 CONG. REC. 4603 (1940), or Congressman Sumners's statement about the lack of judicial review in Germany and Italy, *id.* at 13,811.

147. *Id.* at 4668 (statement of Rep. White).

148. *Id.* at 4735 (statement of Rep. Dirksen); *id.* at 4601 (statement of Rep. Blackney).

149. *See, e.g., id.* at 13,665 (statement of Sen. King); *id.* at 4650 (statement of Rep. Martin).

150. *Id.* at 13,676 (statement of Sen. King).

151. *Id.* at 4736 (statement of Rep. Dirksen); *see also id.* at 4535 (statement of Rep. Michener) ("We have had too much speed and too little consideration in legislative matters in recent years.").

power: “thinly veiled propaganda of particular social interests,” in the words of political scientist Charles Merriam.<sup>152</sup> Edward Corwin, another political scientist and New Deal supporter, was even more explicit. The Due Process Clause, he wrote, “comprises nothing more or less than a roving commission to judges to sink whatever legislative craft may appear to them to be, from the standpoint of vested interests, of a piratical tendency.”<sup>153</sup> “The Court,” he wrote in 1934, “had gradually made itself morally answerable for the safety and welfare of the nation to an extent utterly without parallel in judicial annals, past or present.”<sup>154</sup>

Courts were thus amassing power to themselves. According to Louis Boudin, America had been overcome by “Judicial Despotism” in which “all powers [had been] lodged in an irresponsible judiciary.”<sup>155</sup> The goal of the despot was to preserve the outdated concept of free market capitalism that the New Deal-era intellectual consensus had declared obsolete. “The Constitution,” wrote Rex Tugwell, “is used as a holy of holies within which the ugly practices of free competition can be hid from vulgar eyes.”<sup>156</sup>

Against this background of hostility towards the judiciary, it is not surprising that New Dealers viewed increased judicial involvement in the administrative process to be as bad as judicial second-guessing of legislatures. James Landis tartly condemned the ABA’s calls for more judicial supervision of the administrative process as “ringing speeches against the rise of arbitrary power for the postprandial delight of bar association audiences” that would cripple the administrative state “leaving broken and bleeding the processes of administrative law.”<sup>157</sup>

Stalwart New Dealers in Congress agreed. In opposing the Walter-Logan bill, Representative Adolph Sabath saw such legislation as just another

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152. Herman Belz, *The Realist Critique of Constitutionalism in the Era of Reform*, 15 AM. J. LEGAL HIST. 288, 301 (1971) (quoting CHARLES E. MERRIAM, *NEW ASPECTS OF POLITICS* 53–54 (1925)). For other examples of contemporary hostility towards the judiciary, see EDWARD S. CORWIN, *THE TWILIGHT OF THE SUPREME COURT: A HISTORY OF OUR CONSTITUTIONAL THEORY* (Archon Books 1970) (1934); ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* (2d ed. 1962); and BENJAMIN R. TWISS, *LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT* (Russell & Russell 1962) (1942).

153. Edward S. Corwin, Book Review, 6 AM. POL. SCI. REV. 270, 271 (1912) (reviewing FRANK J. GOODNOW, *SOCIAL REFORM AND THE CONSTITUTION* (1911)).

154. CORWIN, *supra* note 152, at 182.

155. Belz, *supra* note 152, at 303 (quoting LOUIS B. BOUDIN, *GOVERNMENT BY JUDICIARY*, at v (1932)).

156. Herman Belz, *Changing Conceptions of Constitutionalism in the Era of World War II and the Cold War*, 59 J. AM. HIST. 640, 648 (1972) (quoting Rexford G. Tugwell, *Design for Government*, 48 POL. SCI. Q. 321, 322–23 (1933)).

157. James M. Landis, *Crucial Issues in Administrative Law: The Walter-Logan Bill*, 53 HARV. L. REV. 1077, 1102 (1940).

means of promoting judicial interference with the New Deal on behalf of vested interests:

The corporation lawyers who drafted this bill are closer to and they know the judges better than they know some of these gentlemen who have charge of the various bureaus or departments, and that is the reason they want to get the thing into the hands of the judges, to whom they can more easily appeal, and with whom they associate, and in whom they have great confidence that they will protect the rights of property in the United States.<sup>158</sup>

Representative John Rankin was even less politic, accusing the bill's supporters of wanting to establish a "judicial fascisti"<sup>159</sup> and reminding his colleagues that "Jefferson . . . said that if this Government was ever destroyed, it would be destroyed by the courts."<sup>160</sup>

Others in Congress and the Roosevelt administration were more temperate, but their point was essentially the same: giving courts too much control over the administrative process would undermine agency efficiency and expertise for the benefit of the interest groups that opposed the New Deal. Representative Emanuel Celler disliked the idea of substituting "a court opinion for the well-considered opinion of the head of a bureau or agency who is better qualified by far to pass upon the circumstances than Federal judges with all their other multifarious duties."<sup>161</sup> President Roosevelt himself stated that government functioned best with "informed and expert" administration unhindered by needless legal formalities.<sup>162</sup> Those who wished to hamper administrative tribunals with increased judicial oversight, he wrote, were simply "a combination of lawyers who desire to have all processes of government conducted through lawsuits and of interests which desire to escape regulation."<sup>163</sup>

158. 86 CONG. REC. 4669 (1940) (statement of Rep. Sabath).

159. *Id.* at 4530 (statement of Rep. Rankin).

160. *Id.* at 4652 (statement of Rep. Rankin); *see also id.* at 13,719 (statement of Sen. Barkley).

161. *Id.* at 4546 (statement of Rep. Celler). For other statements in opposition to legislation that would have increased the intensity of judicial review of administrative action, *see id.* at 13,720 (statement of Rep. Barkley); *id.* at 4652 (statement of Rep. Celler); *id.* at 4654 (statement of Rep. Edelstein); and *id.* at 4600 (statement of Rep. Ford). *See also id.* at 4595, 4652 (statement of Rep. Rankin).

162. 86 CONG. REC. 13,942 (1940) (veto message of President Franklin D. Roosevelt), *reprinted in* 27 A.B.A. J. 52 (1941) [hereinafter Roosevelt Veto Message].

163. *Id.* at 53. The Roosevelt administration mobilized a host of administrators to testify to the pernicious effects of increasing judicial review of administrative action. *See House Hearings, supra* note 145, at 109 (testimony of Norman S. Case, Acting Chairman of the Federal Communications Commission); *id.* at 68–69 (testimony of Harold Ickes, Secretary of the Interior); *id.* at 64–68 (memorandum of W.T. Kelley, Chief Counsel of the Federal Trade Commission); *id.* at 112 (testimony of Clyde L. Seavey, Acting Chairman of the Federal Power Commission). Both the National

Supporters of the New Deal did not, however, stop their defense of agency autonomy with the assertion that the judiciary had proved itself a particularly inappropriate entity institution to protect democratic values in America. Their argument was not that the administrative state was simply the more representative of two basically undemocratic institutions. To the contrary, they bristled at assertions that administrative planning and prescriptive government were somehow antithetical to democracy. Many believed, in fact, that the opposite was true. As Berle and Means asserted in *The Modern Corporation*, the idea of a supportive relationship between democracy and unregulated capitalism as it functioned in the 1930s was nothing more than a myth. Modern capitalism, they argued, resembled an oligarchy, not a democracy.<sup>164</sup> It was “great industries,” not the administrative state, wrote Tugwell, “that were making robots of us all.”<sup>165</sup> Tugwell and Landis both viewed the New Deal as a democratic response to this dehumanizing oligarchy.<sup>166</sup> Because of the New Deal’s potency as a political and social movement, the executive branch would necessarily respond to the will of the people, who would be constantly monitoring its behavior.<sup>167</sup>

Thus, it was expert administration that allowed democracy to function properly. According to Roosevelt, only administrative agencies could ensure “equality before the law” in the ongoing conflict “between a powerful and concentrated interest on one side and a diversified mass of individuals, each of whose separate interests may be small, on the other side.”<sup>168</sup> Two of Roosevelt’s most able acolytes, Frankfurter and Landis, elaborated. According to Frankfurter, the administrative state was needed to promote equality, the sine qua non of a democratic state. It was also needed to digest, explain and clarify the complex issues that were consistently emerging in an industrialized, technological society: “In a democracy, politics is a process of popular education—the task of adjusting the conflicting interests of diverse groups in the community, and bending the hostility and suspicion and igno-

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Lawyers’ Guild and, more surprisingly, the Association of the Bar of the City of New York testified against legislation that would have increased judicial oversight of the administrative process. *Id.* at 56–57, 119–27. The Guild’s Committee on Administrative Law reported (presumably without a hint of sarcasm) that “[t]he Justices of the Supreme Court would undoubtedly be the first to deny that they have knowledge or experience sufficient to this task” of “contend[ing] with the myriad and constantly changing procedural needs of administration.” *Id.* at 122–23. Liberal opinion magazines also argued against increased judicial oversight of the administrative process, citing the importance of expertise and the malign motives of those who sought the assistance of courts. *See, e.g., The Anti-Bureaucrats*, 102 *NEW REPUBLIC* 492 (1940); *More Check Than Balance*, 150 *NATION* 528 (1940).

164. BERLE & MEANS, *supra* note 85, at 46; *see also* Tsuk, *supra* note 85, at 187–90.

165. TUGWELL, *supra* note 78, at 38.

166. LANDIS, *supra* note 84, at 7–9; TUGWELL, *supra* note 78, at 195–96.

167. TUGWELL, *supra* note 78, at 47, 195–205, 287.

168. Roosevelt Veto Message, *supra* note 162.

rance engendered by group interests toward a comprehension of mutual understanding. For these ends, *expertise* is indispensable.”<sup>169</sup>

Landis concurred with his mentor. The administrative state, he wrote, was an institutional embodiment of democracy in action. As American society became more inclusive and egalitarian—exemplified by Jacksonian Democracy and the expansion of suffrage—the “governing classes” recognized “their growing dependence upon the promotion of the welfare of the governed.”<sup>170</sup> In a democratic society, the people demanded “intervention” by the government to correct the private abuses of economic power that Landis associated with industrialization.<sup>171</sup> The resulting administrative state met those demands.

In addition to growing up from democratic roots, agencies protected democracy from courts and corporations.<sup>172</sup> Agencies acting on behalf of individuals (employees or investors, for example), served as a counterweight to the incredible power wielded by large corporations. Similarly, agencies allowed people to avoid courts, entities that were at best inept bumbler and at worst revanchist defenders of the status quo that sought to “thwart the effects of . . . legislative judgments.”<sup>173</sup> The administrative state acted as an antidote to the inequalitarian assumptions of the system of common law adjudication; a system premised on the demonstrably false notion that all parties in society—be they garment workers or John D. Rockefeller—had the same resources to commence and pursue cases in court. The administrative state equalized the playing field by placing the government on the side of the people rather than having it simply act as a neutral “umpire” in a dispute between two unequal parties.<sup>174</sup>

### III. NEW DEAL ADMINISTRATIVE LAW

This debate between the Roosevelt administration and its opponents as to the legitimacy of an administrative state had a number of concrete doctrinal analogues. Any doctrine that gave more power to courts to review administrative agency actions undermined expertise and prescriptive government. Doctrines that increased administrative independence did the opposite. As the 1930s passed into the 1940s and Roosevelt appointees came to dominate the federal judiciary, courts changed the law to insulate the administrative process from judicial oversight.

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169. FRANKFURTER, *THE PUBLIC AND ITS GOVERNMENT*, *supra* note 93, at 161.

170. LANDIS, *supra* note 84, at 8.

171. *Id.*

172. *Id.* at 33–35.

173. *Id.* at 123.

174. *Id.* at 35–40.

A. *Judicial Review of Agency Action*

This change was particularly marked in the doctrines that governed judicial review of administrative decisions. Indeed, the fate of the *Ben Avon* doctrine of de novo review of rate-making is an excellent example.<sup>175</sup> Progressives on the Court, most notably Justice Brandeis, had attacked the *Ben Avon* doctrine from its beginning. Brandeis argued in his dissent in *Ben Avon* that the judiciary's role in reviewing an agency's factual finding was to do nothing more than determine "whether there was substantial evidence to support the finding of value."<sup>176</sup> Such an inquiry did not permit weighing conflicting evidence or the substitution of a court's judgment for that of the agency. For Brandeis, this allocation of power between courts and agencies was justified by expertise and efficiency. As he wrote, sixteen years later in another rate-making case, the Supreme Court had to recognize "that there is a limit to the capacity of judges."<sup>177</sup> Requiring completely independent review of administrative findings of fact had undermined rate-regulation by creating "lawsuits so protracted as to frustrate" the process.<sup>178</sup> Furthermore, independent review distributed governmental functions so improperly that the ability of both courts and agencies was impeded:

[T]he Court must consider the effect of our decisions . . . upon the administrative and judicial tribunals themselves. Responsibility is the great developer of men. May it not tend to emasculate or demoralize the rate-making body if ultimate responsibility is transferred to others? To the capacity of men there is a limit. May it not impair the quality of the work of the courts if this heavy task of reviewing questions of fact is assumed?<sup>179</sup>

While Brandeis called for a more deferential review than did the *Ben Avon* majority, judicial review under the "substantial evidence" standard he articulated in the *Ben Avon* dissent was hardly without teeth.<sup>180</sup> Brandeis had no problem authoring an opinion overturning the Texas Railroad Commission gas proration orders<sup>181</sup> or joining Justice Butler's opinion upholding a

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175. This discussion of the fate of *Ben Avon* owes much to Barry Cushman's excellent discussion of rate-making. See generally Cushman, *supra* note 48, at 908–17.

176. *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 297 (Brandeis, J., dissenting).

177. *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 81 (1936) (Brandeis, J., concurring).

178. *Id.* at 88.

179. *Id.* at 92.

180. Cf. Cushman, *supra* note 48, at 911–13 (discussing courts' invalidation of "confiscatory" rate regulations for violating due process).

181. *Thompson v. Consol. Gas Util. Corp.*, 300 U.S. 55 (1937).

Department of Agriculture rate-making,<sup>182</sup> despite the fact that both opinions were quite long on facts and technical details.<sup>183</sup>

Rather, it was Brandeis's New Deal protégés, Felix Frankfurter in particular, who essentially stripped courts of their power to review rate-makings. By the time Roosevelt had appointed a majority of the Justices of the Supreme Court, not only was the *Ben Avon* doctrine dead, even Justice Brandeis's substantial evidence standard had been discarded in the interest of protecting administrative expertise from judicial meddling.

*Railroad Commission of Texas v. Rowan & Nichols Oil Co.* exemplifies this desire to shield agencies from judicial oversight.<sup>184</sup> In 1938, the Texas Railroad Commission placed drastic limitations on the amount of oil producers could pump, presumably to preserve oil resources and support oil prices. The oil producers challenged the proration, arguing that the limitations it put on the use of their property violated the Due Process Clause.<sup>185</sup> Both the district court and the circuit court enjoined the proration.<sup>186</sup> In a terse opinion, authored by Justice Frankfurter, the Court reversed the courts below and reinstated the Commission's order. Expertise and the desires of the people of Texas to put these decisions in the hands of an administrative agency warranted a "fresh reminder that courts must not substitute their notions of expediency and fairness for those which have guided the agencies."<sup>187</sup> Courts, Frankfurter reasoned, were simply not the right institution to be making such detailed policy decisions:

Certainly in a domain of knowledge still shifting and growing, and in a field where judgment is therefore necessarily beset by the necessity of inferences bordering on conjecture even for those learned in the art, it would be presumptuous for courts, on the basis of conflicting expert testimony, to deem the view of the administrative tribunal, acting under legislative authority, offensive to the Fourteenth Amendment.<sup>188</sup>

When the case returned to the Court a year later, Frankfurter was even more forthright in his commitment to expertise:

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182. *Denver Union Stock Yard Co. v. United States*, 304 U.S. 470 (1938).

183. *Id.* at 472–81 (valuation of the property of stockyards); *Thompson*, 300 U.S. at 59–61, 70–73 (natural gas production).

184. *R.R. Comm'n of Tex. v. Rowan & Nichols Oil Co. (Rowan I)* 310 U.S. 573 (1940).

185. *Id.* at 578.

186. *R.R. Comm'n of Tex. v. Rowan & Nichols Oil Co.*, 107 F.2d 70 (5th Cir. 1939); *Rowan & Nichols Oil Co. v. R.R. Comm'n of Tex.*, 28 F. Supp. 131 (D. Tex. 1939).

187. *Rowan I*, 310 U.S. at 581.

188. *Id.* at 581–82.

We rejected these arguments as an attempt to substitute a judicial judgment for the expert process invented by the state in a field so peculiarly dependent on specialized judgment. . . .

. . . Nothing in the Constitution warrants a rejection of these expert conclusions. Nor, on the basis of intrinsic skills and equipment, are the federal courts qualified to set their independent judgment on such matters against that of the chosen state authorities.<sup>189</sup>

Accordingly, Frankfurter stated a new rule defining the relationship between courts and the administrative state: “[i]t is not for the federal courts to supplant the Commission’s judgment even in the face of convincing proof that a different result would have been better.”<sup>190</sup> Whatever the judicial role was to be in the administrative processes, it was to be markedly diminished as compared to the role laid out not only in the *Ben Avon* case, but even as compared to the role envisioned by a Progressive like Brandeis.<sup>191</sup>

This shift away from detailed review of rate-making was intimately related to the decline of substantive due process. There existed what Barry Cushman has called a “doctrinal synergy” between the decline of substantive due process and the rise of judicial deference to administrative action.<sup>192</sup> By the early 1940s, Roosevelt’s judicial appointees had destroyed substantive due process. Mere rationality in rate-making was all that the Constitution required, and even this standard was treated so laxly as to render constitutional review a formality.<sup>193</sup> Judicial review of agency rate-making, therefore, became a means in search of an end. What was the point of spending judicial energy reviewing a rate-making if its constitutionality was a forgone conclusion?

Nevertheless, the rise of judicial deference to administrative findings occurred in nonconstitutional contexts as well. The decline of substantive due process might explain the emergence of new judicial attitudes in cases with constitutional implications. It does not, however, explain why courts became

189. *R.R. Comm’n of Texas v. Rowan & Nichols Oil Co. (Rowan II)*, 311 U.S. 570, 573, 575 (1941).

190. *Rowan I*, 310 U.S. at 584.

191. Indeed, in his dissent in *Rowan I*, Justice Roberts explicitly called upon the Court to return to the principles that Brandeis laid out in *Thompson. Rowan I*, 310 U.S. at 585 (Roberts, J., dissenting).

192. See Barry Cushman, *Doctrinal Synergies and Liberal Dilemmas: The Case of the Yellow Dog Contract*, 1992 SUP. CT. REV. 235 (1992).

193. A leading modern casebook on regulation describes judicial review of rate-making after *Hope Natural Gas* as standing for two propositions: “First the judiciary will not embroil itself in assessing valuation methodology as long as the ‘end result’ of the ratemaking process is reasonable. Second, and related, the judiciary will largely defer to the regulator, rather than set rates itself.” SIDNEY A. SHAPIRO & JOSEPH P. TOMIAN, *REGULATORY LAW AND POLICY: CASES AND MATERIALS* 121 (3d. ed. 2003); see also, Richard A. Pierce, Jr., *Public Utility Regulatory Takings: Should the Judiciary Attempt to Police the Political Institutions?*, 77 GEO. L.J. 2031, 2046 (1989).

increasingly deferential in their review of a wide variety of cases that raised no constitutional law issues, such as cases involving the Federal Trade Commission (“FTC”).

As previously noted, during the 1910s and 1920s the federal judiciary had reduced the FTC to little more than agency of clerks—assistants to the federal courts that ultimately heard the merits of the cases brought under the Federal Trade Commission Act.<sup>194</sup> During the 1930s and 1940s, the Supreme Court became considerably more deferential to the agency. The Court cited the FTC’s expertise as a justification for deferring not only to its factual findings, but also to its interpretation of its own powers under the Act. The Court began to admonish lower courts for their tendency to “honor[] . . . with lip service only” the Act’s mandate that agency findings of fact were to be conclusive.<sup>195</sup> As Justice Cardozo wrote in *FTC v. Algoma Lumber Co.*, decided in early 1934: “If [testimony before the agency] may be ignored in the face of the findings of the Commission, it can only be by turning the court into an administrative body which is to try the case anew.”<sup>196</sup> Indeed, courts were to defer not simply to the Commission’s factual findings, but also to the inferences that experts might draw from those findings. “The Commission,” wrote Justice Douglas in *Jacob Siegel Co. v. FTC* in 1946, “is entitled not only to appraise the facts of the particular case and the dangers of the marketing methods employed but to draw from its generalized experience. Its expert opinion is entitled to great weight in the reviewing courts.”<sup>197</sup>

Even more remarkable was the Court’s insistence that the judiciary should defer to the Commission’s determination of legal issues such as the definition of unfair trade practices or the availability of certain remedies under the Act.<sup>198</sup> Indeed, by the end of the 1940s, the Court viewed deferring on these types of issues as an unremarkable and self-evident principle of administrative law:

In [upholding a particular unfair trade practice] we give great weight to the Commission’s conclusion, as this Court has done in other cases. . . . [T]he Court [has] called attention to the express intention of Congress to create an agency whose membership would at all times be experienced, so that its conclusions would be the result of an expertness coming from experience. . . . The kind of specialized knowledge Congress wanted its agency to have was an expertness that would fit it to stop at the threshold every unfair trade practice . . . .<sup>199</sup>

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194. See *supra* notes 49–53 and accompanying text.

195. *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 73 (1934).

196. *Id.* at 77.

197. *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 614 (1946) (citations omitted).

198. *Id.* at 612; *FTC v. R.F. Keppel & Bro.*, 291 U.S. 304, 310 (1934); *Algoma*, 291 U.S. at 81.

199. *FTC v. Cement Inst.*, 333 U.S. 683, 720 (1948) (citations omitted).

In this one passage, written by Justice Black in 1948, the Court nicely summarized the triumph of the prescriptive critique of the pre–New Deal judiciary’s relationship to the administrative state. By deferring to agencies, courts were recognizing their own lack of expertise and taking their proper role with respect to the democratic will of the people as expressed by Congress.

Indeed, by the end of the 1930s, the courts had assumed this deferential posture with respect to all agencies, particularly the new ones that were the product of the New Deal itself. The chaos of pre–New Deal administrative law was replaced by a uniform doctrine that dictated extreme deference to administrative actors. By the end of the 1930s the Supreme Court seemed to be using what could be called a one-sided substantial evidence test. The Court would simply see if there was substantial evidence supporting the agency’s decision without even looking at the evidence or conflicting testimony on the other side that might refute some of the agency’s evidence. For example, the Court upheld agency actions despite the existence of significant evidence indicating that the agency’s decision was incorrect in *NLRB v. Waterman Steamship Corp.*,<sup>200</sup> *NLRB v. Bradford Dyeing Ass’n*,<sup>201</sup> and *Swayne & Hoyt Ltd. v. United States*.<sup>202</sup> The Court held in *Waterman* that even though most relevant issues were not “uncontradicted and undenied” by opposing evidence, these contradictions were irrelevant.<sup>203</sup> They did not enter the substantial evidence equation. “Even though, as appellants seem to argue, the evidence may lend itself to support a different inference, we are without authority to substitute our judgment for that of the Secretary . . . .”<sup>204</sup> Similarly, in *Bradford Dyeing*, the Court held that the substantial evidence inquiry did not permit the Court to judge an agency’s inferences. It could only ensure that the “underlying findings” were supported by substantial evidence.<sup>205</sup>

In some instances, the Court seemed to refrain from applying even this diluted standard of review. The 1941 case *Gray v. Powell*<sup>206</sup> is an excellent example of this phenomenon. *Gray* involved a challenge to the National Bituminous Coal Commission’s (“NBCC”) decision that the Seaboard Railway Company was not a producer-consumer of coal but merely a consumer.<sup>207</sup> Because producer-consumers were not subject to the price-

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200. 309 U.S. 206 (1940).

201. 310 U.S. 318 (1940).

202. 300 U.S. 297 (1937).

203. *Waterman*, 309 U.S. at 226.

204. *Swayne & Hoyt*, 300 U.S. at 307.

205. *Bradford Dyeing*, 310 U.S. at 343 n.9.

206. 314 U.S. 402 (1941).

207. *Gray*, 314 U.S. at 403–06.

fixing and tax provisions of the Bituminous Coal Act, Seaboard stood to lose a considerable amount of money because of the NBCC's decision.<sup>208</sup> The Court upheld the Commission's decision and seemed to retreat from the lax substantial evidence standard:

[T]he function of review placed upon the courts . . . is fully performed when they determine that there has been . . . an application of the statute in a just and reasoned manner. . . .

. . . .

. . . Unless we can say that a set of circumstances deemed by the Commission to bring [Seaboard] within the concept [of] "producer" is so unrelated to the tasks entrusted by Congress to the Commission as in effect to deny a sensible exercise of judgment, it is the Court's duty to leave the Commission's judgment undisturbed.<sup>209</sup>

Mere reasonability, not substantial evidence, was all that the Court required. Its justification of this standard was based on efficiency and expertise:

Congress . . . found it more efficient to delegate [the determination] to those whose experience in a particular field gave promise of a better informed, more equitable, adjustment of the conflicting interests . . . .

. . . .

. . . [This determination] calls for the expert, experienced judgment of those familiar with the industry.<sup>210</sup>

The Court toed a similarly deferential line in *NLRB v. Hearst Publications, Inc.*,<sup>211</sup> decided in 1944. *Hearst* involved the question of whether the "newsboys" who hawked Hearst newspapers on the streets of Los Angeles should be considered employees for the purposes of the National Labor Relations Act ("NRLA" or "the Act").<sup>212</sup> The Board said yes, thereby forcing Hearst to bargain collectively with them. Once again the Court established a profoundly deferential standard. If the Board's decision had a "'warrant in the record' and a reasonable basis in law," then the Court was required to uphold the Board's decision.<sup>213</sup> Thus, substantial evidence had become mere evidence alone—whether "the evidence establishes the material facts."<sup>214</sup>

208. *Id.* at 403 n.1.

209. *Id.* at 411, 413.

210. *Id.* at 411–13.

211. 322 U.S. 111 (1944).

212. *Hearst Publ'ns*, 322 U.S. at 113–15.

213. *Id.* at 131.

214. *Id.* at 130.

The Court's decisions in *Gray* and *Hearst* also showed an inclination to defer to agency decisions that went beyond simple factual findings. In each case, the Court deferred to agency determinations that certain factual findings fit within particular legal standards—what administrative law scholars call “‘mixed questions’ of law and fact.”<sup>215</sup> In *Gray*, there was no dispute that Seaboard obtained its coal from independent contractors who leased land and equipment from Seaboard.<sup>216</sup> Instead the issue was whether, as a matter of law, this type of arrangement made Seaboard a producer or not.<sup>217</sup> Similarly, it was not disputed in *Hearst* that the “newsboys” worked on commission.<sup>218</sup> The question was whether this type of employment relationship made newsboys employees for the purposes of the NLRA.<sup>219</sup> In each case the dissent argued that these were legal issues that were perfectly amenable to resolution by courts, which were more competent than administrative agencies in determining legislative intent.<sup>220</sup> The majority's response to this was quintessentially prescriptive. If the relationship between the legal standard and the facts at issue in the case could be determined through the use of expertise, then it should be. The majority in *Hearst* stated this position explicitly:

Everyday experience in the administration of the statute gives [the Board] familiarity with the circumstances and backgrounds of employment relationships in various industries . . . . The experience thus acquired must be brought frequently to bear on the question who is an employee under the Act. Resolving that question, like determining whether unfair labor practices have been committed, ‘belongs to the usual administrative routine’ of the Board.<sup>221</sup>

Most remarkable was the inclination of some New Deal-era courts to defer to these agency applications of fact to law, even when the law at issue was constitutional in nature. In the late 1930s, substantive due process might have been losing its potency, but free speech rights under the First Amendment were gradually becoming the subject of judicial protection.<sup>222</sup> Yet a

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215. 4 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 30.01, at 189 (1958).

216. *Gray v. Powell*, 314 U.S. 402, 407 (1941).

217. *Id.* at 403.

218. *Hearst Publ'ns*, 322 U.S. at 115–18.

219. *Id.* at 120.

220. *Id.* at 130 (Roberts, J., dissenting) (“The question who is an employee . . . is a question of the meaning of the Act and, therefore, is a judicial and not an administrative question.”); see also *Gray*, 314 U.S. at 417–18 (Roberts, J., dissenting) (arguing that there are limits to the extent administrative officers may determine legislative intent).

221. *Hearst Publ'ns*, 322 U.S. at 130 (quoting *Gray*, 314 U.S. at 411).

222. 2 MELVIN I. UROFSKY & PAUL FINKELMAN, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 719–25 (2d ed. 2002); Schiller, *supra* note 38, 51–74.

number of circuit courts thought it appropriate to defer to agency decisions that circumscribed free speech rights.<sup>223</sup> This practice was most apparent in the way the circuit courts treated the NLRB's decisions punishing employers for statements they made during union representation elections. Throughout the late 1930s the Board held most speech by an employer that was aimed at dissuading workers from joining a union to be an unfair labor practice, regardless of how temperate that speech was. The Board required employers to remain "strictly neutral" when a union attempted to organize their plant.<sup>224</sup> The Board rejected any claims that this doctrine of "strict neutrality" violated the free speech rights of employers.<sup>225</sup>

Though this doctrine aroused considerable controversy at the time, the circuit courts generally enforced the Board's orders.<sup>226</sup> In *NLRB v. Federbush Co.*,<sup>227</sup> the Second Circuit enforced an NLRB finding that the owner of the Federbush Company had committed an unfair labor practice by asking an employee "why he was turning against the firm by joining the union," which was "just a bunch of racketeers . . . trying to collect dues."<sup>228</sup> Writing for the panel, Learned Hand held against the employer. The opinion embraced the tenets of the New Deal-era, expert-based conception of policymaking. "The privilege of 'free speech,' " Hand wrote, "is not absolute; . . . a democratic society . . . cannot indeed live without it; but it is an interest measured by its purpose."<sup>229</sup> To the extent that the employer's speech coerced workers and interfered with their ability to arrive at an informed judgment, it was not protected by the First Amendment.<sup>230</sup> More importantly, it was the experts at the NLRB, not the courts, who were best equipped to determine whether a particular instance of employer speech was coercive:

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223. In addition to the NLRB cases that I recount in this and the next paragraph, courts showed great deference to speech-related administrative determinations of the FCC. Schiller, *supra* note 38, at 96–101.

224. See HARRY A. MILLIS & EMILY CLARK BROWN, *FROM THE WAGNER ACT TO TAFT-HARTLEY: A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS* 174–78 (1950).

225. Cf. Charles C. Killingsworth, *Employer Freedom of Speech and the NLRB*, 1941 *Wis. L. REV.* 211, 214–15 (discussing the Board's defense of this policy).

226. The various Board decisions and their reception in the Circuit Courts are nicely summarized in contemporary literature. See *id.*; *Recent Cases*, 54 *HARV. L. REV.* 330, 344 (1940); *Recent Decisions*, 18 *N.Y.U. L.Q. REV.* 574, 581 (1941). The Sixth Circuit was not as deferential as the other circuits. See *NLRB v. Ford Motor Co.*, 114 F.2d 905 (6th Cir. 1940). By the end of 1941, the Supreme Court upheld the Sixth Circuit's approach. *NLRB v. Va. Power & Elec.*, 314 U.S. 469 (1941).

227. 121 F.2d 954 (2d Cir. 1941).

228. *Federbush*, 121 F.2d at 955.

229. *Id.* at 957.

230. *Id.*

Arguments by an employer directed to his employees have . . . ambivalent character; they are legitimate enough as such, and pro tanto the privilege of “free speech” protects them; but . . . they have a force independent of persuasion. The Board is vested with power to measure these two factors against each other, a power whose exercise does not trench upon the First Amendment.<sup>231</sup>

Thus, Hand stayed within the role that courts had been assigned by New Deal-era legal theorists. He left any say over whether the First Amendment was violated or not to the experts at the NLRB.

### B. *The Fate of Crowell v. Benson*

The fate of *Crowell v. Benson* amidst these odes to expert administration is surprisingly unclear. At no point was the case overruled with triumphant references to the expertise of agencies. Yet the parade of horrors that Dickinson and like-minded reformers feared never came to pass. Instead, the federal courts treated *Crowell* as if it had never been decided, leading one commentator to title a 1940 article about jurisdictional facts *What Has Happened to Crowell v. Benson?*<sup>232</sup> Indeed, even with respect to the specific statute it purported to interpret, the Longshoremen’s and Harbor Workers’ Compensation Act, the decision became a nullity as the Supreme Court narrowed the definition of what a jurisdictional fact was under the Act out of existence.<sup>233</sup>

More importantly, from the perspective of the proponents of prescriptive government, *Crowell* never extended its tentacles into the administrative regimes they cared the most about—those created during the New Deal. This was not for lack of trying. During the 1930s, litigants whose interests were opposed to those of an agency cited *Crowell* as a justification for intense judicial review or to call into question the constitutionality of the statute creating the agency. The National Labor Relations Act was the most frequent, though not the only, target of this sort of attack.<sup>234</sup> Initially, litigants argued that the Act’s failure to provide for de novo judicial review of jurisdictional facts was an infirmity that rendered the statute unconstitutional.<sup>235</sup> Having failed with this argument (apparently the Court found the

231. *Id.*

232. Robert O. Klausmayer, “Jurisdictional Fact” Theory: *What Has Happened to Crowell v. Benson?*, 25 CORNELL L.Q. 274 (1940).

233. See GELLHORN, *supra* note 68, at 944 n.9.

234. For cases not involving the NLRB, see Brief for the Respondents at 47, *Fed. Power Comm’n v. Pac. Power & Light Co.*, 307 U.S. 156 (1939) (No. 508), 1939 WL 48653, and Brief for Appellants at 272, *Morgan v. United States*, 304 U.S. 1 (1938) (No. 581), 1938 WL 39110.

235. Brief for Jones & Laughlin Steel Corp. at 23, 31, 36, 102–03, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (No. 419).

argument to be so meritless that it did not even address it in its opinion),<sup>236</sup> litigants tried to deploy *Crowell* to require more stringent review of the Board's orders and to foreclose assertions that certain Board decisions were unreviewable.<sup>237</sup> As with the constitutional challenge, the Court rejected these arguments by simply ignoring them. In two cases the Court did not even bother to cite *Crowell*.<sup>238</sup> In a third, it relegated it to a footnote and bluntly distinguished it.<sup>239</sup>

Thus, by the early 1940s, judicial review of administrative action had coalesced into a single doctrine. What was once a confusing and incoherent area of the law had been simplified through the application of a cardinal principal of prescriptive administrative law: courts were to defer to administrative agencies. Prescriptive notions of public policy dictated that agencies must be free to apply their expertise to the issues before them without officious intermeddling by the judiciary. By the early 1940s, this dictate had become law.<sup>240</sup> Indeed, by the end of 1941, Roosevelt had appointed seven out of the nine members of the United States Supreme Court, as well as two-thirds of the judges sitting on the Federal Courts of Appeals,<sup>241</sup> many of whom had worked at the highest levels of various federal administrative agencies prior to their appointments.<sup>242</sup> By implementing doctrines that

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236. See *Jones & Laughlin Steel Corp.*, 301 U.S. 1.

237. Brief for Appellants at 27, *Am. Fed'n of Labor v. NLRB*, 308 U.S. 401 (1940) (No. 70) (accidentally referring to the case as *Cowell v. Benson*); Respondent's Brief at 27, 44, *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938) (No. 181); Brief for Respondent at 53, 64–68, *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938) (No. 706).

238. *Am. Fed'n of Labor*, 308 U.S. 401; *Mackay Radio & Tel. Co.*, 304 U.S. 333.

239. *Myers*, 303 U.S. at 50–52, 51 n.8.

240. Though they are outside the scope of this Article, New Deal–era courts tinkered with several other doctrines in a manner that insulated agencies from judicial oversight. For example, the Supreme Court used administrative expertise as a justification for an increasingly narrow conception of who had standing to challenge administrative action. See *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940); *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118 (1939). Similarly, the Court used the doctrine of implied preclusion to prevent judicial review of certain agency actions altogether. See *Switchmen's Union of N. Am. v. Nat'l Mediation Bd.*, 320 U.S. 297 (1943); *Am. Fed'n of Labor*, 308 U.S. 401. Finally, while the New Deal–era Supreme Court hardly pioneered a reading of the Due Process Clause that drew a distinction between common law rights, which triggered due process protection, and statutory privileges, which did not, it was not adverse to using the rights–privileges distinction to insulate administrative action from judicial review. See *Lynch v. United States*, 292 U.S. 571 (1934). Nor did the Court shrink from a narrow reading of the protections provided by the Clause when it was triggered. See *Yakus v. United States*, 321 U.S. 414, 431–43 (1944); *Phillips v. Comm'r*, 283 U.S. 589, 593–601 (1931).

241. By the end of his third term in 1941, Roosevelt had appointed thirty-six out of the fifty-seven judges sitting on the eleven circuit courts. 118 F.2d v-xi (1941). The identity of the president who appointed any given judge can be easily found on the Federal Judicial Center's website: [www.fjc.gov](http://www.fjc.gov) (last visited October 9, 2007).

242. A review of the 1940–41 edition of *Who's Who* reveals the following circuit court appointees with previous service within the federal administrative bureaucracy: Harold Stephens was an Associate Attorney General in the Justice Department, 21 WHO'S WHO IN AMERICA 2454 (Albert

minimized judicial involvement in the administrative process, Roosevelt's judicial appointees furthered the goals of prescriptive government. The "practical judgment" of agencies<sup>243</sup> had trumped the "sterile generalizations" of courts.<sup>244</sup> Saint George had vanquished the dragon.

#### IV. REMOVING A REFRACTIVE LENS: SOME CONCLUSIONS ABOUT NEW DEAL ADMINISTRATIVE LAW

In January of 1944, the United States Supreme Court decided *Federal Power Commission v. Hope Natural Gas Co.*<sup>245</sup> Like *Ben Avon*, *Hope Gas* was a rate-making case. The Federal Power Commission, which set rates for interstate natural gas sales, determined that Hope Gas's rate should be set based on a valuation of the company's property at slightly less than \$34 million.<sup>246</sup> Hope Gas contended that its rate-base was \$66 million.<sup>247</sup> The Commission and the company had differing opinions about "reproduction cost new," "trended original cost," and "accrued depletion and depreciation."<sup>248</sup> Unlike the Court in *Ben Avon*, these were disputes that the post-New Deal Supreme Court had no interest in resolving. Instead, the Court announced a profoundly deferential standard for reviewing rate-makings: "[T]he Commission was not bound to the use of any single formula or combination of formulae in determining rates," wrote Justice Douglas for the Court.

Its rate-making function . . . involves the making of "pragmatic adjustments." And when the Commission's order is challenged in the courts, the question is whether that order "viewed in its entirety" meets the requirements of the Act. Under the statutory standard of "just and reasonable" it is

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Nelson Marquis ed., 1940); Calvert Magruder was General Counsel for the NLRB and the Wage and Hour Division of the Department of Labor, *id.* at 1672; Jerome Frank was General Counsel of the Agricultural Adjustment Administration and a Commissioner on the SEC, *id.* at 968; Armisted Dobie and Thomas McAllister were Special Assistants to the Attorney General, *id.* at 780, 1729; Seth Thomas was the Solicitor of the Department of Agriculture, *id.* at 2553; and William Healy was General Counsel for the Farm Credit Administration, *id.* at 1209. Roosevelt's Supreme Court appointees had similar experiences serving in New Deal administrative agencies: Stanley Reed was General Counsel of the Reconstruction Finance Corporation as well as a Special Assistant to the Attorney General, *id.* at 2146; William O. Douglas was chair of the SEC, *id.* at 795; Frank Murphy was briefly Attorney General, *id.* at 1899; and Robert Jackson served in the federal administrative bureaucracy in a number of capacities including being both Attorney General and Solicitor General, General Counsel of the Bureau of Internal Revenue, and in various positions in the Treasury Department, *id.* at 1371.

243. LANDIS, *supra* note 84, at 33.

244. FRANKFURTER, *supra* note 109, at 236.

245. 320 U.S. 591 (1944).

246. *Hope Gas*, 320 U.S. at 596.

247. *Id.* at 597.

248. *Id.* (internal quotation marks omitted).

the result reached not the method employed which is controlling. . . . Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity.<sup>249</sup>

The Court was getting out of the business of second-guessing expert rate-making bodies. To do so was simply not compatible with the role that New Deal judges set for themselves; they refused to "substitute [their] opinions for the expert judgment of the administrators to whom Congress entrusted the decision."<sup>250</sup>

*Hope Gas* is the perfect bookend for the *Ben Avon* case. In 1920, federal courts picked through the minutia of the rate-making process. What methodology did the agency use? What assets should be included in calculating the rate-base? Were the values that the agency assigned the correct ones? By the 1940s the courts had abandoned the field, leaving agencies to set rates essentially unhindered by judicial oversight.<sup>251</sup> For historians studying the administrative state, the importance of this change in judicial attitude cannot be overstated. In the 1920s, the policy limiting the power and profits of the public utilities was refracted by both the agency that set the rates and the court that reviewed the rate-making. Each institution shaped the policy by imposing its own institutional values. Agencies emphasized expertise and, perhaps, a hostility towards the regulated, while courts emphasized legal norms, and, perhaps, a hostility towards certain types of regulation. By the early 1940s, one of those refractive lenses had been removed. The prescriptive impulses of the administrative state were no longer checked by the institutional prerogatives of the judiciary. The profound deference of New Deal-era administrative law was not to last long,<sup>252</sup> but it firmly defined the role of expertise in the administrative state and created the model of judicial deference that would be both emulated and reacted against as administrative law developed during the rest of the twentieth century.

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249. *Id.* at 602 (citations omitted) (quoting *Fed. Power Comm'n v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942)).

250. *Id.* at 615.

251. *See supra* note 193.

252. Courts became less deferent to agencies in the years following World War II. *See Schiller, supra* note 141; HORWITZ, *supra* note 22, at 213–46.

