Engineering the Modern Administrative State, Part I: Political Accommodation and Legal Strategy in the New Deal Era[1]

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Abstract

Administrative constitutionalism in the United States has been characterized by tension and accommodation. The tension reflects the unsettled nature of our constitutional scheme, especially with regard to separation of powers, and also the concern with agency discretion and performance. Still and all, we have accommodated administrative constitutionalism in fundamental ways, through a constitutional jurisprudence that, in the main, accepts broad delegations of regulatory power to the bureaucracy and an administrative law that oversees agency actions under procedural and substantive guidelines. This was not always the case. In this paper, part one of a larger project, we revisit the critical New Deal period to look at the strategies the Congress and the Supreme Court used to resolve controversies over the emerging administrative state. We see the political and legal accommodation as a product of a (mostly) coherent interbranch dialogue, iterative and fueled by strategy. Having surmounted some important roadblocks in the first New Deal, this effort ultimately resulted in a scheme that enabled the federal government to accomplish their three critical objectives: to deploy national power to solve new economic problems, to create delegations appropriate to modern needs, and to craft novel administrative instruments to carry out legislative aims – all of which required a due amount of legal accommodation, given extant legal doctrine and the interests of the courts.

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I. Introduction

How the modern administrative state emerged from the *sturm und drang* of politics on the one hand and the complex architecture of traditional legal doctrine on the other has long been, and remains, a central question for public law scholarship.[4] It is, to be sure, a subject which our leading legal historians have turned their great talents.[5]

[4] See, e.g., DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940 (2014); MORTIN HORWITZ, THE TRANSFORMATIOON OF AMERICAN LAW 1870-1960 216 (2002); G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 13-32 (2000); BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998); BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998); Mark Tushnet, *Administrative Law in the 1930s: The Supreme Court's Accommodation of Progressive Legal Theory*, 60 DUKE L.J. 1565 (2011); Reuel E. Schiller, *The End of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law,* 106 MICH. L. EV. 399 (2007); Laura Kalman, Law, Politics, and the New Deal(s), 108 YALE L.J. 2165 (1999); Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation,* 104 U. PA. L. REV. 1891 (1994).

[5] In addition to sources cited in n. 7 supra, see LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996); WILLIAM LEUCHTENBERG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT (1995). Moreover, the primary and secondary questions in this vein appear with more or less prominence in books and articles that focus on contemporary legal doctrine. For example, Gillian Metzger's recent Harvard Foreword recurs to the New Deal period to articulate anew the case for a well-fortified consensus view of the durability of administrative constitutionalism. Calling the administrative state "constitutionally obligatory," she notes that these legislative delegations of power to agencies "are here to stay." Gillian Metzger, *The Supreme Court 2016 Term Foreword: 1930s Redux: The Administrative State under Siege*, 131 HARV. L. REV. 1, 72 (2017). To be sure, the modern literature does not want for full-throated critiques of the administrative state, looking with particular ire at the world wrought by the New Deal's accommodation to broad administrative power. See, e.g., PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); D.A. Candeub, *Tyranny and Administrative Law*, 59 ARIZ. L. REV. 49 (2017); Richard A. Epstein, *The Perilous Position of the Rule of Law and the Administrative State*, 36 HARV. J. L. & PUB. POL. 5 (2013). However, the constitutional objections have largely been resolved in favor of administrative

Indeed, one does not have to be an originalist to see squarely the value of engaging the question of how we got here from there.

We revisit this evergreen topic here.[6] Our thesis is that we should view the engineering of the modern administrative state as an outgrowth of deliberate strategies on the part of purposive governmental actors, the president and those in Congress and in the courts. The quest – more or less successful in the end – was for a political and legal accommodation, one that would meet the interests and objectives of Congress while also maintaining an enduring role of the courts in overseeing the administrative process to ensure that this grand project would accord with the extension of the rule of law to cover regulatory agency policymaking. Like any such accommodation, there were elements of compromise, presaged by struggle and experimentation. A close look at critical eras in the history of regulatory administration, through the evidence of both legislative activity and judicial doctrine, is necessary to understand this accommodation and, with it, the evolution of the modern administrative state.[7] This is the larger project of which this focused look at the New Deal era is a part.

Scholars of the American administrative state continue to focus with special energy on the period beginning at the cusp of the New Deal,[8] continuing with the evocative New Deal controversies, in politics and in the Supreme Court,[9] and then into the period

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constitutionalism, and there is little reason to believe that even the most vigorous contemporary attacks on the "dark state" will unwind this situation. See Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe and Kagan on the Administrative State*, 130 HARV. L. REV. 2463, 2465 n. 5 (2017) (comparing administrative state skepticism to "believing in UFOs or watching dystopian movies"). See also EDWARD RUBIN, BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN ADMINISTRATIVE STATE (2005); Cass Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924 (2018).

[6] See text accompanying notes – infra (describing next stages in the project).

[7] We have explored some of these themes in Daniel B. Rodriguez & Barry R. Weingast, *The Reformation of American Administrative Law Revisited,*15 J. L. Econ. & Org. 782 (2015). See also Daniel B. Rodriguez, *Administrative Law,* in OXFORD HANDBOOK ON LAW & POLITICS 340 (K. Whittington ed. 2008))

[8] See ERNST, TOCQUEVILLE'S NIGHTMARE, supra, at 9-28 (describing the evolution of thinking from Ernst Freud through 1920's Felix Frankfurter); WHITE, CONSTITUTION, AT 103-08 (describing academic commentary about emerging agency power in the first two decades of the 20th century). For two especially important pre-New Deal analyses of the situation, see JOHN DICKENSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES (1927); Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614 (1927). Cuellar on "Procedures at War."

[9] See CUSHMAN, NEW DEAL COURT, supra, at 156-76;

leading up to the enactment of the Administrative Procedure Act (APA) in 1946.[10] Why does the New Deal warrant so much attention? This era is rightly seen as critically important in setting the conditions for the progress of the modern regulatory process.[11] Understanding the controversies over the nature and scope of administrative delegation and, as well, the proper performance of regulatory agencies, helps illuminate key themes in American constitutional development, and, likewise, themes in the administrative law.[12]

The literature lacks a compelling and unified story that ties together the so-called New Deal revolution in federal power and administrative constitutionalism with the emergence of meaningful administrative law in the 1930's and 40's. Instead, we have two more or less separate narratives, one focusing on the constitutional law struggles over the scope of the commerce power and the nondelegation doctrine and the other focusing on the newly emerging administrative law the two sets of events were unfolding simultanesously as part of a single political process.[13] The conventional constitutional law narrative takes us from the skepticism of pre-New Deal conservative commerce clause jurisprudence to the stark rejection of legislative delegation reflected in the National Industrial Recovery Act (NIRA) and then to the remarkable events of 1936-37,[14]

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[10] See Schiller, *End of Deference*, supra, at --.

[11] See ADRIAN VERMEULE, LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE 23-29 (2016); ERNST, TOCQUEVILLE'S NIGHTMARE, et. seq.

[12] Professor Schiller puts this point concisely: "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)." *The End of Deference*, 106 MICH. L. REV. at 406.

[13] We say "newly emerging" advisably, given what we know to be important elements of administrative law that happened before – in some respects, long before – the New Deal period. Jerry Mashaw's magisterial work on administrative regulation during the founding period is a useful and compelling antidote to the notion that administrative law was invented in the 1930's. JERRY MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF ADMINISTRATIVE LAW (2012). Still and all, we share in common with many administrative law scholars, perhaps beginning with Freund, continuing with Frankfurter, Landis and other wise exponents of an expanded form of administrative regulation, and continuing to scholars of the present day, who regard the 1930's as a seminal epoch in the development of both regulatory administration and administrative law. See HORWITZ, TRANSFORMATION II, supra; notes cited in n. – supra.

[14] See text accompanying notes – infra.

where the Court appears to shift course suddenly, from a stubborn rejection to an unequivocal embrace of New Deal regulatory power.[15]

The administrative law narrative is more opaque. Administrative agencies, emerging during the Progressive era,[16] grow in substance and in prominence in the 1930's. A long series of questions confronted the Supreme Court concerning the appropriate scope of agency power. This confrontation arose at multiple levels, including separation of powers, of fidelity to rules of fair agency procedure, and the scope of administrative agency power to find facts, apply law to facts, and to interpret statutes. In many ways, the signal case in this emerging New Deal administrative law is *Crowell v. Benson* (1932)[17] decided on the eve of the New Deal, where the Court took a

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[15] *See* EDWARD S. CORWIN, CONSTITUTIONAL REVOLUTION, LTD.73 (1941) (concluding that "the outcome of the election of 1936" was important "in inducing the Justices . . . to restudy their position"); WILLIAM E. LEUCHTENBURG, THE FDR YEARS: ON ROOSEVELT AND HIS LEGACY 223 (1995) (explaining that the Court "beat[] a strategic retreat . . . largely in response to the Court-packing plan"); ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 117 (6th ed. 2016) (stating that "[i]t is hard to doubt that" FDR's landslide victory in the 1936 presidential election and his court-packing scheme "played a part in the new tone of judicial decision that began to be sounded in the early months of" 1937); CARL B. SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT (1943); BENJAMIN F. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW (1942); BRUCE ACKERMAN, 2 WE THE PEOPLE: TRANSFORMATIONS 342–43 (1998) (suggesting that the Court in 1937 "eliminate[d] the risk of hostile Article Five amendment by unequivocally recognizing the constitutional legitimacy of the New Deal vision of activist government"); Jack M. Balkin, *The Court Affirms the Social Contract*, *reprinted in* THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS 11–12 (Nathaniel Persily et al. eds., 2013) (citing the 1937 "switch" as an example of how courts "legitimate the changes" in "the nature of the social compact"); Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69 (2010) (empirical analysis of Justice Roberts' move leftward during the 1936 Term); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 1057–58 (2000) (noting that the New Deal was a "time[] in history . . . when politics appeared to influence the Court, and may well have done so"); Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891 (1994). For a good survey of some of the more recent literature, see Barry Cushman, *The Jurisprudence of the Hughes Court: The Recent Literature,* 89 N.D. L. REV. 1929 (2014).

[15] *See* ACKERMAN, 2 WE THE PEOPLE, supra, at 42 ("all lawyers recognize that the 1930s mark the definitive constitutional triumph of activist national government").

[16] See, e.g., STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 1877-1920 126-31 (1982); Robert Rabin, *Federal Regulation in Historical Perspective*, 39 STAN. L. REV. 1189 (1986).

[17] 285 U.S. 22 (1932).

major step in favor of administrative power.[18] Other linchpins of the modern administrative state include *Schechter Poultry v. United States*,[19] *St. Joseph Stock Yards Co. v. United States*,[20] *Securities & Exchange Comm'n v. Chenery*,[21] and the *Morgan Cases*.[22]' In all these cases, *Schechter* included, the Court put forth standards for agencies to follow to ensure fidelity to an emerging conception of the rule of law in the administrative law.[23] This era, beginning with the New Deal and continuing to the enactment of the Administrative Procedure Act (APA) just fourteen years later,[24] defined for the years to come the acceptable nature and scope of administrative power under our American constitutional scheme.[25]

Seldom do scholars focus on the ways that these two lines of precedent come together; and rare is the book or article that endeavors to connect the blockbuster constitutional law movements of the New Deal period – what scholars from Edward

[18] See VERMEULE, LAW'S ABNEGATION, supra, at 25-29 (describing *Crowell* as a "sweeping attempt to mediate the conflict between law and the administrative state in general terms").

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[20] 298 U.S. 38 (1936).

[21] 318 U.S. 80 (1943) ("Chenery I").

[22] These refer to four cases decided by the Supreme Court within a half decade. See Morgan v. United States, 313 U.S. 409 (1941) (Morgan IV); Morgan v. United States, 307 U.S. 183 (1939) (Morgan III); Morgan v. United States, 304 U.S. 1 (1938); Morgan II); 298 U.S. 468 (1936) (Morgan I).

[23] Cutting matters off at the time of the APA is, to be sure, somewhat arbitrary. While we do not focus closely on post-APA developments in this paper, we do note that some of the more significant steps toward a "fair procedure" model of administrative law are the Supreme Court's decisions in Universal Camera v. NLRB, 340 U.S. 474 (1951) and other cases related to the standards of significant evidence and the meaning of on-the-record proceedings. In Part II of this project we will turn to these and other bellwether cases and illuminating steps in the development of post-New Deal administrative law.

[24] Pub. L. No. 79-404, 60 Stat. 237 (enacted June 11, 1946). On the origins of the APA, see George P. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NORTHW. L. REV. 1557 (1996).

[25] As Ernst summarizes this development: "Administrators exercised great discretionary power but only if they treated individuals fairly and kept within limits imposed by Congress and the Constitution." TOCQUEVILLE'S NIGHTMARE, supra, at 7.

Corwin[26] to William Leuchtenberg[27] to Bruce Ackerman[28] call a "constitutional revolution" – with the birth of modern administrative law. Yet, understanding the connections between New Deal constitutionalism and administrative law are essential to a deeper and broader understanding for the ways in which the courts, Congress, and the President worked to develop a structure of regulatory administration suited to the difficult economic and social problems that would come to characterize modern industrial society. Putting these political episodes and doctrinal developments into two separate boxes, one for constitutional historians and scholars and the other for the intrepid group of administrative law scholars has been counter-productive. Instead, we need to integrate these two separate stories.

Looking anew at this critical period in American legal development, we advance a thesis that navigates between the conventional externalist story and the internalist, court-centric story of public law's origins and impact during and after this era. The first story sees the ratification of broad Congressional power under the Constitution as a concession to external political pressure – an idea captured memorably in the phrase "a switch in time saved nine."[29] In this account, administrative power in the latter New Deal period and afterward was more or less inevitable; it followed in due course from the Court's caving in to political influence, a surrender that explains, too, the steady rise of administrative agency power and impact in the post-War period. This approach sees the epoch as a pitched battle between two views of American constitutionalism and administrative discretion and, thanks largely to the intervention of President Roosevelt and the defanging of the conservative resistance in the wake of these wave elections in 1932 and especially 1936, the winners enjoyed the spoils.[30] Needless to say, this story is abidingly zero-sum: will the Court triumph in forestalling the New Deal? Or will FDR and his progressive vision of a society prevail?

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[26] See EDWARD CORWIN, CONSTITUTIONAL REVOLUTION, LTD. 12, 64 (1941).

[27] See William E. Leuchtenburg, The Constitutional Revolution of 1937, in LEUCHTENBURG, SUPREME COURT REBORN, supra, at 213.

[28] ACKERMAN, 2 WE THE PEOPLE, supra, at 352-53.

[29] Whereby the switch in the voting of one justice turned a 5-4 majority against the New Deal into a 5-4 majority in favor of the New Deal, thereby forestalling FDR's threat to pack the Supreme Court. The quotation is associated with Professor Thomas Reed Powell. On Powell's contemporaneous evaluation of the Court in this era, see John Braeman, *Thomas Reed Powell on the Roosevelt Court*, 5 CONST. COMM. 183 (1988).

[30] For a contemporaneous, if somewhat breathless, depiction of this era that reflects a strong externalist perspective, see CHARLES P. CURTIS, JR., LIONS UNDER THE THRONE 1947).

The other story, sometimes called revisionist, is of more recent origins and, while less influential, does provide a different account of the Court's decisionmaking in the key constitutional cases. Richard Friedman[31] and Barry Cushman [32] propel a thesis that can fairly be seen as "internalist,"[33] that is, as insisting that the Court's decisions upholding in some circumstances federal authority under the Commerce Clause, then famously in the cases involving the National Industrial Recovery Act striking down federal legislation as unconstitutional delegations of legislative power,[34] and then finally upholding the linchpin statutes of the New Deal, can largely be explained on doctrinal terms.[35] This is not to say that external political factors were deemed irrelevant, but rather that it is a vast oversimplification to view these decisions as unmoored from doctrine and as merely political. From a doctrinal perspective, not all New Deal cases were alike. This observation provides the key to understanding the emergence of the political accommodation.

By contrast, the story of administrative law's emergence is more sketchy. Yet, here too an internalist/externalist dichotomy persists. For prominent administrative law scholars looking back at this period, including Louis Jaffe and Kenneth Culp Davis, as well as contemporary legal scholars,[36] the solutions to the difficult problems of administrative discretion lie in nuanced legal doctrine, building on, but not limited to,

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[31] See Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U.PA. L. REV. 1891 (1994).

[32] See CUSHMAN, NEW DEAL COURT, supra; Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201 (1994).

[33] Following the description by Kalman, *Law, Politics*, supra, at 2165-66, which she attributes to Cushman. See CUSHMAN, NEW DEAL COURT, supra, at 3-7. The dueling accounts of the standard and revised stories have been described as "a divide that has long separated historians of the New Deal: internalists who emphasize gradual doctrinal evolution, and externalists who emphasize the causal power of dramatic political events." Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 HARV. L. REV. 718, 728 (2016) (reviewing ERNST, TOCQUEVILLE'S NIGHTMARE).

[34] See text accompanying notes – infra.

[35] See text accompanying notes – infra.

[36] See, e.g., Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 69 OHIO ST. L.J. 251 (2008); Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1, 12-18, 53-66 (2000).

the fundamental architecture of the APA.[37] Judicial review would be the answer to the discretion conundrum; and this doctrine, viewed principally as judge-made,[38] would emerge as mechanisms to control and channel administrative power. The "externalist" perspective looks more skeptically at the avowed autonomy of law and legal doctrine.[39] It sees the answer to administrative discretion largely in political control and oversight.[40] Presaging the Supreme Court's opinions by four decades in seminal administrative law cases such as *Vermont Yankee*[41] and *State Farm*,[42] the *idee fixe* among externalists here is that agency discretion can be limited truly only by political interventions and structural limits.[43] Administrative law, in this account, is essentially politics by other means.[44]

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[37] This is the overarching theme of Professor Jaffe's classic treatise, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965). Professor Davis's comprehensive, albeit eccentric, treatise also valorizes the capacity of judges to supervise administrative agencies, and thereby properly channel and limit administrative discretion. See KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE, VOLUMES 1 & 2 (1971). See also DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES (1978).

[38] See John Duffy, *Administrative Law as Common Law in Judicial Review*, 77 TEXAS L. REV. 113 (1998); Daniel B. Rodriguez, *Jaffe's Law: Reflections on a Generation of Administrative Law Scholarship*, 72 CHI.-KENT L. REV. (1997).

[39] For a skeptical view of the role and motivations of the courts in reviewing administrative agency decisionmaking, see MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION (1988).

[40] See, e.g., Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243 (1999

[41] Vermont Yankee v. Natural Resource Defense Council, 435 U.S. 519 (1978).

[42] Motor Vehicle Manufacturers Ass'n. v. State Farm Mutual Auto Insurance Co., 463 U.S. 29 (1983).

[43] See, e.g., Kevin Stack, The Statutory President, 90 IOWA L. REV. 539 (2005); Elena Kagan, Presidential Administration, 114 HARV. L. REV. 2245 (2001).

[44] Lest we exaggerate this divide among what we are calling internalists and externalists in administrative law, a growing number of influential administrative law scholars are negotiating the political and legal elements of administrative law and looking at multiple mechanisms for controlling agencies. Some of the most important of this work is empirical in focus, and from this work we learn much about the actual structure and strategy of administrative agency performance. See, e.g., Jennifer Nou, *Subdelegating Powers*, 117 COLUM. L. REV. 473 (2017); Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137 (2014); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012); Anne Joseph O' Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889 (2008); Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383 (2004). A classic early statement of this reconciliation

We find neither the internalist nor externalist accounts of constitutional and administrative law as a satisfactory rendering of the complicated political and legal episodes of that key era.[45] Politics mattered, but so too did law and legal doctrine. We argue that Congress, the President, and the Supreme Court engineered the modern administrative state through a political accommodation in which each institution accomplished important objectives, albeit unsteadily and with the challenges emerging from legal constraints and the yin and yang of political and legal strategy. The success of regulatory administration in the New Deal and post-New Deal required deft legislative and presidential strategy. But it also required substantial legal innovation, that is, the development and application of new legal rules and guidelines that would thread the needle of endorsing broad, novel federal regulation while also ensuring that agencies would recognize and respect the rule of law. To be sure, administrative constitutionalism was not created from scratch during the New Deal;[46] nor was administrative law largely an invention of the Hughes Court.[47] However, the creation by Congress of new techniques for delegating administrative power along with new legal strategies to limit such power represented major advances. In just a few short years, we argue, the elements of modern administrative law emerged as a product of the mutual political accommodation engineered Congress, the president, and the courts during the constitutional controversies.

Despite the common metaphor in the literature of a pitched battle between opposing interests and stakeholders, we should recognize that New Deal constitutional controversies were not a zero-sum game, as the traditional externalist perspective holds. Rather, as we argue, it was a positive sum game in which each institution gained, but also compromised in key respects. Broad national power prevailed, to be sure. However, this power was conditioned on a number of important structural and

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between more internalist and externalist views is Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls over Administrative Action Affecting the Community*, 39 UCLA L. REV. 1251 (1992).

[45] Not that we are the first to undertake this effort. Ackerman characterized his effort as an effort to drop "the old and tired debate" between internalist and externalist perspectives. ACKERMAN, 2 WE THE PEOPLE, at 343. See Kalman, *Law, Politics*, supra, at 2166 n.4. In addition to Ernst, cited above, we note Mark Tushnet and Cass Sunstein as fellow travelers along this road to deconstructing the internalist/externalist debate and looking anew at the New Deal and the emergence of a new administrative constitutionalism. See Mark Tushnet, *Administrative Law in the 1930s: The Supreme Court's Accommodation of Progressive Legal Theory*, 60 DUKE L.J. 1565 (2011); Cass Sunstein, *Constitutionalism After the New Deal*, 100 Harv. L. Rev. (1987).

[46] See text accompanying notes – infra.

[47] See MASHAW, supra n. --; Rabin, *Federal Regulation*, supra, at --.

institutional arrangements. First, the Supreme Court provided Congress with something akin to a "how-to manual" to use in constructing lawful delegations of policy authority, a surprising and terribly neglected feature of Schechter, as we demonstrate. The linchpin New Deal statutes, especially the Wagner Act but also the Securities and Exchange Act and the Federal Communications Act all passed constitutional muster, due in no small part to the acquiescence by Congress to these judicial instructions. This acquiescence stands in stark contrast to the approach in writing NIRA in 1933, ill-conceived as a matter of both law and policy.

Second, the Court set out, albeit often tendentiously, criteria for an acceptable regulation of interstate commerce.[48] And while it is true that *Wickard v. Filburn*[49] would later establish a quite broad standard for what constitutes interstate commerce,[50] it is likewise true that Congress and their lawyers defending statutes in litigation proved able to develop criteria would satisfy courts that the regulation affected commerce, and was not merely an opportunistic use of a sort of national police power.

Third and finally, the Court developed important procedural criteria for agencies (acting under the rubric of statutory delegations) to follow in order to pass muster. The NLRA must be seen as a major innovation of the New Deal, instantiating the modern approach to regulatory administration. Canonical cases in administrative law – though cases that never really reach the attention of the great constitutional law treatises or casebooks – reflect well the compromise and accommodation reached between Congress and the judiciary in the area of regulatory administration. This accommodation was designed to enable agencies to function as energetic lawmakers and as faithful agents to legislators under parameters of political control while meeting intelligible standards limiting discretion and of due process. The triumphal externalist fails to capture the broad and striking evolution of doctrine, again as illustrated by the differences between NIRA and the NLRA. For these and other reasons, the traditional externalist story is an inferior way of understanding what actually happened and why it happened in the New Deal constitutional controversies.

Our project here is to fill two lacunae in the large literature, one concerning some key doctrinal developments in both constitutional law and administrative law, the other

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[48] See text accompanying notes – infra.

[49] 317 U.S. 111 (1942).

[50] See post-Wickard cases. See generally Richard Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987).

concerning a theoretical explanation – forged through the application of positive political theory (PPT)[51] – of the engineering of the administrative state.

In the next Part, we set the table for our discussion of the New Deal struggle by focusing on the context, political and legal, which the Court faced as it considered key New Deal statutes, in the first term of the Roosevelt administration – what is often labelled the "First New Deal" – and in cases beginning in 1935 term. In Part III, we consider the Court's constitutional analysis in two principal doctrinal areas, the nondelegation issue and the constitutionality of agency decisionmaking in the adjudicatory context.

The concluding Part IV explains how our thesis provides a meaningful new perspective on this well-trod subject, a perspective which helps us better to understand the political accommodation that undergirds the engineering of the modern administrative state. We also preview later work on this general subject.

II. Regulatory Administration at the Cusp of the New Deal

A comprehensive survey of the economic, social, and political history of the early 20th century as relevant context for the emergence of regulatory administration is well beyond the scope of this article. Historical exegeses on this period have usefully set the table and the terms of the debate.[52] What we can see clearly from the wide and deep historiography of the fifty years between the Progressive and New Deal eras is that our

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[51] See, e.g., Rui DeFiguerido, et al, *The New Separation-of-Powers Approach to American Politics*, in OXFORD HANDBOOK ON POLITICAL ECONOMY (D. WITTMAN & B. WEINGAST eds. 2006); Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the Civil Rights Act of 1964 and its Interpretation*, 151 U. PA. L. REV. 1417 (2003); Pablo Spiller, *A Positive Political Theory of Regulatory Instruments: Contracts, Administrative Law, or Regulatory Specificity*, 69 S0. CAL. L. REV. 477 (1996); McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 SO. CAL. L. REV. 1631 (1995); Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L.Q. 1 (1994); William Eskridge Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L. J. 523 (1992); McNollgast, *Positive and Normative Models of Procedural Rights: An Integrative Approach to Administrative Procedures*, 6 J.L. ECON. & ORG. 307 (1990); McNollgast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989).

[52] Cites Morton Kelley REGULATING A NEW ECONOMY; HOROWITZ, THE TRANSFORMATION OF American LAW, JAMES WILLARD HURST, LAW AND MARKETS IN United States HISTORY.

national political institutions, and especially Congress, worked deliberately, albeit with both successful and failed experiments, to craft appropriate administrative institutions to tackle the new and vexing problems that were arising in this rapidly changing nation. Fundamentally, the national government needed to expand its capacity to act effectively; and it needed to mobilize institutional strategies to carry out its developing objectives.[53] To understand the political accommodation over New Deal regulatory administration, we need to understand a bit about the predicament in both politics and law, and about the strategies emerging to tackle both systematically and simultaneously.[54]

In this Part, we frame the basic strategic issues facing Congress and the courts respectively. For Congress (and also the President), the question was how to construct a proper regulatory apparatus which would function to solve key problems in economic regulation. Solutions would lie in new administrative techniques, a new kind of bureaucracy. These strategies would build on key elements of the Progressive Era edifice, including the Interstate Commerce Act and its progeny, and also federal regulations in trade and food and drugs. However, new problems called for imaginative new architecture. For the courts, the heart of the dilemma was how to reconcile these new regulatory innovations with constitutional doctrine, particularly with regard to the commerce power and separation of powers.

A. The Emerging Administrative State and the Legal Landscape

The burden of defining the scope and contours of federal regulatory administration fell squarely on the shoulders of Congress. Yet, key legislative decisions took place here, as before and after, in the shadow of judicial review. This insight is critical to any positive political theory of legislation; and, indeed, is common sense. Congress could push its agenda only so far as courts were willing to permit.

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[53] See generally HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937 (1991); Harry Scheiber, *Federalism and Economic Order, 1787-1910*, 10 L. & SOC. REV. 58 (1975).

[54] While our analysis in this section does not represent a deep dive into the considerable historiography on law, economic development, and governmental capacity – again, a task beyond the scope of this paper – we are conscious of the extraordinarily rich work of the most prominent legal historians who have valuably looked at the nexus between legal doctrine, legal theory, and economic conditions. See, e.g., J. WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN NINETEENTH-CENTURY UNITED STATES (1959); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860; THE TRANSFORMATION OF AMERICAN LAW 1870-1960 (1992); Harry N. Scheiber, *Federalism and the American Legal Order, 1789-1910*, 10 L. & SOC'Y REV. 58 (1975).

The story of how the Court accommodated Congressional assertions of power under the Commerce Clause is well known; it is featured prominently in the constitutional law casebooks and treatises, and is a commonplace in the scholarly literature on emerging federal regulation in the period between the Progressive Era of the late 19th century and the conclusion of the New Deal. Less attended to are the two questions which are central to Congressional choices about the regulatory instruments it designed to implement federal economic and social policy during this era – first, the limits, if any, on the scope of federal delegation of power; and, second, the bureaucracy's power to make decisions in administrative adjudication. The commerce clause question is fundamentally different than these second two questions, for the former implicates constitutional rules concerning federalism, while the other concern the Constitution's separation of powers.

1. Delegation of power

A dilemma faced by Congress as it embarked on its task to regulate many parts of the economy in the pursuit of better market integration was how properly to structure legislative delegation. In one fundamental sense, that ship had sailed with the enactment of the Interstate Commerce Act in 1887, for there Congress had given an independent agency, the new Interstate Commerce Commission, broad administrative authority to implement the charges of the Act. And while the federal courts may well have been, as James Ely, Jr., puts it, "dubious about an administrative body that was an uncertain fit in the constitutional system as traditionally understood,"[55] no serious challenge was raised to Congress's authority to enact the statute under the Constitution. Indeed, the central question of the constitutionality of creating these so-called independent agencies would await 1935, when the Court decided *Humphrey's Executor v. United States*.[56]

Nonetheless, the Court did indeed grapple with matters of constitutional power in the three decades between the turn of the century and the New Deal. In *United States v. Grimaud*,[57] decided in 1911, the Court upheld the provisions of a federal statute which delegated certain powers to the United States Forest Service. This was not, said the Court, a delegation of legislative authority, a decision which would raise concerns under the Constitution's separation of powers, but the acceptable exercise of

[55] See James W. Ely, Jr., *The Troubled Beginning of the Interstate Commerce Act*, MARQ. L. REV. 1132 (2012).

[56] 295 U.S. 602 (1935).

[57] 220 U.S. 506 (1911).

administrative authority under the executive power in Article I.[58] As such, it was, as in *Field v. Clark*,[59] decided nearly two decades earlier, not an unconstitutional delegation of legislative power to the President.

The Court's most extensive treatment of the delegation issue came close to the New Deal era, when it decided *J.W. Hampton Jr. & Co. v. United States.*[60] The Court in 1928 considered the constitutionality of the Tariff Commission, an entity whose name is fairly self-explanatory in that it was created as part of a statute which accorded the President greater authority, acting through this commission, to impose tariffs in order to combat foreign powers' efforts to impose costs on American products. Significantly, the Commission was obliged to follow a series of administrative procedures, including a version of what would become "notice-and-comment rulemaking" in the APA enacted two decades later. In *Hampton*, the Court offers what to this time was the most comprehensive exegesis on the nature and scope of delegated legislative power. "*Delegata potestas non potest delegari*" (power may not be delegated) grandly declares the Court, noting that this maxim has force within the structure of our constitutional scheme of separation of powers. Legislative delegation of this sort is contemplated by our Constitutional system, for "Congress has found it frequently necessary to use officers of the executive branch within defined limits, to secure the exact effect intended by its acts of legislation."[61] And it can do so "by vesting discretion in such officers . . ."[62]

Critically, however, Congress cannot delegate to an administrative agency the discretion to make laws.[63] The legislature must set out the appropriate standards, and the executive branch (here the Court accepting without much reasoning that the

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[58] See id. et. seq.

[59] 143 U.S. 649 (1892). In *Field*, the Court considered a delegation to the president to set tariffs under the McKinley Act. "That congress cannot delegate legislative power to the president," said the Court, "is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution." See id. at 660. However, these actions by the President "was not the making of law," but rather empowered the executive branch to serve as a "mere agent" of Congress. Id. at 662.
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[60] 276 U.S. 394 (1928).

[61] Id. at 406.

[62] Id.

[63] Earlier 20th century cases in which the Court grappled with the question of proper constitutional delegation include United States v. Grimaud, 220 U.S. 506 (1911); In Union Bridge Company v. U.S., 204 U.S. 364 (1907), and Buttfield v. Stranaham, 192 U.S. 470 (1904).

implementation of regulation is to be regarded as quintessentially an executive function under Article I) is limited to effectuating Congressional purpose by executing these laws, a scheme of execution which is facilitated by a proper degree of discretion. The result turns on what the Court sees as basically a statutory fact, that is that "this Act did not in any real sense invest the President with the power of legislation, because nothing involving the expediency or just operation of such legislation was left to the determination of the President."[64]

Hampton is a strange animal. The Court's acceptance of Congressional action here does not turn in any real sense on a judgment about commerce power; nor does it really entail a firm elucidation of the separation of powers, that is, between what is a legislative versus an executive function. Rather, the Court waxes on about the extensive legislative guidance in the statute about its policy goals, the rationale for delegation to the President and specifically to the Commission to effectuate these goals, the vitality of the procedures embodied in the statute to guide the Commission's discretion, and, ultimately, its acceptance of the bargain struck by Congress to delegate significant regulatory authority to an administrative agency outside of its specific locus of authority. *Hampton* reveals most clearly the Court's judgment that the gravamen of the issue in these matters of regulatory choice of instruments and strategy is pragmatic and tethered to a vision of Congress as the play-caller or the composer – rather than, to mix up the metaphors a bit more, the quarterback or the orchestra conductor.[65]

So far as constitutional delegation is concerned, the Court's approach was rather formalistic, and even somewhat circular. That is, the matter of proper legislative delegation was considered through the lens of a constitutional ipse dixit: Did Congress delegate legislative power (unacceptable) or simply authorize the executive branch to implement public policy through the use of Article I executive power? If the latter, the delegation was appropriate – and, moreover, the executive maintained significant power to supervise these executive officers. If the former, the delegation would be unconstitutional, as it would represent the surrendering of its core functions to a non-legislative entity.

What remained critically uncertain, however, is how much guidance must Congress give to those entities who were exercising regulatory power under the rubric

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[64] 276 U.S. at 411.

[65] See Chester Krizek, *Administrative Law: Delegation of Powers; Constitutional Law*, 1 MARQ. L. REV. 56 (1928).

of the statute.[66] The formalism of the Court's "core functions" analysis obviated the need to consider this question carefully. And it would fall to the New Deal Court in the blockbuster trio of NIRA cases to resolve this question, a question necessary to answer in order for Congress to know how much flexibility it had in choosing the methods of regulatory structure and strategy.

2. Administrative agency decisionmaking

The relationship between courts and agencies in the years before the New Deal was, as legal historian Reuel Schiller notes, a "hodge-podge of different statutes and common law doctrines that could be used to challenge administrative actions."[67] In the main, administrative agency decisionmaking was cabined in important ways and what we have come to know as broad administrative discretion in agency fact-finding, to say nothing of rulemaking, was hardly known.[68] This was principally the result of the federal courts' rather strict demarcation of the line between what functions were properly for the federal courts and which functions could be delegated to agencies to adjudicate.

The Supreme Court's restrictions on agency rate-making authority, delineated just before the turn of the century in *Smyth v. Ames*,[69] and followed by later cases,[70] was one key means of limiting administrative power. At issue in this case was whether state rate-making regulation of *intra*-state railroad shipments could set rates at confiscatory levels, forcing railroads to raise long-haul rates to remain in business. State therefore had incentives to set confiscatory prices, forcing railroads to raise prices elsewhere in the system. Of course, if every state did that, the regulatory environment would be mess. *Smyth v. Ames* held that "a railroad company is entitled to exact such charges for

[66] Adrian Vermeule gives a cogent summary of the dilemma arising out of the Court's effort to synthesize the delegation view in *Field*, *Grimaud*, and *Hampto*n. "[T]he whole problem of delegation," he writes," is to navigate between Scylla and Charybdis." LAW'S ABNEGATION, supra,, at 52. That is to say, how to ensure that the delegate acts "within the bounds of the statutory authorization" when that authorization is exceptionally broad or vague. Id. As Vermeule notes, in an understatement, "the dilemma continues." Id.

[67] Schiller, *The Era of Deference*, 106 MICH. L. REV. at 407.

[68] "In the early decades of the modern administrative state, agencies typically proceeded not through rulemaking, but through case-by-case adjudication . . ." Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924, 1933 (2018).

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transportation as will enable it at all times not only to pay operating expenses, but also to meet the interest regularly accruing upon all its outstanding obligations and justify a dividend upon all its stock, and that to prohibit it from maintaining rates or charges for transportation adequate to all those ends will deprive it of its property without due process of law, and deny to it the equal protection of the laws." Further, "the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience."

The Court imposed additional restrictions in several other cases, for example, the Court's insistence in its 1920 decision in *Ohio Valley Co. v. Ben Avon Borough*[71] that, before any valuation decision was made in a rate-making proceeding, "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."[72]

Through these doctrines, the Court maintained a strong grip on administrative agency power. Agency discretion would exist under the rubric of judicial oversight and, as noted in the earlier delegation cases, only as an outgrowth of executive power under a formalistic reading of Article I.

This crabbed role of administrative agency function and discretion became the *bete noire* of New Deal-era legal scholars who championed a more robust role for the bureaucracy. In his magnum opus, The Administrative Process, James Landis noted the flawed syllogism at the heart of the court-centric view of regulatory administration.[73] "The insistence," Landis writes, "that the administrative process . . . must be subject to judicial review is to be explained in part, I believe, by economic determinism. But the deeper answer lies in our traditional notions of 'law' as being rules administered and developed by courts."[74] Landis wrote in the midst of the New Deal reorientation of the relationship between agencies and courts; yet his focus included, especially, pre-New Deal cases in which (generally in the rate-making context) the courts rejected administrative agency fact-finding where such facts would determine the outcome in disputes, requiring de novo judicial review to ensure that the final legal decisions would accord with the rule of law as guaranteed by the courts *qua* courts. Landis saw,

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[71] 253 U.S. 287 (1920).

[72] Id. at 289.

[73] JAMES LANDIS, THE ADMINISTRATIVE PROCESS (1938).

[74] Id. at 134. See the discussion in HORWITZ, TRANSFORMATION II, supra, at 222-25.

quite correctly, the success of New Deal administrative constitutionalism as requiring more discretion for agencies and thereby a more limited role for courts.[75]

The connecting logic from legislative delegation to agency discretion in regard to fact-finding was the unsatisfactory and unstable distinction between questions of fact and questions of law. That is, the severe restrictions on agency decisionmaking were a reflection of a worldview in which agency actions were interstitial and in which the principal locus of power in the federal government was Congress in policymaking and courts in adjudication. New Deal progressives knew that the bright line was an unworkable one, however. For example, Landis notes J.L. Dickinson's formulation in his 1927 treatise on administrative justice, quoting the long passage that begins with "[i]n truth the distinction between 'questions of law' and 'questions of fact' really gives little help in determining how far the courts will review; and for the good reason that there is no fixed distinction."[76] From this instability, Landis insists that agency discretion in adjudicatory decisionmaking must be broadened and, to the doctrinal point, must be unmoored from the narrow and formalistic approach characteristic of pre-New Deal administrative law.[77]

The largely forgotten tussle over pre-New agency adjudication reveals well the tensions that greeted New Deal reformers, in Congress and in the White House, as they grappled with solutions to growing problems of market integration, state capacity and, of course, the Great Depression. Without a more robust scheme of agency adjudicatory authority, conflicts over the implementation of regulatory statutes would fall into the laps of courts, ill-suited by procedure (and perhaps also by temperament, given the

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[75] And also independence from the President, a key – as Adrian Vermeule describes it, *the* key – element of Landis' argument for emboldened agency governance. Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463, 2467-70 (2017).

[76] J.L. DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 55 (1927), quoted in J. LANDIS, ADMINISTRATIVE PROCESS at 145.

[77] Landis was not alone in this sentiment. Professor White describes Frankfurter's sense of the issues at stake in the controversial growth of regulatory administration and agency power. Like Landis, he saw these issues grounded in emergent views of separation of powers. Indeed, as White writes, "the reframing of essentialist separation of powers jurisprudence was crucial, Frankfurter believed, to the development of administrative law." WHITE, CONSTITUTION, supra, at 106. Legal historian William J. Novak highlights the career of Frank J. Goodnow and his work on administration, work which "laid the groundwork for the jurisprudential transition from nineteenth-century conceptions of the powers and uties of office-holders to modern administrative law." Novak, Legal Origins, supra, at 271 (referring to FRANK GOODNOW, SOCIAL REFORM AND THE CONSTITUTION (1911)). See also HORWITZ, TRANSFORMATION II, supra, at 224-25 (describing the influence of Goodnow on pre-New Deal administrative law).

times?) and limited by the impact they could hope to have through case-by-case dispute resolution. Greater use of rulemaking was the natural answer, to be sure, however, the legal foundation of the rulemaking revolution would await evolution in administrative structure, the enactment of the APA, and the constructive support of the federal courts in fashioning administrative law which facilitated this novel device for regulatory administration. In the first third of the 20th century, the matter of agency authority through adjudication was critical and persistently complicated by old doctrines and separation of powers squeamishness. It would take bold actions by the Supreme Court, and a studied attention by a purposive Congress, to generate meaningful reform in the direction of more capacious administrative power.

B. Summary

As the regulatory bureaucracy came up to the New Deal, important new economic circumstances emerged, Congress faced a formidable challenge in creating mechanisms to address the new circumstances through administrative delegation. To fit under the commerce power of the Constitution's Article I, Congress needed to convince the Court that the regulation of certain activities within a state would ensure the protection of commerce's stream. There was, to be sure, support in the Court for this rationale, but the burden fell nonetheless on Congress to make the connection between its regulatory choices and the Constitutional requisites. Further, the delegation issue under the Constitution looked fairly surmountable, as the Court had approved broad delegations, subject onto to the condition that Congress not attempt to delegate its core lawmaking functions, thus going beyond what the Constitution's separation of powers requires. Yet, the Court had yet to face the circumstance of a delegation so broad that the fundamental policy choices was made by government officials outside of the four corners of Congress. At bottom, the Court had still not squarely address the question of what standards and guidelines in the statute are absolutely necessary to ensure that the agency to which Congress had delegated broad regulatory authority is acting within the scope of the Constitution? So, as Congress would learn painfully, this question of precisely what ex ante statutory guardrails are required was not yet answered as the 73rd Congress embarked on its bold New Deal tasks.

Finally, the answer to the question of when and in what circumstances agencies could, in adjudication, find facts and reach determinations under the rubric of legislatively delegated authority was surprisingly elusive by 1932. The ICC, the FTC, and other Progressive Era agencies enjoyed broad adjudicatory powers, including the power to set just and reasonable rates and to find that companies had engaged in unfair trade practices. However, these decisions were ubiquitously reviewable by federal

courts and, as one case after another made clear, through de novo review. While such judicial oversight did not suffice to eradicate the worry of influential commentators, including Roscoe Pound[78] and, in an earlier era, the great Oxford don, Albert Venn Dicey, writing in the 1880's, that the bureaucracy would run amok,[79] administrative discretion was steadily becoming hard-wired into our governance firmament. The looming question, which would be addressed meaningfully in lodestar cases during the 1930's and 40's, was how to balance the need for ever greater discretion with the Constitution's demands for separation of powers and the rule of law.

One final note before turning next to the New Deal: We should be wary of just embracing the simple observation that the Court's reticence during the pre-New Deal period to put its rubber stamp on legislative delegation to agencies and to the expansion of administrative governance was the product of deep conservative impulse and agenda. True, judges and justices appointed by a long series of Republican presidents. dominated the federal courts. And it is further true that prominent voices opposed the expanding bureaucracy.[80] However, we should not overlook the fact that the acquiescence to, if not the exact endorsement of, national regulatory power is found in many instances in the legal doctrine of the period. Indeed, the Court had crossed a major bridge in declining to rule unconstitutional major instances of social and economic regulation, including the ICA, the Pure Food & Drug Act, the Federal Trade Act, the Railway Labor Act and others. Without doubt, the major expansion of the federal government's constitutional authority to regulate the economy would await the canonical cases of the New Deal era, some of which we will discuss in the next Part. But we should not exaggerate, with the hyperbole often accorded to the "four Horseman" of the pre-New Deal Court, the conservatism of the Court's approach to the bureaucracy in the period leading up to the New Deal. The evidence suggests that the story is considerably more complex and not reducible to a purely internalist or externalist explanation.

Nor should we neglect the fact, as we will discuss further in the remainder of this Article, that the judiciary has institutional interests that go beyond merely instantiating

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[78] On Dean Pound's perspectives on the administrative state, see the comprehensive discussion in ERNST, TOCQUEVILLE'S NIGHTMARE, supra, at 107-38. See also HORWITZ, TRANSFORMATION II, at 218-19.

[79] See A.V. DICEY, THE LAW OF THE CONSTITUTION (8TH ed. 1923).

[80] See the discussion of New Deal era critics of the administrative state in Metzger, Foreword, 131 HARV. L. REV. at --.

ideological preferences.[81] Much of the Court's reticence to go all in on bureaucratic discretion, including before, during, and after the New Deal stems from the reluctance to abdicate power. This reluctance is independent of ideological commitments, and we see it manifest in relevant forms and fashions in the Court's decisions involving regulatory agencies. Landis and Frankfurter well understood this and, more than others, saw the struggle as going beyond a left/right divide. They saw it is a conflict between two critical, and stubborn, institutions, each configured to check one another and, in that, each invested in maintaining significant, durable institutional power. Indeed, the thesis of this article, a thesis we will detail more fully in the next Part, is that both Congress and the courts worked together purposively toward a political accommodation, one which would ensure that the modern administrative state would function meaningfully and efficaciously in order to address various new wicked problems, while also ensuring court supervision of agency's respect for citizen rights.

III. Accommodating the Emerging Administrative State: the New Deal Synthesis

"T]he arc results from the law working itself pure. It is not that the law was overcome by external force . . . The unfolding logic of deference in administrative state represents, not a triumph of force over reason, but a flowering of reason."[82]

The conventional view sees the New Deal relationship between elected officials and the Supreme Court as a zero sum game: the central question was, would the Supreme Court acquiesce or fight the New Deal? This approach divides the period into two parts: First the Court slams Congress and the President by invalidating key pieces of the New Deal agenda. These bold judicial decisions put the new administrative state in peril.[83]

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[81] See text accompanying notes – infra.

[82] VERMEULE, LAW'S ABNEGATION, at 24.

[83] As Professor Ackerman views the matter, these decisions were the dying gasps of the "Old Court," and its "continued war on the liberal welfare state." ACKERMAN, 2 WE THE PEOPLE, supra, at 337. Even among the externalists, this is an extreme view, one eliding the more complicated picture of commerce clause jurisprudence in the period between 1887 and 1935. As Kalman wryly observes, Ackerman, in this rendering "has proven even more externalist than the externalists." Kalman, Law/Politics, 108 YALE L.J. at 2170.

Less than two years later, with overwhelming support of the people manifest in the elections of 1936, an emboldened President threatened to pack the Court. The Court, in response, retreated from its approach and proceeded in one case after another to uphold New Deal legislation against constitutional challenge.[84] With this retreat, the essence of modern regulatory administration is ensured, and, per the zero sum assumption underlying this view, the war is won. In a similar vein, commentators see the Court's embrace of agency adjudicatory power in *Crowell* as a decisive victory for administrative power.[85] It vindicates Landis's view that agency decisionmaking must be freed from the shackles of pre-modern constitutionalism and of presidential politics.[86] New Deal decisions by the Hughes Court are key to both of these explanations; and, although the mechanisms are fundamentally distinct, they are key as well to the more internalist explanations.

The reality, we suggest, is a good deal more complicated. A thorough explanation requires more nuance than that provided by either of these black-and-white, zero sum views. The externalist view is woefully undertheorized, lacking an explicit theory of legislative-judicial relations,[87] and, moreover, cannot explain the contours of the judicial

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[84] See CUSHMAN, NEW DEAL COURT, supra (detailing all the major cases).

[85] But one which, on the face of the opinion, seemed to equivocate profoundly on the matter of administrative discretion, given the integral role it accorded to the judiciary in reviewing de novo jurisprudential and constitutional facts. Two prominent commentators at the time, both of which would do so much to advance the agenda of administrative constitutionalism, expressed grave concerns about Crowell at the time it was decided. As Schiller notes, "*Crowell v. Benson* became something of a bete noire for the proponents of prescriptive government." Schiller, *Era of Deference*, 106 MICH. L. REV. at 411-12 (summarizing the views of Dickinson and Frankfurter).

[86] See Vermeule, *Bureaucracy and Distrust*, 130 HARV. L. REV., supra, at 2466-70.

[87] Although, to be fair, Barry Friedman's extensive elaboration of the Court's jurisprudence in an articulated theory of judicial fidelity to politics is theoretically sophisticated, if incomplete. See BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2010); *Countermajoritarian Difficulty*, Part Four, supra. Its incompleteness, which hopefully will become more clear as we discuss the Court-Congress dialogue below, is that it does not explain how the Court impacts Congressional choices through strategic use of doctrine. While not here claiming that the PPT account is the only plausible theoretical model for explaining this dynamic relationship, it does highlight the importance of drawing a positive theoretical connection between what Congress and the Supreme Court has done and why they have done so. The political science literature on the relationship between law and politics, perhaps beginning with Corwin, has struggled with this challenge. [Cites] And while this article is not the place to adumbrate the full value of a PPT account of the judicial-legislative dialogue, we feel confident in saying that a full picture of the mechanisms of legal change and adaptation requires attention to theory.

doctrine in the relevant cases.[88] And purely internalist explanations are wanting here, as elsewhere, in that they more or less ignore politics. How else are we to interpret the judicial skepticism first and the accommodation next? And how should we see the Court's developing administrative law in pre-APA cases in light of the conditions of emergent administrative government and of political strategy? These questions cannot be answered by either of the rigid internalist and externalist views.

That said, our claim is ultimately limited. We cannot reject whole cloth the assessment by generations of legal and political historians that the Court's move to the Left in this space was influenced by decisions made and threatened by President Roosevelt; nor do we reject the revisionist view associated with the important new scholarship of Barry Cushman, Richard Friedman, and Daniel Ernst that the Court was fashioning their approach around emerging doctrinal categories and considerations. Rather, our aim is to contextualize the three central elements of jurisprudence of this era – commerce power, delegation, and the adjudicatory authority of agencies – around a perspective that sees both Congress and the judiciary as focused on implementing their own objectives through strategic choices and under conditions of constraint (economic and legal).

As we show, the interaction of the courts and elected officials in the New Deal was not zero sum, but positive sum: both sides had something to gain. And part of the acquiescence of the Supreme Court reflected the New Dealers' acceptance of the Court's conception of the requirements of due process, thereby maintaining the integrity of the judicial system and allowing the courts to police the government's regulatory system.

A. Legislative ambitions and strategies in the first New Deal

The New Deal began with a flourish as the newly-elected Franklin D. Roosevelt announced in his inaugural address that he was "prepared under my constitutional duty to recommend the measures that a stricken Nation in the midst of a stricken world may require."[89] He went on to say that "[t]hese measures, or such other measures as the

[88] The most important empirical study of the "switch in time," using sophisticated analytical methods, is Ho and Quinn, *Switch*, 2 J. L. ANALYSIS, supra n.2. They conclude that that Justice Roberts switched his vote, in that he moved suddenly leftward during the OT1936 Term. While congruent with the "externalist" thesis, this dense empirical paper does not express any sympathy (or lack of sympathy, for that matter) for the underlying political influence story. That is to say, accepting the fact of Roberts' change in voting behavior is equally consistent with a view that indicates external influence as with the view that he was suddenly persuaded by arguments in this Term's cases. We discuss the implications of Ho & Quinn for our analysis, in n. – infra.

[89] FDR's First Inaugural Address, January 1933. [Cites]

Congress may build out of its experience and wisdom, I shall seek, within my constitutional authority, to bring to speedy adoption. . . ."[90]

President Roosevelt and the Democratic Congress soon recognized that they needed to rely on the administrative state to help rescue the nation from the Great Depression.[91]

The focus on the administrative state was borne of a steadily increasing confidence on the part of progressive scholars and public intellectuals that regulatory administration through a more imaginative use of the bureaucracy and bureaucratic power was important, and perhaps even essential, to the successful implementation of public policy.[92]

The overwhelming vote of the American people for the Democratic Party in the 1932 election reflected a faith in the President and in Congress to establish instruments of governance appropriate to the conditions of economic and social life.[93] These instruments emerged not only from political expediency, but also from a growing enthusiasm for the bureaucratic state and the utility of administrative agencies to implement legislative objectives and thereby steward the political near-consensus for an

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[90] See id. at --.

[91] The historiography of the New Deal is vast. We base our account on the classic treatments, including IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME (2014); DAVID KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-1945 (2001); ALAN BRINKLEY, THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR (1996); MICHAEL E. PARRISH, ANXIOUS DECADES: AMERICA IN PROSPERITY AND DEPRESSION 1920-1941 (1992); WILLIAM J. LEUCHTENBERG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL (1963); ARTHUR M. SCHLESINGER, JR., THE AGE OF ROOSEVELT: THE POLITICS OF UPHEAVAL (1960).

[92] Morton Horwitz summarizes the shift in focus and in strategy among liberal reformers: "As the Progressives disenchantment with the competence of courts to perform social engineering tasks combined a loss of faith in the sensitivity of judges to questions of social justice, the effort to replace courts with administrative experts became more pronounced." HORWITZ, TRANSFORMATION II, supra, at 225.

[93] On the significance of Roosevelt's election of 1932 to the expansion of the administrative state, see Metzger, *Foreword,* 131 HARV. L. REV at 52 ("FDR's election and enactment of the broad regulatory statutes of the New Deal thus was not a sudden move to administrative government, but it did represent a significant intensification"). See also William J Novak, "The Legal Origins of the Modern Administrative State," in LOOKING BACK AT LAW'S CENTURY (Austin Sarat, et al eds. 2002).

activist national government.[94] Early in the development of New Deal regulatory strategy, a number of key regulatory agencies emerged as the template of legislative delegation and administrative expertise, including the National Labor Relations Board,[95] the Securities & Exchange Commission,[96] and the Federal Communications Commission.[97] The essence of New Deal regulatory administration can be found in these three cornerstone agencies, and in the regulatory apparatus they spawned. However, this strategic template did not come into the picture until a major legal snag was revealed and handled ultimately by the interaction of the Supreme Court with elected officials, negotiating a solution to the problem of the delegation of regulatory authority to bureaucratic agencies. The snag emerged with the implementation of the National Recovery Administration and the regulatory structure developed in the legislative centerpiece of FDR's first hundred days, the National Industrial Recovery Act (NIRA).[98]

When we look back at the controversy involving the NIRA, we need to understand the contours of presidential, congressional, and judicial interests and strategies. So far as President Roosevelt was concerned, we could plausibly view the NIRA as just a bold version of what presidents from Woodrow Wilson to the present had viewed as a strong executive implementing a Progressive vision of legislation and regulation.[99]

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[94] This faith had its origins to some degree in the experimentations and insights of the Progressive Era, where Congress and the President worked in tandem to establish a more coherent conception of expertise and governance through administrative mechanisms.[94] We agree with Adrian Vermeule that the juxtaposition famously drawn between the so-called classical Constitution and the new regulatory state is naïve. "The classical Constitution of separated powers, " writes Vermeule, "cooperating in joint lawmaking across all three branches, itself gave rise to the administrative state."[94] The seeds for 20th century regulatory administration were indeed planted by our Constitutional scheme of government. Still and all, the New Deal period is notable for its statutory innovations, and for its more fulsome grappling with the implications of expanding bureaucracies for the rule of law and the decisionmaking responsibilities and authorities of Congress and the President. It is through the New Deal and key judicial decisions that these issues began to be more systematically worked out.

[95] See JAMES A. GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD: A STUDY IN ECONOMICS, POLITICS, AND LAW VOLUME 1 (1933-37) (1974).

[96] See JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET (2003).

[97] See Patricia Figliola, *The Federal Communications Commission: Current Structure and its Role in the Changing Telecommunications Landscape*, CONGRESSIONAL RESEARCH SERVICE (August 1, 2018)
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[98] See text accompanying notes – infra (describing NIRA)

[99] See generally WHITE, CONSTITUTION, supra, at 104-07.

Before Landis's magnum opus on the administrative state in 1938,[100] influential Progressives, such as Felix Frankfurter, had already been explicating a muscular version of regulatory administration, molded by ambitious presidents and free from political turbulence.[101] Likewise, Congress was steadily expanding the scope of regulation through blockbuster statutes going back two decades before the New Deal.[102] Congress was a willing and critical ally in presidential tactics of expanding the national regulatory footprint. Indeed, Congress was anxious to craft novel regulatory strategies, as evidenced by its important efforts in the years just preceding the New Deal, including the statute that was the subject of the Court's Crowell decision, the Longshoremen's and Harbor Workers' Compensation Act (LHWCA).[103] And it worked quickly in the first Hundred Days of the Roosevelt administration, a period labelled the "First New Deal."[104]

B. Courts, Congress, and the Dialogue

What does the judiciary care about with regard to these evolving regulatory strategies? And how do they manifest their interests in their decisions? This question is critical for understanding the Supreme Court's actions in this period of study. Yet it gets remarkably little attention. Recalling the dichotomy in the traditional literature, either the courts are viewed as mere reactors to political influence – essentially following the election returns, as Mr. Dooley quipped – or they are viewed as autonomous oracles, developing and applying doctrine.[105]

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[100] SEE LANDIS, ADMINISTRATIVE PROCESS, supra.

[101] See FELIX FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT (1930). See Tushnet, 90 DUKE L.J. at 1568-76.

[102] As we discussed in Part II.

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[105] In this latter, internalist account, we could see the Court as acting as faithful agents to the rule of law, and doing their best to implement legal principles or we could see the Justices as acting in accordance with their own ideologies, and using their opinions as a fig leaf to mask their true motives. This debate between the so-called attitudinalist model of judicial behavior and what has been called the legal model continues to rage. See generally HAROLD J. SPAETH & JEFFREY SEGAL, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2001). A We say nothing here by way of interrogating these two models; whether or not it is one or the other is not critical to the internalist explanation, at least as we

The Court implement meaningful legal strategies in their consideration of these novel regulatory mechanisms enacted via statute or administrative order. And it is important to look, first, at what the Court does and say; and, next, at why the justices decide the way they do. Broadly speaking, we see the Supreme Court as engaging in a dialogue with the legislature. In this dialogue, as viewed through the lens of PPT, neither branch truly has the last word.[106] The dialogue is iterative and strategic and can be viewed, at least in a stylized sense, as a game involving two purposive actors, designing and implementing strategies in a system structured by certain rules and practices.[107]

The judiciary's strategies, as we will see as we consider these cases in more detail in the next section, reflected important concerns at two levels: First, they evidenced caution in exercises of Congressional and Presidential power, especially bold new initiatives.[108] And, second, they were skeptical about the exercise of administrative power by agencies, and they therefore created an approach that could be, and indeed was, viewed as intrusive and formalistic.[109]

Viewed through this lens, we might see, as the conventional wisdom of the "switch in time" emphasizes, the Supreme Court as distrusting of administrative agency power and just standing at the ready to strike down the efforts of a collaboratively leftist president and Congress to expand regulatory power. Yet this simplistic confrontation view, originating with FDR for his own political purposes, does not jibe with the evidence. Rather the Court was reasonably deferential to administrative agency power in the years leading up to the New Deal. As White notes, "on the whole, the Supreme Court had been relatively receptive to federal agencies in the years between the 1906 Hepburn Act and early 1930."[110] The situation with respect to administrative agency

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consider it here. That said, Cushman and others pushing internalist explanations seem to accept that judges are acting as faithful agents, within the scope of rule of law constraints.

[106] See De Figueredo, New Separation-of-Powers, supra; see also Brian A. Marks, A Model of Judicial Influence on Congressional Policymaking: Grove City College v. Bell, 31 J.L. ECON. & ORG. 843 (2012).

[107] See sources cited in n. – supra. See generally WILLIAM H. RIKER & PETER ORDESHOOK, AN INTRODUCTION TO POSITIVE POLITICAL THEORY (1973).

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[109] See, e.g., LANDIS, ADMINISTRATIVE PROCESS, supra, at --.

[110] WHITE, CONSTITUTION, at 108.

adjudication was, to be sure, more complicated.[111] But the notion that the Supreme Court acted decisively in the period preceeding Crowell and after the Second New Deal to rubber stamp agency decisionmaking is seriously misleading.

The better assessment is that the dialogue between Congress, the Court, and administrative agencies continued apace in the years during and after the New Deal. No case was the last word, neither the lodestar cases upholding legislative delegations nor the cases deferring to administrative orders in adjudication. Rather, Congress took account of judicial directions about how best to create acceptable statutes; and courts maintained institutional power. As to the latter, it is important to see the judiciary as an institution with interests and objectives. Courts act with strategic purpose as do legislators, the president, and agencies.

Moreover, the Court saw agency decisionmaking, particularly within the realm of adjudication (noting that rulemaking on a broad scale was still a fairly rare phenomenon at the time of the New Deal), as potentially in tension with the work of the judiciary and, perhaps even more critically, in a manner that looked rather alien to judges. "Judges," notes Daniel Ernst, "readily assumed that norms of due process that had been worked out in the courts ought also to govern the 'quasi-adjudication' of administrative agencies, and they condemned administrators who violated these norms."[112]

That the Supreme Court cared deeply about these issues was manifest in how they reviewed cases involving agency adjudication, as we will explore more fully in Section B of this Part. And it is of a piece with what we observe with respect to judicial decisionmaking in a large swath of cases involving regulatory administration, including the prominent cases involving procedural due process in the 1970's and beyond and in the hard look cases of a later period in administrative law. As a bridge to our discussion of concrete judicial doctrine and strategy in the remainder of the paper, we here pull back the lens to say some more about the motivations and objectives of the Court in carrying their review function.

First, judicial scrutiny of regulatory choices made by Congress through statute is very limited. Once federal authority to regulate under Article I is established, the courts have precious little basis to evaluate the techniques Congress employs to ensure that the bureaucracy will implement legislative objectives. Leaving aside the critical issue of

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[111] See text accompanying notes – supra.

[112] ERNST, TOCQUEVILLE'S NIGHTMARE, at 2. Ernst summarizes the compromise thusly: "Administrators exercised great discretionary power but only if they created individuals fairly and kept within limits imposed by Congress and the Commission." Id. at 7.

whether or not Congress or the agency has violated the Constitution, the question of Congressional choice of regulatory instruments is essentially one of separation of powers. Has Congress intruded on a power reserved to another branch of government? In the context of the New Deal regulatory strategies of Congress, courts stood ready to protect the Constitution's separation of powers through its responsibility to interpret the Constitution. So, one element of the Court-Congress dialogue – the Court's protection of the separation of powers – emerges directly from our constitutional practice of judicial review.

Second, Courts care about their own sphere of authority and practice, and they look hard at whether and to what extent a regulatory schema, in design or in practice, impinges on the rule of law. This incentive cannot easily be captured in either an internalist or externalist lens. That is, the Court's protection of the rule of law is related to a sense of institutional responsibility to protect rule of law values, a view that perhaps predates the Constitution, but is certainly embedded in our conception of judicial power and limited government. Moreover, it is part of a cogent, purposive strategy of the Court to ensure that its critical role in governance is protected. We should understand the Court's objectives as connected to rule of law fidelity in both of these senses and for both reasons described here. Of course, a major unanswered question in the first half of the 20th century concerned how to extend the rule of law to the administrative state.

Third, and finally, the Congress-Court dialogue is carried out in an environment in which neither institution truly has the last word.[113] The Court can rule on the matter of statute's constitutionality and, if holding that it violates the Constitution, Congress may take another bite at the policy apple by enacting a statute that cures these constitutional defects. And this effort is, too, subject to judicial scrutiny (to say nothing of judicial statutory interpretation). As we will explore in considerable detail below, Congress's efforts as the first New Deal transitioned to the second New Deal period (1935-1936) were designed to meet the Court's objections and therefore to overcome constitutional obstacles to Congress's regulatory program. In contrast to the view of classic externalist scholars who see the New Deal decisions as more or less a product of the Justices' ideologies, we see these key constitutional cases as part of an iterative dialogue, one involving three willful, strategically savvy institutions each concerned with not only the best interests of the nation but, as well, their own institutional interests and agendas.

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C. Commerce Power and Delegation: Congress in a Bind

Faced with the Democratic Congress and President to take bold steps to address the ills of the Great Depression, the Supreme Court would have to consider in the first years of the New Deal the question of whether Congressional authority to regulate commerce in this way and the particular delegations of power to non-legislators was consistent with the U.S. Constitution.[114] The claim made by the opponents of the centerpiece New Deal legislation was that this legislation lacked adequate standards of policy to guide administrative discretion and therefore risked that agencies would not adhere to the rule of law.[115] It was out of this collision of strategies and interests that the showdown involving the constitutionality of the NIRA arises.

To understand the nature of this controversy, it is necessary to revisit the architecture of the NIRA; and, to do that, we must recur to the political landscape in which President Roosevelt and the Democratic Congress faced in focusing on this landmark piece of legislation. The ambition and novelty of the NIRA could hardly be overstated. Historian Barry Karl describes the act as "the result of a remarkable set of compromises" and views the legislative accomplishment in rather grand terms:

> As a piece of legislation, it was a blend of planning positions that had been debated for two decades. As an administrative program, it met the political demands of presidential management of the economy and, more important, the traditional public-works politics of Congress and the states. Its importance as a historical event is that it was the first significant American attempt to meet the critical needs of the industrialized world of the thirties.[116]

At the same time, the process by which the NIRA was enacted was truncated to say the least. Ira Katznelson notes that the NIRA "was almost entirely drafted, in detail, by the executive branch [and] were passed unchanged from the texts the president had sent to the Hill."[117] Drafters of the statute, certainly under the pressure of FDR, were resistant to suggestions to be more cautious and methodical, [118] the result of which was

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[114] The best treatment of these constitutional conflicts roughly contemporaneous with these events is Robert Stern, *The Commerce Clause and the National Economy*, 1933-1946, 59 HARV. L. REV. 645 (1946).

[115] Legislator objections.

[116] KARL, THE UNEASY STATE, at 116.

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a statute which was "[h]urriedly and incautiously implemented"[119] with "poor attention to constitutional detail."[120]

If the sole issue was whether and to what extent Congress had the power under the Constitution to regulate commercial activity through this statutory mechanism, one devoted to industrial recovery, the harried nature of the process would not be fatal. The question of commerce power, after all, is a binary one; that is, either Congress has the power to regulate commerce in this domain or it does not. In none of the key commerce clause cases before the New Deal did the Court's decision turn squarely on the regulatory technique Congress deployed to carry out its regulatory strategy. And, indeed, sometimes Congress employed an agency (the ICC most famously, and the Railway Labor Board later), and other times it relied on the executive branch to implement its objectives (as in antitrust). The fundamental question was one of legislative power, not instrument design.

Yet, the principal result of the NIRA's careless drafting was that its structure and procedure was, to understate the matter, underdeveloped, a result that would prove fatal in litigation. The NIRA contained very few standards to guide administrative decisionmaking. Nor was the NRA directed to follow administrative procedures of any serious sort in implementing its charge.[121] The absence of suitable safeguards and procedures, and also a requirement of evidence, represented a failure of drafting and of sensible appreciation for politics and the need for a political accommodation.[122] Put

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[119] ERNST, TOCQUEVILLE'S NIGHTMARE, at 6

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[120] CUSHMAN, NEW DEAL COURT, at 38.

[121] The problems with the NIRA went beyond poor drafting, but also included rather weak lawyering on behalf of this novel statute. As Cushman notes "the lawyers defending the NIRA had virtually no strategy" and there appeared to be no real appreciation for the fact that this statute was enacted on a shaky constitutional basis. Cushman at 38. For a valuable perspective from a leading New Dealer insider, see THOMAS EMERSON, YOUNG LAWYER FOR THE NEW DEAL: AN INSIDER'S MEMOIR OF THE ROOSEVELT YEARS 23-24 (1991). See generally PETER IRONS, THE NEW DEAL LAWYERS (1982) 23-24; RONEN SHAMIR, MANGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL 16 (1995). By contrast, opponents to this far-reaching legislation were well organized and strategic. See Metzger, *Foreword*, 131 HARV. L. REV.. at 53-57 (describing the efforts of the Liberty League and other organizations to mobilize against the New Deal). See also id. at 65 ("business and economic conservatives were critical in developing the New Deal attack on the modern national administrative state").

[122] These were problems as well with the Agricultural Adjustment Act. See generally MARIAN C. MCKENNA, FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR 119 (2002) ("the drafters [of the AAA] framed legislation that rested on vague constitutional theories and imprecise legal

another way, the federal government lacked the state-capacity to make this form of regulation work.

Moreover, the statute delegated extraordinary powers to executive officials. Ira Katznelson summarizes the unique political process that accompanied the New Deal statutes of the first hundred days: "These measures were characterized by immense powers delegated from the legislature to the executive branch that dramatically expanded the powers of federal agencies, many of which were new . . . [T]he presidency . . . did gain extraordinary discretion under very broad and often not very well-specified emergency legislation."[123]

Ultimately, it was the combination of these problems that proved problematic. The powers delegated were broad, and arguably "legislative" in nature; as scholars would later summarize the nondelegation doctrine, focusing on pre-New Deal cases as well as the NIRA cases, Congress was seen as having delegated its "core functions" to government officials outside of Congress. And, to make matters worse, there were neither any "intelligible principles" to guide administrative decisionmaking nor any procedures to give us confidence that these officials would exercise power responsibly.

The Supreme Court considered the constitutionality of the NIRA first in *Panama Refining v. Ryan*.[124] At issue here was the President's power to approve and enforce

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foundations"). On the juxtaposition between the AAA and the NIRA, the former salvaged by Congressional action, approved the courts, and the latter an abject failure, Skocpol and Finegold write:

> Like the Agricultural Adjustment Act, the National Industrial Recovery Act created an extraordinary opportunity to extent government intervention into the economy. But, leading into the depression, no properly *political* learning had been going on to lay the basis for the NRA. Such learning as was going on in the 1920s about how to plan for industry was happening within particular industries, with trade association leaders doing the learning. When the federal government withdrew from even nominal control of industry after World War I, it left the field clear to the giant corporations and to the trade associations, whose efforts Hoover simply encouraged and attempted to coordinate, instead of building up independent governmental apparatuses. **Thus when the depression struck and the New Deal found itself committed to the sponsorship of industrial planning, there was only the 'analogue of war' to draw upon – an invocation of the emergency mobilization practices used during World War I.** Yet, in the depression the government's job was much more difficult: not just exhorting maximum production from industry, but stimulating recovery and allocating burdens in a time of scarcity.

KENNETH FINEGOLD & THEDA SKOCPOL, STATE AND PARTY IN AMERICA'S NEW DEAL 277-278 (1995).

[123] KATZNELSON, FEAR ITSELF, supra, at 123-24.

[124] 293 U.S. 388 (1935).

codes of fair competition under Section 9(c) of the Act.[125] Panama Refining challenged a code applicable within the petroleum industry, one which was being used here to enforce bans on the sale of "hot oil," that is, petroleum produced in excess of state quotas. The code did not require the President to make findings of fact before prosecuting businesses for violating its provisions. The Court struck down this provision on the grounds that it was tantamount to "[u]ncontrolled legislative power" and thus represented an unconstitutional delegation under the Constitution.[126]

Acknowledging that broad delegations to the President had been upheld in a number of decisions going back to the previous century, the Court viewed the delegation here as beyond the pale, given the absence of clearly delineated standards for the President to follow in implementing the statute and, as well, the absence of procedures, such as findings of fact, that the President would have to follow to carry out his regulatory responsibilities under Section 9(c).[127] "The Congress," writes Chief Justice Hughes for the Court, "manifestly is not permitted to abdicate, or to transfer to

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[125] As the relevant provision of the Act stated:

> "The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any state law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State. Any violation of any order of the President issued under the provisions of this subsection shall be punishable by fine of not to exceed $1,000, or imprisonment for not to exceed six months, or both."

[Cite]

[126] 293 U.S. at 404.

[127] Id. at 402. The Court the draws its principal conclusion after this long litany of cases upholding delegation within proscribed limits:

> **Thus, in every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend. We think that § 9 (c) goes beyond those limits.** As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited…

others, the essential legislative functions with which it is thus vested. Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly."[128]

The heart of the Court's analysis came where it sought to balance its views about the unacceptable breadth of the delegation of power and the need for deference to Congressional choices about administrative technique and expediency in regulation. The Court says:

> The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility. But the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained.[129]

The second principal challenge to the NIRA came in 1935, in *Schechter Poultry Corp. v. United States*,[130] a challenge to New York City's Live Poultry Code, a code enacted under the rubric of the NIRA. This case, unlike *Panama Refining*, represented a double-barreled legal attack on the constitutionality of the statute, one barrel concerning the scope of the legislative delegation and the other concerning the scope of federal power under the commerce clause. As the Court held, the constitutional flaws in the relevant provisions of the Act stemmed from both sources. First, the NIRA was a hard sell under extant commerce clause doctrine.[131] The case came up to the Court from a conviction of a local slaughterhouse operator, the Schechter Corporation, which had slaughtered poultry at its Brooklyn facility, then selling the poultry to local retailers for

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[128] Id. at 405.

[129] Id.

[130] 295 U.S. 495 (1935).

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direct sale to consumers. There was no evidence of this chicken being sold in interstate commerce. This case was about as poor a vehicle with which to test the constitutionality of the statute as could be devised. A unanimous Court rejected the government's strained argument that the statute could be applied against this defendant.[132]

Yet the fact that this constitutional challenge came up in "the weakest possible case,"[133] as one contemporary lawyer put it, did not spell the doom for the NRA, since presumably there were other companies who did in fact engage in commerce across state lines.[134]

The dagger in the NIRA came from the Court's unanimous holding in *Schechter* that the NIRA represented an unconstitutional delegation of legislative power.

Here the absence of adequate standards and of intelligible principles which would guide agency conduct proved fatal. "In providing for codes," the Court announces, "the [NIRA] dispenses with this administrative procedure and with any administrative procedure of an analogous character."[135] The Court contrasts this statute with other regulatory statutes which had easily passed scrutiny, including the Federal Trade Commission. By contrast to these other statutes, Section 3 of [NIRA] "supplies no standards for any trade, industry, or activity." It concludes that "[s]uch a sweeping delegation of legislative power finds no support in the decisions upon which the government especially relies."[136] This view was reinforced in Justice Cardozo's remarkable concurring opinion, one in which he describes Section 3 of the NIRA as "delegation run riot."[137]

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[132] 295 U.S. at 499.

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[134] Nor did this holding disturb in any meaningful way the state of the Court's commerce clause jurisprudence. See WILLIAM G. ROSS, THE CHIEF JUSTICESHIP OF CHARLES EVAN HUGHES, 1930-1941 68 (2007). See also Cushman, 89 NOTRE DAME L. REV. at 1965 ("At the time, such an interpretation was thoroughly conventional"). Indeed, Stern suggests that the commerce clause holding was unnecessary. Stern, Commerce Clause, 59 HARV. L. REV. at 662.

[135] 295 U.S. 505.

[136] Id. at 507.

[137] Id. at 515. As Professor White observes "if there was any doubt that the limits of a permissive Court's stance toward congressional delegations had been reached with the Panama Refining-Schechter sequence, it disappeared with Cardozo's concurrence in Schechter." WHITE, CONSTITUTION, at 111.

In the end, the poor statutory drafting and insufficient attention to constitutional principles as they had been considered in previous instances of regulation came back to haunt Congress and the President. The concerns that had been percolating among the judiciary, and in particular Chief Justice Hughes about limitless administrative power, overflowed in *Schechter*, as the Court unanimously looked with scorn at this haphazard statute, and saw animate threats to the rule of law and the separation of powers.[138] The statute, declared Hughes, provided the NRA with a "wide field of legislative possibilities" in which the agency could "roam at will."[139] "Such a delegation of legislative power," he wrote, "is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress." [140]

The Court faced one more case growing out of constitutional objections the Democrats bold strategies with respect to the National Industrial Recovery Act. Congress had enacted the Bituminous Coal Act in 1935, effectively taking the code for the industry written under NIRA and passing it as legislation.[141] Delegation to write the code was therefore not an issue. The key issue confronting Congress was how to maintain decent wages for minors in the coal industry and also to provide a right to these miners to bargain collectively. In an important sense, this Act, and the corresponding Coal Code emerged from the NRA after the statute's enactment, was an incipient and unsuccessful bridge between the pro-labor strategies in the NIRA and the major effort to regulate labor relations in the Wagner Act, to be examined in depth below. As Stern notes in his extended discussion of the constitutional controversy, labor costs were more than 50% of the total cost of coal mine production, and so the

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[138] Professor Ernst tells the story of Justice Brandeis calling two of Roosevelt's main lawyers, Benjamin Cohen and Thomas Corcoran, and proclaiming that "[t]he President has been living in a fool's paradise," and warned that the administration's future actions would have to be "considered most carefully in light of these decisions by a unanimous court." ERNST, TOCQUEVILLE'S NIGHTMARE, at 60.

[139] 295 U.S. 510.

[140] Id.

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regulation of wages was an important step in regulating commerce.[142] But was this enough to pass constitutional muster?[143]

The Court considered the constitutional challenge in *Carter v. Carter Coal Co*.[144] The Court here, as in Schechter, evaluated both objections to the Act, first, that this effort to regulate intrastate activities – wages of workers --- was beyond the scope of the commerce clause and, second, this statute represented an unconstitutional delegation of legislative power. The Court's tone was abidingly negative; they appeared to like nothing about this statute. The Court equates mining with manufacturing and stresses the local character of the activities regulated. And none of the traditional exceptions to the otherwise prohibited device of regulating intrastate activities on the argument that they affect the channels and/or instrumentalities of commerce are applicable here. The regulation, as in Schechter, deals with a "purely local activity."

Also fatal is the delegation of lawmaking power, in particular, the delegation of power to private parties, in the form of a National Bituminous Coal Commission. This, says the Court, is "this is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business."[145] This kind of delegation "undertakes an intolerable and unconstitutional interference with personal liberty and private property."[146]

Conventional wisdom sees the flaws with the NIRA as revealed in the decided cases as stemming from the dissonance between legislative power and principles of legality. Public intellectuals, scholars, and even some of the Justices speaking in their extra-judicial capacities in the half century before the New Deal emphasized this

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[142] Stern, *Commerce Clause*, 59 HARV. L. REV. at 664.

[143] Stern notes: "President Roosevelt requested Congress to pass the bill, despite admitted doubts as to whether the Supreme Court would uphold its constitutionality . . ." (quoting form 4 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN DELANO ROOSEVELT 297-98 (1938).

[144] 298 U.S. 238 (1936).

[145] Id. at 246.

[146] Id. at 248.

theme.[147] Yet, the idea that these nondelegation doctrines follows more or less the line set out by A.V. Dicey in his critique of administrative discretion[148] is overly simplistic.[149]

A more nuanced way to understand the Court's skepticism about delegation to agencies is to see that Congress had created a statute that did not provide the sort of standards which would channel administrative discretion in a direction which would best implement legislative objectives. Moreover, the statute gave the judiciary a basis to evaluate the soundness of administrative decisionmaking under relevant principles of statutory interpretation and administrative law. Not surprisingly, the Court emphasized the absence of administrative procedures which could limit the discretion of agencies appropriately.[150]

All was not lost, however, as the Court's opinions, especially in *Schechter*, were not abidingly negative as they are so commonly painted. Indeed, the Court went so far as to provide a template for Congress in solving these problems. It is critically important that we see the Court in these delegation cases as raising concerns that they were confident would be properly addressed and solved by Congress.[151] The Court in

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[147] See Ernst at 2 ("Americans' belief that courts might deliver them from Tocqueville's nightmare gave a distinctly legalistic cast to the administrate state they created after 1900"); id. at 52 (noting Hughes speech in 1931 warning against "unscrupulous" administrators).

[148] See generally A.V. DICEY, LAW OF THE CONSTITUTION (1885). On the legalist tradition of which Dicey, Freidrich Hayek and others sprung, see HORWITZ, TRANSFORMATION II, supra, at 225-30.
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[149] See LANDIS, ADMINISTRATIVE PROCESS, supra, at 50-51: "A principle that runs through the many decisions on delegation of power, however, is that the grant of the power to adjudicate must be bound to a stated objective which the determination of claims ⌈ must tend, and, further, that the grant of the power to regulate must specify not only the subject matter of regulation but also the end which regulation seeks to attain."

[150] As an antidote to the view that the two lodestar cases represented a resuscitation of formalist separation of powers orthodoxy, White points to "a passage toward the end of the [Panama Refining] opinion that hinted that the simple attachment of a few procedural safeguards to congressional delegations might assuage the Court's constitutional concerns." WHITE, THE CONSTITUTION, at 110 (citing 293 U.S. 436).

[151] Cushman points to an interesting comment from the diary of Harold Ickes, Roosevelt's Secretary of the Interior. He says that at a dinner party, Justice Owen Roberts, who had voted with the majority in Panama Refining, assured him "that he is entirely sympathetic with what we are trying to do in the oil matter and that he hoped we would pass a statute that would enable us to carry out our policy." Cushman, *The Jurisprudence of the Hughes Court: The Recent Literature,* 89 NOTRE DAME L. REV. 1929, 1936 (quoting from HAROLD L. ICKES, THE SECRET DIARY OF HAROLD L. ICKES 273 (1953).

Panama Refining and *Schechter* issued what is essentially a how-to manual, a template for constitutional validity.[152]

What were the minimal terms of this how-to manual, this quid pro quo? First, intelligible principles to guide administrative agency discretion, as the Justices made clear in these cases;[153] and, second, procedures which would ensure that agencies would keep within their lanes and would implement the objectives of the statute.[154]

Likewise, these procedures are important to safeguard and facilitate judicial interests. Courts can steer agencies toward sound decisionmaking by requiring agencies to follow processes that are fair and efficient; judicial-like procedures meet these criteria, and it is no accident that courts embrace procedures that are familiar to the courtroom. This is a quintessential example of the political and legal accommodation so instrumental to the establishment and maintenance of the modern administrative state. Congress gets what it wants by establishing a schema of regulatory administration that passes constitutional muster; and courts give their blessing to statutes delegating regulatory authority to an agency when those statutes contain suitable procedural safeguards.[155]

D. Agency Adjudication and the Judicial Function

The critical role of the judicial function in the area of regulatory administration was a central theme of the Court's decision in *Crowell v. Benson*.[156] In *Crowell*, the Court

[152] As Cushman summarizes the impact of the 1935-36 cases, these decisions "did not erect insuperable obstacles to reform in these areas, but instead channeled congressional efforts into achieving those desired ends through means that were consistent with prevailing constitutional doctrine." 89 NOTRE DAME L. REV. at 1964. See also Cushman, *The Hughes Court and Constitutional Consultation*, 23 J. SUP. CT. HIST. 79 (1998).

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[155] Commentators at the time understood that the Court was, as White puts it, "providing blueprints for the creation of new agencies." WHITE, CONSTITUTION, supra, at 113. See, e.g., Reuben Oppenheimer, The Supreme Court and Administrative Law, 37 COLUM. L. REV. 1, 41 (1937) (nothing, with special reference to the nondelegation cases that "the quasi-judicial or quasi-legislative administrative tribunal has been recognized and approved as a permanent instrument of government").

[156]

considered whether an administrator could make findings of fact in disputes arising under the rubric of the Longshore and Harbor Workers' Compensation Act (LHWCA) and, further, whether these findings would be final. Yes, answered the Court as to both questions, so long as the findings were supported by evidence and within the scope of the administrator's authority. Consistent with the political accommodation, Chief Justice Hughes wrote for the Court, "To hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task."[157]

Equally consistent with the political accommodation, the Court insisted that this authority was subject to the requirement that all legal questions were be determined by an Article III court without any deference to administrators. Moreover, courts would make de novo factual determinations in matters involving jurisprudential and constitutional facts. They would do so because of the essential role of the federal courts in supervising administrative power. Further, agency decisions would be subject to judicial review by an Article III court, a requirement that would become well-embedded in the structure of federal courts jurisprudence in the years to follow – indeed, would become a mainstay of the Hart-Wechsler synthesis as described by later generations of federal courts scholars.[158]

The significance of the Court's holding for its time has been noted by prominent public law scholars over the years – that is, the significance of both elements of the holding, the authority vested in the administrative agency to make final factual findings and the maintenance of judicial power in matters of legal interpretation.[159] "Hughes's synthesis," writes Vermeule, "was enormously influential."[160] *Crowell* reflected an accommodation of philosophies and of interests. Tension about the expanding scope of administrative power was conspicuous in the period leading up to the New Deal[161] and

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[157] Id. at 46.

[158] See, e.g., Fallon, Article III Courts, HARV. L. REV. supra. [Hart & Wechsler cites].

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[160] VERMEULE, LAW'S ABNEGATION, at 26.

[161] See, e.g., Tushnet, *Administrative Law*, 60 DUKE L.J. at 1593 ("The proliferation of agencies in the New Deal placed this accommodation under substantial pressure").

even Hughes himself had expressed concern about the bureaucracy.[162] To be sure, Congress had enacted legislation, in addition to the LHWCA, authorizing administrators to make factual determinations – to put in rather more grandiose terms, to exercise administrative discretion and therefore to bear the weight of governmental power -- and yet the Court had been tepid in embracing this new reality of governance. In its *Ben Avon* ruling in 1920,[163] the Court insisted that a federal court determine de novo whether or not a rate was confiscatory.[164] While vehemently criticized by New Deal architects, including Frankfurter,[165] *Ben Avon* remained good law by the time the Court considered the matter of administrative power twelve years later in *Crowell*.[166] In this light, Crowell was a resounding victory for the New Deal agency, seeking a balance between broad administrative discretion and judicial authority.

Considered as a product of its critical time, *Crowell* reveals a judicial accommodation of myriad interests, in particular, the interests of Congress in creating a scheme of administrative governance that was, as Hughes put it, "prompt, continuous, expert and inexpensive,"[167] and the interests of the courts in maintaining an adequate judicial role. Beyond this, *Crowell* also acknowledges that key role of administrative procedure and the establishment of proper guardrails to the exercise of bureaucratic power. These procedures are an essential part of the *quid pro quo* for the Court's constitutional imprimatur on agency power. This would become clearer in the run up to the enactment of the APA and in a number of blockbuster administrative law cases in the seven decades afterward, but it is important to see *Crowell* through that lens.[168]

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[162] See ERNST, TOCQUEVILLE'S NIGHTMARE, at 43-50; 52.

[163] Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920).

[164] For a full discussion of Ben Avon and its place in pre-New Deal struggles over the nature and scope of the administrative state, see Schiller, 106 MICH. L. REV. at 401-404.

[165] See FELIX FRANKFURTER & J. FORRESTER DAVISON, CASES AND MATERIALS ON ADMINISTRATIVE LAW 464 (2d ed. 1935).

[166] Much to the chagrin of New Dealers. See Schiller, 106 MICH. L. REV. at 403 ("For progressive proponents of the administrative state, the Supreme Court's ruling in Ben Avon was a nightmare come to life").

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Chief Justice Hughes notes that the statute provides for notice and hearing, a hearing which is to be public and, moreover, require the administrator's decision to be based upon the "record of the hearings and other proceedings" before him.[169] These procedures are characteristic of foundational regulatory statutes of the Progressive era, and the Court notes precedent that deals with the responsibility of agency officials to base their decisions on evidence in the record.[170] Much is made in hindsight of the Court's requirement that there be judicial review of any legal determinations,[171] but this principle was shaky even as stated in the case. Yet, as Vermeule notes in his extended discussion of law's abnegation in the decades following Hughes's synthesis in *Crowell*, the requirement of judicial review would be tenuous without clarity about what approach courts were to take to examining jurisprudential and constitutional facts and, likewise, what deference courts would pay to administrative agency determinations.[172] The key takeaway from *Crowell*, however, is that agencies must undertake its responsibilities consistent with administrative procedures, procedures which generate better decisions and which provide information that enables Congress and the President sufficient information to carry out their oversight responsibilities and meet their strategic objectives.[173] As we show below, these uncertainties about proper scope

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[169] Crowell, 285 U.S. at 48.

[170] Id. (citing Interstate Commerce Comm'n v. Louisville & Nashville R. Co., 227 U.S. 88; The Chicago Junction Case, 264 U.S. 258; United States v. Abilene & Southern Ry. Co., 265 U.S. 274.

[171] See, e.g., James P. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643 (2004); Richard Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988); David P. Currie, *The Constitution in the Supreme Court: The New Deal, 1931–1940*, 54 U. CHI. L. REV. 504, 514 (1987); Gordon G. Young, *Public Rights and the Federal Judicial Power: From Murray's Lessee Through Crowell to Schor*, 35 BUFF. L. REV. 765, 848–49 (1986).

[172] VERMEULE, LAW'S ABNEGATION, at 29-31.Vermeule continues with an interesting analysis of what he calls the "collapse" of Crowell, noting the ways in which it has been at least thinned out, if not gutted, by a number of doctrinal developments in administrative law. See id. at 29-36. There is a weaker and stronger version of Vermeule's claim. The weaker version is to see the courts after Crowell as moving away, if not entirely abandoning its commitment to independent judicial review. The journey form Crowell to Chevron could be viewed as the rejiggering of agency/court relations so as to deemphasize the de novo character of judicial review in matters of factual findings and interpretation. A stronger version is that the seeds of Crowell's collapse is in Hughes' opinion itself. As Vermeule notes . . . It is difficult to assess this stronger claim without an exegesis of post-Crowell administrative law doctrine, and such an exegesis is beyond the scope of this Article. Still and all, we would make a couple points relevant to this discussion.

[173] See McNollgast, Mathew McCubbins, Roger Noll, & Barry Weingast, Administrative Procedures as Instruments of Political Control, 3 J. L. ECON . & ORG. 243 (1987)

of review, etc., would be settled as the evolving political accommodation became much clearer between 1935 with the passage of the NLRA and 1946 with the passage of the APA.

The Court had embraced administrative discretion in matters of agency adjudication where there are suitable procedures to guide such discretion and where the judiciary maintained a supervisory role. This was the message of *Crowell*, a message that would be reaffirmed later in the New Deal as the Court considered further matters involving the performance of administrative functions in the context of agency adjudication.

Still and all, this accommodation by the Court to judicial interests in maintaining a wide swath of supervisory power through de novo review and strictures on agency decisionmaking even in fact-finding went down skeptically with New Deal progressives. For Landis and Frankfurter especially, they saw the Court's decision as, at best, a very small step forward in the establishing of meaningful administrative discretion and, at worst, a betray of the ideals of the administrative state.[174]

E. Resolving the Delegation Dilemma in the Second New Deal

The Second New Deal represents Congress and the President's attempt to secure the victories won with regard to national economic policy and power, and also to ensure that new regulatory instruments would pass constitutional muster. Famously, President Roosevelt railed against the Court and was resolved to press ahead with his agenda by bold means, including the appointment of justices sympathetic to the New Deal and even to threaten to pack the Court with justices who would outnumber those recalcitrant to his agenda. Just as the Republicans defended the Court for their decisions invalidating key parts of the Democrats' New Deal agenda,[175] the Democratic Party made clear that it would persist in enacting broad national legislation to carry out their policy objectives. As Senator Barkley said in a speech quoting Lincoln's first inaugural:

[174] See LANDIS, ADMINISTRATIVE PROCESS, supra, at 134 ("The insistence that the administrative process in these phases must be subject to judicial review is to be explained in part, I believe, by economic determinism"). See also Crowell, 285 U.S. at 94 (Brandeis, J., dissenting) ("Since the advantage of prolonged litigation lies with the party able to bear heavy expenses, the purpose of the Act will in part be defeated").

[175] The Republican Party platform said "'The New Deal has insisted on the passage of laws contrary to the Constitution. The integrity and authority of the Supreme Court has been flouted.'" [153]

> [I]f the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.[176]

Within a short three-year period, much of the dust would have settled and the Democrats' policy agenda would be secured against constitutional attack. The New Deal agency would triumph.

As we previewed our argument in the introduction, neither the externalist nor internalist views adequately capture the story of the Court's decisions in this critical era, although both are important factors in the equation. To us, a central difference between the Court's approach in the first New Deal wave of delegation cases and the second wave exemplified particularly by *Jones & Laughlin*, is that Congress enacted a statute that met objections and constitutional requirements, as articulated by the majority over the objections of the four horsemen. Although most constitutional law scholars seem not to have noticed, the majority opinion in *Panama Refining* and especially *Schechter Poultry* gave Congress an explicit and detailed roadmap to how to construct a scheme of administrative process that would satisfy its demands. And it was not a coincidence that these demands were particularly focused on the fidelity of agencies to administrative procedures that met both Congress's and the judiciary's strategic interests and needs.

1. <u>Administrative Politics and the Origins of the NLRA</u>

Congress passed the National Labor Relations Act (NLRA), also known as the Wagner Act,[177] in 1935 in part to stem a rising tide of industrial violence of the 1930s. The NLRA was the final step in a series of efforts made in the wake of NIRA-inspired unrest to improve and make permanent a set of institutions to foster the peaceful resolution of labor disputes. The new bill drew on the failures of the previous incarnations of the law.[178]

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[176]Lincoln continued (in a Lockean line): "Nor is there in this view any assault upon the court or the judges. It is a duty from which they may not shrink to decide cases properly brought before them, and it is no fault of theirs if others seek to turn their decisions to political purposes." [Cites]

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[178] See id.

The NLRA succeeded where prior attempts had failed because it went beyond earlier legislation in five ways: (1) It defined a number of unfair labor practices that by nature interfered with the meaningful enjoyment of the organizing and bargaining rights created in the law, imposing clear and uncontestable constraints on employers; (2) it provided a Board-controlled process for election of union representatives, effectively constraining employees as well; (3) it provided the NLRB with the power and independence necessary for effective enforcement of those constraints upon both workers and their employers; (4) it cleared up lines of authority so the president could not intervene on an ad hoc basis; and the NLRB did not depend as did its predecessors, on other organizations for enforcement; and, (5) it created a regulatory process that the Supreme Court held constitutional and hence legally binding on employers. The last two accomplishments represent part of the basis for the development of administrative law that transforms the right of open access into a reality.

To summarize our argument: the NIRA asserted various labor rights to organize, but failed to create an effective set of administrative structure and process to enforce them:

- NIRA provided no clear mandate, command structure, or process to create rules and precedents with which to regulate union activity and labor-firm bargaining. For example, it failed to define adequately the type of acceptable organizations designed to represent union members, created no process or substance by which a firm could be found not in compliance with the law.

- Unclear lines of authority created bureaucratic and administrative problems: The law required that the NLB rely on the NRA and DOJ for enforcement, each of which had their own priorities that conflicted with those of the NLB.

- President Roosevelt intervened in ad hoc ways inconsistent with the NRA.

- The constitutional status of the law and hence NLB regulations remained uncertain, affording employers the ability to delay and resist NLB authority.

In the face of this confusion, the absence of clear constitutionality, and the inability of the government to enforce the rules, employers resisted labor regulation at

every turn. As noted, this disparity between promise and actuality in the context of the Depression generated unprecedented labor unrest.

The NLRA resolved each of these problems. It granted the NLRB a clear mandate with substantially more effective mandate and effective structure and process. The act clarified lines of authority. It also gave the Board the direct ability to enforce its rulings without relying on other organizations, including subpoena powers. By making the NLRB the sole legal authority in its area, the Act also removed the ability of the president to intervene within the agency's jurisdiction. In stark contrast to the 1933 legislation, the act was consciously designed to maximize the likelihood that the Supreme Court would find it constitutional. Finally, the Supreme Court's acceptance of the NLRA's constitutionality led to enforcement of the act, employer compliance, and an end to violence associated with labor.

The NLRA was the culmination of several decades of legal innovation, innovation that is largely responsible for contemporary public law jurisprudence. Politics were an undeniable component of the eventual finding of New Deal laws as constitutional beginning in 1937. But the traditional account of the New Deal constitutional controversies over-emphasizes politics and under-emphasizes the role of the development of doctrine and the necessary inventions in the technology of administrative delegation. The standard wisdom is that after FDR threatened to "pack the court," Justice Roberts made his famous "switch in time," and the Justices acquiesced to his New Deal legislation.[179] Although a caricature, this brief summary of the standard wisdom in constitutional law case books captures their essence.

We argue that a far more complex and interesting story hides in legal doctrine (We thus elaborate on Cushman's claims).[180] The NLRA was a clear and direct attempt to respond to concerns about the New Deal's constitutionality as articulated by the Court in the early New Deal cases. By doing so, Congress invented new structures and processes that the Court would hold in *Jones & Laughlin* as satisfying constitutional restrictions. We assert that Congress and the Court engaged in a dialogue concerning issues of delegation, political control, oversight, and the means of ensuring rights of due process. By trying new structures and processes and having them, at times, struck down and, at times, upheld, Congress and the Court jointly created a major expansion of administrative law.

[179] See text accompanying notes – supra.

[180] See CUSHMAN, NEW DEAL COURT, et. seq.

2. To the Supreme Court

The NLRA drafters' attention to the New Deal precedent and concerted effort to address the Court's concerns paid off. In *Jones & Laughlin Steel,* holding the Wagner Act constitutional, the Court acknowledged that Congress had fixed the delegation issue under the NIRA. After declaring that the *Schechter* case is "not controlling here," (41) the Court goes on and found that,

> The Act establishes standards to which the Board must conform. There must be complaint, notice and hearing. The Board must receive evidence and make findings. The findings as to the facts are to be conclusive, but only if supported by evidence. The order of the Board is subject to review by the designated court, and only when sustained by the court may the order be enforced. Upon that review, all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority, are open to examination by the court. We construe the procedural provisions as affording adequate opportunity to secure judicial protection against arbitrary action in accordance with the well settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation (47).

Furthermore, the Court declared that the Act properly defines and delineates the scope of the Board's authority.

> We think it clear that the National Labor Relations Act may be construed so as to operate within the sphere of constitutional authority. The jurisdiction conferred upon the Board, and invoked in this instance, is found in section 10(a), 29 U.S.C.A. 160(a), which provides: 'Sec. 10(a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 (section 158)) affecting commerce.' [301 U.S. 1, 31] The critical words of this provision, prescribing the limits of the Board's authority in dealing with the labor practices, are 'affecting commerce.' The act specifically defines the 'commerce' to which it refers (section 2(6), 29 U.S.C.A. 152(6))... (30)

By contrast, the NIRA 1) delegated authority without sufficient definition of terms or limits on authority; 2) delegated regulatory authority to private groups; 3) paid little attention to legal decisions about existing legislation with which the New Deal legislation interacted; and 4) made few provisions to ensure respect for rights of due process. Therefore, the Court ruled it unconstitutional. However, the Wagner Act

sought to remedy these defects; it 1) delegated authority with sufficient definitions of terms and limits on authority; 2) delegated authority to the National Labor Relations Board, a government administrative agency; 3) responded to concerns expressed by the Court in previous New Deal cases and modeled the administrative schema on an existing and established agency; and 4) ensured due process rights through delineating the processes through which the agency was to exercise its authority. It learned from the Court's previous decisions and when drafting the NLRA, Wagner and his writers placed the new agency comfortably within constitutional bounds.

3. Explanation

Why did the Court seemingly move in a much more sympathetic direction toward the New Deal Congress's agenda in *Jones & Laughlin*? Barry Friedman sees this turn as a sharp one, viewing the Court in Jones & Laughlin as "flat out overturn[ing] the doctrines that it previously had used to strike down New Deal legislation, abdicating virtually all responsibility to patrol economic legislation for its consistency with the Constitution."[181] For Professor White, this reflects mainly a shift from separation of powers to commerce clause concerns. But this still begs the question of *why*.[182] In a somewhat similar vein, Barry Cushman points out the different doctrinal issues that were at play in these cases.[183] Cushman argues that the early laws were hastily written, often without justification; they were poorly crafted. Further, the quality of the people involved was low.[184] Both crafting and quality were much higher, he argues, for the drafting of the acts associated with the later New Deal cases, including the NLRA and the Social Security Act.[185]

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[181] See BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 234 (2010).

[182] See WHITE, CONSTITUTION, at --.

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[184] Id. at --.

[185] Cushman also reports that: "The drafters of the Wagner Act, by contrast, framed its provisions with both eyes firmly fixed on contemporary constitutional doctrine." Cushman says the same holds for the Social Security Act. See CUSHMAN, NEW DEAL COURT, at 38.

These suggestions point to exogenous explanations for the difference.[186] A more compelling account is that Congress had adapted by 1937 to the Court's directions about how best to configure a statute that would meet constitutional scrutiny.[187]

As Katznelson surveys this dialogue between the Court and Congress, he remarks: "After the Hundred Days, congressional forms of dispute, debate, and decision survived and thrived. .In all, the central place of Congress was maintained. Even more, the crucial lawmaking role that it undertook offered a practical answer to critics who thought the days of legislative institutions had passed."[188]

Congress learned well the lessons imparted by the Supreme Court in the NIRA cases. As a result, the blockbuster statutes enacted later in the New Deal, especially the NLRA and securities acts,[189] represented a new model of regulatory legislation. It

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[186] Ho and Quinn, *Switch*, 2 J. LEG. ANALYSIS, supra, provide some of the most unique evidence about the externalist explanation. Taking January 1937 as a dividing point, they show that Justice Roberts's voting on cases before this dividing point is statistically different from his voting afterward. As they observe, this pattern is what the traditional approach predicts – the essence of the switch in time that saved nine. Unfortunately, their analysis has an assumption wired in, which, while not undermining the empirics, affects the question of whether the externalist explanation is the most plausible: They assume that the cases reaching the Supreme Court are the same before and after January 1937. This assumption builds into the analysis the central element of the controversy: traditionalists see cases as New Deal cases, as if all were alike. Cushman contests this claim, as does Ernst, albeit more equivocally. And, indeed, that the cases are different is the essence of the internalist claim.

Indeed, The main alternative hypothesis is the idea that the New Dealers adapted their legislation to the concerns of the Supreme Court, hence, as we and others argue, legislation was not the same across the New Deal. Furthermore, the chief moment dividing the two periods is the NLRA, producing the very court case of the Ho and Quinn dividing line, *Jones and Laughlin Steel* in 1937. Hence their method does not test whether the New Deal cases before the Supreme Court evolved in a way that made them more acceptable to a majority of the Court.

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[187] The connection between the Court's "how-to" analysis and the structure of the NLRA, SSA, & new AAA was noticed by commentators at the time. See, e.g., Reuben Oppenheimer, "The Supreme Court and Administrative Law," 37 Colum. L. Rev. 1, 14 (1937); Stern, supra.

[188] KATZNELSON, FEAR, at 125.

[189] See A.C. Pritchard & Robert B. Thompson, *Securities Law and the New Deal Justices,* 95 VIRGINIA L. REV. 841 (2009); Barry Cushman, *The Securities Laws and the Mechanics of Legal Change*, 95 VIRGINIA L. REV. 927 (2009).

synthesized the administrative and constitutional law and devised a means by which an agency focused on novel problems might accomplish a series of desired ends, including ending a century of violence surrounding labor organization that at times seemed unsolvable.[190] These statutes represent a major innovations in regulatory administration in administrative law. What was so truly innovative in these statutes? Several key elements, each exemplars of the modern regulatory state.[191]

- The legislation does not delegate the choice of policy goals to an agency. Instead, the legislation defines the policy goals of the agency; the agency is to implement policies chosen by Congress, not delegating authority to the private sector nor leaving to the agency the essential prerogatives to choose those goals;

- The legislation requires findings before making decisions, including the issuance of regulations;

- Related to this, agency decisions must be made on the basis of evidence;
  - That the agency provide substantial evidence;
  - The agency can appeal only to evidence presented as part of the proceeding.

- Standard procedures in circumstance in which an agency was developing a regulation includes (a) the announcement of a proposed regulation, with (b) an opportunity for interested persons to comment, and (c) an explanation of why this rule is appropriate;

- Other requirements arose in instances in when an agency sought a formal proceeding.

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[190] See Margaret Levi, Tania Melo, Barry R. Weingast, & Frances Zlotnick, *Opening Access, Ending the Violence Trap: Business, Government, & the National Labor Relations Act*, in ORGANIZATIONS, CIVIL SOCIETY, AND THE ROOTS OF DEVELOPMENT 331 (Naomi Lamoreaux & John Wallis eds. 2017).

[191] *See, e.g.*, LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320–21 (1965) ("[A] delegation of power [to administrative agencies] implies some limit [and] the availability of judicial review is, in our system and under our tradition, the necessary premise of legal validity."); Adrian Vermeule, LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE 43 (2016) (contending that "[t]he administrative state is entirely the product of the constitutional institutions of 1789" and that administrative agencies are constrained by "relevant constitutional provisions, such as the Due Process Clauses of the 5th and 14th Amendments"); Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939 (2011) ("American administrative law is grounded in a conception of the relationship between reviewing courts and agencies modeled on the relationship between appeals courts and trial courts in civil litigation

The traditional administrative law instinct is to see these familiar requirements as emerging from the APA in 1946. However, these key elements of regulation were in fact hardwired directly into the later New Deal statutes; and they were reinforced in key, early Supreme Court decisions involving administrative decisionmaking..[192] The APA did not appear whole cloth from nowhere; rather, it emerged from a developing body of administrative law and a new model of regulatory administration embodied in the NLRA and other later New Deal statutes.[193]

F. Agencies, Adjudication, and Fidelity to Fair Procedure: The Seeds of the New Administrative Law

In *Crowell*,[194] the Supreme Court confirmed administrative agency power so find facts so long as these findings were supported by the weight of evidence. In doing so, the Court had settled an important issue that had been in doubt after its decision in Ben Avon and that is the agency's latitude to exercise discretion. To be sure, this power was not unqualified. In addition to requiring that the decision be based on sufficient evidence, the Court demanded that an Article III court exercise its supervisory role by deciding questions of law de novo.[195]

The central lesson of *Crowell* was reinforced in cases decided later in the New Deal. The Court's opinion in *St. Joseph Stock Yards Co. v. United States* (1936),[196] made clear that

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[192] See, e.g., Sec. & Exch. Comm'n v. Chenery Corp., 318 U.S. 80, 94 (1943) (holding that if an agency "action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law").

[193] See generally McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J. L. ECON. & ORG. 180 (1999); George P. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. L. REV.1557 (1996).

[194] 285 U.S. 22 (1932).

[195] See id. at 27. See also VERMEULE, LAW'S ABNEGATION, supra, at 23-30; Mark Tushnet, *The Story of Crowell: Grounding the Administrative State*, in FEDERAL COURTS STORIES (V. JACKSON & J. RESNIK eds. 2010); Richard Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988).

[196]

agencies were to be given latitude under the rubric of the relevant statute to determine facts (and, here, to set rates) and, second, that courts were given the responsibility to make determinations about so-called constitutional facts. In addition, agencies should adhere to administrative procedures that ensured that agency decisions would be supported by evidence and, so long as this happened, courts would give substantial weight to the agencies' findings.[197]

St. Joseph Stock Yards is an important doctrinal statement, and one which evinces the political accommodation which the Court was determined to implement as the New Deal emerged through a steady stream of legislation.[198] It elaborates on the principle so critical to the emerging administrative law that agency discretion must be carried out consistent with sound administrative procedures, procedures established by Congress and enforced by the courts. And, interestingly, the doctrinal statement goes a step further than Crowell in instructing courts to acknowledge agency expertise by giving significant weight to agency findings.

In a series of cases beginning in 1936 and continuing for another five years, the Court considered the performance of the bureaucracy in the context of agricultural ratemaking. The principal claim in the first of the five *Morgan* cases, argued in 1935 and decided in 1936, was that the Secretary of Agriculture failed to give the party a "full hearing." The Court agreed that this full hearing must be before the Secretary, as he was the one with the final decision, or at least there needed to be adequate evidence that he had reviewed the evidence and the briefs. This issue continued into the second *Morgan* case, decided in 1938. There, Chief Justice Hughes emphasized in oral argument and in

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[197] 298 U.S. at 50-53.

[198] In his extended discussion of the *St. Joseph Stock Yards* case, Mark Tushnet contrasts what he views as a formalistic approach to the judicial-agency relationship and the legal realism of Justice Louis Brandeis, as reflected in his concurring opinion here. See Tushnet, 60 DUKE L.J. at 1598-1602 ("Hughes's analysis . . . looked backward to a legal world in which, as Brandeis put it, 'rigid rules' governed in an on-or-off fashion"). We do not see this in the same way. Hughes was negotiating an accommodation of interest both within his Court, a Court that had recently invalided big chunks of the NIRA and the AAA, and one which had before it cases, such as the Morgan cases discussed infra, and was faced with another case involving the exercising of administrative power. Moreover, his extended discussion of the role and function of administrative agencies in a comprehensive statute that gave the agency elaborate procedures to follow in order to support an agency decision, was functional in a way that progressive advocates of the New Deal agency would recognize and appreciate. Hughes recognizes, as Tushnet puts it, "imperfections in agencies," along with imperfections in courts. In going a step further than in Crowell in acknowledging that a reviewing court would give weight to the agency's view of the legal issues at stake – or, at the very least, the application of law to facts – Chief Justice Hughes was taking a more functional tack. What Tushnet views as formalism, we view as a scrupulous effort to recognize and implement an appropriate political accommodation.

the final opinion the essential role of adequate administrative procedure. A hearing within the meaning of administrative law required that parties have "a reasonable opportunity to know the claims of the opposing party and to meet them."[199] Hughes' opinion was a veritable brief in favor of maintaining "proper standards" in hearings in order to assure that the parties are treated fairly.

The four *Morgan* Cases, particularly the first two, reflects a Court concerned to maintain reasonable agency procedures.[200] It bears the strong imprint of a judiciary worried that procedural due process would not be met except if and insofar as agencies would follow the procedures spelled out in the statutes and with an interpretation that would implement this "fair play" notion of agency adjudication.[201] As in *Crowell* and *St. Joseph Stockyards*, the Court was not dealing with New Deal administrative agencies. However, Chief Justice Hughes's mention of "these multiplying agencies" made clear that he had firmly in mind the emerging functions of the New Deal bureaucracy.[202] The Court was strategic and effective in preserving their own significant prerogatives, not only with respect to judicial review of agency findings of jurisdictional and constitutional fact but also with respect to ensuring that agencies were meeting, as Hughes put it, "those fundamental requirements of fairness which are of the essence of due process."[203] The Court's view of due process permeated throughout much of the national governmental policymaking process, not just agencies that would, a decade later, become subject to the APA. Ernst summarizes well the political accommodation underlying the Court's approach when he writes: "Americans decided they could avoid Tocqueville's nightmare if administration approximated the structure, procedures and logic of the judiciary."[204]

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[199] Morgan II, 304 U.S. at 18.

[200] Cite to admin law treatises, KC Davis; Jaffe.

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[202] Id. at 22.

[203] Id. at 19.

[204] ERNST, TOCQUEVILLE'S NIGHTMARE, at 5. These decisions involving agency decisionmaking illustrates well the political accommodation accomplished by the Supreme Court during this critical New Deal period. As Professor Ernst describes it: "Judicializing administrative procedure also addressed the interests of two vitally interested groups. Lawyers found that expertise acquired in courts remained valuable in the new administrative state. Professional politicians realized that due process kept

These cases receive attention by administrative law scholars as important examples of the Court's acceptance of administrative agency authority in adjudication and, with it, the steady displacement of the judiciary-centric, common law quality of administrative decisionmaking with the new form of administrative process that Freund, Frankfurter, Landis and others long championed.[205] Yet few see these cases as critical to New Deal constitutionalism, as part of an omnibus, purposive approach of the Supreme Court. We do see these cases as fitting into the general story of political and legal accommodation. Specifically, the Court was willing to permit agencies to function with broad powers so long as Congress had placed sufficient bounds on the delegation; the agencies were acting consistent with the terms of legislative delegation; and so long as the procedures provided by Congress were adequate to keep agencies within their proper lanes.[206] Hughes writing for the Court in the Morgan cases emphasized the importance of fair play; and in Crowell and St. Joseph Stockyards he noted the value of expertise, exercised in accordance with procedures that were conspicuously court-like ("hearings," "evidence"). Viewed against the background of the seminal early New Deal delegation cases, including *Panama Refining*, *Schechter Poultry*, and *Carter Coal*, these administrative adjudication decisions illustrate the Court's embrace of Congressional objectives, objectives which include a widening of the sphere of administrative power and discretion, so long as agencies have standards to guide their discretion and appropriate procedures to maintain fair process and fidelity to the rule of law. Equally, elected officials embraced the procedural standards advocated by the courts as part of the price of constitutional sanction of New Deal legislation.

The Court's insistence on fair play and "due process norms" also animated its decision in *Chenery*,[207] decided in 1943. In *Chenery*, the Court considered an order of the SEC under the Public Utility Holding Company Act of 1935. The Court read this statute, and the administrative process that it constructed, as requiring the agency to base its order on the grounds upon which the record discloses that the agency's action was based. This was required, announced Justice Frankfurter in his opinion for the

executives from using administrative decisions as their own form of individually targeted patronage." Id. at 7.

[205] See generally Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463 (2017).

[206] See, e.g., Cass R. Sunstein, *Participation, Public Law, and Venue Reform*, 49 U. CHI. L. REV. 976, 987 (1982) ("The principal concern of administrative law since the New Deal, in short, has been to develop surrogate safeguards for the original protection afforded by separation of powers and electoral accountability.").

[207] 318 U.S. 80 (1943).

Court, by "the orderly functioning of the process of review."[208] The problem here was not at all with the nature and scope of the agency's powers – as Frankfurter puts it, "we are not imposing any trammels on [the agency's] powers – but with the exercise of administrative discretion and, more to the point, by the agency's failure to engage in appropriate procedures.

In the second *Chenery* case,[209] decided four years later, the Court went to some length to make clear that agency's discretion and prerogative was to be safeguarded by the Court. In a holding that would become blackletter administrative law, the Court made clear that the agency could proceed through an ad hoc (adjudicatory) decision rather than a general rule.[210] And this judgment, Justice Murphy concluded in his opinion for the Court, "is the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts."[211] It is, in short, an example of a judgment that "justifies the use of the administrative process."[212]

In essence, the Court in *Crowell* and cases decided in the years afterward,[213] was providing a how-to manual for administrative agencies,[214] this in parallel with their how-to manual for Congress to follow in establish the appropriate delegation of

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[208] Id. at 94.

[209] Securities Comm' v. Chenery Corp., 332 U.S. 194 (1947).

[210] Id. at 199.

[211] Id. at 209.

[212] Id.

[213] See notes – supra.

[214] Professor Kevin Stack insists that Chenery can best be understood as a decision whose linchpin – that is, the requirement that agencies engage in reasoned decisionmaking – is connected to the conditions for a suitable delegation under the Court's nondelegation doctrine. Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952 (2007). We agree with Professor Vermeule that this stretches the analogy between a constitutional doctrine dealing with legislative power and an edict about fair and reasonable administrative power, an edict note grounded in constitutional rules. See VERMEULE, LAW'S ABNEGATION, supra, at 199. Nonetheless, the basic logic behind these two doctrines have this in common: They are designed to limit the scope of agency discretion and therefore navigate between a strong Progressive vision of agency independence on the one hand and a more circumscribed function for agencies. In this respect, they illustrate well the political and legal accommodation reached during this key area in American regulatory history.

administrative authority. Both elements are important, for they make clear what the Court expects from administrative governance, one focused carefully on choices made by Congress in statutory enactments and the other focused on Congress also, but in the context of agency decisions and the requirements they must meet to withstand scrutiny.

It is important, too, to see the way in which these holdings provided a doctrinal diving board of sorts for a vision of administrative agency deference, one that would take hold in the years following *Crowell*[215] and after the enactment of the APA in 1946.[216] In his analysis of the administrative state evolving after Crowell, Vermeule sees this as an inevitable part of the arc toward deference, one whose seeds were planted in Crowell's unstable compromise between authority and restriction, between a robust role for agencies and a protective role of courts. In a chapter section labeled "The Collapse of Crowell," Vermeule notes the ways in which the Court's insistence on a strong judicial role, and the rest of what he calls the Hughes synthesis has been abandoned. While there is much wisdom in these claims, it is too forward looking in that it takes a number of major post-New Deal developments, including the Court's major decisions in *Chevron v. Natural Resource Defense Council*[217] a half century later and the expanded use of administrative rulemaking in the 1960's and thereafter as evidence that the citadel was shaky at its origin. In contrast, viewedin the context of the problem needing to be solved in the New Deal period and the decade afterward, the cases beginning with *Crowell* and continuing through *St. Joseph Stockyards*, *Chenery*, the *Morgan Cases*, the agency statutory interpretation cases including Skidmore, Gray, and Hearst, and even Universal Camera, decided five years after the enactment of the APA, are examples of a Court grappling with administrative power and with the concern that agencies with wide decisionmaking discretion would result in poor, unfair administrative action. This synthesis emerging from Crowell was indeed influential;

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[215] This period after 1937, with its settlement of the major conflicts over Congressional and administrative power, and the 1960's when social regulation and new administrative governance come to the center of the stage, has been somewhat neglected by scholars. Important recent work that trains a studied spotlight on administrative constitutionalism and administrative law in this post-New Deal period include JOANNA GRISINGER, THE UNWIELDY ADMINISTRATIVE STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL (2014); Reuel Schiller, The Administrative State, Front and Center: Studying Law and Administration in Postwar America, 26 L. & HIST. REV.415 (2008). For broader historical analyses of the period, see, e.g., LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE 20TH CENTURY (2002); LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996).

[216] See McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J. L. ECON. & ORG. 180 (1999).

[217] 467 U.S. 837 (1984).

and, at least for a time, reflected well the balance struck by the Court in the area of regulatory administration.

To be sure, this balance would be tested in the years after the APA's enactment. The history of modern administrative law, defining modern to include the eighty years after the New Deal and this judicial imprimatur on administrative power, reveals this tension in a myriad of decisions and their consequences. In another paper, Part II of this "Engineering" project, we will examine these developments. Spoiler alert: Much of this jurisprudence illustrates the continuing judicial-legislative dialogue and the importance of accommodating the interests and objectives of both branches.

The Court's holdings in these two clusters of constitutional cases, one involving nondelegation and the other involving the proper scope of agency adjudication, not only effectuate a political accommodation which ensures the viability and vitality of the New Deal administrative state, but it also presages decades of administrative law. The administrative law which emerges from the New Deal, and is reflected in lodestar cases such as *Crowell*, the *Morgan Cases*, and *Chenery* points to a new, important dialogue between the federal courts and administrative agencies, a dialogue which carries forward the project of tethering the bureaucracy to the rule of law and to Congressional policy, all the more so as circumstances changed over the post WWII era. The enactment of the APA, coming just a decade after Roosevelt's reelection and the Second New Deal reveals this promise; and so, too, does a series of critically important early administrative law cases, such as Skidmore v. Swift and Universal Camera. We leave to future work a close examination of how these strands of administrative law grow out of this New Deal political accommodation.

G. An Accommodation of Interests

By way of summary, we have considered in context how and why Congress sought to meet their three key objectives, that is, exercising broader national power to deal with the imperative of market integration, delegating policy implementation to regulatory agencies in order to carry out legislative mission and, finally, designing appropriate regulatory instruments to ensure that agencies would implement congressional policy choices and would stick.

We see a dialogue and bargaining between the Supreme Court and political officials over the technology of administration. The early New Deal legislation was hastily written and paid inadequate – indeed, in some case, no – attention to designing agencies in a manner consistent with previous Constitutional rulings by the Supreme Court. Consistent with both this view and the traditional scholarly view, the Supreme

Court rejected many of these laws, including the flagship NIRA. But the Supreme Court further outlined not just the defects in the inadequate structure and process of the legislation, it also explained the structure and process necessary for regulatory laws to be constitutional. These cases led New Dealers to search for commonalities in the successful regulatory legislation delegating power to agencies.[218]

Recalling the standard narratives of constitutional law in this era, the traditional "externalist" account of the New Deal era stresses Congress's interests (along with the President) and sees the story as one of the Liberal Democratic agenda pushed by the President and Congress vanquishing their foes thanks to threats of court-packing and impactful carrots and sticks. So, naturally, this theory focuses on the Congress side of the ledger and sees the matter as one of conquest rather than accommodation. The externalist perspective also sees the constitutional controversy as a zero-sum game: there is only one winner: the recalcitrant Court or FDR and the New Deal. This assumption then structures the case-by-case analysis trying to read each new case, beginning with Blaidell and Nebia, as to evidence for the Court's ultimate judgment. The "internalist" perspective dwells principally on the courts and sees the matter as one of the Supreme Court sticking to its doctrinal guns and crafting constitutional rules which first restrict and then later empower Congress to carry out its regulatory in the form designed by the political branches. Viewed in this light, the only real

[218] There is a way to put this thesis in more conventionally PPT terms. The logic is as follows: The conventional approaches to these issues fails to make the key distinction between the coalition on the Court against the New Deal and the pivot. It may well be that the four horsemen on the Court were so abidingly hostile to the New Deal that no legislation delegating authority to agencies would satisfy them. In particular, despite the how-to aspects of the key anti-New Deal decisions, they would not support legislation reflecting those principles. But, as non-pivotal coalition members in a 5-4 environment, their views do not matter. Instead, the key is Roberts as the universally acknowledged swing voter. As swing voter, the critical decisions in *Panama Refining* and *Schechter* were likely to reflect his views.

This view implies that, were Congress to pass legislation consistent with the how-to strictures, a decisive majority of 5-4 (Hughes and Roberts plus the three dissenter in the anti-New Deal cases) would approve the legislation. This is exactly what happened in *Jones & Laughlin*. The majority approving the NLRA of 1935 has generally been interpreted through the lens of the political story and its emphasis on the "switch in time." Doubtless this account has important insights into the Supreme Court's treatment of New Deal legislation beginning in January of 1937, especially with respect to the commerce clause which the four horsemen took as a strict, binding constraint on congressional legislation. Nonetheless it is not obvious that this holds with respect to the decision about the NLRA, which follows the blueprint and hence the Court's – read, pivotal coalition member, Justices Hughes and Roberts's – implicit bargaining offer to accept legislation that followed the blueprint. As Cushman suggests, the issues before the Court, Justices Hughes and Roberts in particular, in 1937 in *Jones & Laughlin Steel* materially differed from those facing Roberts and the Court in 1935 in *Panama Refining* and *Schechter*

accommodation is Congress's to the courts, that is, the imperative that Congress have fidelity to legal doctrine, doctrine decided by judges more or less following The Law.

Revisionists, such as Cushman, Ernst, and White, point in a different direction, much of which is guided by the internalist direction: the nature of legislation and doctrine produced by the New Deal evolved in a manner sought by the courts.

By contrast to these narratives, and building on the revisionists observations, we argue that Congress and the courts worked purposively to reach an accommodation of interests and of strategies, one which would ensure that Congress could implement its objectives consistent with the needs of this emerging national economy while likewise ensuring the judiciary's interests would be ensured. Significantly, both institutions achieved a major portion of their goals over the course of FDR's first term in initiating the accommodation (counting the *Jones and Laughlin Steel* in January of 1937 as technically still part of FDR's first term, which then ended in March of 1937. Congress succeeded in creating novel, workable regulatory instruments, ones that would enable their legislative objectives to flourish. Moreover, they well understood that the processes of regulatory administration and the performance of agencies would be an iterative process and that strategies of oversight and control would be dynamic and remain so. In our view, the constitutional controversy was not a zero-sum game, but positive sum. Led by the Supreme Court, the judiciary got what it wanted in two important respects: First, the justices succeeded in creating a template for proper delegation through a "how-to" manual of sorts. Our discussion above of the NIRA and NLRA cases examined this template in detail. And, second, they were able to create a politically acceptable rubric for checking and balancing administrative and legislative power and also ensuring that judicial power and prerogative would be respected, this through the imaginative configuration of a new administrative law. Indeed, administrative law is the neglected part of this big story of the New Deal synthesis. The Court made clear in a number of cases during and soon after the New Deal that agency decisionmaking would need to follow guidelines of procedural regularity and rationality. True, the contours of these requirements would be worked out over the course of the next four decades of administrative law, culminating in key "hard look" era cases of the 1970's and 80's.[219] But the New Deal era cases were critical in forging a scheme of delegation, regulatory discretion, and judicial control.

The success of the courts in fashioning the process and limits on the administrative process did not come at the expense of Congress and the President, as the zero-sum traditional externalist perspective holds. Instead, Congress – especially in

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drafting the NLRA – demonstrated that it could create powerful new regulatory agency to achieve desired political ends in an administrative system allowing congressional, not judicial, determination of policy ends.

With respect to the commerce power under the Constitution, we see how the Court in cases such as the railroad labor cases of the 1920s created a doctrine which established the conditions under which Congress could press forward with key efforts to improve market integration and limit the states' ability to balkanize commerce.[220] In these developments, the Court acted as a partner with Congress to facilitate a measured response to a predicament of pre-New Deal federalism. At nearly the same time, however, the Court expressed consternation with how Congress was treating businesses affected by strong regulatory authority and so, in *Gratz,* the Court invoked a rationale that presaged the logic of its administrative adjudication decisions and, in particular, the Court's concern that fundamental fairness and a modicum of due process be maintained where agencies asserted power and affected private economic interest. The point here is not to valorize these cases from the 20's, but instead to see them through a PPT lens as efforts by the Court to empower Congress while also establishing limits on the tactics and techniques used by Congress to guide agency decisionmaking.

We see from the Court's approach to the commerce clause how Congress adapted in developing new regulatory legislation. And, likewise, we see how Congress developed regulatory structures and procedures to meet the Court's concerns with adjudicatory fairness and administrative discretion. Much of the dynamic work of both Congress and the courts during this era could be characterized as experimental; that is, Congress was trying out new strategies and the Court was developing new doctrines. Commerce clause jurisprudence gets a spotlight in the New Deal and post-New Deal era as the Court decides lodestar cases establishing a structure that shapes and importantly broadens national power to deal with a specialized and increasingly integrated economy. From the heyday of the Progressive era, and its creation of the first major national regulatory agencies, and through the initial depths of the Depression and up to the New Deal, the Court had been fashioning doctrine about regulation. Yet, constitutional law scholars too often neglect the doctrine in the modern constitutional canon, even though it is critically important in understanding these experiments and how the two branches the interests of each other.

We should not lose sight of the big picture. All three branches of the national government were working through difficult matters of constitutional theory. The issues were political to be sure, but the struggle was not purely about politics. Legislators and

[220] This state holds in particular for railway labor legislation, including the National Transportation Act of 1920 and the Railway Labor Act of 1926. See text accompanying notes – supra.

judges, in order to develop structures and strategies that would take root, needed to figure out the proper place of regulatory administration in a scheme of constitutional government that insisted upon the separation of powers and worried about administrative discretion – in its rationale, its shape, and ultimately its impact on the well-being of individuals and industry. The fundamental challenge was how to square new technologies of governance with our embedded commitment to the rule of law and democracy. And the mounting of this challenge required a dynamic interaction between two critically important, and also willful, institutions of the national government.

We view these key political episodes, unfolding over the course of a dozen years or so, from the beginning of the New Deal and up to the enactment of the APA, as revealing a significant accommodation – a political accommodation – between these two branches of government. The trials and tribulations of Congress and the Court during this tough period of American regulatory history yielded an accommodation – in game theoretic terms, an *equilibrium* – that ensured that the New Deal agency and the modern administrative state would become more or less entrenched. Moreover, it would be, at least from the perspective of Congress and the courts, successful, meaning it allowed the Congress and the president to meet the demands of a complex, integrated economy as they saw it and also the demands of fairness and rationality in administrative agency decisionmaking and therefore one embodiment of the rule of law extended to cover agency policymaking.

IV. Conclusion

> *"[T]he American administrative state has been neither Tocqueville's nightmare nor Vedder's Good Administration. Its twentieth-century creators did not let the risk of misgovernment keep them from expanding the state to make life better, and they were not fooled by a vision of apolitical expertise into thinking that government would control itself. Instead,* ***working under the particular political and professional conditions of their day****, they imaginatively reworked the law they had to create the government they needed."*[221]

The New Deal agency resulted from deliberate political strategy, negotiation, and accommodation between elected officials and the Supreme Court. It is the product of a complex process that involves key decisions by purposive legislators, a determined

[221] ERNST, TOCQUEVILLE'S NIGHTMARE, at --.

president, and attentive federal judges. Each of these players acted within and through a constitutional framework, this including an architecture forged by text, by doctrine, and by institutions which enable and constrain political choice. Too, these officials were embedded in a legal structure, one which consists of barriers made by not only parchment, but by widely shared and understood legal norms and principles.

On FDR's election, neither the shape nor the foundation of the regulatory state was at all clear. This moment was the dawn of administrative law; the APA was many years away still, and its contents were hard to conceive in any meaningful detail in early 1933. The Great Depression and the failures of the laissez faire capitalism to deal with myriad economic, health, & safety issues forced the president, members of Congress, and also the judiciary to confront a wide range of new regulatory problems for which no adequate administrative structures or principles existed. To be sure, administrative agencies existed – indeed, the quintessential federal regulatory agency, the Interstate Commerce Commission, was a half century old by the time of the New Deal, and the Federal Trade Commission was two decades old. However, the architecture of regulatory administration was fairly crude and the existential dilemma of how best to cabin administrative discretion without sacrificing the advantages of the bureaucracy remained elusive. Moreover, the role and function of the courts remained in tension with the New Deal agency model. Administrative agencies were becoming a vital, and steadily enduring, feature of American political life. Yet, there were key issues which remained to be resolved. And the resolution of these issues would require participation – and, ultimately, collaboration – by all three branches of the federal government.

The New Deal agency did not emerge from the head of Zeus; and it did not gain traction through the unmediated efforts of legal scholars who championed broad administrative agency discretion during the New Deal period. Rather, it was constructed by purposive governmental officials, each working to protect their own political interests and developing strategies which would ensure that their goals would be achievable. These efforts yielded a political accommodation that got important regulatory statutes first through Congress and then through the courts. This process was messy and turbulent. Some of the most important legislation of the famous first "One Hundred Days" – notably, the National Industrial Recovery Act (NIRA) of 1933[222]

[222] The National Industrial Recovery Act was the most far reaching of the several initiatives crafted quickly by 80th Congress in this First Hundred Days. Indeed, Roosevelt stated that "[h]istory will probably record the National Industrial Recovery Act as the most important and far-reaching Legislation ever created by the American Congress." NATHAN MILLER, F.D.R.: AN INTIMATE HISTORY 318 (1991).

– cannot be viewed as anything but wholly unsatisfactorily model foundation and constitutional administrative statute.[223]

Understanding this political accommodation during this key constitutional epoch requires that we understand both the shape of regulatory administration and the impact of law and legal doctrine.[224] The New Deal constitutional controversies were not a zero-sum game in which, as has insisted by many scholars, the Supreme Court caved in 1937 to political pressure. Instead, the New Deal's success reflected the invention of administrative law that satisfied the Supreme Court as to the constitutional requirements of due process while allowing adequate political and policy flexibility for elected officials. With this political accommodation, the elected branches retain control over policy; and the courts retain control over the requirements of fair process and decisionmaking consistent with the rule of law.[225] Fundamentally, this is an old idea, going back to struggles in early common law and the ideas of regulatory administration.[226] But it unfolds in especially important ways during and after the New Deal, ways which define concretely the modern place of agencies and administrative discretion in a complex republic, a republic simultaneously committed to effective social and economic policy and to the rule of law.

Finally, we know that the story does not end with *Jones & Laughlin* and, a decade later, the enactment of the APA. Agencies act in important ways in the next several decades. Some of these actions reveal the ways in which admin officials push the envelope of Congressional choice. So, for example, James Landis expresses doubts by the beginning of the 1960's, manifest in his famous report to President Kennedy, about how agencies are functioning.[227] Early public choice theory (Niskanen, et al) alerts us to the interest group-fueled wealth transfers and "budget maximizing" bureaus. Congress responds in large part to these actions by enacting more prolix statutes, statutes which create even more elaborate procedures to guide agency decisionmaking within their jurisdiction. But struggles persist about how best to negotiate among willful agencies,

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[223] *See, e.g.*, IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME 8 (2013) (explaining that during the New Deal era, "[n]o decisions could be made that were not influenced by practical and moral compromise").

[224] Rodriguez & Weingast, *Reformation Revisited*, supra., at --.

[225] See text accompanying notes – infra.

[226] See ERNST, TOCQUEVILLE'S NIGHTMARE, at --; VERMEULE, LAW'S ABNEGATION, at --; Rabin, *Federal Regulation*, 38 STAN. L. REV. at --.

[227] See the extended discussion in THOMAS K. MCGRAW, THE PROPHETS OF REGULATION – (1984).

political brokers, and legal standards.[228] The courts get into this struggle in earnest in the 1960's and 70's, under their APA authority to review informal rulemaking (by then the modal device for making regulatory policy). The focus shifts from the Supreme Court which, save for a few key interventions (e.g., Overton Park, State Farm, Vermont Yankee), leaves the lion's share of the matters governing admin action to the lower federal courts. In later work, we will look at these developments, arriving at a conclusion consistent with our basic thesis, and that is that Congress and the courts reach a political accommodation among competing interests.

[228] See generally Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV.1667 (1975).