Introduction

By the end of the 1930s, the bureaucrats were in charge. In expanding the federal government’s field of play in the preceding decades, Congress and the White House had created dozens of agencies, departments, bureaus, and commissions to handle this new and staggering workload.¹ With the vast growth

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of government responsibility during the Great Depression came yet more new agencies that complemented and often overlapped the jurisdictions of older ones. Individuals claimed benefits from the Social Security Board, the Railroad Retirement Board, and the Veterans Administration at the same time that businessmen defended their companies against claims of unfair competition before the Federal Trade Commission, submitted shipping rates to Interstate Commerce Commission and the Maritime Commission, and asked the Federal Communications Commission and the Federal Alcohol Administration for permission to run radio stations and to sell liquor. Routine matters handled by more than 100 federal agencies and commissions – what Securities and Exchange Commission chairman William O. Douglas called “the shirt-sleeve work of government” – dwarfed the caseload of Congress and the federal courts. The National Labor Relations Board, for example, resolved more than 22,500 cases in its first four years of operation, while the Board of Veterans’ Appeals held hearings on 46,000 cases in less than six years. As of 1940, the ICC had received more than 98,000 certificate applications under the Motor Carrier Act of 1935. If volume is any measure, administrative officials (who themselves became vastly more numerous during the Roosevelt administration) had taken on the lion’s share of federal governance.

Americans transformed the political relationships, institutional framework, and legal structure of the federal government as they placed ever more legislative, executive, and judicial authority in executive agencies and departments.
and in a new “fourth branch” of independent regulatory commissions. The rise of this “administrative state” – a term that I use to describe the whole of the agencies, departments, bureaus, and commissions sprawled awkwardly across the federal landscape – required Americans to replace democratically elected legislatures and politically appointed officials with educated experts removed from patronage and political pressure, in an apparent departure from traditional American governance and constitutional conceptions of the separation of powers. The organizational structures, official rules, specialized expertise, and ostensible independence from the democratic process that characterize administration had become the dominant form of American governance. Indeed, these agencies and commissions offered an alluring alternative to the inherent irrationality and apparent corruption of democratic politics. Even as New Dealers’ enthusiasm for expanding the federal government’s regulatory commitments waned toward the end of the decade, many of Roosevelt’s major programs and agencies endured, operating alongside the fiscal tools and consumption politics on which the federal government would increasingly rely.
This state – less a “New Deal state” than a state that had survived the New Deal – was no longer a hesitant or emergency experiment. Americans’ reaction to their new government included both apprehension about administrative power and new interest in its rules and limits. On the eve of World War II, criticism of the agencies was at a fever pitch. Individual agencies, administrative practices, and the administrative state as a whole were the subject of questions, concerns, and hostility – from conservative members of Congress disturbed by the political activity of bureaucrats, from executive and legislative reformers troubled by the broader shift in policy-making authority, from regulated parties and their lawyers worried about their own economic interests, from Democrats and Republicans concerned about the administration of substantive laws, from law professors and political scientists wondering what this change meant for democracy and for the logic of the constitutional system, and from agency officials and their defenders who repeatedly stressed the legitimacy of administrative action. The further expansion of government during World War II only intensified concerns that the balance between individual rights and public power left regulated parties vulnerable to overly zealous administrators. Given the Office of Price Administration’s adoption of methods and procedures common at other agencies, charges of OPA lawlessness implicated the administrative state as a whole. As World War II drew to a close, the political furor surrounding administration pushed members of Congress to address the “problem” of administrative authority.

During the middle of the twentieth century, these political and institutional questions about the proper role of administrative governance in American life played out through battles over administrative procedure and organization – the rules that determined how agencies and commissions should exercise their enormous authority. As Americans increasingly eyed government power itself as the thing to be regulated, members of Congress joined prominent lawyers,
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academics, and industry groups in criticizing administrators’ failure to offer due process to the parties before them. Administrative law offered professional, expert, and nonpartisan language for talking about what the agencies should and should not do. Individuals and institutions across the political spectrum weighed in on the specifics of fair hearings, administrative discretion, secretive decision making, and standards of judicial review, turning an esoteric area of law into an arena of partisan political wrangling and battles for power among competing branches of government. Reformers wrote scathing editorials and supportive articles, formed congressional investigating committees and testified before them, brought together influential Americans for special inquiries and study groups (including the two Hoover Commissions), and drafted far-reaching legal reforms encapsulating their visions of the administrative state (the Administrative Procedure Act of 1946 and the Legislative Reorganization Act of 1946 were among those successfully enacted). Some reforms were addressed to all agencies and commissions, some to agencies and commissions with regulatory authority, some to the independent commissions, and still others to individual agencies alone. Through complicated and often arcane discussions of administrative hearings, rule making, and standards of review, proponents and opponents of specific programs and of bureaucracy as a whole struggled to craft rules to ensure the fairness of administrative governance.

In examining these debates, The Unwieldy State offers a political history of administrative law reform and a legal history of the administrative politics involved in shaping and legitimating the administrative state in the postwar decades. Arguments locating administrative legitimacy in the reassuringly scientific nature of administration, in administrative expertise and professionalism, or in interest-group liberalism tend to understate the crucial role of law and procedure in making administrative governance acceptable to Americans in the 1940s and 1950s. Legalism and fairness were tightly linked, and parties

inside and outside government turned to administrative rules and procedures to ensure that administrators acted fairly. As one former Justice Department official reminded Attorney General Homer Cummings in 1938, “unless these agencies are fair and the people at large are convinced that they are fair, administrative law will not succeed.”12 Procedural protections for regulated parties and institutional limits on administrators served to reassure Americans that their rights were not in danger from bureaucratic governance.

This pressure for procedural reform indicates more about anti-bureaucratic politics than legal imperatives, as administrative procedure already operated within clearly established legal boundaries. By the late 1930s, in fact, the administrative process was legitimate – at least according to judges. Agencies’ struggle with reviewing courts had dominated previous decades, during which period many agencies had reassured judges of their trustworthiness by adopting procedures that were more or less quasi-judicial. A rich case law defined the boundaries of administrative due process, and, by 1940, agency officials could defend themselves against claims of administrative lawlessness and “absolutism” by pointing to masses of evidence that administrators were thoroughly bound by existing rules and procedures that judges had repeatedly endorsed.13 Courts consistently deferred to the agencies’ authority and expertise and declined to intervene in any but the most egregious cases.14

12 Charles E. Wyzanski to Homer Cummings, Sept. 29, 1938, 3, Cummings Papers, Box 169, UVA.
14 Daniel R. Ernst has coined the term “procedural Diceyism” to describe the phenomenon in which courts “acknowledged administrators a great deal of freedom from judicial oversight, as long as they handled disputes in ways that mimicked the courts” (Daniel Ernst, “Morgan and the
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Although administrators often had the law on their side, critics offered their own definitions of administrative due process, based not in strict adherence to legal definitions but in broader ideas of how government officials ought to behave. Complaints about administrative illegality and excessive zeal offered a language for condemning the administrative state without directly challenging the substance of the regulatory scheme. Public charges of unfair methods and lawless administration not only brought disrepute to the agencies but also threatened to decrease public support for tasks that, practically, were too much for Congress, the White House, or the courts to handle. Scholars focusing on the legal foundations of bureaucratic authority have traced the increasing legalism of the administrative process but have been generally disengaged from the political struggles that shaped administrative law more broadly. However, these political debates about \textit{how} the federal government would intervene called into question the nature of the postwar state and government intervention into American life.\textsuperscript{15} Members of Congress, the White House, courts, politicians, lawyers, and businessmen who brought their institutional and political concerns to bear on the question of procedural fairness found procedure and substance inextricably intertwined. Critics questioning the fairness of administrative procedure and the role of bureaucrats were often expressing, through arcane and seemingly apolitical language, concern about the size, cost, and crazy-quilt nature of modern government; conservative antistatism and faith in local control; hostility to labor unions, securities regulation, and government rate-setting; confusion about the role of independent commissions in the constitutional structure; and fears about the potential subversion of federal civil servants.\textsuperscript{16} Defining “fairness,” then, was no simple task.


carrying out their regulatory tasks while maintaining numerous and widely accepted ties with regulated parties. The growth of the administrative state was notable, in fact, for the expansion of limits on business activity and the pervasiveness of government relationships with those businesses. “Fairness” had long included opportunities for interested parties to participate in administrative operations through formal hearings and informal relationships. Regulated parties sought to maintain their existing close and influential relationships with administrative officials, and those officials were well aware that cooperative relationships made their jobs much easier. Federal officials during World War I had established an unprecedented degree of administrative authority over the wartime economy while at the same time making room for the views of powerful economic interests. New Deal-era agencies like the National Recovery Administration, the FCC, and the SEC, and wartime agencies like the OPA

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and the War Production Board similarly embraced relationships among the regulators, the regulated, and the public. Regulated parties and their lawyers accepted regulation with varying levels of enthusiasm, but in doing so wanted quick results in noncontroversial cases, elaborate procedural guarantees in contentious ones, and room for political influence throughout. Their continuing ability to participate in administrative policy making would be protected by administrative law reformers, whose proposals consistently reflected the tensions from combining cooperative and adversarial relationships in the same agency, and by agency officials, who saw this as a useful path to regulatory harmony.

Congress and the White House pursued their own interests in procedural and organizational reform, as reformers inside and outside of government saw opportunities for Congress and the White House to work out their relationships to the administrative state and retain a role in policy making. As the 1930s ended, the White House had limited authority over the agencies and commissions and Congress was in no better shape. Although the legislative branch had been instrumental in creating the administrative state, it could only weakly direct agencies’ activities. Several of the regulatory commissions with authority over huge segments of the economy – the NLRB, the SEC, and the FCC, to name just a few – were technically and purposefully independent of each branch of government, and the agencies and departments formally under executive control, such as the Departments of Agriculture, Interior, and Labor, were no less functionally separate. Procedural and organizational reform promised

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on the idea that leaving decisions to the agencies was unfair offered the political branches the opportunity to improve control and guarantee continuing influence therein.

These various pressures were apparent in a number of different efforts in the late 1940s that purported to offer solutions to the problem of agency zeal. The most famous of these, the Administrative Procedure Act of 1946, articulated minimum standards of fairness for administrative officials and, its sponsor claimed, provided a “bill of rights” for regulated parties in the administrative process.23 The act demonstrated apprehension about bureaucrats as the primary makers of federal law and policy and quickly came to represent proper standards of due process in the administrative state. That same summer, Congress directed its own members to scrutinize those officials more closely and more systematically. Responding to repeated complaints that Congress was irrelevant, inefficient, and inadequate in light of the enormous bureaucracy that it had helped create, Congress reshaped itself through the Legislative Reorganization Act of 1946 and offered its members the necessary tools for keeping an eye on the administrative state. Soon thereafter, Republicans taking over Congress in 1947 created their own opportunity to engage the administrative state. The first Commission on Organization of the Executive Branch of the Government, which completed its work in 1949, was established by Congress to address the apparent incoherence of the administrative state and to recommend ways to pull the federal government back from the big-government tendencies it had developed during the New Deal and World War II. Following the organizational recommendations of the “Hoover Commission,” the White House improved its own management capacities as it expanded presidential control over the executive branch and the independent commissions.

These reforms had much in common. Parties relied on dry and arcane language as they struggled to push decision-making authority into the hands of those most amenable to their own interests. Reformers’ professional expertise trumped agency officials’ own experience in administrative battlegrounds, as political scientists and public administration scholars offered organizational and structural proposals and lawyers pushed for legal ones. All relied on formal organization and procedures to direct and reduce the discretion of administrators, bringing lawmaking in accord with the rule of law. These reformers shared a common faith that the shape of the state mattered—that is, that top-level reorganization and uniform procedural rules outside politics would actually affect how officials made decisions.24 At the same time, managing fears