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978-1-107-00432-0 - The Unwieldy American State: Administrative Politics Since the New Deal

Joanna L. Grisinger

Excerpt

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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

¹ For more on the early administrative state, see Matthew A. Crenson, *The Federal Machine: Beginnings of Bureaucracy in Jacksonian America* (Baltimore, MD: Johns Hopkins University Press, 1975); Michael Nelson, "A Short, Ironic History of American National Bureaucracy," *Journal of Politics* 44 (1982): 747–78; William E. Nelson, *The Roots of American Bureaucracy, 1830–1900* (Cambridge, MA: Harvard University Press, 1982); William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996); Kimberly S. Johnson, *Governing the American State: Congress and the New Federalism, 1877–1929* (Princeton, NJ: Princeton University Press, 2006); Jerry L. Mashaw, "Recovering American Administrative Law: Federalist Foundations, 1787–1801," *Yale Law Journal* 115 (2006): 1256–344; Jerry L. Mashaw, "Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829," *Yale Law Journal* 116 (2007): 1636–740; Jerry L. Mashaw, "Administration and 'The Democracy': Administrative Law from Jackson to Lincoln, 1829–1861," *Yale Law Journal* 117 (2008): 1568–693; Gautham Rao, "The Federal *Posse Comitatus* Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth-Century America," *Law and History Review* 26 (2008): 1–56; Brian Balogh, *A Government Out of Sight: The Mystery of National Authority in Nineteenth-Century America* (Cambridge: Cambridge University Press, 2009); Jerry L. Mashaw and Avi Perry, "Administrative Statutory Interpretation in the Antebellum Republic," *Michigan State Law Review* (2009): 7–49; Jerry L. Mashaw, "Federal Administration and Administrative Law in the Gilded Age," *Yale Law Journal* 119 (2010): 1362–472. Studies examining the development and expansion of regulatory authority in the late nineteenth century and early twentieth century include Robert E. Cushman, *The Independent Regulatory Commissions* (New York: Oxford University Press, 1941); Samuel P. Hays, *American Political History as Social Analysis: Essays* (Knoxville: University of Tennessee Press, 1980); David B. Tyack, Thomas James, and Aaron Benavot, *Law and the Shaping of Public Education, 1785–1954* (Madison: University of Wisconsin Press, 1987); Martin J. Sklar, *The Corporate Reconstruction of American Capitalism, 1890–1916: The Market, the Law, and Politics* (Cambridge: Cambridge University Press, 1988); Morton Keller, *Regulating a New Economy: Public Policy and Economic Change in America, 1900–1933* (Cambridge, MA: Harvard University Press, 1990); Morton Keller, *Regulating a New Society: Public Policy and Social Change in America, 1900–1933*

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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.² 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.³ 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.⁴ As of 1940, the ICC had received more than 98,000 certificate applications under the Motor Carrier Act of 1935.⁵ 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

(Cambridge, MA: Harvard University Press, 1994); Barbara Young Welke, *Recasting American Liberty: Gender, Race, Law, and the Railroad Revolution, 1865–1920* (Cambridge: Cambridge University Press, 2001); Tracy L. Steffes, “Solving the ‘Rural School Problem’: New State Aid, Standards, and Supervision of Local Schools, 1900–1933,” *History of Education Quarterly* 48 (2008): 181–220.

² See Arthur M. Schlesinger, Jr., *The Age of Roosevelt: The Coming of the New Deal* (Boston: Houghton Mifflin, 1959); Arthur M. Schlesinger Jr., *The Age of Roosevelt: The Politics of Upheaval* (Boston: Houghton Mifflin, 1960); Ellis W. Hawley, *The New Deal and the Problem of Monopoly: A Study in Economic Ambivalence* (Princeton, NJ: Princeton University Press, 1966); Michael E. Parrish, *Securities Regulation and the New Deal* (New Haven, CT: Yale University Press, 1970); Kenneth Finegold and Theda Skocpol, *State and Party in America’s New Deal* (Madison: University of Wisconsin Press, 1995); David Plotke, “The Endurance of New Deal Liberalism,” *Studies in American Political Development* 10 (1996): 415–20; Nicholas S. Zeppos, “The Legal Profession and the Development of Administrative Law,” *Chicago-Kent Law Review* 72 (1997): 1119–57; Karen Orren and Stephen Skowronek, “Regimes and Regime Building in American Government: A Review of Literature on the 1940s,” *Political Science Quarterly* 113 (1998): 689–702.

³ William O. Douglas, “Virtues of the Administrative Process,” in James Allen, ed., *Democracy and Finance: The Addresses and Public Statements of William O. Douglas as Member and Chairman of the Securities and Exchange Commission*, 243–47 (New Haven, CT: Yale University Press, 1940), 244.

⁴ Attorney General’s Committee on Administrative Procedure, *National Labor Relations Board, Monograph No. 18* (Washington, DC: Department of Justice, 1940), 2; Attorney General’s Committee on Administrative Procedure, *Final Report* (Washington, DC: Government Printing Office, 1941), Appendix F, 324.

⁵ Attorney General’s Committee, *Final Report*, Appendix F, 317.

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and in a new “fourth branch” of independent regulatory commissions.⁶ 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.⁷ Indeed, these agencies and commissions offered an alluring alternative to the inherent irrationality and apparent corruption of democratic politics.⁸ 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.⁹

⁶ President’s Committee on Administrative Management, *Administrative Management in the Government of the United States* (Washington, DC: Government Printing Office, 1937), 32.

⁷ This is the model described in Max Weber, *Economy and Society*, vol. 2, 956–1005 (Berkeley: University of California Press, 1978).

⁸ See Robert H. Wiebe, *The Search for Order 1877–1920* (New York: Hill and Wang, 1967); Alfred D. Chandler Jr. and Louis Galambos, “The Development of Large-Scale Economic Organizations in Modern America,” *Journal of Economic History* 30 (1970): 201–17; Louis Galambos, “The Emerging Organizational Synthesis in Modern American History,” *Business History Review* 44 (1970): 279–90; Alan Trachtenberg, *The Incorporation of America: Culture and Society in the Gilded Age* (New York: Hill and Wang, 1982); Louis Galambos, “Technology, Political Economy, and Professionalization: Central Themes of the Organizational Synthesis,” *Business History Review* 57 (1983): 471–93; William R. Brock, *Investigation and Responsibility: Public Responsibility in the United States, 1865–1900* (Cambridge: Cambridge University Press, 1984); John A. Rohr, *To Run a Constitution: The Legitimacy of the Administrative State* (Lawrence: University Press of Kansas, 1986); Ronald A. Cass, “Models of Administrative Action,” *Virginia Law Review* 72 (1986): 363–98; Olivier Zunz, *Making America Corporate 1870–1920* (Chicago: University of Chicago Press, 1990); Brian Balogh, “Reorganizing the Organizational Synthesis: Federal-Professional Relations in Modern America,” *Studies in American Political Development* 5 (1991): 119–72; Gary Lawson, “The Rise and Rise of the Administrative State,” *Harvard Law Review* 107 (1994): 1231–54; Robert L. Rabin, “Federal Regulation in Historical Perspective,” *Stanford Law Review* 38 (1986): 1189–326.

⁹ John W. Jeffries, “The ‘New’ New Deal: FDR and American Liberalism, 1937–1945,” *Political Science Quarterly* 105 (1990): 397–418; Ira Katznelson and Bruce Pietrykowski, “Rebuilding the American State: Evidence from the 1940s,” *Studies in American Political Development* 5 (1991): 301–39; Ira Katznelson, Kim Geiger, and Daniel Kryder, “Limiting Liberalism: The Southern Veto in Congress, 1933–1950,” *Political Science Quarterly* 108 (1993): 283–306; John J. Coleman, “State Formation and the Decline of Political Parties: American Parties in the Fiscal State,” *Studies in American Political Development* 8 (1994): 195–230; Alan Brinkley, *The End of Reform: New Deal Liberalism in Recession and War* (New York: Alfred A. Knopf, 1995); Michael K. Brown, “State Capacity and Political Choice: Interpreting the Failure of the Third New Deal,” *Studies in American Political Development* 9 (1995): 187–212; Bartholomew H. Sparrow, *From the Outside In: World War II and the American State* (Princeton, NJ: Princeton University

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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.¹⁰ 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,

Press, 1996); Alan Brinkley, “The Late New Deal and the Idea of the State,” in *Liberalism and Its Discontents*, 37–62 (Cambridge, MA: Harvard University Press, 1998); Brian Waddell, *The War against the New Deal: World War II and American Democracy* (DeKalb: Northern Illinois University Press, 2001); Meg Jacobs, *Pocketbook Politics: Economic Citizenship in Twentieth-Century America* (Princeton, NJ: Princeton University Press, 2005).

¹⁰ See “Symposium on Administrative Law,” *American Law School Review* 9 (1939): 139–84, 139; Marver H. Bernstein, “The Politics of Adjudication,” *Journal of Politics* 16 (1954): 299–323; Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (New York: Oxford University Press, 1976); Peter Irons, *The New Deal Lawyers* (Princeton, NJ: Princeton University Press, 1982); Thomas I. Emerson, *Young Lawyer for the New Deal: An Insider’s Memoir of the Roosevelt Years*, ed. Joan P. Emerson (Latham, MD: Rowman and Littlefield, 1991); Ronen Shamir, *Managing Legal Uncertainty: Elite Lawyers in the New Deal* (Durham, NC: Duke University Press, 1995); G. Edward White, “The Emergence of Agency Government and the Creation of Administrative Law,” in *The Constitution and the New Deal*, 94–127 (Cambridge, MA: Harvard University Press, 2000); Anne Mira Kornhauser, *Saving Liberalism: Political Imagination in the American Century* (PhD dissertation, Columbia University, 2004); Joanna L. Grisinger, “Law and the Administrative State,” in Sally Hadden and Alfred L. Brophy, eds., *A Companion to American Legal History* (Hoboken, NJ: Wiley-Blackwell, forthcoming).

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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.¹¹ Legalism and fairness were tightly linked, and parties

¹¹ See James M. Landis, *The Administrative Process* (New Haven: Yale University Press, 1938); Theodore J. Lowi, *The End of Liberalism: The Second Republic of the United States*, 2nd ed. (New York: W. W. Norton & Co., 1979); Brian Balogh, *Chain Reaction: Expert Debate and Public Participation in American Commercial Nuclear Power, 1945–1975* (New York: Cambridge University Press, 1991); Morton J. Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992); White, “The Emergence of Agency Government and the Creation of Administrative Law”; Jacobs, *Pocketbook Politics*; Reuel E. Schiller, “Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945–1970,” *Vanderbilt Law Review* 53 (2000): 1389–453; Daniel Carpenter, *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862–1928* (Princeton, NJ: Princeton University Press, 2001); Reuel E. Schiller, “Reining in the Administrative State: World War II and the Decline of Expert Administration,” in Daniel R. Ernst and Victor Jew, eds., *Total War and the Law: The American Home Front in World War II*, 185–206 (Westport, CT: Praeger, 2002); Elizabeth Cohen, *Consumers’ Republic: The Politics of Mass Consumption in Postwar America* (New York: Knopf, 2003); Jessica Wang, “Imagining the Administrative State: Legal Pragmatism, Securities Regulation, and New Deal Liberalism,” *Journal of Policy History* 17 (2005): 257–93.

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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.

¹³ See A. A. Berle Jr., “The Expansion of American Administrative Law,” *Harvard Law Review* 30 (1917): 430–48; Felix Frankfurter, ed., *A Selection of Cases under the Interstate Commerce Act*, 2nd ed. (Cambridge, MA: Harvard University Press, 1922); Ernst Freund et al, *The Growth of American Administrative Law* (St. Louis, MO: Thomas Law Book Co., 1923); Roscoe Pound, “The Growth of Administrative Justice,” *Wisconsin Law Review* 2 (1924): 321–39; Gerard C. Henderson, *The Federal Trade Commission: A Study in Administrative Law and Procedure* (New Haven, CT: Yale University Press, 1924); John Dickinson, *Administrative Justice and the Supremacy of Law in the United States* (Cambridge, MA: Harvard University Press, 1927); Felix Frankfurter, “The Task of Administrative Law,” *University of Pennsylvania Law Review* 75 (1927): 614–21; I. L. Sharfman, *The Interstate Commerce Commission: A Study in Administrative Law and Procedure*, 4 vols. (New York: Commonwealth Fund, 1931–1937); Board of Investigation and Research, *The Report on Practices and Procedures of Governmental Control*, 78th Cong., 2nd sess., 1944, H. Doc. 678; James M. Landis, *Report on Regulatory Agencies to the President-Elect*, Subcommittee on Administrative Practice and Procedure, Senate Judiciary Committee, 86th Cong., 2nd sess., 1960, Committee Print; see also Rabin, “Federal Regulation in Historical Perspective,” 1320; Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920* (Cambridge: Cambridge University Press, 1982), chap. 8; Schiller, “Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945–1970;” Lowi, *End of Liberalism*; Mark Tushnet, “Administrative Law in the 1930s: The Supreme Court’s Accommodation of Progressive Legal Theory,” *Duke Law Journal* 60 (2011): 1565–637; Thomas W. Merrill, “Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law,” *Columbia Law Review* 111 (2011): 939–1003.

¹⁴ Daniel R. Ernst has coined the term “procedural Diceyism” to describe the phenomenon in which courts “accorded 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 *how* the federal government would intervene called into question the nature of the postwar state and government intervention into American life.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.¹⁶ Defining “fairness,” then, was no simple task.

Procedural reforms reflected the variety of political incentives at play. Long before claims of “capture” came to dominate discussions of administration, postwar reformers were met with a rich tradition of agencies and commissions

New Dealers,” *Journal of Policy History* 20 [2008]: 447–81, 449); see also Daniel R. Ernst, “The Politics of Administrative Law: New York’s Anti-Bureaucracy Clause and the O’Brian-Wagner Campaign of 1938,” *Law and History Review* 27 (2009): 331–71.

¹⁵ Richard B. Stewart, “The Reformation of American Administrative Law,” *Harvard Law Review* 88 (1975): 1667–813; Gerald E. Frug, “The Ideology of Bureaucracy in American Law,” *Harvard Law Review* 97 (1984): 1276–388; Jerry L. Mashaw, “Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development,” *Journal of Law, Economics, & Organization* 6 (Special Issue 1990): 267–98.

¹⁶ Barry D. Karl, *The Uneasy State: The United States from 1915 to 1945* (Chicago: University of Chicago Press, 1983); Barry D. Karl, “Constitution and Central Planning: The Third New Deal Revisited,” *Supreme Court Review* (1988): 163–201; Ellis W. Hawley, “The New Deal State and the Anti-Bureaucratic Tradition,” in Robert Eden, ed., *The New Deal and Its Legacy: Critique and Reappraisal*, 77–92 (New York: Greenwood Press, 1989); Jonathan Bell, *The Liberal State on Trial: The Cold War and American Politics in the Truman Years* (New York: Columbia University Press, 2004); David Ciepley, *Liberalism in the Shadow of Totalitarianism* (Cambridge, MA: Harvard University Press, 2006).

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carrying out their regulatory tasks while maintaining numerous and widely accepted ties with regulated parties.¹⁷ 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.¹⁸ New Deal-era agencies like the National Recovery Administration, the FCC, and the SEC, and wartime agencies like the OPA

¹⁷ Gabriel Kolko, *The Triumph of Conservatism: A Reinterpretation of American History, 1900–1916* (New York: Free Press, 1963); Gabriel Kolko, *Railroads and Regulation, 1877–1916* (Princeton, NJ: Princeton University Press, 1965); Thomas K. McCraw, “Regulation in America: A Review Article,” *Business History Review* 49 (1975): 159–83; Hugh Hecllo, “Issue Networks and the Executive Establishment,” in Anthony King, ed., *The New American Political System*, 87–124 (Washington, DC: American Enterprise Institute for Public Policy Research, 1978); Ellis W. Hawley, “The Discovery and Study of a ‘Corporate Liberalism,’” *Business History Review* 52 (1978): 309–20; Paul J. Quirk, *Industry Influence in Federal Regulatory Agencies* (Princeton, NJ: Princeton University Press, 1981); Daniel T. Rodgers, “In Search of Progressivism,” *Reviews in American History* 10 (1982): 113–32; Galambos, “Technology, Political Economy, and Professionalization”; Thomas K. McCraw, *Propets of Regulation: Charles Francis Adams, Louis D. Brandeis, James M. Landis, Alfred E. Kahn* (Cambridge, MA: Belknap Press of Harvard University, 1984); Mashaw, “Explaining Administrative Process”; Marc Allen Eisner, “Discovering Patterns in Regulatory History: Continuity, Change, and Regulatory Regimes,” *Journal of Policy History* 6 (1994): 157–87; Julian E. Zelizer, *Taxing America: Wilbur D. Mills, Congress, and the State, 1945–1975* (Cambridge: Cambridge University Press, 1998); Elizabeth Sanders, *Roots of Reform: Farmers, Workers, and the American State 1877–1917* (Chicago: University of Chicago Press, 1999); Rabin, “Federal Regulation in Historical Perspective.”

¹⁸ E. Pendleton Herring, “Politics, Personalities, and the Federal Trade Commission, I,” *American Political Science Review* 28 (1934): 1016–29; E. Pendleton Herring, “Politics, Personalities, and the Federal Trade Commission, II,” *American Political Science Review* 29 (1935): 21–35; Robert F. Himmelberg, “The War Industries Board and the Antitrust Question in November 1918,” *JAH* 52 (1965): 59–74; Robert D. Cuff, “A ‘Dollar-a-Year Man’ in Government: George N. Peek and the War Industries Board,” *Business History Review* 41 (1967): 404–20; Robert F. Himmelberg, “Business, Antitrust Policy, and the Industrial Board of the Department of Commerce, 1919,” *Business History Review* 42 (1968): 1–23; Robert D. Cuff, “Woodrow Wilson and Business-Government Relations during World War I,” *Review of Politics* 31 (1969): 385–407; Robert D. Cuff, “Bernard Baruch: Symbol and Myth in Industrial Mobilization,” *Business History Review* 43 (1969): 115–33; Robert D. Cuff, “The Cooperative Impulse and War: The Origins of the National Defense and Advisory Commission,” in Jerry Israel, ed., *Building the Organizational Society: Essays on Associational Activities in Modern America*, 233–46 (New York: Free Press, 1972); Robert D. Cuff, “Herbert Hoover, The Ideology of Voluntarism and War Organization during the Great War,” *Journal of American History* 64 (1977): 358–72; Robert Cuff, “Harry Garfield, The Fuel Administration, and the Search for a Cooperative Order during World War I,” *American Quarterly* 30 (1978): 39–53.

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and the War Production Board similarly embraced relationships among the regulators, the regulated, and the public.¹⁹ 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.²⁰ 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.²¹

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.²² 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 premised

¹⁹ Ellis W. Hawley, *The New Deal and the Problem of Monopoly: A Study in Economic Ambivalence* (Princeton, NJ: Princeton University Press, 1966); Michael E. Parrish, *Securities Regulation and the New Deal* (New Haven, CT: Yale University Press, 1970); Robert M. Collins, "Positive Business Responses to the New Deal: The Roots of the Committee for Economic Development, 1933–1942," *Business History Review* 52 (1978): 369–91; Robert Griffith, "Dwight D. Eisenhower and the Corporate Commonwealth," *American Historical Review* 87 (1982): 87–122; Robert W. McChesney, "Free Speech and Democracy! Louis G. Caldwell, the American Bar Association and the Debate over the Free Speech Implications of Broadcast Regulation, 1928–1938," *American Journal of Legal History* 35 (1991): 351–92; Brinkley, *End of Reform*; Finegold and Skocpol, *State and Party in America's New Deal*; Waddell, *The War against the New Deal*; Cohen, *A Consumers' Republic*; David A. Moss and Michael R. Fein, "Radio Regulation Revisited: Coase, the FCC, and the Public Interest," *Journal of Policy History* 15 (2003): 389–416; Susan L. Brinson, *The Red Scare, Politics, and the Federal Communications Commission, 1941–1960* (Westport, CT: Praeger, 2004); Jacobs, *Pocketbook Politics*; Jason Scott Smith, *Building New Deal Liberalism: The Political Economy of Public Works, 1933–1956* (Cambridge: Cambridge University Press, 2005); Rabin, "Federal Regulation in Historical Perspective."

²⁰ See Robert A. Kagan, "Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry," *Law and Social Inquiry* 19 (1994): 1–62; Ernst, "The Politics of Administrative Law."

²¹ Hugh Hecllo, *A Government of Strangers: Executive Politics in Washington* (Washington, DC: Brookings Institution, 1977).

²² David H. Rosenbloom, *Building a Legislative-Centered Public Administration: Congress and the Administrative State, 1946–1999* (Tuscaloosa: University of Alabama Press, 2000).

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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

²³ Senate Proceedings (statement of Sen. Pat McCarran, Mar. 12, 1946), reprinted in U.S. Senate, *Administrative Procedure Act: Legislative History, 79th Cong., 1944–46*, S. Doc 248 (Washington, DC: Government Printing Office, 1946), 298.

²⁴ James G. March and Johan P. Olson, “Organizing Political Life: What Administrative Reorganization Tells Us about Government,” *American Political Science Review* 77