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## BOOK REVIEW

### THE STRUGGLE FOR ADMINISTRATIVE LEGITIMACY

TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940. By Daniel R. Ernst. New York: Oxford University Press. 2014. Pp. 240. \$39.95.

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#### INTRODUCTION

Nearly forty years ago, Professor James O. Freedman described the American administrative state as haunted by a “recurrent sense of crisis.”<sup>1</sup> “Each generation has tended to define the crisis in its own terms,”<sup>2</sup> and “each generation has fashioned solutions responsive to the problems it has perceived.”<sup>3</sup> Yet “a strong and persisting challenge to the basic legitimacy of the administrative process” always returns, in a new guise, to trouble the next generation.<sup>4</sup> On this account, the American people remain perennially unconvinced that administrative decisionmaking is “appropriate, proper, and just,”<sup>5</sup> entitled to respect and obedience “by virtue of who made the decision” (executive officials) and “how it was made” (the administrative process).<sup>6</sup>

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<sup>1</sup> JAMES O. FREEDMAN, *CRISIS AND LEGITIMACY* 11 (1978).

<sup>2</sup> *Id.* at 7.

<sup>3</sup> *Id.* at 9.

<sup>4</sup> *Id.* at 10.

<sup>5</sup> Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 *ANN. REV. PSYCHOL.* 375, 376 (2006).

<sup>6</sup> *Id.* at 377. Unless otherwise noted, this Review assumes a minimal empirical definition of legitimacy, one that derives from the sociological and psychological literature: an institution is legitimate when people believe that institution to be “appropriate, proper, and just,” and by reason of that belief feel “obligated to defer” to its decisions. *Id.* at 376; *cf.* 1 MAX WEBER, *ECONOMY AND SOCIETY* 214 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., Bedminster Press 1968) (1922) (“[T]he legitimacy of a system of domination may be treated sociologically only as the probability that to a relevant degree the appropriate attitudes [toward the system] will

Freedman also argued that this legitimacy deficit was unwarranted: he characterized the American administrative state as a product of gradual evolution, with roots in the earliest days of the republic and a long track record of substantial political accountability, relatively effective implementation of statutory mandates, and more or less fair procedures.<sup>7</sup> Such a gradualist account of American administrative history was eccentric in the late 1970s, when Freedman wrote his prescient study, *Crisis and Legitimacy*. In the past two decades, however, legal scholars and social scientists have significantly bolstered the gradualist narrative, redescribing the formation of the American administrative state as a centuries-long process of doctrinal development, intellectual adjustment, and political bargaining rather than a constitutional rupture caused by sudden political realignment, emergency rule, or the wholesale adoption of foreign practices and ideologies.<sup>8</sup> Professor Daniel Ernst's intellectual inventiveness, exquisite archival work, and lucid prose have long inspired and guided this project.<sup>9</sup> In *Tocqueville's Nightmare*, Ernst delivers a pathbreaking account of how politically moderate, early twentieth-century lawyers first confronted, then transformed, and finally secured the legitimacy of the administrative state. The book is a canonical contribution to the scholarly effort to normalize American administrative government.

Yet the felt need for such normalizing history recalls the overarching thesis of *Crisis and Legitimacy*: however "normal" the administrative state may (in truth) be, the American people's "uneasiness" about its legitimacy persists.<sup>10</sup> The recent proliferation of scholarly defenses of the *historical* pedigree of the administrative state is a testament to the distinctively historical cast of our present generation's "uneasiness." *Tocqueville's Nightmare* seeks both to diagnose and to alleviate this contemporary historical discomfort.

The book, Ernst explains, "answers a complaint that has gained in popularity since the eruption of the Tea Party movement in 2009," the

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exist, and the corresponding practical conduct [obedience to the system] ensue."). For the potential limits of such a purely empirical definition of legitimacy, see JÜRGEN HABERMAS, LEGITIMATION CRISIS 95–102 (Thomas McCarthy trans., Beacon Press 1975) (1973); and Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1789–92, 1848–50 (2005).

<sup>7</sup> FREEDMAN, *supra* note 1, at 4, 11, 125–26, 259–64.

<sup>8</sup> See sources cited *infra* notes 45–49.

<sup>9</sup> See, e.g., Daniel R. Ernst & Victor Jew, *Introduction*, in TOTAL WAR AND THE LAW 1 (Daniel R. Ernst & Victor Jew eds., 2002); Daniel R. Ernst, *Law and the State, 1920–2000: Institutional Growth and Structural Change*, in 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 1 (Michael Grossberg & Christopher Tomlins eds., 2008); Daniel R. Ernst, *Dacey's Disciple on the D.C. Circuit: Judge Harold Stephens and Administrative Law Reform, 1933–1940*, 90 GEO. L.J. 787 (2002); Daniel R. Ernst, *Common Laborers? Industrial Pluralists, Legal Realists, and the Law of Industrial Disputes, 1915–1943*, 11 LAW & HIST. REV. 59 (1993); Daniel R. Ernst, *Willard Hurst and the Administrative State: From Williams to Wisconsin*, 18 LAW & HIST. REV. 1 (2000).

<sup>10</sup> FREEDMAN, *supra* note 1, at 9, 11.

complaint that “the statebuilders of the early twentieth century abandoned an American tradition of individualism in what amounted to ‘the decisive wrong turn in the nation’s history’” (p. 7).<sup>11</sup> Ernst responds that the early twentieth-century “reformers who supposedly sent the Constitution into exile[] actually designed the principles of individual rights, limited government, and due process” — principles that had guided the nation since its founding — “into the administrative state” itself (pp. 7–8). These reformers did so in large part by ensuring that lawyers would remain an integral part of the administrative process. Whenever the classical, court-centered “rule of law” proved simply unworkable, the “rule of lawyers” would fill the gap: “an adverse but not implacably hostile bar” working both inside and outside the state apparatus to ensure that administrative decisionmaking was fair in application and limited in scope (p. 7).

Ernst is not alone in perceiving an uptick in historically grounded “complaint” against administrative government — and in responding with historically grounded counterarguments. In a recent article, Professors Cass Sunstein and Adrian Vermeule warn that “[i]n the past several years” a form of “libertarian administrative law” has arisen in the federal judiciary, the goal of which is “to compensate for perceived departures during the New Deal from the baseline of the original constitutional order” by applying “a kind of strict scrutiny to agency decisions.”<sup>12</sup> Sunstein and Vermeule’s focus is on the D.C. Circuit Court of Appeals, and they note that, even there, a mitigation of the libertarian tendency may be underway.<sup>13</sup> Yet Sunstein and Vermeule worry that historically inflected libertarian attacks on the administrative state will continue unless the Supreme Court “excise[s] libertarian administrative law root and branch” from our constitutional culture.<sup>14</sup>

<sup>11</sup> The author quotes Tony Badger, *The Lessons of the New Deal: Did Obama Learn the Right Ones?*, 97 HIST. 99, 103 (2012).

<sup>12</sup> Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 398–400 (2015). Others have similarly detected an ideological and doctrinal shift in the courts. See, e.g., Patrick M. Garry, *Judicial Review and the “Hard Look” Doctrine*, 7 NEV. L.J. 151, 152 (2006) (“[A] creeping escalation of judicial scrutiny of agency behavior appears to be taking place.”).

<sup>13</sup> Sunstein & Vermeule, *supra* note 12, at 470–71 (discussing *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 706 F.3d 18 (D.C. Cir. 2014) (en banc)).

<sup>14</sup> *Id.* at 401. The 2014–2015 Term suggests that the Supreme Court is very much on the fence about whether or not to do so. On the one hand, the Court reversed two D.C. Circuit opinions, *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199 (2015); *Dep’t of Transp. v. Ass’n of Am. R.R.s.*, 135 S. Ct. 1225 (2015), that Sunstein and Vermeule identify as epitomizing libertarian administrative law. See Sunstein & Vermeule, *supra* note 12, at 419–23, 429–34. On the other hand, these reversals were accompanied by textbook “libertarian administrative law” minority opinions from Justices Scalia, Thomas, and Alito. See *Perez*, 135 S. Ct. at 1211–13 (Scalia, J., concurring in the judgment); *id.* at 1213–25 (Thomas, J., concurring in the judgment); *id.* at 1210–11 (Alito, J., concurring in part and concurring in the judgment); *Ass’n of Am. R.R.s.*, 135 S. Ct. at 1240–55 (Thomas, J., concurring in the judgment); *id.* at 1234–40 (Alito, J., concurring). These reversals were also followed by a puzzling set of decisions in which Chief Justice Roberts and Justice Kennedy upheld

Ernst's book and Sunstein and Vermeule's article, *Libertarian Administrative Law*, both trace contemporary doubts about administrative legitimacy to the ideology of the "Constitution in Exile."<sup>15</sup> The term was coined in 1995 by D.C. Circuit Judge Douglas Ginsburg,<sup>16</sup> a Reagan appointee, and for the past twenty years it has loomed in the background of conservative critiques of constitutional and administrative law doctrines associated with the New Deal and civil rights revolutions.<sup>17</sup> As described by Sunstein and Vermeule, the ideology of the "Constitution in Exile" is a *mélange* of libertarianism and originalism, one that seeks to restore a putatively lost legal regime defined by "sharp limits on national power" and "unenumerated rights of liberty, property, and contract that go beyond existing judicial understandings."<sup>18</sup>

What any particular exile finds illegitimate about administrative government will depend on which form of argument, libertarian or originalist, she emphasizes. According to Justice Clarence Thomas and Professor Philip Hamburger, for instance, the very existence of the modern administrative state is illegitimate because it departs from Founding-era conceptions of good government, which include a highly formalistic separation of powers and rigorous procedural protections for regulated parties.<sup>19</sup> This view, grounded in historical argument and inflected with an originalist account of legitimation,<sup>20</sup> is distinct in

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complex administrative schemes while casting significant doubt on the Court's tradition of deference to agency statutory interpretation. See *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (declining to apply *Chevron* to "a question of deep 'economic and political significance'" (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014))); *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2513–26 (2015) (declining to address *Chevron*); see also Seth Davis, *Chevron's Magical Disappearing Act?*, PRAWFSBLAWG (June 26, 2015, 2:38 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2015/06/chevrons-magical-disappearing-act.html> [<http://perma.cc/7VHK-UQAW>]; Chris Walker, *What King v. Burwell Means for Administrative Law*, YALE J. REG.: NOTICE & COMMENT (June 25, 2015), <http://www.yalejreg.com/blog/what-king-v-burwell-means-for-administrative-law-by-chris-walker> [<http://perma.cc/JCG5-H8BV>]; Adam Zimmerman, *Chevron After King v. Burwell*, PRAWFSBLAWG (June 25, 2015, 6:00 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2015/06/chevron-after-king-v-burwell.html> [<http://perma.cc/8FL4-PY3A>].

<sup>15</sup> Both the author in his book reviewed here (pp. 8 & 161 n.30), and Sunstein and Vermeule in their article, cite to Douglas H. Ginsburg, *Delegation Running Riot*, 18 REG., no. 1, 1995, at 83, 83–84 (reviewing DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY* (1993)). See Sunstein & Vermeule, *supra* note 12, at 401.

<sup>16</sup> Ginsburg, *supra* note 15, at 84.

<sup>17</sup> See generally RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* (2004); DAVID E. BERNSTEIN, *REHABILITATING LOCHNER* (2011); RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION* (2014); PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014); DAVID N. MAYER, *LIBERTY OF CONTRACT* (2011).

<sup>18</sup> Sunstein & Vermeule, *supra* note 12, at 402.

<sup>19</sup> See *Perez*, 135 S. Ct. at 1215–25 (Thomas, J., concurring in the judgment); HAMBURGER, *supra* note 17, at 3–5, 111, 227, 324.

<sup>20</sup> To the extent that "we [or most of us] are all originalists now," talk of an originalist account of legitimation will not be very helpful. See Lawrence B. Solum, *We Are All Originalists Now*, in ROBERT W. BENNETT & LAWRENCE B. SOLUM, *CONSTITUTIONAL ORIGINALISM I* (2011).

theory if not always in practice from a more directly libertarian approach. The latter faults the administrative state more for the present-day burdens it places on economic liberty and the smooth functioning of markets than its lack of antique authorization.<sup>21</sup> Yet even primarily libertarian critics tend to fall back on originalist or quasi-originalist arguments when it comes to explaining why their economic views should have legally binding force.<sup>22</sup>

Given the originalist spirit of these contemporary critiques of the administrative process, it is perhaps unsurprising that its defenders have responded with history, not economic theory. Yet while this choice is natural for a legal historian like Ernst, it is notable how many administrative law theorists have also turned to history.<sup>23</sup> Sunstein and Vermeule are prime examples, taking a strongly historicist tack in their effort to dispel the shadow cast by the “Constitution in Exile.” Today’s libertarian administrative law, Sunstein and Vermeule contend, represents a repudiation of the Administrative Procedure Act<sup>24</sup> (APA), which was not just any statute. Relying heavily on the historical gloss offered by then-Justice Rehnquist in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,<sup>25</sup> Sunstein and Vermeule argue that the APA’s passage marked a

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*But see* James E. Fleming, *Are We All Originalists Now? I Hope Not!*, 91 TEX. L. REV. 1785 (2013). This Review uses the term “originalism” to refer to those more restrictive originalist variants that would interpret Founding-era conceptions of separation of powers and due process to preclude significant portions of contemporary administrative practice and administrative law doctrine.

<sup>21</sup> See EPSTEIN, *supra* note 17, at 40 (“[T]he entrenched administrative state, especially on issues of fair competition and price stability, causes real economic loss and social dislocation . . .”); Trevor W. Morrison, *Lamenting Lochner’s Loss: Randy Barnett’s Case for a Libertarian Constitution*, 90 CORNELL L. REV. 839, 844–45 (2005) (reviewing BARNETT, *supra* note 17) (arguing that Professor Randy Barnett’s “account of constitutional legitimacy . . . has very little to do with the Framers’ actual views of constitutional formation,” which grounded constitutional legitimacy in “popular sovereignty” as opposed to Barnett’s “presumption of liberty”); cf. HAMBURGER, *supra* note 17, at 2 (“[W]hen this book objects to . . . exercises of binding [administrative] power, it does not ordinarily question the policies thereby pursued by the government. Nor does it question the policies pursued by the government in its exercise of nonbinding power, such as its distribution of welfare, social security, or other benefits.”).

<sup>22</sup> See Morrison, *supra* note 21, at 848 (explaining that while Barnett begins with a “libertarian theory of constitutional legitimacy,” he believes that public-meaning originalism is the “method of constitutional interpretation . . . most consistent with that theory”); Suzanna Sherry, *Property Is the New Privacy: The Coming Constitutional Revolution*, 128 HARV. L. REV. 1452, 1453 (2015) (reviewing EPSTEIN, *supra* note 17) (noting that “Epstein’s constitution . . . is constructed from substantive moral values,” but that “Epstein’s moral values are those on which he believes the Founders based their constitution”).

<sup>23</sup> See, e.g., WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, A REPUBLIC OF STATUTES (2010); JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION (2012); Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1929 (2013).

<sup>24</sup> Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

<sup>25</sup> 435 U.S. 519, 523 (1978).

constitutionally momentous settlement of the legitimacy crisis that shook the American administrative state in the first four decades of the twentieth century, a crisis that culminated in the New Deal.<sup>26</sup> After years of struggle, Sunstein and Vermeule explain, pro- and anti-New Deal forces were able to reach a political compromise by agreeing on the depoliticization of administrative law: “the APA should be treated as an organizing charter for the administrative state — a super-statute, if you will — not because it is a grand statement of principles with a specific ideological valence, but precisely because it is a compromise document,”<sup>27</sup> one that signifies that “the master metaprinciple of administrative law is that it has no single theoretical master principle, at least not with any kind of ideological valence.”<sup>28</sup> The APA, in other words, is a constitutionally authoritative declaration that “administrative law lacks any kind of ideological valence.”<sup>29</sup> And on this absence of ideology, its legitimacy depends. Otherwise, we may assume, the administrative process will remain wracked by Freedman’s “recurrent sense of crisis,”<sup>30</sup> as one political bloc — progressive or libertarian, left or right — repudiates that process as a vehicle for the other bloc’s ideological goals.<sup>31</sup>

While their responses to the “Constitution in Exile” movement diverge in several important respects,<sup>32</sup> *Tocqueville’s Nightmare* and

<sup>26</sup> Sunstein & Vermeule, *supra* note 12, at 466.

<sup>27</sup> *Id.* (footnote omitted).

<sup>28</sup> *Id.* at 471. For the constitutional theory of superstatutes and its implications for administrative law, see generally ESKRIDGE & FEREJOHN, *supra* note 23; Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207 (2015).

<sup>29</sup> Sunstein & Vermeule, *supra* note 12, at 401–02.

<sup>30</sup> FREEDMAN, *supra* note 1, at 6–12.

<sup>31</sup> Cf. Sunstein & Vermeule, *supra* note 12, at 471 (“Administrative law enjoys a partial autonomy from both quotidian politics and political theories, in the modest but important sense that no political view or theory can properly claim to have captured the whole terrain or to describe all the rules.”).

<sup>32</sup> While Sunstein and Vermeule ground the legitimacy of administrative law in a political consensus on its depoliticization, Ernst emphasizes the importance of lawyerly — rather than political — decisionmaking in the legitimation of administrative government. Thus, while Sunstein and Vermeule trace the legitimacy of their depoliticized administrative law to the constitutionally significant political bargain that the APA represents, Ernst views the APA mainly as a “codification” of the earlier “entente” between courts and agencies that the legal profession had brokered by 1940 (pp. 7, 137). The difference grows starker when one considers the argument, put forward elsewhere by Vermeule, that administrative *decisionmaking* (rather than administrative law as it operates in the courts) gains its legitimacy from presidential politics, not from depoliticized legal rules. ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND* 4–5 (2010). Indeed, in his own review of *Tocqueville’s Nightmare*, Vermeule argues that Ernst’s story of lawyerly administration has largely been sidelined by the shift from adjudication to rulemaking as the dominant mode of administrative governance. Adrian Vermeule, *Portrait of an Equilibrium*, NEW RAMBLER, <http://newramblerreview.com/book-reviews/law/tocqueville-s-nightmare> [<http://perma.cc/T2BC-SM47>]. The relationship between Ernst’s lawyerly account of administrative legitimacy and Vermeule’s political conception is discussed below. See *infra* section III.A, pp. 759–61.

*Libertarian Administrative Law* pursue strikingly similar argumentative strategies. First, both works present the *history* of administrative law as an effective *normative* response to the challenge posed by the “Constitution in Exile” movement. Second, they both argue that this history reveals that the administrative process won its legitimacy by the end of the New Deal. Third, they both contend that this legitimacy stemmed from a consensus — whether in the form of a lawyerly “entente” between courts and agencies (Ernst) or a politically brokered “super-statute” (Sunstein and Vermeule) — that the administrative process should be governed by a set of *politically impartial* legal principles.

In regard to this last point of agreement, it is telling that the winners of Ernst’s history are not the hardened legal realists whom we generally think of as building, and justifying, the New Deal state. Rather, Ernst turns the spotlight on reform-minded corporate lawyers, such as Charles Evans Hughes and John Lord O’Brian, who stepped back from the edge of realism. While accepting the necessity of the administrative state for managing a modern economy, they fought to imbue that state with a legalistic conception of “fair play” and a distinctively lawyerly form of expertise. These political and intellectual moderates would have agreed with Sunstein and Vermeule when they write that “[a] dose of legal realism . . . has its place, but . . . respect for the governing rules is not optional.”<sup>33</sup> Just as for Sunstein and Vermeule, the APA evacuated administrative law of “any kind of ideological valence,”<sup>34</sup> for Ernst, the “rule of lawyers” insulated the administrative state from becoming a weapon in the hands of any particular social or economic group.<sup>35</sup>

It apparently goes without saying — neither Ernst nor his protagonists say it — that the impartiality of the “rule of lawyers” admits one important exception. Under a “rule of lawyers,” the administrative state will persistently favor one socioeconomic bloc: lawyers and the

<sup>33</sup> Sunstein & Vermeule, *supra* note 12, at 473.

<sup>34</sup> *Id.* at 401–02.

<sup>35</sup> While Ernst recognizes that “particular political, professional, or scholarly interest[s]” have, on occasion, bent administrative law to their own ends, he suggests that by retaining “their longstanding role as mediators between state and society,” lawyers have successfully imbued the administrative state with the “fundamental principles of American government” (pp. 143–44). These “fundamental principles,” according to Ernst, are exemplified by Hughes’s and O’Brian’s emphasis on fairness toward all regulated parties, regardless of social or economic background (pp. 72–74, 97–106). Indeed, the pivotal moment in the history of the administrative state appears to be Hughes’s prevention of “commission government from evolving into socialism and corporatism” (p. 144). In the wake of this defense of the administrative state from total capture by either labor or capital, lawyers followed Hughes’s lead, “accept[ing] a new role of holding America’s ‘centralized administration’ to the social rationality they knew of as law” (p. 138) (citing Daniel R. Ernst, *The Ideal and the Actual in the State: Willard Hurst at the Board of Economic Warfare, in* TOTAL WAR AND THE LAW, *supra* note 9, at 150, 170).

interests they serve.<sup>36</sup> From this perspective, *Tocqueville's Nightmare* can be read as a narrative of regulatory capture: the capture of the administrative state by lawyers themselves. But while regulatory capture is generally understood as a threat to administrative legitimacy,<sup>37</sup> Ernst suggests that lawyerly capture is its condition precedent. If he is right, important new questions come to the fore: how did lawyers win the struggle to equate administrative legitimacy with their control of the administrative state, and what exactly did they win by defining administrative legitimacy in this way? Ernst's ingenious history not only forces us to ask these questions, but also helps us answer them.

The remainder of this Review is organized as follows. Part I discusses the book's substantive and methodological contributions to the legal history of the American administrative state. Part II gives a fuller description of its narrative structure, cast of characters, and argumentative turns. Part III addresses two sets of objections to Ernst's account. One set of objections relates to the *relevance* of *Tocqueville's Nightmare* to contemporary critiques of administrative legitimacy. First, to the extent that these critiques object to the administrative state on originalist or quasi-originalist grounds, an account of the way in which old constitutional principles were adopted and adapted by a new administrative bar may well be a non sequitur. Second, to the extent that these critiques construe the contemporary administrative state as a primarily political body characterized by presidential control and partisan, quasi-legislative rulemaking, Ernst's history of the "rule of lawyers" may read like ancient history — the record of an era of administrative governance that has long since passed.

Another set of objections assumes the relevance of *Tocqueville's Nightmare* but questions its *persuasiveness* as an account of the administrative state's legitimacy. First, to the extent that Ernst's argument for administrative legitimacy depends on his historical claim that, by 1940, there was a "consensus" on lawyerly administration (p. 125), one might question who exactly consented to this particularly legalistic mode of administrative governance. In order to highlight the

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<sup>36</sup> Cf. William E. Forbath, *Courting the State: An Essay for Morton Horowitz*, in 2 *TRANSFORMATIONS IN AMERICAN LEGAL HISTORY* 70, 77–79 (Daniel W. Hamilton & Alfred L. Brophy eds., 2010) [hereinafter Forbath, *Courting the State*] (calling for a sociopolitical analysis of the continuing dominance of lawyers and legalism in the development of the American state); William E. Forbath, *Politics, State-Building, and the Courts, 1870–1920*, in 2 *THE CAMBRIDGE HISTORY OF LAW IN AMERICA*, *supra* note 9, at 643, 695 [hereinafter Forbath, *Politics*] (describing the legal profession's efforts to maintain its socioeconomic power at the turn of the twentieth century).

<sup>37</sup> See, e.g., Daniel Carpenter & David A. Moss, *Introduction*, in *PREVENTING REGULATORY CAPTURE* 2, 2 (Daniel Carpenter & David A. Moss eds., 2014) (arguing that the "widespread belief that special interests capture regulation, and that neither the government nor the public can prevent this, understandably weakens public trust in government").

deft maneuvers of reformist Wall Street lawyers like Hughes and O'Brian, Ernst's narrative downplays other contenders — most significantly, antilegalistic and prolabor New Dealers, for whom the ostensibly moderate “rule of lawyers” resembled the rule of antilabor conservatives. The victory of Ernst's moderate protagonists may be attributable less to the popularity, or soundness, of their vision, than to a stalemate between more full-throated prolabor and antilabor forces. Second, assuming that there was, in some sense, a consensus on the rule of lawyers around 1940, one might question the extent to which this consensus actually helped to legitimize the administrative state thereafter. Ernst does not consider the possibility that the moderate vision of lawyerly administration has been a source of — rather than a guard against — the “recurrent sense of crisis”<sup>38</sup> that has harried the administrative state since 1940. Yet his protagonists' belief that the administrative state required legal guardianship may well be the precursor — rather than the antidote — to today's libertarian and originalist challenges to administrative legitimacy.

#### I. THE ADMINISTRATIVE STATE IN AMERICAN LEGAL HISTORY

The past twenty years have witnessed a revolution in the historical study of the American administrative state, both inside and outside the legal academy. Toppled are two previously dominant “sovereign narratives.”<sup>39</sup> The first narrative placed the emergence of the modern administrative state in the late nineteenth century, a time of political and economic upheaval that led to the professionalization of the government bureaucracy, both at the state and federal levels, and the rise of the independent regulatory commissions.<sup>40</sup> Before this time, the story went, the American federal government had been a fragmentary “state of courts and parties,”<sup>41</sup> lacking the sort of centralized, professionalized national bureaucracy that, during the nineteenth century, had come to typify European — and properly modern — government.<sup>42</sup> The second narrative, while not denying the importance of turn-of-the-century reforms, associated the true emergence of the modern administrative state with the New Deal, a second period of political and economic upheaval. This period saw an explosion in the size and scope of the federal government; a proliferation of new agencies and commissions; and a legal crisis over the relative independence of administrative decisionmaking from judicial and, at times, legislative

<sup>38</sup> FREEDMAN, *supra* note 1, at 6.

<sup>39</sup> See DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY* 7 (2001).

<sup>40</sup> *Id.* at 8–9.

<sup>41</sup> STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE* 25 (1982).

<sup>42</sup> See *id.* at 24–26.

control.<sup>43</sup> This crisis was resolved, the story went, sometime between President Roosevelt's massive reelection victory in 1936 — precipitating the legendary “switch in time” — and 1946, when Congress passed and President Truman signed into law the APA, a statutory settlement of the conflict between agencies and courts.<sup>44</sup>

These two narratives — one emphasizing the roots of modern administrative governance, the other emphasizing its full flowering — have been successfully attacked on two broad fronts. First, a growing body of scholarship has traced the roots of modern administrative governance back to the early American republic and even to colonial practices.<sup>45</sup> From this perspective, both of the previous sovereign narratives begin far too late, suffering from a widely held belief in the early American state's “exceptional,” “weak” character in comparison to European nation-states.<sup>46</sup> Meanwhile, a second body of scholarship has focused on the gap between the two sovereign narratives, constructing a story of gradual development between turn-of-the-century institutions and ideologies and the midcentury administrative state that achieved international hegemony, even as it remained pockmarked by internal weaknesses and contradictions.<sup>47</sup> The constitutional history of

<sup>43</sup> See CARPENTER, *supra* note 39, at 7; see also G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 13–14 (2000).

<sup>44</sup> See WHITE, *supra* note 43, at 13–14, 94–95.

<sup>45</sup> See, e.g., BRIAN BALOGH, *A GOVERNMENT OUT OF SIGHT* (2009); MICHELE LANDIS DAUBER, *THE SYMPATHETIC STATE* (2013); MAX M. EDLING, *A REVOLUTION IN FAVOR OF GOVERNMENT* (2003); MASHAW, *supra* note 23; REBECCA M. MCLENNAN, *THE CRISIS OF IMPRISONMENT* (2008); WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE* (1996); NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE* (2013); Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 *YALE L.J.* 1012 (2015); Anuj C. Desai, *Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy*, 60 *STAN. L. REV.* 553 (2007); Sarah Barringer Gordon, *The First Disestablishment: Limits on Church Power and Property Before the Civil War*, 162 *U. PA. L. REV.* 307 (2014); Richard R. John, *Governmental Institutions as Agents of Change: Rethinking American Political Development in the Early Republic, 1787–1835*, 11 *STUD. AM. POL. DEV.* 347 (1997); Gautham Rao, *Administering Entitlement: Governance, Public Health Care, and the Early American State*, 37 *LAW & SOC. INQUIRY* 627 (2012).

<sup>46</sup> William J. Novak, *The Myth of the “Weak” American State*, 113 *AM. HIST. REV.* 752, 754 (2008).

<sup>47</sup> See, e.g., MARGOT CANADAY, *THE STRAIGHT STATE* (2009); CHRISTOPHER CAPOZZOLA, *UNCLE SAM WANTS YOU* (2008); GARY GERSTLE, *AMERICAN CRUCIBLE* (2001); COLIN GORDON, *NEW DEALS* (1994); KIMBERLEY S. JOHNSON, *GOVERNING THE AMERICAN STATE* (2007); KEN I. KERSCH, *CONSTRUCTING CIVIL LIBERTIES* (2004); JENNIFER KLEIN, *FOR ALL THESE RIGHTS* (2003); AJAY K. MEHROTRA, *MAKING THE MODERN AMERICAN FISCAL STATE* (2013); MICHAEL WILLRICH, *POX* (2011); JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC* (2004); Ernst, *Law and the State, 1920–2000: Institutional Growth and Structural Change*, *supra* note 9, at 1; Forbath, *Politics*, *supra* note 36; Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 *COLUM. L. REV.* 1083 (2014); Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 *WM. & MARY L. REV.* 1 (2006); Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 *VA. L. REV.* 1 (2000); Reuel E. Schiller, *The Era of Deference: Courts, Expertise,*

the New Deal, which has experienced an astonishing renaissance in the past two decades, is one facet of this second revisionist project.<sup>48</sup> In this second category can also be placed work that questions the stability and coherence of the New Deal state by looking forward in time.<sup>49</sup>

As is clear from the citations in the last paragraph, historians within the legal academy have played a major role in shaping both revisionist projects. Ernst's *Tocqueville's Nightmare* constitutes a vital contribution to the second project, identifying surprising legal and political continuities in the development of the administrative state from the turn of the century to WWII, a period that is best known for rapid legal and political change. In addition to an emphasis on continuity, the most striking methodological aspect of Ernst's history is its sensitivity to the ceaseless interplay of law and politics (p. 7). Most immediately, this sensitivity aims to overcome 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. For almost as long as this divide has existed, there have been calls — and quite significant efforts — to overcome it,<sup>50</sup> but Ernst's synthesis of law and politics is a singular success.

According to *Tocqueville's Nightmare*, the story of the administrative state's development is largely one of gradual doctrinal evolution, but this is only because of the enormous *political* power of lawyers, who were able to impose a legalistic cast on administrative growth (pp. 5, 87, 106, 125, 138, 143, 160 n.22). Having long exercised an outsized political influence in American society,<sup>51</sup> lawyers — specifically, a pa-

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*and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399 (2007); Karen M. Tani, *Welfare and Rights Before the Movement: Rights as a Language of the State*, 122 YALE L.J. 314 (2012).

<sup>48</sup> See, e.g., 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998); BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* (1998); WHITE, *supra* note 43, at 94–127; Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891 (1994); Laura Kalman, *The Constitution, the Supreme Court, and the New Deal*, 110 AM. HIST. REV. 1052 (2005); G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485 (2002).

<sup>49</sup> See, e.g., ALAN BRINKLEY, *THE END OF REFORM* (1995); JOANNA L. GRISINGER, *THE UNWIELDY AMERICAN STATE* (2012); IRA KATZNELSON, *FEAR ITSELF* (2013); SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION* (2014); REUEL SCHILLER, *FORGING RIVALS* (2015); BARTHOLOMEW H. SPARROW, *FROM THE OUTSIDE IN* (1996); JAMES T. SPARROW, *WARFARE STATE* (2011); KAREN M. TANI, *STATES OF DEPENDENCY* (forthcoming 2016).

<sup>50</sup> See Kalman, *supra* note 48, at 1055, 1074–79 (calling for a “synthesis,” *id.* at 1055, and noting prior gestures in that direction); see also, e.g., ACKERMAN, *supra* note 48, at 279–312 (offering a synthetic account); WHITE, *supra* note 43, at 94–127 (same).

<sup>51</sup> Tocqueville himself famously remarked on the peculiar dominance of lawyers in the United States. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 325 (Henry Reeve trans., Longman, Green, Longman & Roberts 1862) (1835) (“The government of democracy is favourable to the political power of lawyers . . .”). For the origins and effects of this dominance, see LAWYERS AND THE RISE OF WESTERN POLITICAL LIBERALISM 28–30 (Terence C. Halliday & Lucien Karpik eds., 1997); CHRISTOPHER L. TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE*

trician group of New York corporate lawyers — were in a strong position to persuade public officials in need of authority, private citizens in need of reassurance, and other lawyers in need of continued employment, that legal doctrines about administrative decisionmaking could constitute an autonomous and enduring form of expert knowledge, one that could not be replaced by alternative forms of administrative rationality and legitimation. The more successful these lawyers were in constructing the autonomy of administrative law, the more their political influence grew. Both the “legalism” and the legitimacy of the American administrative state were the result of this dialectic between lawyerly power and legal knowledge (p. 106).

Ernst’s focus on the interplay of law and politics is not simply a response to a particular problem within New Deal historiography. It is also a hallmark of what might be called the new “legal history of administrative governance.” Mingling American legal history’s continuing debts to legal realism and the critical legal studies movement<sup>52</sup> with insights from American political science<sup>53</sup> and European social

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EARLY AMERICAN REPUBLIC 20–25 (1993); Forbath, *Politics*, *supra* note 36, at 645–50; Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870–1920*, in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 70, 95 (Gerald L. Geison ed., 1983).

<sup>52</sup> For an excellent overview of these debts, see Jessica K. Lowe, *Radicalism’s Legacy: American Legal History Since 1908*, 36 ZEITSCHRIFT FÜR NEUERE RECHTSGESCHICHTE 288 (2014). For a discussion of how the “new constitutional history” has self-consciously taken up the influences of legal realism and critical legal studies and combined them with insights from social history and legal anthropology, see Risa Goluboff, *Lawyers, Law, and the New Civil Rights History*, 126 HARV. L. REV. 2312, 2326 (2013) [hereinafter Goluboff, *Lawyers*] (reviewing KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER (2012)); Risa Goluboff, *The New Constitutional History: Toward a Manifesto* (Mar. 3, 2013) (unpublished manuscript) (on file with the Harvard Law School Library). The legal history of administrative governance shares much in common with this new constitutional history, which, as described by Professor Risa Goluboff, emphasizes the contingency and pluralism of constitutional law, and the agency of “everyday” citizens and social movements in shaping that diverse and indeterminate legal field. See Goluboff, *Lawyers*, *supra*, at 2329. Indeed, several recent legal histories of administrative governance can be read as signal contributions to the new constitutional history. See, e.g., LEE, *supra* note 49; SCHILLER, *supra* note 49; TANI, *supra* note 49. Such overlap between the two fields is not surprising given the constitutional stakes, both in terms of structure and rights, implicit in the development of administrative governance as its own modality of rule. At the same time, the legal history of administrative governance may stray from — or supplement — the new constitutional history by emphasizing the agency of state actors over “everyday” citizens, by recognizing the ways in which state-builders may self-consciously and effectively limit legal contingency and pluralism, and by expressing skepticism about the existence of a social world that is not always already shaped by state management and control.

<sup>53</sup> Specifically, American political development, see KAREN ORREN & STEPHEN SKOWRONEK, *THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT* (2004); the “new institutionalism,” see *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* (Walter W. Powell & Paul J. DiMaggio eds., 1991); and the study of bureaucratic autonomy, see CARPENTER, *supra* note 39.

and political theory,<sup>54</sup> this emerging subfield looks to the variety of institutions and actors — from federal commissions to municipal health boards to urban reform organizations, from cabinet secretaries to state and territorial courts to local volunteers — that have administered the American territory, creating order, legitimacy, and a sense of national belonging even in the absence of a predominant national bureaucracy. Unsurprisingly, this approach first asserted itself in the revisionist effort to root the American administrative state in institutions and ideologies that predated the canonical late-nineteenth-century and New Deal origin stories.<sup>55</sup> But legal historians in the second revisionist camp have also taken up administrative “governance,” exploring the continuities and contradictions that marked twentieth-century administration both inside and outside the national executive.<sup>56</sup>

The rhetorical shift from “state” to “governance” most obviously indicates an effort to break free of earlier accounts of nation-building that emphasized a more-or-less linear path toward a singularly “modern” form of state apparatus — a highly centralized and hierarchical executive bureaucracy.<sup>57</sup> But the use of the term “governance” also tends to indicate a more general agnosticism toward traditional divisions between “state” (agencies, legislatures, and, on some accounts, courts) and “society” (bar associations, think tanks, settlement houses, protests, strikes), and between law and politics. The goal is not to reduce state to society or law to politics, but rather to understand how the relative autonomy of each of these arenas is a product of historical struggle, as various actors have sought to draw and redraw the boundaries between state, society, law, and politics in order to achieve their governmental objectives.<sup>58</sup>

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<sup>54</sup> Especially notable has been the influence of Michel Foucault’s theory of governmentality as an alternative to conventional Weberian and Marxist understandings of the administrative state, which tend to treat the development of the American administrative state as peculiarly arrested. See, e.g., Novak, *supra* note 46, at 772 (citing THE FOUCAULT EFFECT (Graham Burchell, Colin Gordon & Peter Miller eds., 1991); NIKOLAS ROSE, POWERS OF FREEDOM (1999)).

<sup>55</sup> See, e.g., NOVAK, *supra* note 45; TOMLINS, *supra* note 51, at 35–59 (applying Foucault’s analysis of “police” to the early American Republic).

<sup>56</sup> See, e.g., MEHROTRA, *supra* note 47, at 8, 19, 30; SCHILLER, *supra* note 49, at 30; WILLRICH, *supra* note 47, at 78, 80, 212, 301, 327; Ernst, *supra* note 47, at 1; Forbath, *Politics*, *supra* note 36, *passim*; Kessler, *supra* note 47, at 1085 n.4, 1091 n.22; Tani, *supra* note 47, at 322, 375–76, 378, 380.

<sup>57</sup> See generally Forbath, *Politics*, *supra* note 36; Novak, *supra* note 46.

<sup>58</sup> See, e.g., William J. Novak, Stephen W. Sawyer & James T. Sparrow, *Beyond Stateless Democracy*, 36 TOCQUEVILLE REV., no. 1, 2015, at 21, 31 (“[D]emocracies constantly distribute and redistribute, negotiate and renegotiate power between state and society. The traditional opposition between state and civil society, state and democracy simply does not hold up to empirical scrutiny or historical reality. The quest for a new history and theory of the democratic states is rooted in the search for a more synthetic understanding of the state-society relationship at the heart of the democratic project.” (footnote omitted)); cf. Timothy Mitchell, *The Limits of the State: Beyond Statist Approaches and Their Critics*, 85 AM. POL. SCI. REV. 77, 77–78 (1991).

*Tocqueville's Nightmare* provides an exemplary history in this vein, tracking the efforts of elite early-twentieth-century lawyers to construct one boundary between administrative law and administrative politics while eroding another boundary between the administrative state and the legal profession. The historical success of these particular acts of boundary-drawing is evidenced by contemporary legal scholarship that continues to emphasize the depoliticization of administrative law, the legalism of the administrative state, or both.<sup>59</sup>

## II. LAWYERLY ADMINISTRATION: BETWEEN NIGHTMARE AND UTOPIA

The central claim of *Tocqueville's Nightmare* is that we have avoided Tocqueville's nightmare. In his famous reflections on Jacksonian America, Alexis de Tocqueville argued that the nation's lack of "centralized administration" was a very good thing.<sup>60</sup> Given the American people's commitment to popular sovereignty, if a powerful federal bureaucracy ever did emerge at its head, "a more insufferable despotism would prevail than any which now exists in the monarchical states of Europe; or indeed than any which could be found on this side of the confines of Asia" (p. 1).<sup>61</sup> Tocqueville had visited the United States at a moment when the phenomenon of the mass party was beginning to emerge, and his warning can be read as an intuition of how the trinity of popular sovereignty, mass party, and centralized administration might produce something like totalitarianism — a mode of governance in which the national population authorizes its own domination.<sup>62</sup>

During the New Deal — particularly at the moment of President Roosevelt's reelection in 1936 — the United States came as close as it

<sup>59</sup> See, e.g., JACK GOLDSMITH, POWER AND CONSTRAINT 51–203 (2012); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2317 (2006); Sunstein & Vermeule, *supra* note 12, at 402; Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1692–93 (2011) (reviewing BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC (2010)).

<sup>60</sup> 1 TOCQUEVILLE, *supra* note 51, at 319.

<sup>61</sup> The author quotes 1 TOCQUEVILLE, *supra* note 51, at 320.

<sup>62</sup> For the rise of the mass party in the United States and its continental correlates, see GERALD LEONARD, THE INVENTION OF PARTY POLITICS (2002). For the trope of Tocqueville as theorist of totalitarianism, see FRANÇOIS FURET, INTERPRETING THE FRENCH REVOLUTION (Elborg Forster trans., Cambridge Univ. Press 1981); CLAUDE LEFORT, *The Question of Democracy*, in DEMOCRACY AND POLITICAL THEORY 9, 9–20 (David Macey trans., Univ. of Minn. Press 1988); MATTHEW MANCINI, ALEXIS DE TOCQUEVILLE AND AMERICAN INTELLECTUALS (2006); J.L. TALMON, THE ORIGINS OF TOTALITARIAN DEMOCRACY (1952). For recent critiques of Tocqueville's vision of the liberal state and its enemies, see generally Martin Malia, *Did Tocqueville Foresee Totalitarianism?*, J. DEMOCRACY, Jan. 2000, at 179; and Stephen W. Sawyer, *Beyond Tocqueville's Myth: Rethinking the Model of the Liberal State*, in BOUNDARIES OF THE STATE IN US HISTORY 57 (James T. Sparrow, William J. Novak & Stephen W. Sawyer eds., 2015).

ever would to forging this supposedly perilous trinity.<sup>63</sup> Yet no nightmare took place, no “insufferable despotism” arose.<sup>64</sup> Nor did the American government, faced with an ongoing economic crisis and a looming war against fascism, succumb to the judicial utopias of nineteenth-century liberalism, which conflated the rule of law with the rule of courts. Thankfully, Daniel Ernst argues, a politically moderate but intellectually modern group of lawyers, convinced of both the necessity and the danger of autonomous, centralized administration, had been laying the theoretical and practical groundwork for a “liberal administrative state” since the first years of the twentieth century (p. 5). When the time came, their unique model of lawyerly administration — autonomous yet fair, procedurally constrained yet free of overly onerous judicial review — became the principle of American power.

The enormous empirical and conceptual success of *Tocqueville’s Nightmare* lies in Ernst’s reconstruction of how reform-minded Wall Street lawyers, typified by Charles Evans Hughes and John Lord O’Brian, negotiated a careful break with nineteenth-century liberalism. According to Ernst, two nineteenth-century models were particularly significant: the German ideal of the *Rechtsstaat*, imported to the United States by the administrative law scholar Ernst Freund; and the Anglophone ideal of the “rule of law,” theorized by the Oxford lawyer Albert Venn Dicey and championed by bar associations across turn-of-the-century America (pp. 2, 30). Both models proposed to constrain — and legitimate — a burgeoning administrative state by means of extensive judicial review. But neither was capable of explaining how an administrative state so fettered could meet the practical challenges posed by a nation undergoing both rapid economic growth and escalating economic conflict. Ernst’s Wall Street lawyers offered a way out of this bind by unbundling the conflation of administrative legitimation and judicial review (p. 143). Courts would remain responsible for supervising certain aspects of administrative decisionmaking — those that raised questions legal professionals were most competent to judge, such as a decision’s statutory or constitutional authority. But the administrative state would legitimate the balance of its operations by internalizing procedural norms familiar from the common law: the relative separation of prosecutorial and judicial functions, the evenhanded development of a factual record, and the reasoned explanation of a decision in terms of that record.

The book’s weakness lies in its suggestion that this unbundled “Diceyism” was the straightest and most durable road between the ju-

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<sup>63</sup> See KATZNELSON, *supra* note 49, at 39–40 (developing the argument that, in the 1930s, the United States faced a real danger of succumbing to totalitarianism).

<sup>64</sup> 1 TOCQUEVILLE, *supra* note 51, at 320.

dicial utopias of the nineteenth century and an underspecified “nightmare” of lawless administrative discretion, a nightmare given rhetorical heft by the specter of European totalitarianism lurking in the historical background. By implicitly accepting the framework of Tocqueville and his latter-day acolytes, Ernst places a thumb on the scales in favor of legalistic — and antidemocratic — sources of legitimacy. The result is to stint the more left-wing political, economic, and legal voices that Ernst’s Wall Street protagonists successfully silenced on their path to victory.<sup>65</sup> These were the voices of New Deal stalwarts both inside and outside the legal fraternity, who were more antiformalist and anticourt, more pro-administration and — crucially — more prolabor, than even the most reform-minded corporate lawyers could countenance. They believed that an autonomous administrative state was necessary to achieve a more just distribution of the nation’s resources, and that the achievement of this political economic goal, along with democratic support and expert guidance, were the sufficient conditions of the state’s legitimacy.<sup>66</sup>

Ernst certainly does not intend to imply, with his antagonists in the Tea Party and the “Constitution in Exile” movement, that such beliefs were nightmarish or totalitarian. Indeed, the book’s first and final chapters offer relatively sympathetic portraits of the unabashedly pro-New Deal legal realists Felix Frankfurter and Jerome Frank. Yet *Tocqueville’s Nightmare* suggests that the intellectual and political commitments of such men (and women<sup>67</sup>) were largely accommodated by the limitations on judicial review of administrative decisionmaking implemented by Wall Street’s rule of lawyers. In doing so, the book elides the fact that many New Dealers viewed the bar — not just the bench — as a major threat to a socially and economically egalitarian

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<sup>65</sup> The use of the totalitarian specter both to explain and justify mid-twentieth-century political moderation is something of a leitmotif in recent American historiography. See, e.g., DAVID CIEPLEY, *LIBERALISM IN THE SHADOW OF TOTALITARIANISM* (2006); KATZNELSON, *supra* note 49; ANNE M. KORNHAUSER, *DEBATING THE AMERICAN STATE* (2015). For a partial critique of this approach, see Jeremy K. Kessler, *The Last Lost Cause*, *JACOBIN*, Spring 2013, at 96 (reviewing KATZNELSON, *supra* note 49). Perhaps the most striking aspect of the “totalitarian specter” literature is its relative lack of interest in those mid-century thinkers who most explicitly hypothesized a dangerous affinity between liberal democracy and totalitarianism. See, e.g., HERBERT MARCUSE, *The Struggle Against Liberalism in the Totalitarian View of the State*, in *NEGATIONS: ESSAYS IN CRITICAL THEORY 1* (Jeremy J. Shapiro trans., 1968) (1934). Sincere antitotalitarians like Marcuse are hard to fit within the “totalitarian specter” paradigm because they understood liberalism as a way station on the road to totalitarianism, not its existential antagonist. If, as these thinkers argued, totalitarianism was an outgrowth of liberalism, then the defense of liberal ideals that became so prevalent in mid-century America can be understood as neither a necessary nor a rational response to the totalitarian threat.

<sup>66</sup> See William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 *MICH. L. REV.* 1, 53–61 (1999); Forbath, *Politics*, *supra* note 36, at 650–54.

<sup>67</sup> See LANDON R.Y. STORRS, *THE SECOND RED SCARE AND THE UNMAKING OF THE NEW DEAL LEFT* (2013).

society. Ernst's overarching goal — to prove that the modern administrative state was designed around traditional constitutional principles of individual rights, limited government, and due process — may require this sidelining of such antilegalist New Dealers. Part III below discusses whether this marginalization of the legal and political left is historically or strategically sound. This Part focuses on Ernst's account of how legal and political moderates transcended the nineteenth-century utopias of judicial supremacy while establishing the "rule of lawyers" in their place.

A. *Two Utopias: Freund's Rechtsstaat and Dicey's "Rule of Law"*

In the first two decades of the twentieth century, Ernst Freund was the preeminent American theorist of administrative law. Although born in the United States, he had studied in Berlin just as liberal German nationalists were instituting a system of administrative justice designed to constrain their "revanchist, aristocratic" bureaucracy (p. 10). The liberals' ideal, the *Rechtsstaat* (literally "state of law"), was a bureaucracy governed by detailed statutory delegations and both collateral and final judicial review of administrative action by specialized courts. These administrative courts — mixed bodies of executive officials and generalist judges — would gradually develop a set of bright-line rules to delimit bureaucratic decisionmaking (pp. 9–10).

American reformers certainly did not face the same problem as German liberals — how "to keep a royal government from playing favorites" (p. 12). But Freund and many of his contemporaries perceived an analogous risk in the state and federal bureaucracies emerging in turn-of-the-century America: patronage politics and party rule threatened to infuse the administrative state with corruption, incompetence, and, most dangerously, populism. The great Prussian theorist of the *Rechtsstaat*, Rudolph von Gneist, had envisioned administrative courts as arbiters of fairness, "purged of . . . selfish class interests," and Freund believed a similar purge was necessary in the American context (p. 11).<sup>68</sup> This purge would be easier, in a way, because "the American system of review by courts of general jurisdiction" provided for more independence than the German administrative courts, which included members of the aristocratic bureaucracy as well as civil law judges (p. 12).

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<sup>68</sup> The author quotes Erich Hahn, *Rudolf Gneist and the Prussian Rechtsstaat: 1862–78*, 49 J. MOD. HIST. D1361, D1366 (1977) (omission in original). For the politics of German *Rechtsstaat* theorists, see generally 2 MICHAEL STOLLEIS, *GESCHICHTE DES ÖFFENTLICHEN RECHTS IN DEUTSCHLAND* (1999); and Dieter Grimm, *Die Entwicklung der Grundrechtstheorie in der deutschen Staatslehre des 19. Jahrhunderts*, in *GRUND- UND FREIHEITSRECHTE VON DER STÄNDISCHEN ZUR SPÄTBÜRGERLICHEN GESELLSCHAFT* 234 (Günter Birtsch ed., 1987).

While Ernst Freund acquired his taste for judicial supremacy from German *Rechtsstaat* theorists, early-twentieth-century American lawyers were more likely to invoke an alternative English source — Albert Venn Dicey’s *Lectures Introductory to the Study of the Law of the Constitution*<sup>69</sup> (pp. 30–33). Writing at a moment when expanded administrative governance was on the agenda of English as well as American reformers, Dicey developed his account of the “rule of law” by contrasting it with the French *droit administratif* (“administrative law”). The English model, Dicey argued, differed from the French in two crucial respects: first, under the rule of law, “no man [was] punishable . . . except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land”; second, every person, including every government official, was “subject to the ordinary law of the realm and amenable to the jurisdiction of ordinary [judicial] tribunals” (p. 30).<sup>70</sup> This vision of judicial supremacy was bottomed on the belief that common law courts were the preeminent expositors and guardians of individual liberty, the institution that shielded the citizen from the willfulness of executive officials.

Dicey’s *Lectures* offered a kind of *delegitimizing* narrative, a history of English law in which an autonomous administrative state had no rightful place. This history was largely a fantasy, as Dicey himself would partly concede in 1915.<sup>71</sup> But his fantasy continued to enchant American lawyers, “inclined by habit and training to prefer the court over the administrative tribunal” (p. 32).<sup>72</sup> And given the social stature of American lawyers, their inclinations mattered. While recent scholarship has demonstrated that the nineteenth-century executive branch played a greater role in the nation’s social and economic life than previously thought,<sup>73</sup> it remains the case that at the dawn of the twentieth century, “elite lawyers and federal and some high state court judges . . . enjoyed the authority and occupied the social and governmental space that central administrative state elites claimed elsewhere.”<sup>74</sup> They found in Dicey’s “rule of law” a historical and theoretical justification for their immense social power. Proponents of an administrative state

<sup>69</sup> (London, Macmillan 1885).

<sup>70</sup> The author quotes DICEY, *supra* note 69, at 172, 177–78. See also Peter L. Lindseth, *Reconciling with the Past: John Willis and the Question of Judicial Review in Inter-War and Post-War England*, 55 U. TORONTO L.J. 657, 666 (2005).

<sup>71</sup> See A.V. Dicey, *The Development of Administrative Law in England*, 31 LAW Q. REV. 148, 152 (1915); see also Michael Taggart, *From “Parliamentary Powers” to Privatization: The Chequered History of Delegated Legislation in the Twentieth Century*, 55 U. TORONTO L.J. 575, 585 (2005).

<sup>72</sup> The author quotes Robert H. Jackson, *The Administrative Process*, 5 J. SOC. PHIL. 143, 146 (1940).

<sup>73</sup> See *supra* notes 45–46 and accompanying text.

<sup>74</sup> Forbath, *Courting the State*, *supra* note 36, at 73.

largely free of judicial interference had their work cut out for them, as such a mode of governance appeared to pose a direct threat to the lawyering class and the economic interests they served.

*B. The Fall of Freund's Rechtsstaat — and the Disappearance of Felix Frankfurter*

While the *Rechtsstaat's* form of judicial supremacy might have served equally well to protect lawyers and their clients, its foreign accent and emphasis on bureaucratic rationality were unlikely to appeal to the American common lawyer. If Freund's effort to import the German model was to succeed, it would need considerable support from more intellectually open-minded elites in the New York bar and the legal academy. Such support, however, was not forthcoming. As the first chapter of *Tocqueville's Nightmare* recounts, the East Coast legal elite deferred to a blistering critique of Freund's program offered by Felix Frankfurter — a younger but more lucid legal scholar — and his cohort of Harvard Law-trained acolytes (pp. 19–22).

In the early 1920s, Felix Frankfurter had a “radical” reputation (p. 17). A capacious legal thinker, Frankfurter was also a suspect one due to his Jewish heritage and support for pacifists, immigrants, anarchists, and labor activists in their struggle for fair — even special — treatment. Yet as judicial and academic titans such as Oliver Wendell Holmes, Louis Brandeis, and Harlan Fiske Stone recognized, Frankfurter's legal advocacy on behalf of critics of American power was in keeping with his own thoroughly nationalist and statist ideology. Frankfurter simply believed that the legal accommodation of dissenters was one aspect of building a strong state in a diverse, conflict-ridden nation.<sup>75</sup> Unfortunately for Freund, Frankfurter believed that another aspect of building such a strong state was getting rights-obsessed judges out of the business of administration.

Most fundamentally, Frankfurter objected to Freund's standard for judging the practical and normative success of a given administrative scheme: “whether private interests are adequately safeguarded” (p. 19).<sup>76</sup> For Frankfurter, the task of administration was the expert balancing of private and public interests, not the sacrifice of the former to the latter. “[W]e can't consider whether private interests are safeguarded without equally considering the public interests that are asserted against them,” he reasoned (p. 19).<sup>77</sup> What mattered for Frank-

<sup>75</sup> See Kessler, *supra* note 47, at 1115–18 (describing Frankfurter's politics and vision of a powerful but pluralistic administrative state).

<sup>76</sup> The author quotes Letter from Felix Frankfurter to Ernst Freund (Dec. 10, 1921), *microformed on Papers of Felix Frankfurter*, Reel 82 (on file with the Library of Congress).

<sup>77</sup> The author quotes Letter from Felix Frankfurter to Ernst Freund, *supra* note 76 (emphasis omitted).

furter was that “substantive justice” be done “both to public and private interests” (p. 19).<sup>78</sup> As he would put it in a landmark 1927 article, the ultimate *Task of Administrative Law* was to “fashion[] instruments and processes at once adequate for social needs and the protection of individual freedom.”<sup>79</sup> This late-1920s call for a synthesis of private rights and public welfare would be taken up by New Dealers such as Solicitor General Stanley Reed, who in 1935 warned that “[c]laims of individual liberty may in reality be claims to domination over others” (p. 141).<sup>80</sup>

Frankfurter believed that administrators, not judges, were in the best position to strike the appropriate balance between public and private interests crucial to avoiding such domination. If the priority of Freund’s *Rechtsstaat* “was the constraint of administrative discretion,” Frankfurter’s priority “was the freeing of administrators from the oversight of common-law courts.”<sup>81</sup> The young radical was not blind to the risk of abuse, even constitutional abuse, from unchecked administrative action. But he insisted that the constitutional stakes of administrative law did not merit the imposition of legalistic constraints by courts of law. Rather, “[u]ltimate protection” against unconstitutional administrative action was “to be found in the people themselves, their zeal for liberty, their respect for one another and for the common good.”<sup>82</sup> In addition to this political check, Frankfurter also argued that a culture of legal and bureaucratic professionalism would keep the administrative state on the right course: “a highly professionalized civil service, an adequate technique of administrative application of legal standards, a flexible, appropriate and economical procedure . . . and a constant play of criticism by an informed and spirited bar.”<sup>83</sup>

By the time Frankfurter wrote *The Task of Administrative Law*, his views were winning out over Freund’s. In 1926, Freund had finished a “massive manuscript” (p. 22) that tried to prove that American state and federal bureaucracies were moving in the direction of a German system of administrative law (pp. 22–25).<sup>84</sup> “[T]he few legal scholars who read the book,” however, “were unconvinced” (p. 25). They shared

<sup>78</sup> The author quotes Letter from Felix Frankfurter to Ernst Freund, *supra* note 76.

<sup>79</sup> Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 617 (1927).

<sup>80</sup> The author quotes *Reed Makes Plea for Liberal Aims*, WASH. EVENING STAR, May 30, 1935, at A2.

<sup>81</sup> Daniel R. Ernst, *Ernst Freund, Felix Frankfurter, and the American Rechtsstaat: A Transatlantic Shipwreck, 1894–1932*, 23 STUD. AM. POL. DEV. 171, 173 (2009).

<sup>82</sup> Frankfurter, *supra* note 79, at 618.

<sup>83</sup> *Id.*

<sup>84</sup> The author cites Letter from Ernst Freund to Felix Frankfurter (Mar. 7, 1927) (on file with the Commonwealth Fund, Rockefeller Archive Center).

Frankfurter's view that "Freund's focus on private right to the exclusion of public policy and the social interest was 'one-sided'" (p. 25).<sup>85</sup>

In the first years of the Great Depression, then, it was Frankfurter's punchy administrative law lectures, *The Public and Its Government*, that pointed the way forward: "government by expert administrators free to act as their scientific 'temper of mind' led them," checked by politics and professionalism, not common law courts (p. 26).<sup>86</sup> This vision of an emancipated administrative state coincided with a substantive political economic agenda. For all their talk of science, expertise, and efficiency, Frankfurter and the New Dealers he trained were no mere technocrats. The radicalism of Frankfurter's plans for a popular and professional bureaucracy freed from judicial control can be glimpsed in a 1931 letter he wrote to a friend at the *New Republic*. "Ministers in business and finance . . . should fall when they make miserable failures," Frankfurter insisted, referencing the economic catastrophe that had recently seized the nation. Yet "[o]ur kings of finance and captains of industry are all in office." This could not go on. "Commanders-in-chief . . . who bring such disasters upon their country . . . are court-martialed. Similar treatment should be meted out to the Mellons . . . and all their ilk," Frankfurter concluded.<sup>87</sup>

Although *Tocqueville's Nightmare* opens with Frankfurter's successful critique of the *Rechtsstaat*, the book has little room for Frankfurter's own, positive vision of politicized, professional administrators meting out substantive justice to the "captains of industry." The end of the first chapter shifts abruptly in chronology and ideology, from a fallen Freund — dead on the doorstep of the New Deal — to an ascendant Charles Evans Hughes, a patrician Wall Street lawyer fresh off his 1906 New York gubernatorial victory. The next two chapters chart Hughes's rise from reformist governor to Associate Justice to Chief Justice of the Supreme Court, each professional success bringing him one step closer to the transformation of Dicey's "rule of law" into the "rule of lawyers," a model of administrative legitimation grounded in lawyerly expertise.

But what happened to Frankfurter, the young radical who vanquished the *Rechtsstaat* and proposed a politically grounded account of administrative legitimacy in its place? *Tocqueville's Nightmare* doesn't offer a direct answer. Frankfurter makes passing appearances

<sup>85</sup> The author quotes Edwin W. Patterson, 29 COLUM. L. REV. 101, 104 (1929) (reviewing ERNST FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY (1928)).

<sup>86</sup> The author quotes FELIX FRANKFURTER, *Expert Administration and Democracy*, in THE PUBLIC AND ITS GOVERNMENT 123, 151 (1930).

<sup>87</sup> GARY DEAN BEST, THE RETREAT FROM LIBERALISM 7 (2002) (quoting Letter from Felix Frankfurter to George Soule (June 2, 1931), *microformed on Papers of Felix Frankfurter*, Reel 102 (on file with the Library of Congress)).

later in the book, but his realist vision of administrative governance is simply eclipsed by Hughes's legalist alternative. Frankfurter's excoriations of Hughes's approach to judicial review of administrative action in the 1930s and 1940s are muted at best. This marginalization of Frankfurter — and the realist and prolabor worldview he represented — is not an oversight by Ernst. It is rather a subtle expression of Ernst's overarching historical conclusion: that the victory of Hughes's "rule of lawyers" was a total victory — and perhaps a foreordained one, given the social power of the American bar and the interests it served.

### C. Hughes Unbundles Dicey's "Rule of Law"

Like most early-twentieth-century lawyers, Charles Evans Hughes was intuitively attracted to Dicey's "rule of law" and its identification of common law principles and practices with legitimacy *tout court*. As late as 1924, Hughes could effortlessly contrast "the law of a free people" with "those insidious encroachments upon liberty which take the form of an uncontrolled administrative authority" (p. 33). Yet nearly twenty years earlier, Ernst shows, Hughes had begun to transform the logic, if not the rhetoric, of Dicey's "rule of law." What Hughes proposed was to unbundle Dicey's conflation of legitimacy and judicial review, dividing the tasks of administrative legitimation between judges and administrators. Judges would make sure that administrators remained within constitutional and statutory bounds, while basing their decisions on substantial evidence gleaned from a fairly developed record. Administrators, in turn, would regulate their decisionmaking with quasi-judicial procedures, making more extensive — and impractical — judicial review unnecessary.

As early as 1907, Governor Hughes argued that judges should not engage in searching, "weight-of-the-evidence review of the many mundane questions that ar[i]se in the running of a utility or a railroad" (p. 36). Not only were administrators who devoted "their entire attention" to a particular industry far more competent to weigh such evidence (p. 36),<sup>88</sup> careful judicial review of quotidian regulatory decisions would "swamp the courts" and degrade their "public esteem" by implicating them in pocketbook politics (p. 36).<sup>89</sup> Accordingly, judges "should leave 'matters of detail' to commissions" and instead focus on "'real' judicial questions": whether the commission had violated "the constitutional right to hold property and not be deprived of it without due

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<sup>88</sup> The author quotes CHARLES EVAN HUGHES, *Speech Before the Elmira Chamber of Commerce, May 3, 1907*, in ADDRESSES OF CHARLES EVAN HUGHES, 1906–1916, at 179, 186 (2d ed. 1916).

<sup>89</sup> The author quotes HUGHES, *supra* note 88, at 185.

process of law” and whether the commission “had exceeded [its] statutory authority and assumed ‘arbitrary power not related to public convenience’” (p. 36).<sup>90</sup>

These “real judicial questions,” as Ernst notes, would later become known as the “constitutional fact” and “jurisdictional fact” doctrines, exceptions to the more deferential “substantial evidence” standard that applied to judicial review of most administrative factual determinations.<sup>91</sup> Progressive realists like Felix Frankfurter would see these doctrines as major stumbling blocks to an efficient and egalitarian administrative state, leaving pro-business judges in the position to impose their own notions of fairness on administrative efforts to resolve social conflicts between the propertied few and the needy multitude (pp. 46, 48–49).<sup>92</sup> Nonetheless, Ernst argues, after Hughes left Albany for the High Court in 1910, the Associate Justice distinguished himself by applying the constitutional and jurisdictional fact doctrines in a relatively pro-administration manner. In a series of precedent-setting railroad and public utility cases, most notably the *Minnesota Rate Cases* of 1913, Hughes “refused to use [the constitutional fact doctrine] to shift responsibility for most fact-finding from commissions to the courts” (p. 41). He also rejected the railroad lawyers’ favored argument that “the unreasonableness of a rate was ‘the essential jurisdictional fact,’” subject to searching, weight-of-the-evidence review (pp. 41–42).<sup>93</sup>

Hughes’s conception of judicial review as a targeted policing of the constitutional and statutory boundaries of administrative authority was progressive in the context of the early-twentieth-century American bar. But Hughes remained relatively unsympathetic to the broad delegations and summary procedures that many advocates of administrative government preferred. In 1916, he left the Supreme Court for an unsuccessful presidential run against Woodrow Wilson, the favorite of legal and intellectual proponents of a large, activist state. And while Hughes supported the Wilson Administration’s experiments with economic planning and labor mediation during World War I, he saw them as ephemeral, emergency measures. At war’s end, Hughes called for a rapid scaling back and judicialization of “the astounding spectacle of centralized control” that the wartime administrative apparatus had become (p. 44). While more left-wing progressives such as John Dewey and Felix Frankfurter hoped such an apparatus would become a per-

<sup>90</sup> The author quotes HUGHES, *supra* note 88, at 186.

<sup>91</sup> See generally Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939 (2011); Mark Tushnet, *The Story of Crowell: Grounding the Administrative State*, in FEDERAL COURTS STORIES 359 (Vicki C. Jackson & Judith Resnick eds., 2010).

<sup>92</sup> See also Tushnet, *supra* note 91, at 359–60.

<sup>93</sup> The author quotes *Louisville & Nashville Railroad Co. v. Garrett*, 231 U.S. 298, 312 (1913).

manent feature of American life,<sup>94</sup> Hughes thought it incompatible with legitimate peacetime governance. In his 1919 article *The Republic After the War*<sup>95</sup> and a series of addresses to Harvard Law School alumni, Hughes argued that agencies should vest the “different functions of prosecutor and judge” in “different officials,” and should “make their procedures more closely approximate those of courts” (p. 45). As too much judicial oversight would only lead to “dilatatory litigation” and “leave vast activities to the mercy of the cunning, selfish and avaricious” (p. 44),<sup>96</sup> the legitimacy of administrative government depended on “design[ing] agencies” in the image of courts “so as to minimize the need for judicial review” (p. 45).

By the late 1930s, Ernst argues, New Dealers themselves would come to accept this cooperative model of administrative legitimation, following the lead of Chief Justice Hughes, who had returned to the Supreme Court in the early days of the Great Depression. In arguing that the New Deal administrative state came to embody Hughes’s unbundled “Diceyism,” Ernst offers a significant reimagining of what historian Alan Brinkley once called *The End of Reform*: the radical scaling back of the New Deal’s political economic ambitions.<sup>97</sup> To understand why this is so, it is useful to recall the legal and political backdrop against which Hughes rose to power.

#### D. *The Political Economy of Unbundled Diceyism*

Distinguished by his brilliance, Charles Evans Hughes was in many other respects a familiar figure in turn-of-the-century New York. A well-to-do Republican, he made his money working in the world of “the great metropolitan law firms founded in the first years of the twentieth century” (p. 6).<sup>98</sup> Out of these firms emerged the field of corporate law, a specialty that owed its existence to the nation’s increasingly integrated economy — and the increasingly integrated transportation and natural resource industries that sought to exploit it. While committed to economic integration and growth, Hughes and

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<sup>94</sup> ALAN DAWLEY, *CHANGING THE WORLD* 146–47, 316–17 (2003); see also BARRY D. KARL, *THE UNEASY STATE* 48 (1983).

<sup>95</sup> 53 AM. L. REV. 661, 674–75 (1919).

<sup>96</sup> The author quotes Charles E. Hughes, *Some Observations on Legal Education and Democratic Progress*, in *TWO ADDRESSES DELIVERED BEFORE THE ALUMNI OF THE HARVARD LAW SCHOOL AT CAMBRIDGE, JUNE 21, 1920*, at 21, 33 (1920).

<sup>97</sup> BRINKLEY, *supra* note 49.

<sup>98</sup> Hughes began his career in the 1880s at the small but growing firm of Chamberlain, Carter & Hornblower, one of the earliest New York practices to trawl for promising graduates from the top law schools. For balanced assessments of Hughes’s early legal career and its relationship to the development of the New York corporate bar, see 1 MERLO J. PUSEY, *CHARLES EVANS HUGHES* 70–71, 81–82, 90–96, 105–17 (1951); and ROBERT F. WESSER, *CHARLES EVANS HUGHES* 26–27 (1967).

like-minded Republicans were anxious about the social costs that accompanied these developments — impoverished immigrants, industrial accidents, overcrowded cities, and ceaseless, violent struggle between workers and owners over the conditions and price of labor. Republican reformers believed that government could, in theory, meliorate these problems. Courts, however, lacked the time and specialized expertise to do so, while legislatures were “hopelessly mired in the corrupt bargains of party bosses and business interests” (p. 27). These same institutional infirmities also produced an inhospitable regulatory environment for the clients of corporate lawyers, who generally found predictable and expert regulation to be better for business than a morass of inept judicial decisions and a gray market in legislative favoritism (p. 6). Across the board, the solution was “commission” or administrative government.

Administrative agencies offered the social and economic knowledge and efficient procedures that courts lacked, as well as “a new field of political influence” partly insulated from party machines and industry lobbying (p. 26). While German liberals had designed their *Rechtsstaat* to counter the political power of a nearly impenetrable aristocratic bureaucracy, “the openness of administration in the United States” allowed a rising professional class of lawyers, doctors, corporate managers, and academics to view it as a vehicle for their own reformist and rationalizing ends (p. 26).<sup>99</sup> Accordingly, these reformers did not want an overweening judiciary to smother the growth and creativity of the young administrative state.

At the same time, Hughesian reformers shared Ernst Freund’s worry that party politics might function in a manner analogous to the German aristocracy, infusing administration with class bias. While recognizing that efficient administration could bring stability to a society roiled by economic and ethnic rivalries, Hughes and his fellow corporate lawyers remained suspicious of “the people themselves,” that group to whom Felix Frankfurter entrusted the legitimacy of the administrative state in 1927.<sup>100</sup> As Henry Stimson would later write, administrators were especially in need of legal supervision when dealing with matters “full of class feeling, bias, and counter-bias” (p. 101).<sup>101</sup>

“Class feeling” was a decades-old source of anxiety for the Republican elite. The language of “class feeling” had emerged in full force in

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<sup>99</sup> For further discussion of this class formation, see ELDON J. EISENACH, *THE LOST PROMISE OF PROGRESSIVISM* 18–47 (1994); and ROBERT WEIBE, *THE SEARCH FOR ORDER, 1877–1920*, at 111–32 (1967).

<sup>100</sup> Frankfurter, *supra* note 79, at 618.

<sup>101</sup> The author quotes *Text of Stimson Letter on Labor Relations Act*, N.Y. TIMES, Nov. 3, 1938, at 19. See WESSER, *supra* note 98, at 340–41 (describing the ideological continuity between Hughes and Stimson).

the wake of the Civil War, when industrial workers and small farmers offered an unexpectedly literal interpretation of the Republican victors' antislavery commitments to equality and "free labor."<sup>102</sup> The working classes in the North and South saw increasingly nationalized and internationalized networks of capital accumulation as a threat to their equal political and economic citizenship, a threat that could reduce them to a "wage slavery" little better than the racial slavery that the Republican North had so recently crushed.<sup>103</sup> The same men who had "etched out a new conception of an active democratic state to undergird the expanded powers of the federal government" during the Civil War and Reconstruction, now worried that "labor and agrarian agitators" would turn the "active democratic government" into a sword against "property rights rulership."<sup>104</sup> By the 1870s, *The Nation*, founded to trumpet the cause of abolition, decried the "politics of class feeling," a politics that aimed to seize the newly powerful state apparatus and turn it toward economically egalitarian ends.<sup>105</sup>

The Republican legal elite of New York City had stood as a bulwark against this threat for fifty years. Although by the early twentieth century they were coming to respect the administrative state's capacity to rationalize capitalism, they also believed that such a state required constant policing lest it become captured by "class feeling" — the passions of the working class in particular. Accordingly, while Hughes, Stimson, and their Wall Street colleagues were less enamored of judicial review than Freund, Dicey, or the average storefront litigator, they nevertheless believed that courts remained necessary to guard against the seizure of the administrative apparatus by a workers' party. Such a seizure was exactly what the New Deal threatened. Hughes's unbundled "Diceyism" was perfectly tailored to meet this political economic threat, and the third and central chapter of *Tocqueville's Nightmare* beautifully illustrates how Chief Justice Hughes applied his vision of administrative legitimacy to a host of high-stakes, New Deal legal disputes.

### E. A Dicey New Deal

The backdrop of Chief Justice Hughes's tenure was economic conflict at home and the rise of totalitarian governance abroad. As he asked a university alumni audience in the late 1930s, "[u]nder the pressure of economic forces and the insidious teachings of an alien philos-

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<sup>102</sup> See Forbath, *Politics*, *supra* note 36, at 645–46.

<sup>103</sup> See ELIZABETH SANDERS, *ROOTS OF REFORM 30–177* (1999); AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT 244–45* (1998); WITT, *supra* note 47, at 34.

<sup>104</sup> Forbath, *Politics*, *supra* note 36, at 645–46.

<sup>105</sup> *Id.*

ophy, will our democracy be able to survive?” (p. 51).<sup>106</sup> To ensure that it would, Hughes vigilantly “watched for signs” (p. 56) that American government was descending into a “form of autocracy, whether contrived to promote efficiency or to establish class rule” (p. 56).<sup>107</sup> From Hughes’s perspective, early New Deal administration was marked by two such worrisome signs — an absence of rigorous factfinding and almost limitless legislative delegations. While Hughes’s political economic opposition to “class rule” fed his distaste for these features of the administrative state, Ernst shows that even the most pro–New Deal lawyers were uncomfortable with the regime’s early legislative forays.

Felix Frankfurter, for instance, “attempted to advise the drafters” of the National Industrial Recovery Act (NIRA) and the Agricultural Adjustment Act (AAA) that the laws should require administrators to make “findings of fact backed with substantial evidence in support of their orders” (p. 56). “Charles E. Wyzanski, Jr., Frankfurter’s protégé and the top lawyer at the US Department of Labor, thought [the] NIRA ‘a most unbelievably sloppy piece of work’ that no amount of rewriting was likely to save” (p. 56).<sup>108</sup> Whether these warnings were largely tactical, or reflected a deeper ideological agreement with Hughes’s vision of administrative law, is not clear. Nevertheless, Ernst argues that when Chief Justice Hughes, joined by a supermajority of Justices, first limited and then struck down NIRA in 1935, it was not a revanchist, but a corrective act, reaffirming basic principles of administrative governance that progressive lawyers had long supported (pp. 59–60).

Similarly, Ernst reads the Chief Justice’s decisions involving the scope and intensity of judicial review of administrative factfinding as largely corrective. When Hughes gave up his Associate Justiceship in 1916, the Supreme Court had been on an “accommodating trajectory” (p. 56), thanks in part to Hughes’s own efforts to narrow the constitutional and jurisdictional fact doctrines (pp. 43, 56). But in the intervening years, the Court had moved rightward, influenced by the appointment of the former railroad lawyer Pierce Butler, who was happy to reverse regulators for setting rates that deprived railroad and energy companies of the profits to which they were putatively entitled by the Constitution (p. 47). Against this backdrop, Ernst interprets the Chief Justice’s 1932 decision in *Crowell v. Benson*<sup>109</sup> — which approved of a

<sup>106</sup> The author quotes *Secured Liberties Sought by Hughes*, N.Y. TIMES, June 22, 1937, at 21.

<sup>107</sup> The author quotes *Hughes Urges Bar Aid Law Reforms*, N.Y. TIMES, Sept. 30, 1931, at 26.

<sup>108</sup> The author quotes Letter from Charles E. Wyzanski, Jr., to Maude J. and Charles E. Wyzanski (May 16, 1933) (on file with the Massachusetts Historical Society).

<sup>109</sup> 285 U.S. 22 (1932).

district court's de novo trial of two "jurisdictional facts"<sup>110</sup> — as a clarification and narrowing of the jurisdictional fact doctrine, not a "continuation" of the strict interpretation of "Dicey's rule of law" favored by pro-business lawyers and judges (pp. 52–56).<sup>111</sup>

In the abstract, almost any factual question an administrator has to answer while faithfully implementing a statute — for example, "the amount of compensation that should be awarded" under a workingmen's compensation law (p. 53)<sup>112</sup> — can be considered "jurisdictional," as a sufficiently erroneous answer may render the administrator's action ultra vires. In *Crowell*, however, Hughes limited the world of "jurisdictional facts" to those facts that "determined whether the authority under which an agency acted was authority that was in fact Congress's to confer," such as whether a maritime injury had occurred on navigable waters under federal authority (p. 53). With this new definition, Hughes "collapsed" jurisdictional facts into the category of constitutional facts; only if the existence of a fact went to the ultimate constitutional authority of the administrative scheme was it jurisdictional in nature and subject to searching judicial scrutiny (p. 53).

Hughes also worked to limit the impact of the most infamous line of "constitutional fact" cases — those involving the question whether an administrative decision was "confiscatory" in nature,<sup>113</sup> and thus in violation of constitutional due process. It was in these cases that the judiciary's role as guardian of large-scale property owners was clearest. Although Justices Brandeis, Stone, and Cardozo wanted to radically scale back this role by treating administrative orders supported by substantial evidence as presumptively nonconfiscatory,<sup>114</sup> Hughes went part of the way, instructing lower courts that something less than de novo review was appropriate in such cases: "judges should take the regulators' 'reasoning and findings' into account," should generally not consider new evidence absent from the administrative record, and should assign "a heavy burden of proof" to those challenging administrative action (p. 67).<sup>115</sup> Lower courts got the message: by the end of the 1930s, Ernst announces, the jurisdictional and constitutional fact

<sup>110</sup> *Id.* at 60–61.

<sup>111</sup> This characterization of Hughes's doctrinal intent in *Crowell* is somewhat at odds with his political response to the 1920s Court's rightward shift. While legal realists viewed the 1920s Court's constitutional and jurisdictional fact jurisprudence as evidence of federal judges' class bias (pp. 46–49), Hughes insisted that the judiciary was "exempt . . . from the baleful influence of factions" (p. 46) (quoting CHARLES EVAN HUGHES, *The Shrine of the Common Law, in THE PATHWAY OF PEACE: REPRESENTATIVE ADDRESSES DURING HIS TERM AS SECRETARY OF STATE* (1921–1925), at 211 (1925)).

<sup>112</sup> The author quotes *Crowell*, 285 U.S. at 47.

<sup>113</sup> *E.g.*, *Smyth v. Ames*, 171 U.S. 361 (1898).

<sup>114</sup> *See* *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 73 (1936) (Brandeis, J., concurring); *id.* at 93 (Stone and Cardozo, JJ., concurring in the result).

<sup>115</sup> The author quotes *St. Joseph Stock Yards*, 298 U.S. at 54.

doctrines were “moribund,” and “the triumph of the substantial evidence standard was apparent” (pp. 70–71).

While Hughes led the judiciary in this “orderly retreat” from intensive review of administrative factfinding (p. 67), New Deal lawyers were hard at work correcting the regime’s earlier procedural missteps. Ernst takes us inside the offices of Senator Robert Wagner and the Justice Department, where young lawyers fresh from administrative law seminars at Harvard and Columbia judgment-proofed the National Labor Relations Act (NLRA), the centerpiece of the New Deal’s effort to unionize vast numbers of American workers (pp. 60–64). They made sure that Congress’s delegation of authority to the new National Labor Relations Board (NLRB) was constrained by intelligible principles and supported by prevailing understandings of the legislature’s power to regulate interstate commerce (pp. 63–64). The statute also made clear that the Board was to develop an evidentiary record in each labor dispute, act only after regulated parties received notice and a hearing, and justify its decisions with evidence in the record (pp. 62–63).

Lawyerly administration paid off. Before *NLRB v. Jones & Laughlin Steel Corp.*<sup>116</sup> — one of the major challenges to the NLRA’s constitutionality — ever got to the courts, the NLRB “had given the [company] ample opportunity to present evidence, and the Board’s lawyers had carefully compiled a record showing how the company’s behavior burdened or threatened to burden the free flow of commerce,” the crucial constitutional fact (p. 69). In upholding the constitutionality of the Act, Chief Justice Hughes approvingly observed that “[t]he facts found by the Board support its order and the evidence supports the findings.”<sup>117</sup> He also noted that the Act provided for “complaint, notice and [a] hearing” in which administrators “must receive evidence and make findings.”<sup>118</sup> This was good administration, and Hughes was happy to sign off on it.

As Ernst summarizes Chief Justice Hughes’s approach, “[w]hen . . . statutes required agencies to operate within limited delegations, hold adequate hearings, and adopt appropriate findings of fact, Hughes interpreted the relevant constitutional doctrines to uphold an agency’s actions” (p. 68). When, on the other hand, administrative schemes failed to meet these procedural criteria, Hughes “applied [constitutional] doctrines aggressively” (p. 68). For the most part, lawyers within the New Deal state understood Hughes’s emphasis on good procedure, and they drafted the NLRA and later statutes accordingly. They also worked to convince less lawyerly administrators that the

<sup>116</sup> 301 U.S. 1 (1937).

<sup>117</sup> *Id.* at 47.

<sup>118</sup> *Id.*

best way to avoid judicial correction was to follow the basic procedural norms that courts had come to expect from even the most summary adjudication.

Having painted this picture of a lawyerly “reconciliation” between New Deal agencies and the High Court — a reconciliation built on Hughes’s unbundled Diceyism and the “rule of lawyers” it promoted — the central chapter of *Tocqueville’s Nightmare* ends in a surprising state of confusion. The source of confusion is the Hughes Court’s April 1938 decision in *Morgan v. United States*<sup>119</sup> (*Morgan II*), a decision that suggested that the basic procedural norms with which agencies had to comply to secure their legitimacy might be far more expansive than New Deal lawyers had previously understood. *Morgan II* involved an order issued by the famously left-wing Secretary of Agriculture, Henry Wallace. Wallace’s order lowered the rates that “commission men” could charge farmers for access to the stockyards where meatpackers bought livestock.<sup>120</sup> Challenging the fairness of Wallace’s order, the commission men argued that the Department of Agriculture had not given them a “full hearing” as required by statute.<sup>121</sup> The record revealed that the same lawyer who had represented the Department at the administrative hearing “had also prepared the findings of fact and the order Secretary Wallace issued, and he had done so without giving the commission men a chance to contest his version of the dispute” (p. 73). This was the sort of mixing of prosecutorial and judicial functions that Hughes, in the wake of World War I, had warned against (p. 45). But it was — and had long been — standard practice in many administrative agencies (pp. 71–73).

Chief Justice Hughes struck down the order, holding that when Congress required a “full hearing,” it “had regard to judicial standards, — not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature.”<sup>122</sup> Administrators did not have to abide by the same procedures used in common law courts, but they did have to act “in accordance with the cherished judicial tradition embodying the basic concepts of fair play.”<sup>123</sup> It was not fair play for an administrative factfinder to simply accept the recommendations of the “active prosecutors for the Government,” delivered in an “*ex parte* discussion” and without a chance for the regulated party to re-

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<sup>119</sup> 304 U.S. 1 (1938).

<sup>120</sup> *Id.* at 13; *see also id.* at 1.

<sup>121</sup> *Id.* at 15 (quoting Packers and Stockyards Act of 1921, Pub. L. No. 67-51, § 310, 42 Stat. 156, 166 (codified as amended at 7 U.S.C. § 211 (2012))).

<sup>122</sup> *Id.* at 19.

<sup>123</sup> *Id.* at 22.

spond.<sup>124</sup> *Morgan II*, Chief Justice Hughes would later tell the American Law Institute, stood for the proposition that “[t]he wise administrator [should] act ‘in the spirit of the just judge’” (p. 74).<sup>125</sup>

Ernst treats *Morgan II* as the definitive statement of Hughes’s unbundled Diceyism: “Courts would intervene to structure agencies’ proceedings in their own image so that the affected parties could bring egregious decisions to their attention. Otherwise, the judges were to give administrators their lead” (p. 76). But the Chief Justice’s decision was more than a theoretical statement. It had enormous practical implications because many agencies, including the recently formed NLRB, did not enforce a strict separation between trial examiners and factfinders (p. 63). The federal judiciary had not previously suggested that the constitutional norm of procedural due process required such a separation, and many successful New Deal statutes did not require such an intra-agency division of authority (pp. 63, 75).<sup>126</sup> Secretary Wallace implied that Chief Justice Hughes’s real target was the NLRB, which was coming under increasing fire for its favorable treatment of the Congress of Industrial Organizations (CIO), a militant union collective that helped bankroll President Roosevelt’s 1936 reelection victory and conducted a massive strike wave in 1937 (pp. 74, 79).<sup>127</sup>

Whether or not Wallace was right about Hughes’s political motivations, the Chief Justice’s decision hit the NLRB hard. “Days after *Morgan* was announced,” the Board “withdrew several cases from the federal courts and instructed the attorneys who prepared its findings not to discuss cases with trial attorneys or [administrative] trial examiners” (p. 75). Nor was *Morgan*’s impact limited to the particularly controversial Labor Board. As one journalist reported, “virtually all of the quasi-judicial commissions of the Federal Government are beginning . . . to reexamine their procedure in light of the chief justice’s ruling to see whether they are giving the citizens a full and fair hearing in accordance with the time honored judicial processes of fairness and equity” (p. 75).<sup>128</sup> In January 1939, the Justice Department launched a Committee on Administrative Procedure to consider, among other

<sup>124</sup> *Id.*

<sup>125</sup> The author quotes *Address of Justice Hughes at Law Institute*, N.Y. TIMES, May 13, 1938, at 8.

<sup>126</sup> See Louis G. Caldwell, *A Federal Administrative Court*, 84 U. PA. L. REV. 966, 975 (1936) (“So far as I know, not a single federal decision declares or even hints that it is unconstitutional to combine judge with prosecutor or legislator.”); Kenneth Culp Davis, *Separation of Functions in Administrative Agencies*, 61 HARV. L. REV. 389, 391–92 (1948) (summarizing the pre-*Morgan II* case law).

<sup>127</sup> See also KARL, *supra* note 94, at 139 (describing the sit-down strikes organized by the Congress of Industrial Organizations); KATZNELSON, *supra* note 49, at 273 (same).

<sup>128</sup> The author quotes David Lawrence, *Hughes Ruling Gets Quick Action*, enclosed in Letter from Roscoe Pound to O.R. McGuire (May 3, 1938), *microformed on Papers of Roscoe Pound*, Reel 109 (on file with the Harvard Law School Library).

questions, whether “the ideal of even-handed justice . . . require[d] a pretty thoroughgoing separation of the prosecuting and the judicial staff” (p. 76).<sup>129</sup>

Ernst offers *Morgan II* as the capstone of the “entente” between courts and the administrative state. Yet given the upheaval the case caused, it is difficult to avoid the impression that Chief Justice Hughes’s decision sowed new doubts about administrative legitimacy, demanding something more of agencies than learned New Deal lawyers had thought was necessary in designing bodies like the NLRB. If the legitimacy of an administrative decision was to depend on a court’s after-the-fact application of the nebulous concept of “fair play,” administrative legitimacy might remain forever provisional, the artifact of a particular judge’s conception of fairness. Nor could there have been much solace in the equation of “fair play” with “the spirit of the just judge.” Administrators were not judges — that difference was the reason for the former’s existence. Administrators had different expertise, different mandates, and, often, different class backgrounds. Yet if every departure from judicial mores was a potential reason for reversal, then agencies would be little better off than in Dicey’s utopia, where their legitimacy was wholly dependent on judicial approbation.

Such a nightmarish return of judicial supremacy was not to be. But the political and economic circumstances surrounding *Morgan II* all but rule out an interpretation of the decision as settling the administrative state’s legitimacy once and for all. When the Supreme Court handed down *Morgan II* in April 1938, the United States was at the tail end of the bruising “Roosevelt Recession.” This economic downturn had coincided with the CIO’s deeply unpopular strike wave, a campaign that was seen by some as a cause of the downturn, and by many as symptomatic of the New Deal’s irresponsible encouragement of the most radical elements of the working class.<sup>130</sup> As Professor Barry Karl writes: “Amid declining industrial production and soaring unemployment, the call for more radical action was replaced by concern for what the supposed radical action of the New Deal had already done.”<sup>131</sup>

President Roosevelt’s 1937 legislative proposals to pack the Supreme Court and consolidate administrative power in the White House — ginned up in the heady aftermath of his 1936 reelection and months before the recession hit — could not have come at a worse time. The proposals outraged many of the President’s more moderate supporters, especially in the legal profession. Wall Street lawyers

<sup>129</sup> The author quotes Memorandum from Warner W. Garner to James W. Morris (Jan. 21, 1939) (on file with the Harvard Law School Library).

<sup>130</sup> See KARL, *supra* note 94, at 139, 154–58.

<sup>131</sup> *Id.* at 154.

mounted well-funded lobbying campaigns that labeled the judicial and executive reorganization plans as brazen steps in the direction of totalitarian rule, products of “the insidious teachings of an alien philosophy” (p. 51)<sup>132</sup> about which Chief Justice Hughes had warned at the outset of the Depression.<sup>133</sup> These campaigns helped resurrect the popularity of judicial review, reframing the federal courts as guardians of civil liberty rather than economic privilege.<sup>134</sup>

Roosevelt’s Court plan died in the summer of 1937, and “[a]n alliance of southern Democrats and Republicans” rejected much of the rest of the President’s second-term agenda the following fall, delivering Roosevelt “perhaps . . . the most significant defeat of his presidency.”<sup>135</sup> Legislative resistance to the New Deal only stiffened when President Roosevelt responded to his 1937 losses with a failed purge of anti-administration Democrats in the primaries of 1938 (p. 79).<sup>136</sup> Meanwhile, the American Bar Association (ABA) prepared a series of broadsides against the “administrative absolutism” of the New Deal (p. 125), comparing its regulatory agenda to the illiberal regimes of Nazi Germany and Stalinist Russia (pp. 125–27).<sup>137</sup> In this environment, *Morgan II*’s language of “fair play” would be used time and again to imply that New Deal administrators cared more about the social and economic power of favored constituencies than the individual rights of all Americans.

The crisis of 1937–1938 did not dislodge the American administrative state — it was there to stay, and would only be further entrenched by the following year’s military mobilization, launched in response to Nazi and Soviet aggression. But the administrative state’s redistributive potential would be increasingly constrained by the legalistic conception of “fair play” that men like Hughes favored, a conception that conveniently offered a clear distinction between American and Nazi-Soviet governance. Meanwhile, the progressives’ decades-long assault on courts as champions of the privileged few ended in a surprising reversal, as Americans in ever-greater numbers called on judges to articulate and defend their individual rights against unfair public regulation.

<sup>132</sup> The author quotes *Secured Liberties Sought by Hughes*, *supra* note 106, at 21.

<sup>133</sup> See Jeremy K. Kessler, *A War for Liberty: On the Law of Conscientious Objection*, in 3 *THE CAMBRIDGE HISTORY OF THE SECOND WORLD WAR* 447, 458–61 (Michael Geyer & Adam Tooze eds., 2015).

<sup>134</sup> See *id.*

<sup>135</sup> KARL, *supra* note 94, at 168.

<sup>136</sup> See *id.* at 160; KATZNELSON, *supra* note 49, at 175.

<sup>137</sup> See GRISINGER, *supra* note 49, at 21–22; James E. Brazier, *An Anti-New Dealer Legacy: The Administrative Procedure Act*, 8 *J. POL’Y HIST.* 206, 210–11 (1996); Kessler, *supra* note 133, at 459–61; George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 *NW. U. L. REV.* 1557, 1590–93 (1996).

*F. The Politics of "Fair Play"*

The bravura penultimate chapter of *Tocqueville's Nightmare* captures the crisis of 1937–1938 with a zoom lens, as Ernst documents how it rocked New York, President Roosevelt's home state (pp. 78–106). In November 1938, the reelection campaign of Senator Wagner, a stalwart New Dealer and standard-bearer of the regime's prolabor policies, coincided with a referendum on an amendment to New York's constitution, an "anti-bureaucracy clause . . . that would greatly increase New York courts' oversight of the state's agencies" (p. 78). The amendment was the work of anti-New Deal trial lawyers within the New York State Bar Association, and a reflection of the discord that Roosevelt's second term had sown in his home state (pp. 80–87). Ernst recounts how members of the New York City Bar — corporate lawyers of Chief Justice Hughes's ilk, including Hughes's own son — organized against the antibureaucracy clause, which they saw as a threat to rational administration and their own clients' interests (pp. 80–82, 84–85). At the same time, however, these corporate lawyers backed the Senate candidacy of John Lord O'Brian, whose campaign focused on the New Deal's unlawyerly excesses, typified by the incumbent Senator's NLRA and its left-wing Board (p. 99).

Opposed by the corporate lawyers and other moderate Republicans, as well as pro-New Deal Democrats and the hard left, the antibureaucracy amendment was voted down by a large margin (p. 90). But to the great dismay of New Dealers, including President Roosevelt himself, the Senate race was much closer. A decade younger than Charles Evans Hughes, O'Brian had come up in the same world of reformist New York politics — indeed, Governor Hughes had been "O'Brian's entrée to the patrician corporation lawyers of New York City" (p. 92). O'Brian went on to serve in President Woodrow Wilson's Department of Justice, where he tried to rein in the excesses of wartime prosecution of dissent (p. 92),<sup>138</sup> and in 1935, the Roosevelt Administration asked him to defend the constitutionality of the Tennessee Valley Authority (p. 92–93).

O'Brian's deep New York roots and bipartisan service made him an attractive candidate: not an antediluvian opponent of the administrative state as such, but someone who understood that its legitimacy depended on lawyerly restraint. In 1936, O'Brian wrote an ABA report that criticized the NLRB for violating "the traditional requirements of fair play," forecasting the rhetoric Chief Justice Hughes

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<sup>138</sup> See also RICHARD W. STEELE, *FREE SPEECH IN THE GOOD WAR* 5–7 (1999); GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 212–20 (2004).

would use in *Morgan II* (p. 95).<sup>139</sup> By 1938, O'Brian's view was widespread, and the national press — which had long castigated New Deal economic regulation as a threat to freedom of the press — “consistently condemned” the NLRB (p. 96).<sup>140</sup> In the Labor Board, Ernst Freund's decades-old warning that the administrative state might become a vehicle of class rule had come to a head. As O'Brian's old friend from the New York legal world, Henry Stimson, told the *New York Times*, the NLRA's procedures were no way to decide matters “full of class feeling” (p. 101).<sup>141</sup>

The *Times* columnist Arthur Krock predicted that O'Brian's candidacy would put “the extremes of the New Deal” on trial (p. 97).<sup>142</sup> And that is what O'Brian did in a short, monthlong campaign. While declaring himself in agreement with the basic principles of the Wagner Act, he condemned the NLRB's “secret reports and files,” “the partiality and open partisanship” of its staff, its refusal to allow employers as well as employees to call for union elections (p. 99),<sup>143</sup> and its mixing of prosecutorial and judicial functions (pp. 98–99). The reality was that many agencies mixed prosecutorial and judicial functions. But O'Brian insisted that the Labor Board, the locus of New Deal class struggle, had to observe a higher procedural standard because it answered “fundamental questions of human right and even of human liberty” (p. 98).<sup>144</sup>

Although Ernst characterizes this argument as “unconvincing,” the idea that the political branches might merit special suspicion when dealing with “fundamental questions . . . of human liberty” was in the air (p. 98).<sup>145</sup> It had been floated months earlier by Justice Harlan Fiske Stone in Footnote Four of *United States v. Carolene Products Co.*,<sup>146</sup> handed down the same day as Chief Justice Hughes's celebration of the “fundamental requirements of fairness” in *Morgan II*. Notably, it was Chief Justice Hughes himself who had suggested that Jus-

<sup>139</sup> The author quotes Comm. on Admin. Law, Am. Bar. Ass'n, *Report of the Standing Committee on Labor, Employment and Social Security*, 63 ANN. REP. A.B.A. 269, 270 (1938). See also *Morgan II*, 304 U.S. 1, 15 (1938).

<sup>140</sup> For the role of the newspaper industry in fomenting a civil libertarian critique of the New Deal, see EDWIN EMERY, HISTORY OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION 218–27 (1950); and GRAHAM J. WHITE, FDR AND THE PRESS 49–66 (1979).

<sup>141</sup> The author quotes *Text of Stimson Letter on Labor Relations Act*, *supra* note 101, at 19.

<sup>142</sup> The author quotes Arthur Krock, *In the Nation: The Republican Tactics in New York*, N.Y. TIMES, Oct. 6, 1938, at 22.

<sup>143</sup> The author quotes John Lord O'Brian, Address to the Young Men's Republican Clubs of the Eighth Judicial District 6–8 (Oct. 15, 1938) (on file with the Harvard Law School Library).

<sup>144</sup> The author quotes O'Brian, *supra* note 143, at 6.

<sup>145</sup> See generally John W. Wertheimer, A “Switch in Time” Beyond the Nine: Historical Memory and the Constitutional Revolution of the 1930s, in 53 STUDIES IN LAW, POLITICS AND SOCIETY 3 (Austin Sarat ed., 2010).

<sup>146</sup> 304 U.S. 144, 152 n.4 (1938).

tice Stone include Footnote Four's first paragraph, which implied that any law encroaching on the Bill of Rights — including the Fifth Amendment — might be subject to heightened judicial scrutiny.<sup>147</sup>

O'Brian's libertarian critique of the NLRB had legs. On November 1, 1938, the *New York Times* endorsed O'Brian for Senate, and five days later, the *New York Daily News* reported that, "[f]or the first time since Franklin D. Roosevelt crushed Herbert Hoover and shattered the Republican organization with the power of his New Deal appeal," "the political dominance of the President is in peril" (p. 102).<sup>148</sup>

In the end, O'Brian "carried every county above the Bronx save Albany," but lost New York City by a wide margin, and with it, the election (p. 104). Nonetheless, he garnered over two million votes, and cut Wagner's 1932 margin of victory by forty percent. As Ernst astutely observes, the surprising tightness of the race was almost as good as a victory in accomplishing the O'Brian camp's goal — triggering a "reassessment of national labor policy" and New Deal administrative procedure more generally (p. 104). "Roosevelt's expenditure of so much capital on what ought to have been the easiest of senatorial campaigns" was a disaster in light of the wave of congressional and gubernatorial defeats for New Dealers elsewhere in the country (p. 104).

In the wake of the election, the press reported that "a careful stock-taking has gone on in these last few days' among 'the New Dealers whose great object is the transformation of the Democratic party into a New Deal or "progressive" party'" — that is, among the New Deal's most economically and racially progressive supporters (p. 104).<sup>149</sup> "[T]he validity of certain attacks on the WPA and the Labor Relations Board" had been recognized, and there was a growing consensus within the Administration that NLRB "must cease to have a partisan flavor" (pp. 104–05).<sup>150</sup> As Ernst concludes: "Political observers interpreted [O'Brian's] surprisingly strong showing as a sign that attacks on the procedures of the New Deal's agencies might succeed when calls for their abolition or subjection to judicial tutelage would fail" (p. 106). Going forward, the "political legitimacy" of the "nation's bureaucrats" would depend on "the legalism of the American administrative state" (p. 106).

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<sup>147</sup> See Felix Gilman, *The Famous Footnote Four: A History of the Carolene Products Footnote*, 46 S. TEX. L. REV. 163, 166 n.6 (2004).

<sup>148</sup> The author quotes John O'Donnell & Doris Fleeson, *New Deal Control at Stake at the Polls*, N.Y. DAILY NEWS, Nov. 6, 1938, at 8.

<sup>149</sup> The author quotes Joseph Alsop & Robert Kintner, *The Capital Parade*, EVENING STAR (D.C.), Nov. 16, 1938, at A11. It was precisely at this moment that an internal purge began of the New Deal's left wing. See STORRS, *supra* note 67, 51–53.

<sup>150</sup> The author quotes Alsop & Kintner, *supra* note 149.

Ernst's own language here is ambiguous: did the 1938 elections reveal a consensus on the legitimacy of the administrative state or a consensus on how best to *delegitimize* it going forward? Electoral results are famously difficult to interpret, but even on Ernst's own interpretation, what the 1938 electoral season seems to reveal is a widespread belief (at least among lawyers, the press, and upstate New Yorkers) that, while judges should not be tasked with the job of breaking the New Deal state, that state was a rough beast, coursing with class feeling and best housed in a legalistic cage.

The final chapter of *Tocqueville's Nightmare* only strengthens the sense that administrative legitimacy was very much in medias res at the end of the 1930s. The task of this chapter is to explain why Congress's passage of the Walter-Logan bill in 1940 is not evidence of deep disagreement about the legitimacy of administrative government. Walter-Logan was based on a model law prepared by staunchly anti-New Deal members of the ABA, and threatened to subject many administrative agencies to expanded judicial review and a host of new formal procedures.<sup>151</sup> In December 1940, however, President Roosevelt vetoed the designs of a growing number of administration skeptics in the Bar and Congress, citing the need for streamlined administration as the country mobilized for a potential war with Nazi Germany (pp. 137–38).<sup>152</sup> Ernst provides an ingenious if ultimately unsatisfying explanation of this fierce political battle over the minimum legal constraints necessary to legitimate the administrative state.

Walter-Logan has generally been thought to have possessed the imprimatur of the former Harvard Law School Dean Roscoe Pound. The model law on which it was based was published in the same issue of the ABA Annual Report as Pound's *Report on Administrative Procedure* — a famously inflammatory document that denounced the New Deal for its “administrative absolutism” and compared its defenders to Soviet legal theorists (pp. 125–26).<sup>153</sup> But while Pound would later “unambiguously endorse[]” Walter-Logan (p. 135), Ernst shows that he never actually signed on to the ABA model law (pp. 122–23). More significantly, Ernst argues, Pound was led to support the model law's congressional codification, as well as to write his own fiery *Report*, mainly because of academic politics — his ongoing fight with unabashedly pro-administration legal realists such as Felix Frankfurter, Jerome Frank, and James Landis, who had replaced Pound as Dean of Harvard Law School. In actuality, Ernst argues, Pound's vision of

<sup>151</sup> See Brazier, *supra* note 137, at 210–12.

<sup>152</sup> See also Kathryn E. Kovacs, *A History of the Military Authority Exception in the Administrative Procedure Act*, 62 ADMIN. L. REV. 673, 689–90 (2010).

<sup>153</sup> See *Report of the Special Committee on Administrative Law*, 63 ANN. REP. A.B.A. 331, 343, 361 (1938).

administrative legitimacy “converged on about the same position” held by Hughes and O’Brian: “The courts would insist on due process within the agency. Due process within the agency would make further judicial review unnecessary” (p. 125). Were it not for internecine academic warfare, then, Pound “would be seen today as what he in fact was: another sign of an emerging consensus that the structural and procedural reform of agencies would keep Tocqueville’s nightmare at bay” (p. 125).

Ernst’s resuscitation of Pound as a moderate at heart depends in part on minimizing the immoderate goals of Walter-Logan itself. After all, Pound “unambiguously endorsed” the bill, even if he did not agree in all respects with the earlier ABA proposal on which it was based (p. 135). Just as Ernst attributes Pound’s endorsement to academic pique, he suggests that the Walter-Logan debate as a whole was more about political grandstanding (“hyperbolic dialogue”) than legal transformation (p. 137). Indeed, Ernst asserts at one point that “the final version of the bill abandoned heightened judicial review” altogether (p. 137). This rhetoric of “abandonment,” however, is itself hyperbolic.

It is true that a late Senate amendment, passed in the wake of President Roosevelt’s 1940 election victory, eliminated a “clearly erroneous” standard for judicial review of administrative factfinding, leaving only the “substantial evidence” standard commonly used by courts in the late 1930s. But the meaning of neither standard was clear, and the co-existence of both standards in the bill before the late amendment was itself a source of confusion.<sup>154</sup> Furthermore, as Ernst elsewhere acknowledges, Walter-Logan would have expanded judicial review of agency action in a host of ways that had nothing to do with the degree of scrutiny that courts might apply to administrative factfinding (p. 134). For instance, the bill allowed “[a]nyone ‘substantially interested in the effects’ of a rule [to] seek an advisory opinion on its legality” from the D.C. Circuit, and “anyone aggrieved” by an administrator’s “decision” — not merely final administrative “orders” — to challenge the decision via formal agency hearing and circuit court review (p. 134).<sup>155</sup> Given these provisions, it is simply an overstatement to say that the final bill “abandoned heightened judicial review” (p. 137). Fi-

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<sup>154</sup> See James M. Landis, *Crucial Issues in Administrative Law*, 53 HARV. L. REV. 1077, 1093 & n.31 (1940) (noting the confusion); Shepherd, *supra* note 137, at 1621 (“Despite heated debate at earlier and later times about the provision for the clearly erroneous standard, it is unclear whether the provision would have had significant impact. The courts may well already have provided approximately this level of review through the substantial evidence rule that they employed, although the rule’s content was not entirely clear.”).

<sup>155</sup> See Landis, *supra* note 154, at 1091–92 (“[The] known, catalyzing concept of ‘order’ is thrown aside by the new proposal for the concept of ‘decision,’ which is defined as ‘any affirmative or negative decision, order, or act in specific controversies which determines the issues therein involved.’” (footnote omitted)).

nally, even assuming that the late deletion of the “clearly erroneous” standard was more significant than the bill’s retention of these other encroachments on administrative autonomy, that proposition wouldn’t be particularly helpful for the Pound-as-moderate argument — Pound “unambiguously endorsed” Walter-Logan months *before* a politically wary Senate excised “clearly erroneous” review from the bill.<sup>156</sup>

In short, Ernst’s final revisionist moves — Walter-Logan as legislative sound and fury; the bill’s chief intellectual backer, Roscoe Pound, as a moderate turned mad by the academy — are too strong. Although based on deep archival research and close reading, these reinterpretations fail to save many important phenomena. The rabid legal and political-economic contests over administrative government that shook American society in the shadow of totalitarianism cannot be wholly subsumed under the rubric of academic politics or congressional showmanship. Ongoing doubts about the legitimacy of the administrative state would soon hobble New Deal agencies, dismantle wartime agencies, and forestall Truman’s Fair Deal.<sup>157</sup> Such doubts would also lead to a gradual shift in the balance of power between agencies and courts, as the federal judiciary asserted greater control over the executive branch, at times in the name of an increasingly conservative Congress,<sup>158</sup> at times in the name of the fundamental requirements of fairness that Chief Justice Hughes celebrated in *Morgan II*.<sup>159</sup> Although these requirements were “fundamental,” it turned out

<sup>156</sup> Compare Shepherd, *supra* note 137, at 1621–22 (dating the removal of the “clearly erroneous” standard to November 1940, and placing it in the context of Roosevelt’s recent reelection), with pp. 136, 207 n.133 (dating Pound’s endorsement of Walter-Logan to May of the same year).

<sup>157</sup> See MEG JACOBS, POCKETBOOK POLITICS: ECONOMIC CITIZENSHIP IN TWENTIETH-CENTURY AMERICA 182, 193, 225, 229 (2005) (describing the use of antitotalitarian arguments to challenge the legitimacy of price controls and other economic regulation); KATZNELSON, *supra* note 49, at 18–20, 369–72, 383–98, 475–80 (discussing the pivotal role played by southern Democrats and anti-New Deal Republicans — the same political bloc that backed Walter-Logan — in weakening the administrative state throughout the 1940s); LEE, *supra* note 49, at 56–78, 257 (describing the conservative assault on administrative regulation of the workplace throughout the 1940s and its long-term effects); NELSON LICHTENSTEIN, LABOR’S WAR AT HOME 207–12, 234–45 (2d ed. 2003) (describing growing legal and political constraints on prolabor administrative action throughout the 1940s); MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE 17–37 (Duke Univ. Press 1994) (1977) (describing the legal and political constraints faced by the Truman Administration); Reuel E. Schiller, *Reining in the Administrative State: World War II and the Decline of Expert Administration*, in TOTAL WAR AND THE LAW, *supra* note 9, at 185, 188–201 (describing increasing judicial supervision of the administrative state during the 1940s, driven by “the totalitarian specter”).

<sup>158</sup> See, e.g., *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477–87 (1951) (describing the legislative history of the APA and the Taft-Hartley Act as expressing a congressional “mood” of dissatisfaction with deferential judicial review of agency factfinding, *id.* at 487).

<sup>159</sup> See, e.g., *Simmons v. United States*, 348 U.S. 397, 405 (1955) (repeatedly invoking “basic fairness” in overturning administrative adjudication of a draft registrant’s proper classification); see also LEE, *supra* note 49 (tracing the federal courts’ encroachment on administrative control of labor regulation from the 1940s to the present); Schiller, *supra* note 157, at 196–201 (describing

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they were not fixed, and could become more or less onerous when the ideological climate shifted.

The inclusion of Roscoe Pound, one of the most vociferous anti-New Deal voices, in Ernst's "emerging consensus" on administrative legitimacy suggests a peculiarly dissonant concord. What Ernst may have uncovered is not a consensus on the legitimacy of the administrative state, but an agreement to continue litigating that question. Read from this angle, *Tocqueville's Nightmare* is one of the few essential briefs in a trial that has lasted three quarters of a century.

### III. LAWYERLY ADMINISTRATION V. LEGITIMATE ADMINISTRATION

*Tocqueville's Nightmare* ends in 1940 with an "emerging consensus" on what Ernst calls the "rule of lawyers" (p. 125). This American model of lawyerly administration charted a middle course between two sets of "alien ideologies" (p. 144): on the one hand, the "insufferable despotism" of Tocqueville's darkest dreams, the rule of powerful administrators constrained only by the shifting passions of mass politics; on the other hand, the judicial utopias of nineteenth-century liberalism, whether embodied in the German *Rechtsstaat* or Dicey's "rule of law." In the United States, administrative legitimacy would depend neither on popular will nor the supremacy of the courts, but on the "policing" of "administrative discretion" by the "legal profession," operating both inside and outside the federal bureaucracy (p. 143). Lawyers, whether acting as administrators, judges, litigators, or public intellectuals, would make sure that the administrative state continued to obey the all-important principle of "due process" — or its more informal yet more expansive double, "fair play."

By establishing "due process" and "fair play" as the administrative state's regulative principles, early twentieth-century lawyers acted to protect and even extend their social and economic power within American society, ensuring that their particular form of professional expertise, initially "acquired in courts," would remain essential in an administrative age (p. 142). But the interests of the legal profession also aligned with important American ideals and constitutional norms (ideals and norms that lawyers in the late 1930s worked to publicize and popularize). As the self-appointed police of agency government, lawyers could protect individuals from administrative coercion, legislators from administrative aggrandizement, and the administrative state itself from becoming seized by "class feeling" — that is, prolabor poli-

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"the new judicial ascendancy," *id.* at 196, and "the shift of power between agencies and courts," *id.* at 201, that had taken place by the late 1940s); *infra* section III.B, pp. 762–73.

tics — all while permitting administrators the necessary discretion to manage economic and military crises.

The existence of a late 1930s consensus on lawyerly administration bears both historical and normative weight in Ernst's argument. The rule of lawyers did not merely prevent the New Deal state from becoming Tocqueville's nightmare. In continuing to be the most "pervasive" way in which we "hold[] administrators accountable," the rule of lawyers acts as a reproof to those who characterize the contemporary administrative state as a departure from "fundamental principles of American government" (pp. 142–44). Those fundamental principles live on under the watchful eye of the legal profession and, perhaps just as significantly, under the watchful eye of a broader public inculcated with a legalistic conception of legitimacy. Ernst does not develop this latter point at length, but it is an implicit and powerful aspect of his narrative.<sup>160</sup> The political victory that the legal profession won in securing managerial control over the administrative state coincided with a more general legalization of American political culture, as the Constitution and the rule of law came to be seen as symbols of American exceptionalism, distinguishing the United States from its totalitarian enemies.<sup>161</sup> In the background of Ernst's microhistory of lawyerly efforts to shape administrative governance is thus a macrohistory of law's increasingly "hegemonic function" in American society — even as common law courts played a smaller role in governing it.<sup>162</sup> The Constitution is not in exile, Ernst concludes, but incarnated in the administrative state and the administered society that early twentieth-century lawyers built and that we have inherited.

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<sup>160</sup> In a helpful endnote, Ernst identifies his argument with a line of historical sociology that sees the social power of the legal profession as a cause rather than an effect of liberal political culture (p. 160 n.22) (citing Terrence C. Halliday & Lucien Karpik, *Politics Matter: A Comparative Theory of Lawyers in the Making of Political Liberalism*, in *LAWYERS AND THE RISE OF WESTERN POLITICAL LIBERALISM*, *supra* note 51, at 20–34).

<sup>161</sup> See WILLIAM E. NELSON, *THE LEGALIST REFORMATION* 121–37 (2001); RICHARD PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* 224–33 (2004); Kessler, *supra* note 133, at 459–61. See generally Aziz Rana, *Constitutionalism and the Foundations of the Security State*, 103 *CALIF. L. REV.* 335 (2015); Wertheimer, *supra* note 145.

<sup>162</sup> Ernst explicitly discusses the rule of lawyers in terms of "hegemony" (p. 144). For the "hegemonic function of law" and an early application of Antonio Gramsci's concept of hegemony to American law, see EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 147–48 (1974). For theoretical accounts of how the relative hegemony of law both structures the administrative state and the society that it administers, see LOUIS ALTHUSSER, *ON THE REPRODUCTION OF CAPITALISM* 57–93, 164–70 (G.M. Goshgarian trans., Verso 2014); and NICOS POULANTZAS, *STATE, POWER, SOCIALISM* 76–92 (Patrick Camiller trans., Verso rev. ed. 2014). For contemporary lawyerly hegemony in the United States, see Forbath, *Courting the State*, *supra* note 36, at 77–79; and Duncan M. Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT* 19–73 (David M. Trubek & Alvaro Santos eds., 2006).

### A. Relevance Objections

One way of criticizing Ernst's argument is to accept his historical claims while questioning their relevance in rebutting contemporary critics of the administrative state's legitimacy. Two such relevance objections stand out. First, as discussed in the Introduction, one prominent group of contemporary critics ground their arguments in an originalist or quasi-originalist theory of legitimation. The administrative state is illegitimate, these critics contend, in that it traduces Founding-era conceptions of constitutional government.<sup>163</sup> It is not clear that the sort of historicist argument offered by Ernst (or Sunstein and Vermeule in *Libertarian Administrative Law*<sup>164</sup>) is relevant to this contention. Demonstrating that, in the 1940s, old constitutional principles were adopted and adapted by a new administrative bar, or modified by the passage of a "super-statute," may simply make these originalists' case for them.<sup>165</sup>

A second, subtler relevance objection points out that, while Ernst may be right that the administrative state was once governed and legitimated by a "rule of lawyers," there is plenty of evidence to suggest that lawyers have since ceded the field to other forms of expertise and other sources of legitimation. The enormous growth in presidential control of the administrative state may well have displaced the rule of lawyers, providing an alternative source of purely political legitimacy while limiting lawyerly influence over the administrative apparatus.<sup>166</sup> Likewise, the displacement of agency adjudication by agency rulemaking as the primary vehicle of administrative governance may have seriously diminished the importance of legal — as opposed to economic, scientific, and political — expertise.<sup>167</sup>

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<sup>163</sup> See *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1240–55 (2015) (Thomas, J., concurring in the judgment); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1213–25 (2015) (Thomas, J., concurring in the judgment); HAMBURGER, *supra* note 17, at 3–5, 111, 227, 324.

<sup>164</sup> See *supra* p. 720.

<sup>165</sup> Of course, there are "new" and even "newer" originalisms that might well acknowledge the force of such arguments from historical practice and precedent. See Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 819–20 (2015); William Baude, *Originalism and the Positive Turn*, LIBR. L. & LIBERTY: LIBERTY L.F. (Dec. 12, 2014), <http://www.libertylawsite.org/liberty-forum/originalism-and-the-positive-turn> [<http://perma.cc/TW5Y-PRLN>]. These late-model originalists, however, are much less likely to question the legitimacy of the administrative state in the first place.

<sup>166</sup> See POSNER & VERMEULE, *supra* note 32, at 4 ("We live in a regime of executive-centered government . . . and the legally constrained executive is now a historical curiosity."); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001) (arguing that the presidency has "at least a comparative primacy in setting the direction and influencing the outcome of administrative process").

<sup>167</sup> See Vermeule, *Portrait of an Equilibrium*, *supra* note 32 (reviewing *Tocqueville's Nightmare*) ("[P]erhaps the major expansion of the administrative state since *Crowell* has come not in the areas it addressed, but in an area it said almost nothing about: agency rulemaking. . . . Ernst focuses

Ernst sketches the beginning of a response to this second relevance objection in the Conclusion of *Tocqueville's Nightmare*. There, he argues that in the 1970s “lawyers contained the challenge [from economists] to their hegemony by adding cost-benefit analysis and other forms of economic reasoning to their intellectual toolkits,” and implies that the Office of Information and Regulatory Affairs (OIRA), a principal conduit of economic expertise and presidential control, remains under lawyerly hegemony, as “[s]even of OIRA’s eleven administrators have had law degrees” (p. 144). Ernst also acknowledges the growth of agency rulemaking but notes that it was met by a hardcore Diceyan reaction in the form of “hard look” judicial review (pp. 142–43). More generally, Ernst argues that post-1940 criticisms of the administrative state would usually be employed “selectively, to defend a particular political, professional, or scholarly interest,” and that these efforts would be powerfully constrained by the model of lawyerly legitimation that emerged victorious in the late 1930s (p. 144). In the wake of this victory, critics of particular aspects of administrative governance tended to find themselves turning to lawyers, and the lawyerly rhetoric of fair play, to make their cases.<sup>168</sup>

In these brief remarks, one can discern the outlines of a broader defense of the continuing relevance of the rule of lawyers. Such a defense might withstand even the most extreme of counterarguments, advanced by Professors Eric Posner and Adrian Vermeule, that contemporary Americans live under a “plebiscitary presidency,” in which the administrative state is principally “constrained by the shifting tides of mass opinion,”<sup>169</sup> that is, by politics, not law or lawyers. The genius of Ernst’s history lies in its recognition of lawyers and legalism as *political* forces, a recognition that destabilizes the law/politics distinction on which Posner and Vermeule’s argument depends. According to Ernst, when legal elites realized the social and economic advantages of administrative state-building, they took on the project as their own, giving the administrative state their qualified blessing and appointing themselves as its guardians (p. 138). In doing so, they secured their

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on adjudication because his subjects did . . . [But in subsequent decades,] rulemaking became central, encouraged by academics and judges who believed that adjudication lacked the virtues of generality and clarity that rules could afford.”); see also Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1061–76 (2011) (arguing that a variety of administrative law canons have shifted decisional authority within agencies from lawyers to other actors).

<sup>168</sup> Recent scholarship on the post–New Deal administrative state supports this claim. See, e.g., RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007); LEE, *supra* note 49; SCHILLER, *supra* note 49; Schiller, *supra* note 157, at 185, 196–201; Laura M. Weinrib, *From Public Interest to Private Rights: Free Speech, Liberal Individualism, and the Making of Modern Tort Law*, 34 LAW & SOC. INQUIRY 187 (2009).

<sup>169</sup> POSNER & VERMEULE, *supra* note 32, at 16.

continuing *political* hegemony within American society, a hegemony that predated the rise of the administrative state and which was briefly threatened by it.<sup>170</sup> Aided by anxieties about the lawlessness of foreign totalitarianism, the lawyers' maneuver helped to enshrine the sanctity of legalism and, especially, constitutionalism in American political culture. Respect for the fundamental requirements of fairness came to represent both a limit on the American state's ability to mistreat its own citizens and a moral justification for the country's increasingly active role in world affairs.<sup>171</sup> Today, constitutionalism remains a major political force in American life, as do lawyers, its privileged interpreters.<sup>172</sup>

Accordingly, Ernst could argue that while Posner and Vermeule may be right that *formal* legal constraints on the administrative state have withered in the decades since 1940, both executive officials and the "shifting tides of mass opinion"<sup>173</sup> that guide them are shaped by a highly legalistic political culture. To this extent, the rule of lawyers still reigns, embedding both executive action and public reaction in a legalistic discourse that continues to limit and legitimate American public policy. This persistence of lawyerly hegemony would help explain why it falls to *lawyers* such as Posner and Vermeule to elucidate and defend a putatively lawless set of political arrangements.<sup>174</sup> It would also help explain why Vermeule, in his parallel work with Sunstein criticizing "libertarian administrative law,"<sup>175</sup> finds it quite natural to invoke the existence and authority of a depoliticized body of administrative law in order to defend the autonomy of what he elsewhere describes as a hyperpoliticized administrative state.

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<sup>170</sup> For the long history of lawyerly hegemony in the United States, see TOMLINS, *supra* note 51, at 21–26; Forbath, *Politics*, *supra* note 36, at 694–96.

<sup>171</sup> In the early- to mid-twentieth century, the New York corporate bar furnished not only the leaders of the American legal profession but also much of the country's foreign policy elite. For instance, three of the corporate lawyers who play central roles in Ernst's history of the crisis of 1937–1938 — Hughes, Stimson, and John Foster Dulles — served as Secretaries of State, and Stimson also served twice as Secretary of War. For the overlap of legal and foreign policy elites, see Kessler, *supra* note 133, at 459–61; Rana, *supra* note 161, at 353–55; Wertheimer, *supra* note 145, at 13–17.

<sup>172</sup> See generally JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION* (2011); DANIEL LAZARE, *THE FROZEN REPUBLIC* (1996); SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 245–56 (2d ed. 2011); David Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. (forthcoming Feb. 2016); Rana, *supra* note 161, at 360–83; Louis Michael Seidman, *The Secret History of American Constitutional Skepticism: A Recovery and Preliminary Evaluation*, 17 U. PA. J. CONST. L. 1 (2014).

<sup>173</sup> POSNER & VERMEULE, *supra* note 32, at 16.

<sup>174</sup> Cf. Harvey Mansfield, *The Inevitable Imperial President*, N.Y. TIMES, Mar. 13, 2011, at A12 ("Students listen to [Posner and Vermeule] and readers buy their books because they teach the law, not because they are professors of executive domination . . .").

<sup>175</sup> See Sunstein & Vermeule, *supra* note 12.

*B. Persuasiveness Objections*

However successful Ernst's (hypothetical) defense of the contemporary relevance of the "rule of lawyers" might be, this defense brings to light a second set of worries about the *persuasiveness* of his core argument: that a seventy-five-year-old "consensus" on the rule of lawyers provides a stable foundation for the administrative state's legitimacy. Two ambiguous features of this consensus merit further investigation. First, it is not entirely clear who consented to the rule of lawyers. Second, it is not entirely clear what they consented to. These ambiguities may help explain why doubts about the legitimacy of the administrative state have persisted since 1940, and may render the historical recovery of the 1940 consensus less helpful than Ernst suggests for dispelling such doubts today.

First, the who. Toward the end of *Tocqueville's Nightmare*, Ernst acknowledges that "[e]ven in 1940, many" lawyers still "reflexively looked to the courts to keep administrators in check" (p. 137). He also notes that in the midst of World War II, the president of the ABA "complained that, under the influence of 'continental ideas,' New Dealers [in the Office of Price Administration] habitually violated 'rights guaranteed to the people'" (pp. 144-45).<sup>176</sup> And it wasn't only lawyers who were unconvinced by the promise of lawyerly administration. As Congress's 1940 push for radical administrative reform demonstrates, plenty of politicians and private citizens — especially white Southerners and businessmen — believed that Tocqueville's nightmare was in the offing.<sup>177</sup> While Ernst argues that the antibureaucratic furor of the late 1930s and 1940s had a minimal effect on the structure of the administrative process and the distribution of authority between agencies and courts (pp. 136-37), it is hard to interpret persistent rage at administrative decisionmaking (however lawyerly) as consent.

If Ernst's history downplays efforts to subject an already-legalistic administrative state to further judicial control, it has even less to say about those who opposed the rule of lawyers as a politically conservative *constraint* on administrative decisionmaking. The final chapter of *Tocqueville's Nightmare* demonstrates that such critics of lawyerly administration were prominent, perhaps even dominant, within the New Deal state and the legal academy itself (p. 125).<sup>178</sup> Yet Ernst focuses on proving that their great opponent — Roscoe Pound — did not see things so differently from moderates like Hughes and O'Brian.

<sup>176</sup> The author quotes *People's Rights Ignored*, AM. L. & LAW., Dec. 21, 1943, at 5.

<sup>177</sup> See KARL, *supra* note 94, at 153-81; KATZNELSON, *supra* note 49, at 272-75, 369-72.

<sup>178</sup> "Pound's academic opponents . . . had come to enjoy unprecedented power as lawyers and administrators in the New Deal, and they would not surrender it without a fight" (p. 125).

Whether stalwart New Dealers, and the prolabor and progressive constituencies they represented, consented to Hughes and O'Brian's vision gets less attention. Ernst shows that in the mid-1930s, Felix Frankfurter, Charles Wyzanski, and other New Deal lawyers correctly predicted that the first flush of New Deal legislation — the NIRA and the AAA — would not survive judicial scrutiny, lacking sufficiently clear delegations and requiring too little factfinding (p. 56). But did all these lawyers agree with Chief Justice Hughes that administrators should act as disinterested observers in the “spirit of the just judge” (p. 74),<sup>179</sup> or that the fusion of prosecutorial and judicial functions violated “fundamental requirements of fairness” (p. 74)?<sup>180</sup> They certainly did not think so when drafting the National Labor Relations Act. And only months before Hughes called on administrators to comport themselves “in accordance with the cherished judicial tradition” (p. 74),<sup>181</sup> the newly appointed Dean of Harvard Law School, James Landis, defended the administrative synthesis of judicial and prosecutorial power, notwithstanding its offensiveness to the tradition of the Anglo-American judiciary.<sup>182</sup> It is true that the NLRB and other New Deal agencies “‘judicialized’ their procedures” (p. 137) in response to Chief Justice Hughes's demand in *Morgan II* that administrators act “in accordance with the cherished judicial tradition embodying the basic concepts of fair play” (p. 74).<sup>183</sup> But did they any more “consent” to these changes than lawyers at the NLRB consented to being purged in 1940, in the wake of Senator Wagner's bruising reelection fight and amid charges of conspiring with the Soviet Union (p. 105)?<sup>184</sup>

Ernst emphasizes that O'Brian, Hughes, Pound, and the corporate bar — unlike nineteenth-century liberals, irascible storefront lawyers, and diehard anti-New Deal politicians — did not wish to impose plenary judicial review on administrative decisionmaking. They were content with only limited review for procedural fairness and statutory and constitutional fidelity. Nonetheless, their celebration of both judges and lawyers as the disinterested guardians of administrative fairness contradicted the New Dealers' fundamentally realist conception of law. In 1941, Attorney General Jackson proved this conception was alive and well when he warned that the legal profession's “entire philosophy, interest, and training . . . tend toward conservatism.”<sup>185</sup> Judges were

<sup>179</sup> The author quotes *Address of Justice Hughes at Law Institute*, *supra* note 125, at 8.

<sup>180</sup> The author quotes *Morgan II*, 304 U.S. 1, 19 (1938).

<sup>181</sup> The author quotes *Morgan II*, 304 U.S. at 22.

<sup>182</sup> See JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 3, 90–93 (1938).

<sup>183</sup> The author quotes *Morgan II*, 304 U.S. at 22.

<sup>184</sup> See also STORRS, *supra* note 67, at 61–66 (describing the transformation of the NLRB in 1940 due to anticommunism).

<sup>185</sup> ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 313 (1941).

the most conservative of all. Indeed, Jackson noted that Supreme Court Justices were not neutral arbiters, but instead were mired “deep in power politics”<sup>186</sup> as the longstanding champions of the “the economic power of property” over the “the power of the voters.”<sup>187</sup> Here, one is reminded of the abrupt end of Ernst’s first chapter, where Felix Frankfurter’s model of administrative legitimacy — which emphasized the guidance provided by “the people themselves”<sup>188</sup> and made no mention of courts — is simply left behind as the narrative turns to Hughes’s more elitist conception.

Rejecting the veneration of law for law’s sake, New Deal lawyers, many of them Frankfurter’s students, tended to focus on the practical and normative impact that particular kinds of lawyering or judging had on society. Thus, in 1939, SEC Chairman Jerome Frank articulated a fundamental distinction between the dangers posed by national economic regulators who used their discretion to limit private power, and local prosecutors who subjected powerless individuals to “outrageous, indecent, inhuman and unfair acts” (p. 131).<sup>189</sup> “Has the SEC ever used the rubber hose?” was Frank’s damning rhetorical question (p. 131).<sup>190</sup> This distinction between the authority of national administrators to protect the interests of the common man and the power of narrow-minded prosecutors to threaten his liberty and equality was an old progressive trope, dating back to the 1910s when wartime administrators like Felix Frankfurter and John Lord O’Brian first developed it.<sup>191</sup> Yet by the late 1930s, the distinction seemed to have been lost on O’Brian, or at least transformed for him by the shifting balance of class forces in society. Confronting a militant industrial workers movement empowered by congressional legislation and a cadre of administration lawyers sympathetic to its cause, O’Brian characterized the NLRB as a threat to “human liberty” and demanded equal rights for employers when it came to adjudicating the unionization of the workplace (p. 98).<sup>192</sup>

O’Brian and his supporters, the protagonists of Ernst’s history, suggested that a single, timeless norm of “fair play” could and should be applied in administrative hearings and judicial trials, in municipal courts and federal agencies, regardless of the interests at stake or the differentials in power that separated one player from another. *Tocque-*

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<sup>186</sup> *Id.* at viii.

<sup>187</sup> *Id.* at xii.

<sup>188</sup> Frankfurter, *supra* note 79, at 618.

<sup>189</sup> The author quotes Jerome N. Frank, Commissioner, Sec. & Exch. Comm’n, SEC and the Rubber Hose 20 (Apr. 8, 1939), <http://www.sec.gov/news/speech/1939/040839frank.pdf> [http://perma.cc/U3P8-GVNC].

<sup>190</sup> The author quotes Frank, *supra* note 189, at 19.

<sup>191</sup> See Kessler, *supra* note 47, at 1088–90.

<sup>192</sup> The author quotes O’Brian, *supra* note 143.

*ville's Nightmare* persuasively demonstrates the importance of this belief in convincing many lawyers that they should take a lead role in building, rather than undermining, the administrative state. But it also leaves the reader wondering whether anyone *else* was particularly happy about these lawyers' architectural choices.<sup>193</sup>

That being said, Ernst does not necessarily need to show that a *conscious* consensus on the "rule of lawyers" existed in 1940. The model of lawyerly administration that Ernst has unearthed from the archives of moderate Republican lawyers may have achieved dominance not because a majority of the American people — or even a majority of the American legal profession — embraced it. Rather, the rule of lawyers may have simply imposed itself on a political no-man's land, after the struggle between more popular (if extreme) administrative ideologies ended in stalemate. The historian Barry Karl has argued that the late 1930s witnessed precisely such a stalemate between the friends and enemies of the New Deal regime, as the twin threats of totalitarianism and economic crisis made the administrative state both unpopular and unavoidable:

[I]n the stalemate that ensued, what later critics of American government would label "the deadlock of democracy" took its modern form. It was less a deadlock than the persistent threat of deadlock; it was a stalemate broken by movements on the political gameboard that brought about useful changes without giving victory to either side.<sup>194</sup>

Crucially, Karl adds, "courts would step in from time to time, sometimes to fill the vacuum but increasingly to redress imbalances, even to govern."<sup>195</sup>

Stalemate superintended by courts is also the story that many legal scholars and political scientists have told about the development of the Administrative Procedure Act.<sup>196</sup> According to this account, pro- and anti-New Deal forces settled on the APA's notoriously vague language because each side believed that it would be able to convince the courts

<sup>193</sup> As discussed above, Ernst argues that post-1940 criticisms of the administrative state would usually be employed "selectively, to defend a particular political, professional, or scholarly interest," and that the model of lawyerly legitimation that emerged victorious in the late 1930s would powerfully shape these criticisms (p. 144). But the submission of administrative critics to lawyerly "hegemony" (p. 144) is not evidence of consent to that hegemony — that's not how hegemony works. See Thomas R. Bates, *Gramsci and the Theory of Hegemony*, 36 J. HIST. IDEAS 351, 360 ("The phenomenon of 'false consciousness' . . . represents from Gramsci's standpoint simply a victory of the ruling-class intellectuals in this struggle [for hegemony].").

<sup>194</sup> KARL, *supra* note 94, at 160.

<sup>195</sup> *Id.* at 154.

<sup>196</sup> See, e.g., Schiller, *supra* note 157, at 199 ("With the passage of the APA, a lively debate about the meaning of its provisions commenced. . . . Indeed, the APA's intentional ambiguity was the price paid for its unanimous acceptance."); Shepherd, *supra* note 137, at 1662–63 (describing the APA's "intentional ambiguity," *id.* at 1662, and the efforts by pro- and anti-New Deal blocs to create legislative history supporting their preferred interpretations of the statute).

that the document represented its preferred vision of administrative governance.<sup>197</sup> For the New Dealers, this meant robust judicial deference to administrative factfinding, procedural requirements no more onerous than currently existed in administrative practice, and protection against collateral attacks on administrative decisionmaking in courts of law.<sup>198</sup> For the anti-New Dealers, this meant heightened judicial scrutiny of administrative factfinding, heightened procedural requirements, and new opportunities for judicial review of administrative action.<sup>199</sup> Accordingly, even as the votes were being counted, congressmen and administrators compiled competing legislative histories that would justify their preferred interpretations of the statute.<sup>200</sup> Eventually, a piecemeal process of judicial interpretation, administrative response, and fresh congressional intervention produced something in between these two alternative visions of administrative law.

A conscious subject is not necessary for a coherent structure to come into being. Lawyerly administration may have become the law of the American administrative state without the American people knowing it. The lack of a consenting subject, however, does become a problem if one wants to invest a structural settlement with a particular *democratic* meaning and authority. Here, Sunstein and Vermeule's invocation of the APA as a constitutionally significant "super-statute," representing a political compromise on the depoliticization of administrative law,<sup>201</sup> may run into trouble. If the statute's bare language was the product of what Professor George Shepherd has called a "fierce compromise" — an agreement to continue the legal and political fight over the administrative state on somewhat narrower terms<sup>202</sup> — then the APA is an unhelpful authority for the proposition that administrative law is apolitical in character. Indeed, the ideological swings that Sunstein and Vermeule trace from "progressive administrative law" to "libertarian administrative law"<sup>203</sup> may actually represent the faithful implementation of an agreement to disagree.

Ernst's argument is less dependent on *ex ante* subjective consent. So long as lawyers continue to wield power both within agencies and the judiciary, and so long as their training continues to incline them to be attentive to the "fundamental requirements of fairness," a legalistic public's demands on the administrative state may be met, and a post

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<sup>197</sup> See Shepherd, *supra* note 137, at 1665 ("Each party . . . hoped that the courts would resolve the [APA's] ambiguities in [its own] favor.")

<sup>198</sup> See *id.* at 1665–66.

<sup>199</sup> See *id.* at 1666 ("[T]he ABA and conservative scholars argued that the Act created efficiently-firm new rules for expanded judicial review.")

<sup>200</sup> *Id.* at 1665.

<sup>201</sup> Sunstein & Vermeule, *supra* note 12, at 466.

<sup>202</sup> See Shepherd, *supra* note 137, at 1678.

<sup>203</sup> Sunstein & Vermeule, *supra* note 12, at 398–400.

facto legitimacy may obtain. Yet Ernst contends that the rule of lawyers and its unbundled Diceyism have done more than simply constrain the administrative state. They have also supposedly created the conditions for *effective* administrative governance: a relatively pro-administration alternative to the nineteenth-century models of legitimation that depended too heavily on narrow legislative delegations and overweening judicial control. These are the models that present-day Diceyans in the Tea Party and “Constitution in Exile” movements long to reimpose on the American administrative state (pp. 7–8, 142–46). Like Sunstein and Vermeule, then, Ernst hopes to counter the libertarian originalist attack on administrative legitimacy with a historically grounded model of his own. Here, it is less clear that the rule of lawyers will do the trick, because the supposed differences between the rule of lawyers and the present-day Diceyans are both conceptually and historically unclear. Assuming that there was and remains a consensus on the rule of lawyers, what differentiates that consensus from the critiques of administrative legitimacy that Ernst seeks to counter?

One important challenge that Ernst faces in divesting the rule of lawyers of its more Diceyan tendencies is that his chief protagonist, Charles Evans Hughes, remained committed to the constitutional and jurisdictional fact doctrines, doctrines that required heightened judicial review of administrative factfinding when the facts at issue went to an agency’s statutory or constitutional authority.<sup>204</sup> These doctrines had the potential to place the administrative state back under the sign of Dicey, and Ernst works hard to show that Chief Justice Hughes narrowed them, even while refusing to repudiate them altogether.<sup>205</sup> But in writing that “[b]y the end of the 1930s” these doctrines had become “‘ghosts’ of their former selves,” Ernst may underestimate the ability of ghosts to haunt the administrative state (p. 5).

Unlike the Chief Justice, President Roosevelt’s appointees to the Hughes Court were ready to repudiate the constitutional and jurisdictional fact doctrines when it came to challenges to the administrative confiscation of property (pp. 70–71). But they and their successors would adapt these doctrines to the review of administrative factfindings that threatened civil liberty, especially when local officials or national security administrators were the factfinders.<sup>206</sup> And as re-

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<sup>204</sup> See *supra* p. 740.

<sup>205</sup> See *supra* notes 109–115 and accompanying text (discussing Chief Justice Hughes’s approach to the jurisdictional and constitutional fact doctrines).

<sup>206</sup> See, e.g., *Bridges v. Wixon*, 326 U.S. 135, 149 (1945) (invalidating due to insufficient evidence an immigration official’s determination that petitioner was “affiliated” with the Communist Party); *Estep v. United States*, 327 U.S. 114, 142 (1946) (Frankfurter, J., concurring) (arguing that the Court’s review of a factual determination involving personal liberty “revives, if indeed it does not multiply, all the casuistic difficulties spawned by the doctrine of ‘jurisdictional fact’”); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 126, 138 n.11 (1951) (permitting organiza-

cent commentators have noted, civil-libertarian justifications for heightened review of administrative decisionmaking can have economically libertarian effects similar to those accomplished by the old constitutional fact doctrine and the substantive due process jurisprudence that undergirded it.<sup>207</sup> Indeed, Sunstein and Vermeule identify the judiciary's invocation of the First Amendment to heighten review of administrative factfinding that touches upon the *expression* of regulated parties as one of the preferred tools of the insurgent "libertarian administrative law."<sup>208</sup>

To be sure, Ernst is correct that the less onerous "substantial evidence" standard for review of administrative factfinding had already become the norm by the time that Chief Justice Hughes left the Court (p. 71). Yet the meaning of "substantial evidence" underwent significant changes in the fifteen years following the close of Ernst's story. The anxieties that had roiled New York during the Senate election of 1938 and secured congressional passage of the ABA-approved Walter-Logan Bill in 1940 — anxieties that New Deal administrators served a "single class," threatened individual liberty, and caused economic dis-

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tions designated as "subversive" by the Attorney General to challenge this administrative determination in court, and casting doubt on the jurisdiction of the Attorney General to make such a determination without a hearing); *Dickinson v. United States*, 346 U.S. 389, 395–96 (1953) (finding insufficient evidence to support administrators' determination that a draft registrant was not a minister); *Cole v. Young*, 351 U.S. 536, 543 (1956) (rejecting an administrative determination of disloyalty where there was insufficient evidence that the employee's job concerned "national security"); see also Thomas I. Emerson & David M. Helfeld, *Loyalty Among Government Employees*, 58 YALE L.J. 1, 112 (1948) ("[W]here rights under the First Amendment are at stake — rights to which the courts have consistently given a preferred constitutional status — the negative features of judicial review serve an especially useful purpose. In such situations the presumption of administrative legality is reversed, or at least neutral, and careful scrutiny by a second agency becomes of positive value."); Robert Hale, *Does the Ghost of Smyth v. Ames Still Walk?*, 55 HARV. L. REV. 1116, 1132 (1942) (noting in the context of administrative factfinding that Justices Black, Douglas, and Murphy "would retain substantive due process only in connection with protections contained in the Bill of Rights" and "civil liberties"); Louis L. Jaffe, *Judicial Review: Constitutional and Jurisdictional Fact*, 70 HARV. L. REV. 953, 984 (1957) (suggesting that the Supreme Court retained the constitutional fact doctrine for use in "exceptional" situations involving "civil-liberty" violations).

<sup>207</sup> See, e.g., Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1232–40 (2014); Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199 (2015); Jedediah Purdy, *The Roberts Court v. America*, DEMOCRACY, Winter 2012, at 46, 46–58; Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015); Amanda Shanor, *The New Lochner* (Sept. 2, 2015) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2652762](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2652762) [<http://perma.cc/L2H5-9ALK>]; Tim Wu, *The Right to Evade Regulation*, NEW REPUBLIC (June 3, 2013), <http://www.newrepublic.com/article/113294/how-corporations-hijacked-first-amendment-evade-regulation> [<http://perma.cc/MN4T-629Q>]; see also Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism* (unpublished manuscript) (on file with author) (arguing that what contemporary commentators call First Amendment "Lochnerism" was immanent in the federal judiciary's initial turn to robust enforcement of the First Amendment in the 1940s).

<sup>208</sup> See Sunstein & Vermeule, *supra* note 12, at 423–27.

ruption (p. 101) — never went away, and in many cases intensified with the coming of the Cold War. Motivated by these same anxieties, Congress passed the APA in 1946 and the Taft-Hartley Act in 1947.<sup>209</sup> The Supreme Court responded to this anti-administrative “mood” in 1951, by calling for more rigorous application of the substantial evidence standard in its *Universal Camera* decision.<sup>210</sup>

Placing new emphasis on the APA’s instruction that judges “shall review the whole record” when determining whether “substantial evidence” supports an agency’s decision,<sup>211</sup> the *Universal Camera* Court interpreted this language to mean that judges should consider countervailing as well as supporting evidence: “The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.”<sup>212</sup> In 1941, the Attorney General’s Committee on Administrative Procedure had argued that such substantial evidence review “on the whole record” would constitute a break with prevailing practice and involve courts in a weighing of evidence that was properly left to administrative experts.<sup>213</sup> Ten years later, the Court said that a break with prevailing practice was just what the APA and Taft-Hartley had ordered.<sup>214</sup>

Four years after that, the ABA pushed to impose an even higher “clearly erroneous” standard on administrative factfinding, the standard used by appellate courts in reviewing trial judges’ factfinding.<sup>215</sup> The Bar’s legislative effort was unsuccessful this time, but the eminent administrative law scholar Louis Jaffe noted remorsefully that “[i]n the opinion of some courts the [substantial evidence] test already comes very close to the clearly erroneous rule and some courts, whatever their explicit concept of the test, apply it in that spirit.”<sup>216</sup> “It is now generally conceded,” he wrote, “that judicial control is a necessary condition of administrative law in this country.”<sup>217</sup>

When agencies began to do more of their work through rulemaking rather than adjudication, courts responded with the “hard look” doctrine, scrutinizing the records of agency rulemaking with a new inten-

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<sup>209</sup> See, e.g., GRISINGER, *supra* note 49, at 59, 86–90; LICHTENSTEIN, *supra* note 157, at 238–41; MARCUS, *supra* note 157, at 17–19; Brazier, *supra* note 137; Shepherd, *supra* note 137, at 1560.

<sup>210</sup> *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487–88 (1951).

<sup>211</sup> 5 U.S.C. § 706 (2012).

<sup>212</sup> *Universal Camera*, 340 U.S. at 488.

<sup>213</sup> See FINAL REPORT OF ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE 91 (1941).

<sup>214</sup> See *Universal Camera*, 340 U.S. at 482–86.

<sup>215</sup> Louis L. Jaffe, *Basic Issues: An Analysis*, 30 N.Y.U. L. REV. 1273, 1295 (1955).

<sup>216</sup> *Id.* at 1296.

<sup>217</sup> *Id.* at 1291.

sity.<sup>218</sup> Ernst acknowledges this particular expansion of judicial review of administrative factfinding (pp. 142–43). But just as Sunstein and Vermeule attribute the procedural innovations of the 1960s and 1970s to a departure from the APA’s 1946 depoliticization of administrative law,<sup>219</sup> Ernst treats “hard look” review as an anomalous, Diceyan strain in our administrative system, an exception to the “[m]ore pervasive” mode of lawyerly administration instituted in the late 1930s (p. 143).

In general, Ernst’s model of lawyerly administration emphasizes the judiciary’s role in policing procedure, not substance. But even if the procedure/substance distinction is tenable in theory and borne out in practice, judicial control of administrative procedure seems a far cry from the displacement of the “rule of courts” by “the rule of lawyers,” the ostensible arc of Ernst’s history. Consider two of Ernst’s most succinct summaries of the “rule of lawyers”:

Courts would intervene to structure agencies’ proceedings in their own image so that the affected parties could bring egregious decisions to their attention. Otherwise, the judges were to give administrators their lead. (p. 76)

The courts would insist on due process within the agency. Due process within the agency would make further judicial review unnecessary. (p. 125)

The prominence of the courts in these descriptions of the rule of lawyers is striking. It is the courts that get the ball rolling, structuring agencies “in their own image” and elaborating that mysterious quantum of quasi-constitutional “due process” — the “fundamental requirements of fairness” to which Chief Justice Hughes referred in *Morgan II*.<sup>220</sup> Furthermore, as that case indicated, fundamental requirements can change. New Deal lawyers who had dutifully learned the procedural lessons of earlier cases were surprised by the *Morgan II* Court’s demand for some (unspecified) separation of prosecutorial and judicial functions. The lawyers would once again have to change their approach — and some would not survive the transition, as quasi-judicial agencies such as the NLRB were purged of their left-wing members in the course of ostensibly procedural reforms (pp. 104–05).

If this narrative is any indication — and it is a pivotal narrative in Ernst’s book — the model of lawyerly administration turns out to be surprisingly judge driven (pp. 74–76, 104–06). Not only do courts set the baseline for what counts as “fair play” within the administrative state, they may revisit this baseline whenever presented with a puta-

<sup>218</sup> See *Motor Vehicles Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1978); *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 850–53 (D.C. Cir. 1970).

<sup>219</sup> See Sunstein & Vermeule, *supra* note 12, at 398–400.

<sup>220</sup> *Morgan II*, 304 U.S. 1, 19 (1938).

tively “egregious” situation (p. 76). In this light, there is something paradoxical about the statement that “[d]ue process within the agency would make further judicial review unnecessary” (p. 125). Due process within the agency *would* make further judicial review unnecessary, but the continuing availability of judicial review renders the question whether there is due process within the agency provisional at any given moment. The point is not only that judicial review in such a system is highly underdetermined (guided only by quasi-constitutional notions — “due process,” “fundamental requirements of fairness,” “fair play”). From the perspective of getting out from under Dicey’s rule of law, the most worrisome aspect of such judge-driven indeterminacy is that it deprives administrators of the ability to legitimate their own actions through self-regulation. Such self-regulation will necessarily involve either adherence to a previous judicial baseline, which could change, or a guess about a future judicial baseline, which could well turn out to be wrong. Given this uncertainty, it is not clear how much legitimacy administrative self-regulation is capable of producing. No matter how careful administrators are, their legitimacy remains in a state of suspension until the next trip to the courts. Put in these abstract terms, lawyerly administration sounds a lot like a recipe for the “recurrent sense of crisis” that James Freedman described as characterizing American administrative governance.<sup>221</sup>

The virtue of history is to move away from such abstractions. Yet it is hard to see the post-1940 history of administrative governance as free of this recurrent sense of crisis. In the immediate postwar decades, courts invoked the fundamental requirements of fairness and human liberty not only to heighten review of agency factfinding, but also to impose a host of new procedural and substantive constraints on agencies in a variety of unexpected contexts, and to override statutory preclusions of judicial review, much to the astonishment of leading administrative law scholars.<sup>222</sup> Ten years later, the upheaval that

<sup>221</sup> FREEDMAN, *supra* note 1, at 6.

<sup>222</sup> See *supra* note 206 and accompanying text (discussing cases); see also *Simmons v. United States*, 348 U.S. 397, 405 (1955) (repeatedly invoking “basic fairness” in interpreting a statute to require administrators to provide a fuller hearing before denying draft registrant conscientious objector status); *Peters v. Hobby*, 349 U.S. 331, 340, 342–43 (1955) (holding that a Loyalty Review Board was without jurisdiction to review a federal employee’s loyalty); *Greene v. McElroy*, 360 U.S. 474, 508 (1959) (finding that administrators were without jurisdiction to determine the loyalty of a government contractor); *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 749–50 (1961) (avoiding First Amendment question by interpreting Railway Labor Act’s authorization of union shops to prohibit a union from spending dues from an employee on a political cause to which the employee objects); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136–38 (1961) (avoiding First Amendment question by interpreting Sherman Act not to outlaw lobbying of Congress for legislation that would have negative effects upon business competitors); Kenneth Culp Davis, *Nonreviewable Administrative Action*, 96 U. PA. L. REV. 749, 770–71 (1948) (arguing that “[t]o say that administrators have no jurisdiction to err in finding facts is the same in

Sunstein and Vermeule call “progressive administrative law” shook the state, as the D.C. Circuit imposed novel procedural constraints on informal agency action in order to protect the poor, the powerless, and the environment from a heedless Leviathan.<sup>223</sup> From the point of view of Chief Justice Hughes’s decision in *Morgan II*, however, what Sunstein and Vermeule describe as a radical departure from the 1940s looks unexceptional: the imposition of novel yet somehow fundamental requirements of fairness, in keeping with the judicial temper of the day. Similarly, the contemporary critics to whom both Sunstein and Vermeule and Ernst respond — the “Constitution in Exile” movement, the Tea Party — do not sound all that different than the lawyers who celebrated the imposition of new procedural requirements, new personnel, and a heightened standard of review on the NLRB in 1940, and 1946, and 1947, and 1951, all in the name of the same time-honored traditions of “fair play” and “human liberty” that Chief Justice Hughes and John Lord O’Brian invoked in the 1930s (pp. 74, 98).

History, then, may not be terribly helpful for those who wish to counter the arguments of today’s libertarian originalists. Not only may their charges of administrative illegitimacy be immune to evidence of decisions “We the People” made by social consensus or congressional statute in the 1940s, but “We the People” have been markedly skeptical about the legitimacy of administrative governance in the seventy-five years *since* the 1940s. Of course, this skepticism has not stalled the growth of the administrative state. Indeed, the simplest explanation for the “recurrent sense of crisis” haunting the American administrative state may be found in its recurrent expansion.<sup>224</sup> Yet this quantitative achievement has rarely been met with ready qualitative acceptance. Such a fundamental mismatch between administrative growth and administrative legitimation may have a great deal to

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substance as saying that the reviewing court may substitute its judgment as to the facts,” and criticizing *Estep v. United States*, 327 U.S. 114 (1946)); Robert Kramer, *The Place and Function of Judicial Review in the Administrative Process*, 28 FORDHAM L. REV. 1, 1 (1959) (“Today we are witnessing a period of intensive criticism and reappraisal of the entire administrative process.”); Jack Pew, *Non-Reviewable Administrative Action*, 33 TEX. L. REV. 663, 663 (1955) (“The problem of how to maintain some kind of peaceful co-existence between administrative agencies and the courts has caused blood pressures to rise since the early days of the New Deal and is as broad as it is controversial.”); Edward L. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1055–60 (1984) (discussing the judiciary’s heightened supervision of the administrative state in the 1940s and 1950s); Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397, 413–26 (2005) (same); Bernard Schwartz, *Administrative Justice and Its Place in the Legal Order*, 30 N.Y.U. L. REV. 1390, 1393 (1955) (noting that “the scope of review in federal administrative law has very definitely been tending to approach that which prevails” when appellate courts review the factfinding of trial courts).

<sup>223</sup> See Sunstein & Vermeule, *supra* note 12, at 394.

<sup>224</sup> FREEDMAN, *supra* note 1, at 4.

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do with the “rule of lawyers,” a regime that continually holds the administrative state up to the judicial “image” (p. 76), even as it accepts in practice myriad deviations from the procedures of common law courts.

Most American lawyers do not believe in the “Constitution in Exile.” But Daniel Ernst’s rich history shows how they came to be haunted by what one might call the “Court in Exile.” Under the gaze of this spectral Court, the administrative state must continue to incarnate “the spirit of the just judge” and its legalistic conception of “fair play” (p. 74), at the expense of alternative social and economic conceptions of fairness. In the 1930s, some lawyers — and many other Americans — struggled to dispel such legalism once and for all. The rhetoric of Tocqueville’s nightmare, however, proved powerful enough to install Dicey’s utopia in our collective dreams.