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A Tale of Two Administrative Law Regimes

by

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Introduction and Summary

A fully-fledged American administrative state emerged under the New Deal of the 1930s. The first two terms of Franklin Roosevelt's presidency (1933-1941) witnessed both a dramatic expansion of administrative authority and a major reaction and resistance to the administrative state's expansion. The creation of myriad agencies such as the Securities and Exchange Commission (SEC), National Labor Relations Board (NLRB), Federal Communications Commission (FCC), Social Security Administration (SSA), and Works Progress Administration (WPA), to name only a handful, signaled a major change in the scope and methods of government. Al Smith, the Democratic Party's presidential nominee in 1928, four years prior to Roosevelt's nomination, proclaimed in 1936 that "the alphabet was exhausted in the creation of new departments" during Roosevelt's first term.[1] It was at that time that the first of two modern administrative law regimes emerged.

This first modern administrative law regime was characterized by deference to administrative expertise and discretion. While the courts initially resisted the administrative state's intrusion on

[1] Al Smith, "The Facts in the Case," speech at the American Liberty League Dinner, January 25, 1936, available at https://teachingamericanhistory.org/library/document/betrayal-of-the-democratic-party/ (accessed 1/31/2020).

their authority, they eventually retreated from constitutional objections to the delegation of legislative power and to the insulation of agency heads from presidential authority. The courts even created legal doctrines that limited their own authority to oversee the decisions made by agencies. A crisis of legitimacy that came to the fore in the 1930s ended with a whimper in the middle of the 1940s, punctuated by the creation of the Administrative Procedure Act (APA). After the APA's enactment, courts crafted deference and standing doctrines to reduce judicial oversight of administrative decisions. Although the APA was written to counter the aggrandizement of administrative power, its practical impact was different from its drafters' intent.

It appeared as if the administrative state was here to stay, and that it would be undisturbed by courts and political opponents. Agencies would continue to possess wide discretion and would receive deference from reviewing courts. Yet, within a few decades, the legitimacy of this administrative law regime would again come under attack – this time from opponents on the Left. During the 1970s, a second administrative law regime emerged in which agencies would be brought back into politics, and subjected to extensive legal challenge and supervision by courts and interest groups. Having lost faith in administrative expertise, liberal reformers reconceived administrative law to put the courts in charge of the administrative state. In response, courts changed procedural, deference, and standing doctrines to expand judicial authority over agency action. Yet courts refused to entertain deeper constitutional challenges to the legitimacy of the administrative state.

The history of the administrative state is, therefore, primarily a story of two distinct regimes that characterized the period between the 1930s and 1970s. The first modern administrative law regime, which was characterized by deference to expertise, prevailed from the New Deal period until the 1970s. It was displaced by the second modern administrative law regime, which was characterized by judicial partnership with, and indeed oversight of, administrative agencies. This second regime prompted a reaction beginning in the 1980s, which continues to adjust the relationship between courts and agencies, but many aspects of that second regime remain in place today. As the next and final essay in this series will explain, the reaction against administrative law's second regime is ongoing and foreshadows important changes in the administrative state that may be to come.

The New Deal and the Crisis of Administrative Legitimacy

As described in my previous *Perspectives from FSF Scholars* paper in this series, "Progressivism and the True Beginnings of the Administrative State," the administrative state's theoretical foundations were set in the Progressive Era, in the first decades of the 20th Century.[2] It was then that leading political theorists began to question some of the foundational principles of American constitutionalism, such as limited government, representation, and the separation of powers. In their view, the American Constitution contained principles and institutions that were outdated and in need of revision. The ideas of these theorists led to important practical steps that established the first institutions of the modern administrative state, such as the expansion of the Interstate Commerce Commission's ratemaking authority and the creation of the Federal Trade Commission.

It was the New Deal expansion during the 1930s, however, that brought about a full-fledged administrative state in America. Franklin Roosevelt's first two terms in office saw the dramatic

[2] See Joseph Postell, "Progressivism and the Beginnings of the True Administrative State," *Perspectives from FSF Scholars*, Vol. 14, No. 21 (2019).

expansion of administrative power, as well as a backlash from the judiciary, from Congress, and from the entire legal community.

"Black Monday:" The Court Declares the End of Centralization

The first phase of this backlash against the administrative state occurred during the Supreme Court's 1935 term, when the Court's skepticism of the New Deal's constitutional innovations came to a head. In two famous cases, *Panama Refining Company v. Ryan* and *Schecter Poultry Corporation v. United States*, the Supreme Court struck down provisions of one of the central New Deal programs, the National Industry Recovery Act (NIRA), for violating the nondelegation doctrine.[3] The *Schecter* case involved NIRA's delegation of authority to the president to promulgate "codes of fair competition." These codes were typically crafted by industry and government working cooperatively and approved by the president. A similar program for agriculture, the Agricultural Adjustment Act (AAA), brought farmers together to create rules for competition in agricultural markets. One lawyer tasked with implementing the AAA admitted that "in essence we're creating gigantic trusts in all the food industries."[4]

In both cases, the Court struck down statutes for granting such unfettered authority to agencies that "the standards of legal obligation" were contained in the agency's regulations, not in the statutes themselves.[5] In a concurring opinion in *Schecter*, a unanimous decision, Justice Benjamin Cardozo famously called the NIRA "delegation run riot."[6] The Court in 1935 sent Roosevelt a warning that it would not allow Congress to grant unlimited discretion to administrative agencies through vague statutes that left the agencies to define what the law would be.

On May 27, 1935, the same day that *Schecter* was decided – and a day that has come to be known as "Black Monday" – the Court also handed down a decision in *Humphrey's Executor v. United States*. Paradoxically, the decision in *Humphrey's Executor* both limited the president's authority over the administrative state and enabled the expansion of the administrative state by validating the constitutionality of independent regulatory agencies.[7] In *Humphrey's Executor v. United States*, the Court upheld statutory limitations on the president's authority to fire the head of the Federal Trade Commission, arguing that such agencies' "duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative."[8] On the one hand, the decision was consistent with the Court's delegation decisions because it limited the increasing authority of the president over policymaking. Certainly, some of the Justices saw *Humphrey's Executor* as a complement to its decisions in *Panama Refining* and *Schecter*. Justice Louis Brandeis lectured two of Roosevelt's closest advisors in his chambers after the "Black Monday" decisions were read: "This is the end of this business of centralization, and I want you to go back and tell the President that we're not going

[3] *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schecter Poultry Corporation v. United States*, 295 U.S. 495 (1935).
[4] Quoted in Daniel Ernst, TOCQUEVILLE'S NIGHTMARE 57 (2014).
[5] *Schecter Poultry*, 295 U.S., at 530.
[6] *Schecter Poultry*, 295 U.S., at 553.
[7] In a third case handed down on the same day, *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935), the Court struck down a statute that granted mortgage relief to farmers as a violation of the Fifth Amendment's Takings Clause.
[8] *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), at 624.

to let this government centralize everything."[9] Seen from the narrow and immediate perspective of limiting Roosevelt's power, *Humphrey's Executor* worked alongside *Schecter* to limit the amount of authority Congress could grant the president.

However, the long-term effect of *Humphrey's Executor* was to authorize the creation of a new kind of administrative institution that the Constitution (as interpreted in the "Decision of 1789") did not allow. By upholding the creation of independent agencies, the Court struck against the Constitution's original design supporting the president's removal authority as a means of ensuring a responsible and accountable executive branch.

Ultimately, Justice Brandeis's prediction that Black Monday marked "the end of this business of centralization" proved inaccurate. President Roosevelt was not one to back down from a fight, and in February 1937 he announced his famous "court-packing" plan to increase the number of justices on the Supreme Court and to fill those new positions with jurists sympathetic to his administrative policies. The following month Roosevelt devoted one of his "Fireside Chats" to the problem the Court presented. He explained that the American political system was "a three-horse team provided by the Constitution to the people so that their field might be plowed." The problem, however, was that "[t]wo of the horses are pulling in unison today; the third is not." The threat posed by the Court was so great, he declared, that "we must take action to save the Constitution from the Court and the Court from itself."[10] Though Roosevelt's proposal to expand the Court never came to fruition, the Court's challenge to the constitutionality of the administrative state faded after 1935. The Court's acquiescence to New Deal expansions of administrative power was at least indirectly signaled by the Court's 1937 decision in *West Coast Hotel Company v. Parrish*, which upheld state minimum wage legislation from constitutional challenges to state governmental interference in economic matters.[11] Indeed, Black Monday marked the last time the Court curbed the power of the administrative state during the New Deal period.

The Fight Over Reorganization

This was not the end of the resistance to the administrative state, however. Many members of Congress became increasingly concerned about the immense authority the administrative state potentially gave to the president. Roosevelt exacerbated these concerns by pressing for authority to reorganize the bureaucracy in order to increase his ability to oversee and control it. This gave rise to a second phase of backlash against the administrative state: the fight in Congress over controlling the bureaucracy.

The early New Deal period was marked by a haphazard and *ad hoc* response to the emergency of the Great Depression. Little regard was given to questions of government organization. The critical thing, in Roosevelt's mind, was that the government was responding with action. Consequently, as Sidney Milkis wrote, "[b]y 1935, the administration was becoming a bewildering maze of autonomous and semiautonomous regulatory agencies."[12] After his first few years as president,

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[9] Quoted in Arthur Schlesinger, THE AGE OF ROOSEVELT, VOL. III: THE POLITICS OF UPHEAVAL: 1935-1936 280 (2003).
[10] Franklin D. Roosevelt, "Fireside Chat," March 9, 1937. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. https://www.presidency.ucsb.edu/documents/fireside-chat-17 (accessed 1/29/2020).
[11] *West Coast Hotel Company v. Parrish*, 300 U.S. 379 (1937).
[12] Sidney M. Milkis, THE PRESIDENT AND THE PARTIES 105 (1993).

Roosevelt turned to the issue of reorganizing the agencies that had recently been created and subjecting them to presidential control and oversight.

Although reorganization of the executive branch was relatively uncontroversial in earlier periods of American history, Roosevelt's proposal inevitably prompted uproar because he now wished to control the dramatically expanded bureaucracy. Roosevelt's convened a committee to study the reorganization of the executive branch, typically referred to as the "Brownlow Committee," after its leader, political scientist Louis Brownlow. The Brownlow Committee's report went beyond proposing changes to make the bureaucracy more efficient. It insisted upon presidential control of the administrative state as a matter of constitutional principle.

The most famous portion of the Brownlow Committee's report attacked the independent agencies, now given sanction by the Supreme Court in *Humphrey's Executor*, as "a headless 'fourth branch' of government, a haphazard deposit of irresponsible agencies and uncoordinated powers." They resembled "the barns, shacks, silos, tool sheds, and garages of an old farm" rather than a government following an orderly plan.[13] The Brownlow Committee made an argument that was well-grounded in constitutional principle and history. The idea of presidential responsibility for administration, through authority over administrative subordinates, was central to the debates over the presidency at the Constitutional Convention, during the ratification process, and in the famous "Decision of 1789."[14]

The difficulty with the Brownlow Committee's report, however, was that it clearly sought to give the president greater control over policy than Congress. After the broad delegation of such significant authority to the administrative state, putting the president in charge of the bureaucracy meant putting him in charge of power that Congress once controlled. Roosevelt asked Congress for authority to reorganize the executive branch in early 1937, but ran into deep resistance. The House of Representatives ultimately rejected his proposal a year later. Roosevelt was able to obtain more modest reorganization authority, along with an expansion of the president's personal staff resources, in the Reorganization Act of 1939. But he failed in achieving his larger ambitions.

The Opposition of Bench and Bar

After Roosevelt's failure to get the reorganization authority he desired, opposition to the administrative state entered a third phase: resistance by and the bar. This resistance included lawyers in Congress, who introduced legislation aiming to reduce the authority and discretion of administrative agencies. In the end, this resistance largely failed to accomplish its goals, producing only a modest administrative procedural reform in the Administrative Procedure Act (APA).

Courts had begun to adopt a more deferential posture towards agencies in the 1920s and 1930s. Progressive judges such as Louis Brandeis and Felix Frankfurter, wary of judicial intrusion into the administrative process, crafted new standing doctrines that denied access to judicial review of administrative agencies.[15] In addition, judges shifted legal doctrines that had previously

[13] Report of the President's Committee on Administrative Management (1937), at 36.
[14] See Joseph Postell, "Reconciling Administration and Constitutionalism in Early America," *Perspectives from FSF Scholars*, Vol. 14, No. 2 (Jan. 14, 2019).
[15] Scholars today increasingly view standing as having been invented during this period by progressive judges seeking to limit judicial review. See, for instance, Steven L. Winter, *The Metaphor of Standing and the Problem of Self-*

distinguished issues of law from those of fact, deferring to the latter but not the former. Under the new doctrine, issues of law and fact were deemed to be intertwined, and therefore deference was required for questions of law as well as those of fact.[16]

But the bar was largely hostile to the administrative state's intrusions into activities that were normally reserved to courts. Common-law courts engaged in much of the regulatory activity that was now being consumed by agencies. Chief among the opponents of the administrative state was Roscoe Pound, the Dean of the Harvard Law School and, by many accounts, the most significant legal thinker of his generation. The American Bar Association (ABA) began to voice deep reservations about the emergence of the administrative state, and Pound became its most forceful advocate.

In 1938 the ABA issued a report denouncing the "administrative absolutism" of the New Deal and compared this administrative absolutism to "the proposition recently maintained by the jurists of Soviet Russia that in the socialist state there is no law but…only administrative ordinances and orders."[17] This opposition to the New Deal eventuated in the Walter-Logan Act, which Congress enacted in 1939 but doomed by Roosevelt's veto. Walter-Logan sought to reverse the judiciary's increasingly-deferential posture towards administrative agencies and provide greater opportunity for individuals to challenge administrative decisions.

When it became clear that Congress could not overcome Roosevelt's opposition to the ideas in Walter-Logan, the debate shifted to a compromise measure that became the Administrative Procedure Act. The APA was enacted by a voice vote in both the House and the Senate with no opposition.[18] It was uncontroversial when it was enacted, but Congress generally agreed that it would reverse the tendency towards judicial deference. The section of the APA that dealt with the scope of judicial review declared (and still declares today) that "reviewing court[s] shall decide all relevant questions of law" and "interpret constitutional and statutory provisions."[19]

When questioned about this language on the floor of the House, Francis Walter (who had shepherded the Walter-Logan Act through Congress years before) explained that the provision "requires courts to determine *independently* all relevant questions of law."[20] Others offered the same interpretation of that portion of the APA.[21]

In brief, the opposition of the bench and the bar, especially the ABA, contributed to the enactment of the APA, which was designed to at least partly reverse the trend toward increasing judicial deference that had emerged during the New Deal. The law was uncontroversial because it did not go very far in that direction. Congress had failed to enact more far-reaching measures, as it was unable

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Governance, 40 STAN. L. REV. 1371 (1988), Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992), and Ann Woolhandler and Caleb Nelson, *Does History Defeat Standing?* 102 MICH. L. REV. 689 (2004).

[16] See *Gray v. Powell*, 314 U.S. 402 (1941); *NLRB v. Hearst Publications*, 322 U.S. 111 (1944).

[17] Report of the Special Committee on Administrative Law, 63 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION (1938), at 346, 343.

[18] Ernest Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VIRGINIA L. REV. 219 (1986), at 231-2.

[19] 5 U.S.C. §706.

[20] Speech of Rep. Francis Walter, May 24, 1946, in ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY (1946), at 359.

[21] See Joseph Postell, BUREAUCRACY IN AMERICA (2017), at 240-1, 243-4, for further statements.

to override Roosevelt's veto of the Walter-Logan Act. Some of the administrative state's opponents, however, saw the APA as a "pioneer effort" towards limiting the administrative state that would be "perfected by appropriate amendments" in later legislation.[22]

In the end, however, the APA marked the end of this resistance to the administrative state. It did not reverse the trend towards judicial deference to administrative legal interpretations.[23] In spite of the statute's language, courts continued to defer to the administrative state.

In the face of three waves of resistance – constitutional resistance on the Court, political resistance from Congress, and legal resistance from the bench and bar – the administrative state's advance continued. The regime of deference that was established in the first half of the 20th Century seemed to be well-settled.[24] Within a few decades, however, political circumstances had changed and almost all of the significant doctrines that supported judicial deference were limited.

The 1970s Revolution and the Second Administrative Law Regime

The first administrative law regime of judicial deference underwent a revolution in the 1970s. The chief impetus for this revolution was political; it was a reaction to the presidency of Richard Nixon. Nixon's two terms as president reversed a decades-long presidential trend in which presidents friendly to the expansion of the administrative state occupied the White House.

Nixon was not only opposed to many of the administrative state's objectives, he also was aggressive in impressing his own views onto the bureaucracy. As Richard Nathan, a Nixon administration official, carefully chronicled, Nixon sought to establish an "administrative presidency" in which the bureaucracy would represent the views of the president.[25] Initially utilizing his cabinet secretaries to implement his agenda, to little avail, Nixon eventually turned to personal White House staff to carry out his policies.

Nixon's example caused liberal reformers to question whether judicial deference to the bureaucracy's expertise would advance their long-term purposes. They responded to this problem by reconceiving the administrative state as a "surrogate political process" in which interest groups would participate alongside agencies to advance their policy goals.[26] These reformers called on the judiciary to play a much more expansive and significant role in the administrative process as a part of this new vision for the administrative state.

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[22] Speeches of Rep. Earl Michener and Rep. John Robsion, May 24, 1946, in ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, at 347 and 383.

[23] The APA also stated that courts should defer to agencies' findings of fact, only overturning them if "unsupported by substantial evidence." 5 U.S.C. 706(2)(E). This largely continued the previous judicial approach, which was to defer to agencies' factfinding while reviewing legal interpretations *de novo*. In defense of the position that agency factfinding should not receive judicial deference when it implicates core private rights, see Evan Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?* 16 Georgetown Journal of Law and Policy 27 (2018).

[24] Various scholarly accounts of this period refer to the New Deal period as the "Era of Deference." Most notable is Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399 (2007). See also Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975), at 1671-1687.

[25] Richard P. Nathan, THE PLOT THAT FAILED: NIXON AND THE ADMINISTRATIVE PRESIDENCY (1975); Nathan, THE ADMINISTRATIVE PRESIDENCY (1983).

[26] Stewart, 88 HARV. L. REV., at 1670.

The courts proved receptive to ideas advanced by liberal reformers in the 1970s. In three areas of administrative law, legal doctrines were modified to grant the judiciary and interest groups a more robust role in the administrative process. First, agencies' procedural requirements were dramatically expanded through new interpretations of the Constitution's Fifth and Fourteenth Amendment Due Process Clauses and the APA's modest notice-and-comment procedures for informal rulemaking. Courts began to apply the Due Process Clauses to a broader array of interests implicated by agency action, expanding procedural protections for individuals affected by agency decisions.[27] In a series of decisions, the D.C. Circuit Court of Appeals also expanded the APA's procedural requirements for agency notice-and-comment rulemaking, thereby granting interest groups rights to participate in the rulemaking process and to challenge agency rules that they opposed.[28] These developments have resulted in what scholars call the "ossification" of administrative rulemaking, as agencies struggle to cope with the onerous legal requirements courts can now impose on them.[29]

Second, courts expanded the range of interests that possessed legal standing to sue administrative agencies and challenge agency rulemakings. The concept of standing, which had emerged during the Progressive and New Deal periods as a means of keeping the courts out of the administrative process, was now relaxed to bring courts back in.[30] Circuit courts redefined the element of "injury" that triggered standing from an economic definition to one that recognized ideological interests as a basis for standing.[31] The Supreme Court endorsed that redefinition in its 1972 decision in *Sierra Club v. Morton*.[32] The expansion of what constitutes a legally cognizable injury allowed public lobby groups to sue agencies if they could prove that their membership was affected by agency action, The revolution in the concept of standing reached its culmination in the court's 1973 decision in *United States v. Students Challenging Regulatory Agency Procedures*, or *SCRAP*.[33] In that case, five students at the George Washington University School of Law were deemed to possess standing to sue simply because a rate issued by the Interstate Commerce Commission allegedly would affect the environment and therefore their interests.

Third and finally, courts expanded the scope of substantive review of agency policy decisions. The scope of review section of the APA, discussed above, included a provision requiring reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be…arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[34] Often

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[27] See especially *Goldberg v. Kelly*, 397 U.S. 254 (1970) and *Board of Regents v. Roth*, 408 U.S. 564 (1972). Though the latter case limited the range of protected interests from the expansive "grievous loss" definition offered in *Goldberg*, it nevertheless extended Due Process protections to any legal entitlement granted by statute, extending legal protection to interests such as welfare and disability benefits that, in an earlier era, would have been considered "privileges" rather than rights protected by Due Process.

[28] For a sampling see *O'Donnell v. Shaffer*, 491 F. 2d. 59 (D.C. Cir., 1974); *Portland Cement Association v. Ruckleshaus*, 486 F. 2d. 375 (D.C. Cir., 1973); *Automotive Parts & Accessories Association v. Boyd*, 407 F. 2d. 330 (D.C. Cir., 1968).

[29] See Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L. J. 1385 (1982).

[30] See Postell, BUREAUCRACY IN AMERICA, at 220-3, for further discussion.

[31] *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F. 2d 608 (2nd Cir. 1965); *Office of Communication of United Church of Christ v. FCC*, 359 F. 2d. 994 (D.C. Cir. 1966).

[32] 405 U.S. 727 (1972). Although the Sierra Club lost in *Morton*, the Court's opinion endorsed a broader notion of standing that allowed anyone to sue if their interest was within the "zone of interests" protected by the statute. Sierra Club simply had not shown that any of their members were affected by the agency's decision.

[33] 412 U.S. 669 (1973).

[34] 5 U.S.C. §706(2)(A).

called the "arbitrary or capricious" standard of review, it was generally applied in a deferential manner prior to the 1970s. For an agency action to be arbitrary or capricious, it would have to be apparent to the reviewing court that the agency did not carefully consider the question presented to it.

This changed in the 1970s, as a new "hard look" doctrine emerged, especially on the D.C. Circuit Court of Appeals. In 1970, the D.C. Circuit decided *Greater Boston Television Corp. v. FCC*, announcing this new approach to applying the APA's arbitrary or capricious standard. In the court's words, the standard "is to assure that the agency has given reasoned consideration to all the material facts and issues. This calls for insistence that the agency articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts." Reviewing courts, following this approach, would look at the agency's decision carefully, especially its stated rationale and facts identified, and overturn any decision when it appears "that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making."[35] The D.C. Circuit applied this new standard in subsequent, high-profile cases.[36]

The result of these three developments – increased procedural requirements, the expansion of standing to sue agencies, and more rigorous review of the substance of agency decisions – was to put the courts in greater control of the administrative state. "The late 1960s and the 1970s," Marc Allen Eisner writes," saw the emergence of a new regulatory regime.[37] Shep Melnick has explained this administrative law regime as a "politics of partnership" between agencies, courts, and interest groups.[38] This transformation has profoundly affected how the administrative state functions. Melnick writes that these changes in administrative law "have unquestionably had a major effect on national politics and policy….Nearly every federal agency has been touched by the 'reformation' of American administrative law."[39] Today, the decisions of administrative agencies are affected by interest group participation and litigation to a much greater extent than during the Progressive and New Deal eras. This has given interest groups powerful new tools to influence public policy outcomes on the issues around which they are mobilized.

Conclusion

During the New Deal period, the administrative state came into full fruition. Its legitimacy was challenged in various ways by three different groups: the Supreme Court in the mid-1930s, Congress in the late 1930s, and the bench and bar in the 1940s. The administrative state ultimately overcame this resistance, as opponents of the administrative state contributed only modest limits to its authority, particularly under the Administrative Procedure Act.

After the APA was enacted, courts continued to defer to administrative agencies. In some respects this was inconsistent with Congress's intent. At the same time, opponents of the administrative state who promised further reforms after the APA was passed stopped pressing for reform. The result was an administrative law regime of judicial deference to administrative expertise.

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[35] 444 F. 2d. 841 (1970), at 851.
[36] See, e.g., *Industrial Union Department AFL-CIO v. Hodgson*, 449 F. 2d. 467 (D.C. Cir., 1974); *Ethyl Corp. v. EPA*, 541 F. 2d. 1 (D.C. Cir., 1976)
[37] Marc Allen Eisner, REGULATORY POLITICS IN TRANSITION 118 (2d. ed., 2000).
[38] R. Shep Melnick, *The Politics of Partnership*, 45 PUB. ADMIN. REV. 653 (1985).
[39] R. Shep Melnick, *Executive Power and Administrative Law*, 97 PUBLIC INTEREST 134 (1989), 134-5.

This regime lasted only a few decades. As liberals abandoned the notion that the president and the bureaucracy would always be friendly to their preferred policies, they increasingly turned to the courts as supervisors of agencies. Courts crafted new administrative law doctrines that placed themselves in a position of "partnership" with agencies, and interest groups gained greater influence over the administrative process.

As the next and final paper in this series will explain, conservative-leaning jurists responded to this new administrative law regime, curiously, by retreating to the basic principles of the first administrative law regime. They accepted the need for delegation of legislative power, but maintained that courts should defer to administrative determinations of law, should limit standing to challenge administrative action, and should refrain from imposing procedural constraints on agencies. Rather than drawing from the legal tradition that preceded the administrative state, they accepted the administrative state's legitimacy while they sought to keep the courts from gaining too much influence over the bureaucracy. The shift back to Progressive-Era administrative law began in the 1980s, but the doctrinal reforms were only moderately successful. More recently, however, reformers have embraced a more fundamental questioning of the administrative state and supported changes that would return to a pre-Progressive Era understanding of administration's role in the Constitution.

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Joseph Postell, "The Framers Establish an Administrative Constitution" *Perspectives from FSF Scholars*, Vol. 13, No. 19 (May 24, 2018).

Joseph Postell, "Bureaucracy in America: A Constitutional Approach to Administration," *Perspectives from FSF Scholars*, Vol. 13, No. 13 (April 17, 2018).