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*1189 Federal Regulation in Historical Perspective

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INTRODUCTION

A century ago, when Congress established the Interstate Commerce Commission, it initiated a new epoch in responsibilities of the federal government. For the first time, a national legislative scheme was enacted that provided for wide-ranging regulatory controls over an industry that was vital to the nation's economy—the railroads. Moreover, regulation of the industry was committed to an institutional mechanism that was virtually untested on the national stage, an independent regulatory commission. The modern age of administrative government had begun.

The forms and purposes of regulation would change dramatically over the next 100 years in response to unanticipated economic crises, *1190 emerging risks to public health and safety, and shifting public sentiments towards disadvantaged classes. Concomitantly, the evolution of the

regulatory process posed a continuing challenge to the judicial system. Present day principles of administrative law were fashioned from the continuing efforts of the courts to assess the legitimacy of regulatory power and the propriety of administrative discretion. Whether one focuses on the salient characteristics of the administrative system or the philosophical underpinnings of judicial review, the twentieth century has witnessed enormous variety and change in the development of federal regulation.

The growth of the regulatory system has not been wanting for attention. Although much of the literature is devoted to focused proposals for regulatory reform, there is a long tradition of scholarly analysis aimed at furthering an understanding of how the administrative system has developed. A great deal has been written, for example, about regulatory expansion in particular eras. On this score, one need only consider the substantial volume of work on the Progressive era or the detailed treatment of every aspect of the New Deal. [FN1] Many scholars also study reform movements. The literature is virtually boundless: agrarian unrest in the post-Civil War period; the muckrakers of the early twentieth century; and in recent times, the consumer and environmental movements of the 1960s and 1970s.[FN2]

Corresponding to this interest in the politics of administrative reform, but nonetheless pursuing a distinct set of concerns, students of the legal system have contributed to still another literature: the development of a historical understanding of the courts' reception of the administrative system. Along these lines, much has been written about the rise and fall of substantive due process and about the significance of the delegation of powers doctrine. [FN3]

In virtually every instance, these major topics—the politics of regulation, the character of reform movements, the nature of judicial review—have spawned a literature with understandable limitations. In most cases, serious historical work on the politics of regulatory reform has been limited to a single period, such as the Progressive era or the ***1191** New Deal. Much of the most interesting work has been on the establishment and implementation of a discrete regulatory scheme like the Federal Trade Commission Act or the federal securities legislation. [FN4] Legal scholarship, on the other hand, has been limited in another fashion. Although not necessarily tied to a particular era or agency, it has tended to focus primarily on judicial review rather than linking the treatment of themes in the case law to the politics of regulatory enactment and implementation. [FN5]

This article attempts to identify the dominant themes that emerge from an overview of the evolution of the federal regulatory system. [FN6] Beginning with the Populist era, the article examines each of the successive waves of federal regulatory reform through the consumer-environmental movement that reached its zenith in the early 1970s (which I will refer to as the Public Interest era). Specifically, I will discuss the regulatory impulses generated in the Populist, Progressive, World War I, New Deal, post-New Deal, Great Society, and Public Interest periods.

In order to establish a sense of correspondence between the politics of regulation and the growth of administrative law, I will also examine the judicial response to each successive wave of regulatory change. Although my characterization of ‘eras' may be open to question, my criterion for inclusion is simply stated: whether the period is one in which conceptions of the regulatory function were transformed or expanded in a way that contributes to an understanding of the rise of the modern administrative state.

My account begins with the Populist era because of the formative influence of the Interstate Commerce Act on the development of the ***1192** federal regulatory system. Beginning then, and

in the ensuing years until the New Deal, a policing model of regulation invariably triumphed over efforts to elicit government support for various forms of business price-fixing, information-sharing and market-allocating schemes—regulatory initiatives which I will refer to as associational forms of regulation.

The policing model closely corresponded to a widely shared philosophical and political perspective that stressed the limited responsibility of government for economic well-being; essentially, this perspective was premised on an autonomous market-controlled economy. But adherents to this view were willing to concede that the market systematically generated certain 'excessively competitive' practices such as the manufacture of products that seriously endangered health and safety or the setting of rates that were particularly discriminatory. When these practices occurred repetitively and constituted a nationwide problem, various factions—often including producer interests—regarded federal regulation as superior to the *ad hoc* approach of the pre-existing forms of government regulation, the judicially fashioned common law and state regulatory practices.

It is critical, however, to place the Populist and Progressive era policing regulation in a proper context. The policing model was in tension with competing regulatory options of varying intrusiveness. As indicated, a weaker model of government intervention based on common law tort and property principles was the prevalent form of 'regulation,' along with sporadic state and local controls, before the Commerce Act. By contrast, a potentially stronger model of government intervention (more intrusive into market autonomy), anticipating government-encouraged business associational activities, was consistently promoted in various forms—without much success—in the pre-New Deal years.

I share the view that the New Deal was a watershed in the development of the federal regulatory system. It marks the triumph in the political sphere of earlier associational aspirations. I will develop the thesis that those aspirations, as articulated in the Populist and Progressive eras, did not raise fundamental questions about the self-correcting capacity of the market. It was the New Deal that transformed the earlier 'weak' associational impulses into a commitment to permanent market stabilization activity by the federal government. Along with this market-corrective model of economic regulation, the New Deal developed the framework for a transformed federal responsibility to assure individual economic security, and, more generally, triggered a substantial shift in traditional conceptions of the separate spheres of public and private activity.

Like the earlier policing paradigm, the New Deal conception of market-corrective regulation needs to be considered in context. The more ***1193** modest policing model continued to afford a regulatory strategy that served as the pattern for many New Deal programs. By contrast, public control of enterprise activity provided a more strongly interventionist model of regulation—defining 'regulation' broadly—than the New Deal market-corrective paradigm. Notwithstanding the notable exception of the Tennessee Valley Authority, the public control model went considerably beyond the interventionist proclivities of New Dealers.

Thus, the policing reforms of the Populist and Progressive eras—which, I will suggest, experienced a renaissance in the Public Interest era of the 1970s—and the market-corrective programs of the New Deal and post-New Deal eras, represent points on a continuum of intervention strategies. They establish a distinctly American style of regulation, located between the opposing poles of public management and tort law. The style never entirely overcomes the

competing visions offered by a planned economy, a welfare state, or an autonomous market, however. It is, in fact, a patchwork system that is resistant to any ideologically comprehensive rationale for regulation.

A century of regulatory expansion has also seriously tested the adaptability of the federal judicial system. More clearly than the political branches, the courts assumed the mantle of guardian of market autonomy until midway through the New Deal. In concrete terms, this meant that the Supreme Court consistently questioned the legitimacy of newly established regulatory programs. But its resistance to change was guarded: Rather than striking down Populist and Progressive era federal regulatory schemes, the Court was inclined to construe agency powers as narrowly as considerations of its own continuing credibility seemed to permit.

As long as the Court remained committed to separate spheres of private and public activity—that is, to a steadfast protection of property rights—it manifested a central preoccupation with the legitimacy of regulatory power. But again, the New Deal constituted a point of departure. Once the Court overcame its fixation with market autonomy and accepted the New Deal commitment to active intervention in the control of economic activity, judicial concerns shifted dramatically to process-related issues of controlling administrative discretion.

At first, in the post-New Deal era, the judiciary seemed entranced by the conception of administrative expertise. But later, in the Public Interest era of the 1970s, the courts demonstrated a renewed skepticism about the regulatory process. I will suggest that throughout the century the courts tended to grant an uncharitable reception to new regulatory paradigms, but soon accommodated themselves to the idea of administrative expansion by relaxing the standards of judicial review.

Like regulatory power, judicial review can take a variety of forms; Once more, it may be helpful to think of a continuum of interventionist strategies. On one extreme, judicial review could adhere to the model ***1194** of *de novo* reconsideration, and in the Populist era the Supreme Court approached this polar extreme. In the post-New Deal era, by contrast, the Court moved to the other end of the continuum, adopting a strongly deferential model of review. Frequently, however, the Court oscillated between two intermediate points on the continuum, which I will refer to as the Right Answer and Best Efforts models in an examination of the Public Interest era.

Having stated my thesis in summary form, I would offer a caveat. In my view, the everyday politics of regulatory reform has been conducted without much concern for establishing a coherent theory of administrative government. This is hardly surprising. Reform groups as well as political actors have usually been driven either by narrow considerations of self-interest or spontaneous reactions to perceived crises rather than by comprehensive functional views on the role of regulation. As a result, regulatory legislation has been characterized by ambiguity of intention, leaving an open field for the judiciary to assume a substantial presence in defining the contours of administrative power. The courts, in turn, have failed to develop an enduring vision of the appropriate controls on agency power; instead, they have repeatedly provided an uncharitable reception to new regulatory reform movements, only to exercise greater sensitivity to the political process with the passage of time.

But all is not chaos. Although Congress and the courts have never fashioned a coherent theory of administrative government, fundamental questions about the scope of regulatory power have often been put to rest by prescription, and others have arisen as a consequence of new

economic disruptions and changing social values. Patterns emerge, as I have suggested above, even if they defy facile explanation.

My starting point is the post-Civil War period of rapid economic development, which was inextricably linked to long-distance transport of farm and industry products by the railroad. As the commercial influence of rail transport grew, virtually every affected economic class—farmer, merchant, warehouser, or provisioner—developed a stake in its activities. Even before mid-century, serious tensions had arisen among these competing interests. But the level of political and economic unrest reached new proportions after the Civil War, as major demographic shifts occurred in the country, and rapid escalation took place in the scale of industrial and commercial enterprise.

In one way or another, every new economic disruption that arose was linked to the railroads and their practices. And thus, because transportation rates were the key to prosperity for so many competing interests, Congress was obliged eventually to address the multitude of claims that the railroads were behaving unreasonably. Its answer was the establishment of the Interstate Commerce Commission (ICC) in 1887, which serves as my point of inception.

***1195** But first a contextual note. Without downgrading the significance of the Interstate Commerce Act (or the immediately antecedent state railroad legislation), it is nonetheless essential to recognize that government intervention in the economy did not begin with regulation of the railroads. The states, and to a lesser extent the federal government, had been heavily involved in promotional activity almost from the moment it became apparent that the funds needed to finance badly needed internal improvements exceeded the resources available to early private entrepreneurs. Perhaps the most famous instance before the Civil War was the Erie Canal, completed in 1825 by the state of New York, at a cost of just over seven million dollars. [FN7] It was by no means atypical. In the early nineteenth century, state legislatures routinely enacted statutes supporting the construction of canals, roads, railroads, and bridges. [FN8] At its peak in 1840, the partnership of state and private enterprise invested over fourteen million dollars in canals alone. [FN9]

Nor was direct financial aid the exclusive means of state support. Building a transportational infrastructure typically required the acquisition of large blocks of private land. To accomplish these acquisitions, a state often resorted to another in its array of promotional strategies—exercising the power of eminent domain. In fact, the states not only utilized eminent domain liberally in favor of a wide variety of 'public' entrepreneurial activities, but also vested private corporations directly with the power to condemn land for rights-of-way and other facilities, or even to seize building materials such as timber and stone. [FN10] Although the use of the eminent domain power triggered some classic confrontations between old property (vested rights) and new, the courts generally sided with the legislative disposition to subsidize new capital investment, thus legitimating the use of state power in support of economic development. [FN11]

The federal contribution to this pro-growth, booster spirit was foremost in the area of land grant policy. Between 1850 and 1870, the U.S. government offered grants-in-aid for railroad construction of alternate sections of right-of-way on either side of a rail line. The total acreage granted has been estimated to have reached the awesome figure of 180 million acres—an area larger than the entire Old Northwest. [FN12] In addition to this dramatic gesture in support of the railroads, the government initiated a series of land sales and grants for settlement

purposes, ***1196*** the most renowned being the Homestead Act of 1862, which granted a standard allotment of 160 acres of land to settlers who agreed to a set of homesteading conditions. [FN13]

Thus, the regulatory functions assumed in 1887 appear as a point of departure, rather than the advent of government intervention, when viewed in light of a century of federal land grant practices and the long-standing promotional role played by state legislatures. Private enterprises, particularly the railroads, were long-accustomed to being the focal point of governmental support. From the first surge of enthusiasm for westward expansion and commercial development, an infectious, pro-growth spirit was evident and there was no noticeable disposition at any level of government to maintain a hands-off policy regarding entrepreneurial activity.

Even the apparently novel regulatory thrust of the Commerce Act itself had a federal antecedent that was barely noticed. Responding to a continuing sequence of catastrophic boiler explosions, Congress had passed legislation—first in 1838, and then with considerably more bite, in 1852—regulating the construction and maintenance of steamboat boilers. [FN14] The act of 1852 established maximum pressure standards and provided for regular testing and inspection. It included mandatory labeling and licensing requirements and set up a schedule of criminal penalties for infractions. Long before the railroads took center stage as an object of congressional attention, the act provided a full-blown scheme of federal regulation.

When everything is said about federal intervention in the ante-bellum period, however, it remains the case that the daily business of private enterprise remained relatively unimpeded through the mid-1880s. By its very novelty, steamboat boiler regulation was the exception that proved the rule. Federal agencies did not generally inspect, investigate, or monitor any significant business activity to protect against unreasonable risks. [FN15] Businesses were not told how much to charge or produce, when or where to conduct their daily activity, or with whom they might deal. [FN16] From a national perspective, commercial affairs took place in a world without regulation. But the modern era was about to begin.

1197 I. REGULATORY POLITICS IN THE POPULIST ERA

It would be difficult to overstate the centrality of the railroads to the national economy in the post-Civil War period. Roads were poor and modes of highway transport primitive. Waterways were of limited utility for much of the country. Grain, lumber, and other staple consumer and industrial commodities moved from the West to the East—and within regions as well—principally by rail. As the country expanded westward and rural outpost communities proliferated, economic inter-dependency—among producer, warehouser, merchant, and consumer—made the position and practices of the railroads all-pervasive in importance.

The railroads, in turn, had grown up topsy-turvy. When it became clear that the states were in no position to finance a municipally owned system of rail transport, subsidies and grants were provided to encourage the development of privately owned rail systems. Within a short period of time, a number of giant competing railway networks were in operation. [FN17] These huge enterprises, free of any systematic pattern of government constraint or control, developed along multiple overlapping routes that stimulated bitter competition.

But the key to an understanding of the emerging transportation problem rests in the fundamental principles of railroad economics: The railroads carried huge fixed costs in railbed and terminal facilities and were consistently plagued by problems of unused capacity. As a consequence, every railway was under tremendous pressure to secure the maximum feasible traffic.

The resulting grievances are legendary. The sustained need to generate a high volume of business made long hauls much more profitable than short hauls, encouraging ratemaking practices that appeared highly arbitrary to short-haul shippers—and frequently resulted in discrimination against entire communities located at some distance from the main trunk lines. Moreover, these rate differentials were compounded by a wide variety of other practices. George Miller has observed:

The discrimination complained of involved both persons and localities. Personal discrimination meant that different charges were being imposed upon different shippers at the same point for the same service. It existed in the form of preferential rates, rebates, drawbacks, underweighing, underclassification, and numerous other devices Important shippers in competitive markets were able, due to the size of their business, to obtain lower rates than those commonly charged. If they were in business at a number of stations on the same line they might be able to obtain the lower rate at noncompetitive points as well. This result was usually achieved by granting a preferential rate, but in the case of way points it might be reached by raising the common charge ***1198*** above that given to the favored shipper. In any event, the chosen dealer was able to offer a better price to producers and processors than were his rivals. The effects of this form of discrimination were not necessarily passed on to the community as a whole since the price offered by the favored dealers continued to attract business to those points. [FN18]

In those early years, the most salient feature of railroad transportation was competition, not monopoly. The railroads were locked in a vicious struggle for the existing traffic. As might be expected, major shipping interests and established commercial centers often profited greatly from this warfare. Nonetheless, the picture was far more complicated than has sometimes been suggested. Putting aside shipping giants like Standard Oil, the ‘interests' that profited from the competitive warfare of the railroads are not so easily identified.

Consider some of the prospective candidates for success. Major shipping terminals like Chicago were constantly threatened by the commercial facilities at Milwaukee and Duluth. New York merchants, stung by unpredicable fluctuations in freight rates, were in fact leaders in the campaign for railroad regulation. The carriers themselves struggled to eliminate competitive excesses through pooling arrangements and rate conferences. Indeed, a carrier that ‘lost’ in the competitive struggle was, in a sense, the biggest threat because of its competitive edge (freedom from debt service) once it was operating in receivership. [FN19]

If there were few consistent winners from railroad competition, there were far more widespread losers than is commonly thought to be the case. It is a gross oversimplification to view the railroad problem as a struggle between the farmers and the carriers. The carriers were anything but staunch advocates of competition, despite the fact that consistent failure of their cooperative efforts led to endless outbursts of cutthroat rate wars. The larger confusion was in identifying farmers as the principal victims of rate discrimination. In reality, they were only the

initial link in a commercial chain that included grain buyers, provisioners, merchants, storage operators, and sundry other middlemen.

Indeed, the farmer was generally out of the picture after the sale of his produce to a local buyer. Although he might have been outraged by the low price he received for grain, others in the commercial chain confronted daily the vicissitudes of dealing directly with the carriers. Virtually every economic interest that was affected by rail transport was potentially a victim of railroad rate practices. [FN20]

***1199** The Granger legislation of the 1870s, which came as the capstone of the uproar over railroad practices, was in fact dubiously labeled. Although the Grange—the largest of the contemporaneous farmers' political movements—played a role in the enactment of railroad regulation in the grain-producing states of the Upper Mississippi Valley, its participation was of relatively minor consequence.[FN21] The Grange had broader aspirations to form cooperative organizations that would guarantee farmers a degree of economic independence in what was perceived as a pervasively hostile system of commerce. In this context, rate regulation was only one aspect of the farmers' long list of grievances.

For present purposes, the most interesting feature of the Granger laws is precisely the fact that virtually every group affected by the railroads favored government regulation in one form or another. This is a theme that will repeat itself throughout a century of regulatory reform: Even in the heyday of free enterprise, no substantial economic interest involved in the railroad controversy showed any particular ideological commitment to unrestricted private commercial activity. Indeed, if there was a consensus among the groups, it was that an unregulated market constituted an invitation to chaos. What each group sought first and foremost was freedom from perceived discriminatory practices. Farmers, merchants, grain buyers, railroad magnates, and all the others, desired above everything else a form of government intervention that would eliminate ‘arbitrary’ rate practices.

In this boiling cauldron of self-interest, no one sought to revolutionize the economic system. The great irony is that in a real sense the ***1200** railroads, among all the interest groups, had the weakest commitment to a competitive pricing system. Merchants and shippers, as well as farmers, benefited from competition among the railroads that kept rates low. They were principally interested in governmental intervention that would eliminate what they regarded as ‘excessive’ competition: inequality of treatment either on a personal or locational basis. By contrast, the railroads sought rationalization of the market through pooling arrangements. They undoubtedly would have preferred an essentially passive regulatory system that simply approved private pooling. Yet the railroads' self-interest almost certainly would have put them behind active governmental intervention that sanctioned cooperative activity if that were the most effective means of escaping the political and economic costs of continuing rate warfare. Indeed, under the auspices of railroad tycoon Albert Fink, in 1877 the four trunk lines operating west out of New York established a pooling system based on tonnage allotment that was explicitly aimed at eliminating competitive ratecutting. [FN22] Although another half century would pass before comprehensive planning of a rail system was legislated, the carriers' awkward offorts at cooperative behavior foreshadowed a blueprint for plenary consolidation of the rail system. [FN23]

By and large, however, Granger period reform agitation was limited in scope, essentially directed at unreasonable freight charges. In a similarly modest vein, the Granger laws reflected a

judicial failure, an inability of the common law courts to control ‘competitive excesses.’ Although the courts recognized the applicability of unfair competition principles to modes of transport, those common law principles were illsuited to control the discriminatory ratecutting practices that arose in the railroad industry. [FN24]

Between 1871 and 1875, each of the four grain-producing states in the Upper Mississippi Valley—Illinois, Iowa, Minnesota, and Wisconsin—enacted legislation dealing with ‘the railroad problem.’ Although the legislation varied considerably from state to state, these provisions raised virtually all of the issues that would subsequently ***1201*** arise in deliberations over the Interstate Commerce Act: Should a commission form of regulation be undertaken? Should specific types of discriminatory practices be proscribed? Should the power to establish maximum rates be utilized? Should the judiciary have final authority to establish ‘reasonableness?’ [FN25]

There was never a consensus on these issues. Indeed, in these years of turmoil, regulatory action in a given state frequently failed to survive beyond the next legislative session. Controls ran the gamut from a ‘weak’ commission system featuring a single elected commissioner with limited investigatory powers to a ‘strong’ system headed by a multimember commission, appointed for a term and vested with ratemaking authority backed by substantial penalties. [FN26]

The Granger movement itself was strikingly short-lived. [FN27] Although never a political party, the Grange grew by leaps and bounds in the early 1870s, reflecting the farmers' general hostility and suspicion towards commercial interests in a period of economic unrest. It was strongest in the Midwest, but it was a national organization. By 1875, there were over 20,000 granges in the U.S., an increase of more than ***1202*** twenty-fold from only two years earlier. And then, just as suddenly, the movement lost its impetus and a rapid decline set in.

The demise of the Grange reflected a number of factors, some closely linked to political reform impulses of the time. Partly, the Grange simply grew too large too quickly and failed to establish an organizational capacity for checking a downward spiral when marginal members, disappointed by the absence of immediate tangible benefits, drifted away. To a limited extent, the Grange also seems to have suffered an early manifestation of the perennial disease of reform groups. Once the short-term regulatory reform goal (railroad regulation) was accomplished, the utility of the Grange became less obvious. This perception was entirely misplaced. Like most regulatory legislation, the Granger laws reflected compromises that made their subsequent implementation crucial to the farmers' economic well-being. [FN28]

The Granger movement was also undermined by a more fundamental problem. Its downfall was principally caused by an inability to bring about structural reform in the market that would have been far more consequential than regulation of railroad ratemaking. [FN29] The Grange had attracted its membership largely on the promise of cooperative buying enterprises. When these enterprises failed—farmers simply did not have enough cash, group discipline, and business experience to make the system work—the bulk of the membership left in disillusionment, virtually destroying the movement. [FN30]

Within a few years, rising out of the debris of this failure, came what has certainly been among the most radical major reform movements in the history of this country. Beginning in 1885, a Texas-based organization called the Farmers Alliance expanded rapidly in an explosion of new chapters reminiscent of the heyday of the Grange. Like the Grange, the new movement drew its strength from the farmers' sense of isolation—a sense that they were exploited by every

business interest with whom they dealt. In reaction to this predicament, again mirroring the Grange, the Farmers Alliance sought salvation in cooperative effort.

***1203** The Texas farmers, like those throughout the South, were bound into the crop-lien system. Because they had no cash prior to harvest, it became the practice for southern farmers to purchase their needs on credit, giving a lien on their crops to the 'furnishing man.' Thus began a vicious cyclc of credit and lien redemption that bound the small-scale farmers into permanent debt. Whether it was this typically southern scenario or a midwestern version involving bank financing and commercial dealings with a local grain buyer or grain elevator operator, the farmer was the eternal debtor in a universe of scarce money and stiff terms of interest. Cooperative efforts seemed the only answer.

From an institutional perspective, the Farmers Alliance had a far more radical vision of cooperation than the Grange. In 1887, the leadership was proposing a statewide Farmers Alliance Exchange that would serve as both a centralized marketing and purchasing agency for its members. This was a dramatic conception, and one that served as a highly effective organizing device. Utilizing a system of traveling lecturers, the Alliance message spread from community to community across Texas and beyond to neighboring southern states. By 1887, the Alliance had expanded into ten southern states and the leaders began work on organizing throughout the West.

Later that year, the Alliance put its ideology into practice by launching a statewide marketing organization, the Texas Exchange, and unveiling its program for escaping the lien system. In essence, the program envisioned Alliance members joining together in one vast purchasing and marketing cooperative. The members were to be extended credit on the basis of notes on their land and crops, secured by mortgages. The crops were to be marketed jointly by the Exchange which would use the proceeds to liquidate the members' notes. [FN31]

The hitch was that the joint notes had to be translated into capital. As a consequence, the Alliance was vulnerable because it depended on access to the banking system. Not surprisingly, the banks closed ranks with the myriad interests deeply hostile to the Alliance—furnishing merchants, grain dealers, cotton buyers, railroads, grain elevators operators; in short, every interest that felt threatened by the cooperative movement. And the Texas Exchange, in turn, went under.

Although the Exchange was by no means the sole expression of Alliance cooperative efforts, its hopeless struggle against 'the interests' provided a lesson that was not lost on the leadership. Most critically, it led to a decisive change in strategy. Until the failure of the Exchange, the Alliance had remained an essentially private undertaking, relying upon its own organization capacity and counting on its cooperative strength as a vehicle for dealing on equal terms with private financial and marketing institutions. But with the failure of the Exchange, the leadership became convinced that its central difficulty—access to capital ***1204** markets—could only be solved by government intervention. As a consequence, the Alliance unveiled the sub-treasury system, a plan for federal governmental intervention that was unprecedented in boldness of conception. The Alliance leadership reasoned that if private credit was unavailable, the federal government would have to assume the function that the market failed to perform. The plan anticipated that:

the federal government would underwrite the cooperatives by issuing greenbacks to provide credit for the farmer's crops, creating the basis of a more flexible national currency in the process; the necessary marketing and purchasing facilities would be achieved through

government-owned warehouses, or ‘sub-treasuries,’ and through federal sub-treasury certificates paid to the farmer for his produce—credit which would remove furnishing merchants, commercial banks, and chattel mortgage companies from American agriculture. [FN32]

Thus, the Alliance anticipated the federal government issuing fiat money and operating warehouses in order to get cash into the farmer's hands. Private sources of credit would simply be eliminated. A similar plan, involving low interest federally sponsored mortgage money, was anticipated in western states where the typical practice was for the farmer to borrow against equity in land rather than an annual crop. In either event, the sub-treasury system would have thoroughly revamped the economics of agriculture by nationalizing the financing and wholesale marketing of farm products. At the same time, the farmers cooperatives would have institutionalized the collective marketing of agricultural production. The existing market mechanisms would have been obliterated and replaced by a multilevel collective enterprise in which the federal government played an unprecedented role.

Clearly the Alliance plan, which was unveiled at its St. Louis convention of 1889, required sustained political organization and federal legislation. The Alliance was now operating in unfamiliar territory. Until then, the cooperative movement had been principally a private venture, albeit on an exceedingly bold scale. The Alliance leaders had devoted their energies to building an internally strong organization and negotiating with private sources of capital and merchandise. By contrast, the sub-treasury plan necessitated either the support of the traditional political parties or the initiation of a third party movement. In view of the overwhelming hostility invoked by the Alliance Plan, the leaders decided in favor of a third party effort. As a consequence, the People's Party—the political party-based expression of Populism—was born.

By now, all of the seeds of Populism's demise had been sown. The third party movement led to broader organizing efforts, which foundered on racial antagonisms between white and black, sectional loyalties of North and South, and cultural incompatibilities of farmers and laborers. In classical American fashion the third party reform proposals ***1205*** were boiled down to vulgarized reformulations acceptable to the liberal wings of the mainstream political parties, shattering the more radical coalition for change.

The agents of cooption were the Democratic Party, William Jennings Bryan, and the Free Silver Movement. Dubbed ‘the shadow movement’ by Lawrence Goodwyn, Bryan's campaign for the free coinage of silver nonetheless came to be the establishment version of Populism's demands for reform. Free coinage of silver, as an end in itself, entirely failed to address the farmers' economic difficulties. But it became the ‘realistic’ view of what the Populist movement could expect from the system, a view that undermined the ideological base of the People's Party. Not surprisingly, free silver also proved to be a strong rallying cry for another group, with its own ends in mind, the mining interests. Before long, ‘fusion’ with the Democrats became a central point of contention in Populist circles, and by 1896, Populism was finished—drained off into the Democratic candidate Bryan's Free Silver campaign for the presidency against William McKinley.

In my view, it is no overstatement to suggest that the farm movement, in the last years of the nineteenth century, posed the only genuinely radical administrative reform program up to the advent of the New Deal. Certainly, it was the first significant political effort to advocate a public regulatory scheme based on a comprehensive view that the unfettered market system was deeply and irreparably flawed. By contrast, state railroad regulation was makeshift in character, largely

aimed at taming the ‘excesses' of railroad ratemaking practices. Almost without exception, the strongest proponents of such regulation viewed limited public policing of privately managed railroads as a sufficient antidote to the immediate ills of the economy.

Moreover, those same proponents of railroad regulation saw it as a strictly one-shot measure. The political forces that coalesced to pass the Granger Laws had no broader vision of a restructured economic system. Their energies were devoted to rationalizing the principal mode of commercial transport, but they entertained no general view that the market was structurally certain to exacerbate the inequities in society.

Viewed against contemporaneous regulatory reform impulses, the Populists come into sharper focus—and some misconceptions can be put aside. The farmers' revolt, as embodied in Populism, was not concerned principally with regulating the railroads. The farmers saw the railroads as one small cog in a wheel that was grinding them into poverty. The suppliers and merchants with whom they dealt, the financiers who controlled capital, and the leaders of commerce in far-flung trading centers were all at least as responsible for their woes.

The magnitude of these difficulties led the leadership of the Farmers Alliance to formulate proposals for government intervention far ***1206** exceeding the tolerances of society's politically influential vested interests. Ironically, feasible reforms, such as railroad and grain elevator regulation, were of marginal significance to them, but essential reforms (as they saw it), such as the sub treasury system, were far outside the bounds of what realistically might be achieved. The Populists harbored a pervasive distrust of the economic system that placed them well outside the mainstream reform tradition that remainded dominant until the New Deal.

In this political milieu it may appear odd, at first blush, that the Interstate Commerce Act was passed in the late 1880s. The Grange was moribund. The Populists were preoccupied with organizing and establishing cooperatives at the state level. The railroad reform impulse had exhausted itself in virtually every state legislature. Politics continued to be dominated by regional, party, and racial loyalties that were seemingly antithetical to reform. Yet in 1887, the first federal independent regulatory commission was established with the support of overwhelming majorities in both houses of Congress.

Despite considerable scholarly controversy, the forces leading to the enactment of the Commerce Act are not difficult to discern. [FN33] To begin with, each state was able to regulate interstate rail transport only within its own boundaries. This factor in itself led to an inherently unsatisfactory situation for all commercial interests involved in interstate shipment by rail. Moreover, the Supreme Court exacerbated this crazy-quilt system in 1886 by holding that states could not constitutionally regulate even the intrastate segment of interstate transportation. [FN34]

One must also take account of the political process leading to the passage of the Act. The Interstate Commerce Act did not, in fact, spring full-blown from congressional deliberations in 1887. Rather, it was the product of a decade of political debate and compromise that dated back to the tail-end of the Granger period. Throughout the tortuous legislative history, one finds a replay of the pattern of interest group participation and pursuit of economic self-concern that characterized the earlier politicking in state legislative chambers. Once again, what seems most apparent is that virtually no one was happy with the discriminatory practices engaged in by the railroads to secure additional ***1207** business. Merchants, farmers, regional loyalists, and railroad entrepreneurs and shared the view that federal regulation was essential.

Where they disagreed was on the crucial particulars. As might be expected, the self interest of each group pointed in a different direction. The railroads sought freedom to engage in pooling arrangements to 'rationalize' rates, whereas most shipping interests bitterly opposed a bill that would grant any such cartel-like powers to the carriers. The railroads, in turn, were strongly against a restrictive long and short haul provision that would undercut their efforts to spread fixed costs as widely as possible. Many shippers, on the other hand, were vehemently opposed to the discriminatory character—as they saw it—of the practices that such a provision would ban. Similar differences of opinion existed on the weak versus strong commission issue. Depending on whether the particular interest group perceived the agency as attuned to its concerns, the group either favored or opposed substantial judicial review, political independence of the commissioners, and so forth.

In the final round of legislative politicking, the Senate passed its version, the Cullom bill, modeled on the 1873 Illinois Granger Law, which featured an independent commission, allowed pooling, and contained a 'flexible' long and short haul clause. The House stood behind its proposal, the Reagan bill, which took a much stronger stand against pooling, long and short haul discrimination, rebates and other unfair trade practices but without establishing a commission. In committee, a compromise was worked out that leaned towards the Cullom version, but combined elements of both proposals in a strikingly ambiguous fashion. [FN35] On the procompetition side, pooling was banned. On the other hand, long and short haul discrimination, which clearly was based on procompetitive impulses, was prohibited except 'in special cases.' On the proregulation side, the new agency was to police a long list of anticompetitive practices; however, the commission's enforcement powers were limited to issuing cease and desist orders. In a pro-autonomy move, the five commissioners were granted presidential appointments for six-year terms; at the same time, the provision for judicial review equivocated on the respect to be paid to agency decisions. [FN36]

On these shifting foundations, the Interstate Commerce Commission was established. It was not the product of a concerted reform movement. It did not reflect a coherent ideological approach to railroad regulation. And it was not one element in a more broadly conceived political agenda. Instead, the Commerce Act addressed a discrete set of immediately pressing problems in an equivocal fashion that reflected the difficult process of hammering out a legislative compromise. ***1208** In an important sense, the Act was to serve as a model not just for the institutional structure, but also for the politics of future regulatory endeavors.

II. THE COURT IN THE POPULIST ERA

The Granger legislation did more than suggest a variety of approaches for Congress to consider in its deliberations over a national regulatory scheme. It also generated a substantial amount of litigation over the appropriate scope of regulatory activity, litigation that quickly worked its way up to the Supreme Court. As a result, by the time the Court turned its attention to the Interstate Commerce Act, it had established a frame of reference for regulatory activity that strongly influenced the reception it afforded the newborn Commerce Commission.

Munn v. Illinois [FN37] is often regarded as the cornerstone of Supreme Court regulatory jurisprudence, and in a sense it seems appropriate that the case should be granted this pivotal position. In *Munn* and seven companion cases involving railroad regulation, the Court sustained the constitutionality of the Granger laws. Although *Munn* involved legislation setting maximum rates for storage in grain elevators, Chief Justice Waite, in his majority opinion, relied upon a broad principle that also applied to the railroad cases. Drawing on Lord Chief Justice Hale's seventeenth century treatise, *De Portibus Maris*, the Court held that when private property is 'affected with a public interest' it is subject to regulatory control by the state. [FN38]

From a contemporary vantage point, the majority's notion of separate spheres of public power and private entrepreneurial activity—those activities affected with a public interest as distinguished from all others—seems anachronistic. Indeed, Justice Field's dissent forcefully noted the ambiguity surrounding any such distinction. As he saw it, the majority's view created an opening for economic regulation of virtually any private enterprise in the future. [FN39] Field's vision eventually proved prophetic; a half century later the Court announced that 'there is no closed class or category of businesses affected with a public interest.' [FN40]

Nonetheless, in its day, the *Munn* opinion was the indispensable foundation for a robust economic regulatory authority. Concededly, by the mid-1870s broad-ranging state regulatory authority under the traditional police power was widely accepted. Justice Field, the foremost ***1209** judicial advocate of protection for vested property interests, admitted as much in his dissent: '[T]here is no end of regulations with respect to the use of property which may not be legitimately prescribed, having for their object the peace, good order, safety, and health of the community, thus securing to all the equal enjoyment of their property.' [FN41] But Field sharply disagreed with the majority on extending state regulatory power beyond these *sic utere* (use your property so as not to injure another) health, safety, and welfare situations. [FN42] By contrast, Waite held that certain callings—he drew an analogy between grain elevator operators and the common law callings of freeymen, common carriers, wharfingers, hackneys, and such—were critical to the welfare of the community. [FN43] As a consequence, Waite recognized a broad-ranging authority to regulate, extending beyond narrowly conceived applications of the police power—an authority that included the right to set maximum rates or prices. [FN44]

When Congress took action a decade later, it did not provide for maximum rate regulation. But Chief Justice Waite's broad vision of the state regulatory power provided the necessary underpinning for control of the economic practices addressed in the Commerce Act. Moreover, *Munn* put the legitimacy question to rest. Not until the New Deal era would a serious challenge be mounted to the fundamental authority for federal regulatory activity. Thus, even though the Court soon began to express reservations about the precise nature of the regulatory power, *Munn* can properly be regarded as the fountainhead of Populist era judicial thought.

Interestingly, the case that is generally regarded as first in a series of holdings undermining *Munn*actually facilitated the passage of the Commerce Act. In *Wabash, St. Louis & Pacific Railway v. Illinois*,[FN45] the Court reviewed the validity of a state statute prohibiting long and short haul rate discrimination. The railroad had charged a shipper less to transport cargo from Peoria, Illinois to New York than it had charged another shipper from Gilman, Illinois to New York, even though the distance was 86 miles greater. The Court invalidated the statute on the ***1210** ground that the state could not regulate shipping that was part of interstate commerce. Although the majority rather lamely suggested that *Munn* had not given serious consideration to

the issue, the earlier case had clearly assumed that a state could establish regulations governing the domestic portion of interstate transportation as long as Congress had failed to act. In reversing its position, however, the Court hardly demonstrated a generalized antiregulatory bias; on the contrary, by demolishing state efforts to regulate local traffic that passed beyond its borders, the Court provided the final impulse for a federal response—the enactment, a year later, of the Commerce Act.

Before long, controversy over the scope of regulatory authority arose in a new guise that did constitute a more direct challenge to the authority of *Munn*. Having settled the question of federalism posed by *Wabash*, the Court turned to the problems raised by coordinate spheres of authority: the competing claims of legislature, agency, and court in enunciating regulatory policy.

Munn had proceeded on the premise that rate regulation was, by tradition, a legislative function. As an astute early observer, Gerard Henderson, pointed out:

[T]he railroad business was a public business, resembling in many ways the businesses of trucking, ferrying, carriage driving, and the like, which the British Parliament had traditionally regulated. Regulation of railroad rates was therefore a proper legislative function and quite beyond the jurisdiction of the courts. No one ever heard of a British court inquiring whether a schedule of rates for wagoners or ferrymen, fixed by Parliament, was reasonable. If a legislature fixed unreasonable rates, the people had their remedy at the polls, not in the courts. [FN46]

The difficulty was that notwithstanding the attachment to British traditions, the notion of legislative absolutism—let alone final authority in the new upstart administrative agencies—was antithetical to American legal thought. [FN47] As Chief Justice Waite, the author of *Munn*, later noted, the courts regarded it as their constitutional duty to ensure that the power to regulate was not used to destroy or confiscate. [FN48]

The matter came to a head in *Chicago, Milwaukee & St. Paul Railway v. Minnesota*. [FN49]Legislation establishing a state railroad commission was interpreted by the state supreme court to give the agency ‘final and conclusive’ authority on the reasonableness of rates. Reviewing the commission-set rate for intrastate transport of milk, the U.S. Supreme Court held that the reasonableness of a rate is ‘eminently a question for judicial investigation.’ [FN50] The Court proceeded, in this and a series***1211*** of subsequent cases, to undertake the awesome burden of *de novo* review of agency-established rates. In doing so, the Court established a formalist rationale that was refined over the succeeding decade. Prescription of rates might be an inherently ‘legislative function,’ but determining the reasonableness of rates—to ensure that no arbitrary interference with property rights had occurred—was an inherently ‘judicial function.’ [FN51]

What were the real concerns underlying this conceptualistic distinction between ‘inherently’ legislative and judicial functions? It is critical that the cases were decided against the background of Populist unrest. For two decades agrarian political movements were perceived as a genuinely radical threat to established institutions. Under such circumstances, the Court was deeply suspicious of whether western state legislatures was likely to afford adequate safeguards to protect the financial interests of the railroads and their wealthy backers.

To make matters worse, these same legislative bodies increasingly had resort to a new institutional mechanism, the regulatory commission, which owed no fidelity to the procedural

traditions of the common law courts. From the Court's perspective, then, the judicial mandate seemed clear: Only the judiciary stood as a bulwark between popular tyranny and traditional respect for property rights.

So viewed, the retreat from *Munn* was not really an expression of laissez faire zealotry. Although the Court was deeply concerned about protecting private property, the judiciary had recognized the legitimacy ***1212** of extensive government intervention dating back to state involvement in promoting the development of infrastructure before the Civil War. The principal concern of *Chicago, Milwaukee* and its progeny was to ensure nonconfiscatory treatment in a novel regulatory forum; it was not to vitiate the power of regulation itself.

The thrust of *Chicago, Milwaukee* is clearly indicated by the case, a decade later, that marks the culmination of the retreat from *Munn*. In *Smyth v. Ames*, [FN52] the Court undertook its increasingly familiar *de novo* review of a rate schedule (embodied in a Nebraska statute) and enunciated the principal that a railroad is entitled to a 'fair return' on the 'fair value' of its property. [FN53] The *Smyth*formula provided ample room for a suspicious, activist judiciary to narrow the range of administrative discretion in rate cases. It gave no hint, however, of reconsidering the fundamental question of whether state regulation of railroad practices was legitimate.

This growing body of decisions in state railroad commission cases established the context in which the Court began reviewing related issues that arose under the Commerce Act. The state cases, decided against the background of agrarian unrest, led the Court to become increasingly distrustful of legislative and administrative determinations of railroad rates. If the only issue in these cases had been the specter of democratic excess, however, one might have expected a greater degree of generosity from the Court in its treatment of the newly established ICC. Congress had demonstrated anything but Populist enthusiasm for railroad legislation—taking ten years to pass an act that was a patchwork of compromises among mercantile interests, and that failed to provide the commission with ratesetting authority. Moreover, the very composition of the Congress stood as a substantial bulwark against agrarian radicalism.

But as I have suggested, the Court's antipathy towards railroad regulation turned on what might be regarded as a process-related conservatism—a wariness about the exercise of traditionally judicial functions in an unfamiliar forum—as well as fear of popular tyranny and derogation of property rights. These concerns now spilled over into the treatment of the nation's initial independent regulatory commission. In the very first case reviewing an ICC order, *Kentucky & I. Bridge Co. v. Louisville* ***1213** *& N.R. Co.*, [FN54] the circuit court unveiled a niggardly conception of federal regulatory authority, which was prophetic of the Supreme Court's hostile reception of the agency. Invoking the sovereign powers of the judiciary, the court made it clear that the authority of the agency was exceedingly limited. The commission's primary purpose was held to be investigative. Its findings were to be treated only as prima facie evidence in subsequent judicial proceedings. The functions of the commission were regarded as akin to those of a court-appointed master or referee—a preliminary factfinder. [FN55]

On a more generous note, the court asserted that no one could seriously question the congressional authority to establish a regulatory commission. But at the same time, the court left no room for doubt that the agency must remain within its own quasi-legislative sphere of competence:

It is clear that this court is not confined to a mere re-examination of the case as heard and reported by the commission, but hears and determines the cause *de novo*, upon proper pleadings and proofs, the latter including not only the *prima facie* facts reported by the commission, but all such other and further testimony as either party may introduce, bearing upon the matters in controversy.[FN56]

The court's narrow reading of the Commerce Act virtually doomed the agency from the outset. Recall that Congress itself had severely constrained the agency by granting it the meager authority to seek cease and desist orders for practices deemed to be in violation of the statute. If agency determinations of unreasonable practices could be litigated afresh in court with the presentation of new evidence, the ICC's power as an enforcement agency was practically nil. With this consequence clearly evident, the Supreme Court nevertheless adopted the *Kentucky Bridge* approach from the outset. [FN57]

***1214** Still, the agency might have exerted more general authority as an architect of transportation policy. The very vagueness and ambiguity of the Commerce Act, in conjunction with the apparent congressional relief at having ‘addressed’ the railroad issue, created a policy vacuum on vital questions—long and short haul practices, joint rate agreements, and such—that the agency might have filled. However, its efforts to do so were soon squelched.

In the 1897 term, the Court issued a series of opinions that systematically denied the agency any substantial policymaking function. For a decade, the Commission had taken its authority to declare rates unreasonable as a mandate to establish reasonable rates in place of the invalidated ones. The statute did not explicitly grant ratemaking power, but there was precedent at the state level for implying this narrower authority. More critically, since the Commission was otherwise limited to issuing retroactive, nonpunitive cease and desist orders, its determinations had virtually no impact without the authority to declare an appropriate charge for the future. Nonetheless, in *ICC v. Cincinnati, New Orleans & Texas Pacific Railway*, [FN58] the Court adopted the restrictive view of the statute. If Congress had desired to give the ICC ratemaking power, the Court reasoned, it could have done so explicitly. Since it chose not to do so, the agency was without any power to establish rates itself. [FN59]

In yet another attempt to impose some semblance of rationality on the transportation system, the Commission had interpreted the antipooling provision in the Act narrowly, allowing the railroads to establish rate bureaus that fostered uniformity in charges on competing lines. Once again, the Court overturned the ICC's effort, reading the Commerce Act in conjunction with the Sherman Act to prohibit ratemaking associations among the carriers. [FN60]

But the clearest manifestation of hostility towards the agency was the Court's decision in *ICC v. Alabama Midland Railway*, [FN61] construing the vital long and short haul provision in the Act. The Commission had attempted to clarify the Act's ‘special cases' exception to the general prohibition of long and short haul discrimination. The ICC had adopted guidelines that specified a narrow set of circumstances under which a greater charge for a shorter distance would be nondiscriminatory. The Court departed from its propensity to narrowly construe terms in the Act and read the ‘special cases' exception broadly to treat competition—in and of itself—as a circumstance to be considered. This reading totally undermined the agency's effort to give meaning to ***1215** the clause, since competition was precisely the factor that had given rise to the clamor for long and short haul rate regulation in the first place.

Taken together, these cases vitiated the ICC's efforts to create a modest body of substantive policy eliminating some of the most troublesome manifestations of business rivalry among the carriers, [FN62]just as the Court's contemporaneous decisions on administrative finality had undermined the agency's case-by-case authority to declare rates unreasonable. As these cases came down, the number of complaints filed by the ICC dwindled to an insignificant few, virtually all of which were overturned by the lower federal courts. [FN63] Justice Harlan, a frequent dissenter in the railroad commission cases, was led to express his frustration in *Midland*:

Taken in connection with other decisions defining the powers of the Interstate Commerce Commission, the present decision, it seems to me, goes far to make that commission a useless body for all practical purposes, and to defeat many of the important objects designed to be accomplished by the various enactments of Congress relating to interstate commerce. [FN64]

If the first political impulse to create a federal regulatory system was weak and ambivalent, the initial response of the Court was strong and hostile. The Court did not doubt the legislative power to prescribe rates, but it did seriously mistrust the administrative capacity to adjudge rates fairly—as illustrated by *Chicago, Milwaukee*—and as a consequence review rate determinations de novo while denying the ICC authority to establish rates itself. Similarly, although the Court would not have questioned the constitutionality of legislation addressing unfair practices such as joint rate agreements or long and short haul discrimination, it was not about to countenance comprehensive planning by the ICC without a specific congressional directive. The notion that a regulatory commission might stitch together the ambiguities scattered throughout the statute into a coherent (competition-restraining) pattern was entirely foreign to Populist era judicial thought.

Through the vehicle of statutory interpretation, the Court was able to limit the plenary authority of the ICC to regulate private activity without questioning its right to exist. [FN65] Agencies might police the market, but only so long as the final authority remained the the courts. So matters stood when the turn of the century ushered in the next wave of federal regulatory reform.

***1216** III. REGULATORY POLITICS IN THE PROGRESSIVE ERA

The operation of the railroads continued to be a significant political concern as long as they maintained their critical role in commercial and passenger transportation. In the period after the Interstate Commerce Act was passed, however, public agitation over the state of the economy shifted noticeably, corresponding to the dramatic industrialization and urbanization of American society. These changes created singular strains on the economy and challenged traditional values that had emerged in a predominantly agrarian social order. [FN66] As a consequence, new sources of controversy replaced railroad ratesetting practices as the key foci of political activity.

Perhaps the two most insistent of these emerging issues were labor relations and industrial concentration. Labor unrest stimulated much of the landmark social legislation passed in the half century between the enactment of the Commerce Act and the coming of the New Deal. In most cases, however, labor-related reform efforts were not aimed at national political action. Rather, the growing movement for recognition of workers' rights focused on the state legislatures. The

yield was state legislation, including such notable accomplishments as workers' compensation acts and child labor laws.[FN67] With the union movement still in its infancy, the principle of collective bargaining engendered far too much controversy to make the time ripe for federal regulatory legislation. Thus, labor relations remained a backdrop, rather than a central feature, of national political activity throughout this period.

Agitation over trusts, by contrast, did lead to federal action roughly contemporaneous with the Commerce Act. In 1890, Congress passed the Sherman Antitrust Act. [FN68] In doing so, however, Congress chose not to establish an administrative agency as a means of implementing its regulatory scheme. Possibly this decision was motivated by a wait-and-see attitude. The ICC had just begun operations and Congress might well have been wary of allocating too much power to an untested institutional mechanism. More generally, though, Congress's failure to chart a course for implementation of the new legislation appears to have reflected the lack of clear agreement on the nature of the 'trust problem' at the time the Sherman Act was passed. [FN69]

Although everyone was concerned about bigness, no consensus existed ***1217** on whether size was an evil per se, or only when utilized for 'unfair' advantage. This ambiguity was reflected in the avowedly 'experimental' language of the Act itself, which declared illegal—in Delphic terms—'every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce,' and prohibited efforts to 'monopolize, or attempt to monopolize, or combine or conspire with any person or persons, to monopolize any part' of interstate or foreign commerce. [FN70]

Predictably perhaps, the Act did nothing to dampen the consolidation fever of the 1890s. In its youth, the Sherman Act was largely shunned by successive Attorneys General serving under Presidents Cleveland and McKinley. [FN71] Correspondingly, the Supreme Court gave the law a mixed reception. Early Supreme Court decisions did not treat bigness per se as illegal under the new antitrust law. Rather, in the decade after the Sherman Act was passed, the Court interpreted the law strictly against pooling and other loose market-sharing agreements, and liberally to exempt the activities of large-scale combinations like the Whiskey and Sugar Trusts. [FN72]

Arguably, the uncertainty created by the Act triggered further combinations, rather than providing a check on the consolidation movement. [FN73] In any event, the uproar over the trust question continued into ***1218** the twentieth century, as Congress and the Court failed to develop a coherent policy on business consolidation and competition. In the absence of an effective government response, bigness seemed a more ominous threat than ever. In this milieu, Theodore Roosevelt ascended to the Presidency accompanied by the first faint glimmerings of the Progressive movement on the national scene. [FN74]

Like the Populists, the new reformers appeared at a juncture marked by sustained economic unrest. In sharp contrast to radical Populist aspirations, however, the Progressives who spearheaded the drive for regulatory reform on the national level sought marginal change. Their efforts were directed primarily at more effective policing of business 'excesses' in the marketplace, rather than major governmental intervention, such as the Farmers' Alliance scheme for public control over marketing and financing agricultural production.

The modest thrust of the Progressive vision is illustrated by the major strands in Progressive thought on the issue of 'bigness.' Two rather distinct views emerged. [FN75] Contrary to his popular image, Theodore Roosevelt was anything but a trust-buster. Despite the widely publicized *Northern Securities*case, [FN76] Roosevelt consistently held to the position that the

Sherman Act should be utilized in a highly selective fashion. He regarded bigness as an inevitable byproduct of industrial growth, and indeed as a salutary development likely to promote industrial efficiency. Nonetheless, Roosevelt thought that federal regulation ***1219** of big business was essential in order to maintain a necessary distinction between 'good' and 'bad' trusts. Thus, he strongly advocated governmental monitoring of large-scale enterprise to ensure that industrial growth occurred 'natually' rather than through predatory practices.

The embodiment of Roosevelt's regulatory philosophy was the Bureau of Corporations, established in 1903 for the purpose of collecting industrial data and investigating corporate trade practices as a deterrent against illicit corporate activities. [FN77] The Bureau was strongly reminiscent of Charles Francis Adams' conception of the railroad commission—the 'weak' commission model adopted by Massachusetts in 1879. [FN78] Like Adams' regulatory body, the Bureau of Corporations was an expression of the 'sunshine' approach to regulation. The regulator, as a collector and disseminator of information, would cleanse corporate practice through the medium of public scrutiny, while simultaneously educating the business community about efficient methods of competition. [FN79]

In contrast to the Roosevelt view, another wing of Progressivism adhered to an economic philosophy more closely attuned to the classical liberal model of the market. Throughout the period, Louis Brandeis was a staunch advocate of this position. [FN80] Brandeisian Progressives would have used the Sherman Act as a weapon against bigness per se. Brandeis, Robert La Follette, and others of their persuasion rejected the distinction between good and bad trusts and were indifferent to arguments that bigness might be justified on grounds of efficiency of scale. They were consistent critics of the Roosevelt Administration, and as might be expected, were outraged by the Supreme Court's landmark *Standard Oil*decision proclaiming that only 'unreasonable' restraints of trade violated the Sherman Act. [FN81]

Remaining cognizant of these differences, it is important to note ***1220** that neither position anticipated pervasive government intervention of the kind that was to result from the New Deal perception of wholesale market malfunction. Taken to its logical conclusion, the Brandeis view would have cast twentieth century commercial activity in the mold of a preindustrial era in which economic productivity was based on an agricultural economy and small town mercantilism. In this guise, Progressivism appears as the natural heir of Jeffersonian democracy, with small enterprise reestablished as the dominant form of economic activity through limited governmental enforcement of a 'ceiling' on industrial growth. By contrast, although the Roosevelt approach shared the predisposition for a market economy unfettered by active regulatory control, it took a position perhaps more consonant with the Hamiltonian view that national government should play a central facilitating role in encouraging private market activities. [FN82]

These cross currents of concern over how best to control industrial growth were a dominant theme in national politics up to World War I. The period from 1890 to 1914 witnessed a replay—across a broader industrial panorama—of the widespread unrest over unconstrained private business activity that had existed in the Populist era. Although the sharp focus of railroad rate discrimination was absent, it was replaced by a generalized concern about bigness and the evils of monopoly that was shared by small enterprisers, civic groups, and political leaders. The muckraking journalists vividly brought this concern home to the general public in serialized articles, such as Ida Tarbell's expose of Standard Oil, which achieved instant notoriety in the increasingly popular mass-subscription magazines. [FN83] Widespread popular unrest over corporate behavior grew steadily more insistent.

At the same time, again mirroring the Populist era, the besieged industrialists were themselves deeply dissatisfied with the general business environment. Like the railroad owners a generation earlier, major industrial interests in the Progressive era sought an escape from the competitive uncertainty engendered by an unregulated marketplace. They wanted predictability about the boundaries of appropriate trade practices and assurances regarding the legitimacy of consolidation activities. But judicial interpretations of the Sherman Act created a cloud of ambiguity over the legality of trade association activities and informal pooling practices aimed at diminishing competitive tensions. As a consequence, many industrial leaders supported efforts to amende the Sherman Act that promised greater clarity about the kinds of cooperative practices they might undertake.

In this climate of uncertainty and dissatisfaction intense political activity was inevitable. Organized lobbying by business interests grew ***1221** more vigorous. The National Civic Federation (NCF), a group of highly influential business, labor, and civic leaders, was established at the turn of the century and had an organizational life roughly corresponding to the Progressive era. [FN84] The organization sought to foster business cooperation and consolidation. Initially, the NCF concentrated its energies on employment issues, attempting to mediate labor disputes, and working for moderate reforms like workers' compensation. Beginning around 1908, however, the NCF broadened the focus of its lobbying activities beyond labor-management issues, and sought governmental assistance more directly aimed at creating a suitable environment for business cooperation and consolidation. The group became a forceful advocate of a federal agency that would delineate clearly the forms of business cooperation that were proscribed, and by inference, would legitimate those not explicitly disapproved.

But business interests were no more of a single mind in the Progressive era than they had been earlier. Indeed, the twin phenomena of labor strife and industrial growth had deepened the cleavages in the world of commerce. Reflecting these developments, the NCF was challenged from two directions. On one wing, the National Association of Manufacturers (NAM) was rising to prominence as an organization representing small business and mercantile interests. [FN85] The NAM challenged NCF values from the outset. It was extremely hostile to organized labor during the period when NCF activity was directed toward that sphere. More generally, the NAM was deeply suspicious of government assistance to industry in any form; it was the organized advocate of vigorous competition.

On its other wing, the NCF was challenged by the Socialists who argued for a far greater governmental presence: a replacement of the private enterprise system with a governmentally managed and controlled economy. [FN86] Although the Socialists never generated a serious electoral threat to the established political parties, they were a source of constant concern, given the dominant themes of labor unrest and alarm over the growth of industrial scale. Like the earlier Populists, the Socialists were sufficiently radical in their opposition to a market economy to remain outside mainstream policies. Yet they were sufficiently in touch with the problems generated by unregulated competition to ensure that their less threatening reform positions were taken seriously. [FN87]

This maelstrom of ideological and interest group political activity produced a second round of regulatory reform. By 1907, NCF leaders ***1222** had become deeply disturbed by the unstable conditions in which big business operated. The federal government had nothing that could be defined as a policy with respect to unreasonable trade practices or consolidation activities. At most, business leaders could hazard an educated guess about what antitrust enforcement

initiatives would be undertaken by a particular political administration. At the same time, instability continued to reign supreme in the marketplace—underscored by continuing price-cutting episodes.

Leading industrialists desired authoritative guidance—precise advice on the forms of consolidation and cooperation that would be allowed. They wanted the freedom to enter into price maintenance agreements and to establish trade practice guidelines that would withstand antitrust attack. The famous Elbert Gary 'dinners,' at which the head of U.S. Steel brought together the leading steel magnates to establish private understandings on trade practices, were much publicized instances of the kind of cooperative undertaking that industrialists sought to pursue with impunity.

In an effort to translate its agenda into law, the NCF drafted legislation, introduced as the Hepburn Bill in 1908, that would have amended the Sherman Act to proscribe only 'unreasonable' restraints of trade. [FN88] The legislation would have empowered the Bureau of Corporations to approve price maintenance and merger agreements proposed by industry. But the Hepburn Bill failed to secure passage, largely because of the strong opposition of the NAM and associated groups, who feared the potential use of the proposed law as a tool to restrain competition and opposed its exemption of labor unions from antitrust attack. [FN89] As in the debate over pooling arrangements at the time of the Interstate Commerce Act, Congress declined to support the associational aspirations of big business.

The clamor continued, however. Renewing its efforts, the NCF and aligned interests called for the establishment of an independent commission based on the model of the ICC. Two political developments added fuel to the fire. The sometimes sympathetic Theodore Roosevelt was succeeded as president in 1909 by a surprisingly unsympathetic William Howard Taft, who pursued antitrust prosecutions with vigor. Business leaders were particularly shaken when U.S. Steel was prosecuted for pursuing the measures to achieve price stability which were the hallmark of the Gary dinners. [FN90]And then, in 1911 came the *Standard Oil* decision, announcing the 'rule of reason' in interpreting the Sherman Act. [FN91] What might have been taken from the business standpoint ***1223** as a liberalization of antitrust policy was instead regarded, in many quarters, as further confirmation that federal executive policy would remain unstable and unpredictable in the absence of further congressional action.

By the beginning of the Wilson administration in 1913, there was a near consensus among business and political leaders that amendment of the Sherman Act was essential. [FN92] The consensus dissolved, however, as soon as an effort was made to specify more precise economic goals. As with the earlier railroad regulation, political alignments diverged on whether government intervention should foster business associational aims. The prosperous, large-scale industrial interests that were identified with the NCF envisioned a Trade Commission that would be not only more tolerant of bigness, but also more responsive to their desire for rationalization of business planning. Gerard Henderson articulated their position in concrete terms:

[S]upport of a federal trade commission rested not only upon the expectation that such a commission would administer a policy more tolerant toward large aggregations of capital, but on the belief that it could give to a group of business men, in advance, authoritative advice as to the legality of a contemplated undertaking. Two corporations might desire to combine forces, consolidate their plants and personnel and operate as one. Consolidation would call for financing. If there was a doubt as to the legality of the transaction it would be difficult to market

securities. Yet if legality depended upon the view which a court might take as to the reasonableness of the transaction, one could only guess what the result might be. Why could not the parties put the matter frankly and fully before a competent federal tribunal, representing the public interest, and obtain a prompt ruling upon which all parties could rely? A trade association might wish to organize a cost and price information service among its members. Why should it not obtain disinterested and authoritative advice from Washington so that the pitfalls of the Sherman Law could be avoided? [FN93]

It was just such business-government cooperation that had struck fear in the hearts of smaller retail and trade interests. Although groups such as the U.S. Chamber of Commerce and the NAM by no means maintained a consistent, unified position, many of their members stood against an independent business advisory commission armed with a general mandate to regulate competition. Such a commission, they feared, could too easily be captured by large-scale industrial and business interests.[FN94]

Characteristically, the legislative process led to a compromise result. ***1224** Congress passed two regulatory schemes, the Federal Trade Commission Act and the Clayton Act, which tried to bow in the direction of all the contending forces, but on the whole, failed to adopt any coherent strategy towards reconciling business growth with fair competitive practices. The FTC Act prohibited 'unfair methods of competition,' a concept as ill-defined as the 'rule of reason' that had so recently been fashioned in*Standard Oil*. [FN95] If the newly established agency had also been empowered to provide advisory opinions on the property of specific business practices, the vague terminology would have been satisfactory to major industrial interests. But no such power was granted in the Act; industrialists got their agency, but without its most appealing feature.

The Clayton Act, on the other hand, was meant to respond to the demand for greater specificity of antitrust policy, and it did address specific practices. Prohibitions were enacted against price discrimination, 'tie-ins,' interlocking directorates, and stock acquisitions of competitive enterprises.[FN96] Through a series of amendments, however, criminal sanctions against these activities were eliminated and clauses, were added that narrowly circumscribed the enumerated prohibitions unless the activity 'substantially lessened competition' or 'tended to create a monopoly.' [FN97] Congress once again gave the impression of addressing the question of what constituted competitive excess without really resolving how to deal with it.

There is a sense of irony about the Trade Commission being 'modeled' on the Interstate Commerce Commission, as was often stated to be the case. Beyond likenesses in institutional design, the substantive mandate given the newly formed FTC reflected a clear sense of irresolution reminiscent of the conflicting expectations that had characterized the Interstate Commerce Act. In the formation of both commissions, a long period of political debate and repeated efforts to articulate a set of principles precisely defining proscribed competitive behavior—or, in the alternative, creating a mechanism for rendering advisory opinions—resulted in a largely inconsequential directive to monitor and prohibit 'unreasonable' conduct. The failure of the Commerce Act to resolve ambivalent attitudes towards limiting competition in transportation by rail was extended to economic enterprise at large in the Trade Commission Act.

At the most fundamental level, the rival political interests on the national scene during the Progressive era reflected only marginally different ***1225** visions of the role of government regulation. Both those advocating vigorous competition and those seeking associational ends conceived of the trade commission as an institution that would perform a limited facilitating

function. The difference between the two views was that procompetition interests envisioned a trade commission that would police with some vigor, establishing modest constraints on the abilities of large enterprises to disadvantage smaller businesses. The proassociational forces sought an agency that would police with somewhat less enthusiasm, approving private information-sharing agreements and consolidation efforts as long as these activities fell short of predatory practices. Mainstream advocates of regulatory reform, whatever their stripe, subscribed to the notion of a self-correcting economy that necessitated only an essentially passive, reactive governmental presence and delegated the principal decisions about market behavior to private actors.

On the federal level, the policing mode of Progressive reform had been established almost a decade earlier in 1906, during Theodore Roosevelt's second term in office. In that year, joining forces with an activist President, Congress passed the Pure Food and Drugs, Act, the Meat Inspection Act, and the Hepburn Act (amending the Interstate Commerce Act). The regulatory laws were highly visible symbols of the landmark achievements of Progressivism at the national level. Yet, as in the case of the Trade Commission Act, close examination of these reform efforts indicates an exceedingly modest vision of the federal regulatory function. Each of these regulatory schemes was initiated by a distinct coalition of political interests. There was no 'movement' for the legislative reforms of 1906; rather, they were the produce of a political climate that was receptive to a variety of particularized complaints that the market needed to be policed with greater vigor.

In the case of the Meat Inspection Act, [FN98] the trigger for federal legislation was widespread enmity towards the large meat packers. [FN99] As early as 1891, Congress passed legislation providing for inspection of livestock prior to slaughter. But this early system of regulation had been narrowly circumscribed: It was limited to mandatory inspection before slaughter and further restricted in scope to the export trade. The 1891 Act had, in fact, been promoted by the large packers out of concern over the widespread foreign bans on U.S. meat.

By the turn of the century, everyone was unhappy with the meat inspections system. Because of its limited scope, the Act had virtually no impact on small packers engaged in intrastate sales. Moreover, the Act provided ineffective sanctions for unwholesome meat shipped in *interstate* trade. Upon a finding that the meat was unwholesome, the federal inspector's sole remedy was withdrawal of the government stamp of approval. ***1226** No provision was made for either seizure or criminal penalties. The results were predictable: continuing disclosures of disregard for public health concerns. Bad publicity was rampant and 'the Beef Trust' became a real term of disrepute.

In 1905, Upton Sinclair published his famous novel, *The Jungle*, exposing in vivid detail the unsavory conditions in the meat packing industry. The book was an immediate bestseller, causing a widespread uproar. Despite reservations about Sinclair, Theodore Roosevelt was deeply disturbed by the revelations in *The Jungle*, coming amidst the steady drum-beat of bad publicity about meat packing practices. He appointed his own team of investigators whose findings largely supported Sinclair's thinly disguised fictional account of conditions that menaced the health of workers in the packing houses as well as consumers. [FN100] At the same time, Senator Albert Beveridge, an early-day convert to consumerism, came to regard a meat inspection bill as his special interest and crusaded energetically for new legislation.

The large meat packers, well aware of the ill-will on all sides and cognizant of their comparative advantages over smaller competitors in complying with federal standards, did not fight comprehensive regulation in and of itself. Instead, they focused on provisions in the legislative proposal that would have saddled the packers with the costs of inspection and required purveyors to date canned meats. Although they were successful in eliminating these provisions, they failed to push through a provision for *de novo* judicial review that the industry regarded as a major safeguard against excessively stringent implementation of the new comprehensive regulatory scheme. [FN101]

The successful effort on behalf of meat inspection legislation was critical to another regulatory reform bill dealing with public health concerns that was enacted at the same time, the Pure Food and Drugs Act. This closely related measure was nonethelss promoted by distinct interests and enacted contemporaneously through largely fortuitous circumstances, rather than by virtue of a comprehensive political strategy.

The major force behind the food and drugs legislation was Harvey Wiley, head of the Bureau of Chemistry in the Department of Agriculture, who had campaigned for federal regulation of food additives and patent drugs for more than a decade. [FN102] Wiley was a legend in his own time, in some ways similar to Ralph Nader during his crusade for auto safety legislation. Wiley galvanized trade groups, testified before congressional ***1227** committees, published monographs, organized publicity efforts, and generally devoted himself unstintingly to the passage of legislation aimed at providing accurate information about the ingredients and risks of food additives and drugs. Eventually, he got the boost he needed from *The Jungle*, as well as muckraking over health issues and political support from Roosevelt. Congress moved into the field of food and drug regulation, enacting legislation dealing with the mislabeling of food and drug products. [FN103]

The third major piece of reform legislation in 1906 was the Hepburn Act, which gave the ICC power to set maximum rates. [FN104] Like the meat inspection bill, the Hepburn Act was the culmination of a lengthy effort to improve a flawed legislative scheme. In 1887, Congress had enacted the Interstate Commerce Act through a series of compromises which, predictably, ended up satisfying no one. By 1900, railroad ratesetting again stirred up a political storm. Once more, shippers, merchants, and farmers were divided on the solution, but in agreement that stronger measures had to be taken to control the rate practices of the carriers.

Congress responded incrementally, doing little more than sharpening the ICC's tools for implementing the Commerce Act. In 1903, Congress passed the Elkins Act, which required that rates published with the ICC were, in fact, the rates carriers charged. [FN105] The Elkins Act was directed at the continuing tensions caused by the large shipper and small carrier who refused to compete in a gentlemanly fashion; it expressed the familiar purpose of ‘rationalizing’ competition by promoting uniform ratemaking.

Three years later Congress passed the Hepburn Act, giving the ICC power to set maximum rates upon a shipper's complaint that a rate was unreasonable. [FN106] The legislation was a modest step, aimed at fulfilling the conception of the ICC that many of its supporters had held in 1887. Indeed, the agency had unsuccessfully sought to assume the power under its original authority. [FN107] Now, in 1906, explicit recognition of a ratemaking power was feasible, not because the time was ripe for major institutional innovation, but because two decades of accumulated frustration had underscored the ICC's inability to play even a modest policing role

under its meager congressional mandate. [FN108] Even under these ***1228*** circumstances, support for expanding the ICC's powers was hardly overwhelming. It took vigorous intervention by Roosevelt to prevent Congress from including a judicial review provision that would have explicitly vested final authority over rates in the courts. [FN109]

In striking fashion, both the meat inspection and food and drugs legislation—to say nothing of the largely housekeeping amendment to the Commerce Act—demonstrate the exceedingly weak reform impulse behind Progressive era federal regulation. [FN110] The central purpose of the food and drug legislation was to prohibit adulteration and misrepresentation. This perfectly laudable objective amounted to little more than a modest extension of the common law prohibition against fraudulent conduct. In place of private enforcement in the courts, a government agency—the Bureau of Chemistry—was given the power to initiate proceedings against wrongdoers. But the scope of public authority remained grounded in the notion of deception. Caveat emptor, already in retreat, was dealt another glancing blow. The Meat Inspection Act, although more intrusive, anticipated only a very literal cleaning of shoddy commercial practices that again constituted little more than a form of deception: passing off as wholesome a singularly unwholesome product. Even less than in 1887, did the politics of reform***1229*** hint at a fundamental rethinking of the relationship between the public and private sectors.

IV. THE COURT IN THE PROGRESSIVE ERA

Historians of the period have a tendency to contrast Progressive efforts to utilize government regulation for social ends with the *laissez faire* views of the Supreme Court. [FN111] In contrast to the congressional enactments just considered, constitutional scholars point to the twin pillars of conservatism, *Lochner v. New York* [FN112] and *Hammer v. Dagenhart*, [FN113] which invalidated, respectively, state and federal regulatory legislation embracing modest efforts at state paternalism. Undeniably, there was a considerable gulf between the political and judicial visions of the appropriate scope of governmental regulatory power. But the specter of an emerging welfare state politics held in check by an adamently traditional *laissez faire* judiciary is somewhat wide of the mark. Just as the politics of the era is less of a departure from the noninterventionist tradition of national politics than first meets the eye, so too the courts were less of an uncompromisingly reactionaly force than initially seems to be the case.

Viewed in isolation, *Lochner* and *Hammer v. Dagenhart* appear to constitute formidable challenges to the prospect of public intervention impeding private freedom of contract. *Lochner* struck down a state statute limiting the maximum number of hours a baker might work to sixty per week (and ten per day). Justice Peckham resoundingly affirmed freedom of contract, grounding it in the due process guarantee of the fourteenth amendment, and seemed to leave relatively limited scope for the state police power.[FN114] Although four members of the Court dissented, only Justice Holmes took a different approach, arguing that no particular economic philosophy was written into the Constitution, and that the New York statute promoted a legitimate—even if possibly misguided—state paternalism towards protection of health. [FN115]

1230 More than a decade later, when the Court struck down a federal child labor statute in *Hammer v. Dagenhart*, it seemed to speak in the same voice. The statute prohibited interstate commerce in products made by workers under 14 years of age. The Court invalidated the legislation on the grounds that manufacturing was a 'purely local' activity subject to state control, rather than an aspect of interstate commerce. [FN116] Although the opinion is written in the standard contemporary metaphysics of federalism, the Court makes no effort to conceal its continuing distaste for government interference with that most hallowed feature of a market economy: the employment contract.

But if *Lochner* and *Hammer v. Dagenhart* express reverence for freedom of contract, they nonetheless cannot be read in isolation. Considered in context, they are illustrative of the difficult task the Court faced in translating its ideological commitment to an autonomous sphere of property rights into coherent boundaries on public regulation. As Holmes pointed out, dissenting once again in *Hammer v. Dagenhart*, the Court had approved numerous congressional scheme prohibiting transport of goods in interstate commerce during the preceding decade. [FN117] Among these was a challenge to the Pure Food and Drugs Act, in *Hipolite Egg Co. v. United States*, [FN118] which was brushed aside without so much as a dissent. If *Hammer v. Dagenhart* stood only for the proposition that the Court looked disapprovingly on 'purely economic' regulation—in other words, that commerce clause regulation needed to be grounded in substantial health (the Pure Food and Drugs Act), safety (the Meat Inspection Act), or moral (the White Slave Traffic Act and the Lottery Act) purposes—then Congress would have still retained substantial leeway to expand the field of regulatory control. [FN119]

In fact, the Court imposed far less restraint on congressional designs than even this putative 'purely economic' limitation would suggest. Clearly, *Munn* and the subsequent railroad regulation cases that supported the establishment of the ICC—a strictly economic regulatory agency—were, by the turn of the century, unassailable precedents. Moreover, no serious constitutional scholar doubted the congressional power to enact legislation along the lines of the Trade Commission Act—***1231*** the ultimate exercise of purely economic regulatory authority. In other words, just as was true a generation earlier, the Court did not generally reveal its anti-interventionist bias through direct challenges to congressional authority to establish regulatory schemes. In this sense, *Hammer v. Dagenhart* emerges as a narrow precedent, possibly expressing a warning that the Court would not tolerate need-based redistribution under the Commerce Clause.

As in its early architectonic pronouncements on the Interstate Commerce Act, the Court's deep-seated hostility to regulatory expansion was more generally exhibited in its decisions spelling out the scope of the new agencies' powers. The contrast between *Hipolite*, in which the Court dismissed off-handedly a constitutional challenge to the legitimacy of the Bureau of Chemistry, and *United States v. Johnson*, [FN120] in which the scope of the agency's power was in question, is revealing.

In *Johnson*, the Court was called upon to construe the key section in the Pure Food and Drugs Act, which defined misbranded articles as: 'all drugs, or articles of food, . . . the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading *in any particular*. . . .' [FN121] The defendant had placed labels on its medicine indicating that it was a cancer cure, knowing these representations were false. Despite the statutory language 'in any particular,' the

Court construed the law to prohibit only misstatements of the identity (i.e., ingredients) of a drug, and not misstatements regarding its curative properties.

Perhaps the most revealing portion of the majority's narrow reading of the statute is the support it finds for the common law distinction between actionable misstatements of fact and nonactionable misstatements of opinion. The Court was not about to go beyond the common law of unfair trade practices unless Congress very explicitly forced its hand. [FN122]

But the classic instance of the Court's distaste for economic regulatory legislation exceeding the bounds of the common law was its early treatment of the Trade Commission's powers. From the outset, the key question was how the Court would construe Section 5 of the Trade Commission Act, which gave the agency authority to police 'unfair ***1232** methods of competition.' [FN123] On the first occasion that arose, the Supreme Court afforded the FTC a cool reception strongly reminiscent of its treatment of the ICC a generation earlier. In *FTC v. Gratz*, [FN124] which involved a challenge to an agency order prohibiting a firm distributing steel ties and jute bagging from conditioning its sales on the purchase of both items, the Court announced that:

The words 'unfair method of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade. [FN125]

The Court not only limited the Commission to policing trade practices recognized at common law, but also made it clear that agency determinations of proscribed practices were to be paid no deference by a reviewing court. In the absence of a crystal-clear legislative command, the Court would not cede to a newly established commission its authority to formulate the law of unfair competition.

The well-known case of *FTC v. American Tobacco* [FN126] similarly illustrates the Court's deeply conservative reaction to congressional initiatives aimed at enlarging the scope of administrative authority. The case is generally held to illustrate the old (restrictive) approach to agency investigative powers. It could as well be cited as an example of the Court's persistent early efforts to characterize the new agency's powers in terms of a pre-existing common law model of decisionmaking. [FN127] In ***1233**this instance, the Court read Section 9 of the Act, which gave the Commission authority to gather 'documentary evidence' in support of its investigations, as limited to 'such documents as are evidence.'[FN128] Otherwise, in the words of Justice Holmes, the agency might engage in 'fishing expeditions' aimed at gathering general information leading to disclosures of wrongdoing. That Congress might have established an independent regulatory commission with just such a purpose in mind—to serve as a kind of troubleshooting, investigatory commission—was more than the Court would acknowledge.

At the same time that the Court was extending such a cool reception to the newly established regulatory agencies, it marked an about-face in its treatment of the ICC. A procession of ICC cases decided by the Court during this era read the Commerce Act expansively to underwrite broad agency discretion. [FN129] The once beleaguered agency was suddenly granted the respect it had long sought. In *Texas & Pacific Railway v. Abilene Cotton Oil Co.*, [FN130] a

landmark in administrative law doctrine (on primary jurisdiction), the upgraded stature of the ICC might have been forecast. Despite the fact that Section 22 of the Commerce Act explicitly preserved all common law remedies—which presumably would include a common law action in federal court for overcharge—the Supreme Court decided that primary jurisdiction for all such claims was in the ICC. Otherwise, the Court maintained, uniformity of policy on rail carrier rates would be virtually impossible; Congress could not have intended such a result.

But the key case was *ICC v. Illinois Central Railroad*, [FN131] a challenge to an agency finding that the Illinois Central's rules for allocating loading cars to bituminous coal producers improperly discriminated in the treatment of different customers. In the course of upholding the agency, the Court spelled out a new conception of its role in reviewing ICC decisions. After asserting its authority to decide independently issues of constitutionality and the scope of power delegated to the agency, the Court struck an uncharacteristically modest note:

Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp ***1234** merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised. [FN132]

The holding was deservedly regarded as a landmark. The days of de novo review of ICC decisions were over. Nineteenth century railroad regulation cases would soon seem strikingly anachronistic.*Illinois Central* adopted a position that, in hindsight, is recognizable as the modern administrative law position on limited judicial review. The court decides 'questions of law,' but defers to agency decisions on 'questions of fact/policy'—as long as the latter type of decision is nonarbitrary. Most remarkably, perhaps, the Court adopted its new approach even though the 1906 amendments to the Commerce Act retained a highly ambiguous provision that failed to clarify the intended scope of judicial review.[FN133]

Themes and counter-themes exist. At roughly the same time, the Court was both asserting its overriding authority vis-a-vis the FTC and initiating an era of self-restraint in reviewing ICC decisions.[FN134] In another study in contrasts, while the Food and Drug Act had no difficulty passing constitutional muster, the Court construed its substantive provisions very narrowly. Likewise, the Court assumed the legitimacy of the FTC but narrowly construed its powers. And, although Commerce Clause regulation of economic matters was generally tolerated, the federal Child Labor Law was invalidated. Is it possible to discern any central tendencies in the cross-currents of these Supreme Court decisions?

While the Court may have been out of touch with the temper of the ***1235** times, it appears to have been realistic about the limits of its own power. As in the Populist era, the Court evinced a greater attachment to the sanctity of property rights than did the popular branches of government. But at the same time, it recognized that the propriety of regulating competitive trade practices that were generally perceived to be 'excessive' was beyond question. The ICC was an established institution. Antitrust legislation was an accepted fact. Big business had lobbied successfully first for a Bureau of Corporations and then for a Trade Commission with broad powers to police unfair competition. Moreover, under the banner of Progressivism, many states were expansively defining the police power to encompass the health, safety, and welfare

concerns of special classes such as women, children, and injured workers. Given this backdrop, the Court could hardly question the legitimacy of economic regulation per se.[FN135]

Instead, the Court expressed its reservations about encroachment on market autonomy by limiting the powers of the regulatory agencies, just as it had done in the Populist era when dealing with railroad regulation. Thus, the Food and Drugs Act and the Trade Commission Act were read narrowly to more or less emulate the common law. And, in the latter instance, the agency's decisions, even within its undisputed area of authority, were to be shown no deference by the federal courts. In this way, private property interests might be granted maximum feasible protection under the circumstances; and if Congress saw fit to further bolster the regulatory power of these fledgling agencies, there would be time enough to reconsider the relationship between court and agency. [FN136]

Meanwhile, the ICC was treated in a quite different fashion. After two decades, Congress finally had gotten the message across that the agency was to have plenary power in policing unfair competitive practices within its bailiwick: First, Congress passed the Hepburn Act (1906) and then the Mann-Elkins Act (1910), each time overriding Supreme Court decisions which had paralyzed the Commission. During the same period, the ICC itself had steadfastly complained of and lobbied against the Court's restrictive decisions. Furthermore, the passage of time, in and of itself, transformed the agency from a new and threatening institution into an established feature on the political landscape. In this context, the better part of valor was a dignified retreat—***1236** granting the ICC primacy in the field of railroad regulatory policy—rather than a continuing challenge to congressional designs.

In sum, it is surely inaccurate to characterize the Supreme Court of the Progressive era as a steadfast advocate of *laissez faire*. Moreover, despite the language in *Lochner*, the Court's fidelity to a ‘Classical legal consciousness' that distinguished between separate spheres of private and public action[FN137] was, in practice, riddled with inconsistency. The Court's conservative majority was far too muddled on the scope of the police power and pragmatic about agency political support to fit this description. The justices pressed their predelictions for limited controls on the market as far as seemed rhetorically defensible in dealing with a particular regulatory agency or state regulatory scheme, and no further.

What does seem clear is that the Court was notably out of synchronization with the spirit of experimentation that characterized state Progressive social legislation, and, to a lesser extent, the new federal developments in market-policing activity. It was an era of experimentation, marked by genuine concern about the effects of new forms of trade practice and business expansion on the economy. Yet the Court continued to think that the nineteenth century common law of unfair competition established the benchmarks for interpreting the new regulatory efforts. As in the Populist era, the Court waged a determined struggle to remain a generation behind the regulatory impulse of the times.

V. WORLD WAR I AND THE 1920S: THE ASSOCIATIONAL IDEA

In late 1916, it became increasingly clear that American involvement in the war was likely and that a war effort could not be sustained on the foundations of an essentially unregulated

market. Yet there was anything but a consensus about the limits to be placed on the autonomy of producers and distributors of vital goods. Should key industries be nationalized? Short of such drastic action, should production quotas be established? Should wages and hours be set? Should prices be fixed? These were the kinds of questions that needed to be addressed. Characteristically, they were answered more through a process of drift and accommodation than by decisive action. Some Progressives viewed the exigencies of wartime mobilization as an unparalleled opportunity for testing out a new conception of government regulation, involving active planning and oversight of industrial productivity. But in Woodrow Wilson, they had a reluctant champion.

In late 1916, as American involvement in the war became increasingly likely, Wilson established the Council of National Defense. The ***1237** Council took as one of its responsibilities a survey of the capacity of the economy for sustaining a war effort. [FN138] The need for such an undertaking had been well demonstrated by a new breed of engineers and systems analysts whose critique of the economy, indicating the virtual absence of any aggregate data on industrial output and productivity, had already begun to attact public attention. [FN139]

Unfortunately, the Council never lived up to its promise. The committee's mandate was unclear, its formal authority was nil and its energies were diverted into a dubious effort to raise the consciousness of local community elites. In mid-1917 mobilization became a serious matter and new measures were undertaken, including the establishment of the Food Administration and the War Industries Board, two agencies which were to achieve special prominence in the wartime regulatory effort and influence postwar regulation.

The Food Administration was headed by Herbert Hoover, then an engineer and efficiency expert just back from running the Belgian food relief program. A strong case can be made that Hoover espoused the single most influential and coherent regulatory philosophy between the Progressive era and the New Deal. In 1917, his views were already clearly formulated. He envisioned the federal administrator's role as that of a vigorous facilitator of cooperative private enterprise. [FN140] To Hoover, efficiency was an overriding objective, but one which required a middle course between government planning and a *laissez faire* economy. In his view, production and marketing systems needed a rational order; and that order could best be achieved by voluntary, cooperative efforts by enterprisers in discrete areas of commercial activity. Hoover's approach was distinctive in the important sense that he envisioned government playing a major organizing role—one which blurred the line between public and private—in rationalizing business activity. Federal administrators were to be the energizing force in creating private communities of interest.

As Food Administrator, Hoover put his views into action. On the production side, he endeavored to create voluntary incentives to higher ***1238** output through price and profit margin regulations, rather than attempting to set production quotas. And in setting those regulations, he first consulted fully and freely with trade representatives of the farmers and middlemen. In many instances, the rules and guidelines adopted were generated by the conferees themselves. [FN141]

On the consumption side, Hoover conducted a relentless public information campaign, encouraging food conservation through organized door-to-door volunteer appeals to the patriotic impulses of citizens. Again, Hoover clearly rejected an interventionist option, food rationing, in favor of a voluntaristic approach.

The War Industries Board was run by another distinguished outsider to governmental service, Bernard Baruch. [FN142] Like Hoover, Baruch's instinct was to steer a hybrid course between rule by edict and reliance on the market, a course that meshed well with Wilson's irresolution. Although the WIB was the key link in the central purchasing mechanism for the government's wartime industrial needs, the agency operated in a power vacuum. On the one hand, the Armed Services Departments retained the final authority to conclude purchasing agreements. On the other, Congress showed no interest in vesting the WIB with legislative authority to coerce business cooperation. And Woodrow Wilson remained committed to dispersion of policysetting authority between the Board and a number of coordinate committees.

Although the Board did nonetheless rationalize government purchasing to some extent, it did so in a strikingly unsystematic manner. In a singular fashion, the line between public and private spheres of activity was blurred. Industry representatives took dollar-a-year jobs with ‘commodity sections' of the WIB and negotiated purchase agreements with their former colleagues, who informally represented entire industries on counterpart ‘war service committees.’ On one side of the table, the commodity section official—and Baruch—had little formal authority, beyond the ability to negotiate standardized prices and terms of sale subject to the sanction of adverse publicity; on the other side, the service committee could only bind those industry members who voluntarily complied with any agreement reached. While the WIB consistently adhered to the policy of setting a single price per commodity on an industry-wide basis, its major leverage came from a very liberal pricing policy—rather than being based on a firmly established legal authority. A student of the period has concluded:

Both businessmen and government officials, including above all Woodrow Wilson, were ambiguous and hesitant about expanding state control over the economy. By turn they promoted, resisted, or acquiesced in proposals for closer business-government integration. Their irresolution ***1239**produced in the end a curious apparatus, whose official powers were puny in the face of the enormous tasks with which it was charged. [FN143]

Both the Food Administration and the WIB vividly illustrated the depth of the standing commitment to minimal government. Even an economic disruption as staggering as a world war failed to trigger formal production and consumption guidelines that would supplant the ‘normal workings' of supply and demand. Still, the exigencies sharply altered the Populist-Progressive era legacy that government intervention was properly limited to a policing function. Under the stress of a war effort, the Wilson Administration cautiously accepted the need for government endorsement of business planning.

Thus, the traditional market failure linchpin for government intervention, premised on ‘abserrational’ bad conduct such as disregard for health and safety or discrimination in pricing, was relegated to secondary importance. The major focus of regulatory control shifted to concerns about *output*, namely, whether the market produced a sufficient quantity of particular commodities. Clearly, this was a novel consideration. In ordinary times, no significant political group had argued that a particular array of commodities needed to be produced.

A major reason for this shift in perspective was that no significant demand had previously existed for production of public goods—in this case, stocks and supplies in support of a war effort. When the aggregate supply of goods and services came to be dictated in a significant way by urgent public needs the market system could only survive by organizing into communities of mutual interest responding to centrally stipulated resource requirements. If anything, the

remarkable fact—reflecting the power of the ideology of private property—was that the machinery of coordination was so haphazard.

The nationalization of the railroads was the one significant instance, however, in which the pre-existing structure of public-private relations was entirely superseded because of wartime requirements. Historical accounts suggest that the move was in fact far less controversial than might have been expected:

By December 1917 virtually everyone backed federal control [of the railroads]. Shippers thought unified federal control would manage railroads scientifically and produce savings, labor thought federal control would implement the eight-hour day and secure wage increases, and wartime administrators thought federal control would benefit the entire economy while expediting traffic. Even those whom federal control deprived of power agreed to the experiment. The ICC thought railroads' unification imperative, and railroad management—having been guaranteed income—thought Wilson's decision understandable. [FN144]

***1240** Despite this broad support, the governmental effort appears to have been less than an unqualified success. During the period before the war, the ICC had deeply antagonized the railroads by consistently refusing to grant rate increases. Now, the newly formed Railroad Administration incurred the enmity of shippers by steadily raising rates in order to guarantee operating income to the carriers and grant wage increases to potentially disgruntled railroad workers. Despite steadily increasing rates, however, the railroads still managed to lose huge sums of money during the two years of federal control. After the war ended, political support for continued federal management waned, and the ICC resumed its earlier regulatory responsibilities.

But the wartime experience was not erased. The scientific management ideas that had achieved currency in the Progressive era, [FN145] bolstered by the nascent corporatist underpinnings of the Food Administration and WIB, expanded the horizons of those preoccupied by ‘the railroad problem.’ After the war, the minimalist regulatory mandate in the Interstate Commerce Act—even buttressed by the Progressive era efforts to give the ICC stronger policing power [FN146]—seemed an exceedingly modest vision of the role the federal government might play in rationalizing the system of railroad transportation.

After a year of deliberation, Congress passed the Transportation Act of 1920, the furthest reaching federal regulatory statute of its day. Earlier railroad legislation had focused almost exclusively on transportation rates, reflecting a guiding assumption that the essence of the railroad problem was price discrimination against shippers and localities. The 1920 Act gave the ICC even greater authority in this area—empowering the agency to set minimum and even exact rates—and more importantly, unveiled a far broader conception of federal regulatory power. The provisions on pooling, consolidation, extension, and termination of service created the framework for restructuring the industry, under regulatory guidance and supervision, along lines designed to make railroad service more efficient. [FN147] These measures were a further manifestation of the impulse that led to nationalization of the railroads ***1241** during the war—a recognition that market forces, subject to minimal agency policing, could not be relied on to maintain an adequate system of transportation. No previous federal regulatory legislation rested on so bold an assertion of market failure.

Yet, the 1920 Act was seriously defective as a regulatory mechanism for planning a reconstituted transportation network. Although it posed a direct challenge to the vitality of the

privately run transportation system, it did so without real conviction. The ICC was not empowered to consolidate the railroads; rather, it was mandated to prepare a blueprint for combination. The agency was not directly required to establish pools and command interlocking managerial agreements; instead, it was given the authority to approve or promote such arrangements in its discretion. Finally, the Commission was not directed to order extension and abandonment of service; again, it was instead given discretionary authority to do so. In a variety of ways, the ICC was provided with the tools to assert managerial authority over the transportation system; but the tools were blunt, reflecting a continuing ambivalence about active interference with market forces. To fashion a new edifice with such tools would have required a real strength of purpose.

The ICC was *required* to do little more than it had done before—police ratemaking practices. And in the political ambience of the 1920s, its authority was exercised in ways that made the 1920 Act entirely unremarkable. The agency failed to establish a consolidation plan and refused to develop its own strategies on market-sharing, service curtailment, and extension questions. Instead, it followed the line of least resistance, generaly acquiescing in the unsystematic efforts of various railroads to merge, combine resources, or alter patterns of service.

For a disciplined effort to institutionalize the organizational impulses of the war years, one must look elsewhere. By far the most coherent extension of the wartime experience took place under the auspices of Herbert Hoover in the Department of Commerce. [FN148] As his earlier service indicated, Hoover was a man with a distinct vision of the functions that might be exercised by the federal regulatory system. During the 1920s, his very considerable energy was devoted to promoting an associational model of public-private interaction in economic affairs.

Under Hoover, the Commerce Department was divided into three major divisions: one dealt with industry, another with trade, and a third with transportation and communications. Within these divisions, he located specialized bureaus with expertise in statistics, industrial and scientific research, dissemination of information, and coordination of ***1242*** cooperative activities. These specialized Commerce Department units were utilized to target aid and assistance to private associational groups. In this way, Hoover envisioned building a vast network of government-industry ties in which private initiative would be stimulated and supported by public resources.

Throughout the decade, Hoover worked tirelessly to implement his ideas. [FN149] Major government units such as the Bureau of Standards and the Census Bureau were entirely transformed in size and scope of authority to perform new industrial functions. Fledgling industries like aviation received substantial government support in working out consensus standards on licensing, safety, and routing.[FN150] Indeed, the major obstacle to Hoover's association-building enterprise appears to have been internecine warfare with other government departments seeking to protect their jurisdictional domains.

In the final analysis, however, although the associational vision may have departed from a policing model of the regulatory enterprise, it did at bottom reflect a deep-seated aversion to an interventionist style of government regulation—a style characterized by positive public efforts to influence the level or character of the aggregate supply and demand of various commodities. Contrasting Hoover's ‘associational’ vision with a ‘statist’ conception of public regulation, Ellis Hawley has observed:

[T]he structure and methods of the associative state would be different, thus enabling it to escape the torpor and rigidity characteristic of most governmental structures. Insofar as possible, it would function through promotional conferences, expert inquiries, and cooperating committees, not through public enterprise, legal coercion, or arbitrary controls; and like the private groupings to which it would be tied, it would be flexible, responsive, and productive, staffed by men of talent, vision, and expertise, and committed to nourishing individualism and local initiative rather than supplanting them. [FN151]

Hoover was averse to government planning; he saw the norms of efficiency to which he subscribed as a process—a better means of maximizing the output of goods and services, the nature of which were best determined by private enterprise. When the Depression came, he was certainly the most visible, and arguably the most visionary, representative of the old order.

*1243 VI. THE DEPRESSION AND THE NEW DEAL

A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist. [FN152]

So begins the declaration of policy in the first section of the National Industrial Recovery Act of 1933, the centerpiece of Franklin D. Roosevelt's initial strategy for reversing the economic collapse of the Great Depression. [FN153] The NIRA was the subject of intense interest and debate from the outset: Critics, depending on their political perspective, regarded it as fascistic, communistic, or less sensationally, simply monopolistic. [FN154] From a historical vantage point, the picture appears considerably different. The NIRA owed a considerable debt to changing conceptions of the role of regulation that had emerged since World War I. At the same time, however, the Act undeniably enunciated a singularly expansive federal responsibility for the welfare of the economy.

Section 3 of the NIRA granted authority to the President to approve ‘codes of fair competition’ submitted by industry trade groups. The codes were to be promulgated by industry groups that were ‘truly representative’ and were not to ‘promote monopolies.’ But beyond these cautionary terms, the statute contained virtually no limiting language.

The codes were to constitute federally enforceable standards for each industry. Indeed, the President had authority to promulgate a code on his own, should an industry fail to do so. But the Act left the content of the codes purposely vague. On this most critical issue, the NIRA simply referred to a passage at the end of the declaration of policy that contained a catch-all statement of general congressional purposes addressed to reinvigorating the economy. [FN155] With so little *1244 substantive constraint, the codes could address a vast range of business practices, including price levels, wage and hour provisions, price discrimination, advertising practices, and output restrictions. [FN156]

What vision of regulatory control of the economy did the NIRA express? Shortly after assuming office, Roosevelt surrounded himself with a group of academic and intellectual advisors who came to be known as the ‘brains trust.’ [FN157] Although this group provided a seemingly incessant flow of programmatic ideas, they by no means spoke with one voice. Nor

was Roosevelt indifferent to a chorus of business and political influentials apart from the intelligentsia. The interpretive gloss applied to the NIRA during its short lifetime reflected the diverse registers of this mixed chorus of voices. [FN158]

One view of the Act, often identified with Rexford Tugwell, would have treated it as the decisive step, building on the earlier War Industries Board experience, toward a system of national governmental planning. [FN159] The Act was undoubtedly open to such a reading. The statute explicitly provided for labor and consumer members, along with industry representation, on the codemaking authorities. It also required government officials to serve on each code group and vested the final power of code approval in the President. Moreover, federal sanctions applied in cases of violation of the agreements. Thus, the NIRA could be read as embodying a cooperative model of economic planning in which labor, consumer, and business representatives worked with federal officials to set standards and goals for the economy on an industry-by-industry basis.

The Act could also be seen as part of the historical development of an associational view of regulatory intervention. On this score, the debt owed by the NIRA to the business-government ideology promoted by Herbert Hoover in the 1920s is apparent. [FN160] Beginning with the wartime experience of the War Industries Board and Food Administration, carrying through Hoover's work in the Department of Commerce, and culminating in the enactment of the NIRA, it is possible to identify a common theme that reveals a continuity of thought: The NIRA could be regarded as an extension of the business commonwealth envisioned by Hoover.

***1245** This view of the Act is in sharp contrast to the national planning model, with the key difference being the role played by federal administrators. As long as government representatives in the National Recovery Administration functioned as passive participants—and, in fact, nothing in the NIRA required that they play an active role in codemaking and implementation—the statute could reasonably be read as a legislative blueprint for a privately dominated corporatist state.

A third set of aspirations that could be read into the Act traced its origins to the Brandeisian view of vigorously competing small enterprises that emerged during the Progressive era. [FN161] Especially in the later stages of the New Deal, Brandeis and his intellectual disciple, Felix Frankfurter, exerted a discernible influence on the formation of regulatory policy. [FN162] Nonetheless, one must strain to find a blueprint in the NIRA for a society dominated by the Brandeis ethic. Although small businesses had undoubtedly been victimized at times by the excesses of competitive pricing—a practice that the NIRA was supposed to eliminate—they were even more likely to suffer oppression from guild-like industry standards, whether initiated by government officials or private extrepreneurs. On this score, Ellis Hawley has remarked that the advantage of large firms was not in competitive pricing but in their advertising, access to credit, and ability to conduct research, control patents, and attract the best managers. Small firms, on the other hand, often had to rely on pricecutting to offset consumer preferences for advertised brands. Large firms sought to eliminate price and wage differentials and thereby reduce competition from smaller firms. In general, the codes served this goal. [FN163]

If procompetitive tendencies were hardly traceable in the NIRA, the national planning impulse was likewise more a theoretical possibility than a realistic prospect. Replicating the War Industries Board experience, the National Recovery Administration was staffed with

administrative officials who had close ties to the business groups engaged in codemaking and implementation. From the outset, the code formulation process was dominated by the business interests engaged in writing the codes. Rarely did labor and consumer representatives participate, and government members of the team were encouraged by NRA head Hugh Johnson to play a distinctly subordinate role.

Paul Conkin has suggested the inevitable fate of the planners' vision of the act:

In Tugwell there were faint echoes of technocracy, a hint of a corporate state, and a near arrogant contempt for such traditional values as competition, small economic units, and fee simple property. In his ***1246** policies there was the immediate prospect of such varied controls that almost everyone could be persuaded to be frightened. Also, from an economic standpoint, the threat of government controls (planning, as Tugwell used the term, really meant positive controls) would have lowered business confidence even more and further disrupted the low level of private initiative. This meant, for quick recovery, a great deal more regimentation than ever dreamed of in World War I. Roosevelt, fascinated with a milder form of planning (advisory rather than positive controls), probably never grasped, let alone accepted, the full implications of Tugwell's centralized economy. If he did, he knew that it was politically explosive. As Tugwell conceded, Roosevelt could not be induced to think and act outside of a political context. [FN164]

Was the NIRA simply a more elaborate version of Hoover's associative state, in which the government functions as the facilitator of a private business commonwealth? Clearly not—no more than Roosevelt resembled Hoover in ideological disposition or personal temperament. Fundamentally, Roosevelt was an experimenter, who had no well-formulated ideas about a proper strategy of federal administrative intervention. But what distinguished him sharply from all of his predecessors in office was his conviction that government had an affirmative obligation to do whatever was necessary to restore a healthy economy, and as a corollary, his belief that the economy would almost certainly remain debilitated without substantial governmental intervention superseding the normal workings of the market.

Under Roosevelt's initial conception of the New Deal, the federal regulatory role was no longer limited to policing, or even to facilitating. Any sector of the economy that was malfunctioning needed government-endorsed controls on trade practices necessary to ‘make things right.’ Ellis Hawley captures this expansive, and at the same time featureless, vision of the federal role—a vision that was the guiding principle of the NIRA:

Within the confines of a single measure, then, the formulators of the National Industrial Recovery Act had appealed to the hopes of a number of a conflicting pressure groups. Included were the hopes of labor for mass organization and collective bargaining, the hopes of businessmen for price and production controls, the hopes of competitive industries to imitate their more monopolistic brethren, the hopes of dying industries to save themselves from technological advance, and the hopes of small merchants to halt the inroads of mass distributors. Overlying these more selfish economic purposes was a veneer of ideals and conflicting ideologies, conflicting beliefs as to what the act would do and the ultimate form that the business system should take. Finally, added to the superstructure, were conflicting theories of economic recovery, a belief, on one hand, that by raising wages, spreading work, and holding down prices, total purchasing power could be expanded; a belief, on the other, that by checking destructive competition and insuring ***1247** profits, business confidence could be restored and new investment spending stimulated. [FN165]

From a broader vantage point, the first phase of the New Deal, launched with a hailstorm of activity in early 1933, cannot be encompassed within the confines of a single regulatory strategy. Industrial development had come to a standstill, so Roosevelt unveiled the NIRA to address the problem of lagging business productivity with a 'comprehensive' plan. Farmers were devastated by low crop prices and vanishing purchasing power. In response, Roosevelt offered the Agricultural Adjustment Act, which provided subsidy payments to farmers in return for agreements to limit acreage in production. Like the NIRA, the AAA advanced a supply-side strategy: control the output of goods, rather than stimulate demand directly by pumping money into the economy. [FN166]

But if the NIRA and the AAA suggested a substantial diminution of the sovereignty of the market—that is, a rejection of the traditional assumption that long-run economic equilibrium could be maintained through largely unguided private transactions—neither measure established mandatory controls on supply or demand. On a continuum of regulatory interventions, both schemes fell somewhere between the Populist-Progressive era penchant for policing the market and the socialist proposal for public control of the means of production.

Roosevelt, however, in his nonideological determination to re-establish stability by whatever means appeared promising embraced these outer positions on the continuum as well. In the 1933-34 period, the New Deal program included the Securities and Exchange Act, a rather traditional policing regulatory statute aimed at stock issuance and brokerage practices. [FN167] At the same time, Roosevelt's eclectic, wide-ranging legislative agenda included the establishment of the Tennessee Valley Authority, a massive government-run electrification and floodcontrol program. [FN168] As regulatory regimes, the SEA and the TVA had little in common except that they both addressed highly pressing concerns. The stock market crash had been the most visible symbol of the onset of hard times, and the Tennessee Valley region conveyed perhaps as vivid an image of regional poverty and destitution as could be found in the country.

But these New Deal programs, taken together with the NIRA, AAA, and others too numerous to mention here, [FN169] do not add up to a concerted ***1248** strategy. Nor do they fit comfortably within a single rationale for regulation. Rather, the first phase of the New Deal was unique primarily because it evinced a distinctive attitude towards government intervention, one which established a new track for tracing the evolution of the federal regulatory system: a belief that comprehensive government intervention was not only a useful corrective but an essential ingredient for maintaining a general state of equilibrium in the economy.

Throughout the period, the principal objective of the New Deal was economic recovery. Roosevelt was a practical man trying to cope with enormously difficult economic conditions Earlier reform movements had focused on health and safety issues, and later periods of reform would return to those concerns (as well as minority rights), but the New Deal was first and foremost an economic rehabilitation program.

Roosevelt's initial regulatory foray was largely concerned with revitalizing production. Both the NIRA and AAA were administrative schemes that were meant to pump new life into the supply side of the market. By limiting output, eliminating price competition, and fostering intra-industry cooperation, Roosevelt hoped to restore business confidence. His strategy anticipated that as production rose, employment and purchasing power would rise as well, and trigger a cycle of recovery.

But the NIRA was a dismal failure, and the AAA proved to be most beneficial to the relatively prosperous farmers who needed it least. [FN170] In 1935, economic conditions in the country continued to be bleak when compared to the postwar affluence of the 1920s. Small business operators, workers, farmers—a multitude of groups that had supported Roosevelt's efforts in the propitious days of 1933—began to express doubt and dismay at the meager returns two years into the New Deal. [FN171]

At the same time, political expressions of disenchantment began to reach noticeable proportions. Huey Long, a latter-day Louisiana populist, attained ever-greater popularity with his attacks on the moneyed interests and proposals for redistribution of wealth. By the mid-1930s, having been elected senator, he had a national platform for expressing his views—and he had presidential aspirations, as well. [FN172]

In collaboration with Louisiana clergyman Gerald L. K. Smith, Long promoted a 'Share Our Wealth' program that became a lightning rod for grassroots political organizing. Although his campaign for redistribution from the very rich to those of modest means did not withstand close economic analysis, it had wide public appeal.

It was a time of instant popularity for self-styled voices of the people. [FN173] ***1249** Father Charles Coughlin, the 'radio priest' broadcasting out of Royal Oaks, Michigan, reached the largest weekly listening audience in the country with his encomiums in support of 'social justice' for the plain folk. Dr. Francis Townsend, an elderly California physician, promoted his Townsend Plan—a publicly financed pension system that would cover virtually every person in the country over 60 years of age—as a means of achieving economic recovery and affording justice to older people. Once again, the economics of the plan may have been dubious—the plan was to be financed by a highly regressive sales tax, falling disproportionately on younger poor people. But its popularity was underscored by the fact that a petition in favor of the Townsend Plan gathered twenty million signatures! Townsend, Coughlin, and Long became household names and generated the perception among New Dealers that Roosevelt was politically vulnerable on the left, where a substantial segment of his popular support resided. [FN174]

Thus, straitened economic circumstances and strident political criticism converged to create considerable pressure for fresh presidential initiatives that would indicate a renewed sense of purpose. Roosevelt responded in 1935 with a set of programs that historians of the period have marked off as the second phase of the New Deal. [FN175] The new programs constituted a departure from the initial preoccupation with regulation of business enterprise. Emphasis was no longer placed on influencing output and price—the major concerns addressed by the NIRA and AAA. Supply-side governmental intervention had been found wanting. In its stead, the New Dealers now promoted government spending and social insurance programs.

The largest appropriation in American history, almost five billion dollars, was voted by Congress for an emergency relief program administered in part by a new agency, the Works Progress Administration.[FN176] The WPA put millions of the unemployed to work on schemes ranging from standard public works construction projects to cultural ventures involving the fine arts. Another portion of the funds went to the Resettlement Administration, which pursued a variety of rural relief programs including the financing of a limited number of new communities for the rural poor. [FN177]

***1250** Although these public spending forays never constituted models of efficient government, they did bolster the earlier effort under Harold Ickes's Public Works Administration

to commit the federal government directly to creating work for the unemployed. The WPA was highly visible and created the unmistakable impression that government spending was being used to attack the Depression psychology, stimulate demand, and ultimately, it was hoped, achieve economic recovery.

At the same time, Roosevelt threw his support behind the Social Security Act of 1935, perhaps the most widely noted of all the New Deal programs. As has been generally recognized, the assistance to the elderly component of the Social Security Act was not so much a welfare program, in traditional terms, as an insurance scheme. [FN178] Benefits under the program were keyed to contributions during the working life of a recipient; and as this feature suggests, the program was designed to be self-financing. [FN179]

In addition to its insurance approach, other features made the Act considerably less than a full-blown social welfare program for the elderly. The scheme excluded vast numbers of workers from coverage—including agricultural workers, those already retired, and the self-employed—and it failed to address the special economic hardships caused by illness and hospitalization. Nonetheless, Social Security constituted a dramatic step in a society that still believed that public welfare was inconsistent with the ethics of individualism. And, as a mass-coverage federal welfare program, it was unprecedented.[FN180]

Overall, the commitment to direct federal government intervention through massive spending programs aimed at the security of the individual was without parallel. [FN181] In these spending programs, first introduced ***1251** in 1933 but bolstered substantially in 1935, the federal government had assumed a distinctly different type of responsibility. However great the interventionist posture in the NIRA and AAA, those first phase programs employed regulatory controls on firms and producers. They assumed that stimulation of the production side of the economy would revitalize the market and avoided recourse to large-scale public spending.

But the second phase programs concentrated on the distribution of government largess rather than controls on the behavior of firms. Departing from a tradition that could be traded to the Populist and Progressive eras, the New Dealers sought to resuscitate economic activity through direct stimulation of demand rather than by inducing limitations on supply. As a spending perspective replaced a controls strategy, ‘regulation’ took on a far more expansive meaning.

The new distributional approach also introduced another perspective. The strategy suggested by the evolving New Deal initiatives was not just a wide-ranging effort to achieve economic recovery, but also a series of moves aimed at institutionalizing economic security. The acceptance of public works programs signaled that massive levels of unemployment would not be tolerated. The Social Security Act was a statement that those who were no longer able to work would be shielded from destitution. The earlier-established Federal Deposit Insurance Corporation manifested a federal obligation to ensure that a lifetime of savings was not wiped out overnight. [FN182] The Securities and Exchange legislation guarded against manipulation and malfeasance in stock issuances and transactions. Not by design, but in effect, these diverse measures established the federal government role as guarantor against the insecurity of the market system.

If the Depression had one overriding effect, it was to create a profound sense of insecurity, a sense that no firm ground existed between economic order and chaos. The New Deal programs, in a less than coherent fashion, aimed at creating a governmental foundation ***1252** that would put those fears to rest, as well as stimulating a more immediate return to good times.

In the final analysis, however, the second phase of the New Deal, like the first, resists any single-purpose explanation. Although the cluster of social insurance programs and jobs initiatives created the foundation of a welfare state, the New Dealers simultaneously proposed the Public Utility Holding Company Act—a more traditional regulatory measure reflecting the Brandeisian antipathy toward large-scale aggregations of capital. [FN183] If this Act seemed to suggest that the spirit of small enterprise lived on in the New Deal, one had only to turn to the landmark National Labor Relations Act—an initiative that recognized organized labor as a countervailing force to big business—to encounter a regulatory scheme premised on the existence of a commercial world dominated by large-scale entities.[FN184]

These diverse measures suggested that the New Deal was again moving in many directions simultaneously. As in its initial phase, the New Deal continued its propensity to address particularized areas of unrest through regulation by experts—labor relations, public utility operations, and previously, securities issuances and stock market trading. The new distributional programs now emerged as the dominant strategy, but only as part of an ever-broadening commitment to do what seemed necessary to reinvigorate the economy, rather than as an abandonment of some earlier, clearly defined regulatory philosophy.

In historical perspective, the New Deal appears as a distinct break from the past. The regulatory initiatives of the Populist and Progressive eras were largely discrete and limited measures—not dissimilar in kind from common law tort prohibitions against unfair trade practices. They were aimed largely at particularized fields of activity in which vigorous competition led to sharp market practices. Pre-New Deal regulatory initiatives rested on the common law assumption that minor government policing could ensure a smoothly functioning market. [FN185] But the Depression put to rest this constrained view of national power. ***1253** Even the more traditional regulatory aspects of the New Deal conceived of government activity as a permanent bulwark against deep-rooted structural shortcomings in the market economy.

And the New Deal ventured considerably beyond the regulatory model developed in the Commerce Act. The NIRA and AAA represented countervailing strategies to the atomistic tendencies of the market—tendencies that appeared invariably to trigger downward price spirals. Along similar lines, the NLRA served as a buffer against inequality of bargaining power in the labor market. It openly rejected free market assumptions about the mobility of labor. The TVA embraced comprehensive governmental planning as a tool for developing a social infrastructure in a regional economy suffering from perpetual depression. [FN186] Once more, the legislation directly controverted assumptions of a self-correcting mechanism regulating the flow of market transactions.

The New Deal's distributional programs further demonstrated how far the new approach to government intervention departed from the old. The public works and social insurance programs undertaken by the New Dealers put the federal government squarely in the position of employer and insurer of last resort. Instead of indirectly creating incentives for changes in private market behavior, the new government programs established a reliance principle: The public came to look upon government as its guarantor against acute economic deprivation. As a result, the spheres of public and private activity were intermingled in ways that would have a pervasive effect on succeeding waves of administrative reform.

VII. THE NEW DEAL AND THE COURT

The 1932 election installed in office a new president committed to experimentation and reform. It also provided him with a congressional majority convinced that emergency conditions existed—conditions warranting an unparalleled peacetime assumption of executive initiative and authority. In sharp contrast, the 1932, Term of the Supreme Court commenced with only one new Justice, Benjamin Cardozo. Roosevelt was to wait another five years, well beyond the first and second waves of New Deal reform, before an opportunity arose to appoint a Justice of his own political persuasion. Thus, the legitimacy of virtually every important New Deal regulatory enactment was tested before a Court whose continuity with the past was nearly unbroken.

At the outset, the Court—reviewing state legislative exercises of the police power—seemed willing to qualify its fervent attachment to principles of limited governmental intervention in view of Depression circumstances. In *Nebbia v. New York*, [FN187] a state milk control board had ***1254** established a minimum retail price in order to eliminate 'destructive competition' in the industry. The Court upheld the regulatory measure, rejecting a narrow reading of 'businesses affected with a public interest,' which would have precluded price regulation of the milk industry on substantive due process grounds. [FN188]Still more expansively, in *Home Building & Loan Association v. Blaisdell, [FN189] the Court rejected a contracts clause challenge to the Minnesota Mortgage Moratorium contracts clause challenge to the Minnesota Mortgage Moratorium Law, which granted temporary relief from foreclosures and sales of real estate. As in* Nebbia*, the Court recognized that the existing economic conditions justified 'reasonable' exercises of the police power even though such measures interfered with private contractual undertakings. [FN190]*

But in both cases, clear signs of danger existed. The proregulation views of the Court mustered a bare 5-4 majority, with the 'four horsemen of reaction,' as they came to be called—Butler, McReynolds, Sutherland and Van Devanter—registering vigorous dissents.

Within a year the tide turned, and the two most heralded enactments of the First Hundred Days—the NIRA and AAA—were both declared unconstitutional. Utilizing the delegation doctrine, the spending power and the commerce clause, a majority of the Court staked out a position diametrically opposed to the prevailing politics of governmental intervention. [FN191] In doing so, however, the Court was not really launching a judicially inspired counterrevolution in the name of *laissez faire*: The Progressive era railroad, food and drug, and trade regulation laws, for example, were not in jeopardy. [FN192] Rather, the conservative majority sought to hold the line where it thought the appropriate boundary of federal regulatory power was established; namely, at the ***1255** perimeter of illicit trade practices. [FN193]

The NIRA was the first to fall. Dealing initially with a severable provision, the Court invalidated the Petroleum Code promulgated under Section 9(c) of the Act in *Panama Refining Co. v. Ryan*. [FN194]Section 9(c), the 'hot oil' provision, authorized the President to prohibit interstate transport of petroleum produced 'in excess of the amount permitted to be produced or withdrawn from storage by any state law or valid regulation or order' of a state

agency. [FN195] The Court held the section invalid as an unconstitutional delegation of legislative power, proscribed by Article I, Section 1 of the Constitution, because it failed to specify which violations of state law were to serve as the basis for a presidential finding of illegality. [FN196]

Only Justice Cardozo dissented, pointing out that the NIRA Declaration of Policy in Section 1 provided ample guidance to the President in determining when violations of state production quotas should be prohibited. [FN197] In light of a century of exceedingly charitable interpretation of the delegation power,[FN198] *Panama Refining* seemed to forewarn of more general hostility towards the New Deal. The decision clearly indicated that the overall conception of the NIRA was in serious trouble.

Shortly thereafter, in the landmark case of *Schechter Poultry Corp. v. United States*, [FN199] the Act was demolished. The defendants, who operated a kosher slaughterhouse in New York, were convicted of violating the labor and trade practice provisions of the Live Poultry Code promulgated under Section 3 of the NIRA—the section providing for 'codes of fair competition.' This time the Court was unanimous in its disapproval. Indeed, Justice Cardozo, concurring separately to reconcile his position with his *Panama Refining* dissent, put the concerns of the Court most succinctly. One conception of 'fair competition,' he argued, would simply serve as a proscriptive counterpart to the notion of 'unfair competition' embodied in the FTC Act. A broader conception, however, would establish 'a roving commission' to correct undefined evils:

If that conception shall prevail, anything that Congress may do within the limits of the commerce clause for the betterment of business may ***1256** be done by the President upon the recommendation of a trade association by calling it a code. This is delegation running riot. No such plenitude of power is susceptible of transfer. [FN200]

In far greater detail, the majority opinion developed three interlocking themes. Like Cardozo, the majority emphasized the Act's failure to give any content to the concept of 'fair competition,' which had been left open—as the drafters of the Act had intended—for the codes to deal with every variety of merchandising, pricing, and labor relations practice. Never before had regulatory power been extended so far. Moreover, the effective power to promulgate the codes was placed not in a public commission but in the hands of industry trade groups. The idea of private business groups legislating on their own behalf was, in the words of Chief Justice Hughes, 'utterly inconsistent with the constitutional prerogatives and duties of Congress.' [FN201]

The Court closed its comprehensive attack with a third theme, asserting that the excessive reach of the Act violated the commerce clause. In an argument reminiscent of *Hammer v. Dagenhart*, [FN202] the Court relied on the 'indirect' effect of wage and hour provisions on interstate commerce to invalidate the code's efforts to regulate the 'local trade' of slaughtering and selling. [FN203] But this more traditional limitation on federal regulatory power, evoking the metaphysics of products and processes 'at rest' in the flow of commerce, appeared to be an afterthought. In placing principal reliance on the delegation doctrine, the Court clearly indicated the substantial divergence between its conception of the limits of federal regulatory power and that of the New Dealers.

If the Court's challenge to Roosevelt's programs had ended with *Schechter*, the contrast between judicial and political attitudes to New Deal regulatory reform might now appear unremarkable, with the benefit of hindsight. For in its conceptual ambiguity, the NIRA could, in

fact, be construed as a substantial departure from the course charted in earlier federal regulatory designs. As we have seen, the Act was drafted in a fashion that opened the door to government by trade association. [FN204]Industry-established trade standards covering every conceivable manufacturing and merchandising practice might have been given the force of law: A sweeping corporatist vision of the administrative state far exceeding the ideological breadth of earlier conceptions of federal regulatory power.

Indeed, during the two years between enactment and *Schechter*, ***1257** agency implementation seemed to confirm the worst fears of the NIRA's critics. Lawyers in the agency's codewriting section were overwhelmed by the task of negotiating more than a thousand codes, which frequently dealt with esoteric trade practices in unfamiliar industries with which they were totally unfamiliar. The results were predictable:

Business domination of the code-drafting process led to numerous anticompetitive code provisions that favored large over smaller producers. Only a few codes, including those for the lumber, cleaning and dyeing, and coal industries, permitted direct price-fixing, but almost four hundred codes prohibited ‘sales below cost,’ an elusive concept designed to achieve the same price-setting end. Another anticompetitive device, adopted in 444 codes, was the ‘open-price’ system intended to stabilize prices and inhibit competition. Over one hundred codes permitted limitation of machine or plant operating time or, as in the textile industry, outright limits on productive capacity. In accepting such code provisions, NRA lawyers unwittingly sowed the seeds for a future crop of legal problems, which they reaped in thousands of formal complaints and hundreds of lawsuits. [FN205]

As the anticompetitive features of the NIRA codes received attention, criticism mounted and studies of the agency were undertaken. [FN206] These studies confirmed the disorganized and anticompetitive character of NIRA administration, and questioned whether the Act contributed in any meaningful way to combatting the continuing economic crisis. [FN207] Consequently, reauthorization of the NIRA, which was due in 1935, was already in serious doubt by the time *Schechter* was decided.

Reading *Schechter* in context, it comes as no surprise that it is the only case in the series of anti-New Deal decisions handed down in 1935-36 to withstand the Court's changed couse after 1937. Indeed, 50 years later *Schechter* arguably retains its authority as a statement of the outer limits of federal regulatory power. Even today, a congressional act which set up a business regulatory commission with plenary power to establish ‘fair competitive practices' enumerated by industry trade groups would be of doubtful validity. In *Schechter*, the nondelegation doctrine found its home as a residual check on wholesale amalgamation of public and private spheres of activity. [FN208]

***1258** But the Supreme Court did not call off its assault on the New Deal after *Schechter*. Instead, in*United States v. Butler*, [FN209] it went on to invalidate the other major prong of the First Hundred Days, the AAA. Now the Court stood on much shakier ground as reflected in its inability to maintain the consensus achieved in *Schechter*. [FN210] Adopting the view that agricultural production was intrinsically ‘local,’ and consequently beyond the regulatory power of the federal government, the Court invalidated the Act's incentive scheme which had aimed at limiting production through subsidies to farmers financed out of a processing tax. [FN211]

In *Carter v. Carter Coal Co.*, [FN212] the Court relied once again on the commerce clause, the cornerstone constitutional provision in its perennial debate over the limits of federal

regulatory power.[FN213] When the NIRA fell, the United Mine Workers and their allies launched a successful effort to resurrect the Bituminous Coal Code through new legislation, the Bituminous Coal Conservation Act of 1935, which provided for industry-wide minimum price and minimum wage-maximum hour regulations. In a classic statement of the 'distinction' between commerce and manufacturing, Justice Sutherland asserted:

The employment of men, the fixing of their wages, hours of labor and working conditions, the bargaining in respect of these things—whether carried on separately or collectively—each and all constitute intercourse for the purposes of production, not of trade. The latter is a thing apart from the relation of employer and employee, which in all producing occupations is purely local in character. Extraction of coal ***1259*** from the mine is the aim and the completed result of local activities.[FN214]

Having sounded the death-knell for New Deal efforts to establish a federal regulatory power exceeding the accepted ambit of unfair trade practice regulation, the Court reasserted its commitment to freedom of contract—through reaffirmation of substantive due process checks on *state* regulatory efforts. In doing so, the Court returned with a vengeance to its limitations on the scope of regulatory power expressed in *Lochner v. New York* [FN215] and *Adkins v. Children's Hospital*. [FN216] Invalidating the New York minimum wage law for women in *Morehead v. Tipaldo*, [FN217] the tenor of the Court's opinion is captured by its ringing reaffirmation that 'freedom of contract is the general rule and restraint the exception.' [FN218] Wage agreements, in the Court's constrained view, generally created no basis for exercise of the state's police power.

Never had the breach been wider between the coordinate branches of government. Invalidation of the NIRA and AAA could be explained on federalism grounds; namely, the federal regulatory power ought to be strictly limited through resort to a laundry list of inherently 'local' activities, or by reference to a litmus test of direct versus indirect effects on interstate commerce. Such a view, while hopelessly conceptualistic, did not necessarily exhume the old notion of separate and distinct realms of public and private activity. But the NIRA was invalidated principally on a delegation theory that challenged both of the competing New Deal aspirations to reformulate the scope of regulation: On the one hand, the corporatist vision was shattered by the Court's nullification of private participation in codemaking; on the other hand, the planning vision fell victim to the Court's distaste for a 'roving commission' emplowered to enunciate wide-ranging principles of 'fair competition.' The Court's delegation theory strongly suggested that even within the accepted domain of interstate commerce there would be no tolerance of restrictions on private dealings that ventured beyond the limited scope of government intervention in the Progressive era. And *Tipaldo* confirmed the Court's steadfast adherence to corresponding Progressive era limitations on state regulatory power: State police power restrictions on market activity required a firmer foundation than the economic well-being of class or community.[FN219]

But then, within a year, the Court totally reversed its course. The pivotal case, *West Coast Hotel Co. v. Parrish*, [FN220] raised precisely the same issue as did *Tipaldo*—the validity of a minimum wage for women—but the Court rejected the reasoning of that recent decision and expressly ***1260*** overruled*Adkins*. No longer was freedom of contract paramount. The Court now recognized the legislature's power to protect an economically vulnerable class from the impact of superior bargaining power in the marketplace. [FN221]

In short order, the Court turned to federal regulatory power and the wave of litigation that had been launched against the programs enacted in the second phase of the New Deal. In the key case, *NLRB v. Jones & Laughlin*, [FN222] the Court upheld the validity of the National Labor Relations Act. The attack was on familiar commerce clause grounds: that, as in *Carter Coal* and its antecedents, the regulated activity—steel manufacturing—was 'local,' rather than an integral part of the stream of commerce. Speaking for the Court, Chief Justice Hughes revealed a new, expansive conception of the scope of federal regulatory power under the commerce clause:

The fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' for its 'protection and advancement.' . . . That power is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.' Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. [FN223]

A series of cases followed that systematically rejected every tenet of the conservative majority that had so recently provoked a constitutional crisis in its challenge to the New Deal conception of regulatory power. [FN224] The Progressive era landmark, *Hammer v. Dagenhart*, [FN225] holding federal child labor legislation (maximum hours) invalid on commerce clause grounds, was overruled in *U.S. v. Darby*(upholding the Fair Labor Standards Act). [FN226] The limitations on the spending power enuciated in*Butler* were ignored in *Steward Machine Co. v. Davis*, [FN227] which sustained the validity of the unemployment compensation scheme in the Social Security Act. The *Butler* holding was further drained of any remaining vitality when the Court upheld the constitutionality of the Agricultural Adjustment Act, which had been reenacted in substantially the same form. [FN228] Renouncing the commerce clause limitations it had so recently articulated, the Court, in *Wickard v. Filburn*, [FN229] ***1261** held that even wheat crops grown entirely for home consumption might be subjected to federal regulation, since 'consumption of home-grown wheat . . . constitutes the most variable factor in the disappearance of the wheat crop.' [FN230] By then, the four horsemen of reaction and the regulatory views they espoused had vanished from the Court without a remaining trace. [FN231]

In retrospect, despite the abrupt reversal of opinion, the Court's reconciliation with the New Deal conception of regulatory power does not appear so remarkable. In the first place, the NIRA was never reenacted. Thus, the New Deal program that provided a framework for a genuine departure in regulation of the economic sector—a move either to the corporatist state or to a planned economy—was never resurrected to test the mettle of the 'new' Court. Second, the ideological schisms in the 'old' Court facilitated the turnaround. All that was required to shift from *Tipaldo* to *West Coast Hotel*, a 180 degree swing on the validity of minimum wage legislation, was a switch in opinion by a single justice. Indeed, as far back as *Lochner*, the Court had extolled the virtues of freedom of contract by a bare 5-4 majority. Thus, when Justice Roberts capitulated on the scope of the state police power in *West Coast Hotel*—and subsequently recanted on the limits of federal regulatory power in *Jones & Laughlin*—the immediate result was simply to substitute the narrowest possible margin of support for the slimmest margin of opposition to New Deal regulation.

It is, in fact, somewhat of an overstatement to speak of the 'abandonment of *laissez faire*' in any sense in these cases, since Roberts had voted with a 5-4 proregulation majority just three

years earlier in *Nebbia* and *Blaisdell*. More accurately, 'the switch in time which saved nine' occurred through the oscillation of a formalist judge who generally subscribed to the hazy public-private dichotomy propounded by his more conservative brethren but was never quite sure which compartment was appropriate for the New Deal economic recovery legislation. [FN232]

After 1937, by contrast, when the conservative four were replaced by New Dealers, a genuinely new judicial perspective became dominant on the scope of regulatory power. And, as we will see, once the series of post-1937 cases had legitimated the New Deal programs, the Court ***1262** underwent a paradigmatic shift in the focus of its concerns about the regulatory system.

VIII. THE POST-NEW DEAL ERA

By the late 1930s, the New Deal—as an engine of administrative reform—had about run its course. The recovery measures adopted between 1933 and 1936 had not, in fact, succeeded in re-establishing economic prosperity. To the contrary, productivity remained at a low ebb until the industrial sector began to gear up in response to the threat of a new world war. Roosevelt was increasingly distracted by foreign affairs, and somewhat chastened by the opposition to his court-packing effort. Thus, on the domestic side, after the notable legislative ventures of Roosevelt's Second Hundred Days in 1935, no similarly bold third phase emerged.

Yet, if one took inventory of the state of regulation in the late 1930s, it was undeniable that the federal administrative system had been entirely transformed in the short space of a generation. While the most striking changes may have been identified with the main thrust of the New Deal, these highly visible regulatory and relief programs represented only a limited view of the whole. Gradually, regulation had become accepted as the natural response to the development of new technologies.

This phenomenon was perhaps most apparent in the fields of communication and transportation. In response to the development of radio and telecommunications, the Federal Radio Commission had been established in 1927. [FN233] Radio transmission had rapidly grown to the point where an administrative presence became essential, simply as a mechanism for eliminating the chaos of electrical interference in broadcasting. Similarly, in 1938, when commercial airline activity came to outstrip air mail service in importance, political pressure to establish an aviation agency for allocating routes, establishing rates, and promoting the health of the industry—along the lines of the ICC—became overwhelming. [FN234]Likewise, in response to the growing use of natural gas, the Federal Power Commission was set up by the Natural Gas Act of 1938. [FN235]

Contrary to current perceptions, these industry-specific regulatory agencies were peripheral, at most, to the New Deal recovery program—***1263** a program which did not in any event embody a single coherent reform strategy or an articulate regulatory philosophy. [FN236] But the state of regulation in 1938 did sharply underscore the most striking departure taken by the New Deal: the commitment to across-the-board federal intervention as a means of eliminating the economic uncertainties that had come to be associated with unrestricted private market activity. [FN237]

Once the New Deal conception of the state—a national government actively prepared to take on whatever functions seemed necessary to ensure economic prosperity—became an accepted fact, a major shift occurred in the terms of debate over the regulatory system. Disagreement about the appropriate fields of administrative activity subsided to the vanishing point. Hoover's ideal of an associative state, in which government authority was limited to promoting voluntary private action, seemed anachronistic virtually overnight. In fact, immediately after the fall of Hoover, the American Liberty League—a group of extremely wealthy, conservative businessmen who were violently opposed to the New Deal—levelled a vigorous attack on the New Deal programs, proclaiming a crisis of legitimacy and asserting that Roosevelt's designs represented the destruction of the American individualistic ethic. [FN238] But the Liberty League never scored any significant victories in the public policy arena. By the late 1930s, after a half century of uncharted growth, the federal administrative system was viewed in a new light—the ongoing critique of regulatory politics turned from concerns about the appropriate realm of administrative action to a focus on agency decisionmaking processes.

The immediate consequence was a barrage of criticism, emanating in part from the American Bar Association, over the inadequacies of agency procedure and the limitations of judicial review. The vulnerability of New Deal programs to such criticism had already been amply demonstrated. In a sequence of events that quickly became standard ***1264** lawyers' lore, the Supreme Court had unearthed the fact, during oral argument in the *Panama Refining* case, that the enforcement provisions of the National Recovery Administration's code of fair competition for the oil industry had been amended out of existence through uncoordinated bureaucratic mismanagement without anyone in the agency realizing it. [FN239] Indeed, when the NIRA was subsequently invalidated, one of the grounds relied on by the Supreme Court was the absence of adequate procedures for promulgating the codes. [FN240]

The NIRA was only one example among many. Because the New Deal programs were largely uncoordinated ventures into areas in which no pre-existing regulatory framework existed, the procedural aspects of agency policymaking processes were often given short shrift. Thus, when questions of agency legitimacy were put to rest—and, correlatively, the *permanence* of a pervasive, discretionary system of government regulation became an accepted fact of life—it was only natural that political initiatives should focus on the decisionmaking procedures of the agencies.

The reaction against agency processes reached its peak in the late 1930s. In a widely publicized report published in 1938, Roscoe Pound, chairman of the special committee of the ABA on administrative law, excoriated the regulatory system for ‘administrative absolutism’ and catalogued the suspect ‘tendencies' of administrative agencies, among them: (1) to decide without a hearing, (2) to decide on the basis of matters not before the tribunal, (3) to decide on the basis of preformed opinions, (4) to disregard jurisdictional limits, (5) to do what will get by, (6) to mix up rulemaking, investigation, and prosecution, as well as the functions of advocate, judge, and enforcement authority. [FN241]

The ABA's public criticism was coupled with a lobbying effort which led in 1940 to congressional passage of the Walter-Logan bill, an act which was both blatantly political (exempting ‘favored’ agencies) and quite restrictive (significantly enhancing the role of judicial and intra-agency review).[FN242] But Roosevelt's veto of the bill was upheld, the war ***1265** intervened, and for the moment federal regulatory processes were forgotten.

Roosevelt had not been deaf to the rising tide of procedural criticism, however. In 1939, he instructed his attorney general to appoint a committee to report on the 'need for procedural reform in the field of administrative law.' [FN243] After the war ended, this report served as the foundation for the drafting of the APA, which passed both houses unanimously in 1946. [FN244]

The APA is, in essence, a highly conventional lawyer's view of how to tame potentially unruly administrators. It divides the universe of administrative action into two general decisionmaking categories, rulemaking and adjudication. Drawing upon a legislative model, the Act provides notice-and-comment procedural safeguards for informal rulemaking and sets a limited 'arbitrary and capricious' standard of judicial review. [FN245] The APA is not without reservation, however, in its embrace of the legislative model. [FN246] Rather than providing the unbounded procedural freedom that is characteristic of the legislative process, the Act does require some minimal structure for rulemaking (preliminary notice, a period for public comment, and a statement of basis and purpose). Nonetheless, the APA rulemaking scheme is notable primarily for the absence of constraint it places on agency officials.

By contrast, the APA contains provisions for adjudication which set out a fairly elaborate scheme of procedural requirements utilizing the judicial hearing as its decisionmaking model. The APA establishes evidentiary and findings requirements, creates an independent corps of hearing examiners, and adopts an arguably stringent 'substantial evidence' ***1266** standard of judicial review. [FN247] When an agency adjudicates it is required to assume a different posture from its rulemaking mode. It must proceed roughly as a court would in determining the merits of an individual claim.

Although the APA, as a generally applicable code of administrative procedure, was indisputably of great practical significance, it was nonetheless—in an important sense—a symbolic gesture. The Act was a formal articulation of agency due process in return for the newly recognized powers of wide-ranging administrative intervention in the economy. Symbolic benefits aside, the APA had considerable limitations. It did not purport to reshape the role of administrative government in the federal system; it established no new substantive areas of agency responsibility. Nor did the Act purport to alter common law judicial review principles establishing the allocation of authority between court and agency for deciding questions of law and fact. [FN248] In addition, the Act failed to address the vast field of informal agency action—the entire range of interactions between agencies and regulated parties that take place outside the context of a formal hearing or a rulemaking proceeding. Finally, the Act spoke in the broad terms of a charter—'substantial evidence,' 'arbitrary and capricious,' 'statement of basis and purpose,' and so forth—employing language sufficiently vague to allow the greatest leeway in the scope of administrative discretion to fashion regulatory policy in a particularized context.

The structure established by the APA was to be the subject of a barrage of criticism a generation later. At the time, however, and throughout the 1950s, the APA served as the hallmark of a quiescent period. Prosperity reigned after World War II. Although technological development continued to trigger new regulatory schemes, no new flurry of regulatory reform activity clouded the horizon. [FN249] The impulse further to redefine the relationship between the public and private sectors was temporarily in abeyance.

On the judicial side, the post-*Schechter* era ushered in a period of unprecedented goodwill towards the regulatory system. With the final legitimation of the New Deal came the acceptance of a central precept of public administration: faith in the ability of experts to develop effective

solutions to the economic disruptions created by the market system. ***1267*** Although this premise was not new—it had served as a foundation for early railroad regulation and as a basic tenet of Progressive thought—it came to political fruition with the New Deal agencies. And for the first time, the courts came to grips with the implications of expertise for the allocation of decisionmaking authority between court and agency.

In an influential volume published in 1938, James Landis stated the case for recognition of administrative expertness. [FN250] Landis had been on the frontlines of the New Deal as a member of the FTC, chairman of the SEC, and drafter of Roosevelt's trade and securities legislation. [FN251] Now, in response to the criticism that agency decisionmaking processes failed to satisfy traditional constitutional concerns about a tripartite separation of powers, Landis asserted that critics entirely misconceived the distinctive characteristics of regulatory bodies. Likening the commissioners of the ICC to the directors of a railroad, he argued that the agency 'possesses less the appearance of a tribunal and more that of a committee charged with the task of achieving the best possible operation of the railroads.' [FN252]

In Landis' expansive view, the regulatory agencies maintained a partnership role with private entrepreneurs in guiding industrial activity. Thus, the persistent criticism that the agencies were insufficiently 'judicial' was entirely misplaced. Landis regarded this sweeping vision of regulatory power as indispensable, since the agencies were mandated to revitalize the economic health of the private sector: '[T]he art of regulating an industry requires knowledge of the details of its operation, ability to shift requirements as the condition of the industry may dictate . . . and the power through enforcement to realize conclusions as to policy.' [FN253]

Although Landis' vision of a public/private managerial partnership may have exceeded the expectations of most New Deal enthusiasts, his articulation of the virtues of administrative expertise captured the dominant mood of the period. And his correlative argument for a strong measure of judicial deference to agency decisions [FN254] accurately reflected the tenor of the leading administrative law decisions handed down in the post-New Deal era.

Abandoning its longstanding concern over the substantive scope of agency power, the Supreme Court in effect turned inward and focused on process-related questions. At one level, this new thrust meant that the Court questioned the degree of self-restraint that the judiciary itself ought to exercise in shaping regulatory policy. On another level, the Court addressed the applicability of a judicial model to agency decisionmaking ***1268*** processes. These large questions set the agenda for the 1940s and 1950s.

In the landmark case *NLRB v. Hearst Publications Inc.*, [FN255] the Court forthrightly addressed the basic issue of the allocation of policymaking authority between court and agency. Hearst had refused to bargain with a union representing newsboys on the grounds that they were not 'employees' within the meaning of the National Labor Relations Act. Hearst contended that the vendors were independent contractors and consequently outside the coverage of the statute. The court of appeals, examining the various terms of the employment relation according to common law standards, agreed with the publisher and overturned the NLRB bargaining order.

The Supreme Court, in turn, reversed—rejecting the applicability of common law standards. Even though the controversy raised a question of statutory interpretation, the Court took a distinctly deferential position on the judicial role:

It is not necessary in this case to make a completely definitive limitation around the term 'employee.' That task has been assigned primarily to the agency created by Congress to administer the Act. Determination of 'where all the conditions of the relation require protection' involves inquiries for the Board charged with this duty. Everyday experience in the administration of the statute gives it familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self-organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers. The experience thus acquired must be brought frequently to bear on the question who is an employee under the Act. Resolving that question, like determining whether unfair labor practices have been committed, 'belongs to the usual administrative routine' of the Board.[FN256]

Although no single case can be taken as representative of the evolving judicial sensibility on scope of review in the post-New Deal period, *Hearst* probably comes as close as any, extolling the virtues of agency experience and insisting on the limited monitoring function of the courts. [FN257]

On the threshold issue of availability of review, the Supreme Court exhibited even greater tendencies towards self-abnegation. Possibly the most striking instance is *Switchmen's Union v. National Mediation Board*. [FN258] Under the Railway Labor Act, the Board was mandated to decide a jurisdictional dispute between the Switchmen's Union and the Brotherhood of Railroad Trainmen over the representation of yardmen ***1269** in the New York Central Railway system. When the Board decided in favor of the Brotherhood, the Switchmen's Union appealed. Emphasizing the highly controversial nature of representation controversies, the Court concluded that Congress's failure to provide explicitly for judicial review must have been based on a determination that the prestige of the Mediation Board would be damaged if there were any review at all.

Even by 1940s standards, *Switchmen's Union* seems an extreme version of the deferential view.[FN259] But the contemporaneous cases on standing to sue demonstrate that during these years the court was determined to play a very limited role in shaping regulatory policy. In a series of cases—*Alabama Power Co. v. Ickes*, [FN260] *FCC v. Sanders Bros. Radio Station*, [FN261] *Perkins v. Lukens Steel Co.* [FN262]—the Court repeatedly asserted that competitive harm as a consequence of agency action was not a sufficient basis for standing to challenge agency decisions. Instead, standing was taken to require the existence of a 'legal right'—an interest amounting to a direct acknowledgment of concern in the regulatory scheme or the assertion of a common law right. [FN263] Only in *Sanders Bros.*, where the statute explicitly created standing in those 'aggrieved or whose interests and adversely affected' [FN264] by agency action, did the Court acknowledge a right to sue—and then only to protect the public interest rather than narrow pursuit of the petitioner's economic gain. [FN265]

The Court's effort to confine the availability of judicial review within a narrow channel dovetailed with the expansive political conception of regulatory power that had emerged from the New Deal. As we have seen, the New Deal legislation substantially undermined the traditional dichotomy between public and private spheres of activity. [FN266] By the early 1940s, the Supreme Court had accepted the legitimacy of government intervention that dramatically eroded established ideas about a sacrosanct sphere of private activity. As a consequence, the standing and scope of review cases most strongly suggest a single-minded commitment to give free play—through the exercise of judicial self-restraint—to the broad

discretion so recently vested in the New Deal agencies. [FN267] In an unprecedented fashion, the Court simultaneously ***1270*** overcame its reservations about regulatory restrictions on property rights as well as those regarding the institutional competence of administrative agencies.

When the Court turned to questions of appropriate internal agency processes, it again demonstrated a determination to give administrative expertise virtually free rein. The most celebrated instance is the*Chenery* litigation. The two Supreme Court decisions in this decade-long controversy are replete with references to specialized competence and pronouncements on the virtues of experience. In *Chenery I*,[FN268] the Court reviewed an SEC determination under the Public Utility Holding Company Act which precluded the Chenerys, who purchased preferred stock during a reorganization in order to retain a controlling interest in their enterprise, from participating on a parity basis with other shareholders. In reversing the SEC's decision, the Court was careful to point out that the fatal defect was the agency's reliance on judicial precedents—which it misinterpreted—instead of basing its decision on its own conception of fiduciary responsibility. [FN269] Consistent with this deferential position, the Court remanded the case to the SEC for reconsideration of its position. Not surprisingly, the agency again reached precisely the same result, but now its decision was firmly based upon its own views of fiduciary responsibility.

When the case came before the Court again, [FN270] the Chenerys staked out a new position—that the agency should be precluded from fashioning an entirely new policy on fiduciary responsibility and applying it retroactively; rather, that any such rule should be prospective only. Rejecting this contention, the Court found that because problems may arise which an administrative agency could not reasonably foresee or to which hard and fast rules would not apply, the choice between rulemaking and adjudication ‘lies primarily in the informed discretion of the agency.’ [FN271] Having created virtually unlimited freedom for the agency to choose between rulemaking and adjudication, the Court concluded by paying respect to the SEC's ‘accumulated experience with reorganization matters' [FN272]—as Justice Jackson pointed out in dissent, an odd stance given the agency's admission that it had never before addressed the present issue of fiduciary responsibility.

Prior to *Chenery* in the protracted *Morgan* litigation, the Court similarly avowed, in the first instance, the need for careful scrutiny of the agency decisionmaking process, and then, bowing deeply to the mystique of agency expertise, took a strikingly contrary course—reaffirming its commitment to administrative autonomy. Thus, in *Morgan I*, [FN273] ***1271*** the Court spoke of the administrator's obligation to give personal attention to a maximum rate order prescribed under his authority as ‘a duty akin to that of a judge’ [FN274] Continuing, the Court remonstrated that ‘ T he one who decides must hear.’ [FN275] But by *Morgan IV*, [FN276] alarmed by the lower court's implementation of its earlier order—the deposing of the agency official and close oral examination at trial regarding his process of decision—the Court viewed the applicability of the judicial model rather differently:

Just as a judge cannot be subjected to such a scrutiny . . . so the integrity of the administrative process must be equally respected . . .. It will bear repeating that although the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other . . .. [FN277]

A word of caution is required. Although the case law of this period establishes a rather consistent pattern of Supreme Court pronouncements extolling the virtues of administrative autonomy, it must be seen in proper perspective. Deference must not be confused with disregard. The Court was now willing to accept not just an interventionist system of regulation, but one subject to only limited scrutiny—a minimum rationality standard, of sorts. But this does not suggest indifference to administrative government. On the contrary, the Court addressed virtually the entire spectrum of key process issues during the post-New Deal period. [FN278]

The political meaning of these developments seemed almost lost at the time. The Supreme Court's principal decisions on questions of availability, timing, and scope of judicial review marked off a vast field for unconstrained administrative policymaking. This vast discretionary authority exerted a powerful influence over agency-constituency relations for the succeeding two decades. Similarly, the major holdings on internal agency processes—holdings, for example, on institutional decisionmaking, choice between rulemaking and adjudication, and hearing procedures [FN279]—provided substantial leeway for agencies to define their own-priorities and initiatives, and develop close informal relationships with constitutent groups, relatively free from judicial interference. [FN280] A ***1272** backlash would occur against this pervasive sense of judicial restraint—but not until a new era dawned in which substantive regulatory reforms again took precedence on the political agenda.

IX. REGULATORY POLITICS AND THE GREAT SOCIETY

The next wave of substantive reform was not aimed at a reordering of the structure of business regulation. Rather, under the imprint of the Great Society, the form and substance of government largess programs underwent dramatic alteration. Even so, New Deal ideology provided the generative impulse that fueled the resurgence of growth in the administrative system. Indeed, the president who framed the new set of initiatives, Lyndon Johnson, had reached political maturity as a New Dealer—serving, in the 1930s, as an official of the National Youth Administration in his home state of Texas, and campaigning for federal office as a New Deal loyalist. [FN281]

In fact, however, the Great Society—and its central thrust, the War on Poverty—had its origins in the Kennedy Administration. By 1960, the Civil Rights movement had achieved many of the goals of its desegregation strategy in the courts. Yet it was apparent that blacks were subject to continuing economic and educational inequality that was not even touched by the litigation successes of the preceding decade. Moreover, after a sustained period of post-War prosperity, it was equally apparent that a sizable segment of the white population continued to live under conditions of poverty that almost two decades of steady economic growth had failed to alleviate. [FN282]

By the time of his assassination, John F. Kennedy had decided no make an attack on poverty a major item on his legislative agenda. After considering detailed statistical data compiled by his staff on the extent and character of the poverty problem, Kennedy instructed Walter Heller, Chairman of his Council of Economic Advisors, to put together a package of legislative proposals. Thus, the initial fieldwork had already been done when Lyndon Johnson was

propelled into the presidency in November 1963. Johnson's immediate response to the idea of a systematic attack on poverty, according to Heller, was one of unqualified enthusiasm: 'That's my kind of program. . . . [Move] full speed ahead on it.' [FN283]

The model for the administrative structure of the War on Poverty initiatives had been established, in nascent form, before Johnson or Kennedy came to office. In the late 1950s, the Ford Foundation had***1273*** launched its 'gray areas' program, an effort to revitalize urban ghetto communities through funding locally based efforts at community organization. Perhaps the most widely publicized of these undertakings was Mobilization for Youth, a program on the Lower East Side of Manhattan aimed at dealing with the problem of juvenile delinquency through a wholesale attack on community pathology—an attack on the conditions of slum life, rather than the case-oriented treatment of individuals. This sociological rationale for the delinquency program became the dominant ideology of President Kennedy's Commission on Juvenile Delinquency, chaired by his brother Robert Kennedy. Thus as Kennedy's economic advisors were defining an approach to the newly perceived problem of poverty, his urban outreach planners were developing an organizational conception for revitalizing socially and economically deprived communities. [FN284]

These efforts culminated in the Economic Opportunity Act of 1964, Johnson's key Great Society program for fighting his much-heralded War on Poverty. At the core of the new legislation, embodying the first truly innovative administrative strategy since the New Deal, was the concept of 'community action.' [FN285] The community action concept bound together what otherwise might have appeared to be a diffuse and disparate attack on the problem of poverty:

One of the Great Society programs presumably was concerned with juvenile delinquency, another with poverty, and still others with mental health and blighted neighborhoods—a veritable melange of social maladies and programs to cope with them. But the diversity of labels is deceptive. These programs ostensibly had different functions, to be sure, but they carried them out in remarkably similar ways. Each program singled out the 'inner city' as its main target; each provided a basketful of services; each channeled some portion of its funds more or less directly to new organizations in the 'inner city,' circumventing the existing municipal agencies which traditionally controlled services; and, most important, each made the service agencies of local government, whether in health, housing, education, or public welfare, the 'mark'—the target of reform. [FN286]

In support of the statutory requirement of 'maximum feasible participation' among the poor, the Office of Economic Opportunity funded projects and created institutional mechanisms that utilized federal largess in entirely new ways. [FN287] A substantial proportion of federal funding went to the establishment of neighborhood service centers and ***1274*** legal services offices engaged in monitoring, protesting, and challenging those local public agencies which had ongoing relationships with community residents.

Many of these agencies—building inspectors, for example—were engaged in administrative activities that had been traditionally regarded as local and subject to no federal regulatory presence. Others, such as the local welfare agencies, operated within the structure of a federal-state cooperative grant program in which the federal enforcement presence was largely regarded as a statutory formality. Much to the dismay of local administrators, the new community action programs created an unexpected institutional mechanism for regulatory oversight which was both novel and extremely threatening:

. . . community people, social workers, and lawyers were stationed in ghetto storefronts, from which they badgered housing agencies to inspect slum buildings or pried loose payments from welfare departments. Later, the new agencies began to organize the poor to picket public welfare departments or boycott school systems. Local officials were flabbergasted; one level of government and political party was financing the harassment of another level. [FN288]

The point should not be overstated. By no means did every community action program feature this indirect form of federally sponsored intervention into locally based regulatory activities. [FN289] Many War on Poverty programs delivered services directly to new categories of recipient groups: Headstart and Upward Bound were intended to attack the educational problems of the poor; Neighborhood Health Centers, Family Planning Services and Manpower Offices were oriented toward other aspects of community life in which poverty was regarded as the forebearer of physical and economic disadvantage. Even in these areas, however, the federal presence was largely unprecedented; most of these functions had traditionally been initiated by local government agencies—when government played any role at all.

In conjunction with the all-purpose neighborhood service centers, this cluster of discrete programs created a second front for a dual attack on the aspects of lifestyle that seemed critical to the cycle of poverty. On one hand, the federal government had devised new programs for local implementation in areas such as special education, family planning, and manpower training where governmental services were largely nonexistent. On the other hand, the federal government now provided a resource base for revitalizing the delivery of existing government services, such as the administration of welfare or the local schools, which were failing to meet the needs of the poor.

In the process of this major extension of federal executive power, ***1275** the War on Poverty broke new ground in blurring traditional conceptions of public and private. As mentioned, under the rubric of ‘maximum feasible participation’ community-based organizations were established that functioned as service centers for a variety of poverty-related needs. This departure in administrative design was farreaching:

Local agencies were established, frequently in storefront centers. Professional staffs were hired which offered residents help in finding jobs, or in dealing with public welfare, or in securing access to a host of other public services. A neighborhood leadership was cultivated called ‘community workers,’ (close kin to the old ward workers) to receive program patronage. This neighborhood leadership, in turn, became the vehicle for involving larger numbers of people in the new programs, for spreading the federal spoils. It made little difference whether the funds were appropriated under delinquency-prevention, mental-health, antipoverty, or model-cities legislation: in the streets of the ghettoes, many aspects of these programs looked very much alike. [FN290]

When lawyers were hired to staff a more functionally discrete Neighborhood Legal Services office, subsequent activities on behalf of the poor could not be characterized as solely public or private; helping to organize and defend a demonstration at the local welfare agency contained elements of both. The Great Society was an experiment in radically different forms of administrative organization for dealing with economic circumstances that long had been resistant to measurable improvement.

Even more than the New Deal, the Great Society was a manifestation of the twentieth century conception of presidential leadership. Like Roosevelt's program, the War on Poverty was not a

governmental response to an indigenous reform movement. Rather, it was the product of a strong president, surrounded by a latter-day 'brain trust,' who translated the perception of a major social problem into a program of federal administrative initiatives. While Johnson drew upon the New Deal ideology of government responsibility, however, he took it to new heights. Roosevelt demonstrated strong initiative in his First Hundred Days. But he did face the most devastating economic depression the country ever had experienced. Some response was essential. By contrast, Kennedy and Johnson were searching for a broadbased domestic issue that would give meaning to their presidential tenure. Although poverty was no incidental problem, neither the poor nor civil rights advocates had developed any blueprint for federal action. [FN291] Moreover, unlike the New Deal, in which Franklin D. Roosevelt—like both the earlier Roosevelt and Woodrow Wilson—was quick to incorporate congressional ***1276**initiatives for which he had shown little enthusiasm under the banner of his program (*e.g.*, the Wagner Act and the Banking Act), the War on Poverty was singularly an expression of executive vision and initiative.

Interestingly, while the War on Poverty was devised in the absence of sustained lobbying or focused agitation, the program generated a reform movement with a rather well-defined agenda for change and a distinctly nationwide orientation—the National Welfare Rights Organization. The rise and fall of NWRO is, in fact, a suggestive case history in the efficacy of political reform in the American system—reminiscent, in some ways, of the Populist experience almost a century earlier.

Early on, the storefront service centers funded under the poverty program provided a focal point for the grievances of the poor in the community. Most of these grievances—against landlords, local merchants or others—came from lack of money. In addition, a wide variety of disputes involved the availability and amount of welfare benefits. These disputes shifted the field of contention to the administrative practices of the local welfare agency. Welfare recipients and community action workers soon came to see that there was strength in numbers. Moving from a case-by-case approach to organized group efforts, welfare rights leaders began to establish a movement. [FN292]

Social service agencies, and in particular welfare agencies, were more vulnerable than housing or jobs agencies to the demands of the poor; those who met the statutory criteria had an entitlement to benefits. And the welfare agencies appeared to be particularly vulnerable to *organized* efforts. Describing the situation, Piven and Cloward pointed out that:

. . . many welfare departments officially permit extra grants for special purposes, but people are rarely told about them and generally don't get them. Staging a 'mass benefit campaign' requires less organizing effort than the laborious process of adjusting individual grievances and produces a far greater financial pay-off. School clothing lists, for example, are mimeographed and widely distributed in slum neighborhoods, together with an announcement of a forthcoming demonstration at the welfare center. When hundreds of people assemble with a common demand, welfare departments usually release the grants, especially in cities where public officials fear that repression will provoke outbreaks of violence in the ghettoes. [FN293]

'Reform' took a new and more militant turn as recipients resorted to sit-ins, marches and other direct action tactics that frightened and embarrassed local welfare administrators. Such actions quickly destroyed any sense of complacency that might have characterized earlier dealings with constituents. And militancy appeared to pay substantial ***1277** dividends. Virtually

overnight, the welfare rolls expanded dramatically and claims for discretionary grants were tendered en masse. In New York, Boston, and a host of other metropolitan areas where the poor were clustered, welfare claims created extraordinary pressures on local agencies. Riding the crest of this wave, NWRO organized, demonstrated, and litigated—reaching its peak in 1969 when it could claim 22,000 dues paying members in local welfare rights organizations in virtually every major metropolitan area. [FN294]

The welfare rights movement, like Populism, posed a genuinely radical challenge to the system. The Texas dirt farmers who formed the core of the Farmers Alliance disdained incremental reforms in the regulatory system as a means of breaking the cycle of poverty generated by the crop-lien system. Instead, they pressed for an entirely different conception of federal government responsibility, the sub-treasury plan, which would have created a federal obligation to extend credit and services to the farmer, rather than leaving him at the will of local merchants and grain dealers.

Similarly, beneath the clamor of demonstrations, marches, and sitins, NWRO had a set of distinctive political and economic goals—objectives formulated by academics who had played an instrumental role in the formation of the organization. In an influential article published in *The Nation* in 1966, [FN295]Richard A. Cloward and Frances Fox Piven argued that meaningful welfare reform would come only when the system was pushed to the brink of collapse. Only then, when the number of procedural challenges overwhelmed the bureaucratic capacity of the welfare agencies and the level of claims exhausted local tax revenues, would the system be replaced by a more rational approach to poverty: a federally guaranteed minimum income.

The Cloward and Piven thesis became the ideological underpinning of NWRO: Welfare should be recognized as a right, not a privilege, and a guaranteed minimum income should be assured to every family by the federal government. Mirroring the Populist movement, NWRO challenged the tradition of localism and decentralized discretionary decisionmaking. Once again, the economically disenfranchised argued that entrenched patterns of economic disadvantage could only be overcome by a nondiscretionary system of federal controls.

Within a brief period of time, however, the welfare rights movement suffered the same fate as Populism. Organized in 1966, the movement reached its membership peak in 1969, and within the short space of another two years it had collapsed. [FN296] Welfare recipients were willing to support their organization only as long as they could see concrete ***1278** benefits from doing so—but no longer. Once discretionary grants for winter clothing and school needs were obtained as a matter of course, the organization had no specialized function to provide. Membership for its own sake and the long-term hope of a guaranteed national income could not generate a sense of cohesiveness sufficient to sustain mass participation.

Moreover, the states responded to the welfare crisis not by promoting the principle of federal takeover, but by eliminating discretionary grants. Under a flat grant system, the welfare rights movement had a substantially reduced role to play in providing safeguards against arbitrary administrative behavior. Soon, NWRO was a leadership organization without a membership base—lobbying against Nixon's Family Assistance Plan on the grounds that it would provide inadequate levels of guaranteed support. [FN297]

Like the Populists, the NWRO was too far outside the mainstream to achieve more than momentary success. Its radical tractics—direct action strategies of protest—yielded short-term

gains but created substantial political support for eliminating the administrative discretion that had become the focus of recipient demands. Its substantive goal of a guaranteed, decent standard of living anticipated a degree of public acceptance of welfare as a respectable means of support which ran counter to widespread middle class sentiments. If there is a moral to the welfare rights story, it is that the Great Society created expectations which went beyond the reform tendencies of the mainstream political leadership.[FN298] The continuing individualistic ethos in American society has sustained a similar undercurrent of resistance to converting both strands of New Deal ideology—market-correcting business regulation and federal sponsored assistance to the needy—into fully realized alternatives to reliance on markets and personal resources. [FN299]

X. THE PUBLIC INTEREST ERA

Hindsight invariably provides a useful roadmap to the sources of ***1279** major regulatory reform movements prior to the late 1960s. This is not to suggest that all of the constituent elements giving rise to, say, the New Deal, or more narrowly, the formation of the ICC, are self-evident. But generally, each new era of administrative expansion has been characterized by highly visible signposts of economic dislocation or social class discrimination that provide a clear starting point in locating the wellsprings of regulatory growth. Thus, financial machinations and ratemaking practices of the railroads generated identifiable aggrieved interest groups; willful risk-taking among patent medicine manufacturers caused occasional waves of consumer panic; business failures in the Depression triggered unparalleled economic distress; and officially sanctioned racial discrimination contributed to the pervasive disadvantage of black Americans. In each situation, social stimulus and political response may have been somewhat attenuated, but the roots of regulatory reform are apparent.

Around 1970, however, a remarkable resurgence of regulatory reform activity occurred that is not so easily traced to a particular source—and which, nonetheless, reshaped the federal regulatory system. Although the major preoccupations of the period are clear enough—an upsurge of interest in health, safety, and conservation issues—it is anything but self-evident why these concerns emerged precisely when they did and why they evoked such fierce passions. In fact, it is no small matter even to identify the coalitions which fashioned the newly conceived agenda for change.

Much of the literature which deals with the period fails, in the first instance, to distinguish between different themes and interests that are frequently lumped together under the labels of ‘environmentalism’ or ‘consumerism.’ [FN300] The key environmental legislation reflected two entirely distinct aspects of environmentalism, only one of which has anything to do with risks to health. Thus the landmark pollution control legislation of the early 1970s, the Clean Air Act and the Federal Water Pollution Control Act, dealt with health concerns, but equally significant legislation such as the National Environmental Policy Act and the Endangered Species Act primarily addressed environmental aspirations identified with completely different sources: the long-standing interest in scenic areas and natural species embodied in the conservation movement. [FN301] Similarly, the workplace safety concerns dealt with in the Occupational Health and Safety Act cannot readily be identified with the same interests that informed consumer legislation ***1280** such as the Magnuson-Moss Warranty and FTC Improvements Act

or the Automobile Safety Act. Once again, the roots of the one concern, workers' health and safety, trace back to a historically well-defined context—labor relations—that has very different origins from the field of consumer protection. [FN302]

The question arises, then, whether there was a discernible pattern to regulatory reform in the early 1970s. As a corollary, since this movement lacked the clear focus of economic or social class disadvantage that one finds in most earlier periods of regulatory reform, one might ask whether a guiding ideology is identifiable in the legislative initiatives that came to characterize the period.

One disparaging critique has identified the environmental movement as a distinctly upper middle class group of activists bent on creating a zone of protection for their own leisure activities. [FN303]Commenting on this critique, Richard N. L. Andrews has pointed out:

[P]olitical activists in many social movements are apt to be drawn disproportionately from upper middle class backgrounds simply because those are the persons most active and knowledgeable in political affairs; their background and methods do not necessarily mean that they serve only narrow class interests. The civil rights and antipoverty movements also counted many of the upper middle class among both their leaders and members. [FN304]

For other reasons as well, the ‘leisure class' critique seems substantially off the mark—even if limited to the conservation side of environmentalism. The enormous growth in environmental concern during the early 1970s—a heightened level of concern that demonstrated remarkable staying power throughout the decade—went well beyond identification with a social elite. [FN305] This aroused consciousness undoubtedly reflected both a broadbased rise in affluence (and a concomitant widespread increase in outdoor leisure activity) and a greater sense of attachment to symbols of the national heritage like the Grand Canyon or Yellowstone.

Moreover, environmentalism encompasses at least two distinctly different ***1281** types of concerns about ‘the quality of life’: an interest in preservation which is based on a wilderness and outdoor ethic; and a concern about pollution that is a more general byproduct of an urbanized and/or industrial style of life. Although the two strands of dissatisfaction are not necessarily inconsistent, they cannot be lumped together under an ill-defined notion of ‘elitism.’ [FN306] The roots of environmentalism, as well as its interplay with the consumer and workplace safety movements of the 1970s, are more elusive and require a more refined analysis.

As we have seen, in every epoch the growth of the administrative system has been deeply influenced by the ideology of earlier extensions of economic and social regulation. [FN307] In the Public Interest era, however, only faint traces of influence are evident from the legacy of twentieth century regulatory reform movements. [FN308] Instead, the seeds of change were sown in the traumatic racial and foreign policy debates of the preceding decade. By 1970, as a consequence of the civil rights movement and Vietnam, the adult population of this country was politicized, skeptical of authority, and suspicious of traditional norms to a degree unprecedented within the century.

Without question, the most immediate and powerful force in triggering this restive mood was the Vietnam War. For a minority, the War was a genuinely radicalizing experience. But its more general impact—the more salient effect, for present purposes—was on the populace at large. The war fostered a profound distrust of the corporate state, a broadened commitment to institutional reform, and a strong reaction against a materialist lifestyle.

Vietnam had its own vital antecedents. The war had come close on the heels of the civil rights protests and demonstrations of the early 1960s, which had similarly created a massive pool of social activists reluctant to accept unquestioningly the legitimacy of long-established political and social norms. Like Vietnam, the civil rights movement contributed to the activism of the 1970s by fostering a climate in which ***1282** the wisdom of leaders, business or political, was no longer taken for granted.

I do not mean to suggest that aspirations for racial equality and expressions of antiwar sentiment automatically translated into concern about the environment or about inadequate consumer information. But these sustained groundswells of protest and dissent did create an atmosphere in which previously unnoticed consequences of industrialism were subjected to the same close scrutiny as the promises and performance of political and business leaders in other spheres of activity. [FN309] And given the temper of the time, once the largely ignored social landscape of industrial development was subjected to close scrutiny, a new wave of regulatory activity was virtually a foregone conclusion.

By 1970, the most dramatic environmental effects of unchecked industrialism had already received occasional attention. Beginning in the late 1950s, the hazards of atomic fallout became a matter of public concern. Rachel Carson's book *The Silent Spring*, an account of the ecological impact of pesticides, was a bestseller as early as 1962. Continous smog alerts in Los Angeles became a subject of black humor by the late 1960s. The Santa Barbara oil spill in 1969 caused a widespread sense of revulsion against despoliation of the natural environment. The proposal to dam the Grand Canyon triggered a minipolitical movement in favor of protecting a cherished scenic wonder. Thus, at the tail end of the 1960s, it was simply a matter of creating a pattern and assigning meaning to these and other disparate episodes.

Moreover, when these discrete mishaps were viewed collectively, a more fundamental critique became apparent—a critique with clear implications for the administrative system. Rather than appearing as random catastrophes, the oil spills, smog alerts, and chemical hazards seemed to be the most visible manifestations of an inapproately narrow conception of the role of public regulation. From an economist's perspective, these social costs came to be discussed in terms of externality analysis.[FN310] From a political scientist's vantage point, the undesirable side-effects of industrialism were characterized as one consequence of pluralism. [FN311] In fact, both critiques were on the mark because the regulatory system that had emerged from the New Deal was inadequate to the task of controlling the newly discovered dilemmas of the 1970s.

Two fundamental system-wide failures became apparent—corresponding to the dual aspects of the environmental problem. To begin ***1283** with, pollution simply had never been taken seriously as a collective problem; its social cost had been treated as an externality borne for the most part by receptors as a class rather than assigned to polluters as a cost of doing business. The only weapons available to victims of pollution were an ineffectual common law remedy, the tort of private nuisance, and a collection of weak federal and state antipollution statutes. [FN312]

Secondly, the growing conflict between industrial development and mass recreational use, on the one hand, and conservation of natural sites and species, on the other, had never been seriously confronted. The problem was not just one of externalities—the absence of an institutional framework for identifying and assigning liability for the residual costs of industrial and recreational activities—but, even more centrally, an attribute of the pluralist phenomenon. The existing regulatory institutions, whether one examined the Forest Service, the Federal Power

Commission, or the Army Corps of Engineers, implemented their statutory mandates with a distinctive political bias. Almost invariably, such agencies viewed the world through the same prism as their regulatory clientele. These constituent groups, in turn, pressed for economic development projects rather than seeking to promote aesthetic and conservation values. [FN313]

Thus, advocates of 'the public interest,' rendered suspicious of authority and skeptical of materialism by the events of the 1960s, joined the chorus of academic discontent in discerning an underlying pattern of institutional neglect beneath the surface of sporadic crises and catastrophes that made the newspaper headlines. There was a pervasive sense of grievance in the air and receptivity to change—and that was sufficient to launch a new wave of regulatory activity in Congress.

The forewarning that a new era was dawning came in 1966 when Congress passed the Auto Safety Act, a tribute in large part to the persistence of an obscure consumer activist, Ralph Nader. In his book*Unsafe at Any Speed*, Nader had shown the temerity to catalogue the auto industry's indifference to safety considerations. In doing so, he was publicly cast in the role of David battling Goliath by subsequent heavy-handed efforts of General Motors to discredit him. Once GM thrust Nader into the limelight, his findings had an impact reminiscent of the most visible Progressive era muckrakers.[FN314]

Indeed, in many ways the consumerist impulses triggered by Nader's auto safety campaign built directly upon the foundations of Progressive ***1284** era legislation. For example, the Wholesome Meat Act of 1967, passed in response to Nader's allegations of unsanitary conditions in meat processing plants, was designed to extend federal standards to the intrastate processors who were not covered by the 1906 meat inspection legislation. [FN315] Similarly, the Magnuson-Moss Warranty and FTC Improvements Act of 1972 arose out of a crystallized perception of the structural deficiencies in the Federal Trade Commission Act. [FN316] Further, the establishment of the Consumer Product Safety Commission a year later can be traced to the truncated consumer protection authority of the FTC.[FN317]

Despite Nader's early consumerist influence, however, it was environmental concerns over health, safety, and conservation that dominated the Public Interest era. Within the short space of six years, Congress passed landmark legislation dealing with air and water pollution, occupational health and safety, hazardous wastes and toxic substances, and preservation of endangered sites and species.[FN318] This legislative eruption affected virtually every sector of the economy. The regulatory system was studded with new acronyms, such as OSHA, EPA, and CEQ. [FN319]

Two congressional enactments stand out among this outburst of activity as particularly dramatic departures in regulatory design. On the threshold of the new era, the National Environmental Policy Act (NEPA) was signed into law on January 1, 1970. [FN320] Its text and legislative history suggest that NEPA may have been intended as a largely symbolic enactment, expressing the new mood of environmental concern, ***1285** but without establishing any substantive bite. Title I of the Act reads more like an environmental Declaration of Fundamental Rights than a traditional regulatory statute.[FN321] And the new agency established in NEPA, the Council on Environmental Quality, was given the relatively uncontroversial tasks of preparing an annual report on the state of the environment, assisting other agencies in implementing the statute, and monitoring environmental trends. [FN322]

But in Section 102(2)(c), NEPA contained a provision which was to have a singular effect on regulatory decisionmaking—the requirement of an Environmental Impact Statement. Congress provided that:

to the fullest extent possible: . . . all agencies of the Federal Government shall—

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources, which would be involved in the proposed action should it be implemented. [FN323]

The distinctiveness of this requirement can be fully appreciated only by taking account of the continuing shadow cast by the New Deal on the eve of the Public Interest era. As we have seen, the heated debate about the need for greater control over the discretion exercised by New Deal agencies had been temporarily resolved by the passage of the Administrative ***1286** Procedure Act in 1946.[FN324] The enactment of the APA, however, created only a brief respite from criticism. By the early 1960s, a consensus existed that something was amiss.

Two groups of critics emerged. One group contended that the agencies were ignoring their mandate to establish clear and consistent policy guidelines—that economic regulation was adrift in a sea of irresolution. In the classic exposition, Henry Friendly challenged the agencies to abandon their practice of deciding major policy issues almost exclusively through case-by-case adjudication, and exhorted regulators to take advantage of their unique capacity to engage in long-term planning through administrative rulemaking. [FN325]

Another school of critics expressed concern about the oppressive tendencies of the regulatory system. In a widely noted essay, Charles Reich stressed the dramatic fashion in which government largess had come to exercise a pervasive influence over the basic needs of the individual by setting the terms on which one might pursue an education, practice an occupation, or realize the expectation of economic security in later years. [FN326] While Friendly advocated greater reliance on rulemaking, Reich argued the need for more adequate procedural rights in adjudicatory settings.

The critical themses pursued by Friendly and Reich were not entirely at odds. To Friendly, the central issue was the irresolute character of economic regulatory policy. In a sense, he was a forerunner of the ‘captive agency’ critics of the Public Interest era who would similarly assert that the agencies had lost their sense of purpose—that regulation had abandoned the New Deal aspirations of Landis and Frankfurter, who had extolled agency independence as the key to dispassionate exercise of technical expertise. [FN327] By contrast, Reich was principally concerned with maintaining a zone of privacy in which the individual's right to dissent, to be an iconoclast if he so desired, would be protected. To the extent that Reich established an agenda

for political activism, it was most meaningful to the advocates of welfare reform and defenders of civil liberties. [FN328] Friendly, Reich, and like-minded critics converged in their reliance on the traditional procedural mechanisms of rulemaking and adjudication for effecting regulatory reform. Just as the APA resorted to a simple dichotomous model—likening agency adjudication to the judicial process and agency rulemaking to the legislative ***1287** process—so did the critics in the early 1960s pick up on the unfinished business of 1946.

Viewed in this context, NEPA represented a wholly different strategy for controlling administrative discretion. [FN329] Most importantly, the Act had a powerful substantive impetus that was absent from earlier plenary regulatory reform proposals. In essence, APA-type reform took the agency's 'mission' as given, and aimed at creating a formal decisionmaking methodology which would be more conducive to careful deliberation, and to achieving 'correct' outcomes. By contrast, NEPA directly challenged the premise that mission-oriented agencies were discharging their responsibilities with a proper regard for 'the public interest,' as long as they failed to give focused consideration to the impact of their decisions on the environment. NEPA anticipated an altered process of decision rather than simply better procedures for decision; the environmental impact statement was to be 'action-forcing' in that every federal regulatory agency was to reassess its mandate in view of the environmental consequences of any major decision it might reach.

In addition to this highly significant substantive requirement, NEPA brought a different procedural perspective to regulatory reform. The environmental impact statement requirement constituted a departure from the classical approaches to controlling discretion just discussed. From the APA through the New Property, procedural reformers had turned to the adversary model of decisionmaking and proposed more extensive trial-type requirements for agencies. By contrast, NEPA was silent about hearings. In fact, Section 102(2)(c) is completely devoid of all the familiar trappings of procedural reform: There is no reference to the timing of an impact statement, the manner in which it should be prepared, or the availability of judicial review. [FN330]

The primary thrust of NEPA—which underscores its distinctive character—was its reliance upon an internal management technique that owed a greater debt to organization theory than to administrative law. Under the most optimistic scenario, the routinization of an impact statement requirement would necessitate specialized administrative personnel and the establishment of new channels of communication and information-flow within an agency. If these bureaucratic operating procedures were conscientiously pursued, a traditionally mission-oriented agency could exhibit a new sensitivity in defining its organizational goals. [FN331]

***1288** NEPA did, in fact, have a tremendous impact on the administrative system, although not necessarily that which might have been anticipated. Within months of the Act's passage, a federal court had enjoined the Trans-Alaska pipeline on grounds of failure to prepare an impact statement. [FN332]The message from that widely publicized case was clear: The agencies could not ignore the enactment of NEPA.

By 1975, the CEQ reported that in excess of a thousand impact statements had been filed annually over the preceding four years by federal agencies. [FN333] And landmark cases like *Calvert Cliffs*, reading NEPA as a broad charter for requiring 'individualized consideration and balancing of environmental factors,' [FN334] ensured that environmental litigants would have a potent weapon for attacking *pro forma* efforts at compliance with the requirement of an

environmental impact statement. While it is difficult to generalize about the extent to which NEPA actually reordered the priorities of mission-oriented federal agencies, there can be no doubt that the prospect of close judicial scrutiny, and its attendant consequences of additional delay, information-gathering costs, and adverse publicity, had a dramatic impact on the way agencies approached their environmental responsibilities in the 1970s.[FN335]

The second pathbreaking piece of environmental regulatory legislation was the Clean Air Amendments of 1970 (CAA). [FN336] In many ways, the design of this landmark pollution control scheme is at the polar extreme from NEPA. Where NEPA is a broadly stated charter of environmental rights consisting of barely a page of text, the CAA is an extraordinarily technical document as lengthy as a decent-sized novel (although hardly as readable). Where NEPA was designed to influence the mandate of every federal agency, the CAA is addressed to a single specialized agency headed by a sole administrator. Where NEPA is directed exclusively at the federal agencies, the CAA allocates major implementation responsibilities to the states. And finally, where NEPA is designed to effectuate internal management reforms within the federal bureaucracy, the CAA relies upon traditional rulemaking and adjudicative enforcement procedures—including private rights of action—and establishes various avenues for judicial review. [FN337]

***1289** What unites the Clean Air Act with NEPA as a real innovation in regulatory design is congressional recourse to an action-forcing principle. The CAA, like NEPA, rejects the prevailing New Deal wisdom that agency experts could best bring theirtechnical expertise to bear on problems of public policy if they were pointed in the right direction, whether allocation of air traffic routes, design of river rechannelization projects, or whatever, and told to regulate in 'the public interest.' [FN338] NEPA challenged the received learning in a very explicit fashion. Its concern was that, without further direction, a water project administrator—to take one example—would be likely to approve the design of a project with single-minded reference to economic criteria. NEPA was meant to widen the administrator's horizons.

The CAA posed a very different challenge to the New Deal perspective. In setting stringent deadlines for administrative action, the CAA questioned the very will of the regulatory agencies to act. It warned that if air pollution controls were to be enforced by the New Deal strategy, 40 years of experience suggested that the regulators would delay, equivocate, and generally fail to establish in any precise way what 'the public interest' required. Whereas NEPA's response was to rewrite the substantive mandate of the agencies, the CAA took the different tack of requiring that precise standards be established and explicit compliance timetables be met.

Rejecting the toothless provisions of earlier air pollution control legislation, the 1970 CAA established a series of tight deadlines for achieving the overrding objective of the Act: to control the emission of those pollutants which in the administrator's judgment had 'an adverse effect on public health or welfare.' [FN339] To that end, the Act specified that the administrator was to propose ambient air quality standards, based exclusively on risk-related considerations, within 30 days of enactment and to set final standards within 90 days; the states, which were responsible for translating each air quality standard into emissions controls on stationary sources (industrial plants) within their air quality control regions, had another nine months to prepare state implementation plans; the administrator, in turn, was given four months in which to approve or disapprove the plans; and finally, the sources were allowed three years in which to attain the primary emissions standards applicable to them. [FN340]

The strategy for new mobile sources (motor vehicles) was equally uncompromising: Using 1970 emissions as a baseline, the auto manufacturers ***1290** were directed to achieve 90 percent reductions in carbon monoxide and hydrocarbon emissions by 1975, and to meet a similar level of reduction in oxides of nitrogen by 1976. [FN341] The only leeway allowed was a possible one year, one-time-only extension, if the administrator found that certain infeasibility criteria were met. [FN342]

Thus the CAA was a summons to action and a tribute to faith in technological innovation. The innovative character of the law, however, must not be overstated. Many of the central features of the Act were established regulatory strategies by 1970. For example, the Act creates a complex interplay of federal and state responsibility, assigning principal responsibility to the administrator for establishing ambient air quality standards and allocating major responsibility to the states for implementing the standards through emissions controls. But this federal-state cooperative strategy was not new; 40 years earlier, Roosevelt had resorted to a similar approach in designing both the AFDC and unemployment compensation insurance schemes. [FN343] And the post-New Deal era was marked by major grant-in-aid programs for highway construction, educational assistance, and public housing, among other large-scale spending schemes, in which funding and planning responsibilities were shared by federal and state regulatory officials. [FN344]

In another widely noted feature of the Act, Congress ventured into the field of setting particularized standards. Consider, for example, the precision of the above-mentioned standards for new motor vehicles, in which the administrator was not simply instructed to ‘eliminate unreasonable hazards,’ but was required to reduce emissions 90 percent from a specified baseline for identified pollutants. Or, consider the provisions for new stationary source performance standards which defined ‘standard of performance’ as:

a standard for emissions of air pollutants which reflects the degree ***1291** of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reductions) the Administrator determines has been adequately demonstrated. [FN345]

A new congressional mood was evident—a willingness to go beyond the blank-check delegation of the past. Once again, however, this legislative venture is not without major precedents, such as the New Deal securities legislation and the Internal Revenue Code. [FN346] Moreover, despite the significance that some commentators have attached to legislative precision as a means of controlling discretion, the Clean Air Act, read in its entirety, is not especially restrictive. [FN347] The Act is replete with standards such as ‘best system of emission reduction,’ [FN348] ‘reasonably available control technology,’ [FN349]‘lowest achievable emission rate,’ [FN350] and ‘best available control technology.’ [FN351] Such standards create only the illusion of precision. Administrative implementation of the Act confirms what common sense would suggest: ‘best system,’ ‘reasonably available technology,’ and so forth, are not self-defining terms. These standards serve as meaningful controls on discretion only if the courts are willing to exercise stringent judicial review. [FN352]

Thus, the Act was not a *tour de force* of legislative innovation. Nonetheless, it was a singificant departure in regulatory design to establish a tightly interlocking schedule of deadlines, timetables, and specific targeted air quality goals. Whatever room for discretionary choice exists in defining ‘lowest achievable emissions' or ‘best available technology,’ the notion

of unquestioning deference to administrative expertise was dealt a sharp blow by the establishment of firm deadlines for compliance with specified air quality standards. [FN353]

Many air quality regions remained in violation of the standards for ***1292** stationary source pollutants throughout the 1970s, and automotive polutants continued to be a seemingly intractable problem.[FN354] Nevertheless, on virtually all fronts, there were significant reductions in levels of air pollution in the years following the passage of the Act. In addition, the law's technology-forcing strategy created numerous targets for litigation and a public forum for debate over appropriate pollution policy. [FN355]

Putting aside the singular implementation strategies associated with NEPA and the CAA, certain generalizations can be made about the salient characteristics of Public Interest era regulatory reform from a historical perspective. At the time of enactment both NEPA and the CAA stirred up almost no controversy, despite the arguably draconian implications of each regulatory scheme. [FN356] In both cases the most significant political compromises were negotiated in order to iron out differences between forces friendly to the legislation, rather than to pacify a hostile opposition.

For example, in the case of NEPA it was necessary for the two leading senatorial proponents of environmental reform, Senators Muskie and Jackson, to agree on questions such as whether the action-forcing impact statement mechanism was to encompass outside review by agencies other than the agency preparing the statement. [FN357] Far more critically, the impact statement proviso, without which NEPA might have been an empty declaration of support for environmentalism, was only added on the advice of an outside consultant. [FN358]

Similarly, in the case of the CAA, the major shift in emphasis was to strengthen the law, after its architect, Senator Muskie, was stung by sharp criticism of his commitment to the cause of pollution control in a Nader report. [FN359] Although there was an ineffectual eleventh-hour expression of industry protest, the CAA passed both houses of Congress with overwhelming majorities; in the case of NEPA, there was no discernible opposition. [FN360]

Viewed in historical perspective, this phenomenon of virtual consensus ***1293** support for landmark regulatory legislation turns out to be the norm rather than an aberration. From the enactment of the Interstate Commerce Act through the passage of New Deal legislation, major industrial groups were required to generate costly information, were circumscribed in access to markets, and were subjected to criminal enforcement schemes, with hardly a dissenting vote in Congress. Consequently, the smooth passage of the NEPA and the CAA should come as no surprise in itself.

In earlier times, however, the new regulatory scheme frequently produced apparent benefits to powerful regulated interests that helped to explain the relatively mild congressional opposition to proposals for substantial regulatory reform. [FN361] On this score, the environmental laws of the 1970s, and the contemporaneous consumer protection legislation as well, require some further explanation. No one would seriously argue that lumber companies, highway builders, and electric power interests stood to gain from NEPA; or that steel, copper, and auto producers had any reason to stand up and cheer for the CAA. These statutes were not in the spirit of the Interstate Commerce Act and the National Industrial Recovery Act, which seemed to promise all things to all interest groups.

As James Q. Wilson has argued, much of the public interest regulation passed in the 1970s can be characterized politically as involving concentrated costs (on industry) and dispersed benefits (to 'the public') [FN362]—not a scenario that traditionally augured well for the enactment of regulatory legislation. But in the 1970s, big business was truly on the defensive as the public seemed responsive to a wide variety of concerns about the quality of life. An entire series of initiatives resulted—on auto safety, product design, air and water pollution control, scenic conservation, and occupational health and safety, to mention only the most significant—which manifested a distinct bias against economic growth.[FN363] The political climate made it virtually impossible to oppose such programs in principle—and focused objections can always be pursued in the process of agency implementation.

A second striking feature of the Public Interest era legislation is that it was not the product of a social movement for reform, nor even the outcome of pluralistic, interest group politics. As Wilson noted, the passage of NEPA and the CAA might well be characterized as instances of 'entrepreneurial politics'—situations in which astute politicians adopted anticipatory strategies, setting the agenda for regulatory action ***1294** prior to clearly articulated interest group demands for change. [FN364]

This phenomenon has been much more common than is generally recognized. Both New Deal and Great Society regulation represented efforts by political leaders to come to grips with broadbased social ills that had not been translated into focused constituency demands for reform. The distinctive aspect of Public Interest era regulation, however, was the extent to which exceedingly diffuse concerns about health, safety, and conservation were enacted into law with virtually no presidential initiative. By contrast, the New Deal regulatory agenda is strongly associated with Franklin D. Roosevelt, and the Great Society with Lyndon Johnson.

The occupant of the presidential office during the Public Interest era, Richard Nixon, was an uneasy participant from the outset in the movement for 'quality of life' regulation. Although he created the EPA and unveiled an air pollution control bill of his own, Nixon's main constituency was quite clearly the business community. [FN365] Throughout the period, Senator Muskie assumed the mantle of chief protector of the environment. And on the consumer protection side, Ralph Nader served as a one-man catalyst, prodding first one legislative subcommittee and then another to take action on a number of fronts. [FN366]

A third aspect of the Public Interest era that warrants attention is the relatively limited ideological thrust of the reform measures that characterize the period. This assertion may seem at odds with the antigrowth theme evident throughout the era. Consider, however, that no substantial wealth redistribution impulse fueled the Public Interest reform efforts, and no discernible challenge was mounted against the autonomy of a market-based economy. Instead, the key legislation of the period suggested a return to the policing model of Progressivism. In the areas of pollution control, occupational safety, and consumer protection, the prevailing ideology anticipated the internalization of the previously unrecognized costs of industrial growth—a market-corrective strategy that posed no challenge to the premises of an exchange economy. [FN367]

The New Deal agenda, by contrast, is more problematic to characterize. Although much of Roosevelt's legislative program was within the existing policing tradition, the NIRA could have been taken as the forerunner of a planned society. TVA involved an unprecedented rejection of private enterprise. The public welfare and unemployment ***1295** initiatives could have been

viewed as initial steps on the road to a welfare state. Under the rubric of a ‘return to normalcy,’ the New Deal contained the seeds of a new regulatory order—an order that might have dramatically altered the market economy. Even if these tendencies were less than fully realized, the New Deal established an entirely new sense of affirmative governmental obligation to ward off massive economic distress, and thereby demolished the long-standing assumption that federal regulatory intervention ought to serve exclusively as a watchdog over market activity. [FN368]

Within its particular range of concerns, the Great Society even more explicity rejected the concept of limited federal government interference in private affairs. The community action and legal service programs used federal resources to monitor and reorder federal-state aid and assistance programs, blurring the distinction between public and private spheres of activity. [FN369] By contrast, Public Interest era agencies reflected the classical dichotomy between public regulation and private activity, and employed traditional command-and-control rulemaking and adjudication powers to achieve the substantive health and safety goals established by Congress. [FN370]

Even more centrally, however, the Great Society programs built upon the nascent redistributional impulses of the New Deal. [FN371] Lyndon Johnson's early vision of the War on Poverty was to eradicate socioeconomic class distinctions through delivering improved health, education, and welfare programs to the disadvantaged. This vision was directly contrary to the distribution-neutral principles of governmental intervention that preceded the New Deal. In this regard, Public Interest era regulation seems more closely akin to the narrow premises of pre-Depression ideology. Once again, the regulatory system—whether dealing with health, safety, or conservation interests—operated primarily in an enforcement or policing mode. Even the newly recognized substantive values identified in NEPA did not portend a re-examination of the fundamental premises of the system. These values had not been so much rejected as ignored in previous times.

XI. THE PUBLIC INTEREST ERA IN THE COURTS

By the mid-1960s, administrative law seemed not only to have reached maturity but to be rapidly slipping into premature senescence. For two decades, the Supreme Court had extolled the virtues of deference ***1296** to administrative expertise in fashioning the governing principles of judicial intervention and scope of review of regulatory decisions. [FN372] Leading commentators such as Kenneth Culp Davis, surveying the Court's work, consigned the nondelegation doctrine to the scrap heap. [FN373] Charles Reich, in a widely acclaimed essay, decried the sustained, pernicious influence of a narrow judicial conception of constitutional due process rights in government largess. [FN374] The Court seemed deeply committed to a broad-gauged tolerance of administrative discretion.

The regulatory agencies appeared to be emboldened by this state of affairs—but in a perverse fashion. Instead of exhibiting a heightened sense of vitality, agency administrators manifested a singular laxness about enunciating clearly defined policies. [FN375] Rather than overstepping the boundaries of their authority, the lack of close judicial scrutiny seemed to contribute to agency indifference to policy innovation and long-term planning.

Nonetheless, agency officials did have to decide the cases that arose in the normal course of their business. When a railroad or trucking line presented a proposed tariff of new rates, it was necessary for the ICC either to approve or disapprove the petition. When a business formally complained that its competitor was committing an unfair trade practice, the FTC had to decide whether to issue a complaint or not. When two broadcast applicants competed for a single franchise, the FCC had to decide which would be licensed. A regulatory agency cannot simply close shop, whatever its predisposition. In the 1960s, a feeling arose that the agencies were not so much drifting as listing in a consistent direction—albeit without announcing any general principles. Lacking checks on their discretion, they exhibited a consistent bias in favor of the interests of politically influential constituents. [FN376]

Two landmark cases thrust this issue into the limelight. ***1297** *Office of Communication* ***1297** *of the United Church of Christ v. FCC* [FN377] provided a vivid illustration of the linkage between the Civil Rights movement and the Public Interest era. A Jackson, Mississippi, television station, WLBT, filed for a three-year license renewal by the FCC, and was subsequently granted a one-year probationary renewal over the petitioner's protest. WLBT had engaged in a number of dubious programming practices, particularly on racial issues, such as cutting off a network program on race relations when a NAACP representative was about to speak. In rejecting the claim that WLBT's license should be revoked, the FCC refused to afford standing to the petitioner as representative of the listening public, denied a hearing on WLBT's practices, and announced that the agency was the guardian of the public interest.

The D.C. Circuit saw the matter otherwise—understandably, given the FCC's past history of license renewal surveillance. [FN378] The court straightforwardly rejected the notion that the agency could be given a blank check to determine the public interest:

The theory that the Commission can always effectively represent the listener interests in a renewal proceeding without the aid and participation of legitimate listener representatives fulfilling the role of private attorney general is one of those assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear, as it does to us now, that it is no longer a valid assumption which stands up under the realities of actual experience, neither we nor the Commission can continue to rely on it. [FN379]

Still, established patterns of bureaucratic behavior are not easily changed. After remand, the FCC held a hearing at which the Church of Christ participated. The agency then had the temerity to grant a full three-year license renewal to WLBT. Clearly, only an agency thoroughly convinced that the fashioning of broadcast policy was its exclusive domain could have issued such a boldfaced challenge to the court. In response, the D.C. Circuit took the virtually unprecedented step of summarily revoking WLBT's license. [FN380]

The FCC had failed to realize that much more was at stake in the case than WLBT's future. The D.C. Circuit, as its earlier opinion had suggested, was reassessing its relationship with the agency. The larger meaning of the case was to suggest a redefinition of the relationship between federal regulatory agencies and their constituent interest groups, as well as between agencies and the federal courts. The ideology of agency expertise was seriously tarnished in the process.

The second pathbreaking case, ***1298** *Scenic Hudson Preservation Conference v.* ***1298** *FPC*, [FN381]more than any other single judicial decision marked the birth of the environmental movement. Consolidated Edison of New York applied to the FPC for a license to construct a hydroelectric power plant at Storm King Mountain, a scenic site on the Hudson

River. The agency proceeded in a singleminded fashion: It rejected testimony as to impact on fisheries; it refused to consider evidence as to the possibility of interconnected power; and it barred expert opinion regarding an alternative power source (gas turbines) because the evidence was proferred shortly after the hearing concluded. In the process of granting the license, the agency denied that intervenors could impose any affirmative obligations on the project.

Once again, the court reversed on appeal. As in *Church of Christ*, a new mood was apparent; there was a sharp sense of impatience with the agency's self-proclaimed role as exclusive guardian of the public interest:

In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission. [FN382]

The court did not stop, however, at simply requiring better data on the most economically efficient means of meeting the power needs of New York City. Rather, it rebuked the agency for its failure to take account of the project's impact on preservation of natural forms of life, scenic beauty, and historical values. The court of appeals instructed that the agency was to consider intangible as well as economic concerns in determining whether a license should be granted.

Scenic Hudson is a monumental case for a number of reasons. The environmental organization that spearheaded the litigation consisted of a number of wealthy landowners from the area, as well as hikers and nature enthusiasts of more modest means. Through their experience in *Scenic Hudson* these influential individuals became converts to the faith, so to speak, and subsequently played a major role in persuading the Ford Foundation to establish the Natural Resources Defense Council, a public interest law firm which was to become one of the leading environmental litigation groups in succeeding years.[FN383] Thus, in a very concrete way, the case contributed to the birth of environmental law and the development of the new mood of activist judicial review.

In addition, the court's holding posed a direct challenge to every agency whose developmental mandate threatened environmental interests. ***1299** The FPC's narrowly focused process of approving the Storm King proposal was in no sense an aberration; if anything, it was typical of the post-New Deal de facto partnership between regulator and regulated. Against this background, the court's opinion instructing the FPC that it had an affirmative obligation to explore in full aesthetic and environmental concerns, along with alternative sources of power that were not even within the jurisdiction of the agency, called into question the fundamental structure of decisionmaking in cases of economic regulation.

If the agency was required to take a broader perspective, it followed that wider interest group participation would routinely be required. Before long, this insight, linked in *Scenic Hudson* to environmental values, became institutionalized. Third parties regularly participated in widely publicized environmental conflicts. But the ripple effects of *Scenic Hudson* did not stop there. The court's sweeping redefinition of the FPC's mandate contained the seeds of the environmental impact statement requirement subsequently established in NEPA. [FN384]

Finally, at the broadest level, *Scenic Hudson* directly challenged the New Deal ideology of agency expertise. While the FPC retained ultimate responsibility for implementing its newly enlarged mandate, the court's opinion clearly warned that agencies would no longer be assumed

to be in the best position to define the contours of the public interest. Although the court was not explicit, the logic of compelling the agency to consider a variety of factors on which it had no special expertise was to ensure that the standard of judicial review would be more stringent.

In retrospect, *Scenic Hudson* turned out to be far more influential than its like-minded companion case, *Church of Christ*. The explanation is straightforward. The erosion of faith in administrative expertise did not in itself trigger the rise of judicial activism in the early 1970s. Rather, it was the multifaceted concern about environmental issues—fueled, in particular, by the enactment of major new environmental legislation like NEPA and the Clean Air Act—that provided the building blocks for the new foundations of judicial review of administrative action. Thus, *Scenic Hudson* came to be seen as a point of departure, while *Church of Christ* was respectfully retired to the administrative law casebooks.

The focus on environmental issues also served to delineate more sharply the thrust of judicial review in the 1970s. As we have seen, the post-New Deal era signalled a general shift from preoccupation with the legitimacy of agency power to concern about controlling administrative discretion. In the late 1960s, when *Scenic Hudson, Church of Christ*, and their progeny undermined the foundations of post-New Deal deference to administrative expertise, broadened public interest representation in the administrative process was, at first, a central theme of the ***1300*** case law. [FN385] By 1970, however, the principle of liberal access to agency proceedings was fairly well-established. The courts turned to a related aspect of controlling agency discretion that was to become the *leitmotif* of the 1970s: the requirement that agency decisions be adequately explained.

This turn of affairs—the rising concern about processes of agency justification—was not a matter of chance. The environmental cases raised two sets of issues that were inextricably related to the judicial concern about an adequate explanation: how to assess the worth of intangible values which were jeopardized by demands for economic development, and how to resolve scientifically uncertain questions of risks to health and safety. In both situations, it was by no means self-evident that continuing faith in agency expertise was warranted.

Scenic Hudson involved the first issue—how was the FPC to ‘balance’ the power needs of New York City residents against the aesthetic and conservational values intrinsic to the scenery and wildlife at Storm King Mountain? The Second Circuit Court of Appeals threw the agency into a quandary by reversing and remanding the agency's intended grant of a license. Eventually, after years of puzzle and delay, the FPC did manage to generate a record supporting its earlier decision in favor of the project—a record that, at first, withstood judicial review by the Second Circuit. [FN386] Even then, however, the controversy was not settled. Continued debate over the impact on fisheries led to reconsideration of the case, and eventually to the scrapping of the project, two decades after it had initially been proposed.[FN387]

But the main lesson of *Scenic Hudson* is not so much the difficulty of quantifying intangible aesthetic and conservation values. Given sufficient determination (or ideological resolve), anything can be quantified. Rather, the key to the new judicial activism was that once these intangible values became salient, suspicion about the good faith of mission-oriented agencies converged with doubts about the regulators' special competence to assess conservation values. The consequence was much closer scrutiny of agency decisions. Courts began to guard against abuse of discretion by setting standards governing both the initial agency decision and judicial

review which approximated what Judge Harold Leventhal aptly labelled 'the hard look.' [FN388]

***1301** It was at this juncture that the proponents of judicial activism were handed a powerful weapon with the passage of NEPA. In establishing the requirement of an environmental impact statement, Congress triggered an outburst of litigation that appears to have been wholly unanticipated.[FN389] What emerged from the legislative chambers of a structural, internal management reform, was seized upon by environmental litigators in case after case involving the Forest Service, Department of Transportation, Army Corps of Engineers, and a wide array of other agencies, to delay and sometimes derail projects for failure to provide an adequate treatment of the environmental impact of a proposed project. [FN390] In NEPA, the *Scenic Hudson* perspective was writ large as a binding requirement for the entire federal administrative system.

Once aesthetic and conservation values were added to the hierarchy of acknowledged legal interests, even *Scenic Hudson* failed to capture the full thrust of judicial activism. For *Scenic Hudson* involved a statute that could be interpreted to anticipate a careful balancing of tangible and intangible interests. In addition to providing for a formal adjudicatory hearing, the Federal Power Act mandated that a license to construct a hydroelectric power plant was to be granted only if the project would be 'best adopted to a comprehensive plan for approving or developing a waterway.' [FN391]

The pathbreaking effort to extend the stringent obligation to justify agency decisions beyond the confines of a legislative mandate to balance interests in a formal hearing process was *Citizens to Preserve Overton Park, Inc. v. Volpe*, [FN392] a case which was to remain extremely influential throughout the 1970s. Section 4(f) of the DOT Act of 1966 prohibited the secretary from approving federal support for highways built through public parks if a 'feasible and prudent' alternative existed.[FN393] After making the requisite negative finding, the secretary approved funding for a highway through Overton Park in Memphis. Because the DOT Act contained no provisions for an administrative hearing or formal findings of fact, the secretary reached his decision without preparing any form of a record.

In light of the rise in environmental consciousness, the case posed a serious dilemma for the Court, and highlighted a glaring deficiency in the Administrative Procedure Act. Although the APA, as we have seen, created a set of procedures for administrative rulemaking and agency ***1302** hearings, it was entirely silent as to 'informal adjudication.' [FN394] When an agency's enabling act simply required administrative approval of a project or policy without reference to a hearing or formal record, the APA required no additional safeguards. As a result, the Court was called upon to review the secretary's decision in *Overton Park* on the basis of the secretary's litigation affidavit stating that he had considered alternative routes and decided that there was no feasible and prudent alternative to taking the parkland. Faced with this unsupported assertion, the Court overturned the secretary's decision.

From an activist perspective, the process of judicial review appeared to be a charade in a case like*Overton Park* if it only required the secretary's affidavit. Yet the legacy of post-New Deal principles loomed large: At one and the same time, the *Morgan* case enjoined inquiry into the mental processes of the administrator, [FN395] and the APA appeared to proscribe formal findings when the agency's enabling act made no reference to a hearing. Acknowledging both constraints, the Court performed an awkward sleight-of-hand and declared that on remand the

district court might require one or the other of these factfinding techniques, since a reconstruction of the secretary's decisionmaking process was essential to ensure that he had properly exercised his discretion. [FN396] Thus, *Overton Park* revealed a new mood akin to that indicated by the Second Circuit in *Scenic Hudson*—a refusal to take expertise for granted, and concomitantly, an overriding concern for an adequate agency explanation. The curtain was rung down on the post-New Deal epoch. [FN397]

Overton Park did more than require an adequate justification for the secretary's decision, however. The Court virtually ensured that the highway would not be built through the park by narrowly confining the secretary's discretion to find no 'feasible and prudent' alternative to using parkland. It did so by rejecting the possibility that Congress could have intended the secretary to 'balance' the respective interests in conservation of parkland and cost-effectiveness. Pointing out that ***1303** parkland was virtually always the least expensive means of financing a taking for public purposes, the Court held that preservation was a preferred value, and consequently, that parkland was to be taken only when alternative routes involved costs of 'extraordinary magnitude.' [FN398]

In the succeeding decade, the Court was to face similar questions about the primacy of nonmaterial values. In one way or another, key enactments like the Endangered Species Act, the amendments to the Department of Transportation Act, the Occupational Safety and Health Act, and the Clean Air Act appeared to treat conservation, health, or safety, as the case might be, as a preferred value rather than a consideration of equivalent weight to the economic benefits of regulation. As a result, controlling administrative discretion often became even more problematic: The agencies were bound not only to acknowledge intangible values but also to afford them some indeterminate, but clearly substantial, preference.

Following its lead in *Overton Park*, the Court repeatedly declared that Congress intended that such values be treated as paramount. Thus, over the course of a decade, the primacy of protecting health under the CAA was subjected to a variety of challenges, all of which were rebuffed. [FN399] Similarly, in a major decision at the end of the decade, the primacy of wildlife conservation under the Endangered Species Act was affirmed. [FN400] At the same time, the Court declared protection of worker health and safety to be the paramount value expressed in OSHA. [FN401] Each of these decisions was a natural extension of the position taken in *Overton Park*: Legislation involving the new social regulation was to be given the widest possible sweep.

Interestingly, these expansive readings of the new regulatory legislation by an activist judiciary often led to a narrow rather than broad view of the scope of administrative discretion. In *Overton Park*, by defining the 'feasible and prudent' proviso to extend maximum protection to parkland, the Court considerably restricted the secretary's discretion to approve use of parkland for segments of interstate highways. The same point is placed in even sharper relief by *TVA v. Hill*, [FN402] where the Court enjoined a multimillion dollar dam project because it threatened extinction of an endangered species, the snail darter. If the Court had held that 'major' construction projects did not fall within the scope of the Act, as the government contended, agency administrators would have been vested with substantial discretionary power. Thus, by underscoring its commitment to the legitimacy of the proenvironmental values ***1304** established in these legislative schemes, the Court buttressed its parallel resolve to scrutinize administrative discretion through stringent judicial review of agency factfinding.

If steadfast protection of intangible values was one major underpinning of the new judicial activism, the other principal source was the heightened awareness of the problem of scientific uncertainty about risks to health and safety. The importance of this phenomenon can hardly be overstated. The last section traced the pattern of growing legislative concern about protection of health and safety, indicating some of the landmark enactments along the way: the Occupational Safety and Health Act as a declaration that worker safety was of major significance; the Clean Air Act and Federal Water Pollution Control Act as expressions of concern over steadily rising levels of air and water pollution; the Consumer Product Safety Act as a response to apprehensions about product safety; and so forth. [FN403] By recognizing these previously uncountenanced dangers, Congress set the stage for a new drama, almost certainly without any real appreciation of the consequences which its actions entailed for judicial review of agency decisionmaking.

Risks to health and safety involve uncertainty which is strikingly different from that found in typical economic regulation. Undoubtedly, the CAB embarked upon a difficult enterprise when it attempted to determine whether air traffic between two destinations was likely to increase sufficiently in the near future to warrant a reappraisal of existing routes. But this was classic economic uncertainty: The agency was called upon to extrapolate future trends from business experience and guesswork about the state of the economy. By contrast, the EPA was frequently required to establish air quality standards or pesticide tolerances without any meaningful data on dose-response relationships; [FN404] the NRC was called upon to decide questions about nuclear waste disposal in the absence of clear-cut evidence on the long-term reliability of existing options; [FN405] and OSHA was mandated to determine whether various toxic chemicals created potential exposure risks to workers at levels which had never been subjected to careful study. [FN406]

Not only were administrative decisions necessarily based on projections from scattered episodes at much higher exposure levels or on inferences from experimental data based on animal studies, but inaccurate, insufficiently protective, administrative decisions might lead to irreversible long-term risks to society of devastating magnitude. ***1305** Although the FDA had faced dilemmas such as these for many years in issuing new drug clearances, the new regulatory legislation was so pervasive in scope and addressed such a wide range of previously unacknowledged health and safety risks that it once again posed a distinctive challenge to assumptions about administrative expertise.

In a classic controversy of the era, the Reserve Mining Company battled every conceivable opponent—environmentalists, the states of Minnesota, Michigan, and Wisconsin, the Secretary of the Interior, and the EPA—from 1969 through the mid-1970s over the risk to human health from taconite tailings which were a by-product of its production of iron ore. [FN407] The various parties sought to close the plant down on the basis of the risks to human health from emission into the air and dumping of the tailings, which contained asbestiform fibers, into Lake Superior. In response, the company argued that the plantiffs had failed to establish, under traditional standards of proof, that the tailings were in fact harmful.

Beyond a doubt, the plaintiffs could not meet the traditional burden of proof. Although studies clearly linked asbestos exposure to cancer in humans, no probabilistic figures could be established for risks of harm from taconite tailings in and around Lake Superior. Neither epidemiological data nor laboratory studies established a threshold level of taconite discharge below which health risks were unlikely to occur. Thus the court faced a dilemma which received

wide publicity: whether to act on preliminary and inconclusive evidence or wait until initial indications of what might turn out to be a massive, irreversible tragedy appeared. The Eighth Circuit Court of Appeals eventually shifted the burden of proof, requiring the company to either establish the safety of its activities or curtail production within a relatively short period of time. [FN408]

While numerous agencies were involved as litigants, *Reserve Mining* was not a case of judicial review of administrative action; indeed, it is most illuminating as a study of litigation as an alternative to agency processes of deciding issues of scientific uncertainty. Nonetheless, it has all the elements of the cases that were to evoke the new mood of judicial activism: the existence of a low (actually, uncertain) probability of high-magnitude harm; the prospect of late-emerging irreversible consequences; the question of which party should bear the often outcome-determinative burden of proof; the presence of considerable uncertainty about available control technology; and the inability to generate data essential to an informed decision. Under such circumstances, conventional notions of expertise were drained of all vitality, traditional wisdom about burdens of proof seemed strikingly anachronistic, ***1306** and accepted ideas about institutional competence were rendered nearly meaningless. When cases like *Reserve Mining* emerged from the filter of the administrative process, the judiciary embarked upon a reassessment of the very foundations of its relationship with the regulatory agencies.

Perhaps the most clearly demarcated field of action was the D.C. Court of Appeals review of EPA efforts to implement the CAA. A series of major cases provide an unparalleled illustration of the new mood of judicial activism that characterized the 1970s. [FN409] Moreover, these cases triggered a fundamental re-evaluation of the procedural model utilized in agency policymaking during the post-New Deal era.

The story begins with *Kennecott Copper Corp. v. EPA*. [FN410] When the CAA was enacted, the EPA was given four months to establish an ambient air quality standard (AAQS) for each designated 'criteria pollutant'—those for which criteria documents, indicating the hazardous nature of the pollutant, previously had been issued. Among these was sulfur dioxide. The EPA accordingly engaged in informal rulemaking under the APA, establishing air quality standards for sulfur dioxide—including a secondary standard of 60 micrograms per cubic meter aimed at avoiding damage to sources other than humans. In support of this standard, the EPA provided what it regarded as the 'concise general statement' of basis and purpose required by the APA: 'National secondary ambient air quality standards are those which, in the judgment of the Administrator, based on the air quality criteria, are requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of air pollutants in the ambient air.' [FN411]

And that was all. The agency made no effort to explain the relationship between the proposed standard and the overall risk data in its criteria document. Nor did it offer a rationale for the gap between the lowest air quality indicator of harm to nonhuman sources in the published studies and the still-lower standard it had set.

The Court overturned the standard and remanded to the agency for a more adequate explanation of the basis for its decision. [FN412] This seemingly reasonable request for greater elucidation was, in fact, at ***1307** odds with a literal reading of the statute. The APA's informal rulemaking procedure, as suggested earlier, was modeled on a simple distinction between legislative and judicial processes.[FN413] Correspondingly, the central impact of *Kennecott*

Copper was to indicate the gross inadequacy of that simplistic model for ensuring that the EPA based its standards on a reasonable interpretation of the scientific data.

After *Kennecott Copper*, the EPA would generate a substantial administrative record in support of its regulatory rules, but often to no avail. There was an illusion of certainty—of hard-edged precision—about the agency's work: A primary AAQS of 80 micrograms per cubic meter for sulfur dioxide and 75 micrograms per cubic meter for suspended particulates; a new source performance standard for Portland cement plants of no more than 0.30 lb. per ton of feed to the kiln of particulate matter; standards of performance for sulfuric acid plants restricting acid mist to no greater than 10 percent opacity, and for coal-fired steam generators restricting particulate discharge to no greater than 20 percent opacity.[FN414] But the D.C. Circuit would not settle for the trappings of certainty, and it insisted upon a rationale, an explanation for the bottom-line figures emerging from the agency's policymaking efforts. Frequently, the rationale was found wanting. [FN415]

Two divergent views emerged. Judge Leventhal's opinion in *Portland Cement Assoc. v. Ruckelshaus*,[FN416] involving an attack on the EPA's new source performance standard for Portland cement plants, articulated one position. Demonstrating an impressive grasp of technical detail, Leventhal closely scrutinized the agency's reliance on test results at ‘model’ plants and determined that the EPA failed to meet all of the objections raised by industry to its promulgated standard. In a concluding passage, Leventhal referred to the need for ‘steeping in technical matters' if judges were to review effectively agency determinations in cases like *Portland Cement*. Concomitantly, he set a high standard for the agency: It was to provide a record responsive to every substantial question raised about the agency's factfinding process.

The other view, associated with Judge Bazelon, drew a distinction between substantive and procedural review. Bazelon expressed his doubts about the capacity of federal judges to become experts in technical ***1308** matters such as those raised in EPA and NRC cases. [FN417] Instead, he supported the imposition of additional procedural requirements on regulators, including at times an oral hearing with confrontation and cross-examination when critical environmental issues were at stake.

The dialogue was sharply focused in cases such as *International Harvester Co. v. Ruckelshaus*,[FN418] in which Judge Leventhal once again steeped himself in the data on the technology of auto emissions in deciding that the EPA had improperly denied the auto industry a statutory waiver of the five year, ninety percent emissions reduction for new motor vehicles required by the CAA. [FN419]Concurring, Judge Bazelon made plain his disagreement with his colleague's approach. Rather than mastering complex technological issues, the court was obligated to ‘establish a decision making process adequate to protect the interests of all ‘consumers' of the natural environment.’ [FN420] In the present case, Bazelon continued, this obligation dictated ‘at the least a carefully limited right of cross-examination at the hearing and an opportunity to challenge the assumptions and methodology underlying the decision.’ [FN421]

What united the judges, however, was at least as salient as their disagreements. A near-consensus was apparent on the need to exercise close supervision over the regulatory process. Through the mid-1970s, the interplay between the EPA and D.C. Circuit continued. After careful judicial appraisal, the agency's judgment was often affirmed. But frequently the agency was instructed to reconsider and expand on its position. [FN422] The stakes were large in these cases: They involved transportation control plans for major urban areas; technology-based emission

standards for the largest industries in the country; and changes in the lead content of gasoline used in automobiles. Judicial uncertainty about whether the data supported such decisions made the courts reluctant to decide, in the face of equivocal supporting foundations, that the agency had been sufficiently exhaustive in its analysis.

Thus, the era of judicial deference that had spanned three decades was abruptly brought to an end. Regulation was once again viewed with a skeptical, if not jaundiced, eye. But it would be a serious mistake to regard the Public Interest era as a return to the early New Deal sentiments of *Schechter* and its forerunners. As is evident, the new social regulation—of which the CAA was an integral part—posed no threat to the existing common law jurisdiction of the courts. Nor, as indicated in the preceding section, did it portend a major redistribution of political or economic power.

***1309** The legitimacy of the regulatory enterprise was not in question. Rather, the courts were centrally concerned with the question of how to control effectively the exercise of administrative discretion in the singularly perplexing cases of scientific and technological complexity. Deference to traditional processes of informal rulemaking and adjudication in such cases appeared to be tantamount to surrendering the function of judicial review.

If Congress was unaware of these emerging issues in 1970, it was soon educated to the secondary consequences of its excursion into the fields of health and safety regulation. In sharp contrast to congressional efforts before the New Deal to repair the damage done to the regulatory system by activist judicial review, Congress in the 1970s moved to codify the new case law circumscribing administrative discretion. In the CAA Amendments of 1977, Congress added Section 307(d) that adopted virtually all of the hybrid rulemaking procedures fashioned in the preceding years of 'dialogue' between the D.C. Circuit and the EPA. Rejecting the APA rulemaking model, the 1977 Amendments provided for 'joinder of issue' through requirements of opportunity for oral presentation, written response to significant criticisms, and detailed justification of proposed and promulgated rules. [FN423]

Congress failed, however, to institutionalize generally the new judicial activism. Although hybrid rulemaking provisions similar to those added to the CAA were incorporated into a number of regulatory schemes in the early 1970s, Congress did not take across-the-board action by amending the APA.[FN424] As a consequence, the *Kennecott Copper* line of cases established an activist foundation for statutory construction of the APA informal rulemaking provision, just as *Overton Park* declared an interventionist principle for judicial review of informal adjudication. [FN425] Both lines of cases articulated the function of judicial review in sweeping terms, extending the requirement of detailed justification for agency action beyond the ambit of the statutes under which they were decided. Yet in each instance, the court added a substantial gloss to the requirements of the APA. In doing so, a tension was created between competing visions of the purposes of activist judicial review which led to a retreat and an uneasy state of truce in the late 1970s.

The key case that questioned an expansive conception of judicial review was *Vermont Yankee Nuclear Power Corp. v. NRDC*. [FN426] The case arose under the Atomic Energy Act, which did not contain hybrid***1310** rulemaking procedures. When the NRC promulgated generic rules specifying the environmental hazards associated with nuclear waste disposal, environmentalists attacked the agency's action in promulgating the rules, charging that inadequate factfinding procedures had been utilized. The D.C. Circuit opinion by Judge Bazelon

conformed precisely to the position he had taken in earlier Clean Air Act controversies, requiring the agency to make a persuasive case by going well beyond the procedural requisites of the APA:

Many procedural devices for creating a genuine dialogue on these issues were available to the agency—including informal conferences between intervenors and staff, document discovery, interrogatories, technical advisory committees comprised of outside experts with differing perspectives, limited cross-examination, funding independent research by intervenors, detailed annotation of technical reports, surveys of existing literature, memoranda explaining methodology. We do not presume to intrude on the agency's province by dictating to it which, if any, of these devices it must adopt to flesh out the record. It may be that no combination of the procedures mentioned above will prove adequate, and the agency will be required to develop new procedures to accomplish the innovative task of implementing NEPA through rulemaking. On the other hand, the procedures the agency adopted in this case, if administered in a more sensitive, deliberate manner, might suffice. Whatever techniques the Commission adopts, before it promulgates a rule limiting further consideration of waste disposal and reprocessing issues, it must in one way or another generate a record in which the factual issues are fully developed. . . . [FN427]

On appeal, the Supreme Court issued a strong rebuke to the D.C. Circuit, castigating the court for 'engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress.' [FN428] The Supreme Court insisted that the APA, or relevant provisions of an agency enabling act, established the frame of reference for agency policymaking and left no room for an appellate court to impose additional requirements as might seem appropriate in a particular case. Thus, after seven years of silent toleration of the D.C. Circuit's hybrid rulemaking cases, the Supreme Court expressed its repugnance of an approach that, in its view, allowed judges to 'stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good.' [FN429]

Strong language—and yet, on close examination it was far from clear that the Court had in fact undercut the activist thrust of the early 1970s to any significant extent. [FN430] To begin with, the result-oriented critic might have pointed out that the Court, after all, remanded the ***1311*** case for further consideration of whether 'the challenged rule finds sufficient justification in the administrative proceedings' [FN431]—despite the fact that the NRC had gone well beyond literal compliance with the notice-and-comment requirements of Section 4 of the APA. Moreover, at different points in the opinion the Court indicated that under 'compelling circumstances' more than minimal satisfaction of the APA requirements might be demanded. [FN432] The opinion could be taken to be an expression of sound and fury, signifying very little.

This would be a superficial reading of *Vermont Yankee*, however. Clearly, Bazelon's free-wheeling approach to judicial review of cases 'on the frontiers of science and technology' [FN433]—in effect, instructing the agency to try one or another of various suggested additional procedures and then chance another reversal [FN434]—was more than the Court was willing to tolerate. One can speculate that even Judge Leventhal's approach, requiring judges to 'steep themselves' in technical detail, would exceed, by a considerable measure, the scope of review anticipated by the *Vermont Yankee* court.

In my view, there is a true difference of perspective here. In the early 1970s, judicial activism was frequently extended to the point of requiring agencies to provide something approximating a Right Answer to problems of scientific and technological uncertainty. This is not to say that the courts were so naive as to think that the regulatory agencies could absolutely eliminate uncertainty through sufficiently scrupulous factfinding. Rather, the courts were pressing toward a decisonmaking methodology that would closely resemble the adversarial search for truth so congenial to the judicial mind—a methodology that demanded joinder of issue, elaborate articulation of all contending values, impartiality of perspective, and a carefully reasoned decision.

In contrast, *Vermont Yankee* tilted uneasily toward the unstructured political model of agency policymaking incorporated in the notice-and-comment provisions of the APA. Nonetheless, the Court was understandably reluctant to embrace a decisionmaking methodology which, as a practical matter, would eliminate any checks on administrative discretion (other than constitutional safeguards). Instead, the Court opted for what might be labeled a Best Efforts approach. Taking into account that the agency's statutory mission might appropriately create a political 'tilt,' and recognizing the quasi-legislative character of agency rulemaking, the Court sought assurance of good faith consideration ***1312** of the issues by the regulator rather than demanding a pristine search for truth.

As rough approximations, these two categories reflect contrasting perspectives which by the late 1970s, as the Best Efforts approach reached its peak, came to characterize a reassessment of the judicial activism of the preceding few years. There was a retreat along all of the major fronts of judicial review to the more secure ground of requiring only that the regulatory agencies offer some assurance of good faith consideration of the issues.

This withdrawal had begun in a quiet way even before *Vermont Yankee* in the field of informal adjudication. The *Overton Park* court had stressed the need for assurance that the administrator reach a reasoned, independent judgment in such unequivocal terms that, on remand, the district court, in effect, reviewed the record *de novo*. [FN435] Eventually, the Secretary of Transportation reversed himself and refused to certify that no feasible and prudent alternative to taking parkland existed. [FN436] Deeply troubled by the process, if not the substantive outcome in the case, the Court soon found occasion to qualify the stringency of its *Overton Park* standard.

In *Camp v. Pitts*, [FN437] an opinion subsequently relied on in *Vermont Yankee*, the Court reviewed a decision by the Comptroller of the Currency refusing to approve certification of a national bank. Once again, the administrator was not required by statute to prepare formal findings, and he had disposed of the application in rather summary fashion. The court of appeals instructed the district court to review the comptroller's decision *de novo*. The Supreme Court reversed, indicating in no uncertain terms that judicial review of informal adjudication entailed nothing more than finding that the administrator had acted in good faith:

If, as the Court of Appeals held and as the Comptroller does not now contest, there was such failure to explain administrative action as to frustrate effective judicial review, the remedy was not to hold a *de novo* hearing but, as contemplated by *Overton Park*, to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary. [FN438]

Camp v. Pitts, like *Vermont Yankee*, however, should not be read as a return to the post-New Deal idealization of agency expertise. Both cases are more sensibly regarded as efforts to strike an accommodation between a literal reading of the APA, which merely would pay lip service to controlling agency discretion, and an active commitment to adversary techniques, which would be tantamoun to imposing constitutional due process requirements on informal regulatory activities. From a historical perspective, the courts had oscillated from a deferential ***1313*** position to one in which the agencies were put on notice that their work would be scrutinized with great care, and then had begun movement back to a more modest level of activist review.

The same judicial pattern occurred in the area of NEPA litigation. In the leading case of *Calvert Cliffs Coordinating Committee v. AEC*, [FN439] the D.C. Circuit enunciated a set of interpretive principles spelling out the fundamental obligations that NEPA imposed on the federal agencies. On the key question of whether the act realigned the substantive obligations of the agencies—as distinguished from a more modest duty simply to 'consider' environmental values—the court read NEPA expansively, indicating that the statute anticipated a balancing of economic benefits and environmental costs, 'to ensure that, with possible alterations, the optimally beneficial action is finally taken.' [FN440]

In the court's analysis, NEPA review sounds very much like a search for the Right Answer. It is not sufficient to rely on the good faith of an agency—once its consciousness has been raised by a bookkeeping requirement of taking an environmental inventory. If environmental values are important, the court suggests, then they must be fully taken into account. *Calvert Cliffs* was very influential, and in the immediately succeeding years a considerable number of federal courts of appeals followed its lead in proclaiming the 'substantive' obligations of NEPA. [FN441]

But the pendulum swung back once more. In *Strycker's Bay Neighborhood Council v. Karlen*, [FN442]the Supreme Court considered a challenge to a public housing project in which the petitioners argued that the alternative site analysis proposed by the Department of Housing and Urban Development failed to give adequate weight to environmental impacts, as required by NEPA. The Court addressed the question of whether the requirement of an impact statement created substantive obligations and concluded, citing the authority of *Vermont Yankee*, that 'once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences.' [FN443]

Taken together, *Strycker's, Bay*, *Vermont Yankee*, and *Camp v. Pitts* cover a substantial portion of the field in which environmental policy is formulated: NEPA, administrative rulemaking, and informal agency adjudication. Moreover, in a widely noted case decided the year following ***1314*** *Strycker's Bay, American Taxtile Manufacturers Institute v. Donovan*, [FN444] a closely divided Court upheld OSHA's exposure limit for cotton dust, arriving at a decision that clearly gave the agency the benefit of the doubt on the technological feasibility of its standard. [FN445]

These cases indicated a shift in mood that extended beyond the parameters of environmentalism. Indeed, *Camp v. Pitts* was not an environmental case at all, and *Strycker's Bay*—dealing with the population mix in a housing project—stretches the term beyond its normal usage. The contrast between the two landmark welfare cases of the same era, *Goldberg v. Kelly* [FN446] and *Mathews v. Eldridge*,[FN447] provides further evidence of a wide-ranging shift towards greater judicial restraint.

Decided in 1970, in the heyday of the new judicial activism, *Goldberg v. Kelly* created a constitutional right to the full panoply of adversary procedures prior to termination of AFDC benefits. [FN448] The Court's pronouncement was to welfare cases what the Clean Air Act opinions of the D.C. Court of Appeals were for pollution control controversies—a strong declaration that a search for the Right Answer was paramount, and that agencies would be required, whatever the literal terms of their statutory mandates, to establish processes reducing the risk of error to an absolute minimum.

By 1976, however, the Court was far less committed to insisting on accuracy at virtually any price. Applying a similar balancing test to that announced in *Goldberg*—measuring the social costs of additional hearing requirements against the potential error costs to recipients—the Court held in*Mathews v. Eldridge* that the statutory notice-and-response provisions offered adequate protection to federal disability recipients even without providing for a pretermination hearing. [FN449] *Goldberg* was 'distinguished' on grounds that strain credulity. [FN450] Moreover, *Mathews* is just one in a series of contemporaneous cases isolating *Goldberg* as a constitutional right-to-hearing precedent. [FN451]

This substantially parallels the 'fine-tuning' of judicial activism in the environmental cases. *Mathews*does not signal a return to the earlier dichotomy between right and privilege, which entailed minimal control ***1315*** over agency discretion. [FN452] To the contrary, the Social Security program established an elaborate 'paper hearing' procedure prior to termination and assured the recipient a posttermination oral hearing. [FN453] The Court stressed these procedures before concluding—in a contrasting register—with a quote from Justice Frankfurter to the effect that 'differences in the origin and function of administrative agencies 'preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of the courts.'' [FN454] Rather than demeaning the importance of an adequate explanation, the Court was suggesting that such ends could be achieved without imposing trial-type procedures on agencies. [FN455]

With due regard for the right-to-hearing cases, the core of Public Interest era activity was firmly embedded in the new social regulation. Perhaps for the first time in a century of steady administrative expansion, the coordinate institutions—legislative and judicial—acted in tandem rather than moving in opposing directions. In the early 1970s, Congress recognized the need to address a variety of low-visibility collateral costs to health, safety, and the environment that were the legacy of relatively unimpeded long-term industrial growth. At the same time, the courts heralded the importance of these newly recognized values, and in doing so conducted a searching re-examination of fundamental principles of judicial review of administrative discretion. Confronting newly discovered problems in weighing scientific and technological uncertainty or in assessing the value of aesthetic and ecological concerns, the courts liberally construed the new social regulation. But correlatively, they imposed stringent standards of explanation and justification on the agencies responsible for implementing the new legislation. The courts thus fashioned a new judicial activism that first appeared as a dramatic reaction against the deferential judicial posture of the post-New Deal court. Then, as the decade wore on, the approach shifted back to a less intrusive (although still insistent) requirement that agencies demonstrate their competence rather than simply have is taken for granted.

XII. A POSTSCRIPT ON DEREGULATION—UNRESOLVED TENSIONS IN THE ADMINISTRATIVE STATE

As we have seen, Lyndon Johnson's Great Society marked both the furthest extension and, ultimately, the final impulse of the generative force of the New Deal. This is not to say that the advent of the Public Interest era marked the end of the New Deal commitment to affirmative ***1316*** state intervention in maintaining economic stability and assuring personal security. To the contrary, the principal thrust of the new set of legislative initiatives in the 1970s—the social regulation discussed in the two preceding parts—left the landmark legislation of the New Deal untouched. But the health, safety, and conservation schemes of the 1970s either stood apart from this tradition, or traced back to a different one, the Progressive era policing tradition. They offered no real contribution to the continued nourishment of New Deal values. The regulatory system expanded substantially, but it did so by tapping sources that asserted far more modest claims on behalf of the interventionist role of the federal government.

By the late 1970s, however, the expansionist period of the Public Interest era had, in turn, run its course. For the first time in a century, a discernible political movement sought to reassess the need for regulatory programs that administered markets as a means of promoting the health of particular industries. [FN456] This movement was exceedingly widespread: The regulatory system came under close scrutiny by policy institutes and journals, academic disciplines, and politically influential public officials who all came to focus on a clear and dominant emerging theme—deregulation. [FN457]

In the rhetoric of political conservatives, the deregulation movement was often equated with a desire to turn back the clock to a vanished golden age before the New Deal proliferation of regulatory agencies and mass benefit programs. This yearning, however, constitutes an erroneous view of history, ignoring the reality of the politics of regulatory growth during the past century. Beginning with the enactment of the Interstate Commerce Act, regulatory politics consistently exhibited a tension between interests opting for some form of a policing model of regulation—in effect, a more robust version of the common law of unfair competition—and those seeking to legitimate private cartel-like arrangements designed to exercise control over price and access to markets.

The laissez faire, antiregulation position of Standard Oil, struggling to maintain its predatory pricing practices in a market free of any meaningful regulation, fell into early disrepute in the state legislatures, even before the Commerce Act was passed. And on the other extreme, the radical populist demand for public management of the market for agricultural products was quickly coopted by centrist political forces. Over the course of a century, however, the less intrusive middle ground position ***1317***of the Populist and Progressive eras, in which the policing model was dominant, was succeeded by a post-World War II epoch in which some major industries had gradually achieved agency-sanctioned control over price and entry.

Notably, this shift came about in incremental fashion. Plenary efforts to legitimate price and entry controls failed. First, Congress reverted to the Commerce Act model in the establishment of the Trade Commission, and refused to create agency authority to legitimate pricefixing and information-sharing arrangements. Then, a generation later, a unified Supreme Court invalidated the NIRA based on its opposition to ‘delegation run riot.’ [FN458]

But the shift occurred inexorably. Again, the field of transportation provided the arena for new departures in the scope of regulation. The Transportation Act of 1920 provided the ICC with minimum rate jurisdiction. The Motor Carrier Act of 1935 established controls on rates, routes, and entry in commercial trucking. The Civil Aeronautics Act of 1938 instructed the CAB to promote the health and well-being of the airline industry through rate and route certification, among other measures. [FN459]While associational price-and-entry regulation was by no means an exclusive legacy of the New Deal, it became a dominant feature of the regulatory landscape by the post-World War II period.

The antiregulation mood of the late 1970s must be assessed against this background. The increased focus on deregulation was not principally a reaction to the latest wave of regulatory reform—the social regulation of the Public Interest era. No serious effort was mounted to revoke the recent congressional initiatives in the areas of health, safety, and environmental protection—let alone to reassess the need for earlier Progressive era efforts to establish policing controls on the market. Instead, the new criticism was leveled at administrative activity extending beyond the policing model; it constituted an attack—unparalleled in vigor—on price-and-entry regulation.

The economic regulatory agencies were chastised, as in the days of the NIRA, on the grounds that widespread government intervention in support of price-and-entry regulation was suppressing competition and fostering economic waste. [FN460] In unprecedented fashion, Congress responded with a series of deregulatory initiatives: the Airline Deregulation Act of 1978 (providing for total deregulation, in phases, of fare setting and entry restriction in air travel); [FN461] the Motor Garrier Reform Act of 1980 and the Staggers Rail Act (relaxing rate and entry regulation ***1318** of motor carriers and rail traffic, respectively); [FN462] and the Depository Institutions Deregulation and Monetary Control Act of 1980 (eliminating interest ceilings on time and savings deposits). [FN463]

The congressional embrace of deregulation marked a pause after a century of steady growth in the federal administrative system. Moreover, the rising storm of criticism over excessive regulation extended far beyond the field of legislative activity. Traditional administrative rulemaking—so-called command and control rulemaking—came under general attack for its economic inefficiency in failing to discriminate between low-cost and high-cost compliance activity. [FN464] Critics excoriated administrative adjudication for its expense and delay. [FN465] They further challenged agency priorities in establishing policy as failing to give precise consideration to the costs and benefits of various regulatory options—including the possibility of taking no action at all. [FN466]

Lending a sympathetic ear, the Carter and Reagan administrations successively sought to sustain further the deregulatory mood through economic efficiency measures at the agency implementation stage—such as allowing the offsetting and trading of air pollution emissions credits under the Clean Air Act, [FN467] and requiring cost-benefit justification from the agencies for ‘major’ regulatory initiatives prior to administrative action. [FN468] Indeed, the Reagan administration appeared to pursue a broader-based de facto deregulation policy by appointing unsympathetic agency administrators and proposing drastic budget cuts in regulatory programs untainted by congressional disapproval. [FN469]

These latter efforts raised a serious question whether the development of the federal regulatory system had reached a major crossroad. Consider the context. As I have suggested, the

immediately preceding congressional deregulation activity is appropriately assessed within the narrow ideological continuum established by the historical developments ***1319*** of the past century. In this context, the deregulation of the late 1970s appears to be no more than a preference for the less intrusive of the two mainstream approaches that characterize the American regulatory tradition—a preference for a ubiquitous but relatively narrow policing model of regulation over a mixed policing-cartelization system of administrative governance.

This mainstream tradition can accommodate initiatives aimed at achieving greater economic efficiency in the implementation of regulatory goals. These initiatives—ranging from the substitution of marketable permit or fee-based systems for traditional regulation, through establishing agency priorities by cost-benefit analysis—can be viewed as efforts to make the less intrusive policing model of regulation more cost-effective. [FN470] But recent efforts to place major ongoing regulatory programs in the hands of fundamentally unsympathetic administrators might suggest a far more ambitious ideological aim, namely, to reassess the need for regulatory institutions as a mechanism for policing the market. [FN471] Whether such a phenomenon—which would place principal reliance on tort law, as in the nineteenth century, for regulating competitive practices—is imminent remains to be seen. Since Congress has shown no disposition to dismantle the plenary policing system it has established over the last century, the lines of tension caused by the new shift in regulatory politics, though faint, have been sufficiently evident to cause reverberations in the courts.

To assess the Supreme Court's lates turn, however, requires a brief contextual note. In virtually every era, the Supreme Court has tended to react conservatively in the first instance to a new wave of regulatory politics, and then to do an about-face shortly thereafter. Employing the term ‘conservative’ to indicate resistance to change (rather than to denote conservative as opposed to liberal political tendencies), this pattern has emerged quite clearly over the past century.

Consider the historical record. When the Commerce Act was passed, creating the first major federal regulatory agency, the Court immediately issued a series of devastating opinions robbing the ICC of its vitality—only to reverse course two decades later. [FN472] Similarly, when the FTC was established as the hallmark of Progressivism at the federal level, the Court repeated its earlier performance, drastically limiting the powers of the new agency. Once again, a decade was to ***1320*** pass before the Court accommodated itself to a more expansive congressional intention. [FN473] In a similar vein, when the New Deal was launched the Court reacted with alacrity, striking down the key legislation in no uncertain terms—only to effect a complete turnabout by the end of the same decade. [FN474] And a generation later, when the Public Interest era reached its zenith, the Court briefly tolerated a restrictive ‘hard look’ doctrine that seemed tantamount to requiring agencies to find right answers where no such certainty existed; but once again, the Court soon reconsidered and enunciated a more pragmatic, tolerant stance which seemed to require only a good faith effort by agencies struggling with issues of scientific uncertainty and intangible values. [FN475]

Under close scrutiny, the Court's tendency to oscillate between rejection and acceptance when encountering regulatory reform reveals a pattern of sustained concerns about the nature of administrative government. Through the New Deal, the principal concern was *legitimacy*. It was manifested in a variety of forms. The ICC was concomitantly under attack for exercising independent judgment and wielding excessively wide-ranging authority. So too was the FTC.

And in the Court's final outburst against an autonomous regulatory system, the National Recovery Administration fell victim to judicial anxiety over exorbitant administrative power.

After the New Deal, the Court became preoccupied with the nature of agency *discretion*, as distinguished from its legitimacy. Concerns about process replaced those related to substantive reach. For a time in the post-New Deal era, this emerging set of new concerns yielded a quiescent period of grace. But then in the early 1970s the regulatory system was exposed to a new set of shock-waves as the courts—including the Supreme Court, for a brief moment—proclaimed the dawning of a new era of relations between the judiciary and the administrative system.

This new and dramatically assertive judicial mood was marked from the outset by expressions of doubt. Since the New Deal, deference to the agencies had been rationalized in terms of expertise. Now, in an era marked by burgeoning claims on behalf of the environment, public health, and consumer safety, agency expertise had to be given new meaning. As the agencies took seriously the mandate to engage in long-term planning the courts were confronted with fundamental questions of process. Were the agencies required to adopt a comprehensive approach to decisionmaking in which no stone was left unturned? Were the regulators mandated to provide purely technocratic resolutions to issues of policy, or were they free to respond to 'political' considerations in implementing statutory commands? Were administrative ***1321** officials hybrid decisionmakers—operating somewhere in the netherland among the roles of legislator, policy expert, and judge—and, if so, how might a reasonable measure of control be exercised over their activities?

These intractable questions accounted for the judicial oscillation between a search for the Right Answer and tolerance of a Best Effort during the 1970s. Although these questions often arose in cases involving scientific and technological uncertainty, they cast an even longer shadow. They reflected a deep-seated ambivalence that dated back to the enactment of the APA over the appropriate 'model'—legislative or judicial—for confining agency discretion in general policymaking proceedings. Thus, in the 1980s, there remained a perennially unresolved tension between political and technocratic models of agency decisionmaking.

As the deregulation movement cast an uneasy pall over the growth of the administrative system, these issues remained in the foreground and were soon exacerbated. What I have referred to as Ronald Reagan's boldest thrust—his initiatives aimed at vitiating a plenary policing system of regulation—involved the appointment of top officials committed either to halting the expansion of or rolling back ongoing regulatory enforcement programs. In the mid-1980s, these initiatives prompted renewed judicial exploration of the continuing tension between political and technocratic models of the regulatory process. The Court initially opposed a new paradigm of regulatory behavior (an overtly 'political' stance by the Reagan administrative appointees), but then within the space of a single Term appeared to effect a turnabout.

The first of the cases to come before the Court, *Motor Vehicle Manufacturers facturers Association v. State Farm Mutual Auto Insurance Co.* [FN476] involved the rescission of a mandatory passive restraint regulation adopted by the National Highway Traffic Safety Administration (NHTSA). In 1977, during the Carter Administration, the agency had adopted a regulation requiring that either airbags or passive seat belts be installed in all passenger vehicles by model year 1984. Shortly after Ronald Reagan succeeded Jimmy Carter as President and appointed a new head of the Department of Transportation, the NHTSA initiated new rulemaking

proceedings and revoked the mandatory passive restraint regulation. [FN477]In a statement explaining the rescission, the agency took the position that it could no longer assume that most passenger vehicles would be equipped with airbags. Once this assumption was relaxed, the NHTSA thought it conceivable that there would be such a limited decrease in highway accident fatalities due to the use of easily detachable passive ***1322** seat belts that the costs of compliance with the regulation would exceed the benefits in reduced injuries.

The Court found the agency's explanation inadequate, since the agency could have satisfied its concern by requiring airbags or nondetachable seat belts rather than revoking the regulation in its entirety. As a consequence, it overturned the new regulation and remanded to the agency for further consideration.

The decision is reminiscent of the Court a decade earlier in the heyday of Public Interest era activism. Insisting upon a reasoned explanation and a recitation of relevant factors, the Court relied on its bellwether pronouncement of close scrutiny, *Overton Park*. [FN478] Concomitantly, in rejecting a deferential stance, the Court read its most visible symbol of judicial restraint, *Vermont Yankee*, [FN479]to stand for the proposition that courts cannot graft additional procedures on agencies engaged in APA rulemaking—not for the more restrictive proposition of a minimal duty to explain. Throughout the opinion, administrators are characterized as technical experts. Although the NHTSA need not have enacted a passive restraint regulation in the first instance, the Court insisted that once it chose to exercise its 'informed judgment,' a presumption existed that the initial regulation was the best means of implementing congressional policy. [FN480]

Suppose, however, the Reagan Administration had taken the view that it was a bad idea to impose domestic price increases on U.S. auto manufacturers in the face of foreign car competition. Or, consider the possibility that the new administration had assigned very substantial costs to the possibility of a popular backlash against the regulation once it was in force. [FN481] Would any such 'political' justification for the agency's revocation of the passive restraint regulation have been acceptable to the Court?

The tone of the majority opinion—which takes seriously the regulator as technocrat, confined to a focused cost-benefit assessment of safety—seems to reject such justifications. But a concurring opinion subscribed to by four of the justices ends on a note that places in sharp relief the tension to which I refer:

The agency's changed view of the standard seems to be related to the election of a new President of a different political party. It is readily apparent that the responsible members of one administration may consider public resistance and uncertainties to be more important than do their counterparts in a previous administration. A change in administration ***1323** brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulation. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration. [FN482]

These final thoughts in the minority opinion serve as the link to the Court's change of mood within the short space of a single Term. Once again, in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, [FN483] the Court confronted a situation in which a change in presidential appointments to a major federal agency resulted in an immediate reversal of

regulatory policy through revocation of a regulation. But this time the agency fared better in court.

During the Carter Administration, the EPA adopted a number of economic incentive measures aimed at achieving greater industrial development within the standards and emissions limits established under the Clean Air Act. [FN484] Among these measures was the 'bubble' policy, which allowed a polluter to offset emissions reductions from one piece of process equipment in a plant against increased emissions in a new or modified part of the plant, thereby avoiding compliance with the permit process mandated for new major installations. After considerable agency infighting followed by litigation in the D.C. Circuit Court of Appeals, the EPA adopted a regulation in August 1980. The regulation extended the bubble policy to areas which were in compliance with the Act, but prohibited it in nonattainment areas (those regions which were not in compliance with the ambient air quality standards established in the statute). The agency reasoned that the structure of the Act—establishing protection of health as the primary goal of the statute and creating special stringent permitting requirements for nonattainment areas—dictated a dual definition of 'source' in a nonattainment area, so that both plants and components within plants were required to obtain permits if they were major emitters. In 1981, as part of the same Reagan-inspired regulatory reform program that rescinded the passive restraint rule, the EPA scrapped its prohibition of bubbling in nonattainment areas and adopted a new regulation explicitly mandating the bubble in all air quality control regions.

On this occasion, however, the Court accepted the agency's about-face. *Chevron* held that the EPA offered an acceptable rationale for its new rule and suggested that the agency's policy was a reasonable interpretation of statutory provisions (the nonattainment sections) that were silent on the immediate issue. *State Farm* was not mentioned.

***1324** In *Chevron*, just as on numerous previous occasions, the Court, after initially resisting a new approach to regulation, seemed to come to terms with the latest turn in regulatory reform. The Court asserted that the EPA supplied adequate reasons for its sudden change of position; yet the only substantive argument to which the opinion referred was that without the bubble option, existing pollution control equipment might not be replaced and consequently might create greater emissions problems for nonattainment areas than the bubble tradeoffs that escape the scrutiny of the permit process. But this 'reason' for promoting new construction had been around as long as the Clean Air Act itself; it certainly loomed no larger than it had a year earlier when the contrary regulation had been passed. [FN485]

It is an empirical question whether requiring permits for virtually all new and modified sources in nonattainment areas is the only feasible strategy under the Clean Air Act for dealing with the seemingly intractable problems of dirty air regions. But the agency offered no real support for its sudden adoption of the counterintuitive position that allowing substantial exemptions from the permit process would better reconcile the primary health considerations of the Act with industrial development. And it must be remembered, *State Farm* referred to a presumption in favor of standing regulations.

But the most striking evidence of the Court's willingness to tolerate politicization of the rulemaking process is its treatment of the statutory purpose issue. After examining the legislative history of the nonattainment provisions, the Court reached the conclusion that Congress simply did not consider the appropriateness of a bubble. Starting from this premise, and noting the competing Congressional concerns over public health and industrial development, the Court

proceeded to enunciate a singularly deferential position in which the concept of administrative expertise was leavened with a healthy dose of political acumen. Focusing on the different institutional roles of the judiciary and administrative agencies, the Court concluded that regulators are responsible to 'the political branch of the government' and could properly look to the incumbent administration's views when making policy decisions left open by Congress. [FN486]

On this reasoning, Congress delegated to the EPA the task of reconciling its concurrent concerns about public health and industrial development when issues such as the bubble policy arose. If this view is not a temporary aberration, the Court may be destined to come full circle—back to the singular post-New Deal mood of deference to agency expertise. At first blush, the Court's logic seems inconsistent with even the least expansive reading of the nondelegation doctrine. If that battered ***1325** principle means anything, presumably it constrains Congress from enunciating two conflicting goals and mandating an agency to effect a reconciliation. [FN487]

Moreover, even if the statutory goals—in this instance public health and industrial development—are susceptible to a synthetic interpretation, it is unclear why the Court would yield to the regulatory politics of a particular administration in establishing a reconciliation of Congressional intentions. Surely this capacity cannot be an attribute of administrative expertise. Finally, even assuming the nonattainment provisions 'reasonably' can be read to protect public health goals under either of two regulatory strategies (with or without a bubble program), if expertise has any technocratic dimension it might be expected that a reasoned factual basis for change would be required—once the agency relied upon its expertise in concluding, as an empirical matter, that one approach is misguided.

Thus, a half-century after the New Deal—a century after the birth of the federal regulatory system—the world-wise French aphorism seems not entirely out of place, '*plus ą change, plus c'est la même chose*.' The system has grown by leaps and bounds, yet it remains devoid of any coherent ideological framework. In the political sphere, while a broadranging commitment to government intervention seems a continuing legacy of the New Deal, no consensus exists on the appropriate scope of federal regulatory activities. The long-standing tension between a regulatory system dedicated to effective policing of the market and one which would stimulate cooperation among private interests—a tension as venerable as the federal regulatory presence itself—has never been conclusively resolved. For the present, the minimalist policing model of regulation appears to be in the ascendancy, but only the most sefl-confident seer would predict the future. Indeed, even the welfare sector of the administrative system—an especially deep-rooted outgrowth of the New Deal—has not been immune from attack in the years since the demise of the War on Poverty. [FN488]

In the courts, the legitimacy of regulation is no longer seriously questioned. But here, too, widespread recognition of the need for an expansive regulatory system has simply posed critical questions rather than resolved them. The courts have not developed a consistent approach to controlling agency discretion. Such an approach would have to draw on a theory of administrative expertise that dealt coherently with the technical and political dimensions of the regulatory process. Lacking an intelligible theoretical framework, the Supreme Court has oscillated between activism and restraint in reviewing agency decisions. ***1326** Like Congress, the judicial system gets higher marks for pragmatism and flexibility in dealing with each

successive wave of regulatory reform than it does for intellectual coherence and certainty of approach.

[FNa] A. Calder Mackay Professor of Law, Stanford University. I would like to express my appreciation to the Russell Sage Foundation and the Center for Advanced Study in the Behavioral Sciences for providing the support which made this study possible. I am also deeply indebted to a number of friends and colleagues for their helpful insights and suggestions. I want to express particular gratitude to Lawrence Friedman, Bob Gordon, Tom Grey, and Bill Simon for responding so thoughtfully to my requests for critical assistance.

[FN1]. A comprehensive review essay discussing the Progressive era literature is Rodgers, *In Search of Progressivism*, 10 REV. AM. HIST. 113 (1982). A good bibliography of New Deal writing can be found in P. IRONS, THE NEW DEAL LAWYERS (1982).

[FN2]. *See generally* R. HOFSTADTER, THE AGE OF REFORM (1956) (agrarian unrest and muckraking); L. GOODWYN, THE POPULIST MOMENT (1978) (agrarian unrest); H. MORGAN, THE GILDED AGE: A REAPPRAISAL (1970); J. SPROAT, THE BEST MEN: LIBERAL REFORMERS IN THE GILDED AGE (1968) (reform efforts in the post-Civil War period); S. LAZARUS, THE GENTEEL POPULISTS (1974) (consumer and environmental movements).

[FN3]. On substantive due process, *see, e.g.*, B. TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT (1942). On the delegation doctrine, *see, e.g.*, J. FREEDMAN, CRISIS AND LEGTTIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT (1978). *See generally* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (abridged student ed. 1965); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975).

[FN4]. *See, e.g.*, J. SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE 39-99 (1982); M. PARRISH, SECURITIES REGULATION AND THE NEW DEAL 108-44, 151-78 (1970). *See generally* THE POLITICS OF REGULATION (J. Wilson ed. 1980).

[FN5]. *See* note 3 *supra* and accompanying text.

[FN6]. My focus will be principally on federal regulation. This limitation reflects, in part, my main scholarly interests, but it is also dictated by considerations of feasibility. An adequate historical treatment of state administrative systems would require a detailed understanding of the diverse regulatory climates in which they arise. This would be an overwhelming task. More fundamentally, however, my aim in this study is not to provide an encyclopedic account of regulatory activity; rather, it is to identify the principal dynamic features of the growth of a national regulatory system.

It is essential, nonetheless, to emphasize the close correspondence between federal and state regulation, and to note the ever-present theme of federalism in the development of the modern administrative state. In the Populist era, for example, federal railroad regulatory legislation drew heavily upon the blueprints of existing state practices, and at the same time arose, in part,

because of the inadequacies of an exclusively intrastate-based system. Nearly a century later, federal environmental legislation such as the Clean Air Act similarly reflected both the influence and shortcomings of preexisting regulation limited largely by state boundaries. For discussion, see Elliott, Ackerman, & Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313 (1985). Throughout the study. I have attempted to develop the contextual background of state and local regulatory activity when it is crucial to an understanding of the development of a new federal regulatory perspective. But traditionally nonfederal regulatory activities, such as public utility, occupational and insurance regulation, fall outside the scope of this work.

[FN7]. *See* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 160 (1973).

[FN8]. *See generally* J. W. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956).

[FN9]. *See* C. GOODRICH, CANALS AND AMERICAN ECONOMIC DEVELOPMENT 209 (1961).

[FN10]. *See* Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789-1910*, 33 J. ECON. HIST. 232 (1973).

[FN11]. *See* Scheiber, *The Road to* Munn: *Eminent Domain and the Concept of Public Purpose in the State Courts*, in LAW IN AMERICAN HISTORY 329-402 (D. Fleming & B. Bailyn eds. 1971).

[FN12]. *See* R. ROBBINS, OUR LANDED HERITAGE: THE PUBLIC DOMAIN, 1776-1970, at 223 (rev. 2d ed. 1976).

[FN13]. *See* M. CLAWSON, THE LAND SYSTEM OF THE UNITED STATES 64 (1968). In this instance, however, the symbolic aspect of the Act may have outreached its actual significance, because by 1862 virtually all of the land worth farming in plots of 160 acres had been settled.

[FN14]. *See* Burke, *Bursting Boilers and the Federal Power*, 7 TECH. & CULTURE 1, 14-15, 19-22 (1966).

[FN15]. However, there was a fairly substantial amount of health and safety as well as economic regulation at the state level in this early period. *See* L. FRIEDMAN, *supra* note 7, at 161-63 (some states enacted laws regulating labels and measures for commodities, laws applying to quarantines, and laws prescribing limited land use controls).

[FN16]. There was, however, a modest common law of unfair competition (*i.e.*, a form of state regulation administered by the courts). For a brief historical treatment, see W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 130 (5th ed. 1984).

[FN17]. S. BUCK, THE GRANCER MOVEMENT 9-11 (1913).

[FN18]. G. MILLER, RAILROADS AND THE GRANGER LAWS 19-20 (1971) (footnote omitted).

[FN19]. *See* L. BENSON, MERCHANTS, FARMERS, & RAILROADS: RAILROAD REGULATION AND NEW YORK POLITICS 1850-1887 (1955) (the influence of New York merchants in lobbying for railroad regulation); Purcell, *Ideas and Interests: Businessmen and the ICC.* 54 J. AMER. HIST. 568 (1967) (the influence of merchants generally).

[FN20]. The basic problem was rate discrimination, and this affected every part of the community. Merchants at way points and terminal markets, in fact, were more apt to be adversely affected by this abuse than were farmers who often had a choice of collecting points and a choice of buyers. The early complaints of unfair rate making represented the grievances of specific districts and localities rather than the plight of any particular class. In most cases, initiative and leadership were provided by shippers and businessmen working through their boards of trade, mercantile associations, commercial conventions, and the regular political machinery of the state.

G. MILLER, *supra* note 18, at 165.

[FN21]. *Id.* at 165-67. The massive wave of state railroad regulation in the two decades following the Civil War can be divided into two categories for descriptive purposes: the ‘weak’ commissions and the ‘strong’ commissions. The former, following the Massachusetts model, were found mainly in the East (although there were to be a number of exceptions) and had strictly investigatory and advisory, rather than regulatory, powers. The second type—the ‘strong’ commissions, largely following the Illinois model—were located mainly in the Middle West, the West, and the South (New Hampshire being the exception) and were given definite rate setting and enforcement powers. *See* R. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 28-34 (1941).

The Massachusetts Railroad Commission was established by the legislature in 1869. There were three members, appointed by the governor to three-year terms, with one member retiring each year. The members were further required to have no financial interest in any railroad. The able Charles Francis Adams was the board's first chairman. The board's power came from its ability to appeal to the public and the legislature to enact needed reforms or to the attorney general to enforce the laws. This, combined with its substantial investigatory powers, enabled the commission to perform effectively in an eastern state such as Massachusetts, where the railroad problem had never been particularly acute. The success of the Massachusetts commission in stabilizing rates and reducing discrimination made it a prototype for nearly all of the other Eastern states. *See* F. Clark, *State Railroad Commissions and How They May be Made Effective*, VI AMER. ECON. ASSOC. MONOGRAPH 6, at 25-32 (1891).

[FN22]. *See* L. BENSON, *supra* note 19, at 47. For a general discussion of cooperative efforts at establishing pooling arrangements, see A. CHANDLER, THE VISIBLE HAND (1977), at 133-44.

[FN23]. *See* text accompanying notes 147-148 *infra*.

[FN24]. Contrasting turnpikes and canals with railways, Miller has astutely argued:

With few exceptions tolls were levied according to distance, and thus the structure of rates charged between various points of access and egress tended to be uniform throughout the course of the highway. Since it was seldom necessary to offer inducement tolls on a highway that had no rivals, no favor had to be shown to one locality over another or to one customer over another. Preferential rates, rebates, and other forms of discrimination that involved the offering of a rate below the prevailing one rarely appeared. On the forms of personal and local discrimination that became commonplace during the railroad age, the common law was completely silent. Cases involving such abuses had never come before the courts. The hastily combined law of common carriers and public highways failed to protect the public against the practice of rate cutting, and herein lies the source of the railroad problem.

G. MILLER, *supra* note 18, at 29 (footnote omitted).

[FN25]. The earliest railroad commission had been established by the State of Connecticut in 1832 for the purpose of overseeing railroad compliance with a charter. In 1844, New Hampshire created a commission to carry out railway safety inspections, and in the same year Rhode Island established a commission and charged it with preventing rate and service discrimination. *See* A. HOOGENBOOM & O. HOOGENBOOM, A HISTORY OF THE ICC 6 (1976). However, the flowering of the commission movement occurred between 1869 and 1887, when a large number of states set up permanent commissions concerned with maintaining fair and equitable rates.

Before commissions were established to control rail rates, it was common practice for state legislatures to set maximum rates when granting charters. These charters fixed passenger fares at around three or four cents per mile, which was probably below the level that would otherwise have prevailed. However, maximum freight charges showed little continuity among states. These charges were in some cases as low as two cents per ton per mile and in others as high as forty cents per ton per mile. In few cases were the rates lower than competitive rates. As Miller commented, 'It would probably be safe to say that most of the railroad mileage in the United States in the year 1850 was subject to some form of statutory rate restriction. It would be even safer to say that few of the existing limitations had any practical effect.' G. MILLER, *supra* note 18, at 30 (footnote omitted).

Realizing the ineffectiveness of these limitations on freight charges, state legislatures began fixing not maximum rates, but maximum profits that the company could earn. Firms exceeding this profit might then be subject to rate ceilings. This type of law, too, was largely ineffective, since the maximum profit was usually set around ten or fifteen percent of paid-in capital—well above the yearly return for the great majority of railroads. Especially prosperous lines that might have exceeded their limit managed to circumvent the law either by reinvesting earnings in capital stock or raising rates and decreasing volume.

Still other charters did not attempt to regulate either rates or profits, but simply reserved the power of the state to regulate at a later time. Some states went further and wrote into their constitutions the power to amend any and all corporate charters. In addition to the regulations imposed by charters, most states passed general acts of incorporation that contained detailed provisions concerning rate levels, usually stipulating a ceiling for passenger fares and often a

maximum allowable freight profit, while reserving the right later to fix specific rates for freight portage. However, it gradually became obvious that the legislature was not an appropriate body to carry out the detailed task of ratemaking, and the states increasingly came to rely upon a commission to carry out this function.

[FN26]. For a state-by-state rundown, see G. MILLER, *supra* note 18.

[FN27]. The standard history is S. BUCK, *supra* note 17.

[FN28]. The tangled history of implementation, revocation, and amendment of the Granger laws is described in S. BUCK, *id.*, and G. MILLER, *supra* note 18, and also in D. NORDIN, RICH HARVEST: A HISTORY OF THE GRANGE, 1867-1900 (1974). The tendency in all the Granger states was for the regulatory legislation to be thoroughly revamped every time there was a new election—reflecting the ebb and flow of political power of the railroads.

[FN29]. S. BUCK, *supra* note 17, at 73.

[FN30]. A contemporary student of the farm movement, Lawrence Goodwyn, elaborates on why the Grange was shipwrecked on the rock of cooperation:

The basic problem was that the Grange system of cash-only cooperative stores, based on the English Rochdale plan, simply failed to address the real ills of farmers. Because of the appreciating value of the currency—and attendant lower farm prices—most farmers simply could not participate in cash-only cooperatives. They did not have the cash. The unpleasant truth was that a cash store was of little help if one had no money and had to deal with credit merchants. By failing to alleviate the farmers' distress, the Grange soon lost the bulk of its membership.

L. GOODWYN, *supra* note 2, at 32 (1978). Goodwyn's work is the leading historical treatment of the Populist movement, and much of the following discussion is based on it.

[FN31]. L. GOODWYN, *supra* note 2, at 75.

[FN32]. L. GOODWYN, *supra* note 2, at 91-92.

[FN33]. Much of the recent debate has centered on the controversial thesis in G. KOLKO, RAILROADS AND REGULATION: 1877-1916 (1965) that the railroads were themselves the principal interest group responsible for the enactment of the Commerce Act. Kolko's position has been widely attacked on the grounds that it is indefensibly narrow. *See, e.g.*, Purcell, *supra* note 19; Harbeson, *Railroads and Regulation, 1877-1916: Conspiracy or Public Interest?*, 27 J. ECON. HIST. 230 (1967). *See also* L. Benson, *supra* note 19; Nash, *Origins of the Interstate Commerce Act of 1887*, Vol. XXIV (July 1957). A cogent summary of the various scholarly positions, as well as a concise view of the political activity leading to the enactment of the Commerce Act, can be found in S. SROWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACTTIES, 1877-1920, at 125-31, 138-50 (1982).

[FN34]. Wabash. St. Louis & Pac. Ry. v. Illinois, 118 U.S. 557 (1886).

[FN35]. For a more detailed overview, see R. CUSHMAN, *supra* note 21, at 40-65.

[FN36]. *See* Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (1887) ('[S]aid [reviewing] court shall have power to hear and determine the matter; . . . on such hearing the report of said Commission shall be prima facie evidence of the matters therein stated . . .').

[FN37]. 94 U.S. 113 (1876).

[FN38]. 94 U.S. at 126.

[FN39]. For a historical perspective on the views of Justice Field, the chief antagonist of the *Munn*position, see McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 J. AM. HIST. 970 (1975). For another historical view, emphasizing the role of Justice Bradley, the major architect of the pro-regulation position, see Fairman. *The So-Called Granger Cases, Lord Hale, and Justice Bradley*, 5 STAN. L. REV. 587 (1953).

[FN40]. Nebbia v. New York, 291 U.S. 502, 536 (1934).

[FN41]. 94 U.S. at 146. The range of Field's illustrations is instructive:

If one constructs a building in a city, the State, or the municipality exercising a delegated power from the State, may require its walls to be of sufficient thickness for the uses intended; it may forbid the employment of inflammable materials in its construction, so as not to endanger the safety of his neighbors; if designed as a theatre, church, or public hall, it may prescribe ample means of egress, so as to afford facility for escape in case of accident; it may forbid the storage in it of powder, nitro-glycerine, or other explosive material; it may require its occupants daily to remove decayed vegetable and animal matter, which would otherwise accumulate and engender disease; it may exclude from it all occupations and business calculated to disturb the neighborhood or infect the air.

Id.

[FN42]. 94 U.S. at 147-48.

[FN43]. 94 U.S. at 131-32.

[FN44]. 94 U.S. at 133-34.

[FN45]. 118 U.S. 557 (1886).

[FN46]. Henderson, *Railway Valuation and the Courts*, 33 HARV. L. REV. 902, 903-04 (1920).

[FN47]. *See generally* Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1 (1983).

[FN48]. Railroad Commission Cases, 116 U.S. 307 331 (1886).

[FN49]. 134 U.S. 418 (1889).

[FN50]. 134 U.S. at 457-58. The Court carefully enunciated the traditional judicial functions:

[The statute] deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefore, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice.

Id. at 457.

In proceeding to enumerate the procedural defects in the Minnesota statute, the Court goes on to provide one of the earliest discussions of the elements of administrative due process:

No hearing is provided for, no summons or notice to the company before the commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law; and although, in the present case, it appears that, prior to the decision of the commission, the company appeared before it by its agent, and the commission investigated the rates charged by the company for transporting milk, yet it does not appear what the character of the investigation was or how the result was arrived at.

Id.

[FN51]. *See, e.g.*, Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 397-99 (1894). The *Munn* view, that retemaking was a 'legislative prerogative,' continued to have its adherents. Bradley's dissent in*Chicago, Milwaukee* starts from the premise that ratemaking is inherently legislative since the state could have decided to run the railroads itself. If the state had done so, obviously it would have set the rates. It followed, for Breadley, that the state had similar latitude when it placed management of the railroads in private hands. *See* 134 U.S. at 462. Still, Bradley recognized that due process established some minimum constraint on legislative prerogatives (viz., proscribing 'arbitrary power'). *Id.* at 465-66.

[FN52]. 169 U.S. 466 (1898).

[FN53]. *Id.* at 546-47. Further support for the proposition that the Court was less concerned about expansion than abuse of the regulatory power is found in the numerous contemporaneous cases upholding exercises of state police power regulation. *See, e.g.*, Mugler v. Kansas, 123 U.S. 623 (1887)(state prohibition law); Powell v. Pennsylvania, 127 U.S. 678 (1888) (antioleomargarnie law). But there are contrary cases, too. *See generally* S. FINE, LAISSEZ FAIRE AND THE GENERAL-WELFARE STATE (1956); A. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895 (1960). The leading treatises of the period were T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE

POWER OF THE STATES OF THE AMERICAN UNION (1868), and C. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES (1886) (both espousing a narrow view).

[FN54]. 37 F. 567 (C.C.D. Ky. 1889). For discussion of the leading early cases, *see* A. HOOGENBOOM & O. HOOGENBOOM, *supra* note 25, at 30-38; 1 I. SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 23-25 (1931); S. SKNOWRONEK, *supra* note 33, at 150-60.

[FN55]. 37 F. at 613.

[FN56]. *Id.* at 614.

[FN57]. *See, e.g.*, Cincinnati, N.O. & Tex. P. Ry. v. ICC, 162 U.S. 184 (1896). The folly of the Court's position is suggested by the following quote from this leading case:

We think this a proper occasion to express disapproval of such a method of procedure on the part of the railroad companies as should lead them to withhold the larger part of their evidence from the Commission, and first adduce it in the Circuit Court. The Commission is an administrative board, and the courts are only to be resorted to when the Commission prefers to enforce the provisions of the statute by a direct proceeding in the court, or when the orders of the Commission have been disregarded. The theory of the act evidently is, as shown by the provision that the findings of the Commission shall be regarded as *prima facie* evidence, that the facts of the case are to be disclosed before the Commission. We do not mean, of course, that either party, in a trial in the court, is to be restricted to the evidence that was before the Commission, but that the purposes of the act call for a full inquiry by the Commission into all the circumstances and conditions pertinent to the questions involved.

Id. at 196.

[FN58]. 167 U.S. 479 (1897).

[FN59]. The Court did not question the legislative power to grant ratemaking authority to the Commission. On the contrary, it assumed such power existed, 167 U.S. at 505.

[FN60]. United States v. Trans-Missouri Freight Ass'n., 166 U.S. 290 (1897). *See also* United States v. Joint Traffic Ass'n 171 U.S. 505 (1898). Students of railroad regulation history regard these cases as a significant spur to the railroad consolidation movement that occurred at the turn of the century. *See, e.g.*, 1 I. SHARFMAN, *supra* note 54, at 33.

[FN61]. 168 U.S. 144 (1897).

[FN62]. *See also* The Import Rate Case, 162 U.S. 197 (1896).

[FN63]. *See* S. SKOWRONEK, *supra* note 33, at 160.

[FN64]. 168 U.S. at 176.

[FN65]. The tendency in administrative law to regard the delegation doctrine as the principal judicial tool for determining the legitimate scope of agency authority seems to me to be mistaken. By far, the more common strategy resorted to by the Supreme Court in these ICC cases was a persistently narrow construction of the substantive authority conferred upon the agency.

[FN66]. See G. MOWRY, THE ERA OF THEODORE ROOSEVELT, 1900-1912, at 1-15 (1958).

[FN67]. Working class antagonism had a more pervasive influence in the courts (where strikes, boycotts and violence spawned a burgeoning common law of labor relations), at the polls (where the Socialists and the Progressive wings of the mainstream parties responded, in varying degrees, to the new voice of the urban workers), and in the private sphere (where groups as disparate as the American Federation of Labor and the International Workers of the World engaged in vigorous organizing activity).

[FN68]. Ch. 647, 26 Stat. 209 (1890). On the history of the Sherman Act, *see* generally W. LETWIN, LAW AND ECONOMIC POLICY IN AMERICA (1965). For a good discussion of the public agitation against the trusts, *see id.* at 54-70.

[FN69]. *See generally* W. LETWIN, *supra* note 68, at 95-99.

[FN70]. Sherman Act §§ 1-2, 26 Stat. 209.

[FN71]. *See* W. LETWIN, *supra* note 68, at 117-28, 137-42.

[FN72]. Railroad pooling agreements were invalidated in United States v. Trans-Missouri Freight Ass'n., 166 U.S. 290 (1897), and United States v. Joint Traffic Ass'n., 171 United States 505 (1898). There was great concern that the Act would be read literally to prohibit *every* restraint of trade. This concern was soon alleviated, however, by other decisions distinguishing between ‘direct’ and ‘indirect’ restraints of trade. *See* Addyston Pipe and Steel Co. v. United States 85 F. 271 (6th Cir. 1898), *aff'd as modified* 175 U.S. 211 (1899); Hopkins v. United States, 171 U.S. 578 (1898). Along the way, the Court distinguished between ‘manufacturing’ and ‘commerce’ in the famous Sugar Trust case, so as to exempt the former activity from the scope of the Sherman Act. United States v. E. C. Knight Co., 156 U.S. 1 (1895). Charles McCurdy argues that the *Knight* case is explicable on states' rights grounds rather than constituting an expression of laissez faire distaste for the antitrust law. *See* McCurdy, *The Knight Surgar Decision of 1895 and the Modernization of American Corporation Law, 1869-1903*, 53 BUS. HIST. REV. 304 (1979).

[FN73]. For a comprehensive treatment of the consolidation movement, see A. CHANDLER, THE VISIBLE HAND 315-39 (1977). Chandler cites revealing statistics on the mangnitude of the movement. The first wave of merger activity in the 1890s, which he explicitly attributes, in part, to the passage of the Sherman Act, occurred between 1890-93, and resulted in the formation of 51 new holding companies.*See* H. THORELLI, FEDERAL ANTITRUST POLICY 294-303

(1954). A second, far more significant were of consolidation took place between 1898 and 1902, which Chandler describes as follows:

For 1898 Thorelli lists 24 legal consolidations. In 1899 the number shot up to 105—a number that almost equaled the total numbr (108) of all legal consolidations given by Thorelli for the years between 1890 and 1898. During the following three years the number dropped off, but remained substantial with 34, 23, and 26 for the years 1900, 1901, and 1902. For 1903 Thorelli records the names of only 7 tight combinations. The records cited by Thorelli are supported by Ralph Nelson's broader statistical study of firm disapperances. For example, his tables show that disappearance of firms through merger rose from 26 in 1896 to 69 in 1897, to 303 in 1898, to 1,207 in 1899. For the next three years they ran 340, 423, and 370. In 1903 they dropped back to 79. By 1903 the merger movement had clearly run its course. *Id.*at 332.

[FN74]. Historians have had great difficulty identifying a Progressive 'movement,' and with good reason. The diffuse character of 'Progressive' reforms is striking: Local reforms aimed at eliminating 'machine' politics and democratizing the electoral process; state-level reforms intended to regulate factory wages, hours and accident compensation; federal reforms in the food and drug area have all been lumped together as goals of the 'Progressive movement,' despite overwhelming evidence that key participants in the respective policymaking processes shared virtually no sense of common purpose. For discussion of the many dimensions of Progressive reform, see Rodgers, *supra* note 1.

Since my focus will be on the federal system, I will simply note what many historians would regard as the core of state and local Progressive reform initiatives. These efforts clearly are salient to a general understanding of the Progressive era, because demographic factors—in particular, the substantial influx of rural and immigrant populations into the cities—in conjunction with a growing awareness of official corruption at the state and local level played such an important part in triggering early twentieth century reform activity. Municipal reform was characterized by a wide variety of initiatives. Some of these initiatives were structural in design, aimed at professionalizing the decisionmaking process—such as the adoption of the city manager form of government and the implementation of civil service systems. Others had a substantive thrust, such as the promulgation of public health and housing codes, and the assumption of public ownership of utilities.

At the state level, legislative corruption and private monopoly power were the motivating forces for Progressive action. Once again, structural reforms—targeted at the electoral process, in this case—were a major strategic goal: Principal initiatives were women's suffrage, direct primaries, the initiative, referendum, and recall. There was a strong substantive, social welfare impulse as well; in particular, many states adopted legislation aimed at improving working conditions for women and children. *See generally* G. MOWRY, *supra* note 66, at 59-84.

[FN75]. *Compare* J. WEINSTEIN, *supra* note 73, at 66-91 (on T. Roosevelt) *with* T. McCRAW, PROPHETS OF REGULATION 94-109 (1984) (on L. Brandeis).

[FN76]. Northern Securities v. United States, 193 U.S. 197 (1904).

[FN77]. On the Bureau of Corporations, see W. LETWIN, *supra* note 68, at 240-44.

[FN78]. On the Massachusetts commission, see T. McCRAW, *supra* note 75, at 17-40.

[FN79]. Adams' philosophy was, in turn, consonant with a group of reformers known as the Mugwumps, who were early proponents of utilizing administrative expertise to improve the efficiency of private enterprise. *See* S. SKOWRONEK, *supra* note 33, at 132-38.

Many of the Progressive reforms discussed note 74, *supra*, were an expression of this continuing subtheme in the story of the development of both the federal and state regulatory systems: the recurrent enthusiasm for technical expertise as a justification for administrative expansion. At the municipal level, see M. SCHIESL, THE POLITICS OF EFFICIENCY: MUNICIPAL ADMINISTRATION AND REFORM IN AMERICA: 1880-1920 (1977). A case study that is particularly effective in conveying the technical expertise ethic is P. NONET, ADMINISTRATIVE JUSTICE (1969) (dealing with the California workers' compensation administration). *See also* S. HAYS. CONSERVATION AND THE GOSPEL OF EFFICIENCY (1959) (on the conservation movement in the Progressive era). This subtheme can be traced through the Mugwumps and Charles Frances Adams' regulatory philosophy in the Populist era to the wide variety of Progressive era initiatives, and to its highwater mark in the New Deal views of James Landis.*See* notes 250-254 *infra* and accompanying text.

[FN80]. *See* T. McCRAW, *supra* note 75, at 94-109.

[FN81]. United States v. Standard Oil, 221 U.S. 1, 59-60 (1910).

[FN82]. It must be emphasized, however, that Hamilton did not anticipate the issues of corporate scale which preoccupied the Progressives.

[FN83]. On the muckraking phenomenon, see L. FILLER, CRUSADERS FOR AMERICAN LIBERALISM (1939).

[FN84]. For a comprehensive discussion of the National Civic Federation, see J. WEINSTEIN, *supra* note 73.

[FN85]. For a discussion of the NAM in this period, see A. STEIGERWALT, NATIONAL ASSOCIATION OF MANUFACTURERS, 1895-1914 (1965).

[FN86]. On the history of American socialism, see D. BELL. MARXIAN SOCIALISM IN THE UNITED STATES (1967); H. QUINT, THE FORGING OF AMERICAN SOCIALISM (1953).

[FN87]. *See* D. BELL, *supra* note 86, at 53-54.

[FN88]. The Hepburn bill is discussed in W. LETWIN, *supra* note 68, at 247-50.

[FN89]. *See* G. KOLKO, THE TRIUMPH OF CONSERVATION 132-38 (1963); J. WEINSTEIN, *supra* note 73, at 76-82; R. WIEBE, BUSINESSMEN AND REFORM: A STUDY OF THE PROGRESSIVE MOVEMENT 81-82 (1962).

[FN90]. The Gary dinners are discussed in G. KOLKO, *supra* note 89, at 35-37.

[FN91]. 221 U.S. 1, 62 (1911). The case conclusively rejected strict interpretation of the Sherman Act, going beyond *Addyston Pipe* and other earlier cases to declare that only 'unreasonable' restraints on trade were actionable.

[FN92]. *See* A. LINK, WOODROW WILSON AND THE PROGRESSIVE ERA: 1910-1917, 66-75 (1954).

[FN93]. G. HENDERSON, THE FEDERAL TRADE COMMISSION 21-22 (1924).

[FN94]. *See* G. KOLKO, *supra* note 89, at 264-67.

[FN95]. 38 Stat. 717, 719 § 5. In defense of its vague mandate, the conference committee that drafted the final version of the bill asserted: 'It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. If Congress were to adopt the method of definition, it would undertake an endless task.' H.R. Rep. No. 1142, 63d Cong., 2d Sess. (1914).

For the original articulation of the 'rule of reason,' see *Standard Oil*, 221 U.S. at 63-64.

[FN96]. Clayton Act, ch. 323, §§ 2, 7, 8, 10, 38 Stat. 730 (1914).

[FN97]. *See* G. HENDERSON, *supra* note 93, at 28.

[FN98]. Act of June 30, 1906, ch. 3913, 34 Stat. 669.

[FN99]. *See* G. KOLKO, *supra* note 89, at 98-108.

[FN100]. *See* Braeman, *The Square Deal in Action: A Case Study in the Growth of the 'National Police Power*,' in CHANGE AND CONTINUITY IN TWENTIETH CENTURY AMERICA 51-52 (1964).

[FN101]. The regulatory scheme provided for inspection of the slaughtering of animals, processing of meat products, and sanitary conditions of the facilities. Act of June 30, 1906, ch. 3913, 34 Stat. 669, 676, 678. The judicial review provision was narrowly interpreted in Houston v. St. Louis Indep. Packing Co., 249 U.S. 479 (1919) and Brougham v. Blanton Mfg. Co., 249 U.S. 495 (1919).

[FN102]. *See* O. ANDERSON, THE HEALTH OF A NATION (1958).

[FN103]. Pure Food and Drugs Act, ch. 3915, §§ 1-2, 34 Stat. 768 (1906).

[FN104]. Hepburn Act. ch. 3591, 34 Stat. 584 (1906); *see generally* A. HOOGENBOOM & O. HOOGENBOOM, *supra* note 54, at 46-59.

[FN105]. Elkins Act, ch. 708, 32 Stat. 847 (1903) (current version at 49 U.S.C. §§

11703, 11901, 11903,11915, 11916 (1982)).

[FN106]. *See* note 101 *supra*.

[FN107]. *See* text accompanying notes 58-59 *supra*.

[FN108]. In 1910, Congress took yet another step aimed at providing a more robust framework for implementing its original intentions, passing the Elkins-Mann Act, which revitalized the long and short haul clause and gave the agency power to suspend carrier-initiated rate changes for up to six months pending investigation. *See* Elkins-Mann Act, ch. 309, 36 Stat. 539, 547-48, 552 (1910).

[FN109]. The judicial review provision in the Hepburn Act was an ambiguous one. Again, though, it was interpreted to limit the court's power. *See* ICC v. Illinois Cent. R.R., 215 U.S. 452 (1910); ICC v. Chicago, R.I. & Pac. Ry. Co., 218 U.S. 88 (1910); notes 131-134 *infra* and accompanying text.

[FN110]. On this score, the Federal Reserve Act of 1913 also deserves mention. The national banking system has a long, episodic history that intersects at various points with the development of federal regulation. The opening chapter involved leading figures from the early history of the nation. The Bank of the United States, a creature of Alexander Hamilton's vision of the federal government's role in animating American commercial activity, fell victim to Andrew Jackson's antifederalist political animosity. *See generally* B. HAMMOND, BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR (1957). In 1863, the initial federal effort at bank regulation was undertaken by enactment of legislation creating a Comptroller of the Currency and a system of nationally chartered banks. *See* Act of Feb. 25, 1863, ch. 58, 12 Stat. 665. The legislation was motivated by the need to help finance the Civil War through stimulating the sale of government securities. Although the new national banks were required to meet certain reserve requirements, and subjected to modest examination and loan restrictions, the regulatory scheme placed very few limitations on their activities. *See* Hackley, *Our Baffling Banking System*, 52 VA. L. REV. 565, 570-73 (1966).

Fifty years later, the Federal Reserve Act was passed in response to the financial panic of 1907. Although state banks were allowed to become members of the Federal Reserve, the Act did not tamper with the existing dual banking system, consisting of national and state banks. Instead, it established a network of regional Federal Reserve Banks, funded by deposit requirements on members and attuned to promoting greater liquidity through rediscounting the notes of its subscribers. While the rediscount rate and ‘open market activities' (the direct buying and selling of treasury obligations) could have been affirmatively utilized to stimulate the private economic sector, the governors of the system refrained from any such initiatives. *See generally* J. GALBRAITH, MONEY: WHENCE IT CAME, WHERE IT WENT, 143-63 (1975). Indeed, an activist monetary policy was largely eschewed by the Federal Reserve Board even during the Depression when the agency acquired more substantial, centralized regulatory authority.*See* note 182 *infra*. An activist role was spurned, in fact, prior to the 1950s. *See generally* J. W. HURST, A LEGAL HISTORY OF MONEY IN THE UNITED STATES, 1774-1970, at 211-48 (1983).

[FN111]. *See, e.g.*, W. SWINDLER, COURT AND CONSTITUTION IN THE TWENTIETH

CENTURY: THE OLD LEGALITY 1889-1932, at 114 (1969) (discussing 'the point of difference between the legal iraditionalists and the accelerating Progressive Movement'). Swindler does, however, recognize that the views of the legal traditionalists were not always dominant.

[FN112]. 198 U.S. 45 (1905).

[FN113]. 247 U.S. 251 (1918).

[FN114]. Peckham found the state's justification unpersuasive:

Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employees, if the hours of labor are not curtailed.

Lochner, 198 U.S. at 61.

[FN115]. *Id.* at 74-76. Justices Harlan, White and Day also dissented, but they accepted the majority position that the fourteenth amendment created a distinct sphere of protection for private property. They differed on the facts of the case because they thought bakers as an occupational group could be included within the public health (police power) rationale for maximum hour legislation. *Id.* at 65-74.

[FN116]. Compare with the *Knight* case excluding manufacturing activity from the reach of the Sherman Act on similar grounds. *See* text accompanying note 72 *supra*.

[FN117]. *See Hammer*, 247 U.S. at 278-80. *Hammer* was a 5-4 opinion. *Cf.* Lottery Case, 188 U.S. 321 (1903) (prohibition on the interstate carriage of lottery tickets found constitutional); Hoke and Economides v. United States, 227 U.S. 308 (1913) (the Mann Act case, White Slave Traffic act approved).

[FN118]. 220 U.S. 45 (1911).

[FN119]. For discussion of the leading Supreme Court cases of the era, see A. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH. 1887-1895 (1960); B. TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT (1942).

[FN120]. 221 U.S. 488 (1911).

[FN121]. Pure Food and Drugs Act, ch. 3915, § 8, 34 Stat. 768, 770 (1906) (repealed 1938) (emphasis added).

[FN122]. Three justices dissented in an opinion by Justice Hughes that offered a detailed account of the legislative history supporting the broader construction of the statute. The majority opinion was written by Justice Holmes. Contrast his willingness to recognize great leeway in legislative authority to establish regulatory controls in *Lochner* with his restrictive reading of the regulatory authority in fact vested in the agency in the present case. Holmes uncharitable approach to agency powers in the*Johnson* case was not atypical, however. *See, e.g.*, FTC v. American Tobacco Co., 264 U.S. 298 (1924), discussed in text accompanying notes 126-128 *infra*.

[FN123]. In Sears, Roebuck & Co. v. FTC, 258 F. 307 (7th Cir. 1919), the first federal case posing the question, the Court of Appeals for the Seventh Circuit considered a false advertising claim against Sears, Roebuck that did not fall within the established common law categories of unfair competition. Disregarding Sears' protest, the court construed Section 5 broadly:

On the face of this statute the legislative intent is apparent . . .. The commissioners, representing the government as parens patriae, are to exercise their common sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices that have a capacity or a tendency to injure competitors directly or through deception of purchasers, quite irrespective of whether the specific practices in question have yet been denounced in common-law cases.

Id. at 311.

This warm embrace of administrative discretion was not to stand, however.

[FN124]. 253 U.S. 421 (1920).

[FN125]. 253 U.S. at 427-28.

[FN126]. FTC v. American Tobacco Co., 264 U.S. 298 (1924).

[FN127]. For a detailed account of the first decade of judicial review of FTC decisions, see C. McFARLAND, JUDICIAL CONTROL OF THE FTC AND THE ICC, 1920-1930, at 43-99 (1933). McFarland concludes:

[T]he history of judicial review of regulatory orders of the Federal Trade Commission clearly discloses that the judges substitute their own opinions for those of the commissioners or, even when sustaining the commission, hold themselves in readiness to reverse or modify orders with which they do not agree. The hopes of those who studied the situation during the first years have not been fulfilled.

Id. at 92.

[FN128]. 264 U.S. at 306.

[FN129]. *See* C. McFARLAND, *supra* note 127, at 120-22; and cases cited in G. HENDERSON, *supra* note 93, at 98. In the same period, a specialized tribunal, the Commerce Court, was established to review ICC determinations. Its life span was a short three years. For discussion, see I. SHARFMAN, *supra* note 54, at 60.

[FN130]. 204 U.S. 426 (1907).

[FN131]. 215 U.S. 452 (1910).

[FN132]. 215 U.S. at 470.

[FN133]. *See* Section 15, Interstate Commerce Act Amendments of 1906, 49 U.S.C. § 15 (1906).*Compare* Houston v. St. Louis Indep. Packing Co., 249 U.S. 479 (1919), construing the judicial review provisions of the Meat Inspection Act. Here too, the statutory standard was sufficiently vague that the Court could easily have adopted a de novo review position. Instead, the Court again exercised self-restraint—this time in entirely modern terms:

Whether or not the term 'sausage,' when applied to the product of the appellee, in which more than the permitted amount of cereal and water is used, is false and deceptive is a question of fact, the determination of which is committed to the decision of the Secretary of Agriculture by the authority given him to make rules and regulations for giving effect to the act, and the law is that the conclusion of the head of an executive department on such a question will not be reviewed by the courts, where it is fairly arrived at with substantial evidence to support it.

Id. at 484.

Why did the Court pass up the opportunity to exercise the same close scrutiny of this relatively new agency's decisions at it did in FTC cases? Perhaps comparative technical expertise—in later years, such an important consideration—was a factor. The Court may have despaired of its capacity to determine questions like the proportion of by product that divided 'sausage' from 'non-sausage.' These issues were standard fare for the Meat Inspection agency. By contrast, the FTC—at least at the outset—appeared to have been given a mandate to decide trade regulation issues which were of far greater consequence (and correspondingly, involved less technical detail).

[FN134]. On the contrasting judicial treatment of the ICC and FTC, see also C. McFARLAND, *supra* note 127, at 170-88. Consider as well, the sheer burden of de novo review of protracted ICC rate proceedings. While it is speculation, the Court may have taken on more heavy responsibilities in the 1890s than it bargained for. *See* note 57 *supra*.

[FN135]. As indicated earlier, *see* text accompanying notes 116-19 *supra*, *Hammer v. Dagenhart*declared an uncertain limit to federal expansion of police power-type regulation.

[FN136]. Major amendments to both the Food and Drugs Act and the Trade Commission Act were in fact passed in succeeding decades. *See* Food, Drug and Cosmetic Act of 1938, 21 U.S.C. §§ 321 and 1962 Amendments; Magnuson-Moss Warranty—Federal Trade Commission Improvements Act, 88 Stat. 2183 (1975), along with various labelling and packaging acts such as the Wool Products Act of 1939, Fur Products Labelling Act of 1951, Flammable Fabrics Act of 1953, Textile Fiber Products Identification Act of 1958 and Fair Packaging and Labelling Act of 1967.

[FN137]. *See* Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case*

of Classical Legal Thought in America, 1850-1940, in 3 RESEARCH IN LAW & SOCIOLOGY 3 (S. Spitzer ed.1980).

[FN138]. For a history of the war effort, see generally, R. CUFF, THE WAR INDUSTRIES BOARD: BUSINESS-GOVERNMENT RELATIONS DURING WORLD WAR I (1973); D. KENNEDY, OVER HERE (1980).

[FN139].

Appointed to the Naval Consulting Board in 1915, [Howard] Coffin [President of the Society of Automobile Engineers] immediately perceived that before standardization or any appreciable degree of industrial coordination could be effected there must first be a fund of information on which to base intelligent action. That fund simply did not exist. There were, for example, 450 automobile manufacturers in the United States in 1915, and no data had been compiled on their aggregate output, their relative efficiency in employing resources, or their ability to integrate production facilities in an emergency. The same was true of virtually every industry. Consequently, Coffin inaugurated a national industrial inventory, undertaken with the cooperation of the five largest engineering societies, and blessed by President Wilson.

D. KENNEDY, *supra* note 138, at 114.

[FN140]. *See id.* at 117-23.

[FN141]. *See id.* at 119-20.

[FN142]. For a discussion of Baruch's tenure at the War Industries Board, see J. SCHWARZ, THE SPECULATOR: BERNARD M. BARUCH IN WASHINGTON, 1917-1965, at 50-108 (1981).

[FN143]. D. KENNEDY, *supra* note 138, at 137.

[FN144]. A. HOOGENBOOM AND O. HOOGENBOOM, *supra* note 25, at 84-85.

[FN145]. *See, e.g.*, S. HAYS, *supra* note 78.

[FN146]. *See* notes 104-109 *supra* and accompanying text.

[FN147].

The act further allowed carriers to pool and combine if the ICC judged service would be improved and competition would not be ‘unduly’ restrained, required the ICC to prepare a consolidation plan dividing railroads into a limited number of systems which would preserve competition ‘as fully as possible,’ allowed the ICC to regulate intrastate rates that discriminated against interstate rates, and made into law the commission's long-short-haul policies. The new law also required that railroads obtain ICC permission to issue new railroad securities, regulated—through the commission—car distribution, called for automatic train control and other safety devices, required ICC permission for building new lines and abandoning old ones, empowered the ICC to insist on an adequate transportation service even if it would mean

extending existing lines, and in emergencies empowered the commission to unify the nation's railroads.

A. HOOGENBOOM AND O. HOOGENBOOM, *supra* note 25, at 96.

[FN148]. *See* Hawley, *Herbert Hoover, the Commerce Secretariat, and the Vision of an 'Associative State,' 1921-1928*, 61 J. AM. HIST. 116 (1974).

[FN149]. Certainly, the climate was right. The trade association movement was flourishing in the 1920s, growing in number from about 700 at the beginning of the decade to more than 2,000 at the end. *Seeid.* at 139. Obviously, government encouragement was a factor, in itself, in creating the favorable climate.

[FN150]. *See* Hawley, *Three Facets of Hooverian Associationalism: Lumber, Aviation and Movies, 1921-30*, in REGULATION IN PERSPECTIVE: HISTORICAL ESSANYS 95 (T. McCraw ed. 1981). Not all the government-sponsored activities were equally successful. *See id.* at 101-08, on associational activity in the lumber industry.

[FN151]. Hawley, *supra* note 148, at 118-19.

[FN152]. National Industrial Recovery Act [NIRA] ch. 90, 48 Stat. 195 (invalidated in Schechter v. United States, 295 U.S. 723 (1935)).

[FN153]. Comprehensive historical studies of the New Deal include P. CONKIN, FDR AND THE ORIGINS OF THE WELFARE STATE (1967); W. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932-1940 (1963); R. McELVAINE, THE GREAT DEPRESSION: AMERICA, 1929-1941 (1984); and 2 A. SCHLESINGER, JR., THE AGE OF ROOSEVELT [THE COMING OF THE NEW DEAL] (1959), and 3 *id.* [THE POLITICS OF UPHEAVAL] (1960).

[FN154]. The opposition, although initially muted, ranged from populist style antitrusters to ultra-conservative, wealthy industrialists. *See* note 238 *infra* and accompanying text (on the Liberty League); E. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY 29-31 (1966) (on Populist opposition).

[FN155].

It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources.

NIRA, *supra* note 152, § 1.

[FN156]. *See* E. HAWLEY, *supra* note 154, at 31-34, 55-62.

[FN157]. *See* R. MCELVAINE, *supra* note 153, at 124-28.

[FN158]. *See generally* E. HAWLEY, *supra* note 154, ch. 2.

[FN159]. Tugwell, a Columbia University economics professor, was a long-standing advocate of government planning and extensive administrative controls on the market. For a retrospective on the early New Deal, as he saw it, see R. TUGWELL, THE BRAINS TRUST (1968).

[FN160]. *See* E. HAWLEY, *supra* note 154, at 36-43.

[FN161]. *See* T. McCRAW, PROPHETS OF REGULATION, *supra* note 75, at 108-22.

[FN162]. *See* ROOSEVELT & FRANKFURTER: THEIR CORRESPONDENCE, 1928-1945 (M. Freedman annot. 1967); P. STRUM, LOUIS D. BRANDEIS 390-97 (1984). *See generally* P. IRONS, THE NEW DEAL LAWYERS 8-9 (1982).

[FN163]. E. HAWLEY, *supra* note 154, at 83.

[FN164]. P. CONKIN, *supra* note 153, at 35-36.

[FN165]. E. HAWLEY, *supra* note 154, at 33.

[FN166]. Consider, however, the less ambitious Commodity Credit Corp., which in a fashion reminiscent of the old Farmers' Alliance program, provided loans to farmers on the security of their crop. *See* P. CONKIN, *supra* note 153, at 42. On the agricultural program more generally, see 2 A. SCHLESINGER, JR.,*supra* note 153, at 40-67.

[FN167]. *See* M. PARRISH, SECURITIES REGULATION & THE NEW DEAL (1970).

[FN168]. The development and implementation of the TVA is concisely outlined in P. CONKIN, *supra*note 153, at 49-50.

[FN169]. For further discussion, see R. McELVAINE, *supra* note 153, at 162-65.

[FN170]. *See id.* at 149-51, 161-62. *See generally* E. GOLDMAN, RENDEZVOUS WITH DESTINY 346-52 (1958).

[FN171]. *See* R. McELVAINE, *supra* note 153, at 252-54.

[FN172]. Long's carcer is treated comprehensively in T. H. WILLIAMS, HUEY LONG (1969).

[FN173]. For a good treatment of Roosevelt's critics on the left, see W.

LEUCHTENBURG, *supra* note 153, ch. 5 (‘Waiting for Lefty’).

[FN174]. The critical weakness of each of these charismatic figures was that they had no national political organization. Yet, Roosevelt had to fear a third party movement that might make him vulnerable to a moderately conservative Republican candidate. There was also a serious erosion of New Deal support indicated by several popular state-based political movements such as the Progressive Party in Wisconsin, the Farmer-Labor Party in Minnesota, and Upton Sinclair's Democratic primary victory in California. *See* R. McELVAINE, *supra* note 153, at 231-37.

[FN175]. The standard early account is B. RAUCH, THE HISTORY OF THE NEW DEAL (1944). For a later discussion, see R. McELVAINE, *supra* note 153, at 250-63.

[FN176]. *See* R. McELVAINE, *supra* note 153, at 254-55, 265-75.

[FN177]. *See* W. LEUCHTENBURG, *supra* note 153, at 140-41.

[FN178]. *See* Skocpol & Ikenberry, *The Political Formation of the American Welfare State in Historical and Comparative Perspective*, 6 COMP. SOC. RESEARCH 87 (1983).

[FN179]. While payroll tax contributions under the Act created the illusion of a system in which benefit payments represented returns from individual ‘savings accounts,’ in reality Social Security involved substantial intrabeneficiary subsidies. Political considerations dictated portraying the system as ‘a huge set of public piggy banks into which individual prospective ‘beneficiaries' put away ‘contributions' for their own eventual retirement.’ *Id.* at 134.

[FN180]. Moreover, the Act also provided coverage for the unemployed and set up the AEDC program. However, these programs retained a significant component of state administration and control. For a critical analysis stressing the formative influence of Wisconsin Progressives on the New Deal approach to social security, see *id.* 178, at 120-39.

[FN181]. For a vivid account of the psychological impact of one such program, the Civilian Conservation Corps, consider the following:

By September, 1935, over five hundred thousand young men lived in CCC camps. In all, more than two and a half million would enlist: boys from the southern pines and the sequoia country of the West, boys from Bayonne and Cicero who had never seen forests or mountains before. They thinned four million acres of trees, stocked almost a billion fish, built more than 30,000 wildlife shelters, dug division ditches and canals, and restored Revolutionary and Civil War battlefields. They fought spruce sawflies and Mormon crickets in western forests, grasshoppers in the Midwest, gypsy moths in the East. They built a network of lookout towers and roads and trails so that first could be detected and reached more easily; when fires broke out, regiments of Roosevelt's ‘Tree Army’ were rushed to the front—forty-nine firefighters lost their lives. Above all, they planted trees—saplings of cedar and hemlock and poplar—in burned-over districts, on eroded hillsides, on bleak mountain slopes ruthlessly stripped of virgin timber.

W. LEUCHTENBURG, *supra* note 153, at 174.

[FN182]. In terms of impact, the Glass-Steagall Act of 1933, establishing the FDIC, can be viewed as the most significant piece of New Deal monetary legislation. In the second phase of the New Deal, the Banking Act of 1935 thoroughly revised the structure of the Federal Reserve System—centralizing control and providing greater independence in the Board of Governors, creating greater flexibility in reserve and rediscounting powers, and affording greater leverage for open market transactions. But central bank monetary policies can only succeed when the investment community is prepared to take advantage of a favorable climate for borrowing. There is general agreement among the scholars that, in the depths of the Depression, the increased authority vested in the Federal Reserve Board accomplished very little—despite the Board's efforts to stimulate private investment. *See* P. CONKIN, *supra* note 153, at 69; J. GALBRAITH, MONEY 196-97 (1975). By contrast, the FDIC, from the outset, created a sense of security for savers that contributed to drastically reducing the runs on financial institutions and the consequent number of bank failures.

[FN183]. The Public Utilities Holding Company Act was aimed at breaking up the massive utilities empires and monitoring the financial practices of their successors. Apart from its trust-busting aspect, the Act was essentially an extension of the disclosure and policing functions of the SEC. Overall, it was perhaps the clearest New Deal manifestation of the old Brandeisian hostility to bigness per se. *See* E. HAWLEY, *supra* note 154, at 329-37.

[FN184]. The NLRA represented unfinished business on the part of Congress. Organized labor had never effectively employed the bargaining power implicit in Section 7a of the NIRA. *See* P. IRONS, *supra* note 162, at 203-14. Recognizing the importance of his labor constituency and aware of their discontent over the failure of the NIRA. Roosevelt reluctantly threw his support behind the NLRA. *See* E. HAWLEY, *supra*note 154, at 195. The Act set up a new independent regulatory agency, the National Labor Relations Board, empowered to recognize bargaining units and police unfair labor practices throughout the industrial sector of the economy. Through this legislation, the federal government afforded organized labor the legitimacy long extended to big business.

[FN185]. In the case of the railroads, some observers would have argued that more extensive regulation was required because the enterprise was ‘quasi-public’ in nature. This view can be traced back at least as far as Munn v. Illinois, 94 U.S. 113 (1876), see notes 37-44 *supra*.

[FN186]. *See* sources cited in R. McELVAINE, *supra* note 153, at 365 n.5.

[FN187]. 291 U.S. 502 (1934).

[FN188]. *Nebbia* fulfilled Justice Field's prophecy, a half century earlier in his *Munn* dissent, that the category of ‘business affected with a public interest’ would prove inadequate for containing the regulatory power. On this score, the majority opinion in *Nebbia* concluded:

[W]hat constitutional principle bars the state from correcting existing maladjustments by legislation touching prices? We think there is no such principle. The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. . . .

[I]t is clear that there is no closed class or category of businesses affected with a public interest . . .. The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good.

291 U.S. at 531-32, 536.

[FN189]. 290 U.S. 398 (1934).

[FN190]. Chief Justice Hughes stated, 'The legislation is temporary in operation. It is limited to the exigency which called it forth . . .. [T]he operation of the statute . . . could not validly outlast the emergency [that spawned it] . . ..' 290 U.S. at 447.

[FN191]. The doctrinal orientation of law school courses often fails to provide a comprehensive treatment of the regulatory views of the New Deal Court. The delegation issue is examined, largely in isolation, in Administrative Law. Substantive due process and the commerce clause are taken up in Constitutional Law. But there is no attempt at synthesizing the varying techniques utilized over the past century to limit regulatory power.

[FN192]. On this score, consider that there was no serious constitutional challenge mounted against the New Deal securities legislation—the New Deal legislation most closely cut in the Progressive era pattern.

[FN193]. See discussion of the Progressive era court, notes 111-137 *supra* and accompanying text. The boundary of *state* regulatory power, expanded in *Nebbia*, was always more elusive because of its grounding in the historically well-recognized state police power.

[FN194]. 293 U.S. 388 (1935).

[FN195]. *Id.* at 406.

[FN196]. *Id.* at 431-32. The criminal enforcement provisions of the Petroleum Code had been invalidated by an independent bureaucratic mishap—they were inadvertently left out of the Executive Order promulgating the Code. For a detailed discussion of the *Panama Refining* litigation, see P. IRONS, *supra*note 162, at 58-74.

[FN197]. 293 U.S. at 435-37.

[FN198]. *See* R. PIERCE, S. SHAPIRO & P. VERKUIL, ADMINISTRATIVE LAW & PROCESS, § 3.4.1, at 52-53 (1985).

[FN199]. 295 U.S. 495 (1935).

[FN200]. *Id.* at 553.

[FN201]. *Id.* at 537. In passing, the Court also referred to the failure to establish 'quasi-judicial' administrative procedures for enacting codes, *id.* at 553, but quite clearly this argument was merely a make-weight.

[FN202]. 247 U.S. 251 (1918). *See* text accompanying note 116 *supra*.

[FN203]. 295 U.S. at 548-49.

[FN204]. *See* text accompanying note 163 *supra*.

[FN205]. P. IRONS, *supra* note 162, at 33. On the lax manner in which codes were drafted and the dominance of large industrialists, *see also* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 66 (1965).

[FN206]. *See, e.g.*, E. GOLDMAN, *supra* note 170, at 269-71 (discussing to Darrow reports).

[FN207]. The first authoritative historical study of the New Deal argued on the basis of production, price and payroll statistics that, if anything, the invalidating of the NIRA eliminated an obstacle to recovery and contributed to an economic upswing. *See* B. RAUCH, THE HISTORY OF THE NEW DEAL 206-07 (1944).

[FN208]. Compare Jaffe's equivocal conclusion in JUDICIAL CONTROL OF ADMINISTRATIVE ACTION,*supra* note 205:

Undoubtedly, it can be argued that considered realistically, *Schechter* has been put in the museum of constitutional history. But granting the existence of a doctrine limiting delegation (and almost no court has ever denied it), the doctrine is intelligible only in terms of the degree of delegation which the judiciary regards as appropriate in the circumstances. There are still differences of degree between the NRA on the one hand and the AAA and the OPA on the other. These examples suggest—and there are others including projected legislation not passed—that *Schechter* prods Congress into awareness of its responsibility for bringing major policy decisions into focus. Arguably the Court has given Congress a latitude broad enough for almost any administrative experiment believed at the time to be necessary. It may be that were the country to enter a new depression or become committed to general planning, insistence on the doctrine of the *Schechter* case might provoke a constitutional crisis.

Id. at 71-72.

[FN209]. 297 U.S. 1 (1936).

[FN210]. Stone, Brandeis, and Cardozo dissented in *Butler*.

[FN211]. In *Butler*, Justice Roberts issued his often ridiculed statement on the role of the Court in constitutional review of federal legislation:

When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty, to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question.

297 U.S. at 62-63. From a formal standpoint, Roberts' statement suggests an exceedingly modest view of the judge's role, a purely mechanistic function. Ironically, it served as the jurisprudential underpinning for a series of cases that set a high-water mark in activist review of legislative regulatory programs.

[FN212]. 298 U.S. 238 (1936).

[FN213]. Note that there are two distinct, formalist conceptual themes found in these cases: 1) a federal-state theme ('direct-indirect' burdens; 'purely local' activities, and so forth), and 2) a public-private theme (police power vs. private autonomy).

[FN214]. *Carter*, 298 U.S. at 303.

[FN215]. 198 U.S. 45 (1905).

[FN216]. 261 U.S. 525 (1923).

[FN217]. 298 U.S. 587 (1936).

[FN218]. 298 U.S. at 610-11.

[FN219]. *See id.*

[FN220]. 300 U.S. 379 (1937).

[FN221]. *Id.* at 398-99.

[FN222]. 301 U.S. 1 (1937).

[FN223]. *Id.* at 36-37 (citations omitted).

[FN224]. For a detailed discussion of the constitutional crisis, see Leuchtenburg, *The Origins of Franklin D. Roosevelt's 'Court-Packing' Plan*, 1966 SUP. CT. REV. 347.

[FN225]. 247 U.S. 251 (1918).

[FN226]. 312 U.S. 100 (1941).

[FN227]. 301 U.S. 548 (1937): *see also* Helvering v. Davis, 301 U.S. 619 (1937) (upholding the old-age provisions in the Act as a valid promotion of the general welfare).

[FN228]. United States v. Rock Roval Co-op, 307 U.S. 533 (1939); *see also* H. P. Hood & Sons, Inc. v. United States, 307 U.S. 588 (1939) (constitutional objections to the Agricultural Marketing keting Agreement Act and to several features of an order issued thereunder overruled on the authority of *Rock Royal*).

[FN229]. 317 U.S. 111 (1942).

[FN230]. *Id.* at 127.

[FN231]. As for the 'horsemen,' Van Devanter hung up his stirrups in 1937, Sutherland in 1938, Butler in 1940, and McReynolds in 1941.

[FN232]. *Cf.* Justice Harlan's dissenting opinion in *Lochner*, 198 U.S. at 65 (arguing that maximum hour legislation for bakers constituted an exercise of authority in the public health and welfare). Harlan disagreed with Peckham on the instant case, but not on his formalist schematization of public-private spheres of authority. For a more sympathetic view of Roberts, see Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311 (1955).

[FN233]. In 1934, the Communications Act was passed, consolidating radio, telephone, and telegraph regulation and establishing comprehensive regulatory power in the Federal Communications Commission. For a brief history of the regulation of communications before 1934, see J. HERRING & G. GROSS, TELECOMMUNICATIONS: ECONOMICS AND REGULATION 210-38 (1936).

[FN234]. *See* Behrman, *Civil Aeronautics Board*, in THE POLITICS OF REGULATION 75 (J. Wilson ed. 1980) (brief historical overview of the CAB and its activities).

[FN235]. *See* E. SANDERS, THE REGULATION OF NATURAL GAS: POLICY AND POLITICS, 1938-1978, at 46-47 (1981).

[FN236]. In this regard, the case for a New Deal model of regulatory activity is somewhat overstated in Ackerman & Hassler, *Beyond the New Deal: Coal and the Clean Air Act*, 89 YALE L.J. 1466 (1980). *See also id.* at 1471 n.10 (cited references discuss certain ideals characteristic of the New Deal, such as affirmation of expertise, agency insulation from political control, and insulation from judicial oversight). For example, the NIRA, AAA and even the NLRB were not established to utilize 'expertise.' Moreover, the ICC, FCC, and CAB were not designed to accomplish objectives which were particularly central to the New Deal. Finally, the SEC and NLRB do not fit the blank-check delegation model.

[FN237]. Still, it is important to maintain a sense of perspective. While the problem of massive unemployment was addressed by the enactment of a federal unemployment insurance program, neither the New Deal nor later political administrations supported the more farreaching initiative of a comprehensive national program for guaranteeing jobs to the unemployed. Similarly, although federal monetary policy was utilized to influence the operation of the economy, continuing disruptions in the business cycle did not lead to nationalization of the banks. Innumerable other instances could be offered. My point is that the employment of federal regulatory power continued to be tempered by a commitment to a privately run economy.

[FN238]. On the Liberty League, see A. SCHLESINGER, THE AGE OF ROOSEVELT. THE POLITICS OF UPHEAVAL 518-23 (1960).

[FN239]. For a discussion of the *Panama Refining* case and the events leading up to it, see P. IRONS,*supra* note 162, at 58-74.

[FN240]. *Schechter Poultry Corp.*, 295 U.S. at 532-33, 541.

[FN241]. *Report of the Special Committee on Administrative Law*, 63 A.B.A. REP. 331, 346-51 (1938). A year earlier, the first in a succession of presidential study commissions issued a report (the Brownlow Report) urging incorporation of the independent regulatory agencies into 12 single-headed executive departments responsible directly to the President and separation of the administrative, prosecutorial and adjudicatory functions of the agencies. *See* PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, REPORT WITH SPECIAL STUDIES (1937). For a critique of the committee's report, see Jaffe, *Invertive and Invertigation in Administrative Law*, 52 HARV. L. REV. 1201, 1236-42 (1939).

[FN242]. For discussion and critique of the bill, see Landis, *Crucial Issues in Administrative Law: The Walter-Logan Bill*, 53 HARV. L. REV. 1077 (1940). Among others, the exempted agencies included the Federal Reserve System, the Federal Trade Commission, the Interstate Commerce Commission and the Department of State.

[FN243]. *See* ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 8, 77th Cong., 1st Sess. (1941). Kenneth Culp Davis has described the outcome of the committee's deliberations:

A committee of distinguished practitioners, judges, and professors was appointed, which set about its tasks in scholarly fashion. It went after the facts. Its staff interviewed administrative officers, subordinates in the agencies, and practitioners who had had cases before the agencies. A detailed monograph was written on each agency, and the committee and the agency then discussed the problems raised. Thereafter the committee held public hearings to receive opinions concerning the descriptions of procedures and the criticisms in the monographs. An elaborate report was finally prepared, which, with its appendices, fills 474 printed pages. This report, together with the monographs on which it is based, is still a primary source of information about the federal administrative process; even though it is out of date, no new comprehensive study has penetrated so far.

K. DAVIS, ADMINISTRATIVE LAW TEXT 8-9 (3d ed. 1972).

[FN244]. The majority report of the Attorney General's Committee accepted the concept of independent regulatory agencies. In response to the concern about the separation of powers, the report proposed a corps of independent hearing examiners. More generally, the majority report set forth a standardized set of procedural safeguards for agency decisionmaking. The final version of the APA was a compromise between the majority's views and those of critics like the ABA. K. DAVIS, *supra* note 243, at 9.

[FN245]. *See* 5 U.S.C. §§ 553(b)-(c), 706(2)(A) (1982).

[FN246]. Indeed, the ambivalent position taken in the APA sparked a major controversy over

legislative intent thirty years later. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978); notes 426-434 *infra* and accompanying text.

[FN247]. *See* 5 U.S.C. §§ 554, 556, 557, 706(2)(E), 3105 (1982).

[FN248]. These principles, however, were still somewhat unsettled. *See, e.g.*, Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) (dealing with the question of whether a 'substantial evidence' standard required judicial scrutiny of the entire record).

[FN249]. Perhaps the most important new agency formed during this period was the Atomic Energy Commission, established under the Atomic Energy Act of 1954. At the same time, there were major substantive revisions to many of the existing regulatory schemes, such as the 1947 Taft-Hartley amendments to the National Labor Relations Act. From a broader perspective, the post-World War II period witnessed enormous growth in the magnitude of the administrative state, in response to massive spending on military weaponry. *See* J. CLAYTON, THE ECONOMIC IMPACT OF THE COLD WAR (1970). But this important phenomenon is outside the scope of the present study.

[FN250]. J. LANDIS, THE ADMINISTRATIVE PROCESS (1938).

[FN251]. *See* T. McCraw, *supra* note 75, at 181-88.

[FN252]. J. LANDIS, *supra* note 250, at 13.

[FN253]. *Id.* at 23-24.

[FN254]. *See, e.g., id.* at 143-45.

[FN255]. 322 U.S. 111 (1944).

[FN256]. *Id.* at 130.

[FN257]. The *Hearst* case, in turn, relied on Gray v. Powell, 314 U.S. 402 (1941).

[FN258]. 320 U.S. 297 (1943).

[FN259]. *Compare id. with* Stark v. Wickard, 321 U.S. 288 (1944). *See generally* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 343-48 (1965).

[FN260]. 302 U.S. 464 (1938).

[FN261]. 309 U.S. 470 (1940).

[FN262]. 310 U.S. 113 (1940).

[FN263]. *See generally* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION

501-31 (1965).

[FN264]. 47 U.S.C. § 402(b)(6) (1982).

[FN265]. *See also* Associated Indus. of N.Y., Inc. v. Ickes, 134 F.2d 694 (2d Cir.), vacated as moot, 320 U.S. 707 (1943).

[FN266]. *See* notes 183-186 *supra* and accompanying text.

[FN267]. The Court might well have reacted otherwise. Three decades later the Court was disposed to 'brake' its recognition of new substantive regulatory powers through a highly activist judicial review.

[FN268]. SEC v. Chenery Corp. [Chenery I], 318 U.S. 80 (1943).

[FN269]. *Id.* at 92.

[FN270]. SEC v. Chenery Corp. [Chenery II], 332 U.S. 194 (1947).

[FN271]. *Id.* at 203.

[FN272]. *Id.* at 207.

[FN273]. Morgan v. United States [Morgan I], 298 U.S. 468 (1936).

[FN274]. *Id.* at 481.

[FN275]. *Id.*

[FN276]. United States v. Morgan [Morgan IV], 313 U.S. 409 (1941).

[FN277]. *Id.* at 422.

[FN278]. Post-New Deal administrative law doctrine is discussed in comprehensive detail in L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965).

[FN279]. For a discussion of these major holdings, see K. DAVIS, ADMINISTRATIVE LAW TREATISE (Supp. 1970).

[FN280]. On informal relations in the regulatory process, see Stewart, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, 1985 WIS. L. REV. 655; Rabin, *Some Thoughts on the Dynamics of Continuing Relations in the Administrative Process*, 1985 WISC. L. REV. 741.

[FN281]. For treatment of Lyndon Johnson's relationship to the New Deal, see R. CARO, THE YEARS OF LYNDON JOHNSON: THE PATH TO POWER (1982).

[FN282]. *See* S. LEVITAN, THE GREAT SOCIETY'S POOR LAW 13 (1969) (discussing M. HARRINGTON, THE OTHER AMERICA). On the evolution of the War on Poverty generally, see Sundquist, *Origins of the War on Poverty*, in ON FIGHTING POVERTY (J. Sundquist ed. 1969); J. DONOVAN, THE POLITICS OF POVERTY (1967); F. PIVEN & R. CLOWARD, REGULATING THE POOR 248-338 (1971).

[FN283]. S. LEVITAN, *supra* note 282, at 18.

[FN284]. Sundquist stresses the linkage between MFY and other developing ‘streams' the fed the War on Poverty from an ideological perspective—programs in the areas of urban renewal, manpower retraining, and public welfare. *See* J. Sundquist, *supra* note 282, at 8-19.

[FN285]. *See generally* P. MARRIS & M. REIN, DILEMMAS OF SOCIAL REFORM (1967) (discussing the central role of community action reform in antipoverty policy of the 1960s).

[FN286]. F. PIVEN & R. CLOWARD, *supra* note 282, at 260.

[FN287]. For a case study perspective, see R. KRAMER, PARTICIPATION OF THE POOR: COMPARATIVE CASE STUDIES IN THE WAR ON POVERTY (1969). For a history and critique of the community action programs, see D. MOYNIHAN, MAXIMUM FEASIBLE MISUNDERSTANDING (1969).

[FN288]. F. PIVEN & R. CLOWARD, *supra* note 282, at 266.

[FN289]. Moreover, the community action programs were only one title in the Economic Opportunity Act.*See* D. MOYNIHAN, *supra* note 287, at 75-100.

[FN290]. F. PIVEN & R. CLOWARD, *supra* note 282, at 261.

[FN291]. Unlike the New Deal, it was not at all clear that a successful War on Poverty would translate directly into a favorable electoral position. The search for a Great Society-type program was in large measure a case of a president in pursuit of a permanent place in history.

[FN292]. For a more detailed documentation of the link between the Great Society and the welfare rights movement, see F. PIVEN & R. CLOWARD, *supra* note 282, at 290.

[FN293]. *Id.* at 324.

[FN294]. *See* F. PIVEN & R. CLOWARD, POOR PEOPLE'S MOVEMENTS 295-96 (1977).

[FN295]. Piven & Cloward, *A Strategy to End Poverty*, 202 THE NATION 510 (1966).

[FN296]. In fact the New York chapter, which had been the largest, actually collapsed in 1969—and the Massachusetts chapter less than a year later. *See* F. PIVEN & R. CLOWARD, *supra* note 294.

[FN297]. On the evolution of the Family Assistance Plan, see D. MOYNIHAN, THE POLITICS OF A GUARANTEED INCOME: THE NIXON ADMINISTRATION AND THE FAMILY ASSISTANCE PLAN (1973).

[FN298]. In fact, the structural underpinnings of the Great Society—the community action and legal service programs—were largely dismantled, victimized by a backlash against large-scale domestic spending and continued involvement in Vietnam. This is not to say that the programs vanished without a trace. On the contrary, two decades later many of the health and education initiatives exhibited a continuing vitality. *See* Rosenbaum, *Twenty Years Later. The Great Society Flourishes,* N.Y. Times, Apr. 17, 1985, at 1, col. 4.

But failures of implementation, as well as crosion of political support, seriously undermined the impact of a variety of key Great Society programs. *See, e.g.*, J. Murphy, *The Educational Bureaucracies Implement Novel Policy: The Politics of Title I of ESEA, 1965-1972*, in POLICY AND POLITICS IN AMERICA: SIX CASE STUDIES (A. Sindler ed. 1973).

[FN299]. For an extended treatment of the these that America has been unable to develop a strong national government and regulatory system because of its deep-seated commitment to individualism and to an individualistic style of politics, see B. KARL, THE UNEASY STATE: THE UNITED STATES FROM 1915 TO 1945 (1983).

[FN300]. *See, e.g.*, Lilley & Miller, *The New 'Social Regulation*.' 47 THE PUBLIC INTEREST 49 (1977) (which simply ignores the conservation theme in its treatment of environmentalism).

[FN301]. On the divergent themes in the conservation movement itself, compare J. SAX, MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS (1980) (examining the interaction between preservationist policy and public opinion in determining appropriate use of the national parks), with S. HAYS, *supra* note 145. *See generally* R. NASH, WILDERNESS AND THE AMERICAN MIND (3d ed. 1982) (a history of the idea of wilderness in American though from settlement through recent environmental legislation).

[FN302]. *Compare* Friedman & Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50 (1967) (describing the origins of the workers' compensation movement) *with* M. NADEL, THE POLITICS OF CONSUMER PROTECTION (1971) (dealing with the history of consumerism).

[FN303]. *See, e.g.*, W. TUCKER, PROGRESS AND PRIVILEGE: AMERICA IN THE AGE OF ENVIRONMENTALISM (1982).

[FN304]. Andrews, *Class Politics or Bureaucratic Reform: Environmentalism and American Political Institutions*, 20 NAT. RESOURCES J. 221, 223 (1980).

[FN305]. Consider that in 1965, a nationwide poll showed that only 28% of the population viewed air pollution as a very serious problem in their area, as compared to other parts of the country. By 1970, the figure had risen to 69% of the population. *See* Erskine, *The Polls:*

Pollution and Its Costs, 36 PUB. OPINION Q. 120, 121 (1972). According to a Harris Poll, and 1967, 44% of the population said it would be willing to pay $15 more in taxes to finance a federal program for air pollution control. By 1971, 59% of those polled responded in the affirmative. *Id.* at 132.

[FN306]. Traditional environmental groups such as the Sierra Club, Friends of the Earth, and the Wilderness Society tended to be primarily interested in preservation issues. To the limited extent that they were involved in lobbying or litigation before the Public Interest era, it was to defend natural resources. In contrast, the new public interest groups active in the 1970s, like EDF and NRDC, strongly emphasized pollution control issues. Clearly, there were overlapping areas of concern in the Public Interest era—NRDC engaged in Forest Service litigation in defense of roadless areas, and SCLDF became involved in pollution control cases under the Clean Air Act, for example—but the constituencies of these groups and issues remained relatively distinct.

[FN307]. Consider, for example, the discussion at text accompanying note 160 *supra*, of the influence of post—Progressive associationalism on the New Deal, or more narrowly, the impact of the ICC model on the structure of the Federal Trade Commission.

[FN308]. The most obvious link would be between Ralph Nader and Progressive era reformers. *See generally* S. LAZARUS, THE GENTEEL POPULISTS (1974) (reviewing the social and historical context of the late 1960s and early 1970s reform movements).

[FN309]. *See* W. ROSENBAUM, THE POLITICS OF ENVIRONMENTAL CONCERN 57-60 (1973); *see also*Andrews, *supra* note 304, at 230.

[FN310]. For discussion and citation of sources, see Roberts & Stewart, Book Review, 88 HARV. L. REV. 1644 (1975).

[FN311]. The pluralist critique, which emphasizes the role of interest groups in determining public policy initiatives, is explored in T. LOWI, THE END OF LIBERALISM (1969).

[FN312]. The limitations of tort law and early antipollution legislation are analyzed in R. STEWART & J. KRIER, ENVIRONMENTAL LAW AND POLICY (2d ed. 1978).

[FN313]. This phenomenon was early recognized by the courts. *See, e.g.*, Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). *See* text accompanying notes 381-384 *infra*.

[FN314]. For an account of the General Motors episode, see C. McCARRY, CITIZEN NADER 3-29 (1972).

[FN315]. Wholesome Meat Act of 1967, 21 U.S.C. §§ 641-645, 661 (1982).

[FN316]. *See* H.R. REP. 1107, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7702 (discussing Consumer Products Warranties—Federal Trade Commission Improvements Act).

[FN317]. A number of consumer protection laws followed the 1966 Motor Vehicle Safety Act. Some of the most significant legislation of this period, apart from enactments mentioned in the text, included the Federal Cigarette Labeling and Advertising Act of 1966, the Child Protection Act of 1966, the Fair Packaging and Labeling Act of 1966, the Wholesome Poultry Products Act of 1967, the Flammable Fabrics Act of 1967, the Natural Gas Pipeline Safety Act of 1968, the Federal Consumer Credit Protection Act of 1968, the Radiation Control Act of 1968, the Coal Mine Health and Safety Act of 1969, the Child Protection and Safety Toy Act of 1969, the Fire Research and Safety Act of 1969, and the Fair Credit Reporting Act of 1970.

[FN318]. These congressional schemes, which are only the most prominent among a considerably wider array of legislation, include the Clean Air Act of 1970, the Federal Water Pollution Control Act of 1972, the Occupational Safety and Health Act of 1970, the Resource Conservation and Recovery Act of 1976, the Toxic Substances Control Act of 1976, the National Environmental Policy Act of 1969, and the Endangered Species Act of 1972. For a description of the vast panoply of environmental legislation passed in this period, see W. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW (1977).

[FN319]. The Occupational Safety and Health Administration was established by the Occupational Safety and Health Act. The Environmental Protection Agency, which was given authority over much of the pollution control legislation of the 1970s, was set up by executive order of Richard Nixon. The Council on Environmental Quality was established by the National Environmental Policy Act.

[FN320]. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified at42 U.S.C. § 4331 (1982)).

[FN321]. 42 U.S.C. § 4331(a) (1982) reads:

The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

On the origins of NEPA, see R. LIROFF, A NATIONAL POLICY FOR THE ENVIRONMENT: NEPA AND ITS AFTERMATH (1976), and R. ANDREWS, ENVIRONMENTAL POLICY AND ADMINISTRATIVE CHANGE: IMPLEMENTATION OF NATIONAL ENVIRONMENT POLICY ACT (1976).

[FN322]. *See* 42 U.S.C. § 4344 (1982).

[FN323]. 42 U.S.C. § 4332(2)(C) (1982).

[FN324]. *See* text accompanying notes 239-249 *supra*.

[FN325]. *See* H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS (1962).

[FN326]. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

[FN327]. Landis' view is discussed in the text accompanying notes 250-254 *supra*.

[FN328]. Perhaps the high-water mark for the New Property concept was Goldberg v. Kelly, 397 U.S. 254, 257 n.3 (1970), requiring a 'fair hearing' prior to termination of AFDC recipients. In the welfare rights area, another Reich article, *Individual Rights and Social Welfare: The Emerging Legal Issue*, 74 YALE L.J. 1245 (1965), was also influential.

[FN329]. On this score, compare the Freedom of Information Act of 1966, 5 U.S.C. § 552 (1982), which constituted yet another strategy for controlling administrative discretion—one based on widespread access to agency records and decisions. *See generally* K. DAVIS, ADMINISTRATIVE LAW TEXT 68-87 (3d ed. 1972).

[FN330]. The silence of the Act on these critical questions established a fertile field for litigation. *See generally* F. ANDERSON, NEPA IN THE COURTS (1973).

[FN331]. A comprehensive organizational perspective on NEPA is offered in S. TAYLOR, MAKING BUREAUCRACIES THINK (1984).

[FN332]. Wilderness Soc'y v. Morton, 479 F.2d 842 (D.C. Cir. 1973), *cert. denied*, 411 U.S. 917 (1973).

[FN333]. *See* ENVIRONMENTAL QUALITY: THE FIFTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 388-89 (1974).

[FN334]. Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm., 449 F.2d 1109, 1115 (D.C. Cir. 1971).

[FN335]. *See generally* Taylor, *supra* note 331, at 232-74. For an early, widely cited skeptical view, see Sax, *The (Unhappy) Truth About NEPA*, 26 OKLA. L. REV. 239 (1973).

[FN336]. Pub. L. No. 91-604, 84 Stat. 1676 (1970) (codified at 42 U.S.C. § 7401 (1982)). Consider also the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified at 33 U.S.C. § 1251 (1982)), discussed and analyzed in W. RODGERS, *supra* note 318, at 354-68 (1977).

[FN337]. The Clean Air Amendments of 1970 are described in detail in W.

RODGERS, *supra* note 318, at 214-353.

[FN338]. *See* B. ACKERMAN & W. HASSLER, CLEAN COAL/DIRTY AIR 4-12 (1981).

[FN339]. 42 U.S.C. § 1857c-3 (1970). In the 1977 Amendments, the language was changed to read 'may reasonably be anticipated to endanger public health or welfare.'

[FN340]. *See* Pub. L. No. 91-604, § 4(a), 84 Stat. 1676, 1678-80 (1970) (current version at 42 U.S.C. §§ 7408-7410 (1982)). Primary emissions standards governed health risks. Secondary standards, which were to be achieved within a 'reasonable' time, governed 'welfare' risks—risks to nonhuman receptors such as plants, animals, and materials.

[FN341]. Pub. L. No. 91-604, § 6(a), 84 Stat. 1676, 1690 (1970) (current version at 42 U.S.C. § 7521(b)(1) (1982)).

[FN342]. The criteria were:

[T]hat (i) such suspension is essential to the public interest or the public health and welfare of the United States, and (ii) all good faith efforts have been made to meet the standards established by [the Amendments], (iii) the applicant has established that effective control technology, processes, operating methods, or other alternatives are not available or have not been available for a sufficient period of time to achieve compliance prior to the effective date of such standards, and (iv) the study and investigation of [emission control technology by] the National Academy of Sciences [which the Amendments require] and other information available to [the Administrator] has not indicated that technology, processes, or other alternatives are available to meet such standards.

The administrator's refusal to grant the auto manufacturers' subsequent request for extension was reversed in International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973).

[FN343]. *See* note 180 *supra* and accompanying text.

[FN344]. For treatment of the characteristics of federal grant programs, see M. DERTHICK, THE INFLUENCE OF FEDERAL GRANTS: PUBLIC ASSISTANCE IN MASSACHUSETTS (1970).

[FN345]. Clean Air Amendments of 1970, Pub. L. No. 91-604, § 4(a), 84 Stat. 1678, 1683 (current version at 42 U.S.C. § 7411(a)(1) (1982)). The 1977 Amendments again revised the provision. The principal change was inclusion of a special standard for coal-fired utilities. *See* Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 109(C)(1)(A), 91 Stat. 685, 700 (current version at 42 U.S.C. § 7411(a)(1)(A) (1982)).

[FN346]. Securities Act of 1933, ch. 38, tit. I, 48 Stat. 74 (current version at 15 U.S.C. §§ 77a-77b (1982)); Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (current version at 15 U.S.C. §§ 78a-78k (1982)); Internal Revenue Code of 1939, ch. 2, 53 Stat. 1 (current version at 26 U.S.C. §§ 1-9601 (1982)).

[FN347]. *See* Schoenbrod, *Goals Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 U.C.L.A. L. REV. 740 (1983); *cf.* Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183 (1973)(criticizing broad delegation of powers to administrative agencies).

[FN348]. Clean Air Amendments of 1970, Pub. L. No. 91-604, § 4(a), 84 Stat. 1676, 1683 (current version at 42 U.S.C. § 7411(a)(1) (1982)).

[FN349]. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 129(b), 91 Stat. 685, 747 (current version at 42 U.S.C. § 7502(b)(3) (1982)).

[FN350]. *Id.* at § 129(b), 91 Stat. 685, 748 (current version at 42 U.S.C. § 7503(2) (1982)).

[FN351]. *Id.* at § 129(a), 91 Stat. 685, 736 (current version at 42 U.S.C. § 7475(a)(4) (1982)).

[FN352]. *See also* notes 367-369, 372 *infra*.

[FN353]. But provisions for variances and lax enforcement further diluted the uncompromising character of the Act. The statutory provisions are discussed in Currie, *Federal Air-Quality Standards and Their Implementation*, 1976 AM. B. FOUND. RESEARCH J. 365.

[FN354]. For discussion, see L. LAVE & G. OMENN, CLEARING THE AIR: REFORMING THE CLEAN AIR ACT (1981).

[FN355]. Litigation under the Act is systematically discussed in S. MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT (1983).

[FN356]. Compare the Federal Water Pollution Control Act of 1972, which went so far as to proclaim a zero-pollution goal, triggering a presidential veto. Nonetheless, the veto was overridden by overwhelming majorities in the House and Senate. *See* A. MARCUS, PROMISE, AND PERFORMANCE: CHOOSING AND IMPLEMENTING AN ENVIRONMENTAL POLICY 142-43 (1980).

[FN357]. *See* R. LIROFF, A NATIONAL POLICY FOR THE ENVIRONMENT: NEPA AND ITS AFTERMATH 18-20 (1976).

[FN358]. *See id.* at 16-18.

[FN359]. J. ESPOSTTO, VANISHING AIR: THE RALPH NADER STUDY GROUP REPORT ON AIR POLLUTION 269-78, 287-94 (1970). The process of legislative enactment of the CAA is discussed in Ingram, *The Political Rationality of Innovation: The Clean Air Act Amendments of 1970*, in APPROACHES TO CONTROLLING AIR POLLUTION 12-56 (A. Friedlaender ed. 1978).

[FN360]. *See* R. LIROFF, *supra* note 357, at 30-31 (discussing passage of the NEPA); Ingram, *supra* note 359, at 29-38 (discussing passage of the CAA).

[FN361]. The strong version of this thesis, *see* note 33 *supra*, is found in two historical studies, G. KOLKO, RAILROADS AND REGULATION 1877-1916 (1965) (dealing with the events leading to the enactment of the Interstate Commerce Act): G. KOLKO, TRIUMPH OF CONSERVATISM (1963) (analyzing the origins of federal regulatory legislation in the Progressive era).

[FN362]. *See* J. WILSONS, THE POLITICS OF REGULATION 364-72 (1980).

[FN363]. Bigness per se had been attacked at the turn of the century, and business practices were challenged in the Depression, but the positive value of growth in industrial output had never been pervasively questioned before.

[FN364]. *See* WILSON, *supra* note 362, at 370-72.

[FN365]. For a catalogue of Nixon's anti-environmental actions, see NIXON AND THE ENVIRONMENT: THE POLITICS OF DEVASTATION (J. Rathlesberger ed. 1972). A more balanced view is found in R. ANDREWS, ENVIRONMENTAL POLICY AND ADMINISTRATIVE CHANGE IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT 21-27 (1976).

[FN366]. *See generally* C. McCARRY, *supra* note 301.

[FN367]. As the next section will indicate, this phenomenon is mirrored in the courts, where the emphasis on process—rather than legitimacy—was increasingly intensified.

[FN368]. *See* text accompanying note 186 *supra*.

[FN369]. *See* text accompanying note 290 *supra*.

[FN370]. It should be emphasized, however, that key Public Interest era regulatory schemes explicitly provided for private rights of action. *See generally* Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982). For discussion of alternatives to command-and-control regulation, see F. ANDERSON, ENVIRONMENTAL IMPROVEMENT THROUGH ECONOMIC INCENTIVES (1977).

[FN371]. *See* text accompanying notes 169-186 *supra*.

[FN372]. *See* text accompanying notes 255-278 *supra*.

[FN373]. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 150-57 (2d ed. 1978). For a leading contemporaneous defense of the need to revitalize the nondelegation doctrine, see T. LOWI, THE END OF LIBERALISM 128-56 (1969). *See generally*, Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982).

[FN374]. *See* Reich, *The New Property*, 73 YALE L.J. 733 (1964).

[FN375]. *See, e.g.*, H. FRIENDLY, THE FEDERAL ADMINISTRATIVE ACENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS (1962).

[FN376]. A decade earlier, this view was afforded widespread academic currency in a much-discussed 'life cycle' theory. *See* M. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 74-95 (1955). As Louis Jaffe has pointed out, however, the captive agency model failed to explain some clear instances of regulatory conduct that departed from the interests of agency clients. *See* Jaffe, *The Effective Limits of the Administrative Process: A Re-Evaluation*, 67 HARV. L. REV. 1105 (1954).

The most widely publicized treatment of the captive agency phenomenon in the Public Interest era was the series of Nader Reports, beginning with the famous study of the FTC. *See* E. COX, R. FELLMETH & J. SCHULZ, THE NADER REPORT ON THE FEDERAL TRADE COMMISSION (1969). *See generally* Schuck, Book Review, 90 YALE L.J. 702 (1981) (discussion of the politics of regulation from 1965 to 1980).

[FN377]. 359 F.2d 994 (D.C. Cir. 1966).

[FN378]. *See* Abel, Clift & Weiss, *Station License Revocation and Denials of Renewals, 1934-1969*. 14 J. BROADCASTING 411 (1970).

[FN379]. 359 F.2d at 1003-04.

[FN380]. Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969).

[FN381]. 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

[FN382]. *Id.* at 620.

[FN383]. On the development of the public interest law movement, see B. WEISBROD, J. HANDLER & N. KOMESAR, PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS (1978); Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207 (1976).

[FN384]. For a discussion of NEPA, see text accompanying notes 322-335 *supra*.

[FN385]. *See* Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

[FN386]. 453 F.2d 463 (2d Cir. 1971).

[FN387]. The case was finally settled in December, 1980. *See* N.Y. Times, Dec. 20, 1980, at 1, col. 1. For discussion of the settlement process, see Hudson River Power Plant Settlement: Materials Prepared for a Conference Sponsored by the N.Y.U. Law School and the N.R.D.C. (K. Sandler & D. Schoenbrod eds. 1981) (unpublished manuscript); *see also* Schoenbrod, *Limits and Dangers of Environmental Mediation: A Review Essay*, 58 N.Y.U. L. REV. 1453, 1461-62

(1983).

[FN388]. *See* Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*,403 U.S. 923 (1971). Initially, the 'hard look' principle applied to the *agency's* responsibilities in formulating a policy or reaching a decision. But the courts soon expanded the notion to encompass judicial responsibilities in reviewing an administrative record.

[FN389]. *See generally* R. LIROFF, *supra* note 357 (discussion of the results of the passage of NEPA).

[FN390]. *See* L. WENNER, THE ENVIRONMENTAL DECADE IN COURT 44-47 (1982); F. ANDERSON, NEPA IN THE COURTS 239-45 (1973). *See generally* 16 NATURAL RESOURCES J. (1976) (articles on the implementation of NEPA).

[FN391]. *See* 16 U.S.C. § 803(a) (1982).

[FN392]. 401 U.S. 402 (1971).

[FN393]. 49 U.S.C. § 303 (1982).

[FN394]. *See* text accompanying notes 243-249 *supra*.

[FN395]. Morgan v. United States [Morgan IV], 313 U.S. 409 (1941); *see also* text accompanying notes 273-278 *supra*.

[FN396]. 401 U.S. at 420.

[FN397]. As Judge Bazelon put it in a widely cited passage from a contemporaneous case suspending the use of DDT:

We stand on the threshold of a new era in the history of the long and fruitful collaboration of administrative agencies and reviewing courts. For many years, courts have treated administrative policy decisions with great deference, confining judicial attention primarily to matters of procedure. On matters of substance, the courts regularly upheld agency action, with a nod in the direction of the 'substantial evidence' test, and a bow to the mysteries of administrative expertise. Courts occasionally asserted, but less often exercised, the power to set aside agency action on the ground that an impermissible factor had entered into the decision, or a crucial factor had not been considered. Gradually, however, that power has come into more frequent use, and with it, the requirement that administrators articulate the factors on which they base their decisions.

EDF v. Ruckelshaus, 439 F.2d 584, 597 (D.C. Cir. 1971) (citation omitted).

[FN398]. 401 U.S. at 411-13.

[FN399]. *See, e.g.*, Union Electric Co. v. EPA, 427 U.S. 246 (1976); Lead Industries Assoc. v. EPA, 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980).

[FN400]. TVA v. Hill, 437 U.S. 153 (1978).

[FN401]. American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490 (1981).

[FN402]. 437 U.S. 153 (1978).

[FN403]. *See* text accompanying note 318 *supra*.

[FN404]. *See e.g.*, Kennecott Copper Corp. v. EPA, 462 F.2d 846 (D.C. Cir. 1972) (challenging the secondary standards established for sulfur dioxide); Lead Industries Assoc. v. EPA, 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980). *See generally* R. CRANDALL & L. LAVE, THE SCIENTIFIC BASIS OF HEALTH AND SAFETY REGULATION (1981).

[FN405]. *See* Yellin, *High Technology and the Courts*, 94 HARV. L. REV. 489 (1981).

[FN406]. *See, e.g.*, Industrial Union Dept., AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980)(benzene standard).

[FN407]. *See* Reserve Mining Co. v. EPA, 514 F.2d 492 (8th Cir. 1975). The *Reserve Mining* controversy is fully treated in F. SCHAUMBERG, JUDGMENT RESOLVED: A LANDMARK ENVIRONMENTAL CASE (1976).

[FN408]. *Reserve Mining Co.*, 514 F.2d at 519-20, 535-40.

[FN409]. *See* S. MELNICK, *supra* note 355, at 68-70.

[FN410]. 462 F.2d 846 (D.C. Cir. 1972).

[FN411]. *Id.* at 848. *See* APA § 4, 5 U.S.C. § 553(c) (1982).

[FN412]. The court remonstrated that:

There are contexts, however, contexts of fact, statutory framework and nature of action, in which the minimum requirements of the Administrative Procedure Act may not be sufficient. In the interest of justice . . . and in aid of the judicial function, centralized in this court, of expeditious disposition of challenges to standards, the record is remanded for the Administrator to supply an implementing statement that will enlighten the court as to the basis on which he reached the 60 standard from the material in the Criteria.

Kennecott Copper, 462 F.2d at 850 (citations omitted).

[FN413]. *See* text accompanying note 245 *supra*.

[FN414]. The EPA's proposed regulations for Portland cement producers, sulfuric acid plants, and coal-fired steam generators were published in 36 Fed. Reg. 15,704 (1971). The sulfur dioxide standards were published as part of the EPA's ‘National Primary and Secondary Air

Quality Standards' in 36 Fed. Reg. 8, 186 (1971).

[FN415]. *See, e.g.*, National Lime Assoc. v. EPA, 627 F.2d 416, 561-52 (D.C. Cir. 1980); Portland Cement Assoc. v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); Essex Chemical Corp. v. Ruckelshaus, 486 F.2d 427 (D.C. Cir. 1973); *Kennecott Copper*, 462 F.2d 846. *See generally* S. MELNICK, REGULATION AND THE COURTS (1983); Rodgers, *A Hard Look at Vermont Yankee*, 67 GEO. L.J. 699 (1979).

[FN416]. 486 F.2d 375 (D.C. Cir. 1973). *See generally* Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509 (1974).

[FN417]. *See, e.g.*, Ethyl Corp. v. EPA, 541 F.2d (D.C. Cir. 1976) (*en banc*) (concurring opinion), *cert. denied*, 426 U.S. 941 (1977). *See generally* Bazelon, *Coping with Technology Through the Legal Process*, 62 CORN. L.Q. 817 (1977).

[FN418]. 478 F.2d 615 (D.C. Cir. 1973).

[FN419]. *See* Clean Air Act of 1970, § 202 (current version at 42 U.S.C. § 521(B) (1982)).

[FN420]. 478 F.2d at 651-52.

[FN421]. *Id.*

[FN422]. *See* S. MELNICK, *supra* note 355, at 58-70 and L. WENNER, *supra* note 390, at 64-68.

[FN423]. *See* Clean Air Act Amendments of 1977, §§ 307(d)(3), (d)(5) (current version at 42 U.S.C. § 7607(d) (1982)).

[FN424]. For discussion of other hybrid rulemaking provisions, see Fuchs, *Development and Diversification in Administrative Rulemaking*, 72 NW. U.L. REV. 83, 102-08 (1977).

[FN425]. *See* Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805, 1812-16 (1978).

[FN426]. 435 U.S. 519 (1978).

[FN427]. NRDC v. Nuclear Regulatory Comm'n, 547 F.2d 633, 653-54 (D.C. Cir. 1976).

[FN428]. *Vermont Yankee*, 435 U.S. at 525.

[FN429]. *Id.* at 549.

[FN430]. This view was taken by some of the contemporaneous commentators on the decision. *See, e.g.*, Rodgers, *A Hard Look at Vermont Yankee: Environmental Law Under Close Scrutiny*, 67 GEO. L.J. 699 (1979).

[FN431]. *Vermont Yankee*, 435 U.S. at 549.

[FN432]. *Id.* at 524, 543.

[FN433]. Natural Resources Defense Council v. Nuclear Regulatory Comm'n, 547 F.2d at 643, 653.

[FN434]. *See* text accompanying note 412 *supra*.

[FN435]. Citizens to Preserve Overton Park v. Volpe, 335 F. Supp. 873 (W.D. Tenn. 1972).

[FN436]. Citizens to Preserve Overton Park v. Brinegar, 494 F.2d 1212 (6th Cir. 1974).

[FN437]. 411 U.S. 138 (1973).

[FN438]. *Id.* at 142-43.

[FN439]. 449 F.2d 1109 (D.C. Cir. 1971).

[FN440]. *Id.* at 1123.

[FN441]. *See, e.g.*, Environmental Defense Fund v. Corps of Engineers, 492 F.2d 1123 (5th Cir. 1974);Sierra Club v. Froehlke, 486 F.2d 946 (7th Cir. 1973); Silva v. Lynn, 482 F.2d 1282 (1st Cir. 1973);Conservation Council v. Froehlke, 473 F.2d 664 (4th Cir. 1973); Environmental Defense Fund v. Corps of Engineers, 470 F.2d 289 (8th Cir. 1972); Environmental Defense Fund v. TVA, 371 F. Supp. 1004 (E.D. Tenn. 1973), *aff'd per curiam*, 492 F.2d 466 (6th Cir. 1974).

[FN442]. 444 U.S. 223 (1980).

[FN443]. *Id.* at 227.

[FN444]. 452 U.S. 490 (1981).

[FN445]. For discussion of the point, see Rabin, *Legitimacy, Discretion and the Concept of Rights*, 92 YALE L.J. 1174, 1184-87 (1983).

[FN446]. 397 U.S. 254 (1970).

[FN447]. 424 U.S. 319 (1976).

[FN448]. *Goldberg*, 397 U.S. at 264, 266-71.

[FN449]. *Mathews*, 424 U.S. at 332-49.

[FN450]. For discussion, see Mashaw, *The Supreme Court's Due Process Calculus for*

Administrative Adjudication in Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

[FN451]. *See* B. SCHWARTZ, ADMINISTRATIVE LAW (2d ed. 1982). I do not mean to suggest that the retreat from *Goldberg* was exclusively a matter of reassessing the controls that courts might exercise over agency factfinding. Almost certainly, the *Goldberg* approach fell out of favor for substantive reasons as well, namely a continuing reaction against the redistributional impulses of the Great Society.

[FN452]. *See* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

[FN453]. *See Mathews*, 424 U.S. at 345-49.

[FN454]. *Id.* at 348 (quoting FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 143 (1940)).

[FN455]. For further discussion of the point, see Rabin, *Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement*, 44 U. CHI. L. REV. 60 (1976).

[FN456]. As indicated earlier, the New Deal also generated an antiregulation reform movement of sorts.*See* text accompanying notes 238-244 *supra*. But the political activity leading to enactment of the APA was directed at 'proceduralizing' regulatory activity rather than rolling back substantive programs.

[FN457]. The activities of the American Enterprise Institute, including publication of *Regulation* (a journal devoted to critical assessment of regulatory programs) offer a leading illustration of the phenomenon. For a good scholarly review of the movement, see S. BREYER, REGULATION AND ITS REFORM (1982).

[FN458]. *See* text accompanying note 194 *supra*.

[FN459]. For a detailed historical treatment of rate and entry regulation in three key areas—utilities, shipping, and airlines—see J. WILSON, THE POLITICS OF REGULATION 3-120 (1980).

[FN460]. *See* S. BREYER, *supra* note 457, at 197-260.

[FN461]. *See* B. Behrman, *Civil Aeronautics Board*, in J. WILSON, *supra* note 459, at 104-20. The impetus towards deregulation of the airlines actually began in the Ford Administration.

[FN462]. *See* Moore, *Rail and Truck Reform—The Record So Far*, REG., Nov.-Dec. 1983, at 33.

[FN463]. *See* Scott, *The Uncertain Course of Bank Deregulation*, REG., May-June 1981, at 40. In the same period, Congress also enacted limited deregulatory legislation in the fields of communications and natural gas. For a concise general discussion of the entire range of these

deregulation efforts, see R. NOLL & B. OWEN, THE POLITICAL ECONOMY OF DEREGULATION 3-25 (1983).

[FN464]. *See, e.g.*, F. Anderson, A. Kneese, P. Reed, R. Stevenson & S. Taylor, ENVIRONMENTAL IMPROVEMENT THROUGH ECONOMIC INCENTIVES (1977); *see also* E. BARDACH & R. KAGAN, GOING BY THE BOOK (1982) (attacking the frustration and discontent caused by ‘regulatory unreasonableness').

[FN465]. For a careful and comprehensive analysis of the limitations of judicial review of administrative action in a specific context, namely the Clean Air Act cases, see S. MELNICK, *supra* note 355.

[FN466]. The American Enterprise Institute journal *Regulation*, first published in 1977, provided a continuing critique of regulatory action from a cost-benefit perspective.

[FN467]. *See generally* R. LIROFF, AIR POLLUTION OFFSETS: TRADING, SELLING AND BANKING (1981).

[FN468]. *See* G. EADS & M. FIX, RELIEF OR REFORM? REAGAN'S REGULATORY DILEMMA 107-38 (1984).

[FN469]. *See id.* at 139-62; *see also* R. LITAN & W. NORDHAUS, REFORMING FEDERAL REGULATION 100-32 (1983).

[FN470]. It should be noted, however, that if cost-benefit standards were adopted in regulatory programs which currently give primacy to health and safety goals, such as OSHA and the CAA, the *level*of ‘police’ protection afforded would be dramatically altered.

[FN471]. The most widely-publicized instance during Reagan's first term was the tenure of Anne Gorsuch as Administrator of the EPA. Morale at the agency appears to have virtually collapsed during her tenure, along with enforcement activity.

Consider also the suggestions of Attorney General Edwin Meese III that independent regulatory agencies violate the constitutional separation of powers. *See* Meese Says High Court Set Up ‘Fourth Branch,” N.Y. Times, Mar. 1, 1986, at 13.

[FN472]. *See* text accompanying notes 57-65, 129-131 *supra*.

[FN473]. *See* FTC v. R. F. Keppel & Bro., 291 U.S. 304 (1934).

[FN474]. *See* text accompanying notes 187-232 *supra*.

[FN475]. *See* text accompanying notes 410-445 *supra*.

[FN476]. 463 U.S. 29 (1983).

[FN477]. This effort was part of a much wider review and rollback of existing regulations mandated by Reagan. *See* R. LITAN & W. NORDHAUS, *supra* note 469, at 119-25. *See also* G. EADS & M. FIX, *supra*note 468, at 125-38.

[FN478]. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

[FN479]. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

[FN480]. *Cf.* EDF v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971) (in which the court required the agency to initiate enforcement proceedings once a substantial risk of harm was recognized).

[FN481]. On this score, the earlier public uproar over the ignition interlock system could be regarded as a salient datum.

[FN482]. 103 S. Ct. at 2875 (Rehnquist, J., concurring in part and dissenting in part) (footnote omitted).

[FN483]. 104 S. Ct. 2778 (1984).

[FN484]. *See* L. LAVE & G. OMENN, CLEARING THE AIR: REFORMING THE CLEAN AIR ACT (1981).

[FN485]. Moreover, this reason was not even the one supplied by the EPA for the new regulation. See generally the criticism of the decision in *The Supreme Court, 1983 Term*, 98 HARV. L. REV. 87, 247-55 (1984).

[FN486]. 104 S. Ct. at 2793.

[FN487]. On this score, consider Justice Rehnquist's opinion in Industrial Union Dept., AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 671-88 (1979) (concurring in the judgment) (non-delegation grounds).

[FN488]. *See* Bawden & Palmer, *Social Policy: Challenging the Welfare State*, in THE REAGAN RECORD 177, 177-201 (1984).