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# 1. The historical origins of American regulatory exceptionalism

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Anyone who was trained to be a professional historian since the 1960s has received a stern lecture on the perils of “American exceptionalism”—the idea that something about the political and economic development of the United States rendered it unique in the history of the nation-state (Kammen, [1992] 1997). We were taught that the idea, once at the very center of the discipline’s methodology, smacked of uncritical jingoism. It was not an analytic framework for studying the United States, but an almost mystical belief not only that America was different from other countries, but that it was better: uniquely blessed with liberty, equality, and democracy; particularly generative of innovative, pragmatic capitalism; endowed with a moral purity unsullied by decadent European autocracies.

It was thus a bit odd for me to indulge in the exceptionalist narrative that is suggested by the task of writing about the historical foundations of the American regulatory state for a volume on comparative regulation. My goal had to be a different type of exceptionalism. One rooted not in American civic religion but instead in a more basic, and uncontroversial, law and society truism: the legal systems that spring from different societies will be different. The corollary to this point is simply that the differences between the American system and other jurisdictions may have their roots in the divergent historical narratives. Historical contingency generates different state structures. America is not “exceptional” in the way every parent believes their children to be. It is simply different, one among a number of flavors of ice cream.

This is a comforting distinction for an American historian trying to fit in with a crowd of comparatists. Unfortunately, there are two elements of the narrative that I will present that are close enough to the original conceptions of American exceptionalism to leave me a little uneasy. First, it is difficult not to notice that the American administrative state is underdeveloped as compared with other advanced, industrial democracies. Viewed through squinted eyes, this might look a little bit like a remnant of the laissez-faire triumphalism that has plagued the writing of American history. Secondly, there is the marked legalism of the American administrative process. Not only does American administrative law seem to place a considerable emphasis on the oversight of the regulatory process by independent, inexpert, generalist judges, but it also demands of its regulators behaviors that seem remarkably court-like. This also looks suspicious. The importance of courts to a “liberty-loving” people is another of the foundational principles of American exceptionalism. After all, it was the inventor of the whole damn idea who noted that “scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question” (Tocqueville, [1835] 1985: 280). Substitute the word “regulatory” for the word “political” in

Tocqueville's tiresomely famous quote, and you have a plausible description of the American regulatory state.

This chapter will take these two assertions as its premises: that the American administrative state is underdeveloped as compared with other industrialized countries; and that independent courts and legalistic behavior by regulators have an outsized influence on American regulatory policy. It will then suggest not only that these two phenomena are products of the American historical experience, but that they are related to each other. In particular, I will argue that these dimensions of the contemporary regulatory state result from a combination of ideological, political, and institutional factors. Ideologically, American political culture contains contradictory attitudes towards the state. An examination of antebellum regulatory policy reveals a strong desire to use the government, particularly at the local level, to further the public good. In many instances, antebellum Americans embraced a strong, "positive" state. At the same time, a powerful current of *laissez-faire* hostility towards the state permeated antebellum political culture. This unstable ideological bedrock is the foundation upon which the modern American regulatory state is built.

The political factors that shaped the rise of the administrative state in the United States were similar to those felt in all industrializing countries. The growth and dislocation caused by rapid industrialization led to political demands for the increased regulation and control of the emergent capitalist order. In the United States, however, these political impulses were filtered through and dampened by a national government with a particular set of institutional structures. Thus, the demands for regulation and other forms of state intervention were weakened by both the ideological ambivalence of American political culture towards the state, and obstructive institutional mechanisms. Ultimately, this ideological ambivalence and institutional resistance combined in the form of judicial control of the administrative process. This in turn led to a form of American regulatory exceptionalism, though hardly in a triumphalist mode.

## THE STATELESS AMERICAN STATE? ANTEBELLUM ADMINISTRATION

Nineteenth century America was an exceptionally dangerous place. Of course, life any time before the advent of modern conceptions of hygiene and antibiotics was apt to be fleeting, but the nineteenth century was particularly bad. Indeed, life expectancy declined through most of the century, returning to late eighteenth century levels only in the 1870s (Hacker, 2010). A variety of factors caused this decline: increased mobility, urbanization, the Civil War, and of course, industrialization. Many more things exploded in the nineteenth century than in any previous century in history.

Consider the steam engine.<sup>1</sup> Its importance to the economic development of the United States is something known to everyone who was forced, in high school, to sit through a lecture on James Watt and John Fitch. Just how dangerous the engine could

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<sup>1</sup> This description of the nineteenth century steamboat trade and its regulation is based on Johnson (2013: 97–125), Mashaw (2012: 187–208), and Hunter ([1949] 2010: 121–80, 271–304).

be, particularly when combined with what might be called the free-wheeling approach to capitalism typical of antebellum America, usually receives less attention. Watt's famous invention was a low pressure engine. The engine's pistons were moved up by a blast of steam, pressured at about 10 pounds per square inch. This steam was then cooled in a condenser, creating a vacuum within the cylinder that pulled the piston back down. While Watt's invention was elegant and technologically sophisticated, it was not of much use for the main economic engine of antebellum America: the steamboats that plied the Mississippi, Missouri, and Ohio rivers. These boats needed simpler, lighter, more powerful engines. They had to drive flat-bottomed boats across the sandbars and snags of the meandering Mississippi and its tributaries. They had to be easily repairable, to avoid costly delays. And they had to be light and small, to maximize the amount of cotton that could be packed onto the boat. As a result, while the deep draft steamships of Europe and the East Coast used Watt's low pressure engine, the Mississippi River trade was driven by high pressure engines: no condensers, no cooling, no vacuum. Just steam firing at pressures of up to 100 psi through the cylinders, and venting into the air. These were powerful, light, simple engines. They were also engines with a tendency to explode.

This tendency was magnified by the brutal competition that developed along the Mississippi in the first half of the nineteenth century. So much capital flowed into the riparian transport industry that the market quickly became glutted. As competition increased and profits fell, steamboat owners sought to generate a reasonable return on their investment with practices that only increased the dangers of river boating: faster speeds, less down time for maintenance, and more crowded boats. They also sought out every last market, running their boats up into every tiny tributary regardless of the toll that doing so took on the keel, the wheel, and the engine. Thousands of people died in crashes and explosions on the western rivers during the steamboat era, and 5 percent of total cargo was lost to such incidents. With all this carnage and financial loss, it is not surprising that the steamship industry generated numerous calls for regulation, leading to two federal statutes, one in 1838 and another in 1852.

The administrative mechanisms employed in these two statutes beautifully illustrate the historiographical dispute that students of antebellum American administration encounter as soon as they assess the era. Traditionally, historians viewed antebellum America as essentially stateless. For so-called "consensus" historians of the 1950s and their behavioralist confreres in political science departments, this statelessness was born out of an abstract, ineffable (and often unexplained) ideological preference that Americans had for *laissez-faire* (Schiller, 2000a: 1399–410). (Here's that American exceptionalism again.) By the end of the twentieth century, social scientists had moved away from this cultural explanation for American statelessness, and had replaced it with a causal story more rooted in facts than in the exceptionalist assumptions that have traditionally hobbled historians of the United States. That is not to say they abandoned exceptionalism. They simply gave concrete, historical explanations for it. In contrast to Europe, the United States had wide suffrage before the development of a strong central state. This fact caused Americans to look suspiciously on such a state. Instead, when it came to their welfare, they turned to the institutions that were compatible with the liberty and popular sovereignty they were used to (Skowronek, 1982: 4–10; Weir, et al.,

1988: 16–27). Antebellum America thus became, in the words of political scientist Stephen Skowronek (1982: 24), “a state of courts and parties.”

In the absence of powerful executives or active legislatures, it was courts that regulated the economy, serving as nurse-maids for an emergent capitalist order. Instrumentalist courts created legal doctrines—the will theory of contract, negligence doctrine, property law that promoted alienation of land and the active use of property, *damnum absque injuria*—aimed at generating rapid economic growth. According to this story, antebellum economic “regulation” was nothing more than the judicial removal of common law doctrines that restrained economic growth. Whether this change reflected the desires of most Americans or simply that of certain elites was hotly contested, but the fact that the change occurred was not. Nor was the fact that the legal regime that emerged was hostile to modern notions of economic regulation. Its effect was to do away with limitations on the autonomy of economic actors who wished to actively use their property, or take risks that might yield substantial economic rewards (Hurst, 1956; Levy, 1957; Horwitz, 1977).

In recent years, historians have challenged this portrait of antebellum administration. Most notably, William Novak’s 1996 study of local and state regulation found scores of small, state and local administrative entities engaged in a wide variety of administrative activities to promote public morals, health, and safety. Police and fire departments, port inspectors, market inspectors, sanitary commissioners, and boards of health proliferated in antebellum America, and with them came the regulation of commercial transactions that would seem heavy-handed, even by today’s standards. Similarly, other scholars, such as Leonard White (1948, 1951, 1954), William Nelson (1982), Brian Balogh (2009), and Jerry Mashaw (2012), have demonstrated the surprising prevalence of federal administrative activity in the antebellum period. Most of this activity was consistent with what we now might call the “pro-growth” tenor of the common law—subsidizing infrastructure, promoting westward expansion—but some was less friendly to capital accumulation: implementing the embargo of 1807, or tariffs, or, to return to where we started, regulating steamships.

If ever a regulatory statute fit within the skeletal, “courts and parties” vision of the antebellum state, it was the federal government’s first attempt at steamship regulation: the Steamboat Inspection Act of 1837 (Mashaw, 2012: 189–92). Since the founding of the republic, owners of vessels that engaged in coastal and riparian trade were required to license their ships, but this licensure was nothing more than the pro forma registering of ships with customs officials to facilitate the collection of tariffs. The 1837 statute required steamship owners to submit certificates of inspection—annual inspections of their ships and semi-annual inspections of their boilers—in order to get their licenses. The inspectors, however, were not government employees. Instead, they were private individuals, appointed on a case-by-case basis by the local federal district judge. The inspectors were paid by the ship owner: five dollars to certify the ship’s seaworthiness and five dollars to certify the boiler’s safety. Penalties for violation of the statute were imposed through common law suits brought by private individuals who were enticed by the prospect of keeping half the fine themselves. The statute also attempted to further steamship safety by creating specific criminal penalties and enhanced civil penalties for negligent operation of a ship.

Not surprisingly, the 1837 statute, depending entirely on private enforcement and inspectors whose primary incentive was to be lax enough to get return business, was a failure. Faced with public outcry in the face of continuing, spectacular steamboat explosions, Congress shifted regulatory strategies (Mashaw, 2012: 192–95). The 1852 statute created a Board of Supervising Inspectors, with each board member in charge of one of nine districts. Individual inspectors were appointed by a three person panel consisting of the board member for the appropriate district, a local customs official, and a federal district judge. These inspectors were paid a salary and had their work reviewed by the Board. They also implemented safety standards that were defined in the statute or created by the Board in a manner that looks remarkably like modern administrative rulemaking. Finally, unlike the 1837 statute, the 1853 Act eschewed punitive private enforcement, replacing common law causes of action with administrative adjudications that could result in the revocation of a ship's license.

It is tempting to look at the evolution of antebellum steamboat regulation as illustrating a simple, satisfying story of change over time: the American state was small at the beginning of the nineteenth century, but as it encountered the economic and social realities of industrialization, it became larger and modern regulatory mechanisms emerged. The real story, however, is much less coherent. Novak (1996) illustrates the remarkable resilience of intense economic regulation at the local and state level throughout the antebellum period. Mashaw (2012: 91–143) demonstrates that the purportedly antistatist Jeffersonians employed particularly heavy-handed administrative mechanisms in the Land Office and to enforce the embargo. On the other hand, he also shows that the nascent federal administrative apparatus was haphazard, responding to political impulses to regulate with a wide variety of administrative structures with differing degrees of centralized control. White (1954) argues, with delightful irony, that the Jacksonian commitment to rotation in office led to the increasing bureaucratization of agencies as the institutional knowledge of long-serving professional bureaucrats was replaced with written, institutionalized, formalized guidance for inexperienced citizen administrators. Similarly, Nelson (1982) turns Weber's famous portrayal of bureaucracy on its head, arguing that antebellum state structures developed along Jacksonian lines: designed to decentralize and democratize power, to connect the state to the people, not to separate it from them. Finally, despite the wonderful work of all these revisionists who have unearthed a substantial antebellum administrative state, they cannot magically eliminate the existence of the dramatically transformed common law doctrines, described by Willard Hurst (1956), Leonard Levy (1957), Morton Horwitz (1977), and Nelson (1975) himself, that promoted a vision of private law that was liberal, antistatist, and market driven.

Thus, the complete picture of antebellum administration is one of incoherence. Americans wanted intense state and local regulation to protect what courts called the *salus populi*, "the people's welfare." Yet, they also wanted to be left alone by the government to operate as free agents in a sometimes brutal but sometimes profitable market. They viewed the federal government with suspicion, but they demanded national administrative structures to distribute public goods and protect them from exploding steam engines. As Balogh (2009) has written, they wanted the federal government, but they wanted it hidden. Novak (1996) suggests that at the state and local level they wanted a more visible state to give them protection from the

vicissitudes of the emergent market economy. Yet, they also elected judges that shaped the common law to encourage the growth of just such an economy. Administration in antebellum America was not plagued by Emerson's ([1841] 1993: 36) hobgoblins of consistency. As another great literary voice of the era said: "Do I contradict myself? Very well, then I contradict myself, I am large, I contain multitudes" (Whitman, [1855] 2005: 43).

## THE PATCHWORK STATE: CIVIL WAR TO DEPRESSION<sup>2</sup>

It was against this variegated regulatory background that the United States confronted the considerable social stresses of the late nineteenth and early twentieth century.<sup>3</sup> American society grew increasingly complex. The economy expanded rapidly, driven by the dramatic growth of railroads. Corporations grew in size, swallowing their competitors and integrating both vertically and horizontally. Chain stores and mail-order houses began to generate a mass consumer culture. Waves of immigrants from Europe and Asia arrived on American shores. American wealth increased, but so did the gap between the rich and the poor. This transformation of America into an industrial, increasingly urban, ethno-culturally diverse, economically polarized country generated considerable social tension. To some, industrial capitalism seemed to be crushing individual liberty and flooding markets with unsafe, unwholesome products. Others feared that mass culture and the influx of immigrants undermined traditional moral values. Still others saw increasing labor militancy and hostility towards big business as the first steps towards a cataclysmic attack on property rights.

This dynamic, unsettled social context generated a succession of political movements advocating social and economic reform: the Grangers, Populism, Progressivism, and all manner of labor activism from the Knights of Labor, to the American Federation of Labor, to the Wobblies. Such reform politics spawned strong regulatory impulses. The administrative regimes that emerged from these impulses differed from their antebellum antecedents in a number of ways. First of all, on the whole, they were less distributive and more redistributive. The government was no longer simply being asked to give away land or pensions. Instead it was required to allocate wealth among different groups: between shippers and railroads, or workers and employers, or businesses and consumers. Secondly, because of the increasingly national scope of the economy, the federal government took on a more prominent administrative role.

Consequently, the 65 years between the end of the Civil War and the beginning of the Great Depression saw the substantial growth of the administrative state at both the state and federal level. To a certain extent, this was the classic Weberian story. Slowly but surely there emerged independent state institutions, characterized by scientific expertise, professionalism, and alleged independence from partisan politics. This first

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<sup>2</sup> "Statebuilding as patchwork" is Skowronek's phrase (1982).

<sup>3</sup> This discussion draws on the enormous literature about the growth of regulation between the end of the Civil War and the beginning of the New Deal. For excellent overviews see Keller (1977, 1990, 1994), White (1958), and Rabin (1986: 1197–243). Mashaw (2012: 227–82) also discusses this period and it is the focus of Skowronek (1982).

happened at the state level. States began regulating the rates that railroads and grain elevators could charge their customers. Public utility commissions, which regulated water, gas, and electric rates, came into being soon afterwards. As the twentieth century began, many states passed pure food laws and attempted to regulate working conditions, particularly of women and children. They also engaged in morals regulation, censoring movies and banning alcohol consumption. Each of these activities, in turn, called for the creation of new bureaucracies or the expansion of old ones.

By the end of the nineteenth century, the federal government was increasingly getting into the act. In particular, the national scale of the railroad industry suggested that some form of federal regulation was inevitable. State regulation proved ineffective. Cutthroat competition was bankrupting dozens of railroads in the east, while in the west problems of undercapacity limited economic expansion. Economic downturns in the 1870s drove rates down below what the state commissions had established and a political counter-offensive by the railroads weakened the power of the more coercive commissions. Finally, in 1886 the Supreme Court held that the Constitution's commerce clause prohibited states from regulating interstate railroad shipments at all, thereby dramatically limiting state agencies' powers.

The next year Congress responded by enacting the Interstate Commerce Act (ICA), which established the Interstate Commerce Commission (ICC). The creation of the ICC was a significant milestone in the creation of the administrative state for a number of reasons. It was the first federal administrative agency empowered to regulate a subject matter that was not traditionally part of the federal government's portfolio. Thus, it marked the beginning of the growth of the federal administrative state and its expansion into areas of economic regulation that had traditionally been left to the states. Additionally, it established a model for future administrative structures. First, it was an independent commission, not subject to the direct control of the president. Though the president appointed all 11 commissioners, he could not remove them at will, as he could members of the more traditional, executive administrative departments such as the treasury department or the war department. Secondly, the ICC acted primarily through adjudications. The agency enforced provisions of the ICA, such as prohibitions against unreasonable rates, by bringing cases against individual carriers. The commissioners would then sit as a court, hearing evidence and determining whether the Act had been violated. These determinations could then be appealed to a federal circuit court, which would review the agency's decision.

The ICC was the first agency in what became a dramatically increased, and substantially more visible federal administrative presence during the first three decades of the twentieth century. The growth that followed—both at the federal and state levels—represented the administrative manifestation of progressive politics of the early twentieth century. Scientific expertise was to be deployed to solve the social and economic problems of the time. Thus, as the American economy became more national in scope, independent federal administrative entities such as the Federal Reserve Board (1913), the Federal Trade Commission (1914), the Federal Power Commission (1920), and the Federal Radio Commission (1927) were created to manage it. Additionally, the powers of existing federal agencies were expanded so as to provide mechanisms for enforcing federal forays into novel areas of regulation such as pure food and drug laws

(within the Department of Agriculture), the income tax (the Treasury Department), and prohibition (also within the Treasury Department as well as the Justice Department).

This narrative of the growth of state and federal administrative capacities has become the standard one, but two caveats are in order. First of all, as Mashaw (2012), Balogh (2009), and White (1948, 1951, 1954) have shown, late nineteenth century federal administration was not without antebellum antecedents. Secondly, the growth of the administrative state was hardly uncontested. The laissez-faire strand of American political culture was magnified in the years following the Civil War. The political (and military) triumph of free labor ideology during the War reinforced the laissez-faire tendencies that were already quite strong in American political culture. This ideology and the persistent localism of American politics combined to resist the rise of larger and more centralized state structures. While this ideological fissure ran through many of the political struggles over the creation of the administrative state, it is particularly obvious in judicial hostility towards expanded regulation.

The precise extent to which courts used substantive due process to impose a laissez-faire constitutional ideology on the regulatory products of progressive reform has been the subject of debate among historians. The first historians to write the legal history of this era portrayed it as one in which state and federal courts used substantive due process and a narrow reading of the commerce clause to eviscerate the emergent regulatory state (Twiss, 1942; McCloskey, 1951; Paul, 1960). According to this view, regulatory statutes fell like flies, struck down as either unconstitutional exercises of federal power under antiquated dual federalist conceptions of that power, or as impermissible interferences with freedom of contract. Those regulatory schemes that survived, this argument went, were subject to withering judicial review, in which courts substituted their judgment for the opinions of expert administrators.

Subsequent work has revealed a more nuanced story (Benedict, 1985; Gillman, 1993; Cushman, 1997; McCurdy, 1998; Schiller, 2000b; 2007: 407–13). The vast majority of regulatory initiatives created in the late nineteenth and early twentieth century easily survived constitutional attack. Similarly, a closer look at the relationship between courts and the administrative state in this period shows that courts reviewed most regulatory acts with a light touch. There were, however, exceptions. The closer a given regulatory regime sat to the core of the police power as it was traditionally conceived (the protection of health, safety, and morals), the more easily it passed constitutional muster, and the less intrusive was judicial review of day-to-day administrative action. On the other hand, legislatures that pressed at the outer boundaries of the police power, regulating basic economic transactions in a manner less tethered to these traditional conceptions of state power and individual liberty, were more likely to end up in constitutional hot water. Thus, courts were stricter in their approach to regulation of employment contracts or utility rates than they were to censorship of the mails, prohibition, or the implementation of pure food laws.

The peculiar institutional structure of American government also limited the growth of the administrative state. As institutionalist scholars have demonstrated, the reform policy impulses that were generated by industrialization and the increasing complexity of American society were impeded not simply by the ideological resistance of some Americans, elite or otherwise (Nettl, 1968; Skowronek, 1982; Skocpol, 1985). Institutional arrangements also inhibited the implementation of these political preferences.

The American state was structured in such a way as to impede the development of national administrative institutions. Federalism, as well as the requirements of bicameralism, and the customs and rules of the Senate fostered a form of political localism that made creating national regulatory regimes difficult. This fact was compounded by the extraordinary power of locally-oriented political parties. As Skowronek (1982: 41, 69) has argued, few politicians had much interest in creating national institutions that might undermine their own power. While it is an exaggeration to say that American political parties viewed the federal government as nothing more than an entity that should provide goodies to be dispensed by local politicians, it is nonetheless true that they recognized that a centralized, professionalized, Weberian bureaucracy would weaken their hold on power.

The prevalence of ideological *laissez-faire* and the persistent localism of American political institutions did not prevent the emergence of new administrative structures at the end of the nineteenth century or the beginning of the twentieth century. They did, however, ensure that these new structures were weaker than they might otherwise have been. Administrative state capacity grew, but it was limited by intense political oversight, decentralization, and judicial hostility, both with respect to constitutional review and substantive oversight. Rather than developing a tradition of bureaucratic governance, as was the case in Europe, the American administrative state developed as a piecemeal response to particular political pressures, processed through governmental institutions that themselves limited the effectiveness of the era's regulatory policies.

## THE MODERN STATE AND ITS LIMITS

The Great Depression generated another round of regulation, at both the state and federal level.<sup>4</sup> Indeed, the regulatory programs created during the New Deal form the backbone of the contemporary administrative state. Modern securities regulation, banking regulation, communications regulation, workplace regulation, and regulation of agriculture all have their origins in the New Deal. Nevertheless, the New Deal and its aftermath represent the final piece in our narrative about the comparatively weak nature of the American administrative state. The institutional limitations of the American state shaped the New Deal in a manner that circumscribed state intervention in the economy, even in the face of unprecedented demands for it. Additionally, the political and ideological aftermath of the New Deal locked in America's curiously reluctant approach to economic regulation.

When Franklin Roosevelt was elected in 1932, it was with a mandate to take some form of dramatic government action to combat the economic crisis that had crippled the country for over three years. On the campaign trail, however, he had never been particularly specific about what he would do. This was, in large part, because he himself did not have a specific plan. Consequently, the New Deal saw a tremendous amount of administrative experimentation. Historians of the New Deal have catalogued

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<sup>4</sup> The literature on the New Deal and the administrative state that sprang from it is enormous. The classic texts are Leuchtenburg (1963) and Hawley (1966). For excellent, more recent accounts, see Badger (1989), Brinkley (1995), Kennedy (1999), and Katznelson (2013).

the crazy-quilt of policies that the Roosevelt Administration put into place in its attempts to bring the nation out of the Great Depression. Some figures within the administration advocated the suspension of antitrust laws and the implementation of government-guided, industry-wide planning. Others vociferously attacked monopolies, demanding vigorous antitrust enforcement. Still others proposed new robust regulatory mechanisms. Some of these mechanisms were of a coercive, “command and control” variety, setting the rates that businesses could charge and limiting entrepreneurial discretion with a heavy hand. Others were considerably less demanding, emphasizing industry transparency and accountability. Of course there was support for the famous public assistance programs of the New Deal—the Works Progress Administration, Social Security, unemployment insurance—but there were also deficit hawks who advocated forcefully for balanced budgets. Finally, there was a smattering of Keynesians. They were fiscal manipulators who sought to end the Depression through increased government spending. Such spending would not only soften the impact of the Depression on the least fortunate. It would also stimulate the economy by increasing the ability of the average person to consume goods and services.

What many of these programs did have in common, however, was the way in which they were circumscribed by the structures of the American state. Lack of existing institutional capacity frequently required the administration to regulate through existing, often private, structures. Sometimes, as with the Security and Exchange Commission’s regulation of stock exchanges, doing so was successful. Other times, as with the National Recovery Administration’s dependence on industry boards, it was a disaster. Additionally, federalism, bicameralism, and the disproportionate power of southern politicians due to one-party rule in the South led to the devolution of public assistance programs and many regulatory regimes to state and local actors. This limited the effectiveness of many administrative programs. Southern politicians were not going to allow the Fair Labor Standards Act, the National Labor Relations Act, or the Social Security Act to upset the racial hierarchy in their state by lessening African American economic dependence on local whites. Similarly, state and local implementation of social welfare programs was shaped by both that same impulse and by a genuine lack of state capacity. The only way to quickly implement a public assistance program in a country with a comparatively small federal bureaucracy was to enlist state and local officials into the process, even if doing so meant that some policies would be carried out in a manner that was not fully effective.

Nonetheless, the Great Depression provided a unique opportunity for political forces that wished to overcome the ideological and institutional limitations on the American state. The scale of the Depression created space for a vision of business regulation that was much more expansive than the United States had seen up to that time (Brinkley, 1995: 4–8; Lichtenstein, 2002: 100–05; Katznelson, 2013: 227–75). Within the hodge-podge of New Deal initiatives were several in which business, government, and workers, as represented by their labor unions, would co-determine American economic policy. This was the theory behind both the National Industrial Recovery Act (with its “industry codes”) and the Agricultural Adjustment Act (with its “marketing agreements”). The War Labor Board, the Office of Production Management, the National Resource Planning Board, and the Office of Price Administration continued this vision of a corporatist administrative state in which market mechanisms were subordinated to

expertise-informed, politically accountable planning. These were forms of state intervention that, as demonstrated by the other country chapters in this volume, became widespread in Europe and East Asia in the postwar period and were only scaled back in favor of the regulatory mode of state action beginning in the 1980s and 1990s (Kelemen, this volume; Ohnesorge, this volume).

By 1946, that New Deal vision of administration had disappeared (Brinkley, 1995: 201–64; Kennedy, 1999: 363–77; Lichtenstein, 2002: 105–28; Katznelson, 2013: 367–402). New Deal administrative experimentation had ended, replaced by a deep commitment to the light touch of Keynesian economic management. In the absence of an extreme economic crisis, ideological opposition to strong state institutions reasserted itself. Postwar antiradicalism drove the advocates of statist economic planning out of the political mainstream. At the same time, America's encounters with totalitarianism both in Germany and the Soviet Union caused many Americans to look warily at their own state. Indeed, the behavior of domestic political institutions during World War II and the red scare that followed soured people across the political spectrum on the administrative state. Conservatives hated the Office of Price Administration while liberals hated the Subversive Activities Control Board (Horwitz, 1992: 241; Schiller, 2002: 193–95).

Keynesianism, on the other hand, emerged from the War with a glowing reputation (Brinkley, 1995: 265–71). The massive deficit spending brought about by the War seemed to have cured the nation's economic ills. In that context, all the other economic remedies for the Great Depression—planning, budget balancing, robust antitrust enforcement—lost their luster. Indeed, Keynesian fiscal policy was the perfect mode of economic regulation for a country with underdeveloped administrative institutions and an ideological predilection to dislike the state. One of its most appealing aspects to postwar policy-makers was how, unlike many of the New Deal's other policy prescriptions, it seemed to require very little government involvement in the economy. The problems of capitalism could be solved, its hard edges softened, so to speak, without massive administrative agencies butting into the daily operations of private businesses. Fiscal Keynesianism allowed postwar liberals to have their cake and eat it too. They could tinker with the economy to soften the business cycle without creating the huge administrative state that Americans had come to view with some suspicion.

The emergence of this postwar administrative order is the final piece in the story of the evolution of the comparatively underdeveloped American administrative state. From the very beginning of the United States, its political culture was ambivalent towards administrative and regulatory action, particularly by the federal government. At the same time, the institutional structures of American government—federalism, bicameralism, separation of powers, the strength of a locally oriented party system—inhibited the development of robust administrative institutions even when American politics generated demand for them. Finally, in the years following World War II, the rise of Keynesianism allowed American policy-makers to cut the Gordian Knot. In the uncompetitive context of the postwar global economy, it provided all the economic planning America needed, and it came without the fear of creating an overbearing state.

Obviously, the end of New Deal corporatism and the ascendance of Keynesianism did not eliminate state regulation of social and economic life. The postwar period saw

a continued growth of the regulatory state.<sup>5</sup> Regulation of the workplace increased with the passage of Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Employee Retirement Income Security Act, the Occupational Safety and Health Act, and the Americans with Disabilities Act. Congress created environmental regulatory regimes including the National Environmental Protection Act, the Clean Air Act, and the Clean Water Act. Food and drug regulation increased in intensity. Consumer products and automobiles were regulated in a way they had not been before. More recently, economic crises have once again generated regulatory impulses, creating new regulations for banking and securities markets. Thus, despite a wave of economic deregulation in the 1970s and 1980s, the American regulatory state has increased substantially in size and scope since the end of World War II.

And yet, many of these regulatory innovations bear the characteristics of the underdeveloped American state. They still have a patchwork feel, as if they are haphazard intruders into a “natural” world of private ordering. Many are still highly contested in the political arena and are thus frequently hampered by aggressive political oversight. For some, the involvement of states required by federalism has created inefficiencies. Most significantly, all of them are weakened by the United States’ commitment to an outsized judicial role in the regulatory processes. This manifests itself in two ways. The first is the intensity with which courts oversee the administrative process. The second is the fact that both Congress and the courts have forced regulatory actors to act in a proceduralized, judicial manner. Agencies must behave like little courts, complete with procedures that inhibit efficiency in order to protect the rights of individuals from the power of the state. This is the final stop in historicizing the exceptionalism of the American regulatory state: explaining why courts and court-like behavior are so central to the American administrative process.

## COURTS AND REGULATION

If you are studying the relationship between courts and the American regulatory state, you could do worse than to start with Louis Jaffe. Jaffe, a protégé of Felix Frankfurter, a New Deal lawyer, and, ultimately, a law professor at Harvard from 1950 until 1976, was one of the founders of the field that we know today as “Administrative Law.” Writing his magnum opus, *Judicial Control of Administrative Action* in 1965, Jaffe identified the crucial function of administrative law: ensuring the legitimacy of the regulatory state. Regulation was only legitimate if the regulatory process embodied the common values of American society—what he called “unity and coherence” (Jaffe, 1965: 327). Not that Jaffe was naive. “In a society so complex, so pragmatic as ours, unity is never realized ... . Indeed, there is no possibility of agreement on criteria for absolute unity. What is contradiction to one man, is higher synthesis to another” (Jaffe, 1965: 327). At a certain point, however, regulatory actions that were insufficiently moored to common values lost legitimacy. “[W]ithin a determined context there may be

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<sup>5</sup> For an overview of the politics and regulatory policies of the United States during the postwar period see Patterson (1996) and Rabin (1986: 1262–314). For specific regulatory regimes see Hays (1987), Mashaw and Harfst (1990), Klein (2003), and Purdum (2014).

a sense of contradiction sufficient to create social distress” (Jaffe, 1965: 327). Such distress, Jaffe believed, could be minimized through the “subordination of the agency to judicial jurisdiction” (Jaffe, 1965: 327). Judicial review would legitimate the administrative state.

This desire to find and promote unifying American values amidst social distress is not surprising coming from a 60-year-old Harvard law professor writing in the middle of the 1960s. Similarly, his invocation of complexity and pragmatism show that Jaffe had not abandoned some of the assumptions of his New Deal-era youth. Finally, his solution to the problem of administrative legitimacy—judicial stewardship of the administrative state—places him firmly within postwar process theory to which so many elite legal academics of his generation adhered. The relationship between administrative agencies and courts was defined by their respective institutional competencies. Agencies implemented particular public policies using their experience and expertise. Courts brought these administrative actions “into harmony with the totality of the law,” thereby serving their function as “the acknowledged architects and guarantors of the integrity of the legal system” (Jaffe, 1965: 327). Jaffe’s beliefs seem almost overdetermined. What other views about the legitimacy of the administrative state would a former New Dealer ensconced in the legal academy have in 1965?

Earlier in *Judicial Control of Administrative Action*, however, Jaffe evidenced a more nuanced understanding of the relationship between regulatory legitimacy and courts. “The availability of judicial review is the necessary condition, psychologically, if not logically, of a system of administrative power that purports to be legitimate, or legally valid” (Jaffe, 1965: 320). Here is a quote that a comparatist can cotton to. To base the regulatory state’s legitimacy on the availability of judicial review might have been a psychological necessity for postwar Americans, but it was not a metaphysical requirement that transcended all places and all times. Indeed, one of the most enlightening things about the work of Mashaw and others who have examined the nineteenth century administrative state is that they have demonstrated that our modern conception of judicial review of administrative action does not have an undisputable historical pedigree.

To the contrary, Mashaw and Ann Woolhandler (1991) have shown that nineteenth century judicial review was, as Mashaw (2012: 25) writes, “bipolar.” In instances when the legislature gave administrative actors discretion in carrying out their official duties, such as in the federal system of disposing of public lands, judicial review was essentially non-existent. On the other hand, if statutory language did not explicitly grant such discretion, administrative actors were subject to common law claims for damages, claims that were adjudicated *de novo* before a judge and a jury. Thus, a nineteenth century customs inspector might find himself hauled before a local court and found personally liable for trespass by a jury that showed no deference to administrative expertise or the sovereign authority of the federal government. In such cases, there were no doctrines of immunity of official acts or *Chevron* deference to protect administrative actors. Their only remedy was to pay the claim and petition Congress for reimbursement. Thus, Jaffe’s psychological dependence on judicial review did not exist before the beginning of the twentieth century. There is no indication that administrative regimes not subject to judicial review, such as steamship regulation, public lands disposal, pension allocation, or the thousands of state and local regulatory

actions that Novak (1996) describes, were viewed by antebellum Americans as any less legitimate than those regimes that were subject to common law collateral review.

The modern conception of judicial review dates from the turn of the century (Schiller, 2007: 407–12; Merrill, 2011; Ernst, 2014). It was then that any given administrative action was divided into findings of fact, interpretations of law, and the application of that legal standard to the facts. “Pure” issues of law were to be decided by courts, while factual findings and their application to legal standards were done by the agency, subject to some form of intermediate scrutiny by the judiciary. Courts would check to see if administrative action was an “abuse of discretion” or not; whether it was “reasonable”; whether it was supported by “substantial evidence.” Each of these standards sought to subject administrative action to a form of judicial monitoring that sat somewhere between absolute passivity and *de novo* review. As Thomas Merrill (2011) has described, this model, which he calls the “appellate model,” was first seen in judicial review of the ICC under the Hepburn Act in 1906. The model quickly spread, as legislatures adopted it, piecemeal, as they created new regulatory regimes during the Progressive Era and the New Deal. Immediately after World War II, the federal government and most state governments passed administrative procedure acts that generalized this model of judicial review. These statutes created off-the-rack rules that applied the appellate model of judicial review to all regulatory actions.

Nor was the emergence of the appellate model of judicial review the only manifestation of judicial meddling with the regulatory process. The twentieth century also saw the increasing judicialization of regulatory entities themselves. Regardless of how intense judicial review of administrative action was, the agencies themselves were to behave in a judicial fashion. Their decisions should be made in an adversarial proceeding, with evidentiary records, independent adjudicators, and a chance for the parties to appear and confront the agency officials who would regulate them. This tendency is most obvious in the passage of the federal and state administrative procedure acts, all of which imposed these sorts of court-like requirements on agency adjudications (Shepherd, 1996; Schiller, 2002; Grisinger, 2012: 59–108). The due process cases of the 1960s similarly judicialized many informal agency actions (Friendly, 1975). In the 1970s, federal courts transformed even that least judicial of regulatory actions—issuing regulations—into an adversarial process by imposing a series of quasi-adjudicatorial requirements on agency rulemakers: detailed notice, decisions based on a record, agency disclosure of data, agency responses to cogent comments by the regulated (Stewart, 1977: 731–33; Schiller, 2001: 1159–60).

Thus, over the course of the twentieth century, courts developed a distinctive role in the American regulatory process. While the intensity of judicial review waxed and waned under the sometimes ineffable standards of the appellate model of judicial review, there was never any question that courts were to play a substantial role in the regulatory process. As Judge Henry Friendly cheekily noted in 1975, courts and agencies acted as partners in the regulatory process, but there was “little doubt who is considered to be the senior partner” (Friendly, 1975: 1311 n. 221). Indeed, even outside of the confines of judicial review, twentieth century administrative law expected agencies to behave like courts. The judiciary thus sat atop the regulatory process, either reviewing its outcome or serving as a model for the procedures it used.

Scholars who study the relationship between courts and the administrative state have suggested a number of reasons for the rise of judicial review and the judicialization of the administrative process in the early twentieth century. First of all, the timing is suggestive (Schiller, 2007; Merrill, 2011). Courts asserted their control over the administrative process just as it was becoming national in scale and broader in the subjects it regulated. According to this argument, the rise of judicial control of the administrative process related to issues of legitimacy, though in a different manner than Louis Jaffe might have suggested. To the extent that the vast majority of administrative entities in the nineteenth century were local and state bodies regulating in areas that were traditionally thought of as subject to government regulation, the administrative state's legitimacy went unquestioned. Indeed, Novak (1996: 235–48) argues that such regulation was legitimated by its local, republican connection to community norms that rejected modern, liberal beliefs such as the distinction between public and private or between the state and the individual. Regulation was legitimated by tradition. It was woven into the fabric of local communities. With the growth of national administrative structures and with the expansion of the palate of regulatory subject matters, this basis for legitimacy disappeared, and people went looking for others.

They found these new sources of legitimacy in the courts. Indeed, this fact leads to the second set of explanations for the significance of the judiciary in the American regulatory state (Ernst, 2014). Since colonial times, American political culture assigned to common law courts and the lawyers who practiced before them a special role in the protection of individual rights against the state. The legal profession's job was to act as a buffer between the state and society, defending liberty and the rule of law. To assist lawyers in this task were some traditional mechanisms—juries and the common law—as well as devices embedded in the emergent American constitutional order: judicial independence, judicial review, and separation of powers. Thus, with the rise of national bureaucratic structures in the late nineteenth century, it is not surprising that lawyers and courts would be enlisted in the defense of traditional liberties against the new leviathan. What better way to protect individuals from the arbitrary power of the regulatory state than to ensure that courts and lawyers sat atop that state, and to demand that agencies behave as much like courts as possible?

## CONCLUSION

Judicial review is thus the final element in our story of the historical origins of American regulatory exceptionalism.<sup>6</sup> Its basis in the idea that courts and lawyers have a special role in protecting individual liberty connects it with the *laissez-faire* ideology that is prevalent in American political culture. Its rise also identifies it as yet another institutional characteristic of American government that has the effect of limiting the

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<sup>6</sup> This is not to argue that other jurisdictions have not come to use judicial institutions to police regulatory bureaucracies. However, even today American courts retain more control over discretionary policymaking than do courts in Europe (e.g., Bignami, Regulation and the courts, this volume; Rose-Ackerman, this volume; Cane, 2010: 453–59; Lindseth, 2010: 160, 246).

strong regulatory impulses that have frequently emerged from American society. A political victory establishing a new regulatory regime could easily be undermined by judicial oversight or the proceduralization of the administrative process. The story of the weak American administrative state and the prevalence of judicial control of the administrative processes are thus linked. They also sit within the same ideological medium: an American political culture where a commitment to laissez-faire is in constant struggle with both republican communal values and the felt political necessities of responding to the dislocations caused by a modern, capitalist economy. The policy impulses that flow out of this complex, contradictory political culture are themselves warped and dampened by American institutional arrangements. Intense judicial review and the proceduralization of the administrative process, in addition to separation of powers, federalism, bicameralism, and the persistent localism of the dominant political parties combine to make regulatory action, particularly at the national level, difficult. Add to this equation the rise of the relatively stateless Keynesian alternative to statist planning in the years after World War II, and you have a historical narrative that leads to the current American administrative structures. This is a different form of American exceptionalism. It is not one in which American “character” or “virtue” created, in Louis Hartz’s words, a “nation [that] never really sinned” (Hartz, 1955: 31). Instead, it is a form of exceptionalism whose ideological contradictions and institutional structures generated a regulatory state that has not always been able to implement the reform aspirations of its people.

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