

**The Birth of a “Logical System”:
Thurman Arnold and the Making of Modern Administrative Law**

August 25, 2004

Mark Fenster*
Associate Professor
Frederic G. Levin College of Law
University of Florida
P.O. Box 117625
2500 S.W. 2nd Avenue
Gainesville, FL 32611-7625
352/392-8468 (v)
352/392-3005 (fax)
fenster@law.ufl.edu

* J.D., Yale Law School, 1998; Ph.D., University of Illinois, Champaign-Urbana, 1992.

The Birth of a Logical System: Thurman Arnold and the Making of Modern Administrative Law

Abstract

Much of what we recognize as contemporary administrative law emerged during the 1920s and 1930s, a period when a group of legal academics attempted to aid Progressive Era and New Deal regulatory efforts by crafting a legitimating system for the federal administrative state. Their system assigned competent, expert institutions—most notably administrative agencies and the judiciary—well-defined roles: Agencies would utilize their vast, specialized knowledge and abilities to correct market failures, while courts would provide a limited but crucial oversight of agency operations. This Article focuses both on this first generation of administrative law scholarship, which included most prominently Felix Frankfurter and James Landis, and on the contemporaneous challenge to their work raised by the legal realist Thurman Arnold. Arnold characterized early modern administrative law as a quasi-formalist effort to impose a logical system of procedure and judicial review on what he saw as pragmatic, functional regulatory agencies that were attempting to address the crisis of the Depression. Although he conceded the persuasive power of this logical system, Arnold predicted that its requirements, especially for adversarial litigation and judicial review, would ultimately impede the optimal operations of a modern administrative state. Although Arnold's eclectic alternative proposals had no influence, his predictions and critique remain incisive and relevant to an academic field and body of doctrine that regularly face regular bouts of intellectual and political crisis.

The Article carries the historical disagreement between Arnold and his contemporaries into the present by connecting their debates first to the development of legal process theory as an approach to federal courts and constitutional law in the 1950s and then to similar debates in administrative law today. Arnold's challenge to early modern administrative law, the Article argues, remains relevant because American law still demands a systemic, legalistic conception of the administrative state. A logical system of administrative and legal process has enormous symbolic power even though, as its current detractors note, it often produces suboptimal regulatory practices. The recurring conflict between an enormously durable system and its critique, a conflict that continues to drive administrative law scholarship, began in the 1920s and 1930s; any efforts to reform the field should understand the terms and implications of the conflict's foundations.

Table of Contents

Abstract	2
Introduction	4
I. An Administrative and Judicial Process: First Generation Administrative Law Scholarship.....	10
A. Precursors to the First Generation	11
B. The First Generation.....	15
C. James Landis and <i>The Administrative Process</i>	21
II. Arnold’s Post-Realist Approach to Administrative Law	26
A. Arnold’s Post-Realism	29
B. Critiquing the “Symbols” of Administrative Governance	32
C. Arnold’s Administrative Law.....	40
1. Faster Judicial Decisions.....	43
2. Greater Judicial Involvement.....	46
3. Minimize Judicial Involvement	49
D. Conclusion.....	52
III. The “Mumbo-Jumbo of Legal Jargon”: Frankfurter, Arnold, and the Procedure Core of Administrative Law	54
IV. The Administrative Process and the Legal Process Approach	61
A. The Institutional Core of the Legal Process Approach	62
B. Against Theology: Arnold, Henry Hart, and Judicial Process	66
V. Regulatory Frustration and the Recurring Crisis of the “Logical System”	69
A. Systemic Continuity	70
B. The Continuity of Crisis and Dissent	76
Conclusion	80

Huge treatises are now appearing showing the compatibility of administrative justice with the law. Just as theology was not able to exist without a Redeemer, so the “law” must have its equity or its administrative law in order to save mankind from the consequences of its logical systems.

- Thurman Arnold (1935)¹

Since their origins in the Depression, the practice, teaching, and study of modern administrative law have continued to develop in the midst of debates over how to resolve conflicts between a dominant set of legal doctrines and external political demands. Over the past half-century or more, periodic administrative legitimacy crises have spawned an academic literature consisting of authoritative, influential articles that clarify embryonic doctrines and theories.² The now-familiar rhythm of such outbursts began with modern administrative law’s widespread emergence in the 1930s, when federal regulatory agencies became sufficiently prevalent to warrant extensive attention from legal academics.³ Administrative law histories have established this fairly well-known story: Academics sympathetic to the Roosevelt Administration, including most prominently Felix Frankfurter and the young professors who had taken his classes at Harvard Law School, provided the theoretical and doctrinal bases for the Administration’s efforts to address the vast market failures wrought by the Depression.⁴ In doing so, this first generation of scholars launched administrative law as a basic part of the law

¹ THURMAN ARNOLD, *THE SYMBOLS OF GOVERNMENT* 64 (1935)[hereinafter *SYMBOLS*].

² The period of greatest ferment was the mid-1970s, when three influential critiques of administrative law appeared: James O. Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 *STAN. L. REV.* 1041 (1975); Robert Rabin, *Administrative Law in Transition: A Discipline in Search of an Organizing Principle*, 72 *NW. U. L. REV.* 120 (1977)[hereinafter *Transition*]; Richard B. Stewart, *The Reformation of American Administrative Law*, 88 *HARV. L. REV.* 1668 (1975)[hereinafter *Reformation*]. This ferment was neither unprecedented, see HENRY FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS* (1962), nor the last word, see CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* (1990); Jody Freeman, *The Private Role in Public Governance*, 75 *N.Y.U. L. Rev.* 543, 545-49 (2000).

³ See Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 *STAN. L. REV.* 1189, 1252-53 (1986)[hereinafter *Historical Perspectives*].

school curriculum and a popular subject of academic legal research. More important, they put in place a particular ideological and conceptual approach to the subject, one that continues to shape the theory and practice of administrative law today.⁵ For first generation administrative law scholars, the correct legal and administrative processes and structure would lead inexorably to superior law and policies. Their presumptions about both the peculiar competencies of administrative agencies and the limited but still important role of the judicial review of agency action continue to underpin the conceptual and doctrinal dimensions of the field.

These scholars faced opposition in their own time, most famously from elite members of the legal community who—seeking to protect their clients, their status and business, and/or their legal culture—sought to challenge the political and legal legitimacy of new and expanded federal regulatory programs.⁶ But they also faced a critique from an unlikely source within the legal academy: Thurman Arnold, a member of the Yale Law School faculty associated with the legal realists.⁷ Like the first generation of administrative law scholars, Arnold was an advocate of federal regulation and especially of the New Deal, but unlike his contemporaries at Harvard, he was deeply suspicious of comprehensive solutions based upon structural and procedural systems. His brief but evocative writings on the subject represent a singular effort to bring realism's

⁴ See, e.g., STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 21-24 (5th ed. 2002); G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 103-08, 114-16 (2000)[hereinafter CONSTITUTION].

⁵ See WILLIAM C. CHASE, THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNMENT (1982); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 213-25 (1992); WHITE, CONSTITUTION, *supra* note 4, at 103-08; Thomas O. Sargentich, *Teaching Administrative Law in the Twenty-First Century*, 1 WIDENER J. PUB. L. 147, 150-54 (1992); Stewart, *Reformation*, *supra* note 2, at 1677-78.

⁶ See RONEN SHAMIR, MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL (1995); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1571-72 (1996); Nicholas S. Zeppos, *The Legal Profession and the Development of Administrative Law*, 72 CHI.-KENT L. REV. 1119 (1997).

⁷ The best current source of biographical information on Arnold is Gene M. Gressley, *Introduction, in VOLTAIRE AND THE COWBOY: THE LETTERS OF THURMAN ARNOLD 1* (Gene M. Gressley ed., 1977)[hereinafter VOLTAIRE AND THE COWBOY]. A full-length biography by Spencer Webber Waller is forthcoming from NYU Press.

insights to the judicial review of federal administrative agencies.⁸ Arnold argued that society is shaped by a deep-seated desire for stable and authoritative legal and political symbols, and he proposed an eclectic mix of creative means to enable the growth of an administrative state, one that would be sufficiently free of legal constraints to attack what he considered the root causes of the Depression.

Both early proponents of the federal administrative state and their critics shared the assumption that the “supremacy of law” undergirding a liberal democracy required the judiciary and administrative agencies to operate within separate but interdependent spheres—even if they disagreed as to whether the judiciary’s role was to uphold or strike down agency decisions.⁹ By contrast, Arnold called for abandoning the separate domains of agency regulation and judicial review in favor of more functional, flexible relationships between courts and agencies, relationships that would include both institutional partnerships and greater agency independence. This departure from the consensus of his day reflected Arnold’s commitment to two of realism’s core tendencies: a deep-rooted distrust of formal distinctions and a restless quest for practical solutions to the functional impasses caused by unreflective formalist assumptions. The solutions Arnold proposed to the inefficiencies and irrationalities caused by judicial review were thus both critical and reconstructive, and opposed the formalities of legal system-building.¹⁰

⁸ See JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY CLAIMS 11-14 (1983) [hereinafter BUREAUCRATIC JUSTICE].

⁹ The popular notion of “judicial supremacy,” which presumes the judiciary’s authority to provide a final review of legal and especially constitutional questions, became prominent during the 1890s with the early stirrings of the administrative state, and was tied during that time to classical legal formalism and laissez faire ideology. See ROBERT A. BURT, THE CONSTITUTION IN CONFLICT 253 (1992); STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920, at 152-53 (1982); William E. Nelson, Commentary, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States: 1790- 1860*, 120 U. PA. L. REV. 1166, 1182-85 (1972); cf. Barry Friedman, *The History of the Countermajoritarian Difficult, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 339-42 (1998) (placing the term’s earliest rise in popularity in the early and mid-nineteenth century).

¹⁰ This anti-systemic tendency extended to sarcastic criticism of the American Law Institute’s common law restatement project. See Thurman W. Arnold, *The Restatement of the Law of Trusts*, 31 COLUM. L. REV. 800 (1931).

Arnold resisted what he termed the “logical system” of administrative law, with its acceptance of a central role for judicial review, even as he recognized the judiciary as a necessary, if merely symbolic and ideological, component of the modern administrative state. Like the first generation scholars and their critics, he too saw the inevitability of law’s institutional “supremacy,” but assumed that any effort to retain judicial review would inevitably sink agency discretion. In the “trial by combat” of litigation, courts would always emerge the symbolic superior to any party appearing before them, whether individual, agency, or Congress.¹¹ The only way to protect fledgling administrative agencies, therefore, was to avoid the combat in any way possible.

Arnold’s proposed alternatives to trial by combat were dead on arrival and his critique of administrative law has largely been ignored, even as his anti-formalist criticism has remained current and popular.¹² But his work was more than an historical anomaly. It was prophetic. He saw that the emerging approach advocated by his contemporaries featured a comprehensive, formal system that would successfully utilize prevailing symbols to legitimate administrative agencies. He also correctly predicted the costs of creating a formal structure that would ultimately limit administrative discretion and regulatory flexibility. Equally significant, his work illuminates two fundamental, related, and relatively unexplored aspects of the past and present of administrative law, aspects which in turn explain the cyclical tendencies of scholars in the field to find crisis and resolution in its familiar and flexible structures.

First, his critique and the debate it sparked between himself and Felix Frankfurter starkly reveals modern administrative law’s procedural core and its precursor relationship to the legal

¹¹ Thurman Arnold, *Trial by Combat and the New Deal*, 47 HARV. L. REV. 913 (1934) [hereinafter *Trial by Combat*].

¹² See Mark Fenster, *The Symbols of Governance: Thurman Arnold and Post-Realist Legal Theory*, 51 BUFF. L. REV. 1053, 1056-57 (2003).

process theory that would become, in the post-war period, the dominant post-realist approach to legal scholarship and teaching. Arnold rejected any fundamental or functional distinctions between the judiciary and agencies as institutions of governance except insofar as they served the symbolic dimensions of governance. He also showed little faith in process as a necessary and sufficient means to a functional administrative state. Rather, he saw procedural doctrines in the same way that a wily, creative attorney does: as a tool to move a decisionmaker to a desired outcome. Process, form, and structure were secondary to substantive policy and functional results. It was in response to Arnold, as well as to opponents of the New Deal expansion of the regulatory state, that first generation scholars began to articulate the concepts of process-centered jurisprudence, of limited, reasoned judicial review, and of institutional competencies—concepts now associated with legal process theory—as justifications both for the rise of administrative agencies and for the continuing (though limited) importance of judicial review of agency action. Juxtaposing the first generation scholars’ work to Arnold’s critique, then, makes plain the core commitments of modern administrative law—both in the moment at which they emerged and in the later appearance and success of legal process theory. In this light, administrative law appears less a realist effort to create a pragmatic, problem-solving legal regime and academic discipline, and more a traditional effort to apply recognizable, comprehensive, formal legal structures and methods to an emergent area of law and government.

Second, reinserting Arnold’s critique into the historical trajectory of administrative law enables a better understanding of how the first generation scholars set in motion a systematic approach that is sufficiently abstract, flexible, comprehensive, and familiar to have contained the political and conceptual challenges to the administrative state that have unfolded over the past fifty years. Although first generation scholars recognized the dangers of judicial review for

administrative agencies—this debate took place, after all, at the height of the controversy surrounding the Supreme Court’s finding some New Deal regulatory programs unconstitutional—they advocated a system based on the judiciary’s ultimate supremacy over agency competence in developing expert policy. Like the first generation, succeeding generations of administrative law scholars have identified particular crises of legitimacy, governance, and functionality in regulatory agencies, and have posited new models of judicial and administrative processes that can better serve the needs of their times. Though certainly not without merit or beneficial effects, such efforts have typically offered to resolve the external crises they identify by redefining internal institutional competencies and rejiggering the relative authority of the judiciary and the internal procedures of administrative agencies. Such reforms reaffirm an earlier faith in a structural solution to the challenge of the regulatory state, one based upon administrative and legal process and overseen ultimately by the judiciary. To break this conceptual log jam and remake the field of administrative law, more recent scholarship has sought to change the first generation’s model, often borrowing methods and theories offered by other academic disciplines. In doing so, this scholarship has taken up, unknowingly, Arnold’s original challenge, and faces the same conceptual impasse and settled institutions and doctrines as Arnold faced, as further calcified by the field’s long history.

To illuminate the comparison between Arnold and the consensus on administrative law that emerged in the 1920s and 1930s, the Article begins in Part I of this Article presents first generation scholars’ successful efforts to legitimate a vision of agency expertise and judicial review. Part II turns to Arnold’s competing vision of administrative law, first summarizing the broad themes of his approach to law and governance, and then focusing on his critique of conventional notions of judicial review within administrative law and his various proposals for a less formal and more flexible approach. Part III discusses the first generation scholars’ debate

with Arnold in correspondence and published scholarship, a debate that illuminates what both sides saw as the stakes of their proposed visions of modern administrative law. Parts IV and V consider the implications of this debate for the historiography of administrative law as a field of legal academic endeavor. Part IV demonstrates the conceptual connections between first generation scholarship and the legal process theory that emerged in the post war period, and recounts Arnold's intervention in 1960 against what he saw as legal process advocates' conservative formalism—an intervention in which he revisited the arguments he initially made as modern administrative law emerged. Part V considers the continuities between first generation scholarship and more recent administrative law scholarship, as well as between Arnold's dissent and current critiques of the field.

I.
An Administrative and Judicial Process:
First Generation Administrative Law Scholarship

At the height of legal realism, administrative law was a nascent academic enterprise, as well as an embryonic practice area of federal law.¹³ Significant federal statutory mandates for regulatory programs whose implementation was overseen by administrative agencies (as well as myriad state regulatory agencies overseeing state programs) had been in place since the Populist and Progressive Eras. Despite this fact, the modern federal administrative state—envisioned as a response to and check upon market failure—did not begin in earnest until the early New Deal.¹⁴ Unsurprisingly, then, as late as 1937, only a bare majority of accredited law schools offered one or more courses in administrative law.¹⁵ And even though numerous important agencies, including the Interstate Commerce Commission and the Federal Trade Commission, had fully

¹³ See A.H. Feller, *Prospectus for the Further Study of Federal Administrative Law*, 47 YALE L.J. 647 (1938).

¹⁴ See Rabin, *Historical Perspective*, *supra* note 3, at 1243-53.

¹⁵ See Arthur T. Vanderbilt, *The Bar and the Public*, 23 AM. BAR. ASSN. J. 871, 874 (1937).

established themselves by the time of the New Deal,¹⁶ the Roosevelt Administration faced enormous resistance from elite segments of the legal profession as it attempted to expand the number and scope of the federal regulatory bureaucracy.¹⁷ Attorneys and jurists increasingly accepted federal administrative agencies as essential elements of American governance during the early part of the twentieth century, despite their apparently anomalous position within traditional, formalist conceptions of the constitutional order. But the acceptance was grudging, and the legal legitimacy of the administrative state and its operations remained the subject of vigorous debate.¹⁸

A. *Precursors to the First Generation.*

Legal academics in the early twentieth century had developed a number of competing approaches to the emerging field. All shared the general commitment of the Progressive Era to address large scale economic and social issues through legislative regulatory programs administered by government bureaucracies rather than through common law causes of action adjudicated by courts. Writing in the *Harvard Law Review* in 1936, Justice Harlan Fiske Stone described this shift as “a substitution made necessary, not by want of an applicable law, but because the ever-expanding activities of government in dealing with the complexities of modern life had made indispensable the adoption of procedures more expeditious and better guided by specialized experience than any which the courts had provided.”¹⁹

¹⁶ See Act of Feb. 4, 1887, 24 Stat. 379, 383 (establishing Interstate Commerce Commission); Act of Sept. 26, 1914, 38 Stat. 717 (establishing Federal Trade Commission). See generally WHITE, CONSTITUTION, *supra* note 4, at 98-103 (describing how administrative agencies such as the Interstate Commerce Commission had grown in power and achieved some measure of popular and judicial acceptance during the early part of the twentieth century).

¹⁷ See sources cited *supra* note 6.

¹⁸ See WHITE, CONSTITUTION, *supra* note 4, at 96-108.

¹⁹ Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 16 (1936). On Progressive Era political commitments and their relationship to academics studying government and administrative law, see JAMES T. KLOPPENBERG, UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT, 1870-1920, at 361-63, 383-85 (1986); William J. Novak, *The Legal Origins of the Modern American State*, in LOOKING BACK AT LAW'S CENTURY 249 (Austin Sarat et al. eds., 2002).

The least important of these approaches within law schools was that associated with Frank Goodnow of Columbia University's Law School and Government department, a leading Progressive advocate of administrative agencies, and teacher of the first administrative law course taught in a law school.²⁰ Goodnow's legal scholarship sought to enable regulatory bodies to operate free of the narrow constitutional constraints that courts used to limit congressional legislation and delegation.²¹ His approach was largely an internal one that studied how administrative officers applied and executed statutes, and focused less on common law development by the judiciary, which was the traditional focus of the legal academy.²² Goodnow ultimately became better known as a founder of the academic discipline Political Science (or Government) and for developing the empirical study of government institutions.²³

A second approach that was more cognizable and much better-known within the legal academia of the 1920s and 1930s was that of Ernst Freund. Like Goodnow, Freund had worked in law schools and political science departments, and had also served in government agencies.²⁴ Freund also shared with Goodnow a commitment to Progressive politics, and called both for increased governmental reliance on technical, scientific professionals to make expert

²⁰ See DOROTHY ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE* (1991); Novak, *supra* note 19, at 249; Richard M. Thomas, *Deprofessionalization and the Postmodern State of Administrative Law Pedagogy*, 42 J. LEGAL EDUC. 75, 75 n.6 (1992).

²¹ See Novak, *supra* note 19, at 258, 271-72.

²² Goodnow's most significant treatise on administrative law was intended for students of "politics." FRANK J. GOODNOW, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES*, at iv (1905). The treatise spent only the first of its six "books," and part of another, and less than a third of its pages, on specifically legal issues, concentrating instead on the forms and practices of administration and the work of administrative officers. See also John A. Fairlie, *Public Administration and Administrative Law*, in *ESSAYS ON THE LAW AND PRACTICE OF GOVERNMENTAL ADMINISTRATION: A VOLUME IN HONOR OF FRANK JOHNSON GOODNOW* 3, 28-30 (Charles G. Haines & Marshall E. Dimock eds., 1935) (contrasting Goodnow's approach to the more legal approaches of Ernst Freund, Bruce Wyman, and others within legal academia).

²³ See JAMES HART, *AN INTRODUCTION TO ADMINISTRATIVE LAW* 4-5 (1940); *Introduction: Frank J. Goodnow*, in *ESSAYS ON THE LAW AND PRACTICE OF GOVERNMENTAL ADMINISTRATION* *supra* note 22 at v, x.

²⁴ See OSCAR KRAINES, *THE WORLD AND IDEAS OF ERNST FREUND* 2-8 (1974). An illustration of Goodnow's distance from the traditional legal academy is the apocryphal tale of Thomas Reed Powell, who described the experience of studying under Goodnow in the early years of the twentieth century after having attended Harvard Law School, as one in which he had been "de-Harvardized." LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-60*,

administrative decisions divorced from the corruption of politics, and for a field of administrative law to legitimate and assist in the “legislative regulation of economic activity.”²⁵ He explicitly encouraged legal academics to study administrative agencies and to assist them in discerning their broad legislative mandates.²⁶

Freund focused especially on systems of public administration, on the specific powers (such as licensing and ratemaking) that public officers and agencies wielded, and on statutory and common law bases for judicial review of administrative action.²⁷ The latter constituted a “strictly legal discipline” and had become the subject matter of the legal academy; public administration, by contrast, was an extra-legal realm considered by professors of Government and Political Science.²⁸ In this regard, he sought to bridge what he described as the differentiated study of administrative organization and administrative powers, the former of which focused on optimizing internal public administration and the latter of which performed the “more strictly legal” task of protecting “right and justice” through external judicial institutions.²⁹ In his instruction on the internal functions of administration, Freund’s work focused students’ attention on the workaday world of government officials and attorneys, and served the traditional role of introducing “the rank and file of the bar-to-be to methods of legal thinking, to the fundamental

at 50 (1986)[hereinafter LEGAL REALISM]. On the importance of Freund’s and Goodnow’s work to the development of a pre-New Deal public law, see Novak, *supra* note 19 at 255.

²⁵ Ernst Freund, *Historical Survey*, in THE GROWTH OF AMERICAN ADMINISTRATIVE LAW 9, 20 (Ernst Freund et al. eds., 1923)(hereinafter *Historical Survey*). Freund’s approach itself had its precedents; treatise author and state supreme court justice Thomas Cooley, for example, was a nineteenth century precursor of Freund. See Paul D. Carrington, *Law and Economics in the Creation of Federal Administrative Law: Thomas Cooley, Elder to the Republic*, 83 IOWA L. REV. 363, 387-88 (1998).

²⁶ Freund, *Historical Survey*, *supra* note 25 at 39; Ernst Freund, *The Correlation of Work for Higher degrees in Graduate Schools and Law Schools*, 11 ILL. L. REV. 308 (1916).

²⁷ See Oliver O. Field, *The Study of Administrative Law: A Review and a Proposal*, 18 IOWA L. REV. 233, 234-35 (1933).

²⁸ Ernst Freund, *Administrative Law*, 1 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 452, 455 (Edwin R. A. Seligman ed., 1932).

²⁹ *Id.*

rules, to the elements of procedure.”³⁰ This approach remained an important one to the legal academy and to the bar, as faculty focused on the vocational aspects of administrative law through the case method,³¹ and as leading members of the bar called for greater attention in law teaching to “the principles and methods of procedure in administrative law cases” within agencies.³²

In his more traditional legal academic work, Freund presented a curiously conservative approach for a committed Progressive.³³ His early casebook on administrative law used case-based training methods to emphasize the various common law means by which individuals could seek relief from judicial action.³⁴ But his understanding of the constitutional and legislative limits of administrative agencies was quite constrained. To Freund, legislatures strictly limited agency discretion within a statutory framework, and any agency efforts to regulate beyond its statutory mandate that affected individual liberty or property rights was “hardly conformable to the ‘Rule of Law.’”³⁵ At the same time, he considered it appropriate for legislatures to delegate authority only to agencies that concerned uncontroverted issues of policy or opinion.³⁶ In the

³⁰ See Maurice H. Merrill, *Three Possible Approaches to the Study of Administrative Law*, 18 IOWA L. REV. 228, 232 (1932)[hereinafter *Approaches*].

³¹ See Field, *supra* note 27, at 235; Paul L. Sayre, *A Common Law of Administrative Powers*, 18 IOWA L. REV. 241, 247 (1933). After Freund’s death, his successor at the University of Chicago, Kenneth Sears, published a similar casebook that provided a remedy-based, functional approach and limited consideration of the larger constitutional issues on which Frankfurter and Davison’s casebook focused. See KENNETH C. SEARS, *CASES AND MATERIALS ON ADMINISTRATIVE LAW* at vii-viii (1938).

³² See O. R. McGuire, *Reforms Needed in the Teaching of Administrative Law*, 6 GEO. WASH. L. REV. 171, 176-78 (1937). During this period, McGuire was chairman of the ABA’s Special Committee on Administrative Law that was developing a proposal for a specialized administrative court to hear appeals from agency adjudications. See Daniel R. Ernst, *Dicey’s Disciple on the D.C. Circuit: Judge Harold Stephens and Administrative Law Reform, 1933-1940*, 90 GEO. L.J. 787, 790 -93 (2002).

³³ Freund’s commitment to Progressivism was real but cautious. See KRAINES, *supra* note 24 at 93 -94.

³⁴ See Merrill, *Approaches*, *supra* note 30 at 228; Fairlie, *supra* note 22 at 28 -29.

³⁵ Freund, *Historical Survey*, *supra* note 25 at 22 -23; see also Ernst Freund, *The Substitution of Rule for Discretion in Public Law*, 9 AM. POL. SCI. REV. 666, 670 (1915) (“[F]or in a government by law discretion ought to have a very limited place in administration.”). Freund’s position was subject to vigorous criticism from, among others, Dean John Wigmore of Northwestern. See generally John H. Wigmore, *The Dangers of Administrative Discretion*, 19 ILL. L. REV. 440, 441 (1925) (arguing for control rather than reduction of administrative discretion).

³⁶ See ERNST FREUND, *ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY* 218-221 (1928).

absence of such consensus, Freund argued, legislatures should control private activity directly by statute, without administrative enforcement.³⁷

B. *The First Generation.*

The approach that was beginning to dominate legal academia during the early twentieth century, established at Harvard in the century's first decade, opposed both Freund's narrow vision of administrative discretion and his focus on the judicial review of statutory and common law issues.³⁸ Harvard Law School dean Roscoe Pound and professors Bruce Wyman and Thomas Reed Powell in the first quarter of the century,³⁹ and, later and more clearly, Harvard professor Felix Frankfurter and his students (most prominently James Landis—himself later dean of Harvard) were the leading legal academic theorists who helped develop the most influential modern conception of administrative law.⁴⁰ To varying extents, and with Frankfurter and Landis

³⁷ See *ibid.*

³⁸ See WHITE, CONSTITUTION, *supra* note 4, at 107. Cf. CHASE, *supra* note 5 (alleging that Frankfurter, with the help of his students, purposefully subverted Freund's approach and, to an extent, his career).

³⁹ See BRUCE WYMAN, PRINCIPLES OF ADMINISTRATIVE LAW (1903); Roscoe Pound, *Executive Justice*, 46 AM. L. REG. 144 (1907); Pound, *The Growth of Administrative Justice*, 2 WISC. L. REV. 321 (1924)[hereinafter Pound, *Growth*]; Thomas Reed Powell, *Administrative Exercise of the Police Power* [Parts I and II], 24 HARV. L. REV. 268 & 333 (1910). Pound would later adamantly oppose the New Deal and administrative discretion, and single out first generation scholars for withering, often excessive criticism. See Paul Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 268-71 (1978).

⁴⁰ See Sayre, *supra* note 31 at 241 -42 (describing Frankfurter's influence on the then-present generation of legal academics teaching and writing on administrative law). On Frankfurter's teaching at Harvard, which concentrated on public law subjects like administrative law and public utilities as well as federal jurisdiction, see Roscoe Pound, *Felix Frankfurter at Harvard*, in 1 FELIX FRANKFURTER: A TRIBUTE 137, 140-43 (Wallace Mendelson ed., 1964). On Frankfurter's "old boy network," through which he placed his best students in the right clerkships and prepared them for careers in elite academic or government positions, see G. EDWARD WHITE, *Felix Frankfurter, The Old Boy Network, and the New Deal*, in INTERVENTION AND DETACHMENT: ESSAYS IN LEGAL HISTORY AND JURISPRUDENCE 149 (1994).

Some have argued that Frankfurter was a minor administrative law scholar whose great achievement was in acting as a mentor to others. See CHASE, *supra* note 5, at 137-39; Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 540-41 (2002). It seems a curious reflection of academic priorities to call someone a minor scholar in the field when they train a generation of scholars, lawyers, and officials in a particular approach that they retained throughout their entire illustrious academic and public careers. Frankfurter himself considered his administrative law teaching to be among his most important tasks as an academic, and he purposely limited his administrative law seminars (as well as those on federal jurisdiction) to elite groups of Harvard's highest achieving students. See Mary Brigid McManamon, *Felix Frankfurter: The Architect of "Our Federalism,"* 27 GA. L. REV. 697, 752 n.329 (1993). Long into their distinguished academic careers, Frankfurter's students continued to remember their mentor's administrative law seminar. See, e.g., Louis L. Jaffe, *Administrative Law: Burden of Proof and Scope of Review*, 79 HARV. L. REV. 914, 918-19 (1966) (describing the class period after the Supreme Court's decision in *Crowell v. Benson*, 285 U.S. 22 (1932), and using his memory of that event to describe Frankfurter's and Brandeis's conception of a flexible

leading the way, the first generation scholars of the late 1920s and 1930s shared strong commitments to the idea that a powerful national administrative state led by experts was necessary to solve the most important political issues of the day. These experts would engage in a “systematic effort” to expand “the area of accredited knowledge as the basis of action” in the “intricate and technical facts” of a modern economy and society.⁴¹ “Regulation by government,” according to John Dickinson, a former Frankfurter student, would promptly prevent future public harms caused by the inadequacies, failures, and collapse of the market by granting discretionary power to government agencies with “technical knowledge” unavailable to courts.⁴²

Ultimately, the emergent approach of first generation administrative law scholarship emanated from three assumptions. First, federal administrative agencies, with their expertise, flexibility, and ability to consider systemic solutions to pressing national problems, were so necessary for a growing, modern nation that traditional constitutional understandings regarding the separation of governmental powers must yield—at least to some extent.⁴³ Relying on the same Progressive Era traditions to which Freund and Goodnow subscribed, legal academics sought to establish a legal environment that enabled government intervention to serve a range of economic and social reforms.⁴⁴ Pound had proposed the development of a body of law that

approach to administrative law). Moreover, claiming Frankfurter had secondary status as an administrative law scholar requires one to ignore the relevance of Frankfurter’s extensive writings on federal jurisdiction and on the institutional role of the Supreme Court for the development of administrative law as a field. As I note in Part III below, he certainly did not consider that work irrelevant—procedure and jurisdiction were, to him, central to making administrative agencies legitimate and protecting the status of the judiciary. In his approach, a proper legal process was essential to a functional and legitimate administrative process.

⁴¹ FELIX FRANKFURTER, *THE PUBLIC AND ITS GOVERNMENT* 151-51 (1930).

⁴² JOHN DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES* 14-15 (1927). Dickinson dedicated the book “to Roscoe Pound and Felix Frankfurter, pathfinders of the law.” *Id.* at v.

⁴³ See WHITE, *CONSTITUTION*, *supra* note 4, at 98-108. Separation of powers in this context refers both to the notion that the tripartite branches of government each have their own sphere of permissible activity that cannot be broached by another, and that Congress cannot delegate its lawmaking powers to another enumerated branch of the government, unless a unit of government delegated by Congress to exercise its power is itself an agent of the Legislature.

⁴⁴ See Herbert Hovenkamp, *The Mind and Heart of Progressive Legal Thought*, 81 *IOWA L. REV.* 149, 157-58 (1995).

would challenge the existing “methods of broad generalization” of constitutionally permissible action.⁴⁵ In Frankfurter’s words, the administrative law considered by legal academics must offer “fluid tendencies and tentative traditions,” and must protect against “sterile generalization unnourished by the realities of ‘law in action.’”⁴⁶ Thus only an academic with a “rigorously scientific temper of mind” who is “able to move freely in the world of social and economic facts” would be capable of understanding and helping to construct a proper approach to administrative law.⁴⁷ Caution about “government by experts” was not entirely misplaced, Frankfurter wrote, but external political control and internal standards of performance developed by the expert professionals themselves *could* provide sufficient restraint.⁴⁸ The law professor’s role in the development of modern administrative law, then, was to nurture and promote the constitutional doctrine necessary to free experts to perform those tasks.

Their second, and equally important, assumption was that notwithstanding the importance of administrative expertise, a limited judicial review should remain at the center of the process by which congressional delegations of power to administrative agencies and agency actions themselves would be deemed legal and legitimate.⁴⁹ In the opening sentence of a chapter on “Legal Order in Fields of Disputed Social Policy” in his 1927 book *Administrative Justice and the Supremacy of Law*, John Dickinson described the essential but properly constrained role of the judiciary in this way: “Judicial review for so-called error of law is crucial not only as keeping open the necessary opportunity for the courts to compel observance of the law as previously formulated, but also as the channel through which they can carry forward the process

⁴⁵ Pound, *Growth*, *supra* note 39 at 336.

⁴⁶ Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 619 (1927).

⁴⁷ *Id.* at 621.

⁴⁸ FRANKFURTER, *supra* note 41, at 157-60.

⁴⁹ See Rabin, *Transition*, *supra* note 2, at 122-23.

of legal development.”⁵⁰ For Dickinson, review of administrative action by a modern judiciary open to developing a common law of regulation would constitute “an instrument of the supremacy of law in building out new ground for the operation of general rules and principles.”⁵¹ Frankfurter agreed.⁵² Constitutional common law, correctly applied by right-minded judges, would give birth both to a properly modern administrative state *and* to a properly modern administrative law jurisprudence. It was not the fault of the common law that some judges resisted the regulatory modernism preferred by an emerging generation of administrative law professors; rather, fault lay with those judges who improperly applied legal rules and concepts in new, inappropriate contexts.⁵³ Indeed, one only need to have considered the success of existing agencies to see that in a modern administrative law that included judicial review as “an integral part of the regulatory system,” law’s supremacy was in no danger.⁵⁴ Maintaining “our traditional system of judicial justice,” Frankfurter and Landis had argued, was of paramount importance, and administrative agencies must of course conform to that system.⁵⁵

Third, first generation administrative law scholars presumed that legal academic research and teaching should focus on the traditional study of the judicial role in this process—that is, on the limited judicial review of administrative agencies rather than on the bureaucratic operations and decisionmaking of the agencies themselves.⁵⁶ This approach assumed a binary between the

⁵⁰ DICKINSON, *supra* note 42, at 203.

⁵¹ *Id.* at 206. See Rabin, *Transition*, *supra* note 2, at 122-23.

⁵² See CHASE, *supra* note 5, at 14; Daniel Ernst, *Williard Hurst and the Administrative State: From Williams to Wisconsin*, 18 LAW & HIST. REV. 1, 13-14 (2000).

⁵³ DICKINSON, *supra* note 42, at 216, 334.

⁵⁴ I. L. Sharfman, *The Interstate Commerce Commission: An Appraisal*, 46 YALE L.J. 915, 948, 950 (1937).

⁵⁵ FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 173-74 (Johnson Reprint ed. 1972)(1928).

⁵⁶ According to William Chase, over the course of the first two decades of the century, Dean Pound had sought to avoid the issue of agencies’ decisionmaking, conceiving of it ultimately as a necessary evil of the Progressive Era that would surely disappear as it became unnecessary. Frankfurter’s later resistance to Freund’s conception of administrative law in legal academia as the study and development of agency procedures was intended to protect the role of legal academics and jurists from encroaching upon the work and decisions of administrative agencies. See CHASE, *supra* note 5, at 107-13.

actual internal work of administrative agencies—which had been at least an element of Freund’s and Goodnow’s works—and the external law governing judicial review of the jurisdiction and procedures of the administrative agencies, which within the Frankfurter approach constituted the field of administrative law.⁵⁷ Answering the question “what is administrative law?” in a 1937 law review article, Frankfurter’s casebook co-author J. F. Davison rejected the internal approach as an impossible effort to classify the necessarily intuitive, experimental actions of agencies.⁵⁸ At that time there appeared to be no logical universal system of public administration discernible by law faculties—or, for that matter, even by Justice Holmes, as Davison noted.⁵⁹ The internal approach was therefore significantly less appropriate for teaching and research than the external one, which focused on a typical area of legal academic expertise: the refinement of constitutional common law principles.⁶⁰ These efforts to create a modern conception of administrative law assumed that courts and legal academics would avoid intervention into the regulatory process at least for the present until a new administrative court (akin to courts of equity) would be developed—which itself would not occur until regulatory procedures and practices had been regularized.⁶¹ Meanwhile, law schools across the country began to adopt new courses in administrative law that studied appellate decisions from federal and state courts of general jurisdiction using the case method, while the field of “public administration” arose concurrently in Political Science departments to develop rational and apolitical expertise in

⁵⁷ See CHASE, *supra* note 5, at 60-67 (citing WYMAN, *supra* note 39).

⁵⁸ See J. F. Davison, *Administration and Judicial Self-Limitation*, 4 GEO. WASH. L. REV. 291, 297-99 (1936).

⁵⁹ See *id.* at 298 (noting Justice Holmes’s statement that administrative agencies base their decisions on “an intuition of experience that outruns analysis”) (quoting *Chicago B. & Q. Ry. Co. v. Babcock*, 204 U.S. 585, 598 (1907)).

⁶⁰ See Field, *supra* note 27; Louis L. Jaffe, *The Contributions of Mr. Justice Brandeis to Administrative Law*, 18 IOWA L. REV. 213 (1933)[hereinafter *Contributions*].

⁶¹ CHASE, *supra* note 5, at 114-15. Scholars held fast to this assumption despite efforts by Congress and the bar to develop an administrative court to develop expertise in, and review intensively, the decisions of regulatory agencies, and even to take over the agencies’ power to adjudicate controversies surrounding their work. See Maxwell S. Isenburgh, *Developments in Administrative Law, 1930-1940*, 27 VA. L. REV. 29 (1940); Louis L. Jaffe, *Invective and Investigation in Administrative Law*, 52 HARV. L. REV. 1221 (1939). Leading legal academics

matters of policy and bureaucracy.⁶² Legal academia's limited focus on judicial review at once protected the expertise of lawyers, law professors, and the judiciary within the familiar methods of teaching and scholarship established in the late nineteenth and early twentieth centuries, and expressed the elite legal academy's Progressive Era commitment to expertise by presuming that administrative agencies should be protected from substantive judicial review.⁶³ As one critic of this approach noted, the curriculum of administrative law classes before (and, only to a slightly less degree, after) World War II was concerned almost exclusively with appellate judicial opinions reviewing administrative decisions, with little or no focus on the internal rulemaking or adjudicatory processes within agencies.⁶⁴

The focus on external judicial review rather than internal agency operations also shaped the doctrinal issues upon which first generation scholars focused their attention. Frankfurter's co-authored 1932 casebook on administrative law spent more than half its pages on constitutional challenges to legislation and administrative action, focusing especially on issues related to the separation of powers and Congressional delegation of powers to agencies.⁶⁵ This led one critic to characterize the casebook as "in effect a specialized work on constitutional law."⁶⁶ Freund himself criticized Frankfurter's exceptional attention to constitutional issues—a priority reversing that assumed in Freund's earlier casebook, which had focused almost entirely upon the statutory and especially common law doctrines that affected agencies—and commented skeptically upon the status that law teachers and students bestowed upon the fleeting fashion of

resisted, and ultimately defeated such efforts in favor of mere procedural review of administrative decisions. CHASE, *supra* note 5, at 145-46.

⁶² CHASE, *supra* note 5, at 117-34.

⁶³ See G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION* 327 (exp. ed. 1988).

⁶⁴ ESTHER L. BROWN, *LAWYERS, LAW SCHOOLS AND THE PUBLIC SERVICE* 179-82 (1948).

⁶⁵ See FELIX FRANKFURTER & J. FORRESTER DAVISON, *CASES AND OTHER MATERIALS ON ADMINISTRATIVE LAW* (1932).

⁶⁶ Clark Byse, *Administrative Law—Cases and Comments*, 25 IOWA L. REV. 839, 839 (1940).

“juristic performance” in the field of constitutional law.⁶⁷ Later authors abandoned the Frankfurter casebook’s exceptional concern with constitutional issues, but nevertheless continued to focus on the judicial review of constitutional issues as a major, preliminary consideration for a course in administrative law.⁶⁸

C. *James Landis and The Administrative Process.*

As important as Pound’s, Frankfurter’s, and Dickinson’s work was in the 1920s, James Landis, author of the seminal work *The Administrative Process* (1938) as well as Frankfurter’s student and co-author, was the most important theorist of administrative law in support of the New Deal.⁶⁹ Originally delivered at Yale in the prestigious annual Storrs lectures in January 1938 and published as a book that same year, *The Administrative Process* was at the time the most coherent, accessible, and comprehensive account of the current state of administrative law from the perspective of a New Deal proponent.⁷⁰ Well before his Storrs lectures—which he had originally been invited to deliver in 1935 but which were delayed while he served as chairman of the Securities and Exchange Commission—Landis had earned acclaim as a leading New Deal administrator, and he had recently become dean at Harvard Law School.⁷¹

Landis explained that administrative agencies and the administrative legal process that shaped their work were a necessary outgrowth of the increasingly complex economy and society that modernity had engendered. As a result of both their historic necessity and their rational

⁶⁷ Ernst Freund, Book Review, 46 HARV. L. REV. 167, 169-70 (1932) (reviewing FRANKFURTER & DAVISON, *supra* note 65).

⁶⁸ See, e.g., WALTER GELLHORN, ADMINISTRATIVE LAW: CASES AND COMMENTS (1940); see generally Byse, *supra* note 66, at 841, 846 (describing Gellhorn casebook as “a significant and distinctive contribution” and as better serving an upper-division law school course in administrative law than its predecessors).

⁶⁹ JAMES LANDIS, THE ADMINISTRATIVE PROCESS (1938). On Frankfurter’s relationship with Landis, one of his favorite Harvard students, see JOSEPH P. LASH, *A Brahmin of Law: A Biographical Essay*, in FROM THE DIARIES OF FELIX FRANKFURTER 3, 35-36 (1975).

⁷⁰ See DONALD A. RITCHIE, JAMES M. LANDIS: DEAN OF THE REGULATORS 84-85 (1980). It remains the standard text that casebook authors use to demonstrate the ideas of first generation scholarship. See, e.g., PETER H. SCHUCK, FOUNDATIONS OF ADMINISTRATIVE LAW 10-14 (2d ed. 2004) (excerpting LANDIS, *supra* note 69); PETER L. STRAUSS ET AL., GELLHORN AND BYSE’S ADMINISTRATIVE LAW 27-29 (rev. 10th ed. 2003) (same).

development, “the administrative process” of agency operations and administrative law had already achieved “great stature” and would only grow in the future.⁷² Landis considered the administrative process to be an optimal means of promoting government oversight because within its parameters agencies could study an issue comprehensively in order to resolve a controversy as “rightly,” rather than as fairly, as possible.⁷³ Moreover, the regulatory state was necessary both to distribute wealth to “ethical levels” and to maximize the total of society’s wealth.⁷⁴ To those who would complain of the administrative state’s coercive nature in its efforts to maximize and distribute wealth, Landis asserted that in the state’s absence, economic, legal, and political coercion would be performed by uncontrollable private entities rather than by a democratically elected and accountable government.⁷⁵ Accordingly, Congress and the President should create more, and more expert, administrative agencies, because only by doing so could government provide the “efficiency that is the desperate need.”⁷⁶

In *The Administrative Process*, Landis dismissed as irrational those opponents of the New Deal who claimed the Roosevelt administration’s expansion in the number and size of federal agencies was unconstitutional.⁷⁷ If a court faced a constitutional claim that legislation or an agency action violated separation of powers principles, it must recognize the constitutionality

⁷¹ See STRAUSS ET AL., *supra* note 70, at 62-82.

⁷² LANDIS, *supra* note 69 at 8-9.

⁷³ *Id.* at 38-40.

⁷⁴ *Id.* at 16.

⁷⁵ See *id.* at 11 (“[T]he penalties that private management can impose possess a coercive force and effect that government even with its threat of incarceration cannot equal.”); see also *id.* (noting that the management of a large corporation like U.S. Steel has power not only over its employees or customers but also “either by itself or in combination with its contemporaries can virtually determine what policies with reference to the production and sale of steel we shall pursue as a nation”). This argument echoes a central assertion of the legal realists that is most closely associated with Robert Hale, an economist by training and a professor at Columbia Law School from 1919-1949. See BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* 210 (1998); Neil Duxbury, *Robert Hale and the Economy of Legal Force*, 53 MOD. L. REV. 421 (1990); Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Hale, *Force and the State: A Comparison of “Political” and “Economic” Compulsion*, 35 COLUM. L. REV. 149 (1935).

⁷⁶ LANDIS, *supra* note 69 at 23-24.

and necessity of both the delegation and the administrative act. Agencies that developed regulatory programs or adjudicated complaints after following proper procedures should withstand constitutional scrutiny insofar as the administrative process sufficiently balanced the constitutional branches of government, and because the products of this process were far more important to the function of government and the preservation of political order than was the value of trying to preserve a static, outdated vision of “separate” powers.⁷⁸ Thus, the relationship between agencies and Congress must be formally flexible but based on structural means of control. Successful statutory delegation would provide agencies with sufficient authority to devise and implement proper solutions to economic and social problems, while Congress would retain oversight through the appropriations process.⁷⁹

Reviewing recent Supreme Court decisions on the constitutionality of the administrative state with a mixture of respect and criticism, Landis considered the extent to which the Court shared his vision of agency expertise and the judicial role of validating proper administrative processes and decisionmaking. Landis praised the Court’s recent decision in *Humphrey’s Executor*, which upheld Congressional constraints on the President’s power to remove officers of independent agencies,⁸⁰ because the decision demonstrated that the Court was coming to the mature realization that agencies needed and deserved sufficient “administrative freedom of movement” through discretion and independence.⁸¹ At the same time (and for the same reasons), Landis decried the Court’s holding that agency findings of “jurisdictional” facts, the existence of which serve as “a condition precedent to the operation of a statutory scheme,”⁸² and

⁷⁷ See, e.g., *id.* at 4 (describing the critical “literature” regarding the administrative process as “abound[ing] with fulmination”).

⁷⁸ *Id.* at 46.

⁷⁹ See *id.* at 75-78.

⁸⁰ *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935).

⁸¹ See LANDIS, *supra* note 69, at 115-16.

⁸² *Crowell*, 285 U.S. at 22.

“constitutional facts” “where rights and liberties are involved”⁸³ deserved no judicial deference.⁸⁴ By creating and enforcing this distinction to protect its institutional prerogative, Landis argued (referring to Justice Brandeis’s dissents in *St. Joseph Stock Yards v. United States* and *Crowell v. Benson*), the Court invited destructive judicial intrusion into the administrative process over legal matters.⁸⁵

In this regard, Landis shared legal realists’ faith in expertise and skepticism about abstract conceptions of constitutional law. Indeed, referencing and utilizing legal realism’s critique of formalism, he argued that courts must look not just at precedent and legal forms but at “other sciences” in order to understand the “incredible areas of fact” embedded in every systemic business problem.⁸⁶ In facts and science lay the legal necessity and legitimacy for administrative agencies. The interdisciplinary and flexible expertise necessary to regulate economic behavior required more than a judiciary of narrow, irrelevant competencies, whose expertise limited them to the important task of reviewing agency solutions for fairness and reasonableness.⁸⁷

⁸³ *St. Joseph Stock Yards v. United States*, 298 U.S. 38 (1936).

⁸⁴ *See Ohio Valley Water Co. v. Ben Avon*, 253 U.S. 287 (1920) (requiring judicial exercise of court’s “independent judgment as to both law and facts” in review of administrative ratemaking record when the resulting rates are alleged to be constitutionally confiscatory); *Ng Fung Ho v. White*, 259 U.S. 276 (1922) (requiring independent judicial determination of the “essential jurisdictional fact” of citizenship in habeas corpus challenge to deportation order); *Crowell*, 285 U.S. at 22 (holding that the judiciary must exercise an independent judgment regarding the constitutional jurisdiction of a federal agency); *St. Joseph Stock Yards*, 298 U.S. at 38 (holding that the judiciary has a duty “to exercise . . . an independent judgment upon the facts” where a constitutional violation by a federal agency is alleged, although it may rely on a record developed by the agency). On the withering, but not death, of these doctrines in favor of an explicit deference to administrative decisions based upon substantial supporting evidence on the administrative record, *see STRAUSS ET AL.*, *supra* note 70, at 973-78.

⁸⁵ *See LANDIS*, *supra* note 69, at 132-42 (discussing *St. Joseph Stock Yards*, 298 U.S. at 73 (Brandeis, J., dissenting); *Crowell*, 285 U.S. at 65 (Brandeis, J., dissenting)).

⁸⁶ On Landis’s and Frankfurter’s relationship with realism, *see infra* notes 99-100 and accompanying text.

⁸⁷ *See LANDIS*, *supra* note 69, at 30-31; *see also id.* at 32-34 (explaining additional advantages of regulation by administrative agencies to be their ability to engage in uniform, ongoing supervision of industries or disputes and their ability to create practical solutions based upon “all the available considerations” rather than generalized conclusions “drawn from the majestic authority of textbooks and cases” reached as a result of single disputes raised by individuals seeking to secure their rights). Indeed, he adopted a realist tone when privileging agencies over the judiciary, dismissing the “lesser vision” that courts are inherently superior in all respects to administrative agencies because of courts’ “delphic powers,” and “affinity with deep and mysterious principles of justice that none but [themselves] can grasp.” *Id.* at 135; *see also id.* at 47, 12 (describing critics’ fetishization of the number three in their separation of powers arguments as “numerology”); *id.* at 47 (dismissing formalist fears that the administrative process unconstitutionally threatened the separation and independence of the tri-partite government as “hysterical[]” and the result of “political conceptualization”).

Despite his frustration with the Court’s mixed record of respecting the administrative process and his realist anti-formalism and faith in expertise, Landis nevertheless placed judicial review at the center of the administrative process. He adopted Justice Brandeis’s declaration in his dissent in *St. Joseph Stock Yards*: ““The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly.””⁸⁸ Courts offered specific areas of expertise as well as constitutional authority in adjudicating certain types of disputes between agencies and private parties. Judicial review could and indeed must play an important role in legitimating agency action that fell within agencies’ broad authority, as well as in checking unconstitutional congressional delegations to agencies and illegal agency behavior. He wrote, “The line of demarcation [between facts and law, and agencies and courts] will then speak in terms of reality, in terms of an appreciation of the limitations and abilities of men, rather than in terms of political dogma and religious abstractions.”⁸⁹ The administrative process ends, then, with judicial review of those issues about which courts have expertise: questions of law and of procedure. Courts could retain their “supremacy” over issues requiring legal expertise, while agencies had unreviewable authority to consider those requiring factual expertise, so long as the agency followed constitutionally and statutorily required procedures—which inevitably produced the proper application of expert knowledge. Judicial and administrative institutions, employing their relative competencies, could perform their necessary constitutional and statutory duties.

Operating in this way, law would continue to hold prestige and “grandeur” in a governing regime with powerful administrative agencies. Closing *The Administrative Process*, Landis waxed rhapsodic:

⁸⁸ *Id.* at 124 (quoting *St. Joseph Stock Yards*, 298 U.S. at 84 (Brandeis, J., dissenting)).

⁸⁹ *Id.* at 153.

The power of judicial review under our traditions of government lie with the courts because of a deep belief that the heritage they hold makes them experts in the synthesis of design. . . . The rise of the administrative process represented the hope that policies to shape . . . fields [of social and economic regulation] could most adequately be developed by men bred to the facts. That hope is still dominant, but its possession bears no threat to our ideal of the “supremacy of law.” Instead, it lifts it to new heights where the great judge, like a conductor of a many-tongued symphony, from what would otherwise be discord, makes known through the voice of many instruments the vision that has been given him of man’s destiny upon this earth.⁹⁰

Hyperbole notwithstanding, *The Administrative Process* captures the confidence and mood of first generation scholars towards both administrative agencies and administrative law.

Frankfurter, too, wrote confidently of this emerging consensus of administrative law, which he asserted constituted “the processes by which great activities of government . . . are subdued by the reason appropriate to them.”⁹¹ The “reason” Frankfurter and Landis advocated was sufficiently systemic to encompass an enclosed universe of administrative and judicial processes, with institutions that offered specific competencies and respected the boundaries within which they operated. But it was also sufficiently open to allow, within those institutional boundaries, the development of expert agencies capable of solving the problems faced by the modern state, and careful, wise, and prudent judges capable of resolving legal and constitutional issues only when necessary and within their courts’ jurisdiction.

II. Arnold’s Post-Realist Approach to Administrative Law

Like his Harvard-affiliated contemporaries, Arnold was wholly in favor of the New Deal, whose efforts to bring about what he celebrated as the “great productive machine with new energy and efficiency” required the expansion of the federal administrative state.⁹² He explicitly advocated large-scale governmental interventions into the economy as a necessary response to

⁹⁰ *Id.* at 154-55.

⁹¹ Felix Frankfurter, *Introduction to a Symposium on Administrative Law Based Upon Legal Writings 1931-33*, 18 IOWA L. REV. 129, 130 (1933).

⁹² ARNOLD, SYMBOLS, *supra* note 1, at 266-67.

the economic crisis of the Depression. He attributed the crisis to the “industrial feudalism” of private corporations that had caused widespread unemployment and then failed to respond to the plight of the legions of destitute people through the country.⁹³ Thus, responding in 1936 to a query from *The Nation* magazine about what he expected of Roosevelt’s second term, Arnold predicted success for an administration “which attempts, through organizations which it creates or controls, to step into areas where private enterprise is unable to operate effectively.”⁹⁴ But that success would depend, Arnold warned, upon the government’s developing practical, “efficient organizations”—not high falutin’ “new ideals” or a new “theory of government” about which the people could not care less.⁹⁵ In order to facilitate the Roosevelt Administration’s development of such organizations free from political and legal interference, Arnold focused in his scholarly and more popular work on ways to limit and channel the judicial review of administrative agencies. In doing so, he engaged in the same general political and legal project as Frankfurter, Landis, and their cohorts in the first generation of administrative law scholars.

But Arnold’s approach, which appeared in a law review article and his two mid-1930s books, was more radical.⁹⁶ For one thing, his institutional and intellectual affiliations differed from theirs. He taught at Yale, having turned down a competing offer from Harvard (which he thought was filled with “colorless” young men⁹⁷) in favor of the “exciting” times he thought available to him with the realists in New Haven.⁹⁸ Furthermore, Frankfurter, Landis, and their

⁹³ *Id.* at 106-07.

⁹⁴ Thurman Arnold, *What I Expect of Roosevelt*, THE NATION, Sept. 28, 1936, at 628.

⁹⁵ *Id.*

⁹⁶ THURMAN ARNOLD, THE FOLKLORE OF CAPITALISM (1937) [hereinafter FOLKLORE]; ARNOLD, SYMBOLS, *supra* note 1; Arnold, *Trial by Combat*, *supra* note 11.

⁹⁷ VOLTAIRE AND THE COWBOY, *supra* note 7, at 186 (reprinting letter from Thurman Arnold to Carl Arnold, May 20, 1932).

⁹⁸ *Id.* at 178 (reprinting letter from Thurman Arnold to Wilson Clough, Mar. 17, 1931). For an account of the realist milieu at Yale, see KALMAN, LEGAL REALISM, *supra* note 24, *passim*; Robert W. Gordon, *Professors and Policymakers: Yale Law School Faculty in the New Deal and After*, in HISTORY OF THE YALE LAW SCHOOL 75, 85-104 (Anthony T. Kronman ed., 2004).

Harvard-affiliated colleagues were not at the center of realism.⁹⁹ Once ensconced at Yale and a close friend and associate of the core group of legal realists, Arnold became the rare realist-affiliated scholar who wrote extensively on administrative law.¹⁰⁰

More significantly, however, Arnold's approach to administrative law shunned the design of a properly limited approach to judicial review and the study of the judiciary's limited competence. Instead, it was primarily a critical theory of the symbolic practices of governance, one that rejected a systematic, formal approach to administrative law. At the same time, it was also an effort to reconstruct a flexible, multifaceted administrative law from available and new legal doctrines, in hopes of promoting a more efficient and effective state apparatus for overcoming the crisis of the Depression. In the sections that follow, I provide a concise summary of Arnold's post-realist approach before turning to his work on administrative law, where I consider his critical and reconstructive efforts in turn.

⁹⁹ Indeed, none of them appeared in Karl Llewellyn's famous list of realists. See Karl Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1227 n.10 (1931) (“Frankfurter we do not include; he has been currently considered a ‘sociological jurist,’ not a ‘realist’”) but see HORWITZ, *supra* note 5, at 213-25 (treating Landis and Frankfurter as realists). The core of the Progressive/ New Deal administrative law scholarship emerged from Harvard beginning in the early twentieth century, in the scholarship of Bruce Wyman, Roscoe Pound, Thomas Reed Powell, Frankfurter, and the stream of Frankfurter's students like Dickinson and Landis that filled the ranks of law schools across the country. The core of the realist movement, by contrast, was located most prominently at Yale and Columbia. At the same time, some of the Harvard-affiliated administrative law scholars, like Dean Pound and J. Forrester Davison, Frankfurter's student and coauthor of his administrative law casebook, ranked among realism's fiercest critics (and in Pound's case, a fierce critic of the New Deal approach to administrative law that his work had foreshadowed decades earlier as well). See NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 156 (1995); Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 CARDOZO L. REV. 601, 618-21 (1993); cf. N.E.H. HULL, ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE 212-15 (1997) (describing debate between Pound and Llewellyn over the extent to which those on the periphery of the realist movement, which included Frankfurter and Landis, were sufficiently “realistic” and distinct from the legal academic norm). This is not to ignore the fact that many of the first generation administrative law scholars saw themselves as anti-formalist. Writing in 1927, for example, John Dickinson noted the “slumbering” common law tradition that led government and law to be perceived as opposites and the latter to control the former “by the supposedly fixed and absolute standards of an Abstract Law.” DICKINSON, *supra* note 42, at 77, 98-99. As I showed in Part I-C, Landis also occasionally deployed a critical irony to his formalist predecessors that resembled realists' rhetoric. But a limited anti-formalism should not be confused with a fully committed realism, which core realists espoused.

¹⁰⁰ See DUXBURY, *supra* note 99 at 155 -57. Administrative law at Harvard was sufficiently different from a realist vision of administrative law to provoke Adolf Berle, a New Dealer at Columbia, to describe a “conflict between the idea of administrative law developed at Harvard and the idea of self executed law as we try to think of it at Columbia.” NAVIGATING THE RAPIDS 1928-1971: FROM THE PAPERS OF ADOLF A. BERLE 150 (Beatrice Bishop Berle & Travis Beal Jacobs eds., 1973).

A. *Arnold's Post-Realism.*

Arnold has been miscast as one of, and/or as an extreme version of, the legal realists that swept the legal academy during the 1930s.¹⁰¹ Instead, as I have argued elsewhere, Arnold both extended and broke from realism by considering the implications of realist insights into areas of public law that mainstream realism had previously neglected and by using new critical methodologies to develop a singular, idiosyncratic approach to law.¹⁰² While the traditional legal realist critique revealed the historically constructed and contingent nature of the legal forms that legal formalists essentialized,¹⁰³ Arnold instead inquired into the deeper importance of the cultural “symbols” and “folklore” of governance, and especially into the disjunction between the ideological spirituality of form and what he called the “temporal” needs of society and the functional means to address them.¹⁰⁴ Like the realists generally,¹⁰⁵ Arnold’s work featured both a critical and a reformist mode.¹⁰⁶ His critical impulse was generally more prevalent in his writings, and was and remains the basis for his reputation—although, as I note in Part II-C, his ideas for a flexible approach to judicial review of administrative agency action was especially innovative (if not especially detailed and never followed by courts or commentators).

In developing his critical approach, Arnold appropriated—often without clear

¹⁰¹ See KALMAN, *LEGAL REALISM*, *supra* note 24 at 34 -35; WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 67-69 (1973); Douglas Ayer, *In Quest of Efficiency: The Ideological Journey of Thurman Arnold in the Interwar Period*, 23 *STAN. L. REV.* 1049 (1971); Neil Duxbury, *Some Radicalism About Realism? Thurman Arnold and the Politics of Modern Jurisprudence*, 10 *OXFORD J. LEGAL STUD.* 11, 12 (1990); John Henry Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 *BUFF. L. REV.* 459, 511-12, 569-70 & n.589, 585 (1979).

¹⁰² See Fenster, *supra* note 12, at 1059-72. Much of what follows in this Part is a summary of that article, and a more detailed development of and support for this summary is available therein.

¹⁰³ The literature of and on realism, in its complexity and variable manifestations, is vast. The realism with which Arnold is associated and which most interested him was at once critical of prevailing formalism and conceptualism, and committed to reconstructing a more functional, empirically-based approach to law. See *id.* at 1061-66. The most trenchant recent accounts of realism are DUXBURY, *supra* note 99, at 65-159; KALMAN, *LEGAL REALISM*, *supra* note 24; JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* 19 (1995).

¹⁰⁴ ARNOLD, *FOLKLORE*, *supra* note 96, at 20.

¹⁰⁵ See KALMAN, *LEGAL REALISM*, *supra* note 24 at 3; Gary Peller, *The Metaphysics of American Law*, 73 *CALIF. L. REV.* 1151, 1220-26 (1985).

attribution—the insights of the emerging qualitative social sciences of the early twentieth century. These included liberal psychologists and sociologists performing ideology and propaganda studies (most prominently Harold Lasswell,¹⁰⁷ Vilfredo Pareto,¹⁰⁸ and Walter Lippmann¹⁰⁹), anthropologists and folklorists (such as Bronislaw Malinowski¹¹⁰ and Franz Boas¹¹¹) studying the folkloric and symbolic practices of “primitive societies,” and institutional economists (such as Thorstein Veblen¹¹² and Walton Hamilton, Arnold’s colleague at Yale¹¹³) who focused on the social context of economic and social behavior.¹¹⁴ Although his focus was rarely on developing specific political or economic proposals, Arnold inherited from institutionalist economics the vision of a structural, mechanistic solution to the endemic weaknesses and imbalances of capitalism through such devices as government intervention in setting prices and wages and disciplining corporations.¹¹⁵ Claiming to perform the role of a “diagnostician” who sought to understand and explain the context and pathologies of the political debates of the mid- to late-1930s, and, ultimately, to intervene on the side of the New Deal with

¹⁰⁶ See Fenster, *supra* note 12, at 1064-66.

¹⁰⁷ See HAROLD D. LASSWELL, PSYCHOPATHOLOGY AND POLITICS 183-93 (1930); Lasswell, *The Function of the Propagandist*, 38 INT’L J. ETHICS 258 (1928); Lasswell, *The Theory of Political Propaganda*, 21 AM. POL. SCI. REV. 627 (1927).

¹⁰⁸ VILFREDO PARETO, THE MIND AND SOCIETY at v, v-vi (Andrew Bongiorno & Arthur Livingston, trans., Arthur Livingston ed., 1935).

¹⁰⁹ WALTER LIPPMANN, PUBLIC OPINION 365 (1922).

¹¹⁰ See BRONISLAW MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY (1926).

¹¹¹ See Franz Boas, *The History of Anthropology*, 20 SCIENCE 512, 519 (1904); Frank Boas, *The Mind of Primitive Man*, 14 J. AM. FOLKLORE 1, 2-3 (1901).

¹¹² Veblen’s major works include: THORBEIN VEBLER, THE VESTED INTERESTS AND THE COMMON MAN 90-93 (Capricorn, 1969) (1919); VEBLER, THE PLACE OF SCIENCE IN MODERN CIVILISATION AND OTHER ESSAYS, 233 (1919); VEBLER, THE THEORY OF THE LEISURE CLASS: AN ECONOMIC STUDY IN THE EVOLUTION OF INSTITUTIONS 119 (Modern Library 1934) (1898); and Veblen, *Why Is Economics Not an Evolutionary Science?* 12 Q. J. EC. 373, 388 (1898).

¹¹³ Hamilton’s major works include: WALTON H. HAMILTON, INDUSTRIAL POLICY AND INSTITUTIONALISM: SELECTED ESSAYS (Joseph Dorfman ed., 1974); Hamilton, *Institution*, in 7 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 84 (Edwin R. A. Seligman ed., 1932); and HAMILTON & HELEN R. WRIGHT, A WAY OF ORDER FOR BITUMINOUS COAL (1928).

¹¹⁴ See Fenster, *supra* note 12, at 1078-94.

¹¹⁵ See THEODORE ROSENOF, ECONOMICS IN THE LONG RUN: NEW DEAL THEORISTS AND THEIR LEGACIES, 1931-1993, at 1-11, 65-67 (1997)

the prevalent intellectual tools of his era,¹¹⁶ Arnold analyzed the conservative political, economic, and legal formalisms that prevented the emergence of a modern industrial America he thought would be able to overcome the Depression.¹¹⁷ A diagnosis of what he called “the taboos and customs of the tribe”—the symptoms of the dominant political culture that structure political discourse and extend into all of a society’s institutions—was a necessary prerequisite to developing a properly functional, practical solution to the Depression or to any other crisis or problem faced by modern society.¹¹⁸ Arnold therefore proposed a shift from realism’s focus on the mere critique of law’s surface forms and practices, or its temporal inefficiencies, to an inquiry into the deeper spiritual, symbolic forms and practices that shape law as a field of governance.

Arnold thus aligned himself with legal formalists and traditional economists (whose work realists also critiqued) by arguing that certain assumptions regarding legal doctrine, political structure, and a capitalist economy seemed essential to the governing institutions of the United States. But he also agreed with legal realists that many of those assumptions were outdated, inefficient, and unjust. Unlike conventional realists, Arnold had little faith that mere reform would cure governing institutions and the public of their irrational investments in the symbols of government and capitalism. Such symbols, he argued, form the terrain upon which the struggle for political and legal changes takes place. Realists sought to debunk symbols; Arnold sought to understand and use them to reshape the public’s beliefs in “a science *about* law rather than a science *of* law.”¹¹⁹

¹¹⁶ ARNOLD, FOLKLORE, *supra* note 96, at 205.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Thurman W. Arnold, *Book Review*, 36 COLUM. L. REV. 687, 690 (1936).

Arnold's project, then, was to develop a critical method and voice that could best understand the "symbols of government" and the "folklore of capitalism" as the popular monographs named them.¹²⁰ The result was a provocative, though underdeveloped, approach to the study of governance that he called "Political Dynamics,"¹²¹ as well as an ironic and critical voice that remains memorable for its ability to deflate the pretentious assumption that legal and political institutions should somehow uphold consistent, timeless, abstract principles.¹²² A reflexive proponent of an excessive functionalism, Arnold sought only those policies and institutions that he thought could best maximize the welfare of citizens.¹²³ But he did so while also recognizing the role culture and signification play within institutions and in society and the popular need to believe in consistent, timeless, abstract symbols. It was this dual approach—a post-realism that combined realism's critical functionalism with a social scientific interest in studying the prevailing culture and ideology of his time—that Arnold brought to the study of administrative law. I introduce that approach in the sections that follow.

B. Critiquing the "Symbols" of Administrative Governance.

The final three chapters of Arnold's first book, *The Symbols of Government* (1935), apply the critique of formalism that Arnold had developed in the book's previous chapters to the judicial, jurisprudential, and political resistance to the administrative agencies associated with the New Deal.¹²⁴ In the grand hierarchy of governing institutions, Arnold lamented, the administrative tribunal and agency faced a long, largely uphill battle. He contrasted the work of

¹²⁰ ARNOLD, FOLKLORE, *supra* note 96; ARNOLD, SYMBOLS, *supra* note 1.

¹²¹ Arnold defined Political Dynamics as "a science *about* society that treats its ideals, its literature, its principles of religion, law, economics, political systems, creeds, and mythologies as part of a single whole and not as separate subjects, each with its own independent universe of principles." ARNOLD, FOLKLORE, *supra* note 96 at 349.

¹²² See Fenster, *supra* note 12, at 1095-1100 (connecting Arnold's ironic voice to those of H.L. Mencken and Thorstein Veblen).

¹²³ See, e.g., ARNOLD, FOLKLORE, *supra* note 96, at 177 (adopting a normative principle "that it is a good thing to produce and distribute as much goods as the inventive and organizing genius of man makes possible"); see also

the tribunal and agency to the work of courts in a criminal trial, a powerful, well-known spectacle that provides a certain degree of comfort and satisfaction for political subjects in its procedural format and seemingly impartial application of substantive law. The administrative tribunal and agency could never compete with this popular conception of the judge and legal proceedings as upholder of the “Law.” In their operations, administrative agencies simply failed to provide the necessary symbolic assurance that the underlying philosophical disputes about the relationship between the State and the individual had been fairly considered and resolved.¹²⁵ More than any constitutional doctrine or political resistance, this symbolic deficit not only left agencies vulnerable to political and legal challenges, but rendered them inferior in power and prestige to the judiciary that would resolve any legal dispute concerning agencies.

Like Frankfurter and Landis, Arnold’s overriding legal focus in *Symbols* and his second book, *The Folklore of Capitalism* (1937), was on the judicial review of administrative agencies. Arnold was convinced that agencies enjoyed relative advantages in investigating and attacking the largest economic and social problems of the day. He claimed, for example, that administrative agencies would enable the country to benefit from their “huge reservoir of technical skill, capable of running a great productive machine with energy and efficiency.”¹²⁶ He rejected the traditional schema that juxtaposed administrative agencies—the looming, demonic symbols of bureaucracy—against the privileged judiciary—the supposedly neutral institution with sacred powers to interpret the Constitution and scrutinize legislative and administrative actions.¹²⁷ The widespread judicial fetish of an apolitical, objective judiciary, combined with the

ARNOLD, *SYMBOLS*, *supra* note 1, at 266-67 (arguing that functional, temporal governance was the most important goal of government and the basis of a “new humanitarian creed” he hoped would sweep the United States).

¹²⁴ See ARNOLD, *SYMBOLS*, *supra* note 1, at 172-271.

¹²⁵ See *id.* at 133.

¹²⁶ *Id.* at 266-67.

¹²⁷ *Id.* at 205-06. See also SHAMIR, *supra* note 6, at 99-100 (placing Arnold in the context of other elite lawyers and legal academics who championed administrative agencies over the judiciary as state actors most likely to respond effectively to the Depression).

prevailing negative conception of administrative law by conservative members of the bar and bench, assumed an inherent value in maintaining a strict separation of the tri-partite branches of government.¹²⁸ It was this assumption, Arnold believed, that enabled a formalist, conservative judiciary to thwart the New Deal's efforts to promote the production and distribution of the "comforts" necessary to relieve the Depression.¹²⁹

The problem, Arnold argued, was symbolic and procedural. Formalism's legal distinction between courts and agencies, which in his more conventional realist mode he happily debunked, was in fact constituted by the prevailing symbolic duality between courts and agencies. The rule of law and its various institutions and practices, in other words, were the results of a powerful need for symbols of authority and stability. Law's symbolic authority presumes a powerful judiciary that is fair, impartial, and necessarily protective of individual freedoms, and that is therefore opposed to and above the dangerous "bureaucracy" of administrative agencies. The judiciary resolves disputes that the bureaucracy creates, and in so doing demonstrates its inherent superiority in the hierarchy of government and in its abilities to govern.

Most importantly, courts profit from their position as institutions that merely apply legal authority, in the form of neutral rules of procedure and substantive common and statutory law that are external to them. Courts rely upon externally-derived, pre-existing, and arcane rules of procedure and justiciability that protect them from the intrusion of heated political arguments

¹²⁸ Arnold was specifically reacting to the Court's reinvigoration of the nondelegation doctrine in the mid-1930s. *See, e.g.*, *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (invalidating Bituminous Coal Conservation Act of 1935 for unconstitutional delegation of legislative power to fix hours and wages to certain coal producers and miners); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (declaring National Industrial Recovery Act unconstitutional because its codes of fair competition lacked enforcement standards); *Panama Refining Co. v. Ryan*, 239 U.S. 389 (1935) (declaring section 9(c) of National Industrial Recovery Act unconstitutional for granting President authority to determine and enforce policies regarding production and transportation of petroleum). These cases marked what G. Edward White calls the "unexpected" and temporary shift by the Court back to a "traditional separation of powers theory" in the mid-1930s. WHITE, *CONSTITUTION*, *supra* note 4, at 108.

¹²⁹ *See* ARNOLD, *SYMBOLS*, *supra* note 1, at 252-53.

and provide them sufficient discretion to avoid certain disputes at certain times. Accordingly, even when the results of their decisions are difficult and troubling, courts are never at fault so long as they follow preconstituted fair procedures and preconstituted substantive law.¹³⁰ Law’s “supremacy”—a presumption shared even among proponents of administrative agencies¹³¹—inoculated the judiciary, as an abstract institution, from systemic criticism as well as from criticism directed at individual justices and judges who obstructed the development of administrative agencies. Bureaucracies symbolized the inverse. They establish their own substantive rules and procedures, “that silly form of rule and precedent known as red tape,” which they apply to their subjects, and therefore appear less objective and legal. Unlike the judiciary, which appears to be a neutral, apolitical institution that is physically and politically removed from the disputes it settles, agencies, as part of the Executive Branch, seem directly connected to the political hurly-burly.¹³²

The judiciary also thrived, Arnold argued, by limiting itself and its exercise of power, while agencies were required to engage in vast acts of regulatory intrusion in order to achieve their mandated goals. Although courts gain prestige by appearing to settle disputes while making the law “more and more certain,” they only actually settle limited issues presented before them, and thereby “owe their power to the fact that they never clarify total situations.”¹³³ By refusing to consider the next question that is likely to be brought to them or the implications of their own decisions, courts reserve their decisional capital and “obtain a power to keep litigants guessing.”¹³⁴ Agencies, by contrast, are typically required by statutory mandate to develop comprehensive regulatory schemes and enforce civil law, and therefore cannot perform their

¹³⁰ See *id.* at 205-06.

¹³¹ See text accompanying *supra* notes 49-55 88 91

¹³² See ARNOLD, SYMBOLS, *supra* note 1, at 205-06.

¹³³ *Id.* at 173.

duties in so incremental and restrained a manner.¹³⁵ They therefore appear unduly intrusive, unwieldy, and bureaucratic, especially when compared to the removed, refined domain of the judiciary.

The epitome of this symbolic universe was the “trial by combat” model of litigating challenges to administrative action. In litigating, Article III courts adjudicate challenges to entire statutory and regulatory regimes through the prism of a dispute between one or more individuals and the agency and/or federal government. Arnold saw this as a foolishly inefficient and indeterminate means for evaluating the legality and wisdom of an agency’s actions.¹³⁶ Courts decide only individual cases and controversies brought to them by the parties to the suit, even when such cases represent a small part of a particular regulatory scheme. Courts also require parties to follow arcane procedural rules; base their decisions solely upon a developed record produced by the parties themselves; and choose, where necessary, from a limited menu of remedies.¹³⁷ In short, cases and the ensuing combat “must just happen” and may require the expenditure of millions of dollars and extensive delays—an approach that “does not permit a coherent or planned scheme for judicial participation in government regulation.”¹³⁸

The appellate decision, the ultimate result of the trial by combat, is singularly unhelpful for regulatory programs. The Supreme Court’s “delphic pronouncements” in the period leading up to its declaring the National Recovery Act unconstitutional, for example, often dodged the crucial constitutional issues the public debated, and even its decision in *Schechter Poultry* failed fully to resolve the fate of any of the other acts pending before Congress.¹³⁹ Nevertheless, the Court merely added to its own luster by refusing to resolve the constitutional issues it was

¹³⁴ *Id.* at 174.

¹³⁵ *See ibid.*

¹³⁶ *See generally id.* at 172-98 (criticizing “trial by combat” model of judicial review).

¹³⁷ *Id.* at 184.

charged with considering:

Here is a government of symbols in its most rarefied essence. The Court had played its hand with great skill, and emerged triumphant as an institution. The Constitution was more revered and feared than ever before. But still no one quite knew just what had happened—what was constitutional, or unconstitutional.¹⁴⁰

Courts thus separate themselves from the regulatory process by remaining “aloof from investigation and regulation” and awaiting a challenge to a specific “action or threatened action which has damaged, or is about to damage, some particular person.”¹⁴¹ And by asserting their authority to decide the constitutionality of regulatory rules developed by an agency’s investigation, courts could either dodge a controversy or “take pot shots at specific regulations without being forced to assume responsibility for the regulatory scheme as a whole.”¹⁴² Agency adjudications faced no better fate. To review individual complaints against regulatory enforcement, agencies such as the National Recovery Administration and the Agricultural Adjustment Administration developed their own internal administrative processes that incorporated legal folklore, only to face uncertain appellate review again.¹⁴³

Even when agencies defeated a challenge to a regulation or an action, they lost the larger war. In victory, agencies assumed the symbolic role of the bureaucratic victor over an individual subject to its regulatory power, in a battle whose outcome is determined by the judiciary’s higher, neutral authority.¹⁴⁴ Judicial supremacy, and concomitant administrative inferiority, emanate from the formalist symbolic hierarchy that privileges the judiciary and law over agencies and policy. The judiciary gives its blessing upon, and thereby confers temporary legitimacy to, the agency’s action; but future, more lasting legitimacy will require further

¹³⁸ *Id.* at 181.

¹³⁹ *Id.* at 176-77 (citing *Schechter Poultry Corp.*, 295 U.S. at 495).

¹⁴⁰ *Id.* at 178.

¹⁴¹ *Id.* at 182-83.

¹⁴² *Id.* at 189.

¹⁴³ Arnold, *Trial by Combat*, *supra* note 11 at 937 -38.

blessings provided at the conclusion of additional, time consuming, and expensive trials by combat.

This symbolic structure of administrative law produced the peculiar pathologies of legal resistance to the New Deal. Formalism’s enduring symbolic construction of courts and administrative agencies perpetuated the folkloric belief that courts protect individual freedom while administrative agencies are demonic forces of inefficiency and collectivity, and that courts represent a “rule of law above men” while administrative tribunals “apply practical considerations to court decisions.”¹⁴⁵ The symbolic assumptions of the formalist approach to administrative law granted conservative courts—already predisposed to strike down new regulatory regimes and rules under the false assumption that they were thereby protecting freedom—too much discretion to reverse agency decisions and the legislative authorization of regulation. Agencies were therefore relegated to secondary status behind the judiciary, especially when their specific actions or general legal authority faced a legal challenge. As a form of dispute resolution and state power, litigation appeared to be an essential and natural element of nineteenth century laissez faire ideology that remained prevalent in the mid-twentieth century. As such, litigation provided little more than

a series of miracle plays to give [the individual dispute and its judicial resolution] a theatrical development. In the memory of the present generation the moral lesson of the judicial miracle play has been that rugged individuals are not regulated. Instead, they fight for their rights. In this battle they expect government to let them alone.¹⁴⁶

The emerging field of administrative law practice and the first generation administrative law scholarship decidedly failed to recognize this symbolic base and conservative bias of

¹⁴⁴ ARNOLD, SYMBOLS, *supra* note 1, at 187.

¹⁴⁵ ARNOLD, FOLKLORE, *supra* note 96, at 372.

¹⁴⁶ ARNOLD, SYMBOLS, *supra* note 1, at 188. Interestingly, Arnold’s use of the term “trial by combat” echoes Roscoe Pound’s characterization of “the sporting theory of justice” as one of the “causes of popular dissatisfaction with the administration of justice” that could be cured by a shift from courts to administrative tribunals. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729 (1906).

governance and litigation—in fact, first generation scholars, despite their good intentions, merely proposed to mire agencies further in the folklore of judicial supremacy and procedure. Arnold likened efforts to develop a new administrative process, whether by New Deal proponents or critics, to the “double-headed system of law and equity” that failed to assist dispute resolution and only led to confusion among courts, attorneys, and laypeople.¹⁴⁷ Because the prevailing symbolic hierarchy required a clear separation of regulatory agencies and the judiciary, he speculated, such confusion was likely to persist as academics developed their “dialectic exploration and footnotes” that would explain the correctness of a new system.¹⁴⁸ For Arnold, an administrative state built around judicial supremacy would not, in the long run, achieve the larger goal of establishing independent, effective administrative agencies. And so he set out for himself the task of proposing an alternative means to provide a legal basis and structure for agency operations.

C. *Arnold’s Administrative Law.*

Like Landis and Frankfurter, Arnold saw the work of the administrative lawyer and law professors as focused on the scope and practice of judicial review. He assumed the necessity and legitimacy of administrative agencies within the modern state, and wasted little of his time considering the actual practices and decisions of a particular agency. Accordingly, when Arnold proposed a notion of administrative law that was distinct from those of either skeptics or proponents of the administrative state, he did so by rethinking the parameters of judicial review and the relationship among the three branches of government. In that regard, he was not akin to Frank Goodnow or Ernst Freund, whose work focused either on internal agency operations or means to police or expand agency discretion. Moreover, his view departed from that of his predecessors or contemporaries largely with respect to judicial review of agency rulemaking;

¹⁴⁷ Arnold, *Trial by Combat*, *supra* note 11 at 940.

when “lowly and oppressed” individuals sought redress for particularized grievances through an adjudicatory challenge of a regulation as it applied to them, Arnold conceded that the judiciary must uphold the fundamental ideal of the fair trial. As he characteristically explained: “In the celebration of legal and economic theories [when reviewing rulemaking], the Court should be equipped only with prayer books and collections of familiar quotations. In the protection of those seeking a fair trial it should be armed with a sword which it dared to use with courage.”¹⁴⁹

Regarding the narrow but important legal issues surrounding the judicial review of administrative rulemaking, however, Arnold offered a radically distinct program than his contemporaries.

Arnold’s proposed method of judicial review of regulatory administrative actions did not specifically require courts to uphold all such actions, whether proposed by Roosevelt’s New Deal or by some other administration or political movement.¹⁵⁰ He did, however, assert that a judge who recognizes “the evanescent nature of any form of social bookkeeping will hesitate to interfere with any exercise of governmental power which is sincere in its purpose and honestly designed as an experiment in social welfare.”¹⁵¹ In a clear echo of Holmes, Arnold warned against a court’s “stand[ing] guard over any legal or economic theory,” lest that theory lose favor

¹⁴⁸ *Id.* at 942.

¹⁴⁹ ARNOLD, SYMBOLS, *supra* note 1, at 197. One might wonder how a realist like Arnold could be so secure in the adjudication/ rulemaking distinction. The distinction had been established in the early part of the twentieth century in the procedural due process context and had been formulated in part by no less an anti-formalist than Justice Holmes. *See* *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (Holmes, J.) (taxpayer has no right to expect individualized hearing before legislative revaluing of property); *Londoner v. Denver*, 210 U.S. 373 (1908) (individual property owners had a right to an individual hearing to challenge individualized special tax assessment on their property). It remains in force today, despite protestation by no less a formalist than Justice Thomas, who has challenged its logic in the context of Takings Clause jurisprudence. *See* *Parking Ass’n of Georgia v. City of Atlanta*, 450 S.E.2d 200 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995) (Thomas, J., dissenting); *see generally* Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls Over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251, 1256-57 (1992) (discussing current salience of adjudicative/ legislative distinction).

¹⁵⁰ *See* ARNOLD, SYMBOLS, *supra* note 1, at 196 (“There is no formula for exercise of such power.”).

¹⁵¹ *Id.*

among scholars and legitimacy among the public.¹⁵² Ultimately, Arnold favored judicial solutions that would enable agencies the opportunity to experiment, that would require courts to review an agency's actions almost entirely in light of the interests of society as a whole rather than in terms of the plaintiff's interests, that would provide "speedy methods" of appeal to the U.S. Supreme Court, and that would involve the participation of the judiciary in federal regulatory regimes.¹⁵³

In an effort to enable "an orderly, planned participation of courts in the growing area of governmental regulation," Arnold proposed a number of solutions to the problems caused by the prevailing conception of strictly separate powers policed by a powerful judiciary.¹⁵⁴ I discuss these below. Common among each of the methods he suggests was the assumption that necessary experimentation in the relationship between agencies and courts, and in the work of agencies, had been unduly checked by the relative hierarchy that granted the judiciary significantly higher status and power over administrative agencies. Courts could approve or strike down entire regimes months or even years after the agency had approved them, and agencies worked in fear that any new rules they proposed would be similarly challenged and struck down at some indeterminate later date by some as-yet unidentified court under some as-yet unknown legal theory.¹⁵⁵ Also common to each of these methods was the assertion that the lines between branches of government should not simply be redrawn or reconceived as permeable boundaries. Rather, they should be obliterated, with the judiciary lending its prestige to agencies by engaging in active but limited oversight in the regulatory process while using its power and expertise to protect individuals challenging unfair and oppressive agency decisions. As Arnold explained in a letter to Felix Frankfurter, he thought that "a judiciary which was

¹⁵² *Id.*; compare *Lochner v. New York*, 190 U.S. 45, 75 (Holmes, J., dissenting) ("But a Constitution is not intended to embody a particular economic theory.").

¹⁵³ See Arnold, *Trial by Combat*, *supra* note 11 at 944 -45.

¹⁵⁴ *Id.* at 937.

permitted to face real problems” would employ “looser and more practical” approaches to the problem of federal regulation, and would invoke a rhetorical “dialectic” that was “more poetical and symbolic” in upholding and assuming the responsibility for “planned administration.”¹⁵⁶

Arnold’s proposals ultimately sought to appropriate and display the symbols of governance while subverting the first generation’s tendencies towards creating logical systems of judicial review.

These proposals remained undeveloped in Arnold’s work, and lack even the appearance of a system or program. Rather, they are an exercise in anti-formalist guerilla intervention into a field fast solidifying around a coherent, systematic structure of agency expertise and judicial review. Despite their larger incoherence, they do sort into three types: those that sought greater judicial involvement in rulemaking, those that enabled quicker judicial consideration of challenges to regulatory programs that courts would consider in a relatively non-adversarial context, and those that proposed greater agency independence from judicial review.

1. Faster Judicial Decisions

Arnold was among those during the mid-1930s who called for federal courts to have the authority to issue declaratory judgments in constitutional challenges to government action—a group large enough to be characterized by a law student author in the *Harvard Law Review* in 1938 as making “[t]he familiar cry for a more speedy adjudication of constitutional issues free from ‘technical’ barriers.”¹⁵⁷ He embraced declaratory judgments, as well as (even more controversially) advisory opinions, for allowing courts to reach a decision without the formality of a trial or the risk of remedies that might otherwise attach to constitutionally impermissible actions.¹⁵⁸ Both would give legislators, regulators, and regulated parties the opportunity to know

¹⁵⁵ ARNOLD, SYMBOLS, *supra* note 1, at 192-93.

¹⁵⁶ VOLTAIRE AND THE COWBOY, *supra* note 7, at 201-02 (reprinting letter from Thurman Arnold to Felix Frankfurter, June 11, 1934).

¹⁵⁷ Note, *Declaratory Judgments in Constitutional Litigation*, 51 HARV. L. REV. 1267, 1267 (1938).

¹⁵⁸ ARNOLD, SYMBOLS, *supra* note 1, at 185.

whether a statute or set of regulations are constitutionally permissible, and whether private actors' contemplated courses of conduct would run afoul of statutory and regulatory limits.¹⁵⁹

Leaving aside the advisory opinion, which Arnold correctly predicted would not be adopted at the federal level,¹⁶⁰ Arnold wrote in the period that the declaratory judgment emerged as a legitimate judicial remedy for federal causes of action. A decade earlier, even the Progressive voice of Justice Brandeis had not only pronounced in *Willing v. Chicago Auditorium Association* that the declaratory judgment was beyond the power granted statutorily to the federal judiciary, but noted that the remedy exceeded the justiciability limits of Article III's "cases and controversies" limitation.¹⁶¹ Frankfurter agreed: declaratory judgments were unwise and beyond the constitutional pale.¹⁶² Nevertheless, state legislatures had begun to adopt the declaratory judgment in the early twentieth century,¹⁶³ and five years after Brandeis's decision in *Willing* the Court held that a suit originally brought in state court under the state's declaratory judgment act could present a justiciable appeal to the Supreme Court, "so long as the case retains the essentials of an adversary proceeding, involving a real, not a hypothetical controversy, which is finally determined by the judgment below."¹⁶⁴ At least in part as a result of the Court's changed

¹⁵⁹ *Id.* at 186.

¹⁶⁰ See CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* 65 (6th ed. 2002) (describing the rejection of the advisory opinion within the federal system as "the oldest and most consistent thread in the federal law of justiciability"); see also RICHARD H. FALLON ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 78-79 (5th ed. 2003) (reproducing correspondence between President George Washington's cabinet and the Supreme Court, which the Court refused to respond to a series of twenty-nine questions seeking "extrajudicial[]" answers).

¹⁶¹ See *Willing et al. v. Chicago Auditorium Ass'n*, 277 U.S. 274 (1928). One rising star of the legal academy and student of Felix Frankfurter, Louis Jaffe, applauded Justice Brandeis's skepticism about the declaratory judgment to review legislation and administrative action. See Jaffe, *Contributions*, *supra* note 60, at 217-18.

¹⁶² See EDWARD A. PURCELL, *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS*, at ch. 5 (2000)[hereinafter *BRANDEIS*]; Felix Frankfurter & Henry M. Hart, Jr., *The Business of the Supreme Court at October Term, 1932*, 47 HARV. L. REV. 245, 286 n.96 (1933).

¹⁶³ See Edwin M. Borchard, *The Uniform Declaratory Judgments Act*, 18 MINN. L. REV. 239 (1934); Borchard, *Declaratory Judgments in Administrative Law*, 11 N.Y.U. L. Q. 139 (1933).

¹⁶⁴ See *Nashville, C. & St. L. R. Co. v. Wallace*, 288 U.S. 249 (1933). Justice Stone, who authored the decision, had filed a separate concurrence in *Willing* refusing to conclude that declaratory judgments are beyond the constitutional scope of Article III courts.

perspective, Congress passed the Federal Declaratory Judgment Act,¹⁶⁵ which the Court unanimously upheld against a constitutional challenge in 1937.¹⁶⁶ Soon thereafter, declaratory judgments became a central remedy within administrative law. The original Administrative Procedure Act, passed in 1946, expressly permitted any person “adversely affected or aggrieved” by Agency action to seek “Judicial Review” thereof by “actions for declaratory judgments,”¹⁶⁷ while courts, commentators, and the Attorney General’s Committee on Administrative Procedure praised the declaratory judgment as a remedy capable of solving disputes over administrative action.¹⁶⁸

But Arnold wanted more from the remedy, and in the mid-1930s criticized its impending domestication. He was convinced that declaratory judgments, like advisory opinions, were unlikely to emerge as a new way of testing and reviewing regulations because they would throw the Court into a political maelstrom that it sought to avoid in order to protect its “aloof and strategic position, and thereby its priestly power.”¹⁶⁹ The narrow vision of declaratory judgments in state legislatures (and, by implication, in the Supreme Court’s requirements of appeals from state courts) blunted the remedy’s radical potential by merely reproducing the old case and controversy requirement in a new form. “The very fact that it has surrounded itself with such an enormous body of learned literature, philosophy, and cases during the brief period of its acceptance,” Arnold complained ironically, “indicates that the framers of [declaratory judgment

¹⁶⁵ 28 U.S.C. § 400 (1934).

¹⁶⁶ See *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937).

¹⁶⁷ 5 U.S.C.A. § 1009 (1946).

¹⁶⁸ See Report of Attorney General’s Committee on Administrative Procedure, Senate Document No. 8, 77th Cong., 1st Sess.; *Quinones v. Landron*, 99 F.2d 618, 620 (1st Cir. 1938) (citing as “one of the benefits” of declaratory judgments “the opportunity afforded to resolve disputes arising over the powers, duties and privileges of administrative officers”); Note, *Declaratory Judgments—1941 to 1949*, 62 HARV. L. REV. 787 (1949) (“In the field of public the Declaratory Judgment offers both Government and the individual a means for the determination of disputed powers and duties, which avoids the risk of taking action which later may prove to be illegal.”).

¹⁶⁹ ARNOLD, SYMBOLS, *supra* note 1, at 186; see also Arnold, *Trial by Combat*, *supra* note 1, at 930 (noting that declaratory judgments are “quite rare, probably due to the unfamiliar language of the formidable literature which has clustered about this . . . logical device”).

acts] have been anxious not to depart from the traditions of the past.”¹⁷⁰ And indeed, the federal act limited declaratory judgments to “cases of actual controversy,”¹⁷¹ a limitation that the Court cited as essential to the Act’s constitutionality by establishing a remedy and procedure resulting from “an adjudication of present right upon established facts” rather than “an advisory opinion upon a hypothetical basis.”¹⁷² Decrying the excessively technical requirements of the federal declaratory judgment as it was understood and promoted by his Yale colleague Edwin Borchard, Arnold ultimately envisioned the remedy as a post hoc advisory opinion in which constitutional challenges to statutes and regulations could be adjudicated quickly, and courts could not avoid “inconvenient cases” through excessive “‘judicial’ thinking” that forced the presentation of cases in particular ways at a particular stage of development.¹⁷³

He also advocated, but was equally ambivalent about, the use of injunctions as a remedy for challenges to New Deal legislation.¹⁷⁴ Injunctions promised speedy resolution of issues at a preliminary stage as well as the possibility of ongoing jurisdiction and judicial oversight in administering the remedy. On the one hand, a request for injunctive relief allowed courts a certain degree of discretion in awarding and crafting a remedy while they still worked within the conventional framework of the trial by combat. But the use of injunction was significantly less than perfect precisely because the legal standard for its issuance was too indeterminate. Within the trial by combat framework, courts could use the undefined irreparable harm standard to delay or strike down regulatory programs permanently, while a temporary injunction’s cost and uncertainty might result in a de facto permanent end to an agency’s efforts.¹⁷⁵ Moreover, the requirement that a plaintiff seeking to enjoin enforcement of a statute or regulation first violate it

¹⁷⁰ Arnold, *Trial by Combat*, *supra* note 11 at 926.

¹⁷¹ Federal Declaratory Judgment Act § 1, 28 U.S.C. § 400 (1934).

¹⁷² *Haworth*, 300 U.S. at 242.

¹⁷³ VOLTAIRE AND THE COWBOY, *supra* note 7, at 202-03 (reprinting letter from Thurman Arnold to Felix Frankfurter, June 11, 1934).

¹⁷⁴ *See* Arnold, *Trial by Combat*, *supra* note 11 at 929 -30.

created an undue hazard for potential plaintiffs who feared having to face penalties if they failed to win.¹⁷⁶ The litigation by case or controversy model, even when applied in the early and relatively speedy context of a preliminary injunction hearing, required unnecessary acts and considerations in order to obtain a resolution of the constitutional issue with which the interested parties were concerned.

2. Greater Judicial Involvement

Accordingly, Arnold considered options that abandoned the traditional litigation model. His proposals included not only excluding judicial review entirely, which I discuss in the next section, but, paradoxically, efforts to increase judicial involvement by including courts in the rulemaking process itself. The notion that courts and agencies should operate together as agency partners, rather than as separate, often adversarial, elements within a system of government, was not entirely new.¹⁷⁷ Nor was the notion of partnership or collaboration foreign to administrative law scholars and advocates of the administrative state, including Justice Frankfurter himself.¹⁷⁸

But Arnold's efforts, predictably, were intended to push courts more emphatically and structurally into partnership with agencies. The most radical of these efforts would have courts

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 930.

¹⁷⁷ Congress has a long history of creating specialized courts to ease the caseload burden faced by federal courts of jurisdiction, develop judges with specific expertise in complex areas and long-term oversight of agency operations, and increase the efficiency of adjudicating disputes. See Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 330-31 (1991). For an overview of specialized courts today, see RICHARD H. FALLON, JR. ET AL, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 41-46 (5th ed. 2003). Through still formally separate, such courts promised to solve some of the problems Arnold and others identified with traditional federal judicial review. In Arnold's time, the most recent effort to create a specialized court to review decisions by one agency was the Commerce Court that President Taft proposed in 1910 to review Interstate Commerce Court decisions. See FRANKFURTER & LANDIS, *supra* note 55 at 153 -74. Taft envisioned the court as a means to bring together disparate economic and political interests, support the development of the administrative agency and its professional expertise, and to overcome the institutional obstacles to administrative regulation generally. See SKYWROTE, *supra* note 9, at 262-63. For largely political reasons resulting from the perception that it favored railroad interests, the court failed miserably and lasted only three years. See George E. Dix, *The Death of the Commerce Court: A Study in Institutional Weakness*, 8 AM. J. LEGAL HIST. 238 (1964).

¹⁷⁸ See *United States v. Morgan*, 313 U.S. 409, 422 (1941) (describing agencies and courts as "collaborative instrumentalities of justice"); see generally Warren W. Gardner, *Federal Courts and Agencies: An Audit of the Partnership Books*, 75 COLUM. L. REV. 800, 800-03 (1975) (tracing judicial and commentators' use of "partnership" metaphor).

treat agencies' regulatory schemes "as they d[o] [the courts'] own masters, referees, or receivers . . . [u]nder a scheme of discretionary review."¹⁷⁹ Courts could thereby "approve or disapprove administrative regulations as they were formulated" and would therefore be responsible for "definite rules."¹⁸⁰ As a result, the judiciary engaged in administrative law would serve as "an investigating body" rather than "an arbiter of combats."¹⁸¹ Such supervisory review would prevent the judiciary from invalidating agencies' necessary experimentation with new rules and administration. Courts would presumably be privy to the information and insights of experts without the cumbersome procedures of civil litigation, and would experience as well the difficulties and frustrations of formulating a regulatory response to a complex set of economic and social issues. The administrative and judicial processes would thereby collapse or at least proceed simultaneously. Agencies would operate as junior partners to courts in a partnership whose purpose was to develop regulatory programs. As a result, agencies would no longer perceive courts as adversarial authorities whose review begins only after the agency has fully developed its programs.¹⁸²

Although it would soon be codified in Rule 53 of the Federal Rules of Civil Procedure, judicial use of a special master was a longstanding tradition in courts of equity,¹⁸³ and the new rule largely adopted existing doctrine and practice.¹⁸⁴ The court-appointed master and receiver models offered for Arnold an apparatus by which courts could, at their discretion, appoint and adopt an objective adjunct to supervise, investigate, and come up with proposed resolutions to a

¹⁷⁹ ARNOLD, SYMBOLS, *supra* note 1, at 191.

¹⁸⁰ *Id.* at 191-92. Arnold conceded, however, that non-deferential judicial review of specific administrative actions should apply in instances in which an agency or commission makes quasi-judicial decisions. In those instances, agency actions are more likely to appear arbitrary and personal, and a court's review of the agency's action is more likely to be based upon and limited by the kinds of issues (such as due process) over which courts have expertise. *See id.* at 202-03.

¹⁸¹ *Id.* at 192.

¹⁸² *Id.* at 191-92.

¹⁸³ James R. Bryant, *The Office of Mastery in Chancery: Colonial Development*, 40 A.B.A. J. 595 (1954).

¹⁸⁴ Armistead M. Dobie, *The Federal Rules of Civil Procedure*, 25 VA L. REV. 261, 291 (1939).

particular matter.¹⁸⁵ For similar reasons, Arnold identified the corporate reorganization, where federal courts relied upon receivers, committees, and masters to oversee, as another potential model for agency-court partnership.¹⁸⁶ In the optimal equity receivership process that emerged by common law innovation, federal district courts oversaw a process by which the debtor and all its creditors and bondholders would negotiate a plan to enable the bankrupt corporation to get back on its feet financially.¹⁸⁷ At the time Arnold was drawing this analogy, in the mid-1930s, his friend and Yale colleague William Douglas was helping to lead efforts to reform federal bankruptcy law in part by rationalizing receivership procedures through new federal statutes and, ultimately, by increasing federal oversight of the bankruptcy process through Securities and Exchange Commission investigations of large corporate reorganizations.¹⁸⁸ For Arnold, the reorganization process's openness, collaboration, and relatively active judicial involvement seemed to offer flexibility that was lacking in classic adversarial litigation.¹⁸⁹

Arnold also wanted to develop a means by which courts could retain ongoing jurisdiction over regulatory programs. He applauded the Supreme Court's decision in *Appalachian Coals, Inc. v. United States*, for example, where the Court affirmed a lower court's "holding a suit open for purpose of experimental development" to see if an otherwise per se illegal combination of coal producers could nevertheless act in a reasonable manner to save the coal industry in Appalachia.¹⁹⁰ Although it reversed the lower court's ruling finding that a combination of coal

¹⁸⁵ For a thorough description of the duties to which courts assigned masters during the first half of the twentieth century, covering the period both before and after codification, see Irving R. Kaufman, *Masters in the Federal Courts: Rule 53*, 58 COLUM. L. REV. 452, 462-69 (1958). On the continuing tension in American trial practice over the use of special masters to enable courts to gather understand scientific evidence, see Margaret G. Farrell, *Coping with Scientific Evidence: The Use of Special Masters*, 43 EMORY L.J. 927 (1994).

¹⁸⁶ Arnold, *Trial by Combat*, *supra* note 11 at 930 -31.

¹⁸⁷ See DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 56-60 (2001).

¹⁸⁸ See *id.* at 101-09; Note, Cloyd Laporte, *Changes in Corporate Reorganization Procedure Proposed by the Chandler and Lea Bills*, 51 HARV. L. REV. 672, 675-77 (1938).

¹⁸⁹ See Arnold, *Trial by Combat*, *supra* note 11 at 930 -31. Arnold did criticize limitations placed on the court's record that prevented a judge from supervising a bankrupt corporation's transactions after approval of the reorganization plan. See *ibid.*

¹⁹⁰ *Id.* at 928 (citing *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 377-78 (1933)).

operators had violated federal antitrust laws, the Court remanded the case with instruction that the lower court may retain jurisdiction for the purpose of taking remedial measures in the event that the defendants' future operations prove to be illegal and against the public interest.¹⁹¹

Ongoing jurisdiction and oversight would again transform courts into partners with agencies in the latter's regulatory programs.

3. Minimize Judicial Involvement

Arnold also sought means to enable agencies to bypass, or at least minimize, judicial oversight. To that end, he favored the consent decree, which he would later utilize extensively as head of the antitrust division of the Justice Department from 1938 to 1943.¹⁹² Since the mid-1920s, the Justice Department had increasingly resolved civil suits enforcing antitrust laws against anti-competitive business activities through consent decrees in which defendants agreed to prospective injunctions against future illegal activity.¹⁹³ An equitable means to end enforcement actions through tailored injunctions negotiated by the government and defendants, the government's authority to enter into and hold parties to the terms of consent decrees had been upheld by the Supreme Court in two decisions in the years immediately preceding Arnold's work on administrative law.¹⁹⁴ In *Swift II*, its second consent decree decision, the Court also limited the ability of courts to modify existing decrees to "[n]othing less than a clear showing of

¹⁹¹ *Appalachian Coals*, 288 U.S. at 378, *overruled in part on other grounds*, *Copperweld Corp. v Independence Tube Corp.*, 467 U.S. 752 (1984).

¹⁹² See ALAN BRINKLEY, *THE END OF REFORM* 111-12 (1995); ELLIS W. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY* 429-30 (1966); Milton Katz, *Consent Decrees and Antitrust Administration*, 53 HARV. L. REV. 415 (1940).

¹⁹³ See William H. Donovan & Breck P. McAllister, *Consent Decrees in the Enforcement of Federal Anti-Trust Laws* 46 HARV. L. REV. 885, 885-86 (1933). The attorney general used consent decrees significantly more often in the antitrust context because of provisions in the Sherman and Clayton Acts granting federal courts the authority to provide prospective injunctive relief against future criminal anti-competitive activity. See Katz, *supra* note 192, at 416-19.

¹⁹⁴ See *Swift & Co. v. United States*, 276 U.S. 311 (1928) ("*Swift I*"); *United States v. Swift & Co.*, 286 US 106 (1932) ("*Swift II*").

grievous wrong evoked by new and unforeseen conditions.”¹⁹⁵ To Arnold, the consent decree offered federal agencies welcome discretion in regulatory and legal enforcement with limited judicial oversight in its crafting and without cumbersome, fixed rules of judicial review.¹⁹⁶ In the words of commentators writing contemporaneously with Arnold, the consent decree represented “law enforcement by negotiation,” enabling the parties to use this negotiation to “settle[] economic questions of great public importance” without the direct intervention of potentially conservative courts and the trial by combat mode of judicial dispute resolution.¹⁹⁷

In a proposal that would have avoided judicial review altogether, Arnold suggested that agencies use arbitration with regulated parties to “escape . . . the judicial hunt for issues” by settling disputes over the constitutionality of legislation and agency action.¹⁹⁸ Of course, advocating arbitration to settle disputes over matters of law—and especially of constitutional law—merely begs the question of whether and to what extent a party to arbitration could seek judicial review of the resulting decision or agreement. Arnold did not propose an answer, but did respond to the controversy of judicial review of arbitrated settlements in his typical fashion by noting with bemused irony the unquestioned presumption that a nonjudicial resolution was inherently less fair and authoritative than a judicial one.¹⁹⁹ For Arnold, the increasingly widespread use of arbitration as an “escape from law” made plain the unsettling fact that the “judicial system has been unable to include the settlement of many important types of disputes.”²⁰⁰ Dispute resolution, in other words, was more important to Arnold than the resolution of broad legal issues. But arbitration was imperfect, Arnold conceded, not least

¹⁹⁵ *Swift II*, 286 U.S. at 119, *overruled by* *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 380 (1992) (holding that the current Fed. R. Civ. P. 60(b)(5) set down a “less stringent . . . standard” intended to meet the “need for flexibility in administering consent decrees”).

¹⁹⁶ Arnold, *Trial by Combat*, *supra* note 1, at 928. Interestingly, Arnold did not propose either the consent decree or an *Appalachian Coal*-type judicial oversight in *Symbols* when he adapted (and shortened) the earlier “Trial by Combat” article.

¹⁹⁷ Donovan & McAllister, *supra* note 193, at 912.

¹⁹⁸ ARNOLD, *SYMBOLS*, *supra* note 1, at 187.

because arbitration agreements to settle disputes had “become technical and full of pitfalls,” and thereby defeated the purpose of avoiding the symbolic jurisprudential constraints that led him to seek refuge in arbitration as an alternative model.²⁰¹ At the same time, at least arbitration offered a model for moving parties towards a reasonably agreeable resolution outside the folkloric realm of the trial by combat, with its initial uncertainty, its absolute winners and losers, and its presumption of judicial superiority.

D. Conclusion.

Reform was inevitable, Arnold speculated, although not immediate; he believed that an imminent groundswell of popular belief in planning and a concomitant abandonment of *laissez faire* as an economic ideal would surely drive courts to “intelligent procedural planning.”²⁰² Such reform was not likely to sweep away the old symbols.²⁰³ But the “practical elasticity” and relative indeterminacy of those symbols would allow for the emergence of a new, more efficient relationship between courts and agencies, while the traditional symbols of judicial review would survive to meet the “pontifical needs” and “deeply felt emotional want” of lawyers and the general public.²⁰⁴ The emergent New Deal and the residual formalist folklore, in other words, would by necessity coexist.

Although he recognized the importance of an independent judiciary as a symbol of governance, Arnold happily and creatively considered any functional solution that would more efficiently enable agencies to work what he believed to be their instrumental magic. He eschewed both a case-driven focus on the federal appellate adjudication of constitutional issues

¹⁹⁹ Arnold, *Trial by Combat*, *supra* note 1, at 928 -29.

²⁰⁰ *Id.* at 929.

²⁰¹ ARNOLD, SYMBOLS, *supra* note 1, at 187.

²⁰² Arnold, *Trial by Combat*, *supra* note 1, at 945.

²⁰³ *Id.* at 947. Nevertheless, at the end of both his 1934 article and *Symbols*, Arnold did hold out the possibility that the attachment to “trial by combat” was disappearing, despite his earlier commitment to the notion that such symbols had deep roots in popular and professional thought. *See id.* at 947.

²⁰⁴ *Id.* at 946; ARNOLD, SYMBOLS, *supra* note 1, at 268-71.

by common law development and the creation of a new-fangled approach to administrative law based on a comprehensive federal statute and a federal administrative court. Instead, consistent with his general approach to legal thinking and pedagogy, he embraced an oddly inventive method of creating new means to avoid the trial by combat in pragmatic ways. In the preface to his casebook on trials, judgments, and appeals, co-authored with his Yale colleague Fleming James, Arnold declared:

[F]rom the point of view of this book, legal principles are regarded as an argumentative technique—in other words, as an arsenal of offensive and defensive weapons to be used in litigation. . . . Inventiveness and ingenuity in the use of legal analogies are actually far more important in legal battles than scholarly learning.²⁰⁵

And so it was with his vision of the “principles” of administrative law. Arnold’s conception of administrative law and government regulation, as well as his tenure as head of the Antitrust Division, demonstrates a strong push for structural change that, through the strategic deployment of using existing symbols and laws, would not appear as radical as it was.²⁰⁶ In his willingness to see through and abandon entirely the contingent, constructed symbols of judicial supremacy, as well as the constitutional monolith requiring the separation of government’s tri-partite branches, and in his eagerness to attack them offensively and defensively with both shopworn and newly formed weapons, Arnold stood alone.

III. The “Mumbo-Jumbo of Legal Jargon”: Frankfurter, Arnold, and the Procedural Core of Administrative Law

Arnold’s lonely, outlying stance and kit bag approach to administrative law opposed the emerging consensus building around notions of relative institutional competencies and of judicial review as a limited, but important, safeguard for the modern liberal democracy. As a prominent legal academic, he and his proposals did not go unnoticed. In correspondence with Arnold and

²⁰⁵ THURMAN W. ARNOLD & FLEMING JAMES, JR., *CASES AND MATERIALS ON TRIALS, JUDGMENTS AND APPEALS* at v-vi (1936).

in the public forum of his casebook on federal jurisdiction, Felix Frankfurter summarily rejected Arnold's vision of a more active judiciary engaged alongside administrative agencies in the regulatory state. In so doing, Frankfurter and his co-authors clarified a vision of a judicial process that should be separate from, that should follow on, and that ultimately should structure and trump the administrative process in which he and Landis had so much faith. This Part uses Frankfurter's comments and work to identify the differences between the vision of administrative law developed by first generation scholars and Arnold's criticism and alternative approach. The contrast foregrounds the procedural core of administrative law by revealing what Frankfurter and Arnold saw as the stakes of the first generation's project. For Arnold, the logical system of administrative law stood in the way of the administrative state; for Frankfurter, administrative law provided the procedural protection that would enable both an administrative state and a stable, powerful judiciary.

Arnold was friends with both Frankfurter and Landis from at least his early days at Yale.²⁰⁷ The elder Frankfurter read his work and on occasion sent him comments. After reading "Trial by Combat and the New Deal," in which Arnold developed his approach to administrative law, Frankfurter praised its "frolicsome learning" and "liveliness of spirits."²⁰⁸ But he ultimately rejected Arnold's approach and satirized his refusal to distinguish "'right' or 'wrong,'" and took sardonic umbrage at what he saw as Arnold's call for a "new deal by the judiciary, with its slogan 'government of the people, for the people and by the courts.'"²⁰⁹ He derided Arnold's proposed "juristic offensive" as a secret plot to "arouse popular revulsion and thus lead to the

²⁰⁶ See ROSENOF, *supra* note 115, at 10.

²⁰⁷ See VOLTAIRE AND THE COWBOY, *supra* note 7, at 186 (reprinting letter from Thurman W. Arnold to Carl Arnold, May 20, 1932).

²⁰⁸ Letter from Felix Frankfurter to Thurman Arnold (undated), Thurman Wesley Arnold papers, American Heritage Center, University of Wyoming, at Box 9.

²⁰⁹ *Ibid.*

appropriate confinement of judicial power.”²¹⁰ Whether Arnold secretly hoped courts would actively oversee administrative regulation so that their failure would destroy judicial authority and status—which is the implication of Frankfurter’s criticism—is unclear. Perhaps, as Frankfurter suggested, Arnold was covertly trying to achieve what he had argued two years earlier in a major article in the *Harvard Law Review*: that procedure can serve as “an escape from substantive law” when the relevant legal rules seem opposed to reaching a desired result.²¹¹ At minimum, Frankfurter clearly considered Arnold’s ideas a bizarre effort to extend administrative law beyond constitutional limits.

In a 1928 monograph that he wrote with Landis, Frankfurter had begun to articulate a Progressive theory of the judiciary, imagining it as an institution with coherent and well-defined authority operating in a modern nation-state in which jurisdiction and procedure were themselves instruments of ends, or “means of effectuating policy.”²¹² And later, in an article written with Henry Hart, he advocated judicial resistance to the “undue suction into the avoidable polemic of politics” that arose from considering any and all constitutional challenges to the administrative process.²¹³ In that article, published the same year as Arnold’s “Trial by Combat,” Frankfurter and Hart thoroughly embraced the “seemingly technical rules” of jurisdiction as both a form of “wise statecraft” and as a set of “procedural safeguards” intended to protect the judiciary from

²¹⁰ *Ibid.* They maintained this cordial rivalry throughout the 1930s. A few years later, after Arnold’s success with *Symbols and Folklore*, Frankfurter sent Arnold a clipping from an editorial in the *Montgomery (Alabama) Advertiser* linking recent work by the two New Deal academics. His cover note asked, “Isn’t it funny for them to link me with you? Haven’t they heard of Newton and Einstein and Karl Marx and J.C.?” It is unclear which role Frankfurter saw himself playing in those pairings. Letter from Felix Frankfurter to Thurman Arnold, (Jan. 24, 1938) Thurman Wesley Arnold papers, American Heritage Center, University of Wyoming, at Box 11.

²¹¹ Thurman Arnold, *The Role of Substantive Law and Procedure in the Legal Process*, 45 HARV. L. REV. 617, 642-47 (1932) [hereinafter *Role*]; see generally Charles M. Yablon, *Justifying the Judge’s Hunch: An Essay on Discretion*, 41 HASTINGS L. REV. 231, 244-46 (1990) (contextualizing Arnold’s argument within his advocacy in favor of the administrative state).

²¹² FRANKFURTER & LANDIS, *supra* note 55 at 2; Edward A. Purcell, Jr., *Reconsidering the Frankfurter Paradigm: Reflections on Histories of Lower Federal Courts*, 24 LAW & SOC. INQ. 679, 683-84 (1999).

²¹³ Felix Frankfurter & Henry M. Hart, Jr., *The Business of the Supreme Court at October Term, 1934*, 49 HARV L. REV. 68, 90 (1935).

“subtle or daring attempts at procedural blockade-running.”²¹⁴ Federal courts generally, and the Supreme Court specifically, must be strict regarding jurisdiction in constitutional cases to utilize the “accumulated experience” that has formed “the tradition of constitutional adjudication.”²¹⁵ Proceeding in what Frankfurter and Hart declared was the traditional manner allowed the justices to appear as “statesmen,” and, most importantly, enabled “continuance of the Court’s traditional share in the government of our democratic society.”²¹⁶ If it proceeded otherwise, the Court would affirmatively create or assert itself in inter-branch disputes in a way that could threaten its hard-won prestige.²¹⁷ In his 1938 review of the Court’s decision to find jurisdiction to review Congressional actions in cases challenging the constitutionality of the Tennessee Valley Authority²¹⁸ and the Bituminous Coal Conservation Act,²¹⁹ Frankfurter found instances in which—whether one agreed with the Court’s ultimate decision to uphold or strike down these two representative legislative schemes of the New Deal—the Court’s very grant of jurisdiction demonstrated that it had foolishly fallen prey to the “imponderable pressure of the public importance of the statutes under review.”²²⁰ If the doctrine of constitutional review that cautioned against bowing to such pressure were further unsettled, Frankfurter cautioned, “unnecessary friction [would be added] to the complicated workings of our government; it weakens the responsibility of Congress in shaping policy; it undermines vital confidence in the disinterested continuity of the judicial process.”²²¹

²¹⁴ *Id.* at 91.

²¹⁵ *Id.* at 93-94.

²¹⁶ *Ibid.*

²¹⁷ *Id.* at 94, 98.

²¹⁸ *See Ashwander v. Tennessee Valley Auth. (TVA)*, 297 U.S. 286 (1936) (upholding the constitutionality of the TVA’s authority to compete with private power companies in the sale and distribution of electric power to consumers).

²¹⁹ *See Carter Coal*, 298 U.S. at 238 (1936) (striking down as unconstitutional the wage and hour commissions of the Bituminous Coal Conservation Act).

²²⁰ Felix Frankfurter & Adrian S. Fisher, *The Business of the Supreme Court at the October Terms, 1935 and 1936*, 51 HARV. L. REV. 577, 627-28 (1938).

²²¹ *Id.* at 637.

In his casebook on federal jurisdiction (written with Harry Shulman), Frankfurter pitted his and Hart's argument about the necessity of federal jurisdiction's role as a bulwark against the judiciary's involvement in substantive matters against Arnold's efforts to use procedure to force courts to reach substantive efforts.²²² Consecutive excerpts within the opening chapter on the constitutional limits on federal jurisdiction and procedure reveal the crux of these opposing views. For Frankfurter and Hart, jurisdictional limitations, and most notably the case or controversy requirement, reflect the "accumulated experience of a century and a half" of constitutional adjudication.²²³ Arnold saw no need for a case or controversy requirement at all, and considered it mere priestly ideology that limited dispute resolution to small, narrow issues argued by exaggeration and partisanship.²²⁴ A rigid case or controversy requirement was hardly a forward-thinking doctrine to encourage development of administrative operations necessary to the modern state. "The common law," he argued, "is neither clear, sound, nor even capable of being restated in areas where the results of cases are being most bitterly contested. And particularly with reference to administrative regulation does mutual exaggeration of opposing claims negative the whole theory of rational, scientific investigation."²²⁵ To Frankfurter and Hart, this was foolish and silly:

It is neither intellectual timidity nor adherence to the mumbo-jumbo of legal jargon that has made the Supreme Court from the very outset, on appeals to it, give very restricted scope to the concept of "case" or "controversy." The instinct of statesmen who were either participants in or witnesses to the fashioning of the Constitution decisively rejected any practice which would make of the Court a standing body of expert expounders of the Constitution. If the Court was to have the vital function which it evolved for itself, the occasions for its authoritative intervention had to be severely circumscribed.²²⁶

²²² See FELIX FRANKFURTER & HARRY SHULMAN, CASES AND OTHER AUTHORITIES ON FEDERAL JURISDICTION AND PROCEDURE 92-94 (rev. ed. 1937) (excerpting Frankfurter & Hart, *supra* note 213, at 90-98); 94-95 (excerpting Arnold, *Trial by Combat*, *supra* note 11, at 919-22).

²²³ *Id.* at 92 (quoting Frankfurter & Hart, *supra* note 213, at 90).

²²⁴ See *id.* at 94-95 (excerpting Arnold, *Trial by Combat*, *supra* note 11, at 919-22).

²²⁵ *Id.* at 95.

²²⁶ Frankfurter & Hart, *supra* note 213, at 94.

When courts utilize the restraint and discretion offered by jurisdictional limitations, Frankfurter and Hart claimed, they engage in a reasoned effort to preserve the institutional competence of the judiciary.

Theirs was the most sophisticated vision of judicial restraint of any first generation administrative law scholars. They assumed that proper, constitutionally-limited legal process at once sufficiently constrained the administrative process and allowed that process to develop expert policy. For Arnold, a judiciary restrained by a limited vision of its constitutional duty and authority unduly delayed the implementation of necessary federal regulation, provided courts with political cover from difficult decisions, and delegitimated agencies relative to courts by simultaneously claiming authority to pass constitutional judgment over agency action and refusing to do so in a particular instance (while reserving the privilege to do so later). For first generation administrative law scholars, the judicial process was an entity apart from and superior to the administrative process; for Arnold, judicial and administrative processes were secondary to, and themselves merely part of, the regulatory project of New Deal governance. One advocated a timeless, presumptively nonideological constitutional system without any necessary substantive end; the other championed a contingent, historically necessary and appropriate regulatory project that sought to respond to an economic and political crisis.

A series of friendly exchanges between Frankfurter and Arnold in early 1936 that began in response to the Supreme Court's decision in *United States v. Butler* (1936) crystallized these opposing changes.²²⁷ The Court in *Butler* held that the processing tax at the core of the Agriculture Adjustment Act of 1933 was an unconstitutional invasion of the reserved powers of the states and exceeded Congress's taxing and spending authority under the general welfare

²²⁷ Letter from Thurman Arnold to Felix Frankfurter, Jan. 8, 1936, Thurman Wesley Arnold papers, American Heritage Center, University of Wyoming, at Box 9.

clause.²²⁸ In his majority opinion, Justice Roberts declared that the “only” duty of the judicial branch when faced with an “appropriately challenged” act of Congress is “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.”²²⁹ For Justice Stone, joined by Justices Brandeis and Cardozo in dissent, the majority’s willingness to strike down a key portion of the Act in its entirety, in response to a suit by the receiver of an agriculture commodity processing company that owed taxes from previous years, ignored an essential “guiding principle” of constitutional adjudication: necessary and prudent judicial self-restraint in the face of efforts to seek constitutional invalidation of seemingly “unwise laws” should properly defer the power of repeal to “the ballot” and “the processes of democratic government.”²³⁰ Similarly, Walter Gellhorn, in his 1940 casebook, would characterize Justice Roberts’s statement and approach to adjudication as one “made by the learned justice more for the delectation of the newspaper reading public than for the enlightenment of the profession,” and as akin to support for the issuance of advisory opinions.²³¹

As a supporter of the New Deal, Arnold was opposed to the substance of the Court’s decision.²³² But the majority’s willingness to consider the constitutionality of the entire statute was consistent with his desire for speedy and dramatic adjudication. Tongue firmly in cheek, Arnold wrote Frankfurter two days after the decision was issued, saying that he “never dreamed” he would have such influence on the Court, and that he knew of no source other than his article “where the Court could find authority for making such a broad decision.”²³³ Frankfurter agreed,

²²⁸ 297 U.S. 1 (1936).

²²⁹ *Id.* at 62.

²³⁰ *Id.* at 78-79 (Stone, J., dissenting).

²³¹ GELLHORN, *supra* note 68 at 133.

²³² See Thurman W. Arnold, *Debate—Affirmative: Prof. Thurman W. Arnold*, in NEW YORK STATE BAR ASS’N, PROCEEDINGS OF THE FIFTY-NINTH ANNUAL MEETING 159, 162-63 (1936) (arguing against majority decision in *Butler* and in support of that part of Justice Stone’s dissent asserting the constitutionality of the A.A.A.).

²³³ Letter from Thurman Arnold to Felix Frankfurter, Jan. 8, 1936 *supra* note 227.

returning Arnold's letter with a handwritten note characterizing him as a "prophet."²³⁴ Three months later, after the Court issued its *Carter Coal* decision invalidating the Bituminous Coal Conservation Act of 1935 as an unconstitutional delegation of legislative power to fix hours and wages to certain coal producers and miners,²³⁵ Frankfurter sent Arnold a mocking telegram in which he complained that the decision

convinces me that my devotion to ancient Supreme Court doctrine that the [] Court should confine itself to the case in the record is completely outmoded and should be abandoned by sound men everywhere. Stop. You were right. Stop. I was wrong. Stop. And so [I] apply herewith for membership in your seminar where these inevitable judicial tendencies to spread opinions all over the map are explained with the aid of your almost uncanny penetration into judicial psychology. Stop. I am now a convert to your statesmenlike doctrine of contracting jurisprudence by enlarging it which is probably the best substitute that can be adopted for sociological jurisprudence in these curious times.²³⁶

Arnold apparently hoped that the Court's occasional striking down New Deal legislation might establish a new, dramatic jurisprudential approach, that—no matter the substantive result—would be incidentally beneficial to legislators and agencies by speeding the validation of regulatory programs. Frankfurter saw this and was appalled at the potential danger to the Court's institutional prestige, even if the Court's invalidation of key parts of the New Deal might lead to a political and popular upheaval in support of New Deal programs that the Court could not contain. At minimum, Arnold embraced the long-term regulatory gains that would result from removing the uncertainty of piecemeal litigation, and he may even have enjoyed seeing, as Frankfurter suspected, the prospect of an administration he favored facing a wounded Court. His was, in the end, a strategic litigator's vision of administrative law that sought to utilize existing procedure to achieve a particular substantive result. While Frankfurter supported the same substantive aspects of the New Deal, his attachment to a philosophical, normative, and systemic vision of legal process outweighed his politics.

²³⁴ Felix Frankfurter, undated annotations to Letter re: *Butler*, *supra* note 227.
²³⁵ *Carter Coal*, 298 U.S. at 238.

IV. The Administrative Process and the Legal Process Approach

The legal process Frankfurter and the first generation of administrative law scholars triumphed as a corollary to the administrative process foreshadowed the emergence, after World War II, of what became known as the legal process approach. When they framed the proposed field of administrative law doctrine, research, and teaching as a matter of institutional design within a seamless system of law and governance, first generation scholars had laid groundwork for the intellectual ferment that followed.²³⁷ Frankfurter's student and co-author, Henry Hart, would become one of the leading proponents of the legal process approach, as would many of Frankfurter's other students at Harvard and Supreme Court clerks.²³⁸ Legal process came to dominate legal education in the post-war period; and today it remains a pervasive, if not quite predominant, characterization of governance and especially of the judiciary's role within it.²³⁹ As it further developed the ideas of first generation administrative law scholars, the legal process approach came to shape the entirety of American post-war public law scholarship, providing both a legitimating set of procedural norms and practices for the growing administrative state and a flexible approach to the varied and changing purposes for which federal agencies would be

²³⁶ Letter from Felix Frankfurter to Thurman W. Arnold, May 22, 1936, Thurman Wesley Arnold papers, American Heritage Center, University of Wyoming, at Box 9.

²³⁷ See William N. Eskridge, Jr., & Philip P. Frickey, *Historical and Critical Introduction* to HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS*, at li, lxi-lxii (William N. Eskridge, Jr., & Philip P. Frickey eds., 1994)[hereinafter *Historical and Critical Introduction*]. Let me be clear as to the limits of this relationship. I am decidedly *not* arguing that the first generation administrative law scholarship of Frankfurter and Landis directly created the legal process approach, which focused largely on issues relating more directly to federal courts and jurisdiction. Landis and especially Frankfurter were concerned with more practical and political matters than the post-war legal process scholars, whose work tended towards a much higher level of abstraction. Rather, the earlier work was an important influence with somewhat different political motivations that operated within a distinct historical context. See PURCELL, BRANDEIS, *supra* note 162, at ch. 9; Purcell, *supra* note 212, at 775 n.76.

²³⁸ See LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 29, 259-59 n.35 (1996) [hereinafter *STRANGE CAREER*].

²³⁹ See William N. Eskridge, Jr., & Philip P. Frickey, *The Making of The Legal Process*, 107 HARV. L. REV. 2031, 2032-33 (1994).

used.²⁴⁰ This Part draws connections between the scholarship of pre-war administrative law theory and the post-war legal process approach, and argues that by both criticizing the emergence of a formal, systematic vision of administrative law and proposing a quite different set of relationships between courts and agencies, Arnold forecast the triumph of a process-centered approach, and saw in advance that approach's functional, conceptual, and political limits.

A. *The Institutional Core of the Legal Process Approach.*

Because first generation administrative law scholarship had focused on designing a system of judicial review that would enable the emergence of an optimal administrative process, they did not anticipate the entirety of the legal process paradigm.²⁴¹ Briefly identifying the elements of the legal process approach, however, makes plain the historical connection between the two. The legal process approach commanded that judges should rely on “reasoned elaboration” expressed in fulsome, consistent, and rational decisions;²⁴² engage in a “maturing of collective thought” through the careful, incremental exercise of common law development;²⁴³ and ultimately create and protect a self-limiting judicial institution that performs those tasks in which it is competent.²⁴⁴

This latter assertion about institutional competence demonstrates the essential continuity between first generation administrative law scholarship and contemporary administrative law theory. It rests on a presumption about the structural determination of governance, and states a commitment, both as a matter of theory and a matter of normative consequence, to a permanent

²⁴⁰ See William N. Eskridge, Jr., & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 709-10 (1991).

²⁴¹ For a useful summary of the range of embedded assumptions in the legal process approach, see Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 964-66 (1994).

²⁴² HART & SACKS, *supra* note 237, at 145-50.

²⁴³ Henry M. Hart, *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 100 (1959).

²⁴⁴ HART & SACKS, *supra* note 237, at 696, 1009-11.

allocation of decisionmaking within specific and appropriate institutions.²⁴⁵ In an article on criminal law, Henry Hart declared that institutional competence is “axiomatic,” insisting that “each agency of decision ought to make those decisions which its position in the institutional structure best fits it to make.”²⁴⁶ Settled institutional structures are “more fundamental than the substantive arrangements in the structure of a society,” Hart wrote with his co-author Albert Sacks, because they distribute decisionmaking among institutions, from the private ordering of the market to the interconnected institutions of government, and thereby serve as “the source of the substantive arrangements and the indispensable means of making them work more effectively.”²⁴⁷ The primary purpose of law’s core “constitutive or procedural understandings or arrangements” is to respect and protect institutional structures, which legal process adherents considered more fundamental than mere substantive arrangements because they—and only they—enable “well-informed and wise decisions” and optimal results.²⁴⁸

Thus, the legal process approach presumes the basic functionality of American representative democracy, and conceptualizes judicial review both as an “anomaly” that is duly constrained by attention to process issues and as the most effective and least dangerous bulwark to other institutions’ failure to operate within the bounds of constitutional order.²⁴⁹ In this regard,

²⁴⁵ Eskridge & Frickey, *Historical and Critical Introduction*, *supra* note 237, at xciv-xcvi.

²⁴⁶ Henry M. Hart, Jr. *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 426.

²⁴⁷ HART & SACKS, *supra* note 237, at 154.

²⁴⁸ *Id.* at 3, 154.

²⁴⁹ See Richard Davies Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223, 226-28 (1981) (quoting ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16-23 (1962)). In the version most committed to a restrained, conservative judiciary, Legal Process saw the judicial institution serving as the “least dangerous branch” of government, one that could develop and use “neutral principles” of procedure and decision to resolve only those disputes it could competently and appropriately consider. BICKEL, *supra*, at 58 (“Courts must act on true principles, capable of unremitting application. When they cannot find such a principle, they are bound to declare the legislative choice valid.”); Herbert Wechsler, *Toward Neutral Principles in Constitutional Law*, 73 HARV. L. REV. 1, 11 (1959) (defining the judicial role as employing “criteria that can be framed and tested as an exercise of reason and not merely as an act of willfulness or will”); *id.* at 15 (declaring that “the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieve”).

In all its modes, legal process sought objective principles of decision formation that would be applied within a competent, restrained judicial institution, and thereby presumed the possibility of a nonideological, pluralist, and democratic means of achieving and protecting the great American postwar consensus. A blend of

the legal process approach operates less as a full-blown jurisprudential theory than, in Neil Duxbury's words, "an attitude premised on the belief that those who respect and exercise the faculty of reason will be rewarded with the discovery of a priori criteria which give sense and legitimacy to their legal activities."²⁵⁰ Committed to a rather windy-seeming claims about the reason embedded in and produced by procedural formality, the legal process approach seems to stand in opposition to the overt anti-formalism of legal realism. But it has appropriated many of realism's tendencies and insights, including its focus on procedure and its recognition that the judiciary is an active agent of decisionmaking, an agency whose decisions make law rather than finding it.²⁵¹ In doing so, however, it articulates realism's lessons in distinct ways by focusing on systemic, rather than functional, ends. Legal process adherents study procedure to develop and protect the judiciary's institutional competence as appellate tribunals built upon reason, rather than to create detailed, functional procedural regimes.²⁵² Like realists, legal process adherents diverge from the scientific naturalism of classical legal formalism. Despite this commonality, however, legal process ultimately proposes a strict set of distinctions—between law and policy; between branches of government; and between principled reason and unprincipled, willful

constitutional, normative, and functional presumptions of best and necessary political economic practices, legal process was legal academia's contribution to the historic bloc of cold war liberal intellectuals, which included theories of pluralism in political science and consensus in American historiography. See DUXBURY, *supra* note 99, at 242-51, 255-57; G. Edward White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 SW. L.J. 819, 829 (1986). For an overview of consensus in the mainstream of immediate post-war intellectual circles, see EDWARD PURCELL, *THE CRISIS OF DEMOCRATIC THEORY* 257-58 (1973). Cf. ANDREW ROSS, *NO RESPECT: INTELLECTUALS AND POPULAR CULTURE* 55-56 (1989) (describing the formation of an "historic bloc" of liberal post-war intellectualism). Most famously, postwar liberals declared "the end of ideology" and celebrated a political system "in which all the active and legitimate groups in the population can make themselves heard at some crucial stage in the process of decision." DANIEL BELL, *THE END OF IDEOLOGY* (1960); ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 137 (1956).

²⁵⁰ DUXBURY, *supra* note 99, at 208. Cf. Brian Leiter, *Is There an "American" Jurisprudence?*, 17 OXFORD J. LEGAL STUD. 367, 370-71 (1997) (reviewing DUXBURY, *supra* note 99) (rejecting Duxbury's characterization of legal process, among other schools of modern American legal thought, as "jurisprudence" on the grounds that such movements are better considered as types of constitutional or political theory).

²⁵¹ See DUXBURY, *supra* note 99 at 211 -12; G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 284-86 (1973) [hereinafter *Evolution*].

²⁵² See White, *Evolution*, *supra* note 251, at 286.

activism—that themselves constitute what Morton Horwitz has called an “institutional formalism.”²⁵³

The legal process approach’s institutional core and concern with structure echoes similar tendencies in first generation administrative law theory. To make this connection even clearer, consider the relatively brief treatment that Henry Hart and Albert Sacks gave in their famous casebook materials²⁵⁴ to the place of administrative agencies within the legal process.²⁵⁵ They presumed a settled system in which, despite the “great variety” of administrative powers, “the dynamics of subsequent growth” in the “arrangement” of administrative regulation “follow a distinctive pattern.”²⁵⁶ Official responsibility for formulating policy, elaborating statutory authority, and developing methods of individual adjudication lies first in the administrative agency to which regulatory authority was generally delegated, no matter whether the legislation bestowed these specific powers on the agency or was silent.²⁵⁷ Its “first-line status” grants the agency the opportunity, without judicial assistance, to establish regulatory programs and adjudicatory arrangements on which regulated parties can rely, and to spare courts the burden of handling “the great mass of controversies” itself.²⁵⁸ “On appropriate challenge” to agency action or the underlying legislation itself, courts function as a “second-line” reviewing agency with the duty to determine the constitutionality of the statute and regulatory program, and whether the

²⁵³ HORWITZ, *supra* note 5, at 254; *see also* RICHARD A. POSNER, *OVERCOMING LAW* 75-77 (1995) (associating legal process school with classical legal formalism); Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 895 (1987) (noting analogous approach of early twentieth century formalism with Wechsler’s use of legal process theory to critique the Warren Court).

²⁵⁴ The casebook materials—though never completed and officially published, they were widely adopted as mimeographed drafts—“provided the name, the agenda, and much of the analytical structure” for the legal process approach. *See* Eskridge & Frickey, *Historical and Critical Introduction*, *supra* note 237, at liii.

²⁵⁵ The materials treated administrative law and process only briefly on the assumption that students would consider the subject more thoroughly in an administrative law course. *See* HART & SACKS, *supra* note 237, at 1060-61.

²⁵⁶ *Id.* at 165.

²⁵⁷ *Id.* at 165-66.

²⁵⁸ *Id.* at 1291.

agency action was authorized by the statute.²⁵⁹ Viewed from the perspective of first generation administrative law scholars, legal process theory's commitment to institutions and structures would appear quite familiar; and looking backward at the historical and thematic connections between the two, we can see more clearly the procedural core of early modern administrative law, with its pretensions of structural protection for the agencies and the more permanent and important judicial institutions.

B. Against Theology: Arnold, Henry Hart, and Judicial Process.

In 1960, at the legal process approach's apogee, Thurman Arnold published a scathing attack on Henry Hart in the *Harvard Law Review*, responding to Hart's criticism of what he deemed unreasoned and unprofessional opinions issued by certain members of the Warren Court.²⁶⁰ Using a fairly simple empirical method, Hart had complained that the Court was deciding too many cases too quickly,²⁶¹ and as a result was issuing decisions that lacked "the underpinning of principle which is necessary to illumine large areas of the law and thus discharge the function which has to be discharged by the highest judicial tribunal of a nation dedicated to exemplifying the rule of law."²⁶² To prove his point, Hart provided a detailed exegesis of the Court's recent grant of habeas corpus in *Irvin v. Dodd*,²⁶³ a decision in which the Court provided a "transparently indefensible reading [of the Indiana Supreme Court opinion denying the capital defendant's appeal of his conviction due to a biased jury and improper prosecutorial conduct] in order to strike down jurisdictional barriers to the consideration of federal claims."²⁶⁴ In this decision, and generally, the Court had failed to follow the proper legal

²⁵⁹ *Id.* at 166-67.

²⁶⁰ See Thurman Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298 (1960) (responding to Henry Hart, *Foreword: The Time Chart of the Justices, The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84 (1959)[hereinafter *Time Chart*]) [hereinafter *Theology*].

²⁶¹ See Hart, *Time Chart*, *supra* note 260, at 85-94.

²⁶² *Id.* at 99.

²⁶³ 359 U.S. 394 (1959).

²⁶⁴ Hart, *Time Chart*, *supra* note 260, at 110.

process that would “illumine large areas of the law” and establish “impersonal and durable principles of constitutional law.”²⁶⁵ Hart closed his jeremiad by warning that reason, and not merely a temporary majority of justices, is “the life of law,” and by claiming that such reason had been lost in the operations of the Warren Court.²⁶⁶

Arnold had left Yale and academia in 1938 for the Justice Department, and had since served briefly on the District of Columbia federal circuit court of appeals before establishing the private law firm that would become Arnold & Porter,²⁶⁷ but he felt strongly enough about his old nemesis’s criticism to defend in print a Court that included many of his own friends.²⁶⁸ After disagreeing with Hart’s close reading,²⁶⁹ Arnold dismissed his larger argument that the Court’s purportedly incompetent decisions failed to uphold the institution’s standard. In the same critical voice he had wielded decades before, he argued that principles were not immutable, and that the operations of the Supreme Court, with its nine diverse members, often resulted in difficult decisions with fragile majorities—unlike the opinions of legal academics who Arnold believed used the limitless time available to them to propose platitudes and unworkable legal propositions in the *Harvard Law Review*.²⁷⁰ What is worse, Arnold alleged, Hart’s conception of the proper judicial process and the competent judicial institution had evolved into a new conservative formalism in which he and his cohorts criticized the Court on procedural and formal grounds in order to condemn the Court’s increasingly liberal tendencies.²⁷¹

²⁶⁵ *Id.* at 99.

²⁶⁶ *Id.* at 125.

²⁶⁷ See VOLTAIRE AND THE COWBOY, *supra* note 7, at 51-94.

²⁶⁸ See *id.* at 88.

²⁶⁹ See Arnold, *Theology*, *supra* note 260, at 1304-10. In an article that was otherwise supportive of Hart and critical of Arnold, even Hart’s dean, Erwin Griswold, found his analysis of *Irvin* lacking. See Erwin N. Griswold, *Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81, 83 (1960).

²⁷⁰ See Arnold, *Theology*, *supra* note 260, at 1312-14.

²⁷¹ See *id.* at 1315-17. The argument that legal process used procedural means to further conservative political commitments is fairly common. See, e.g. Gary Peller, *Neutral Principles in the 1950’s*, 21 J. L. REFORM 560, 566 (1988); Michael Wells, *Busting the Hart & Wechsler Paradigm*, 11 CONST. COMMENT 557, 564-67 (1995); but see KALMAN, *STRANGE CAREER*, *supra* note 238, at 30-36; Eskridge & Frickey, *Historical and Cultural Introduction*,

Here, in a somewhat changed but still recognizable form, was the complaint Arnold had lodged against Hart and his colleagues more than twenty years earlier—although he saw the Henry Hart of 1960 opponents as an unsympathetic associate of the conservative “corporate bar” rather than as a fellow New Deal advocate.²⁷² Hart’s legal process approach, it seemed, had confirmed Arnold’s original suspicion that underneath the apparent New Deal advocacy of first generation administrative law scholars lurked a formalism as pernicious as that of Langdellian conservatives. For Arnold in 1960 as in the mid-1930s, the fetish of process, institutions, and systems came at the expense of a frank consideration of substance. Systems would not aid political efforts to improve the economy and society, any more than they had aided the New Deal; and the wider social benefits that would flow from these political movements, Arnold presumed, vastly outweighed any loss that would be incurred by an “unprincipled” Court or a non-systematic administrative law. Law’s role was to further substantive aims, not to build and protect “reason” through procedural and institutional systems. Arnold thereby anticipated arguments that critics from fields as diverse as Law and Economics and Critical Legal Studies would later employ against the legal process approach.²⁷³

What Arnold saw as the “theology” of the mature legal process approach—which included, for Henry Hart, counting the hours and minutes justices spent on each decision to see if they had sufficiently enabled “the maturing of collective thought” in their deliberative processes²⁷⁴—was itself a culmination of the logical system whose coherence and consequences he had debated with Frankfurter. Viewed as part of a larger movement in American legal academia, first generation administrative law scholarship was an early development in the

supra note 237, at cvi-cxiii, cxx-cxxi (defending legal process proponents against charges that they opposed the Warren Court’s desegregation decisions and were latter-day formalists).

²⁷² Arnold, *Theology*, *supra* note 260, at 1315.

²⁷³ For summaries of this criticism, see Eskridge & Frickey, *Historical and Critical Introduction*, *supra* note 237, at cxviii-cxxv; Edward L. Rubin, *Commentary—The New Legal Process, The Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1398-1402 (1996).

building of a post-war, post-realist consensus around a particular vision of law and reason. In terms of influencing legal doctrine and future scholarship, whether in the field of administrative law or in legal doctrines and legal academia generally, Arnold lost that debate badly. But, as the next Part argues, aspects of his critique continue both to resonate in contemporary scholarship and to explain the idiosyncratic dynamics of administrative law.

V. **Regulatory Frustration and the Recurring Crisis of the “Logical System”**

The approach offered by first generation administrative law scholars and challenged by Arnold successfully established a long-lasting conceptual system to understand the role of law and legal institutions in the administrative state. Its concerns with administrative discretion and judicial review continue to structure and suffuse the curriculum of administrative law courses and remain at the core of administrative law scholarship. At the same time, the field regularly suffers through periods of crisis and self-examination, due in part to external political pressures placed on administrative agencies and their regulatory practices and to the insights of interdisciplinary scholarship that test some of administrative law’s foundations. This Part suggests that most legal academic challenges to the legitimacy and regulatory practices of administrative agencies and to the way in which the subject is studied and taught arise from within the dynamic of institutional competence and judicial review that was found and furthered by first generation scholars. Moreover, the frustration that these challenges represent is often resolved—to the extent that it is resolved at all—within the same dynamic. To challenge the dynamic itself—as some recent scholarship is doing—is to return, in a sense, to Arnold’s project: resist or disrupt the presumptions of a comprehensive logical system built upon procedure and embrace instead an explicit substantive project of optimal regulatory practices.

²⁷⁴ See Hart, *supra* note 260, at 86, 94, 100.

As much epilogue as argument, this Part does not offer a solution to the cycle of regulatory frustrations that administrative law's logical system generates. Instead, it draws connections between the system as it was identified by first generation scholars and as it currently exists. Looking first at continuity across time in administrative law scholarship, I argue that even though early scholars lost their arguably blind faith in agencies during the post-war period, they nevertheless remained in thrall to the logical system they had developed. Second, I describe the continuity between current and early administrative law casebooks, identifying themes and structures that continue to dominate the classroom. Finally, I identify continuities between Arnold's opposition to that system and contemporary scholars' dissent to the current doctrines and practices of administrative law. This historical continuity confirms Arnold's insights regarding both the symbolic core of administrative law's logical system, and the limits that core places on how, and how much, any effort to reconfigure the system can succeed.

A. *Systemic Continuity.*

To claim historical continuity between the administrative law theory of the mid-1930s and that of seventy years later seems absurd on its face. The intervening decades have witnessed passage of the Administrative Procedure Act; a vast expansion of the number, type, and province of regulatory agencies; wide recognition of the administrative state's legal legitimacy; and, over the past three decades, recurrent calls for the dismantling of the federal regulatory apparatus.²⁷⁵ But at the same time, viewed from the abstract level of the logical system that first generation administrative law scholars advocated, the field has been remarkably settled. A recent definition of administrative law by one of the field's most important academics would look quite familiar to scholars of the 1930s:

[Administrative] law defines the structural position of administrative agencies within the governmental system, specifies the decisional procedures those agencies must follow, and

²⁷⁵ For an overview of this history, see Rabin, *Historical Perspective*, *supra* note 3, at 1262-1315.

determines the availability and scope of review of their actions by the independent judiciary. It furnishes common principles and procedures that cut horizontally across the many different substantive fields of administration and regulation.²⁷⁶

Administrative law scholarship has often claimed to be breaking free of its early moorings. Even three of the most vocal proponents of administrative agencies during the New Deal, then-Justice Frankfurter and his former students Louis Jaffe and James Landis, seemed to abandon their faith in administrative agencies in the decades following World War II and to require or call for more thorough external checks on agencies' regulatory discretion.²⁷⁷ Their movements culminated in Frankfurter's 1951 opinion in *NLRB v. Universal Camera*—which recognized a political “mood” established by Congress that sought enhanced judicial review²⁷⁸—in the law review articles that resulted in Jaffe's 1965 book *Judicial Control of Administrative Action*—which denounced judicial “self-deprecation and abdication” of agency oversight²⁷⁹—and in Landis's 1960 report to President-Elect Kennedy proposing means to increase Executive control over the federal regulatory bureaucracy.²⁸⁰ In their distrust of agencies and their newly developed faith in judicial and other external checks on agency discretion, they and others in the post-war period emphasized that, in Jaffe's words, “[t]he availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which

²⁷⁶ Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 438 (2003).

²⁷⁷ See HORWITZ, *supra* note 5, at 235-40. The precise periodization of this shift is the subject of some dispute. But whether this shift occurred immediately following World War II, over the course of the first two decades after the war, or later, is largely irrelevant for purposes of my argument. See Thomas Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039 (1997) (asserting that the shift away from New Deal-era deference to agencies occurred in the 1970s); Daniel B. Rodriguez, *Jaffe's Law: An Essay on the Intellectual Underpinnings of Modern Administrative Law Theory*, 72 CHI.-KENT L. REV. 1159, 1163 (1997) (asserting that the shift occurred in the 1950s and 1960s); Reuel E. Schiller, *Reining in the Administrative State: World War II and the Decline of Expert Administration*, in TOTAL WAR AND THE LAW: THE AMERICAN HOME FRONT IN WORLD WAR II 185 (Daniel R. Ernst & Victor Jew eds., 2002) (asserting that the shift began immediately following World War II).

²⁷⁸ 374 U.S. 474, 487 (1951) (holding that the Taft-Hartley Act's language requiring the NLRB's findings of fact to be supported “by substantial evidence on the record considered as a whole” standard for the support “expressed a mood” in Congress away from legislative presumptions of agency expertise and judicial deference).

²⁷⁹ LOUIS JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 344 (1965).

²⁸⁰ STAFF OF SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE TO THE SENATE COMM. ON THE JUDICIARY, 86TH CONG., *REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT* (1960) (written by James M. Landis) [*hereinafter* LANDIS REPORT].

purports to be legitimate, or legally valid.”²⁸¹ Indeed, Jaffe went so far as practically to denounce Landis and *The Administrative Process* in an article published after Landis’s death, where he argued that the hopes placed by New Deal advocates in administrative expertise and large federal regulatory agencies could only last as long as the New Deal’s historical peculiarity.²⁸² Similarly, in his report to Kennedy, Landis famously expressed his own frustration with the administrative state by excoriating regulatory agency performance and by proposing significant reforms, including greater Presidential oversight.²⁸³ Within twenty-five years of leading the effort to establish a modern vision of administrative law, these stalwarts of the first generation seemed to repudiate their earlier conceptions of the administrative process.

But Arnold’s critique of the “logical system” these first generation figures advocated demonstrates that although they may have lost faith in what they perceived to be the excesses of the New Deal regulatory state, they presumed the stability of an underlying system of administrative law and process. Unlike Arnold, first generation scholars did not want to dispense with judicial review and, despite their abiding faith in agency expertise, they constructed a system of institutional tasks and competencies that included loose but still-prevalent checks and balances.²⁸⁴ As I explained above, even Landis, in a book that enthusiastically advocated regulation and the administrative state, supported a continuing and central role in the administrative process for judicial review.²⁸⁵

When their early work is remembered correctly, their later work does not appear to mark a loss of faith in the administrative process. Justice Frankfurter’s decisions continued to focus on

²⁸¹ JAFFE, *supra* note 279, at 320.

²⁸² See Louis L. Jaffe, *James Landis and the Administrative Process*, 78 HARV. L. REV. 319, 321-24 (1964)

²⁸³ See LANDIS REPORT, *supra* note 280; see generally THOMAS K. MCCRAW, PROPHETS OF REGULATION 206-07; 219-21 (1984) (discussing LANDIS REPORT, *supra*).

²⁸⁴ See text accompanying *supra* notes 49-55. Cf. John F. Duffy, *The FCC and the Patent System: Progressive Ideals, Jacksonian Realism, and the Technology of Regulation*, 71 U. COLO. L. REV. 1071, 1114-17 (2000) (characterizing New Deal supporters like Landis as embracing vision of unfettered agencies).

²⁸⁵ See text accompanying *supra* notes 88-90

jurisdictional issues that restrained judicial intervention into the administrative process,²⁸⁶ while his opinion in *Universal Camera* merely sought to reflect and implement a change in legislative direction, and thereby to enforce the wishes of the legislative institution.²⁸⁷ As a justice, his administrative law decisions sought to strike a balance between the integrity of the administrative process and the integrity of the lower federal courts.²⁸⁸ Jaffe himself noted in an analysis of Frankfurter's judicial decisions on administrative law that the jurist's "point of view" towards the field that he developed as an academic did not alter in its generalities, though its specific doctrinal patterns became "less pronounced [and] their application more flexible."²⁸⁹

Frankfurter's disciples shared his views. Jaffe did not seek a radical change to the administrative process or the field of administrative law in the 1950s; instead, he suggested that faith in the absolute and necessary expertise of agencies was misplaced, and although no formula could perfectly check administrative discretion, judicial review was especially important "to curb and correct administrative distortion, to substitute the broad for the narrow view."²⁹⁰ Nor did Landis's report present a radically different vision of the dynamics of administrative law, despite his greatly increased suspicion of administrative discretion.²⁹¹ Rather, he proposed incremental structural solutions to increase presidential oversight and efforts to recruit better agency personnel.²⁹² The logical system Frankfurter, Landis, and Jaffe advocated was sufficiently flexible to allow them to remain committed to its dynamic, even as they advocated adjustments to its precise workings. If agencies were less expert and objective than they had previously

²⁸⁶ See Bernard Schwartz, *The Administrative World of Mr. Justice Frankfurter*, 59 YALE L.J. 1228, 1256 (1950).

²⁸⁷ For a thorough analysis of how *Universal Camera* fits within Frankfurter's evolving but consistent theory of administrative law, see Alfred S. Neely, *Justice Frankfurter, Universal Camera and a Jurisprudence of Judicial Review of Administrative Action*, 25 U. TOL. L. REV. 1 (1994).

²⁸⁸ See Nathaniel L. Nathanson, *Mr. Justice Frankfurter and Administrative Law*, 67 YALE L.J. 240, 264 (1957).

²⁸⁹ Louis L. Jaffe, *Adventures in Administrative Law*, in FELIX FRANKFURTER: THE JUDGE 206, 206 (Wallace Mendelson ed., 1964).

²⁹⁰ JAFFE, *supra* note 279, at 26.

²⁹¹ See LANDIS REPORT, *supra* note 280, at 1-3.

appeared to the leaders of the first generation, then other competent institutions, particularly the judiciary, could reform agency procedure and organization by tightening the reins and heightening their scrutiny of agencies—all without calling the system itself into question.

In their structure and focus, contemporary administrative law casebooks show a similar continuity. They are not significantly distinct from the first great modern administrative law casebook, Walter Gellhorn's first text (published in 1940), which moved from early chapters introducing the administrative state through the structural constitutional issues of the separation and delegation of powers. It spent the bulk of its time discussing common law and pre-APA statutory efforts to define fair administrative procedures before concluding with judicial control over administrative determination.²⁹³ Although sprinkled with significant amounts of commentary on constitutional issues (including an extended excerpt from an Arnold article on the symbolic differences between judges and bureaucrats), the Gellhorn casebook used a traditional case- and court-centered approach.²⁹⁴ Contemporary casebooks—even when they present significant amounts of theoretical and substantive background material in an introductory chapter to orient students to the administrative process—continue to take a court-centered approach that revolves around the role of judicial review and relies upon appellate decisions to illustrate and explain the relative institutional roles of administrative agencies and the three governmental branches.²⁹⁵ They still focus as well on procedural issues and on administrative

²⁹² See *id.* at 66-68, 83-87.

²⁹³ See GELLHORN, *supra* note 68

²⁹⁴ See *id.* at 147-52 (excerpting Arnold, *Role*, *supra* note 211, at 624-31).

²⁹⁵ See, e.g., RONALD A. CASS ET AL., ADMINISTRATIVE LAW: CASES AND MATERIALS (4th ed. 2002) (presenting materials in three parts: "Institutional Framework," with one chapter on the nature and functions of agencies and two chapters on judicial review; "Administrative Functions," with chapters on policy formation, adjudication, enforcement, and licensing; and "Indirect Controls," with chapters on liability and public access); JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC SYSTEM (5th ed. 2003) (following an extended introduction to administrative law, separate chapters focusing on how the legislature and executive supervise agencies, how agencies adjudicate, make rules, and gather and disperse information, and then how courts review suits to challenge administrative action); STRAUSS ET AL., *supra* note 70 (following an introduction to administrative law and a chapter on agencies' position within the "structural constitution," four chapters on administrative procedure and open government, and then three chapters on judicial review).

discretion.²⁹⁶ The most significant departure from the current pedagogical norm are casebooks that focus separately on administrative procedure in certain specific areas of substantive regulation and emphasize more clearly the nature and purpose of agencies' regulatory mandates. But they largely reconfigure the traditional emphasis on judicial review by considering it on an agency-by-agency basis, and by bracketing the substantive regulatory material in discrete, early sections.²⁹⁷ Thus, the substance and pedagogy of the academic field reveals the extent to which the institution- and procedure-focused approach of first generation scholarship remains dominant.

B. The Continuity of Crisis and Dissent.

As it appears in casebooks, administrative law today may look relatively similar to the field as it emerged from the 1930s, but continuity should not be mistaken for theoretical ossification. As I noted in the Introduction, administrative law as a body of doctrine and an academic field has faced recurring political crises over allegations that agencies impose unfair or inefficient regulatory practices, are subject to capture by regulated industries or public interest groups, or are simply incompetent.²⁹⁸ As the first generation scholars themselves demonstrated during the 1950s, these bouts of frustration have forced the field to rethink at least some of its assumptions about agency discretion and judicial review. To what extent have these crises affected the foundations of administrative law as they were established by the field's first generation?

²⁹⁶ See, e.g., STRAUSS ET AL., *supra* note 70 at iv (describing administrative law course and casebook as a body of judicially reviewable procedural requirements and concerns with efforts to control administration by the separate spheres of government).

²⁹⁷ See, e.g., BREYER ET AL., *supra* note 4 (including an extensive introduction to regulation and focus on regulatory substance and individual agencies, and including extensive section on alternatives to agency-based regulation; but also focusing ultimately on judicial review and on using appellate decisions for teaching materials); see also Jerry L. Mashaw, *Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development*, 6 J. L. ECON. & ORG. 267, 268 (special issue 1990) (noting limits of these casebooks' dissent from procedure- and structure-obsession of administrative law teaching and theory because of their failure to explain how substantive-specific procedure is generated and sustained).

²⁹⁸ See, *supra* notes 2-3 and accompanying text.

Consider first an especially well-known instance of a scholar identifying a particular crisis and its resolution: Richard Stewart’s important article in 1975 noting the breakdown of what he termed the “traditional model” of judicial review and formal procedures, and the emergence of a largely court-imposed, pluralist model of administrative process in which agencies are required to consider a fair representation of affected interests in their rulemaking procedures.²⁹⁹ Viewed from Arnold’s perspective, new, additional procedural requirements did not shake the foundations of administrative law. Interest representation, and related statutory efforts to open the records and meetings of the administrative process that became law in the 1960s and 1970s,³⁰⁰ are procedural fixes to political legitimacy crises, imposing statutory rights and common law changes on administrative procedures without directly affecting the systematic logic of the administrative state. Although they may have complicated and inhibited agency operations and judicial review,³⁰¹ representation and participation have not significantly diminished administrative law’s faith in procedure, institutional competencies, and legal-centrism—indeed, they have reinforced the assumption that procedural requirements placed upon agencies and enforced by judicial review lead to better substantive policy.

Some contemporary critics, however, have suggested more radical changes—changes that, by moving away from traditional conceptions of administrative law as doctrine and

²⁹⁹ See Stewart, *Reformation*, *supra* note 2, at 1669, 1670, 1675. Nevertheless, as he noted, each model shared “a common social value in legitimating, through controlling rules and procedures, the exercise of power over private interests by officials not otherwise formally accountable.” *Id.* at 1671.

³⁰⁰ These include the statute imposing record disclosure requirements on agencies, the Freedom of Information Act (which became law in 1966 and was the subject of important amendments in 1974), and the statute imposing open meeting requirements, the Government in the Sunshine Act, which became law in 1976, and the statute imposing access requirements in advisory committees formed by federal agencies, the Federal Advisory Committee Act, which became law in 1972. See The Freedom of Information Act, Pub. L. No. 89-497, 80 Stat. 250 (1966); Freedom of Information Act Amendments of 1974, Pub. L. 93-502, §§ 1-3, 88 Stat. 1561-64 (1974); The Government in the Sunshine Act, Pub. L. No. 94-409, *codified at* 5 U.S.C. § 552(b) (1976); The Federal Advisory Committee Act of 1972, Pub. L. No. 92-463, 86 Stat. 770, *codified at* 5 U.S.C. App. I.

³⁰¹ See Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 217-36 (1997); Reuel Schiller, *Enlarging the Administrative Policy: Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945-1970*, 53 VAND. L. REV. 1389, 1450-52 (2000).

academic field, resemble Arnold's critique of the procedural and conceptual core of first generation scholarship. A small sampling of such criticism reveals their parallels to Arnold's earlier dissent. As a system, some critics argue, administrative law is fatally flawed. It is excessively adversarial and legalistic in its approach to regulation, and thereby imposes unnecessary, and otherwise avoidable, social and economic costs to the regulatory process.³⁰² Its focus on judicial review invites interference in the administrative, and especially the rulemaking, process.³⁰³ It is based on a premodern sensibility and understanding of the administrative state as quasi-legislative and quasi-adjudicative, and thereby misunderstands and impedes modern, instrumentally rational agency operations.³⁰⁴ And with its hierarchical, tightly structured system, it cannot reckon with the role private entities increasingly play in public governance and the opportunities that this role offers for interdependent relationships between private and public realms.³⁰⁵ Similar criticism condemns administrative law as an academic field for its excessive focus on the judiciary, which renders it unable to consider the extent to which internal administrative processes operate outside the control of judicial review,³⁰⁶ as well as for its related failure to develop a theory of regulation that can account for the dynamics of regulatory practice

³⁰² See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM* 198-206 (2001).

³⁰³ See Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243 (1999) (arguing that judicial review of administrative rulemaking is both unwise and likely unconstitutional); Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 478-79 (1986) (warning against powerful judicial review because it discourages agency discretion and empowers judges to perform economic due process review of agency rulemaking).

³⁰⁴ See Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 189-90 (2003); see also EDLEY, *supra* note 2 (complaining of the outdated judicial control of administrative agencies that arises from a "trichotomy" of adjudicative fairness, scientific expertise, and politics that correspond with judicial, executive, and legislative institutions and that manifests itself in conceptual failings, incoherence, and poor governance).

³⁰⁵ See Freeman, *supra* note 2, at 545-50.

³⁰⁶ See, e.g., MASHAW, *BUREAUCRATIC JUSTICE*, *supra* note 8 (noting that in the context of social security disability claims, the traditional conception of judicial review's role in administrative law is descriptively false, as most claims are considered and resolved internally and without judicial oversight or appeal); Rabin, *Transition*, *supra* note 2, at 126-28, 132, 144-45 (criticizing traditional administrative law approach for its judicial-centric approach that fails to consider the important internal administrative practices that affect the consequences of substantive regulatory programs).

and policy formation.³⁰⁷ Finally, the entire growing body of literature applying public choice and positive political theory to administrative agencies challenges the naiveté of first generation scholarship. Far from a logical system of competent institutions with sufficient internal checks to protect the rule of law, public choice scholars argue, the administrative state is composed largely of self-interested actors seeking to maximize individual and institutional capital.³⁰⁸ And far from being reasoned objective means to control discretion and legitimate agency action, positive political theory scholars tell us, administrative procedures are merely means by which legislators protect their own political interests and those private interests they represent.³⁰⁹

These are inherently functional critiques, asserting that no matter the symbolic value of a system built on conceptions of pre-constituted, legitimating procedures and institutions, what may have once appeared to be a logical system now obstructs the administrative state from either achieving the goals set out by its political masters or realizing the potential benefits of its expert bureaucracy. Not all of these critics propose radical reform—indeed some, like first generation scholars who sought to reform the system in the 1950s, would merely rejigger judicial standards of review³¹⁰—but all challenge what first generation scholars took as an article of faith, namely that administrative law is concerned with designing legal and administrative processes that lead, inexorably, to legitimate and optimal regulatory results. They represent a trend towards focusing

³⁰⁷ See Steven Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 6 (1998); Susan Rose-Ackerman, *Progressive Law and Economics—and the New Administrative Law*, 98 YALE L.J. 341, 347 (1988); Stewart, *supra* note 2, at 1670-71 n.5.

³⁰⁸ The public choice literature is vast. For an excellent summary and critique, see Croley, *supra* note 307, at 34-56.

³⁰⁹ See Matthew McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989); McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987).

³¹⁰ See, e.g., EDLEY, *supra* note 2, at 230-34 (calling for courts to review agency decisions based on norms of “sound governance”); William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 445 (2000) (advocating partnership model of judiciary-agency relationship rather than hard look review of administrative rulemaking, but casting such partnership as “comparable to the professor’s review of a major research paper” in which the reviewer is “demanding” and “prepared to make difficult judgments,” but with the ultimate shared if creating “a well-reasoned product”); Shapiro, *supra* note 303, at 467, 491 (calling for broader

on substantive consequence, rather than system, procedure, and form.³¹¹ As such, these criticisms echo frustrations that Arnold first voiced, frustrations regarding how the first generation scholars conceived of the administrative state, as well as whether and how administrative law could legitimate and tame agencies. Reconsidering Arnold and the foundational efforts of first generation scholarship enables a clearer picture of the difficulties and stakes of administrative law reform.

Conclusion

In 1935, Arnold quipped that administrative law provided a “Redeemer” for the modern state in the guise of a logical system;³¹² in the intervening years, it has served that purpose for law professors who revere, obsess over, and complain about its emphasis on procedure, institutional competencies, and judicial review. Arnold correctly predicted both the success of that emphasis and the frustrations it would create. The failure of his proposals, which offered no logical system or symbolic substance to attract and inspire the field, also proves his point. It is a point worthy of consideration for contemporary efforts to reform administrative law in order to achieve substantive, normative ends: Administrative law needs its legitimating symbols, its logical systems. To forget or neglect that is to court failure.³¹³

agency discretion and less judicial imposition of requirement that agencies engage in “synoptic” decision-making processes).

³¹¹ See generally Richard A. Posner, *The Rise and Fall of Administrative Law*, 72 CHI.-KENT L. REV. 953, 957 (1997) (“Administrative law scholarship has acquired . . . a more substantive, a more economic, and a more institutional cast. There is much more interest in what works, and much less in the forms and formalities of the administrative process except insofar as they shape consequences in the real world.”).

³¹² ARNOLD, SYMBOLS, *supra* note 1, at 64.

³¹³ For an especially entertaining and depressing description of reformers failure to grasp this, see Jerry L. Mashaw, *Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 U. PITT. L. REV. 405 (1996).