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Nicholas S. Zeppos

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THE LEGAL PROFESSION AND THE DEVELOPMENT OF ADMINISTRATIVE LAW

NICHOLAS S. ZEPPUS*

INTRODUCTION

The history of regulation is cluttered with stunning ironies. The American Medical Association's opposition to the Medicare Act surely seems odd given the now-deeply appreciated contribution of almost one-fifth of the federal budget to covering the costs of medical care.¹ Recall as well the fierce opposition of the banking industry to the federal deposit insurance system during the Great Depression.² It did not take long for the banking industry to see the advantages of the federal subsidy, particularly when competing with other institutions for deposit dollars.³ No doubt one can conjure up both innocent and sinister explanations for these interest group about-faces. The latter may include charges that the tardy embrace of the regulatory initiative was designed only to blunt more radical interference by the government, or that the ultimate product bears the significant imprint of the affected interests.⁴ Putting these aside, however, it may be fair to say that interest groups are poor judges of what "reforms" are in their long-term interests.

Lawyers, it seems, are no better than doctors and bankers in predicting what government actions will be in their long-term interests. The well-documented account of lawyer opposition to the New Deal

* Professor of Law, Vanderbilt University School of Law. I would like to thank all of the participants in the symposium for their helpful comments and questions. I would also like to thank Jim Ely, Barry Friedman, John Goldberg, Jack Heinz, Don Langevoort, Harold Levinson, Bob Rasmussen, and George Shepherd for the helpful comments and suggestions they have provided. All errors, of course, are my responsibility. I would also like to thank Adam Levine ('98) and John Flippen ('98) for their outstanding research work.

1. See OFFICE OF MANAGEMENT AND BUDGETS, A CITIZEN'S GUIDE TO THE FEDERAL BUDGET 10 (1997).

2. See John L. Douglas, *Deposit Insurance Reform*, 27 WAKE FOREST L. REV. 11, 15 (1992).

3. See Jonathan R. Macey & Geoffrey P. Miller, *Deposit Insurance, the Implicit Regulatory Contract, and the Mismatch in Term Structure of Banks' Assets and Liabilities*, 12 YALE J. ON REG. 1, 19-20 (1995).

4. On Medicare, see generally THEODORE R. MARMON, THE POLITICS OF MEDICARE (1973).

and the rise of the administrative state⁵ must surely strike some as bizarre.⁶ By any standard it appears as if the administrative state, and the regulatory regimes that came with it, provided the legal profession with innumerable professional opportunities. The inevitable link between overregulation through administrative agencies and the economic welfare of lawyers has now become the dominant popular,⁷ and even academic, account.⁸ Recent scholarship tells us that this was not always the case. Historical and sociological accounts of the rise of the administrative state document the opposition of significant, influential elements of the legal profession to this shift in governmental power.⁹ These accounts do more than simply canvass the historical record and analyze the legal profession's opposition. They attempt instead to provide an account of lawyer resistance to administrative government that is sociological, economic, and at times jurisprudential. The range and depth of these other themes differ among commentators, often because of disciplinary emphasis rather than disagreements in root explanations.¹⁰ Yet there remains a well-documented and convincingly demonstrated consensus as to why major segments of the bar, what some have characterized as the elite bar, resisted the administrative state.

This earlier exhaustive work is the departure point for my paper. In this paper I describe and critique this conventional account of lawyer opposition. In doing so, my goals are twofold. First, and perhaps most ambitiously, the paper is part of a larger research project that examines the relationship between the legal profession and the construction of law and legal institutions.¹¹ Second, although I criticize

5. See, e.g., 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 (1996).

6. Indeed, Shamir, who most thoroughly documents the struggle, notes the irony: "What elite lawyers regarded as a deprofessionalization process ultimately enhanced their own professional powers." SHAMIR, *supra* note 5, at x.

7. See PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE* 10-11, 22-29 (1994). It was no coincidence that former Vice President Quayle, who chaired the Competitiveness Council charged with regulatory reform and oversight, argued that economic productivity suffered for the benefit of the legal profession. See *Quayle Raps Lawyers*, 77 *A.B.A. J.*, Oct. 1991, at 36.

8. The argument that lawyers benefit from "excessive" regulation is analyzed and critiqued in B. Peter Pashigian, *The Market for Lawyers: Determinants of the Demand For and Supply of Lawyers*, 20 *J. L. & ECON.* 53 (1992).

9. See sources cited *supra* notes 2, 3, and 5.

10. Shamir, a sociologist, provides an account deeply rooted in the sociology of the professions. See SHAMIR, *supra* note 5, at 7-10. Shepherd, a law professor, provides a political-historical account. See Shepherd, *supra* note 5, at 1559-61.

11. See Nicholas S. Zeppos, *The Professional Construction of Interpretive Theory: The Legal Profession and Statutory Interpretation* (on file with author).

the conventional account, I do so not necessarily to displace it as at least a partial explanation for how lawyers shaped the Administrative Procedure Act ("APA"),¹² and the structure of administrative law. Rather, I suggest gaps or shortcomings that need to be filled in to make the conventional account more complete.

The paper is divided into three parts. Part I is a brief explanation of the legal profession's basis for claims of expertise, power, and prestige necessary to understand any theory of lawyer resistance to the administrative state. Part II describes the conventional account of lawyer resistance to the administrative state. Part III offers both a critique of, and a supplement to, the conventional account.

II. THE LEGAL PROFESSION AND CLAIMS OF PROFESSIONAL STATUS AND POWER

Before outlining the conventional account of the legal profession's resistance to administrative government, it will be helpful to place that struggle in a broader historical and jurisprudential setting. By focus and necessity, this discussion is greatly simplified.¹³ The conventional account begins by describing the regime antedating the APA, the status quo that administrative government displaced. This regime dominated legal discourse in the late-nineteenth and early-twentieth century, a time that most historical accounts describe as the age of formalism, or the period of classical legal reasoning.¹⁴ The overused¹⁵ (and perhaps ill-defined) label "formalism" includes a wide variety of ideas. Perhaps most prominently, the term has come to describe a certain method of judicial decisionmaking and legal reasoning. Law, or more precisely the common law, developed and was studied as a scientific, objective reasoning process.¹⁶ Sometimes this description includes an emphasis on deductive or syllogistic reasoning,

12. 5 U.S.C. §§ 551-559, 701-06 (1994 & Supp. II 1996).

13. The brief discussion draws on the major works including NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* (1995); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (1977); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960* (1992) [hereinafter HORWITZ II].

14. See DUXBURY, *supra* note 13, at 9; HORWITZ, *supra* note 13, at 253-54; HORWITZ II, *supra* note 13, at 9. On the rise of formalist thought more generally, see MORTON WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* (5th ed. 1976).

15. The looseness of the term, and whether it accurately describes legal reasoning of the period, has been noted by commentators. See JAMES W. ELY, JR., *THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER 1888-1910*, at 72 (1995); Ronald Dworkin, *Pragmatism, Right Answers, and True Banality*, in *PRAGMATISM IN LAW AND SOCIETY* 359, 368 (Michael Brint & William Weaver eds., 1991).

16. See HORWITZ, *supra* note 13, at 254; HORWITZ II, *supra* note 13, at 16-17.

or the arbitrary use of analogical reasoning or categories to decide cases.¹⁷

In this historical and jurisprudential account of what judges do, lawyers are not neglected. Indeed, they are a crucial part of the story, and formalism is a central part of the legal profession's ascendancy. The status of the legal profession—and the power, privilege, and economic benefits that attached to this status—could only be successfully maintained through specialized knowledge and a unique expertise.¹⁸ These claims of knowledge and expertise enabled lawyers to control access to the profession, to design a system of self-regulation, and to control (at least partially) the pace of legal developments.¹⁹ In short, these claims empowered the profession to control producers, to control production by the producers, and to control the demand for this production.

But what was this specialized knowledge and body of expertise claimed by lawyers? Law, of course, but law with a formalist twist. For lawyers, as much as for judges, law was a science: a specialized and objective body of rules that a lawyer could discover and apply through a careful reading of legal materials, primarily cases.²⁰ This formalist description of law carried with it an important distancing mechanism as well. If law was scientific and objective, it also was not politics. It was essential for lawyers not only to create a deep epistemological basis for law, but also clearly to separate the realm of law from the world of politics.²¹

This last proposition was an important part of the lawyer's description of his work. Lawyer's work involved constant interaction with a court—a governmental institution. This linkage between the profession and the bench provided opportunities for, and strength to, the profession.²² Yet by operating within the sphere of a governmen-

17. See HORWITZ, *supra* note 13, at 199.

18. Horwitz specifically makes the connection between the professional project of the bar and the rise of formalism. See *id.* at 256-59.

19. See RICHARD L. ABEL, *AMERICAN LAWYERS* chs. 2-5, 7 (1989).

20. See HORWITZ, *supra* note 13, at 258-59; SHAMIR, *supra* note 5, at 80-81.

21. See HORWITZ, *supra* note 13, at 256 ("The desire to separate law and politics has always been a central aspiration of the American legal profession."); SHAMIR, *supra* note 5, at 12 (noting that the elite bar found it essential to "retain the symbolic separation between" law and politics). I recognize that there is considerable tension between the bar's separation of law and politics and the bar's historical involvement in both great matters of state and partisan politics. The point of my paper, however, is not to resolve this historical and theoretical tension.

22. Shamir explores the link between bench and bar at great length:

[The] "intellectual dependency" [of the bar and judiciary] . . . in the United States was established around the centrality of courts in producing and announcing legal truths and a surrounding ring of legal practitioners as their most entrusted officers and gate-

tal institution (the courts), lawyers faced the charge that they were subsidiary, but nonetheless important, actors in the exercise of governmental power. Formalist accounts that separate law from politics properly emphasize the judiciary's need to maintain the separation.²³ But the separation was also important for lawyers: It created an essential bond between the judiciary and the legal profession.²⁴ Lawyers performed an indispensable role in acting as translators of the judicial product, as well as independent officers of the court primarily responsible for advocating and assisting the court in the scientific process of discovering the true and correct principles of law.²⁵

To describe what is central to the formalist account of judging and the legal profession is to highlight an obviously missing element. The formalist account never claims that judges generate fair, just, efficient, or practical rules.²⁶ This omission from the account of judging is equally significant to the formalist description of legal expertise: Claims by lawyers for professional status involved no argument that lawyers can actually propose or make better laws as objectively measured by some yardstick, whether that yardstick be justice, equality, efficiency, or utility. Lawyers, it seemed, were neither particularly good at designing, nor trained to design, mechanisms such as legal doctrines that produced socially or economically desirable outcomes. In other words, the basis of lawyers' claims for professional status and expertise carried almost no normative arguments. This is not to say that lawyers were not good at supposedly isolating the essential or true rules of law from a mass of cases. Yet the weeding process was a claim of expertise based on objective understanding, rather than a claim that lawyers were good at picking rules out from among conflict-

keepers. . . . [The] historic centrality of courts in the development of law in the United States was the foundation upon which lawyers . . . acquired prestige, influence, and wealth.

SHAMIR, *supra* note 5, at 80

23. *Cf. id.* at 102-03 (stating that the perceived separation of the judiciary from politics allowed the judiciary to operate outside the domain of the state and within its own court-centered world of informed reason).

24. *See id.* at 102 ("[The] defense of judicial authority as the primary, if not exclusive, source of law production was rooted in the intimate perceived connection between judicial powers and the practicing bar's own professional status.").

25. *See id.* at 103 (describing a system with "the judge at the center, surrounded by a ring of practicing lawyers who operated as officers of the court").

26. The absence is particularly odd when the formalist account also includes claims that *laissez-faire* individualism and a preference for markets were an essential part of formalist reasoning. *See DUXBURY, supra* note 13, at 25. Horwitz attempts to explain the apparent contradiction by arguing that formalist rhetoric disguised *laissez-faire* policy choices found in formalist judicial reasoning. *See HORWITZ, supra* note 13, at 253.

ing cases that they somehow knew worked best, or would produce the desired end (assuming that the end could be identified).²⁷

In sum, the professional status claims made by lawyers at this time had two components: one methodological and the other institutional. First, law was a scientific and objective process. Second, law was independent of politics, and lawyers operated as significant and autonomous adjuncts to the judicial system.

III. THE CONVENTIONAL ACCOUNT OF LAWYER OPPOSITION TO THE ADMINISTRATIVE STATE

Two recent studies analyze the evolution of the APA and administrative law from the perspective of the elite bar.²⁸ Professor George Shepherd's article²⁹ offers a comprehensive political-historical account of the more than decade-long struggle between the American Bar Association ("ABA") and the Roosevelt (and eventually Truman) administration over the nature of administrative government and the content of an administrative procedure reform bill. Shepherd theorizes that the battle over administrative reform and administrative procedure pitted the ABA against many New Deal initiatives.³⁰ Shepherd sees the battle as largely one of politics: The ABA resisted the policy initiatives of the New Deal. But he also argues that *professional* interests motivated, and were perceived as motivating, much of the bar's opposition.³¹ In a somewhat different approach, Professor Ronan Shamir's book³² on the elite bar and the New Deal traces the profession's opposition to administrative government, but emphasizes

27. The sole exception would have been that lawyers were equipped to offer ideas to reform legal institutions, particularly courts, or to propose procedural reforms. These sorts of policy initiatives were, of course, logical extensions of the profession's close link to the courts, and are easily explained from the standpoint of self-interest: If lawyer status rested on ties to the courts and the separation of law and politics, the profession had a strong interest in ensuring that the more blatant efforts to politicize courts be curbed. On the profession's role in judicial reform, see TERRENCE C. HALLIDAY, *BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND POLITICAL EMPOWERMENT* 147 (1987).

28. By "elite bar," I mean those lawyers who represented large business interests and often served as leading members of established bar organizations.

29. See *supra* note 5.

30. See Shepherd, *supra* note 5, at 1560.

31. See *id.* at 1571-72 (noting that the elite bar feared the effect of New Deal agencies on their practice, clients, and investment in specialized training). See also *id.* at 1613 (noting that the opponents of the Walter-Logan bill charged that procedural reform was really a lawyers' relief bill); *id.* at 1625 (noting that FDR vetoed the Walter-Logan bill and charged that administrative reform was driven by legal profession's self-interest). Shepherd's broader thesis that the APA was a fierce political battle is novel, challenging earlier assertions that the APA was adopted out of dispassionate expertise. See Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219 (1986).

32. See *supra* note 5.

the political-sociological dimensions of the struggle.³³ At bottom, however, both Shepherd and Shamir agree on certain fundamental points that constitute what I refer to as the “conventional” account of bar opposition to administrative government. In this part I briefly sketch out this conventional account, particularly insofar as it grows out a jurisprudence of legal formalism.

It should hardly be surprising that the formalist account of the professional status of the legal profession forms the departure point for the conventional account for lawyer opposition to the administrative state. The formalist account had served the profession well, and the shift to administrative government threatened to undermine this account. How exactly this threat would occur played out in both familiar and unfamiliar ways.

Most importantly, administrative government threatened to undermine the important distinction between law and politics.³⁴ This threat involved a series of discrete claims that were both procedural and methodological. I use the terms “procedural” and “methodological” to convey separate but overlapping concepts. By procedural, I mean the design of institutional and adjudicative forms used to resolve legal disputes. By methodological, I mean the form of reasoning used by decisionmakers to reach legal conclusions.

For the profession, politics in decisionmaking was minimized by adherence to fair procedures with impartial adjudicators. Administrative justice undermined this procedural system by substituting informal meetings presided over by a political actor for the formalized, structured, and ritualistic hearing before an independent judge.³⁵

33. See SHAMIR, *supra* note 5, at 7-10.

34. See *id.* at 12 (noting that in the “administrative arena . . . the dichotomy [between] law and politics was dissolved, . . . [which] triggered renewed struggles over the power and influence of lawyers”); *id.* at 104 (“Nowhere was the dissolution of law and politics, of reason and will, more obvious than in the administrative arena.”); see also Shepherd, *supra* note 5, at 1559 (noting that the battle over the APA helped resolve larger battle over rule of law); *id.* at 1625 (finding that lawyer resistance to administrative government was based upon agencies’ rejection of legal reasoning and profession’s expertise base—substitution of agency expertise for lawyer expertise). We will put to the side exactly what the content of administrative law or administrative reasoning might include. See *infra* Part IIIc.

35. The account offered here is not represented as true. For example, no doubt many would dispute the pristine apolitical characterization of adjudication, particularly as practiced in state and federal courts at the time of the New Deal. Defenders of administrative government did not miss the point, arguing that lawyers disliked administrative process because of their lack of social ties with the new agency decisionmakers. See Shepherd, *supra* note 5, at 1614 (quoting 86 CONG. REC. 4668-69 (1940) (remarks of Rep. Sabath)) (asserting that lawyers opposed agencies because they felt closer to and more able to influence judges, with “whom they associate”).

The point is made most dramatically³⁶ in the National Recovery Administration ("NRA"), charged with implementing the National Industrial Recovery Act ("NIRA").³⁷ The NIRA, the centerpiece of the so-called first New Deal,³⁸ charged the NRA (ultimately through the President) with adopting codes of fair competition that would govern virtually every aspect of the American economy.³⁹ In short, the NIRA reflected a judgment that the economic crisis of the Great Depression was caused by overcompetition, and sought to substitute central state planning for destructive competition. The NIRA made clear that in generating its rules of fair trade and competition, it was committed to a non-legalistic model of decisionmaking; lawyers were not welcome participants. The agency boasted that it would adopt rules through negotiations and highly informal, ad hoc hearings, rather than formal proceedings.⁴⁰ The introduction of a new kind of forum, with different rules (if any) of procedure and evidence obviously posed a challenge to the established practices of the profession. And the free-wheeling character of the process, along with the overtly political character of the agency's charge, led to fears that politics, and not law, would produce legal outcomes.

But, according to some, there was more going on. More threatening to the profession was the NIRA's overt, and perhaps belligerent, claim that it would not be bound by "legalisms" in its lawmaking functions.⁴¹ What exactly the NIRA condemned as "legalisms" is not entirely clear, but the likely targets were the formalities of adjudication and litigation, as well as traditional legal concepts and categories used by lawyers to construct legal arguments and rules.⁴² In place of

36. And perhaps in the most exaggerated fashion because one now finds few defenders.

37. Act of June 16, 1933, ch. 90, 48 Stat. 195.

38. See WILLIAM E. LEUCHTENBERG, *THE SUPREME COURT REBORN* 213 (1995).

39. See NIRA § 3(a).

40. See PETER IRONS, *THE NEW DEAL LAWYERS* 26 (1982) ("The national experiment with government by trade association began without the barest of semblance of an administrative structure through which to draft and implement the 'codes of fair competition' contemplated by the NIRA."); SHAMIR, *supra* note 5, at 18-19 (quoting a 1933 NIRA press release) ("No representative of a private interest favoring or opposing a code has any legal right to control or direct the presentation of evidence or the procedure in a public hearing . . ."). General Hugh Johnson, the "bombastic" (IRONS, *supra*, at 27) first administrator of the NIRA and a lawyer by training (who nonetheless despised lawyers, *id.* at 35) told industry groups to "leave their attorneys at home." SHAMIR, *supra* note 5, at 19 (quoting a 1933 NIRA press release).

41. See SHAMIR, *supra* note 5, at 18-19 (noting that the NRA's "sweeping discretionary powers were explicitly designed to avoid legalistic methods and to escape judicial review").

42. As discussed *infra*, much of this debate played out in arguments about the permissible scope of power delegated by Congress to the President and the NIRA, and particularly whether antecedent legal concepts or categories in some way constrained the agency's power to give substantive content to rules of "fair competition." See, e.g., *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

classical legal reasoning, the NIRA sought to make law more consistent with what it viewed as political, economic, and social necessities and realities. Such a clear political influence on the content of law and the process of lawmaking marked a major shift from the classical model, and obliterated for lawyers the essential separation between law and politics.⁴³ Thus, according to the conventional account, the NIRA's "anti-law" rhetoric rocked at least one of the foundations of classical legal thought upon which lawyers' claims for professional status were based. If law was not objective, scientific, and the result of a specialized form of reasoning, then how could lawyers maintain their special claims of power and privilege? And, even more devastating, if law generation was simply or properly a political process, then why were lawyers any better at that process than others without legal training? The boundary between law and politics had been breached, and the consequences, according to the conventional account, were clear. The bar's long struggle for autonomy — upon which its social and economic status rested — and its claim for a specialized expert knowledge, all were challenged by administrative government.⁴⁴

The blurring of the line between law and politics and the adoption of non-judicial models of lawmaking raised more practical problems for the profession as well. Yet interestingly, and perhaps surprisingly, they are not central to the conventional account. Consider the NIRA's threat to develop law free from legalistic requirements. Unfortunately for the NIRA, this freedom often meant dispensing with one of the most basic elements of a fair legal system: notice through published laws.⁴⁵ Critics frequently charged that the agency's codes of fair competition were neither published nor readily

43. The broad scope of the power conferred upon New Deal agencies made the conflation of law and politics a logical step. Jerome Frank accepted the job of General Counsel to the Agricultural Adjustment Administration only by convincing himself that his role would not be limited to legal advice but would allow policy decisions as well. See IRONS, *supra* note 40, at 129 (noting Frank's assertion that it was "impossible to separate the line between policy and law"); see also SHAMIR, *supra* note 5, at 32 ("The NIRA . . . symbolized the arrival of an era in American law in which expediency and pragmatic considerations ushered in a spirit of relative disregard for strict legalistic practices and a rejection of what is known as 'classical legal thought.'"); Shepherd, *supra* note 5, at 1559 (asserting that the battle over the APA was fundamentally about defining the concept of the rule of law).

44. See SHAMIR, *supra* note 5, at 171 (arguing that bar attack on administrative government as part of an effort to "block a movement and a process in the course of which the power of law as objective knowledge and their own power as sole carriers were systematically undermined." "Dejudicialization" raised the prospect of "deprofessionalization.").

45. See Erwin Griswold, Note, *Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation*, 48 HARV. L. REV. 198, 204-05 (1934); SHAMIR, *supra* note 5, at 108.

accessible.⁴⁶ The fairness problems posed by such a system were obvious, and the absence of public law undermined one of the primary and lucrative aspects of law practice: counseling, or preventive law. This service may be as important as litigation,⁴⁷ both in terms of client satisfaction and generating legal fees. The demand for this kind of service surely dries up when the lawyer cannot access the most basic materials upon which her advice must be based.⁴⁸

The threat of informal, ad hoc procedures also raised demand questions for the profession.⁴⁹ The informality of the process raised basic issues of due process and bias.⁵⁰ Some lawyers feared that a fair hearing before the agency would be close to impossible. How these bias concerns played out in the professional setting seems clear. Demanding a price for service based on the possibility of a desirable outcome, becomes more difficult if the prospects for prevailing drop to a sufficiently low percentage. A client does not usually enrich a lawyer when they head off to a kangaroo court.

Of course, in raising questions about the fairness of administrative adjudication, the bar found itself in a bit of a dilemma. On one hand, the bar could push for reforms that bypassed agency adjudication entirely and could seek to solve client problems by behind-the-scenes negotiation. This, in turn, might require law firms to hire former agency staff or lawyers. While eventually a common practice for law firms, we will see later that it initially posed some problems for elite lawyers.

On the other hand, the elite bar could press for a code of fair procedures to govern agencies and make them more like courts.⁵¹ Yet this strategy raised a threat to the institutional affiliation between the profession and the judiciary. To the extent that the agencies were

46. The ultimate embarrassment for the NIRA came with the discovery that the regulation upon which the agency relied for imposing penalties for violation of its "hot oil" code of competition had never been promulgated. See IRONS, *supra* note 40, at 70-71.

47. See B. Peter Pashigian, *A Theory of Prevention and Legal Defense with an Application to the Legal Costs of Companies*, 25 J. L. & ECON. 247 (1982).

48. See SHAMIR, *supra* note 5, at 104 (noting the "maze of unpublished and unclear procedural and substantive rules compromised the 'scientific' nature of legal practice"); see also *id.* at 20, 105 (discussing how the bar's perception of the NIRA's hostility to formal judicial procedures forced the elite bar to focus on the social and economic aspects of the profession, destroying the lawyers "true role" within a formal adversarial system).

49. See generally Shepherd, *supra* note 5, at 1572 (reviewing the bar's fear that a shift to administrative agency lawmaking would decrease the demand for courts and traditional lawyers).

50. See *id.* at 1574 (noting that early ABA administrative reform efforts focused upon separation of agency functions and strict procedures).

51. See *id.* at 1582-83 (detailing 1937 reform proposal requiring at least one lawyer on each agency board and formal findings supported by a written record).

fairer and “almost” like courts, it became more palatable to shift the bulk of work from the courts to the agencies.⁵² And, as we have seen, the relationship between courts and lawyers was a significant feature in the bar’s establishment of professional status.

There was no doubt in the eyes of the bar, however, that the rise of administrative government challenged this institutional affiliation between bench and bar. The bar’s link to the bench provided lawyers with a certain status—one that, for a variety of reasons, they would not derive from any affiliation with an administrative bureaucracy. As we saw in the formalist account of the rise of the legal profession, the bar clearly based its status claims on the lawyer’s essential role in translating the work of the bench. The substitution of agencies for the courts posed an obvious challenge to this important institutional affiliation.⁵³ The ABA, in its long and fierce resistance to administrative government and the New Deal, saw a clear link between the status and power of the courts and the legal profession.⁵⁴ The linkage was not simply one of power sharing, but intellectual dependency as well. As Shamir argues, “The historic centrality of courts in the development of law in the United States was the foundation upon which lawyers, as a professional group in ‘civil society,’ acquired prestige, influence, and wealth.”⁵⁵

During the New Deal, the bar’s efforts to shore up this relationship took two forms. First, members of the bar repeatedly defended the courts against a steady stream of attacks: that they were too slow, conservative, or unqualified to handle complex social and economic problems facing the nation.⁵⁶ Second, the bar focused its primary efforts at administrative law reform on judicial review and the clear subordination of agencies to the courts.⁵⁷ Obviously, the judicial review

52. *Cf. id.* at 1569, 1573-74 (noting the ABA’s advocacy of strict judicial review to create an administrative state more acceptable to the bar).

53. Defenders of administrative government did not miss the point either. Robert Jackson noted the “movement to displace the courts by administrative tribunals.” Robert H. Jackson, *The Bar and the New Deal*, Address Before the Association of American Law Schools (Dec. 28, 1933), in *HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS, PROCEEDINGS OF THE THIRTY-FIRST ANNUAL MEETING* 117 (1934).

54. See SHAMIR, *supra* note, at 78-79 (detailing public speeches by bar leaders defending power and independence of the judiciary and emphasizing the “inherent connection between the status of courts and the social influence and prestige of the legal profession”). See also the comments of ABA President William Ransom: “As to lawyers, both in pending legislation and in administrative regulations and departmental rules, there is a manifest tendency and purpose to circumscribe and limit the activities of lawyers . . .” *Id.* at 79.

55. *Id.* at 80.

56. *Cf. id.* at 70-79 (outlining one critic’s contention that the judiciary had become “out of tune with the necessity of the times,” and the bar’s defense of the judiciary).

57. See Shepherd, *supra* note 5, at 1574-77.

provisions of the APA have been understood as preserving some measure of judicial control of administrative agencies.⁵⁸ But during the long dispute over administrative reform the bar's proposals were even more aggressive. At times the bar sought to centralize all review in a single court, or to shift all agency adjudication to an administrative court.⁵⁹ Too late in the day for the bar to eliminate agencies, such a scheme would not only preserve judicial supremacy, but inevitably maintain the procedural status quo as well.⁶⁰

This conventional account of bar resistance to the rise of administrative law follows logically from the formalist account of the twentieth-century rise of the legal profession. The profession based its status on assertions of a knowledge base where law was a scientific discipline. Moreover, the bar's privileged role was inextricably bound up with the power, independence, and prestige of the courts. This objective, autonomous, smoothly functioning system faced a direct and serious challenge with a shift to administrative government. Not surprisingly, therefore, bar resistance to the administrative state followed the predictable path necessary to preserve the status quo: maintain the separation of law and politics, and insist on the primacy and independence of the judiciary.

IV. CHALLENGES FACED BY A PROFESSIONAL ACCOUNT OF LEGAL DEVELOPMENTS: LAWYER INDEPENDENCE, DESCRIBING LAWYERS' WORK, AND PUZZLES OF THE MARKETPLACE FOR LEGAL SERVICES

Certainly there is substantial historical and jurisprudential support for the conventional account of bar resistance to the rise of the administrative state. The early-twentieth-century formalist account of law, and the profession's dependence on the law-politics separation, seem well accepted. There is similar support for the claim that administrative law was shaped by the interests of a large and influential part of the bar. While convincing, I nonetheless find the account of the

58. See Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 473 (1989) ("Prompted by the perception that the New Deal's regulatory fervor had bred a chaotic and unaccountable world of administrative power, the APA represented a conscious congressional determination to strengthen judicial control over the administrative system.").

59. See Shepherd, *supra* note 5, at 1574-75.

60. The bar's opposition to administrative government rested of course not simply on the jurisprudential concerns outlined above, but also on the fears of practicing in a non-judicial forum. See DUXBURY, *supra* note 13, at 153 ("[L]awyers trained in common law techniques were suddenly expected to speak a new and different language, the language of the administrative state."); Shepherd, *supra* note 5, at 1572.

bar's resistance to the administrative state incomplete and almost too neat. A number of theoretical, empirical, and jurisprudential questions that seem critical to the story remain either partially or totally unanswered. Some of these questions are relatively narrow and focus on issues pertaining to administrative law. Yet others are broad and legitimate inquiries posed for any theory that tries to explain the influence of the bar on the structure of law and legal institutions.

A. *The Problem of Existing Agencies*

For those questioning administrative government during the New Deal, agencies were not new. The Interstate Commerce Commission ("ICC")⁶¹ was approaching fifty, and the Federal Trade Commission ("FTC")⁶² was into its third decade. Why the fierce resistance to administrative agencies during the 1930s when bar experience with existing agencies had not previously triggered such widespread concern or professional anxiety? This puzzle warrants further consideration because it raises a number of issues about bar resistance to administrative government. Indeed, the treatment of existing agencies was so peculiar that it challenges the entire enterprise of understanding the APA as the profession's response to the threats posed by administrative government.

Consider first that at various points in the APA debate, the ABA's reform bills specifically exempted the ICC, FTC, and the Food and Drug Administration from the strict procedures otherwise imposed on the New Deal agencies.⁶³ This suggests that it was not administrative government per se that threatened the status and knowledge claims of the profession. Indeed, seen in this light, the bar's resistance to administrative government was less a smokescreen for a professional agenda than resistance to a particular kind of *substantive* regulation found in the New Deal.

This point is buttressed by a further oddity, noted by both Shamir and Shepherd, but not generally incorporated into their more theoretical frameworks. Those segments of the bar with long-established relationships with certain administrative agencies wanted no part of administrative reform, or were outright opposed to it.⁶⁴ The question

61. See Act of Feb. 4, 1887, 24 Stat. 379, 383.

62. See Act of Sept. 26, 1914, 38 Stat. 717.

63. See Shepherd, *supra* note 5, at 1606-07.

64. The Federal Bar Association—which included many government lawyers and those with substantial practice before government agencies—generally opposed the ABA's reform proposals. See *id.* at 1577. Indeed, on the one issue the Federal Bar Association pressed—a bill to

is obvious: If administrative government so threatened the professional status and epistemological foundation of law practice, why were large segments of the bar either indifferent or outright opposed to the ABA's efforts? More precisely, if the threats posed by administrative government could have undermined the knowledge foundation for the elite bar, what was the foundation upon which other segments of the bar had built their own status, reputation, and claims to expertise?

These anomalies must be better incorporated into any account that attempts to explain the APA as part of the bar's professional project. Shamir discusses the conflict among segments of the bar but gives us little understanding of the motivations of the non-elite bar⁶⁵ (or what might be considered as specialized segments of the elite bar)⁶⁶ other than what might be imagined as their own economic and professional self-interest. Shepherd's account is largely historical, focusing on the ABA's efforts and noting the schisms among different segments of the bar.⁶⁷ Yet even he seems to vacillate at points. Shepherd at times argues that lawyer loyalty to client interests drove opposition. At other times, however, he refers to broader "rule of law" concerns.⁶⁸ Yet it seems odd that some agencies could undermine fundamental concerns about adherence to the "rule of law" while others could continue business as usual without jeopardizing this central professional value. In the discussion below, I attempt to offer some explanations for these anomalies. Yet my explanations—even if accurate—are at times fundamentally at odds with the conventional

mandate that only lawyers be allowed to appear before federal agencies—the ABA refused to offer support. *See* SHAMIR, *supra* note 5, at 94-96. The elite corporate bar that dominated the ABA leadership saw little threat to lay representation of their clients, and found the Federal Bar Association's effort at monopoly unseemly. *See id.* The National Lawyer's Guild—whose membership and agenda differed markedly from the more anti-regulatory views of the ABA—also opposed efforts to restrict the New Deal agencies. *See* SHAMIR, *supra* note 5, at 81; Shepherd, *supra* note 5, at 1599. Finally, those lawyers with established practices before the Patent Office, Treasury Department, and Customs Service had no use for administrative law reform. Rather than reaffirming their professional status, this segment of the bar saw the ABA's proposals as undermining their investment of human capital. *See* Shepherd, *supra* note 5, at 1577 (noting that practitioners before other agencies saw ABA efforts as "destroy[ing] the hard-won expertise both of the existing administrative courts and of the lawyers who practiced before them.").

65. Some small firms or solo practitioners may build their claims of status and economic power on a different jurisprudential foundation than Shamir hypothesizes motivated the elite bar. *Cf.* CARROLL SERON, *THE BUSINESS OF PRACTICING LAW: THE WORK LIVES OF SOLO AND SMALL-FIRM ATTORNEYS* 110-14 (1996) (discounting the significance of technical legal skills as the basis for successful practice among small-firm attorneys by emphasizing the value of "personal touch" and "bedside manner").

66. No doubt lawyers with an established practice with agencies such as the Patent and Trademark Office or the Department of the Treasury would meet whatever definition of elite that is adopted.

67. *See* Shepherd, *supra* note 5, at 1577, 1599.

68. *See id.* at 1559-60.

account because they rely upon a more shallow kind of professional opportunism.

1. The Politics of Agency Control

Perhaps the schisms among the members of the bar and the focus on New Deal agencies can be explained in a political context. As noted above, Shepherd argues that the ABA's opposition was not just to administrative government, but administrative government as conceived by the New Deal and controlled by FDR. Indeed, in this way Shepherd deviates from the conventional account, claiming that the threat to client interests dominated the bias concerns.⁶⁹ The threat of strong presidential leadership and control over the agencies may have led the bar to fear that capture or control would be difficult, if not impossible. Stated more ominously, these agencies would be more political and hostile to clients.⁷⁰ Moreover, given the sustained political and intellectual assault on the bench and bar by many, including most prominently FDR,⁷¹ the bar may have doubted the ability of the courts fully to tame the agencies.

This explanation is both consistent and at odds with the conventional account. It is consistent because the threat of a centrally dominated and stridently political bureaucratic ascendancy in the New Deal might indeed have been a different kind of administrative process than found in the existing agencies. In Shamir's terms, there truly was a threat that law would equal politics. It is at odds, however, because it fails convincingly to disprove an alternative hypothesis developed below: that elite lawyers did not resist politically motivated or even incompetent agencies unless those agencies aggressively attacked the interests of loyal, paying clients.

2. Client-Centered Resistance

The puzzle of the bar's acceptance of existing agencies might also be solved by looking more closely at the character and function of New Deal agencies and contrasting them with the existing agencies. Some interesting inferences can be drawn, but they do not necessarily support the conventional account of elite bar opposition. Looking at the older agencies like the FTC and ICC, it is possible to sketch out interest-group alignments that naturally tamed agencies. For exam-

69. *See id.* at 1571.

70. *See id.* at 1576.

71. FDR's attack on administrative reform included more than a fair share of attacks on the legal profession. *See id.* at 1625.

ple, diffuse consumer interests were no match for focused commercial interests in shaping FTC policy. Moreover, according to one prevalent but controversial view, dominant railroad interests quickly captured and controlled the ICC.⁷² The New Deal agency most vilified by the bar, the National Labor Relations Board (“NLRB”), raised a far different problem. The National Labor Relations Act⁷³ is a classic example of a law affecting the interests of two well-organized and focused interest groups: labor and management. In public choice terms, the Act imposed concentrated costs on one group (management) and dispensed concentrated benefits for another group (labor).⁷⁴ In such a supply-demand pattern, it is not unlikely that lawyers representing management interests would fear that the NLRB could not be easily controlled. Even worse, if control did occur it might well be through the influence of labor, not management. Where a law had the potential for such distributive consequences on important clients, lawyer resistance was predictable.

This account of lawyer resistance to agencies explains the anomaly of pre-New Deal agency acceptance that the conventional account generally fails fully to develop. This explanation, however, springs not from concerns over the impact of a new legal regime on professional claims of knowledge or expertise, but from concern over client interests and substantive outcomes. No doubt the tasks and functions of the New Deal agencies were quite different from their predecessors. But rather than triggering the bar’s independent pursuit of a professional agenda, the difference further cemented the lawyer-client bond. The subject matter of the most vilified New Deal agencies involved particularly sensitive matters for the clients of elite lawyers. Apart from the NLRB, the agency most frequently attacked by the bar was the Securities and Exchange Commission (“SEC”).⁷⁵ These two agencies were quite different from the FTC or the ICC. They threatened the basic foundations of capitalist structure. The NLRB—with juris-

72. See GABRIEL KOLKO, *RAILROADS AND REGULATION 1877-1916*, at 59 (1965). Kolko’s thesis has been subject to sustained attack. See Robert W. Harberson, *Railroads and Regulation, 1877-1916: Conspiracy or Public Interest?*, 27 J. ECON. HIST. 230 (1967); see also ALBRO MARTIN, *ENTERPRISE DENIED: ORIGINS OF THE DECLINE OF AMERICAN RAILROADS, 1897-1917*, at chs. 7, 9 (1971). The transformation of the FTC from progressive to conservative policies is detailed in G. Cullom Davis, *The Transformation of the Federal Trade Commission, 1914-1929*, 49 MISS. VALLEY HIST. REV. 437, 446-48 (1962).

73. 29 U.S.C. §§ 141-187 (1994).

74. See MICHAEL T. HAYES, *LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS* 108 (1981).

75. See Shepherd, *supra* note 5, at 1606-07. On the New Deal battles over the SEC, see generally JOEL SELIGMAN, *THE TRANSFORMATION OF WALL STREET* (1995).

diction over labor-management disputes—and the SEC—with jurisdiction over capital markets—empowered agencies in areas of great concern to the most powerful clients represented by the elite bar.

Of course, at this point one may be tempted to dismiss the entire conventional account of bar opposition to the administrative state and explain elite bar reform efforts as professional rhetoric by the ABA to mask purely client interests. This is a challenge that Shamir takes quite seriously, and attempts to rebut by demonstrating that elite bar activities were indeed independent of client interests.⁷⁶ Yet his case seems unconvincing. Shamir's effort to show bar independence rests at least in part on the professional, non-litigation activities of the bar, especially the role played by ABA. On this point, however, the historical record shows that the dominant voices in the ABA spoke on behalf of the large financial and industrial concerns most threatened by New Deal administrative government.⁷⁷ Shamir also relies upon the bar's opposition to the NIRA to show independence from client interests. According to Shamir, most of the large corporate interests represented by elite lawyers stood to benefit from the NIRA's relaxation of antitrust regulation.⁷⁸ This view draws further support from the fact that small business and small law firms brought many of the legal challenges to the NRA.⁷⁹ But this evidence also is problematic as proof of bar independence from clients. In fact, although large businesses dominated the code drafting process under the NRA, they were at best ambivalent about the effect of the law on their interests. The labor protection provisions of the NRA were bitterly opposed by large business.⁸⁰ While the opposition of small business was clear,

76. See SHAMIR, *supra* note 5, at 45-50, 159-70 (rejecting the thesis that professions simply draw benefits by serving propertied class).

77. Shamir attempts to argue that part of the bar's effort to pursue its agenda independent of client interests involved enlisting the ABA as an "authoritative, impartial" speaker on legal issues. Yet he concedes that "it was extremely hard to draw a clear distinction between the objectives and positions of lawyers who acted in the capacity of private counsel and those who acted in the capacity of impartial experts." *Id.* at 46; *see also id.* at 51 ("[T]he various attempts of lawyers to convey an image of impartial professional experts who cared for the public good were far from effective."). Moreover, opponents of the elite bar's efforts were hardly fooled by the enlistment of the ABA. See Shepherd, *supra* note 5, at 1613 (opponents of Walter-Logan bill arguing that "the ABA and anti-labor business interests were allied closely").

78. See SHAMIR, *supra* note 5, at 21-22.

79. See *id.* at 21.

80. See, e.g., IRONS, *supra* note 40, at 98 (noting big business' financial support of the opposition to the government in *Schechter* due to the oppressive measures of the NRA).

elite lawyers and their corporate clients played a major role in the constitutional attacks on the NIRA as well.⁸¹

Yet one need not adopt a single-dimensional account of influence to explain elite bar opposition to administrative government. The bond between lawyer and client could have worked in more complex ways to strengthen the bar's resistance. In their classic study on the Chicago bar, John Heinz and Edward Laumann argue that lawyers tend to defend the interests of their clients without conflict with their own values and preferences.⁸² Rather, lawyer and client interests and values merge because of the many social and political networks they otherwise share.⁸³ Thus, bar opposition to the New Deal agencies was perhaps quite genuine and at the same time consistent with client interests. According to Heinz and Laumann, we should have been surprised to discover otherwise.

If this convergence of lawyer and client interests is plausible, the conventional account needs significant emendation. It is no longer plausible to place administrative law reform solely in the context of the bar's professional agenda. Rather, the pursuit of the agenda must be placed within the broader value structure and relationships that bind lawyer and client.

In offering these explanations for the ferocity of lawyer resistance to the administrative state from 1933 to 1946, I do not mean to suggest that they offer an alternative true account for either the anomaly of exempting existing agencies from reform efforts or the schisms within the bar. Yet surely the anomaly is worth exploring, and any answers might prove illuminating on a host of issues. For example, if the resistance to the New Deal agencies was based upon the interest group supply-demand configurations outlined above, it might provide

81. The Supreme Court's invalidation of the NRA in *Schechter Poultry* involved a small business and was originally filed by a small law firm. But as Irons notes, before the Supreme Court Schechter's lawyer was

joined by Frederick H. Wood [...] [a] partner in the powerful and prestigious Wall Street firm of Cravath, deGersdorff, Swaine and Wood. . . . Significantly, Wood was a member of the National Lawyers Committee, the branch of the anti-New Deal American Liberty League made up of fifty-eight leading corporate lawyers. . . . [T]he small Brooklyn poultry firm and its owners were actually clients-by-proxy for the Liberty League and the Iron and Steel Institute, the most influential and well-financed of the big-business trade associations that had turned against the NRA.

Id.

82. See JOHN P. HEINZ AND EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* (1982).

83. See *id.* at 34; John P. Heinz & Peter M. Manikas, *Networks Among Elites in a Local Criminal Justice System*, 26 L. & SOC'Y REV. 831, 853 (1992).

some insight into lobbying and lawyer influence on agency structure.⁸⁴ Or if the bar's fierce resistance resulted from the NLRB and the SEC's novel inroads into capitalist structures, it might inform us on the controversial issue of bar independence from powerful clients, or the overlap between the political identity of the elite bar and their client base. The point is not simply one of historical accuracy. Indeed, if there is reason to doubt the independence of the bar, it might doom efforts to develop robust theories of lawyer influence on the form and substance of law and legal institutions.

B. The Missing Piece in the Formalist Account: Formalist Lawyers as Legal Realists

The conventional account of the legal profession in the age of formalism and the bar's resistance to the administrative state may correctly capture broad jurisprudential trends, and even accurately reflect public statements by the bar. Yet the conventional account contains a gaping hole: It fails to discuss, address, or describe how or whether law practice mirrored formalist ideology. In other words, the conventional account of legal ideology and resistance to the administrative state lacks a theory of lawyer advocacy or advice.

As an initial matter, we might question whether law practice ever bore the trademarks of formalism. Quite simply, did lawyers tell their clients that answers were clear, objective, certain, and free from the indeterminacy that the legal realists later identified? The answer to this question is probably no. At the most general level, some have questioned the formalist account of law and argued that as depicted (or caricatured), formalism simply never existed.⁸⁵ But at the more specific level of what lawyers did, what they told their clients, and how they made judgments, it was realism and not formalism that captured the daily work of lawyers in the age of formalism. Shamir notes that even before the onslaught of legal realism, "th[e] daily professional practices [of lawyers] had been based on down-to-earth assessments of the judicial process as a contingent, arbitrary, and haphazard game in which the key to success often resided in the ability to please or impress the right judge at the right place and time."⁸⁶ A contemporary

84. See Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93 (1992).

85. See Dworkin, *supra* note 15, at 368.

86. SHAMIR, *supra* note 5, at 155; see also Thomas Grey, *Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory*, 63 S. CAL. L. REV. 1569, 1590 (1990) (pragmatism is the "implicit working theory of most good lawyers").

lawyer of Holmes virtually yawned at his aphoristic assertion in *The Common Law* that “[t]he life of the law has not been logic: it has been experience.”⁸⁷ Didn’t all good lawyers know that anyway?⁸⁸

The formalist account of law also does not mesh with what we know about how lawyers give advice to clients. Here we must be careful not to use present information to evaluate law practices more distant in time. Yet the information may be useful in asking whether lawyers would have advised clients along the lines of the formalist account. Present learning suggests not. Lawyers who give formalist answers to difficult legal questions will fear ex post errors. Suppose a client asks a lawyer whether a certain precaution is necessary and the lawyer gives a clear answer that it is not. If a court later holds that it was, the problems for the lawyer are obvious. Perhaps malpractice liability was not a real possibility at the time, but certainly for a sophisticated client the error would lead them to shop for another lawyer.⁸⁹ Even if the lawyer is ultimately correct in his formalist prediction of the law when giving advice, the client may still face litigation over the issue. Again, the formalist advice would grossly misstate the risk of litigation, which for a client can be as expensive or disruptive as the liability risk.⁹⁰ There seems no reason why the client would not value, and the lawyer would not want to provide, advice that was candid, cautious, and balanced.⁹¹

Apart from errors or overstatements in predicting legal outcomes, a formalist lawyering methodology might have undermined lawyer reputations, a primary source of marketing and advertising. Formalism presumably rewarded lawyers on the correctness of advice—whether the lawyer’s discernment matched the court’s ex post determination. Yet this narrow measure of success significantly reduces the lawyer’s ability to claim credit or develop a reputation for advocacy skills. How would a lawyer develop a reputation for having

87. O. W. HOLMES, JR., *THE COMMON LAW* 1 (1881).

88. See MARY ANN GLENDON, *A NATION UNDER LAWYERS* 188 (1994) (discussing Jabez Fox, *Law and Morals*, B.L. SCH. MAG. 1, 6 (1897)).

89. If the lawyer cautiously overstates risk and the client takes too many precautions the lawyer is not off the hook either. Competitors with lawyers who realistically assess risk should have an advantage in pricing to more accurately reflect the costs of necessary precautions. On whether lawyers in certain settings do overstate risk, see Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 L. & SOC’Y REV. 47 (1992).

90. Also ignored in the conventional account is the transactional side to law practice. Although arising outside of litigation, the decision to enter into or how to structure a transaction may turn on the particular assessment made by the lawyer.

91. Or if there are systematic biases in legal advice it is toward overcautious advice but of a fuzzy character. See Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers in Transmitting Legal Rules*, 5 S. CAL. INTERDISC. L.J. 375, 376 (1997).

premium skills for persuading judges and shaping legal doctrine in ways desirable for paying clients? In other words, how is one any better than another? Even if value billing was unheard of at the time, quality, results, risk, and reward were hardly unknown concepts to either members of the bar or their more sophisticated clients.

Whether my description of lawyers giving legal advice is accurate or applicable to either the early-twentieth century or the period embracing the battle over the APA is not crucial to my point. Even if inaccurate, if we are going to construct either a historical account of legal ideology, or of lawyer opposition to the administrative state, it is at least worth investigating whether the formalist ideology played out in all legal fora—law office, board room, and courtroom—or whether different descriptions and conceptions of law were at work depending on the setting. If so, it may be necessary to reject or refine the conventional account of how lawyers used formalist conceptions of law to solidify their claims of status and privilege.⁹²

C. Attempting To Go Beyond Generalizations: Comparing Common Law and Administrative Law “Reasoning”

The profession’s deep investment in the belief that law—precisely, the common law—involved a unique, specialized form of reasoning played a key part in the history detailing the bar’s opposition to administrative government. The conventional account equates this divergence with the difference between law and politics. And, as we know, the separation of law from politics was critical to the bar’s claims of professional expertise and autonomy. Past this general claim, the conventional account makes no effort to analyze systematically the asserted differences between common law and administrative law reasoning. In this Part, I outline the details of such an argument,

92. It may be that even if lawyers giving advice did not follow formalist dogma it is still possible to construct expertise models of legal practice. Indeed, most post-realist efforts at explaining legal reasoning or law would fall into this category. Certainly there have been any number of attacks on the content, autonomy, and objectivity of these post-realist accounts. Whether they have dismantled the expertise foundation of the legal profession is at least debatable. It may also be that even within the confines of the formalist conception of law, where law practice was nonetheless more “realist,” there are obviously persuasive accounts that can be offered that make them compatible. Acoustic separation between the law office and the courtroom might have preserved formalist accounts as dominant. If law was constructed surreptitiously in the formalist account to privilege the powerful as some have claimed, then there were indeed strategic reasons for this acoustic separation. Again, my goal is not to offer the true account, but to suggest a need to incorporate law practice into an account of law and lawyer claims for professional status.

concluding that the oversight is unfortunate because here there may be some support for the conventional account.

At a certain level of generality, it is easy enough to grasp the distinction between common law and administrative law "reasoning." Certainly our instincts tell us that agencies ought to, and do, solve problems differently than judges. That, after all, is at least one reason for empowering an agency and not a court. But once past this generalization, it is more difficult to draw out the distinctions between common law and administrative law. One immediate problem, without even attempting to draw the distinction between the two areas of the law, is to give meaningful content to each separately.⁹³

1. Common law reasoning

Start with the common law. Descriptions of common law reasoning differ depending on the time, the practitioner, or conceptions of the common law process. Is it the common law as practiced by Cardozo, Holmes, Traynor, Posner, or the judge one mile from my office sitting in the Tennessee Supreme Court? Is it common law as conceived by the realists, the pragmatists, or the formalists? For some, the common law is hailed as pragmatic, instrumental, and experimental.⁹⁴ But those words hardly describe the formalist conception of the common law, or the conception of the common law that the bar defended as it railed against the lawlessness of the administrative state. For them, the common law reasoning process was logical, syllogistic, deductive, analogical, closed, determinate, or objective.⁹⁵

The conventional account of lawyer opposition to the administrative state adopts the latter conception of the common law as the operative description. In contrast, administrative law was described during the APA debate as experimental, political, empirical, flexible, or ex-

93. I put aside a claim that administrative process and judicial process involve different procedural and evidentiary rules. While concerns over the fairness of administrative procedure did preoccupy the elite bar during the APA battle, the sources above make clear that there was a separate, important objection to administrative government, and this revolved around the methods by which judges reason to results in individual cases.

94. See Benjamin Cardozo, *Jurisprudence*, in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 7 (Margaret E. Hall ed., 1947); John Dewey, *Logical Method and Law*, 10 *CORNELL L.Q.* 17 (1924). For a more modern defense of elements of common law reasoning, see CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* (1996), which is assessed in Edward L. Rubin, *Legal Reasoning, Legal Process and the Judiciary as an Institution*, 85 *CAL. L. REV.* 265 (1997).

95. See SHAMIR, *supra* note 5, at 102-03 (discussing legal formalism and judicial reasoning); HORWITZ, *supra* note 13, at 257-65 (discussing the "scientific" nature of formalist reasoning).

pert policymaking.⁹⁶ Unfortunately, however, the description and contrast usually stops at this point. The formalist conceptions of the common law are generally known, and the different qualities of administrative law are clear. Hence, the bar's resistance to administrative law.

Yet seemingly more could be done to refine or test the proposition that common law reasoning differed from the "reasoning process" used by administrative agencies, if indeed we can even characterize it as a form of legal reasoning. In short, we need a more careful analysis of the content of administrative reasoning contrasted with the perception of common law reasoning. Clearly, general claims that administrative reasoning differed from common law reasoning, even if they sound intuitively persuasive, would be more so if they were backed by specific analysis of contemporary examples of the two forms of lawmaking.

2. Cardozo, the common law, and administrative reasoning

An initial inquiry in this comparison might be to ask how prominent or leading proponents of the common law reacted to administrative law. How did common law lawyers and judges of the time view administrative law? I propose briefly to examine Cardozo's reaction to administrative law. Using Cardozo has several advantages: He was probably one of the more modern of the common law judges, and his express but equivocal concession that policy choice plays a role in common law judging⁹⁷ would make him most akin to (but nonetheless far from) the policy-oriented, empirically grounded decisions we expect from agencies. Thus, a clear clash between Cardozo and administrative reasoning might buttress the "distinction" claim that is so central to the conventional account of lawyer hostility to administrative law. After evaluating Cardozo's reaction to administrative law, I

96. See SHAMIR, *supra* note 5, at 104, 134. For a contemporary description focusing on the expertise of administrators, see JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938). In relying on Shamir's description of administrative "reasoning" we tread into a controversy well beyond the scope of this paper—to what extent was the rise of the administrative state linked to the legal realist movement? Some who have analyzed the matter in great detail suggest that the two were not linked, and that realism did little to inspire administrative government. See DUXBURY, *supra* note 13, at 153, 155-58. Others, however, have argued that there were clear theoretical and conceptual links between the New Deal, administrative government, and legal realism. See SHAMIR, *supra* note 5, at 134-40; see also ROBERT JEROME GLENNON, *THE ICONOCLAST AS REFORMER: JEROME FRANK'S IMPACT ON AMERICAN LAW 84-85* (1985); HORWITZ II, *supra* note 13, at 185 ("administrative law is in many ways the culmination of the crisis of legitimacy that Realist criticism produced").

97. See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 98 (1921).

analyze examples of administrative law reasoning. Here I contrast Cardozo's work with the SEC's two decisions in the famous *Chenery* cases, because for reasons that I detail later, these agency rulings are particularly interesting examples of administrative reasoning.

Cardozo's short tenure on the Supreme Court rendered little information on how he viewed the relationship between common law reasoning and administrative law.⁹⁸ His voting record on major New Deal initiatives was generally favorable, although hardly universally supportive.⁹⁹ A hint of Cardozo's skepticism about the New Deal and the potential abuses of administrative government can be found in his concurring opinion in *Schechter Poultry Corp. v. United States*.¹⁰⁰ Cardozo joined the Court's opinion striking down the centerpiece of the first New Deal, the NRA; he wrote separately because he had voted to uphold a different part of the Act in the earlier *Panama Refining* decision.¹⁰¹ In his *Schechter* concurrence, Cardozo wrote that unlike in *Panama Refining*, the "delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant . . ."¹⁰² Cardozo then went on to contrast the NRA with delegations upheld in previous cases. The delegation in *Schechter* allowed the President, with the assistance of trade and industrial associations, to adopt codes of "fair" competition.¹⁰³ The Court previously had upheld a grant of power to the FTC to prohibit "unfair" trade practices.¹⁰⁴ Despite the similarity in the language of the two laws, Cardozo found them really quite different.

98. His writings off the bench shed little light on how he viewed the administrative process.

99. See *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937) (Cardozo, J.) (upholding constitutionality of the Social Security Act); *Carter v. Carter Coal Co.*, 298 U.S. 238, 324-25 (1936) (Cardozo, J., concurring and dissenting) (voting to uphold provisions of the Bituminous Coal Conservation Act); *Jones v. SEC*, 298 U.S. 1, 29 (1936) (Cardozo, J., dissenting) (voting to uphold agency subpoena); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (joining opinion holding that President's power to remove administrative officer may be limited by "cause"); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (joining opinion invalidating mortgage relief law); *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) (Cardozo, J., concurring) (voting to invalidate NRA); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 433 (1935) (Cardozo, J., dissenting) (voting to uphold "hot oil" regulations adopted under NRA). As these cases make clear, Cardozo had few occasions to address administrative law issues while on the Supreme Court, and some of the cited cases (*Steward Machine Co.* and *Louisville Bank*) are not, strictly speaking, administrative law cases. Moreover, the result in *Humphrey's Executor* is a bit ambiguous. While the case provides the constitutional basis for independent agencies and further legislative innovations in the administrative state, at the time it probably represented an effort to limit administrative government through a strong executive.

100. 295 U.S. 495, 551 (1935) (Cardozo, J., concurring).

101. *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 433 (1935) (Cardozo, J., dissenting).

102. *Schechter Poultry*, 295 U.S. at 551.

103. *Id.* at 522.

104. *Cf. FTC v. Keppel & Bros.*, 291 U.S. 304 (1934) (sustaining FTC orders).

His language is worth quoting at length because it spells out his views on the dangers of excessive administrative power, and by implication, the major defects in administrative solutions to legal problems:

If codes of fair competition are codes eliminating “unfair” methods of competition ascertained upon inquiry to prevail in one industry or another, there is no unlawful delegation . . . when the President is directed to inquire into such practices and denounce them when discovered. For many years a like power has been committed to the Federal Trade Commission But there is another conception of codes of fair competition, their significance and function, which leads to very different consequences, though it is one that is struggling now for recognition and acceptance. By this other conception a code is not to be restricted to the elimination of business practices that would be characterized by general acceptance as oppressive or unfair. It is to include whatever ordinances may be desirable or helpful for the well-being or prosperity of the industry affected. In that view, the function of its adoption is not merely negative, but positive What is fair, as thus conceived, is not something to be contrasted with what is unfair or fraudulent and tricky. . . . The code does not confine itself to the suppression of methods of competition that would be classified as unfair according to accepted business standards or accepted norms of ethics. It sets up a comprehensive body of rules to promote the welfare of the industry, if not the welfare of the nation, without reference to standards, ethical or commercial, that could be known or predicted in advance of its adoption.¹⁰⁵

I quote this passage at length because it is full of many common law concepts, and because it nicely ties into themes Cardozo explored in his other writings, on and off the bench. Notice initially the tension between the manner in which administrative power is exercised and the workings of established common law concepts and methodologies. Common law “action-inaction” or “positive-negative” distinctions are featured prominently in Cardozo’s *Schechter* analysis. It was fine to discover and condemn unfair actions secretly used to trick the public. But it was entirely different to declare affirmatively new standards of fairness: the latter project was not “merely negative, but positive.” The clear relationship to the action-inaction distinction, so important to Cardozo’s common law project,¹⁰⁶ doomed the NIRA.

105. *Schechter Poultry*, 295 U.S. at 552-53.

106. See *H.R. Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896 (N.Y. 1928) (Cardozo, J.) (holding that water company’s failure to supply adequate water pressure did not subject it to liability for damage from fire). According to Shamir, much of the realist project was to employ legislation and administration to “shape [law] in light of social ends” and to move “from negation to action.” SHAMIR, *supra* note 5, at 149-50. Cardozo’s essay *Jurisprudence*, *supra* note 94, provides an interesting explanation and defense of common law judging against the realist critique.

Notice as well the source of power to condemn actions as “unfair.” The FTC did so by analogy to that which is “fraudulent or tricky.” At bottom the FTC was simply a more efficient mechanism for elaborating common law concepts of fraud or deceit. The NIRA, however, had no established tradition upon which to draw.¹⁰⁷ Finally, Cardozo suggested that when an agency is permitted to develop law by departing from strictly common law concepts, it should do so cautiously, with reference to “accepted business standards, or accepted norms of ethics.”¹⁰⁸ As he wrote in *The Nature of the Judicial Process*, custom and morals were legitimate sources of guidance for the common law judge.¹⁰⁹ But in *Schechter Poultry* the agency made law that had no grounding in custom or traditional concepts. And while Cardozo had conceded that the common law process sometimes involved the ways of “sociology,”¹¹⁰ that element of the legal process did not justify the manner in which the NIRA sought to develop legal rules. The agency’s ambitious goal simply to address the “welfare of the nation” was hardly an adequate legal guide.¹¹¹

Some caveats about my use of Cardozo are in order. I do not mean to suggest that Cardozo was hostile to the New Deal, or entirely unsympathetic to administrative government. On the first point, there is reason to believe that he was a strong supporter of major New Deal initiatives.¹¹² On the latter point, I suggest that his approach stemmed less from outright hostility than caution and unfamiliarity about the full scope of the administrative process. Concededly, the NIRA was one of the most notorious and controversial administrative agencies. Despite these limitations, my goal is simply to show the contrast between common law reasoning as conceived by one of its truly finest practitioners and the nature of administrative lawmaking. In other

107. See *Schechter Poultry*, 295 U.S. at 531-33, 552 (noting common law foundation for FTC power as well as elaborate procedures FTC employs for identifying “unfair” practices). At oral argument in *Schechter Poultry* a critical point came when Solicitor General Reed failed to limit the NIRA’s powers to the FTC’s limited ability to condemn those practices well established by precedents as “unfair.” See IRONS, *supra* note 40, at 96; see also *Jones v. SEC*, 298 U.S. 1, 32-34 (1936) (Cardozo, J., dissenting) (voting to uphold agency subpoena that sought to reveal traditional fraud).

108. *Schechter Poultry*, 295 U.S. at 553.

109. See CARDOZO, *supra* note 97, at 62 (“It is . . . not so much in the making of new rules as in the application of old ones that the creative energy of custom most often manifests itself today. General standards of right and duty are established.”).

110. See *id.* at 65-66 (“[W]e pass, therefore to the force which in our day and generation is becoming the greatest of them all, the power of social justice which finds its outlet and expression in the method of sociology. The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence.”).

111. *Schechter Poultry*, 295 U.S. at 553.

112. See *supra* note 99.

words, although the flaws Cardozo found in the way that the NIRA sought to make law were constitutional in character, common law checks and concepts—reasoning by analogy, action-inaction distinction, the use of custom, and the cautious use of social welfare—were part of the constitutional analysis. To license an agency to make law so far removed from common law methodology was “delegation running riot.”¹¹³ Even when announcing legal principles by the “method of sociology,” courts did not “run riot.” Judges were not “commissioned to set aside existing rules at pleasure in favor of any other set of rules which they hold to be expedient or wise. . . . [T]hey are called upon to say how far existing rules are to be extended or restricted. . . .”¹¹⁴ But the NIRA hardly assessed how far existing rules ought to extend or contract, a process that necessarily allows for incremental change. Indeed, in its short life the NIRA undoubtedly produced more law than Cardozo’s New York Court of Appeals had created from its inception.¹¹⁵ The lightning speed with which the NIRA adopted its codes of fair competition, unanchored to any preexisting legal concepts or norms, raised serious doubts for a judge accustomed to a system that might take a decade to accomplish an incremental shift in the tort doctrine of duty.

3. Administrative reasoning versus common law reasoning: *Chenery and Macpherson*

The distinctions between common law reasoning and administrative law identified by Cardozo can be drawn from an entirely different perspective. The two orders issued under the Public Utility Holding Company Act in the dispute between the *Chenery* Corporation and the SEC provide a further opportunity to compare and contrast common law reasoning and administrative law. The SEC based its initial order upon common law principles of fiduciary duty, and the Supreme Court ultimately reversed the order as a misreading of those principles.¹¹⁶ In its second order, the SEC dropped the common law rationale and based its decision upon an elaboration of the policies found in the Act it administered.¹¹⁷ Thus, the *Chenery* dispute shows how an agency engages in common law and administrative law reasoning.

113. *Schechter Poultry*, 295 U.S. at 553.

114. *CARDOZO*, *supra* note 97, at 66-67.

115. The NRA was adopted on June 12, 1933 and by the time it expired two years later, 1003 codes had been adopted by the NIRA. See *IRONS*, *supra* note 40, at 32.

116. See *In re Federal Water Serv. Corp.*, 8 S.E.C. 893 (1941), *rev'd*, *SEC v. Chenery Corp.*, 318 U.S. 80, 89 (1943).

117. See *In re Federal Water Serv. Corp.*, 18 S.E.C. 231, 253 (1945), *aff'd*, 332 U.S. 194 (1947).

Moreover, the personalities involved in the *Chenery* dispute are too tempting to ignore. The *Chenery* proceeding covered the SEC careers of William O. Douglas and Jerome Frank, who wrote at least parts of the agency order reversed in *Chenery I*. Apart from any controversy surrounding connections between legal realism, the New Deal, and the rise of the administrative state,¹¹⁸ certainly the involvement of two prominent figures in the realist movement allows us to examine whether administrative reasoning was as lawless as its critics in the bar complained.

The *Chenery* controversy grew out of the attempted reorganization of a utility holding company under the recently enacted Public Utility Holding Company Act. Greatly simplifying, the management proposed to merge existing companies into a new company and issue new common stock. Preferred stock in the old company would be converted to this new common stock. While the reorganization was pending before the SEC, the officers and directors of the company purchased the existing preferred stock that was to be converted to common stock. As every court to look at the case stated, and as the SEC conceded, the purchases were on the open market, without any hint of fraud or trading on confidential information.¹¹⁹ In its first order, the SEC approved the reorganization but with the condition that the management turn in its stock at cost plus 4½% interest. The major controversy at this point in the proceeding was whether some source of law, either the Public Utility Holding Company Act or common law, prohibited the purchases by management.

The reasoning in the SEC's first order is fascinating. The legal and jurisprudential pedigree of the order is a bit difficult to pin down. The order claims to define the "fair and equitable" standard of Section 11 of the Act, but actually relies extensively upon the common law to define the statutory standard.¹²⁰ Throughout the opinion, there are a number of rather remarkable anti-formalist rhetorical flourishes that are virtual rallying cries for the legal realist movement. The SEC's order repudiates the analogical, deductive, and abstract qualities associated with common law reasoning. The order invokes Holmes' warning to "think things not words,"¹²¹ at least for Frank a

118. See *supra* note 96.

119. See *Chenery Corp. v. SEC*, 128 F.2d 303, 308 (D.C. Cir. 1942), *aff'd*, 318 U.S. 80, 86 (1943).

120. See *Federal Water Serv. Corp.*, 8 S.E.C. at 907.

121. *Id.* at 911.

critical admonition.¹²² The order then mocks the abstract, circular nature of common law reasoning by stating that “[i]t will not do to argue that a reorganization is a reorganization”¹²³ The order supports this dismissal of formalism by a citation to Thurman Arnold’s article, *Criminal Attempts—The Rise and Fall of an Abstraction*, hardly the seminal work on corporate reorganizations.¹²⁴

On the precise issue of the stock purchases, however, the SEC’s order bears at least some of the attributes of common law reasoning. Indeed, at first glance it appears to rest on some variation of classic analogical reasoning. The order begins with the settled proposition that officers and directors of a corporation are fiduciaries.¹²⁵ It then states that a fiduciary is like a trustee, and because a trustee cannot deal in the property he manages, so too managers cannot deal in the stock of the corporation they run during a reorganization.¹²⁶ The order also compares the officers and directors in this reorganization to the committee in the reorganization of a corporate bankruptcy.¹²⁷ The order supports this analogical reasoning by numerous case citations and block quotations, including an 1846 Supreme Court decision¹²⁸ and a 1928 New York Court of Appeals opinion written by Cardozo.¹²⁹ Realist influence nonetheless is evident with citations to Berle and Means, and Justice Douglas as well.¹³⁰

But is the SEC order in *Chenery I* a marked break from common law reasoning—a new kind of administrative law reasoning—or is it simply bad common law reasoning? The answer is not entirely obvious. The SEC clearly included the references to Holmes, Arnold, Berle and Means, and Douglas to show that it employed a different method of legal analysis. While the SEC’s creative use of doctrine does have common law referents, the agency’s reasoning is unusual in a number of ways. The order cites cases and draws analogies, but it does not cite, discuss, distinguish, or weave in the cases that clearly hold that officers and directors owe no duty to shareholders in the

122. See DUXBURY, *supra* note 13, at 122.

123. *Federal Water Serv. Corp.*, 8 S.E.C. at 911.

124. See *id.* at 911 n.34 (citing Thurman W. Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 Yale L.J. 53 (1930)).

125. See *id.* at 916.

126. See *id.* at 916-17.

127. See *id.* at 917.

128. See *id.* at 916 (quoting *Michoud v. Girod*, 4 How. 502, 557 (1846)).

129. See *id.* at 917 (quoting *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928)).

130. See *id.* at 916 n.33 (citing BERLE & MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932)), 919 (citing opinion by “Mr. Justice Douglas”).

purchase of stock absent fraud or deceit.¹³¹ The SEC's order may imply that legal principles are simply general propositions that are applied to explain results triggered by specific fact patterns.

So understood, there may be some substance to the perception that administrative reasoning as practiced by the SEC in *Chenery I* threatened common law methodology. It appears as if the SEC did not employ common law reasoning in the fashion traditionally portrayed by its defenders on the bar and bench. The order may also have raised the concerns about agency lawmaking expressed by Cardozo in his *Schechter* concurrence: the order does not simply negate existing practices that are "unfair and inequitable," but seeks to proscribe as "unfair" legitimate business practices; the order has no grounding in common law concepts; and the order ignores established custom and practice in industry. The emphatic repudiation of the SEC's reasoning by the court of appeals and the Supreme Court¹³² made clear that whatever Frank and others believed, legal reasoning was not simply politics, and legal doctrine as made by the common law courts had meaningful limits.

Yet this inquiry is quite speculative, and I may be drawing far too much meaning from the first *Chenery* order. The inquiry can be further pursued, however, by contrasting the SEC's analysis in *Chenery I* with what might be considered a common law masterpiece: Cardozo's opinion in *MacPherson v. Buick Motor Co.*¹³³ The case is revolutionary in the sense that it has come to represent the elimination of privity in modern tort law.¹³⁴ Perhaps in retrospect the decision in *MacPherson* jarred existing doctrine far more than the SEC's failed common law innovation in *Chenery*. Yet the manner in which Cardozo reasoned to his result is quite different from the SEC's effort. The opinion in *MacPherson* is about six pages long. As Judge Posner notes, "[m]ost of Cardozo's opinion is devoted to an analysis of precedents"¹³⁵ Almost two-thirds of the opinion is devoted to a discussion of the relevant cases and legal doctrine, primarily those cases from New

131. See *SEC v. Chenery Corp.*, 318 U.S. at 88 (1943) ("If, therefore, the rule applied by the Commission is to be judged solely on the basis of its adherence to principles of equity derived from judicial decisions, its order plainly cannot stand."); *Chenery*, 128 F.2d at 307 ("Indeed, so far as we are able to find, no case has gone to the length of holding a director accountable to a stockholder in the purchase and sale of shares of stock except where fraud or some form of overreaching is shown . . .").

132. See *Chenery*, 128 F.2d 303, *aff'd*, 318 U.S. 80 (1943) (reversing the SEC's first order).

133. 111 N.E. 1050 (N.Y. 1916).

134. See PROSSER & KEETON ON THE LAW OF TORTS 682-83 (W. Page Keeton ed., 5th ed. 1984).

135. See RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 108 (1990).

York and other jurisdictions suggesting that there was no duty under the facts.¹³⁶ By contrast, the SEC's order in *Chenery* discusses cases, but not with the same care, treatment, and seriousness that Cardozo does. Indeed, where the SEC relies on one line of cases, choosing to ignore voluminous contrary authority, Cardozo creates the impression that New York common law, although perhaps at one time contrary to the no-privity rule, in fact now had largely abandoned privity, at least in the circumstances presented.¹³⁷ Again, as Posner notes, "it should be apparent that it is the very caution, modesty, and reticence of the opinion that explain its rapid adoption by the other states. *MacPherson* is the quietest of revolutionary manifestos, the least unsettling to conservative professional sensibilities."¹³⁸

So described, an opinion "the least unsettling to conservative sensibilities" would no doubt be accepted in method (if not in result) by the bar, including the elite bar. And if the method in the SEC's order in *Chenery I* contrasts markedly with Cardozo's masterpiece, it is easy to speculate that the elite bar reasonably distrusted the nature of administrative law reasoning. The SEC wore its realism on its sleeve, clearly made new law, and while citing some cases, did little to weave its result into existing doctrine. Faced with two lines of cases, the SEC simply chose one without acknowledging or distinguishing the other. By contrast, Cardozo eliminated privity by implicitly telling his reader that "it was almost gone any way, and may continue to limit liability."¹³⁹ Thus, for the bar, the differences between the two decisions—one by an agency and the other by a common law court—while in some respects subtle, were indeed obvious.

Yet there is something unsatisfactory about relying on the first *Chenery* order to contrast administrative law reasoning and common law reasoning. Both seem focused on the common law and therefore, as noted above, one is tempted to find my effort a bit procrustean. It is simply bad common law (Frank) versus good common law (Cardozo). There are many poorly written or incompletely reasoned judicial decisions, and we would not claim that these mark out an entirely new form of legal reasoning.¹⁴⁰ Indeed, it seems odd that the SEC in

136. See *MacPherson*, 111 N.E. at 1052-54.

137. See *id.* at 1052-53.

138. POSNER, *supra* note 135, at 109.

139. See *Ultramares Corp. v. Touche*, 174 N.E. 441, 448 (N.Y. 1931) (Cardozo, J.) (holding that lender may not sue borrower's auditor for negligence).

140. Perhaps a constitutional analogue to the SEC's first *Chenery* order is *Romer v. Evans*, 116 S. Ct. 1620 (1996). The Court in *Romer* ignored seemingly contrary precedent, and developed entirely new Equal Protection concepts without grounding its reasoning in established doc-

the first *Chenery* order relied on common law reasoning or methodology at all. The statutory power granted to the SEC included the authority to ensure that reorganization plans were "fair and equitable." Why didn't the agency simply define that term free from the common law in light of the policies behind the Act? This is the obvious strategy because presumably the shortcomings of the common law prompted both the creation of the SEC and the adoption of the Public Utility Holding Company Act in the first place.

The Supreme Court's reversal of the first order posed the issue starkly for the SEC. With Frank gone to the Second Circuit, we need not speculate on how his idiosyncratic philosophy shaped the second agency order. But interestingly, it is the second order, necessitated by the Supreme Court's rejection of the first order's common law reasoning, that bears a closer resemblance to perhaps what the bar feared agency reasoning would look like.¹⁴¹ It is not based on case law. Indeed, virtually no law is cited in the second order. Nor is it based on specific record evidence. Rather, the expertise and predictive judgments of the agency produce a careful analysis of the "pyramided corporate structure with which we have to deal."¹⁴² Indeed, probing for wrongdoing in each case would result only in lengthy hearings that would delay enforcement of the Act's important policies: "Since the more subtle, though powerful, forms of such conduct defy specific proof, and since the application of a subjective standard of good faith would in any event be inappropriate here, we must foreclose inquiry into the motives and intentions of reorganization managers . . ."¹⁴³

Several aspects of the SEC's reasoning in the second *Chenery* order are striking. First, having failed in common law reasoning, the agency did not quit but instead aggressively asserted the power to develop standards of conduct under its broadly delegated power.¹⁴⁴ The Supreme Court's ruling in *Chenery I* was indeed pyrrhic for the bar: better to have an agency do bad common law reasoning than to claim

trine. See Lynn A. Baker, *The Missing Pages of the Majority Opinion in Romer v. Evans*, 68 U. COLO. L. REV. 387 (1997). Others, however, have argued that the imperfections one finds in the reasoning in *Evans* can actually be defended and developed into a more comprehensive form of judicial reasoning. See Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45 (1996); Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1739-45 (1995).

141. See *In re Federal Water Serv. Corp.*, 18 S.E.C. 231 (1945), *aff'd*, 332 U.S. 194 (1947).

142. *Id.* at 250.

143. *Id.* at 257.

144. "What we mean, therefore—and we cannot emphasize this too strongly—is that concepts of 'honesty, full disclosure and purchase at a fair price,' traditionally applied to dealings in normal course between corporate managers and stockholders, cannot be the controlling tests in the decision of the case." *Id.* at 256.

the power to make law entirely free from the common law.¹⁴⁵ Second, this order is free of legalisms and bears some of the attributes of what agencies supposedly do. The order dispenses with any need for detailed evidentiary support for its propositions; agency expertise and its ability to make predictive judgments are substitutes for record evidence. Third, and perhaps most importantly, the opinion is policy driven and focused on what the agency believes is necessary to protect shareholders. It is instrumental: to protect shareholders and to prevent corporate abuses, a broad prophylactic rule must be adopted.¹⁴⁶ Particularly on this last point the contrast with Cardozo in *MacPherson* is striking. Only in the briefest of passages does Cardozo even hint at the desirability of imposing a duty on the manufacturer.¹⁴⁷

In sum, my examination of the contrast between common law and administrative law reasoning provides some basis for the conventional account's claim that the latter was a different, more political style of legal reasoning. Thus, my discussion in this part does not contradict the conventional account. Rather, it highlights an important line of inquiry that had previously been neglected.

D. *The Market for Legal Change: Lawyers as Innovators*

A final piece missing from the conventional account of bar resistance to the administrative state is an explanation for the seemingly massive failure of lawyers to market innovative legal services. Today, administrative practice is a large, important, and profitable part of practice for firms throughout the country. The puzzling question is why, given the obvious business opportunities presented by the rise of administrative law, the bar (or elite segments of the bar) was so slow (or reluctant) to fill this important new niche in legal services. An easy answer might be grounded in a claim that the legal services market, although not a cartel, nonetheless operated with cartel-like features and chilled both innovations and competition.¹⁴⁸ But the easy answer is unpersuasive. Many contemporary accounts highlighted the business opportunities presented by administrative law and administrative regulation.¹⁴⁹ And while the move to a more competitive legal

145. See, e.g., *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944) (rejecting effort to bind agency to application of common law concepts in defining "employee" under the statute).

146. See *Federal Water Serv. Corp.*, 18 S.E.C. at 256-57.

147. See POSNER, *supra* note 135, at 108.

148. For an evolutionary account of the profession from guild-cartel to competitive market, see Richard A. Posner, *The Material Basis of Jurisprudence*, 69 *IND. L.J.* 1 (1993).

149. See Milton Handler, *Analysis of Section 7-A of the National Industrial Recovery Act*, U.S.L.W. 4 (May 15, 1934); Martin T. Manton, *A New Deal for Lawyers*, 19 *A.B.A. J.* 559 (1933);

market has prompted recent recognition that explicitly addresses the innovative aspects of law practice,¹⁵⁰ it is difficult to believe that in the “pre-competitive” world, lawyers were not practice innovators.¹⁵¹ Indeed, we saw that at the time of the APA debate, many lawyers had already innovated and established administrative law practices. Yet oddly, the elite segments of the bar saw no need or showed no interest in offering innovative services in light of these new regulatory reforms. Below I offer reasons for this non-market behavior.

As the bar, and particularly the elite bar, confronted the possibility of an administrative state, they already had established patterns of practice that reflected investments of human capital in practice areas. For specialists and generalists alike, their ability to earn income from offering their services reflected investments made in learning certain areas of law and the governing procedures.¹⁵² Administrative law required lawyers to learn new and different skills. These were not simply new substantive areas, but also new rules of practice and procedure, and new techniques such as lobbying and negotiating with administrative officials.¹⁵³ For existing members of the bar it was difficult to make this transition or take advantage of these new opportunities. To the extent administrative law would replace existing practice areas, it was difficult for members of the bar to make a new investment of human capital to master and then market their expertise. They could not simply drop their existing practice and spend

see also Leon Green, *Must the Legal Profession Undergo A Spiritual Rebirth*, 16 *IND. L.J.* 15 (1940). Some entrepreneurs wrote “how to” books for the lawyer confronted with the new administrative state. *See, e.g.*, FRANK E. COOPER, *THE LAWYER AND ADMINISTRATIVE AGENCIES* (1957).

150. *See* Yves Dezalay & Bryant Garth, *Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes*, 29 *L. & SOC'Y REV.* 27 (1995); Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *L. & SOC'Y REV.* 95 (1974); Michael J. Powell, *Professional Innovation: Corporate Lawyers and Private Lawmaking*, 18 *L. & SOC. INQUIRY* 423 (1993); *see also* Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 *YALE L.J.* 239 (1984).

151. Consider the use of labor injunctions and railroad receiverships, controversial and innovative areas of late-nineteenth and early-twentieth-century practice.

152. On understanding the investments of human capital made by lawyers, *see* Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 *STAN. L. REV.* 313 (1985).

153. Apart from the reinvestment costs the profession might also have been concerned that the shift to administrative law would have required a greater understanding of the client's business operations, which in turn would have led to blurring of the professional boundaries. *See* SHAMIR, *supra* note 5, at 105. Also, the bar no doubt saw the demands of lobbying as a further attack on the boundaries of the legal profession, as well as the potential for harmful commercialization to invade the public profession. *See* Shepherd, *supra* note 5, at 1572 & n.55.

non-billable time retooling for administrative practice.¹⁵⁴ To do so would force down their incomes or force them to trade earned leisure time for more work time.

Even if the rise of administrative law did threaten to cannibalize the practice of the established bar, there might have been strategies available to blunt the more adverse effects. One such strategy, especially for those with ties to powerful clients, would have incorporated administrative practice into the existing firms. In this way, the lawyer could turn over work for which he was not qualified to partners in his firm who may reciprocate with work their clients generate (for example trading court litigation and administrative work across members of the firm generated by different or the same firm clients), or balance downturns in traditional litigation with upswings in administrative work.¹⁵⁵ Thus, one solution to the professional crisis caused by administrative law was simply to create an administrative practice area in the firm.¹⁵⁶

It was not easy, however, to hire people expert in administrative law directly out of law school or "raid" other law firms. The obvious strategy was to hire lawyers out of agencies: The now-familiar revolving door seemed like the preferred solution. Yet this solution carried potential costs for lawyers, particularly those in the elite bar. Caution about generalizations should be invoked here, but it appears that some administrative agencies provided employment opportunities to minority groups that were underrepresented in the elite bar. Jerold Auerbach and others have noted that Jews, Catholics, and women found comparatively diminished barriers to legal employment when seeking work in the New Deal agencies.¹⁵⁷ Given the composition of the potential hiring pool, it may have been difficult for the elite firms

154. This is particularly true if it required learning in an agency housed in Washington, D.C., without regional offices.

155. See Gilson & Mnookin, *supra* note 152, at 321-39 (developing portfolio justifications for law firm structures). Here I am assuming that administrative practice does not entirely displace established litigation and transactional fields.

156. Or as became more common, to hire a communications lawyer (FCC work), a labor lawyer (NLRB work), and securities lawyer (SEC work).

157. See JEROLD S. AUERBACH, *UNEQUAL JUSTICE* 224-25 (1976); see also SHAMIR, *supra* note 5, at 4 (noting Auerbach's discussion of the emergence of counter-elites in New Deal agencies). For a critical analysis of Auerbach's work, see Terrence G. Halliday, *Professions, Class, and Capitalism*, 24 *EUR. J. OF SOC'Y.* 321 (1983). As Shepherd notes, distrust of the NLRB was exacerbated by the agency's employment of women in roles of substantial responsibility. See Shepherd, *supra* note 5, at 1608.

As I noted above, however, the story is indeed a complex one. Jerome Frank, General Counsel to the Agricultural Adjustment Administration, apparently became concerned that there were too many Jewish lawyers in his agency. Thus, despite the fact that he was Jewish, Frank adopted a policy of anti-Semitism in hiring. See IRONS, *supra* note 40, at 126.

and established bar easily to incorporate these agency lawyers into the firm as part of any service innovation. The idea of widespread lateral hiring alone might have been considered unusual at this time,¹⁵⁸ and that these laterals might have been Jewish, Catholic, or female only compounded the difficulties of this as a market innovation.

Moreover, the social, religious, gender, and ethnic preferences that could well have made firms reluctant aggressively to recruit agency lawyers were undoubtedly shared by the clients they served. Acceding to customer preferences as a form of discrimination is hardly unusual, even in a competitive market.¹⁵⁹ If lawyers and clients shared the same social networks, it should be expected that the bar was reluctant to choose integration as a market innovation or as a means of expansion. Of course, in an ideal world we might well expect that competitive forces will eliminate discrimination.¹⁶⁰ A client should want to buy the best services from the lowest bidder. Even if we do not view the bar or the elite bar as capable of stifling this competition, a broader view of law firm-client relations explains this reluctance. If we view the desire to exclude certain groups from the elite bar as part of a larger project of social exclusion which produced positive benefits for those choosing the exclusion, we can understand their choice for exclusion over innovation as a rational one.¹⁶¹ Of course, this would not entirely deter innovation, for both cartels and the norms of social exclusion are subject to defectors, especially when the returns are high enough. Or, more importantly, it could do little to halt the ability of former agency lawyers to set up their own law firms, particularly in Washington, D.C., and market their innovative services more directly.¹⁶²

This explanation for the failure of the elite bar to innovate contains an element of rationality: Elite lawyers' valued the composition of their firm and the nature of their practice over the benefits from innovation. The decision now seems wrong, for any number of rea-

158. See MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS* 54 (1991).

159. See Cass R. Sunstein, *Why Markets Don't Stop Discrimination*, 8 *SOC. PHIL. & POL.* 22 (1991).

160. This position is forcefully argued in RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS* 32-37 (1992); see also GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* (2d ed. 1971).

161. A version of this theory is developed in Kenneth J. Arrow, *Models of Job Discrimination*, in *RACIAL DISCRIMINATION IN ECONOMIC LIFE* 83 (Anthony H. Pascal ed., 1972). It is challenged in EPSTEIN, *supra* note 160, at 44-45.

162. The early evolution of the D.C. Bar is discussed in CHARLES A. HORSKY, *THE WASHINGTON LAWYER* (1952). For more recent efforts at analyzing the roles and influence of the D.C. Bar, see Edward O. Laumann, et al., *Washington Lawyers and Others: The Structure of Washington Representation*, 37 *STAN. L. REV.* 465 (1985); Robert L. Nelson & John P. Heinz, *Lawyers and the Structure of Influence in Washington*, 22 *L. & SOC'Y REV.* 237 (1988).

sons. Yet it may be that in this context, indeed in the entire project of understanding administrative law as being shaped by the interests of the elite bar, ascribing rationality to the elite bar and its professional project makes assumptions about individuals and institutions that are simply incorrect. If we alter some of the assumptions of rationality, the resistance to administrative government becomes understandable, even if it meant the failure to realize the potential for substantial income gains.¹⁶³

Law is generally considered a conservative profession, a defensible position given the obsession with precedent and tradition. The elite bar, in its efforts to preserve its professional realm and resist the administrative state, demonstrated antipathy to abrupt changes in the status quo. This status quo bias can be understood in more formal terms, based upon concepts developed in the behavioral decision literature that explore how individuals make choices when faced with an uncertain future. Assume that lawyer L has a practice worth x . If someone offers to pay him $x+1$ for the same level of work, L should accept the offer. His utility will be maximized by the trade. Similarly, if L is offered an income increase when the legal regime shifts from court-centered common law to agency-centered administrative law, L should accept the offer. However, psychologists have identified behavioral anomalies that question these assumptions of rationality.¹⁶⁴ In our example, even if the offer of income from an administrative law regime exceeds the existing value, L may refuse. Choices are heavily biased for the status quo because the individual greatly values what he has far more than what he otherwise would pay to purchase it in a market transaction. This principle of choice is known as the endowment effect: “[P]eople are often unwilling to give up what they already have . . . for what they would otherwise prefer to it. The loss looms larger than the gain. People are therefore biased toward the status quo, or things the way they are.”¹⁶⁵ Thus, the overvaluation of the loss

163. I am grateful to Ed Rubin for suggesting this line of inquiry as an explanation for the behavior of the elite bar.

164. The behavioral concepts are outlined and applied to the securities laws in Donald C. Langevoort, *Selling Hope, Selling Risk: Some Lessons for Law from Behavioral Economics About Stockbrokers and Sophisticated Customers*, 84 CAL. L. REV. 627 (1996). A more recent exposition of some of the general concepts can be found in CASS R. SUNSTEIN, BEHAVIORAL ANALYSIS OF LAW (University of Chicago John M. Olin Working Paper No. 46, 2d Series 1997) (on file with author). For a more general discussion of these concepts, see JONATHAN BARON, THINKING AND DECIDING (2d ed. 1994); ROBYN M. DAWES, RATIONAL CHOICE IN AN UNCERTAIN WORLD (1988).

165. BARON, *supra* note 164, at 383; Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979).

of the existing forms of practice and expertise prevented the shift to a more profitable form of practice.

This bias occurs even if we posit substantial gains from L shifting from common law practice to administrative law. Assume L makes \$100,000 per year, and if a shift to administrative law occurs, she has an 80% chance of making \$150,000 (equal to \$120,000) and a 100% chance of continuing to make \$100,000 under the common law status quo. Despite the fact that L's expected utility in an administrative law regime is greater than the utility under the status quo (\$120,000 is greater than \$100,000), L will prefer the status quo.¹⁶⁶ This is known as the "certainty effect," because people are "attracted by the absolute certainty of the [\$100,000]."¹⁶⁷ And any potential gains that might accompany a shift to administrative law are discounted against potential income losses, even if the potential gains and losses are equivalent.¹⁶⁸

I offer these predictions of choice by lawyers under uncertainty not to displace entirely the sociological account offered by Shamir, or to discount the possibility that the bar acted rationally to preserve gains from the professional project that it believed would be forfeit in an administrative law world. Experiments in trading coffee cups¹⁶⁹ ought to be cautiously applied to the behavior of complex organizations or groups like the ABA or the elite bar. Yet these insights seem to fill a gap in, or offer a challenge to, the conventional account of elite bar resistance to the administrative state. Moreover, bar resistance to administrative law is not the only example of the profession's resistance to changes in the legal status quo. While both the self-interested nature of the opposition and the client loyalty explanations come quickly to mind to explain such behavior, it often leaves unexplained the glaring missed opportunities that come with change. The behavioral patterns of choice under uncertainty may provide a missing part of the explanation, particularly because they are consistent with more general assertions about the inherently conservative nature of the legal profession.

166. This is true even if there is an 80% chance of \$150,000 and a 20% chance of 0, because $\$120,000 + \0 is still greater than \$100,000.

167. BARON, *supra* note 164, at 358.

168. *See id.* at 363.

169. *See id.* at 383-84 (explaining experiment where differing values placed on coffee cups by those given the cups and those who bid to buy them).

CONCLUSION

Efforts to understand and explain development in law and legal institutions are often too narrow, sometimes excluding the legal profession as an instrument of, or barrier to, change. In this respect, recent scholarly efforts to understand or explore the relationship between the legal profession and the development of administrative law ought to be encouraged and applauded. Yet the ambitious nature of this particular project (how and why the elite bar resisted administrative law), as well as the broader project (how the large, disparate, and diverse legal profession expresses its professional interests in shaping the evolution of law), suggests that much work needs to be done if this line of inquiry is to continue to produce important and insightful findings. The problems and challenges outlined above are designed to serve as cautionary statements, as well as a call for further research in this important and neglected area of legal scholarship.

