

10-2000

Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945-1970

Reuel E. Schiller

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Administrative Law Commons](#)

Recommended Citation

Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945-1970*, 53 *Vanderbilt Law Review* 1389 (2000)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol53/iss5/1>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in *Vanderbilt Law Review* by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945-1970

*Reuel E. Schiller**

I.	INTRODUCTION	1390
II.	HISTORIOGRAPHY.....	1393
	A. <i>The "New" Institutional History of American Politics</i>	1393
	B. <i>The Pluralist Judiciary</i>	1396
III.	FROM INTEREST GROUP PLURALISM TO PARTICIPATORY ADMINISTRATION	1398
	A. <i>Interest Group Pluralism and Postwar Theories of Administrative Law</i>	1399
	B. <i>Participatory Thought and the Administrative State</i>	1410
IV.	FEDERAL COURTS AND THE CHANGING MODELS OF POLICY- MAKING	1417

* Associate Professor, University of California, Hastings College of the Law. B.A. Yale College, J.D. University of Virginia, Ph.D. (history) University of Virginia. Shorter versions of this Article were presented at the American Society of Legal History's 1999 Annual Meeting in Toronto, Ontario and at the Center for the Study of Law and Society at the University of California, Berkeley. I would like to thank the participants at both of those fora for their insightful comments. Ash Bhagwat, Malcolm Feeley, Robert Kagan, and Alice Kaswan are due particular thanks, as is Brian Balogh, who provided much needed bibliographical guidance. I am also grateful to Leon Billings, William Rodgers, and Joseph Sax, each of whom took the time to discuss the legislative history of the Clean Air Act with me. This article was written with the assistance of a 1066 Foundation Faculty Award. It is with great pleasure that I take this opportunity to thank the Foundation for its generosity.

A.	<i>Judicial Review of Administrative Action</i>	1417
B.	<i>The Transformation of Administrative Due Process</i>	1428
C.	<i>Standing</i>	1435
D.	<i>Conclusion</i>	1443
V.	PARTICIPATORY LEGISLATION	1443
A.	<i>The Freedom of Information Act</i>	1444
B.	<i>The Citizen Suit Provision of the Clean Air Act</i>	1446
VI.	CONCLUSION.....	1450

1. INTRODUCTION

"The availability of judicial review," wrote Louis Jaffe in 1965, "is the necessary condition, psychologically, if not logically, of a system of administrative power which purports to be legitimate, or legally valid."¹ In so writing, Jaffe suggested that the abstract beliefs that Americans have about the way government is supposed to work define the relationship between courts and the administrative state. It does not follow, logically, from the existence of administrative agencies that their actions must be policed by courts. Instead, our beliefs about how public policy ought to be made and about which institutions are best at protecting our liberties, help dictate the relationship between the judiciary and the administrative state.

Between the end of World War II and the beginning of the 1970s, these beliefs shifted dramatically. In the immediate postwar period, academics, political pundits, and other public intellectuals subscribed to a vision of policy making that I will call interest group pluralism. The state responded to battling interest groups that were capable of representing the interests of all Americans. By the early 1960s, interest group pluralism had fallen into disrepute. Interest groups, it was argued, were unrepresentative institutions that corrupted the political process. Instead, government had to be made participatory, genuinely inclusive of and responsive to the people. This Article suggests that this change altered administrative law. The contours of administrative law shifted to accommodate this new understanding of how government worked. Our psychological requirements changed and administrative law followed suit.

1. LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 320 (1965).

This story of intellectual and legal change is situated within a rapidly growing body of scholarship about the rise of the administrative state. Part II of the Article examines that literature and places this Article within it. In particular, I argue that the existing historical literature ignores the role that the judiciary plays in the post-World War II administrative state. Political historians have enriched our understanding of postwar policy-making by demonstrating how agencies shape and transform the public policies that the legislature creates. In doing so, however, they have left out the crucial role that courts play in the administrative process. Just as agencies bring their own institutional concerns and ideologies to the policy-making process, so courts impose their own interests as they try to exercise control over the administrative state.

Parts III and IV of this Article describe the nature of these interests. Part III examines changes in American political and intellectual culture that occurred between the end of World War II and the beginning of the 1970s. In Part III.A, I argue that during the immediate postwar period, Americans subscribed to a vision of politics known as interest group pluralism. Politicians simply implemented the desires of interest groups as they clashed and compromised in the political arena. Postwar thinkers applauded this system, naïvely suggesting that interest groups were capable of representing the interests of all Americans. This optimistic vision of American politics suggested a particular relationship between courts and the administrative state. Because the judiciary was the least pluralist branch of government, thinkers believed that it was inappropriate to charge it with a great deal of responsibility for overseeing administrative agencies. Consequently, they suggested that courts adopt a passive attitude towards judicial oversight of administration. Thus, courts created doctrines that facilitated legislative control of the administrative process, while minimizing judicial involvement.

Part III.B describes the demise of this group pluralist vision of policy-making. By the end of the 1950s, academics began attacking interest group pluralism. Interest groups, they argued, were incapable of representing all Americans. Instead, interest groups represented only entrenched, vested interests. They facilitated the political power of the elite at the expense of the majority. The consequence of this increasingly pessimistic vision of policy-making was a reconceptualization of the proper role for the judiciary in American government. Since unrepresentative interest groups controlled the legislature and the executive (including the administrative state), only the judiciary could be expected to represent the

people. Its isolation from a corrupt political process allowed it to be genuinely representative. This vision of the judicial role, known today as "legal liberalism,"² had a profound effect on administrative law theorists. No longer were courts expected to defer to administrative agencies. Instead, they were to police them to protect the public from agencies that had been captured by the interests they were supposed to be regulating.

Part IV of this Article demonstrates how, beginning in the 1960s, administrative law changed to conform to the principles of legal liberalism. I describe how judges changed administrative law doctrines in an attempt to make the administrative process genuinely participatory. They increased the vigor with which courts reviewed administrative decisions, they mandated a dramatic increase in the procedural protections to which people were entitled when they came into contact with agencies, and they enlarged the number of people who were entitled to seek judicial review of administrative actions. By making these changes, the judiciary sought to establish itself as the peoples' agent within the administrative state.

Part V discusses legislative efforts to promote a participatory, legal-liberal conception of the administrative state. In particular, this section describes the circumstances surrounding the passage of the Freedom of Information Act in 1966 and the citizen suit provision of the Clean Air Act in 1970. Each statute attempted to make the administrative state more responsive to the people. Yet each did so in a quintessentially legal-liberal way by giving courts more power over agency operations. Indeed, the legislative history of the Clean Air Act provides the most obvious link between the academic proponents of legal liberalism, the lawyers who litigated cases based on participatory principles, and actual changes in legal rules.

In Part VI, I conclude by linking the story I have told to the contemporary contours of administrative law. I argue that the incoherence of many administrative law doctrines and the contradictions among these doctrines stem from the conflicting visions of the judiciary and the administrative state that emerged after the decline of legal liberalism and the rise of a profoundly anti-statist ideology during the 1980s.

2. LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM 2* (1996).

II. HISTORIOGRAPHY

A. *The "New" Institutional History of American Politics*

For nearly twenty years, historians and social scientists who have studied American political history have been engaged in a project known to the initiated as "bringing the state back in."³ This catchphrase has come to stand for the idea that American political history can only be understood in light of the effect of political institutions on public policy.⁴ These institutions, whether they are political parties, administrative agencies, or congressional committees, warp policy inputs. Thus, American public policy is not simply the desires of voters or interest groups implemented by the state. Instead, it is those desires processed through state institutions that have an independent effect on the way these policies are realized.

Not surprisingly, this approach to political history, often called "New Institutionalism,"⁵ is particularly interested in the development of the administrative state. After all, agencies are one of the main institutional intermediaries between the policy desires of the people and the way those desires are implemented. Consequently, new institutional scholars have presided over an effervescence of studies concerning the American administrative apparatus.⁶ These studies are wonderfully subtle. They explain, for

3. See generally BRINGING THE STATE BACK IN (Peter B. Evans et al. eds., 1985).

4. There has developed a vast bibliography regarding the so called "new" political history. For some nicely outlined basic premises, see Theda Skocpol, *Bringing the State Back In: Strategies of Analysis in Current Research*, in BRINGING THE STATE BACK IN, *supra* note 3, at 3-37. For two additional works, see Karen Orren & Stephen Skowronek, *Order and Time in Institutional Study: A Brief for the Historical Approach*, in POLITICAL SCIENCE IN HISTORY: RESEARCH PROGRAMS AND TRADITIONS 296-317 (James Farr et al. eds., 1995); David Brian Robertson, *History, Behavioralism, and the Return of Institutionalism in American Political Science*, in THE USES OF HISTORY ACROSS THE SOCIAL SCIENCES 131-39 (Eric H. Monkkonen ed., 1994). J. P. NETTL, *The State as a Conceptual Variable*, in 20 WORLD POLITICS 559 (1968) and STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920* (1982) are two germinal writings.

5. See, e.g., James G. March & Johan P. Olsen, *The New Institutionalism: Organizational Factors in Political Life*, 78 AM. POL. SCI. REV. 734 (1984).

6. There are too many examples to list. For a nice selection of articles written in the new institutionalist mode, see generally BRINGING THE STATE BACK IN, *supra* note 3; FEDERAL SOCIAL POLICY: THE HISTORICAL DIMENSION (Donald T. Critchlow & Ellis W. Hawley eds., 1988); STRUCTURING POLITICS: HISTORICAL INSTITUTIONALISM IN COMPARATIVE ANALYSIS (Sven Steinmo et al. eds., 1992); and THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES (Margaret Weir et al. eds., 1988). Additional articles can frequently be found in *The Journal of Policy History* and *Studies in American Political Development*. For book-length examples of

example, how the peculiarities of American state formation shaped contemporary bureaucratic structures; how political ideologies and social policies became embedded in institutions in a manner that has limited future policy choices; and how administrative actors pursued agendas independent of public desires that, in turn, have shaped those desires.⁷

Despite all this exciting work, new institutional scholarship is not without its flaws. In particular, it has two problems that this Article begins to correct. First of all, in "bringing the state back in," these thinkers seem to have removed the judiciary from the narrative of American political history altogether. In much of this scholarship, courts as a variable in the policy-making process are pushed to the periphery. When they are mentioned at all, it is in one of two marginal contexts. First, scholars portray courts as significant actors only in the pre-modern, nineteenth-century state.⁸ During the twentieth century, their policy-making functions are taken over by bureaucratic, administrative actors. Second, when courts do appear, they are placed in limited policy pigeonholes (civil rights and civil liberties, for example) that scholars view as unrelated to the main narrative of state-building in twentieth-century America.⁹

This vision of the judiciary's role in the modern administrative state profoundly underestimates the significance of courts in the administrative process. Scholars within the legal academy, like Richard Stewart, Martin Shapiro, Robert Rabin, and Thomas Merrill, have written detailed historical accounts of the relationship

this type of scholarship, Skowronek's *Building a New American State* is indispensable. Other excellent monographs are BRIAN BALOGH, *CHAIN REACTION: EXPERT DEBATE AND PUBLIC PARTICIPATION IN AMERICAN COMMERCIAL NUCLEAR POWER, 1945-1975* (1991) and BARTHOLOMEW H. SPARROW, *FROM THE OUTSIDE IN: WORLD WAR II AND THE AMERICAN STATE* (1996).

7. See BALOGH, *supra* note 6, at 21-59; SKOWRONEK, *supra* note 4, at 39-46; Ann Shola Orloff, *The Political Origins of America's Belated Welfare State*, in *THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES*, *supra* note 6, at 37-80 for these examples.

8. See SKOWRONEK, *supra* note 4, at 24-31.

9. See *id.* at 287, 289. For several exceptions to this tendency to push the judiciary to the periphery of studies of the administrative state, see generally R. SHEP MELNICK, *REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT* (1983); LUCY E. SALYER, *LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* (1995); CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960* (1985); and Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1 (2000).

between the judiciary and the administrative state.¹⁰ Yet, these seem to go unread by the institutionalist historians and social scientists. Courts impose their own, semi-autonomous interests on the policy-making process, bending and warping policy inputs like any other state institution. Accordingly, if we are truly to bring the state back into American political history, we need to include courts.

The second problem with institutionalism is that, in its most reductionist form, it suggests an unreasonable degree of autonomy for administrative actors. As Ira Katznelson and Daniel Ernst have suggested, historians need to place governmental institutions in their ideological context.¹¹ Ernst, for example, warns that institutional historians must remember the extent to which race and gender norms define bureaucratic procedures.¹² Similarly, Katznelson faults institutional historians for failing to discuss state-building in the context of Americans' conflicting beliefs about liberalism and statist social democracy.¹³

I begin to address these issues. Interestingly, solving the first problem (the absence of courts from the new institutional narratives) helps to solve the second (the absence of an ideological context for these narratives). I will demonstrate that the judiciary asserted increasing control over the administrative process between 1945 and the early 1970s. In doing so, I will suggest that courts served as a medium for importing societal beliefs about policy making into the administrative process. We can begin to place the administrative state in an ideological context by examining the beliefs that the judiciary imposed on it, particularly ideas about participatory democracy and legal liberalism. Enriching the story of postwar state-building in this way both brings the courts back into the narrative about political development in the United States and

10. See generally MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION (1988); Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039 (1997); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975).

11. See generally Daniel R. Ernst, *Law and American Political Development, 1877-1938*, 26 REVS. AM. HIST. 205 (1998); Ira Katznelson, *The State to the Rescue? Political Science and History Reconnect*, 59 SOC. RES. 719 (1992).

12. See Ernst, *supra* note 11, at 214.

13. See Katznelson, *supra* note 11, at 722, 730-37; see also Ira Katznelson & Bruce Pietrykowski, *Rebuilding the American State: Evidence from the 1940s*, 5 STUDS. AM. POL. DEV. 301, 305-07 (1991).

helps us to understand the ideological context in which this state-building occurred.

B. The Pluralist Judiciary

This Article's goal—to begin to fill in these notable gaps in the institutionalist story about the development of the modern administrative state—is not without its own historiographical hazard. Social scientists' increasing interest in institutionalism was a rejection of behavioralism, the previous generation's model for explaining how politics worked.¹⁴ A grossly oversimplified description of behavioralism would go something like this: public policy is the result of the state's reaction to different interest group pressures. Interest groups lobby legislators, struggle for control of political parties, and hammer out compromises with one another. The state then simply implements the results of this group struggle.

When behavioralists turned their attention to the judiciary, they often squeezed it into their pluralist vision of the way politics worked. This led to many wonderful studies demonstrating how litigation, like lobbying and campaign contribution, is an activity that interest groups engage in to further their agenda.¹⁵ This insight, however, can be taken too far. The fact that litigation stems from interest group activity does not mean that the outcome of litigation, a judicial decision, is simply a response to interest group pressures.¹⁶ Legal doctrines created by courts may have the same

14. See James Farr, *Remembering the Revolution: Behavioralism in American Political Science*, in *POLITICAL SCIENCE IN HISTORY*, *supra* note 4, at 215-21; Robertson, *supra* note 4, at 125-129.

15. See generally, e.g., J. W. PELTASON, *FEDERAL COURTS IN THE POLITICAL PROCESS* (1955); VICTOR G. ROSENBLUM, *LAW AS A POLITICAL INSTRUMENT* (1955); CLEMENT E. VOSE, *CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES* (1959); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); Clement E. Vose, *Litigation as a Form of Pressure Group Activity*, 319 ANNALS AM. ACAD. POL. & SOC. SCI. 20 (1958); Comment, *Group Action: Civil Rights and Freedom of Association*, 54 NW. U. L. REV. 390 (1959) [hereinafter Comment, *Group Action*]; Comment, *Private Attorneys-General: Group Action in the Fight for Civil Liberties*, 58 YALE L.J. 574 (1949) [hereinafter Comment, *Private Attorneys-General*].

16. Not surprisingly, many behavioralist political scientists fell into this trap. See EARL LATHAM, *THE GROUP BASIS OF POLITICS: A STUDY IN BASING-POINT LEGISLATION* 39, 51-53 (1952); PELTASON, *supra* note 15, at 3-6; DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND POLITICAL OPINION* 479-98 (1951); Dahl, *supra* note 15, at 280-81, 293-95. Nor are contemporary thinkers immune. See, e.g., Merrill, *supra* note 10, at 1042 n.23.

effect as legislation, but they are created through a different process. In particular, they are created by institutions with a great deal more autonomy than legislatures. Judges, particularly life-tenured federal judges, are insulated from political pressures. Thus, they temper their political loyalties with other, potentially conflicting, obligations such as fidelity to legal precedents and canons of statutory construction, or personal beliefs about the judicial role.¹⁷ Nor are the non-legal factors that affect judicial decision-making necessarily filtered through the interest group process. To be sure, the election or appointment of judges is part of a political process that responds to political pressures. Accordingly, judges arrive on the bench with a political predisposition. After that time, however, they (like all of us) assimilate ideas from a wide variety of sources and are free to implement those ideas without retribution from disgruntled constituents. Similarly, they cannot be sanctioned when personal beliefs that remained unexposed during the appointment process are later revealed.

This extreme, indeed, caricatured, behaviorist vision of the judiciary and its critique suggest a note of caution before we begin the process of bringing courts back into our understanding of twentieth-century political history. The judiciary is more than just another place for interest groups to influence the process of law creation. As they interact with the administrative state, courts funnel a wide variety of beliefs through the doctrines they impose on agencies. Some of these beliefs are almost entirely autonomous from the political system and the culture in which the court operates. For example, judges adhere to legal rules because of their training and because of the sanctions, such as reversal by an appellate court, that they are subject to for ignoring them. Other beliefs are what

17. While this phenomenon has not been studied with respect to twentieth-century administrative law, it has been examined in a wide variety of other contexts. The literature with respect to slave law is a particularly useful place to explore the semi-autonomous nature of law. See EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 25-49 (1976); MARK V. TUSHNET, *THE AMERICAN LAW OF SLAVERY, 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST* 121 (1981). For the interaction of formalism and race after the Civil War, see generally Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39. More relevant to this Article are studies of the judiciary's autonomy from politics during the New Deal and with regard to the constitutionality of the administrative state before then. See generally BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998); Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 L. & HIST. REV. 293 (1985); Barry Cushman, *Lost Fidelities*, 41 WM. & MARY L. REV. 95 (1999).

might be called semi-autonomous. They are not instructions passed to judges directly from interest groups through the political process. Instead, these beliefs stem from the broader political culture, the same political culture that defines the contours of partisan politics.

This Article examines some of these semi-autonomous beliefs. Both the optimistic, consensus-oriented assumptions people had about policy-making during late 1940s and 1950s and the skeptical, fractious assumptions of the 1960s and early 1970s affected day-to-day politics in the United States. This Article will suggest that this change in the way people thought public policy should be made also shaped the legal rules that controlled the interaction between the courts and the administrative state. Political action did not itself change the way courts behaved. Instead, broader, more abstract ideas about political culture affected judicial decision making. This change in the judiciary's role in the administrative process then stimulated political action that attempted to ensure that the courts would retain the role that they created for themselves.

III. FROM INTEREST GROUP PLURALISM TO PARTICIPATORY ADMINISTRATION

Having established this historiographical context, I can now turn to the two substantive narratives that constitute the heart of this Article. The first is a story of intellectual and cultural history. Between the end of World War II and the beginning of the 1960s, the basic assumptions that Americans had about the way politics worked changed dramatically. This Section will describe that change. American intellectuals emerged from the Second World War with a profoundly optimistic vision of the capacity of American government to represent the broad spectrum of interests that existed within the United States. By the beginning of the 1960s, this vision lay in shambles, replaced by an image of a government hopelessly isolated from the people it was supposed to represent. This change caused American intellectuals to rethink the appropriate relationship between the courts and the administrative state. Jaffe's psychological conditions of administrative legitimacy had shifted. After studying this shift, I will embark on my second narrative—the story of how the judiciary assimilated these new conditions and changed administrative law and its role overseeing the administrative state.

A. *Interest Group Pluralism and Postwar Theories of Administrative Law*

We live in a time when the public views "special interests" with a profoundly jaundiced eye. Consequently, it is difficult to recapture the enthusiasm with which postwar thinkers spoke of the interest group. Postwar intellectuals like Daniel Bell, Seymour Martin Lipset, Oscar Handlin, Daniel Boorstin, John Kenneth Galbraith, and Arthur Schlesinger (both father and son) applauded the tendency of Americans to form into groups.¹⁸ These voluntary associations transmitted positive social values, shielded individuals from overreaching state power, and created a stable political system that protected Americans from totalitarian ideologies.¹⁹ The political manifestation of these associations, the interest group, was the basic building block of American politics. Interest groups mobilized voters and represented them in terms that politicians would understand and react to; they promoted mass power.²⁰ Indeed, often these thinkers seemed to view the state as entirely transparent, as nothing more than "a reflex of an adjustment of power groups."²¹ Politics was the process of interest groups "struggl[ing] for a shot at using the fulcrum of the State."²² In the words of the particularly effusive John Chamberlain, interest groups were "the corporate age's analogue to the individual freeholder of Jeffersonian times."²³

18. See, e.g., DANIEL BELL, *THE END OF IDEOLOGY: ON THE EXHAUSTION OF POLITICAL IDEAS IN THE FIFTIES* 32 (1962); DANIEL J. BOORSTIN, *THE GENIUS OF AMERICAN POLITICS* 170-76 (1953); JOHN KENNETH GALBRAITH, *AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER* 108-53 (1956); SEYMOUR MARTIN LIPSET, *POLITICAL MAN: THE SOCIAL BASES OF POLITICS* 200-19 (1960); ARTHUR M. SCHLESINGER, SR., *PATHS TO THE PRESENT* 23-50 (1949); ARTHUR M. SCHLESINGER, JR., *THE VITAL CENTER: THE POLITICS OF FREEDOM* 253-56 (1949); Oscar Handlin, *Group Life Within the American Pattern: Its Scope and Its Limits*, 8 *COMMENTARY* 411 (1949). For my more detailed discussion of interest group pluralism and its effect on postwar legal thought, see Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 *BERKLEY J. EMP. & LAB. L.* 1, 11-18 (1999).

19. See BELL, *supra* note 18, at 66, 112; BOORSTIN, *supra* note 18, at 34-35, 170-76; Handlin, *supra* note 18, at 411-12; LIPSET, *supra* note 18, at 200-19; SCHLESINGER, SR., *supra* note 18, at 49.

20. This idea is most prominent in the works of behavioralist political scientists. See, e.g., ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 132-33, 145-46 (1956); V.O. KEY, JR., *POLITICS, PARTIES, AND PRESSURE GROUPS* 183, 196-98 (2d ed. 1947); LATHAM, *supra* note 16, at 224; TRUMAN, *supra* note 16, at 38, 46-47.

21. JOHN CHAMBERLAIN, *THE AMERICAN STAKES* 27 (1940).

22. *Id.* at 32.

23. *Id.* at 28.

In political science departments, behavioralist theories of government buttressed this vision of interest group pluralism. The writings of V.O. Key, David Truman, Earl Latham, and Robert Dahl suggested that the state simply responded to the outcome of clashing interest groups.²⁴ "Both the forms and functions of government," wrote David Truman in 1951, "are a reflection of the activities and claims of such groups."²⁵ The following year Latham echoed this sentiment, albeit with a more colorful, martial metaphor: "The legislature referees the group struggle, ratifies the victories of the successful coalitions, and records the terms of the surrenders, compromises, and conquests in the form of statutes."²⁶ Dahl wrote that "[t]he making of governmental decisions" is the "steady appeasement of relatively small groups."²⁷ Thus, the consensus in political science departments was the same as among intellectuals generally; interest groups reflected the desires of their constituents and transmitted these desires to the state, which then implemented them.

For behavioralists, this responsive vision of government also applied to the administrative state. According to Princeton University political scientist Avery Leiserson, the basic function of administrative agencies was to respond to interest group demands.²⁸ Charles Wiltse, writing in the *American Political Science Review* in 1941, concurred.²⁹ He characterized administrative agencies as nothing more than spokesmen for pressure groups. The administrative agency, wrote Wiltse, "becomes the official instrument through which the wishes of the interest group are made known to the coordinate legislative and executive branches of government."³⁰ Key and Dahl relegated administrative agencies to a similar role. "[S]ometimes," Dahl wrote, "bureaucracy and clientele become so intertwined that one cannot easily determine who is responsive to whom."³¹ Key agreed: "The prevailing practice is that the administrative agencies represent the interests they serve."³² Returning to

24. See *supra* note 20.

25. TRUMAN, *supra* note 16, at 506.

26. LATHAM, *supra* note 16, at 35.

27. DAHL, *supra* note 20, at 146.

28. See AVERY LEISEN, ADMINISTRATIVE REGULATION, A STUDY IN THE REPRESENTATION OF INTERESTS 1-53 (1942).

29. See Charles M. Wiltse, *The Representative Function of Bureaucracy*, 35 AM. POL. SCI. REV. 510 (1941).

30. *Id.* at 514.

31. DAHL, *supra* note 20, at 148.

32. KEY, *supra* note 20, at 705.

his martial language, Latham declared administrative agencies to be the "army of occupation left in the field to police the rule won by the victorious coalition."³³ Thus, during the 1940s and 1950s, political scientists viewed administrative agencies as nothing more than another instrument in the state's on-going attempt to respond to the desires of the private interest groups that actually guided public policy in the United States.

Currently, we are inclined to view this description of the political and administrative process with cynical resignation, if not alarm. In the 1940s and 1950s, however, many academics and public intellectuals applauded it. Interest groups served as a conduit for citizens' desires in a society whose size and complexity might otherwise create a nation of politically impotent, atomized individuals.³⁴ Additionally, interest group pluralism blunted the political extremism that led to either fascism or Stalinism.³⁵ In particular, a diversity of interest groups, competing for the allegiance of the citizenry, kept left-wing ideology out of American politics because individuals would see themselves as belonging to too many different groups to consider themselves solely members of an economic class.³⁶ These overlapping loyalties, as Lipset called them, reduced the "emotional aggressiveness involved in political choice" and thereby promoted stable democracy.³⁷

Though there was no self-evident jurisprudential analogue to behavioralism, group pluralist thought in the social sciences did not go unnoticed in the legal academy. Some legal scholars, such as Mark DeWolfe Howe, Thomas Cowan, and Robert Horn, suggested ways in which legal doctrines could be adapted to buttress interest group pluralism.³⁸ Others, taking a less normative approach, described litigation as simply another point at which interest groups

33. LATHAM, *supra* note 20, at 38.

34. See DAHL, *supra* note 16, at 133, 145-46; KEY, *supra* note 20, at 179, 183; TRUMAN, *supra* note 16, at 43-44.

35. See BELL, *supra* note 18, at 373, 393; BOORSTIN, *supra* note 18, at 34-35, 170-176; SCHLESINGER, SR., *supra* note 18, at 49-50.

36. See CHAMBERLAIN, *supra* note 21, at 28; BELL, *supra* note 18, at 66.

37. LIPSET, *supra* note 18, at 88, 200-19.

38. See generally ROBERT A. HORN, *GROUPS AND THE CONSTITUTION* (1971); Thomas A. Cowan, *Group Interests*, 44 VA. L. REV. 331 (1958); Thomas A. Cowan, *The Impact of Social Security on the Philosophy of Law: The Protection of Interests Based on Group Membership*, 11 RUTGERS L. REV. 688 (1957); Mark DeWolfe Howe, *The Supreme Court, 1952 Term Foreword: Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91 (1953).

applied pressure to the political system.³⁹ Finally, group pluralist thinking had a profound effect on Legal Process theory, the dominant academic conceptualization of the role of courts in American government in the two decades following the Second World War.⁴⁰

Process theorists, such as Alexander Bickel, Herbert Wechsler, Harry Wellington, Albert Sachs, and Henry Hart, suggested that each branch of government undertake the tasks for which it was best suited. The politically responsive legislature, for example, was best equipped to make choices among policy preferences.⁴¹ The judiciary, on the other hand, had "the leisure, the training and the intuition" to determine the society's "enduring values" and to ferret out neutral principles upon which legislation should be judged.⁴² Thus, process theorists' pluralist outlook on policy-making led them to adopt a very deferential attitude towards the decisions of the legislature, the ultimate responsive organ in a pluralist conception of government. Alexander Bickel's famous 1960 Foreword to the *Harvard Law Review*, entitled *The Passive Virtues*, illustrated this point.⁴³ In *The Passive Virtues*, Bickel argued that the Supreme Court should use a variety of procedural devices, such as standing, mootness and the political question doctrine, to avoid rendering decisions on the merits in cases where a such a determination would invade the prerogatives of the legislature. Instead, the Court should use "the process of avoidance and admonition" to inform the legislature that the statute in question was constitutionally problematic and to force it to make difficult policy decisions knowing that fact.⁴⁴ "[T]he resources of rhetoric and the techniques of avoidance enable

39. See PELTASON, *supra* note 15; ROSENBLUM, *supra* note 15; VOSE, *supra* note 15; Clement E. Vose, *Litigation as a Form of Pressure Group Activity*, 319 ANNALS AM. ACAD. POL. & SCI. 21 (1958); Comment, *Group Action*, *supra* note 15; Comment, *Private Attorneys-General*, *supra* note 15.

40. For an introduction to process theory, see KALMAN, *supra* note 2, at 22-42; G. EDWARD WHITE, PATTERNS OF LEGAL THOUGHT 136-50 (1978); and William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, in THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW at li-cxxxvi (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

41. See Gary Peller, *Neutral Principles in the 1950s*, 21 MICH. J.L. REFORM 561, 593 (1988); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31 (1959).

42. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 24-26 (1962); see also Wechsler, *supra* note 41, at 1.

43. Alexander M. Bickel, *The Supreme Court 1960 Term Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 65 (1961).

44. *Id.* at 67.

the Court to exert immense influence. It can explain the principle that is in play and praise it The Court can require the countervailing necessity to be affirmed by a responsible political decision, squarely faced and made with awareness of the principle on which it impinges."⁴⁵ Essentially, Bickel would have the Court lecture the legislature, hoping that the latter would adjust its behavior accordingly.⁴⁶

Even in instances when process theorists thought that judicial review was appropriate, they did so with reference to basic pluralist assumptions. Bickel, for example, used interest group theory to justify judicial review. He suggested that since Dahl and Truman's studies of interest groups indicated that institutions other than the legislature could be "responsive to the needs and wishes of the governed . . . one may infer that judicial review, although not responsible, may have ways of being responsive."⁴⁷ Similarly, Harry Wellington and Robert McCloskey justified a more activist judiciary in the rare instances where the political process had broken down by systematically excluding certain interest groups.⁴⁸

Process theory was a natural, though more sophisticated, continuation of New Deal-era thinking about the role of the judiciary in American government. Progressives had long viewed the American judiciary as a reactionary institution, typified by its prodigal willingness to grant labor injunctions and its perceived hostility to protective legislation.⁴⁹ Gut-wrenching battles between

45. *Id.* at 77.

46. For another example of the process of avoidance and admonition, see Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 24-28 (1957).

47. BICKEL, *supra* note 42, at 19.

48. See Robert G. McCloskey, *The Supreme Court 1961 Term Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54, 71 (1962); Harry H. Wellington, *The Constitution, The Labor Union, and 'Governmental Action'*, 70 YALE L.J. 345, 372 (1961).

49. For contemporary objections to labor injunctions and judicial hostility towards protective legislation and the administrative state, see generally LOUIS B. BOUDIN, *GOVERNMENT BY JUDICIARY* (1932); FELIX FRANKFURTER & NATHAN GREEN, *THE LABOR INJUNCTION* (1930); GILBERT E. ROE, *OUR JUDICIAL OLIGARCHY* (1912); E. S. Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643 (1909); and Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909). Modern historians have, of course, chronicled the progressive impressions of the judiciary. See, e.g., ARNOLD M. PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895* (1976); MELVIN I. UROFSKY, *A MARCH OF LIBERTY* 574-78 (1988). For reactions to the federal judiciary's hostility towards labor unions, see generally WILLIAM FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991).

New Deal legislative programs and an unsympathetic Supreme Court in the early years of the Roosevelt administration only heightened this suspicion.⁵⁰ Consequently, the need for a minimal judicial role in the administrative process became an article of faith among dedicated New Dealers. The courts were not to meddle in the workings of the newly enlarged administrative state. Their attitude towards expert administration was to be one of profound deference.⁵¹

After World War II, intellectuals' attitudes towards the administrative state changed.⁵² America's encounter with the bureaucratic totalitarianism of Hitler and Stalin sullied the promise of expert administration. Indeed, even in the United States, administrative agencies seemed sometimes to wield arbitrary, authoritarian power. In the years immediately following the Second World War, even a loyal New Dealer like Louis Jaffe wrote about the dangerous tendencies of the administrative state. Too much faith in "experts" and "rationalism" could lead to totalitarianism,⁵³ wrote Jaffe. "Even if we grant . . . the magnificent accomplishments of the New Deal," he continued, "we cannot forget that our age has produced elsewhere, and even on occasion in our own country, the most monstrous expressions of administrative power."⁵⁴ Indeed, by the middle of the 1950s, New Deal-era liberals could point to a increasing number of administrative manifestations of McCarthyism to confirm their worst fears.⁵⁵

Thus, when postwar legal thinkers turned their attention to the role of the judiciary in the administrative state, they found

50. This story has been told many times. For a nice summary, see UROFSKY, *supra* note 49, at 668-79. See CUSHMAN, *supra* note 17, for the most nuanced version.

51. The clearest articulation of this vision of the proper relationship between the judiciary and the administrative state was James Landis' *The Administrative Process*. See also FELIX FRANKFURTER, LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER 1913-1938, at 236 (1939); FELIX FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT 50-51 (1930); J. F. Davidson, *Administration and Judicial Self-Limitation*, 4 GEO. WASH. L. REV. 291, (1936); and Charles Grove Haines, *Effects of the Growth of Administrative Law on Traditional Anglo-American Legal Theories and Practices*, 26 AM. POL. SCI. REV. 875, (1932).

52. For details on the effect of World War II on Americans' thinking about the administrative state, see generally Reuel E. Schiller, *Reining In the Administrative State: World War II and the Decline of Expert Administration*, in TOTAL WAR AND THE LAW (Daniel Ernst & Victor Jew eds., 2001) (forthcoming) (unpublished manuscript, on file with the *Vanderbilt Law Review*).

53. Jaffe is quoted in MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 240 (1992).

54. JAFFE, *supra* note 1, at 323.

55. See HORWITZ, *supra* note 53, at 240-41.

themselves pulled in opposite directions. On the one hand, the dictates of process theory suggested that the courts should have a limited role in policing legislatively created entities like administrative agencies. On the other hand, fears concerning the absolutist potential of the administrative state demanded the creation of some controls on its power; the most obvious candidates were the courts. Indeed, the claim that imposing the rule of law on agency behavior could protect Americans from an administrative state run amok, which prior to World War II had been solely the claim of opponents of the New Deal, was increasingly heard across the political spectrum.⁵⁶

Consequently, some legal scholars simply abandoned (or perhaps never accepted) process theory shibboleths against active judicial review of administrative actions. Writing in 1954, Louis Schwartz criticized courts for abandoning their role of overseeing the administrative process.⁵⁷ The judiciary, he argued, should be "defining general policy within which economic administration must function."⁵⁸ Similarly, Bernard Schwartz decried judicial passivity and called for amendments to the Administrative Procedure Act that would have mandated increased judicial scrutiny of administrative actions, including the creation of a special administrative court devoted exclusively to that task.⁵⁹ Indeed, the recommendations that Schwartz supported were those of a blue ribbon commission appointed by Congress in 1953 and chaired by former president Herbert Hoover.⁶⁰

Nevertheless, the dominant administrative law theorists during the 1950s were not willing to abandon so easily process theory assumptions about the judicial role and their pluralist underpinnings.⁶¹ Writing in 1954, Jaffe acknowledged that as the admin-

56. See *id.* at 230-46; see also C. HERMAN PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937-1947*, at 177-97 (1948); Schiller, *supra* note 52 (manuscript at 11, 24-25, 30).

57. See Louis B. Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436 (1954).

58. *Id.* at 475.

59. See Bernard Schwartz, *Administrative Justice and Its Place in the Legal Order*, 30 N.Y.U. L. REV. 1390 (1955); Bernard Schwartz, *Administrative Law*, 30 N.Y.U. L. REV. 85, 98-109 (1955).

60. See COMMISSION ON THE ORGANIZATION OF THE EXECUTIVE BRANCH OF GOVERNMENT, TASK FORCE ON LEGAL SERVICES AND PROCEDURES, REPORT ON LEGAL SERVICES AND PROCEDURES 72-88 (1955).

61. See Merrill, *supra* note 10, at 1056-59; Keith Werhan, *The Neoclassical Revival in Administrative Law*, 44 ADMIN. L. REV. 567, 576-83 (1992).

istrative progeny of the New Deal matured, problems associated with agency operations, such as agency capture and insufficient flexibility, became more apparent.⁶² Jaffe feared, however, that people would draw the wrong lessons from this phenomenon. In particular, a dramatic increase in judicial supervision of the administrative process would be a mistake since, in Jaffe's opinion, these problems did not stem from inadequate supervision. The industry orientation of many agencies, for example, was the product of legislative choice, not agency malfeasance.⁶³ Similarly, if agency power seemed unrestricted, the problem was over-broad delegations of authority from the legislature, not administrative aggrandizement of power.⁶⁴

These were problems of the political branches, and consequently, they demanded pluralist solutions of which increasing judicial scrutiny of administrative actions was not one.⁶⁵ Questions concerning the extent of agency authority and the manner in which this authority was exercised were quintessentially political ones, and thus the legislature should answer them.⁶⁶ Accordingly, like other process-minded thinkers, Jaffe suggested that courts poke and prod legislatures to define administrative power more narrowly. This was a pluralist, rather than a judicial, solution to the problems of the administrative state.

Jaffe articulated these views most forcefully in a pair of articles about the delegation of legislative power to administrative agencies written in the late 1940s.⁶⁷ Both were steeped in the language of pluralism: "[T]here is also the general concern that large decisions of policy should be grounded in consent. Consent is the product of compromise and can only be arrived at through represen-

62. See Louis L. Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105, 1107 (1954).

63. See *id.* at 1109, 1110, 1113.

64. See *id.* at 1134; Louis L. Jaffe, *An Essay on Delegation of Legislative Power: I*, 47 COLUM. L. REV. 359, 359-60 (1947) [hereinafter Jaffe, *Delegation I*]; Louis L. Jaffe, *An Essay on Delegation of Legislative Power: II*, 47 COLUM. L. REV. 561, 593 (1947) [hereinafter Jaffe, *Delegation II*].

65. See Louis L. Jaffe, *Judicial Review: Question of Law*, 69 HARV. L. REV. 239, 263-64 (1955) [hereinafter Jaffe, *Question of Law*]; Louis L. Jaffe, *Judicial Review: Substantial Evidence on the Whole Record*, 64 HARV. L. REV. 1233, 1259-61 (1951).

66. See Jaffe, *Question of Law*, *supra* note 65, at 261; Louis L. Jaffe, *Basic Issues: An Analysis*, 30 N.Y.U. L. REV. 1273, 1285 (1956).

67. See Jaffe, *Delegation I*, *supra* note 64, at 359-60; Jaffe, *Delegation II*, *supra* note 64, at 593; see also Hans J. Morgenthau, *Implied Limitations on Regulatory Powers in Administrative Law*, 11 U. CHI. L. REV. 91, 91-94 (1944).

tation. The legislature comprises a broader cross-section of interests than any one administrative organ . . .”⁶⁸ Accordingly, “we must not take lightly the objection to indiscriminate and ill-defined delegation. It expresses a fundamental democratic concern.”⁶⁹ The solution to the problem of overdelegation was for courts to ensure that the legislature adopt specific standards for administrative action.⁷⁰ He never suggested that courts themselves supply those standards. Instead, judicial saber-rattling would be enough. The importance of the Supreme Court’s nondelegation jurisprudence was that it demonstrated the existence of “a hint of reserved power” for the judiciary.⁷¹ It allowed the courts to demand more exacting delegations from the legislature.⁷² Though he did not explicitly say it, this reserved power thus acted as a tacit threat (a “caveat,” he wrote)⁷³ to legislatures that might otherwise delegate authority to the degree that they ceased to serve their pluralist function of making “large decisions of policy” by providing administrators with adequate standards to guide their actions.⁷⁴

Writing on the subject of delegation over a decade later, Alexander Bickel demonstrated how Jaffe’s theory would work in action. In *The Passive Virtues*, Bickel praised three decisions in which he thought the Court properly reprimanded Congress for delegating authority too broadly. In *United States v. Rumely*, the Court overturned a contempt citation issued by the House Committee on Lobbying when Rumely would not reveal who had made bulk purchases of the right-wing pamphlets he sold.⁷⁵ The Court held that the vague language of the Committee’s authorizing resolution was not specific enough to justify the Committee’s question to Rumley.⁷⁶

The two other decisions that Bickel lauded in *The Passive Virtues* dealt directly with administrative agencies. In *Kent v. Dulles*, the Court held that Congress’s broad delegation of authority to the State Department to issue passports was insufficiently specific to authorize the withholding of passports because of an applicant’s

68. Jaffe, *Delegation I*, *supra* note 64, at 359.

69. *Id.* at 360.

70. See Jaffe, *Delegation II*, *supra* note 64, at 593.

71. *Id.* at 592.

72. See *id.* at 578.

73. *Id.* at 592.

74. Jaffe, *Delegation I*, *supra* note 64, at 357, 366 (“[T]he legislature must be ready to intervene when administration runs into crucial issues for the settlement of which the existing standard is an inadequate guide.”).

75. *United States v. Rumely*, 345 U.S. 41, 47-48 (1953).

76. See Bickel, *supra* note 43, at 65 (1960).

political affiliations.⁷⁷ Bickel's final case, *Greene v. McElroy*, involved the State Department's decision to withdraw the security clearance of an executive at a defense contractor without any due process.⁷⁸ The Court held that the withdrawal was improper because neither Congress nor the President had authorized the State Department to act in such a summary fashion.⁷⁹ In each instance, Bickel did not question the right of Congress to authorize the actions taken by the agency or committee. Instead, he applauded the Court for "holding Congress to its responsibility for a policy decision which it failed to make or to announce with sufficient particularity."⁸⁰ Thus, the Court's function was to ensure that Congress offered a "principled justification"⁸¹ for its actions and that the Court "recall the legislature to its own policy-making function."⁸² Like Jaffe, Bickel reconciled the pluralist demand for judicial passivity with the postwar fear of administrative power by calling on courts to alert the legislature to potential problems with the administrative state. They were not, however, to substitute their own judgment.

Kenneth Culp Davis' writings in the 1950s were less theoretical than Jaffe's or Bickel's, but he ended up in the same place. Like Jaffe, Davis argued that accusations of interest group domination of the administrative process were directed at the incorrect institutional actor. "Pro-industry" agencies were not captured, they were simply implementing statutes that favored business interests.⁸³ Indeed, Davis argued that agencies did not have inherent political tendencies. "[T]he administrative process . . . has a chameleonic quality of taking on the color substantive program to which it is attached."⁸⁴ Furthermore, as the political attitude that led to the creation of an agency changed, the agency's policies changed along with it.⁸⁵ Thus, administration was pluralist, reflecting the desires of the popularly elected branches of government.

Having articulated this set of beliefs, Davis went on to describe a fairly circumscribed role for courts in the administrative

77. *Kent v. Dulles*, 357 U.S. 116 (1958); see Bickel, *supra* note 43, at 71.

78. *Greene v. McElroy*, 360 U.S. 474, 504-08 (1959).

79. See Bickel, *supra* note 43, at 72.

80. *Id.*

81. *Id.* at 74.

82. *Id.* at 68.

83. 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 14-15, 19-21 (1958).

84. *Id.* at 14.

85. See *id.* at 17-18.

process. Like all postwar theorists, he believed in more of a role for the courts than existed during the New Deal. Nevertheless, in his gigantic, four volume *Administrative Law Treatise*, published in 1958, he argued forcefully that the legitimacy of the administrative state did not hinge on every agency action being subjected to judicial review.⁸⁶ Indeed, efficient administration dictated that even agency legal determinations must sometimes remain unreviewed.⁸⁷ Davis believed that some checks on administrative power were necessary, but he suggested that internal checks could be just as effective as external, judicial ones.⁸⁸ He devoted an entire chapter of his magnum opus to criticizing the judiciary's tendency to create rights of judicial review in the absence of congressional intent.⁸⁹ Similarly, he voiced his disapproval of instances when courts ignored general principles of deference to administrative actors and substituted their own judgment for that of an agency.⁹⁰ Accordingly, it is not surprising that when faced with proposals to expand judicial review of administrative actions, Davis, like Jaffe, roundly condemned them.⁹¹

The contrast between Jaffe and Davis' writings on the one hand, and Louis and Bernard Schwartz's on the other, indicates that postwar administrative law theory was hardly uncontested terrain. Different scholars called for differing degrees of judicial involvement in the administrative process. Nevertheless, by the end of World War II, a consensus had developed that the judiciary should take a more active role in policing agencies than it had during the New Deal. This point, however, can be easily overstated. Though administrative law scholars were considerably more suspicious of agencies than they had been during the 1930s, this suspicion did not uniformly translate into calls for greater judicial control of the administration. For many liberals coming of age during the 1930s, it was difficult to cast off the shadow of a judiciary tainted by its association with allegedly unprincipled attacks on progressive social legislation and the prodigal granting of inequitable labor injunctions. Thus, for many of these thinkers, more active involvement of the political branches in the administrative process would protect America from administrative absolutism. To assert

86. *See id.* at 53-64.

87. *See id.* at 62-64.

88. *See* 4 DAVIS, *supra* note 83, at 113.

89. *See id.* at 1-9, 77-87.

90. *See id.* at 220-33.

91. *See* 1 DAVIS, *supra* note 83, at 27-28, 31.

judicial control over the administrative state because the latter was not politically responsive enough was, in the minds of group pluralist thinkers, letting the fox guard the hen-house.

B. Participatory Thought and the Administrative State

In retrospect, postwar political theory—with its resolute condemnation of any ideology, its obsessive focus on stability and the preservation of the “Vital Center,” and its sunshine and morning-glory portrait of American pluralism—fits squarely within a political culture generated by economic prosperity, slowly expanding cultural pluralism, anti-communism, and atomic anxiety. This political culture soon ran aground on the shoals of reality.⁹² The Civil Rights Movement and its political and intellectual heirs highlighted the imperfections of this consensus-oriented, optimistic view of the American polity. Consequently, intellectuals on both the right and the left recast their theories of government to accommodate the increasingly fractious nature of American political life.⁹³ The primary victim of this recasting was the benevolent interest group.

This new generation of thinkers did not reject the idea that government responded to interest groups. The problem, as they saw it, was that interest groups were not genuinely pluralist. Public policy did not represent the beneficial clash of different interest groups, but was instead the result of manipulation of the state by entrenched elites. The interest groups that struggled for control of the state were elite economic actors whose interests did not coincide with those of the people. Accordingly, interest group pluralism de-

92. For 1950s “consensus” intellectual and political culture, see generally GEORGE LIPSITZ, *CLASS AND CULTURE IN COLD WAR AMERICA* (1981); ELAINE TYLER MAY, *HOMEWARD BOUND: AMERICAN FAMILIES IN THE COLD WAR ERA* (1988); RICHARD H. PELLIS, *THE LIBERAL MIND IN A CONSERVATIVE AGE: AMERICAN INTELLECTUALS IN THE 1940S AND 1950S* (1985). Historians have yet to satisfactorily explore the reasons for the change in American political culture that took place at the beginning of the 1960s. For the best start, see PELLIS, *supra*, at 346-99; see also MORRIS DICKSTEIN, *THE GATES OF EDEN* 55-58 (1977); JOHN G. GUNNELL, *THE DESCENT OF POLITICAL THEORY: THE GENEALOGY OF AN AMERICAN VOCATION* 263-67 (1993); RAYMOND SEIDELMAN & EDWARD HARPHAM, *DISENCHANTED REALISTS: POLITICAL SCIENCE AND THE AMERICAN CRISIS, 1884-1984*, at 185-186 (1985); James Farr, *Remembering the Revolution: Behavioralism in American Political Science*, in *POLITICAL SCIENCE IN HISTORY*, *supra* note 4, at 218-19; Maurice Isserman & Michael Kazin, *The Failure and Success of the New Radicalism*, in *THE RISE AND FALL OF THE NEW DEAL ORDER, 1930-1980*, at 215-21 (Steve Fraser & Gary Gerstle eds., 1989).

93. For a detailed discussion of intellectuals’ conceptions of policy-making during the 1960s, see Schiller, *supra* note 18, at 48-57.

scribed the way that these elites formed public policy. Indeed, it was an illusion that tricked people into believing their interests were represented when they actually were not.

Not surprisingly, left-wing academics, like C. Wright Mills, Gabriel Kolko, and Grant McConnell, articulated this line of thinking.⁹⁴ It was equally apparent, however, in the writings of more mainstream scholars. Writing in the early 1960s, Paul Appleby, Hans Morgenthau, and James McGregor Burns each bemoaned the fact that "manipulation and undebated decisions of power [had] replace[d] democratic authority."⁹⁵ In political science departments, a new concern about the way in which political institutions blocked and warped expressions of the popular will increasingly replaced the pluralist behavioralism of Vose, Truman, Dahl, and Latham.⁹⁶ Even dyed-in-the-wool behavioralists like Truman and Dahl shifted their positions on interest group pluralism by the early 1960s. Truman acknowledged that policy making was "the lot of those in positions of privilege in the structure of elites intervening between the government . . . and the ordinary citizen."⁹⁷ Similarly, Dahl's famous 1961 study of New Haven municipal politics, *Who Governs?*, answered its titular question with a portrait of elites wielding distinctly undemocratic resources like social standing, media access, and political patronage.⁹⁸ Indeed, the early 1960s saw many similar monographs on urban politics,

94. See generally GABRIEL KOLKO, *THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916* (1963); GRANT MCCONNELL, *PRIVATE POWER AND AMERICAN DEMOCRACY* (1966); C. WRIGHT MILLS, *THE POWER ELITE* (1956).

95. HANS J. MORGENTHAU, *THE PURPOSE OF AMERICAN POLITICS 200-01* (1960); see generally PAUL APPLEBY, *CITIZENS AS SOVEREIGNS* (1962); JAMES A. MCGREGOR BURNS, *THE DEADLOCK OF DEMOCRACY: FOUR-PARTY POLITICS IN AMERICA* (1963).

96. See Robertson, *supra* note 4, at 125-27.

97. David B. Truman, *The American System in Crisis*, 74 *POL. SCI. Q.* 481, 497 (1959).

98. ROBERT A. DAHL, *WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY* 225-28 (1961). I do not mean to overstate this point. *WHO GOVERNS?* argued that the policy making processes in New Haven were basically democratic. Indeed, it was elite dominance in the face of a relatively apathetic citizenry that, Dahl believed, led to political stability. See *id.* at 315. Dahl had little patience for Mills and others who dismissed American democracy as essentially a fiction. See Robert A. Dahl, *A Critique of the Ruling Elite Model*, 52 *AM. POL. SCI. REV.* 463, 465-69 (1958). Nevertheless, *WHO GOVERNS?*, with its focus on the manner in which elite politicians run the government, provides a remarkable contrast to the interest-group politics that Dahl lauded in *A Preface to Democratic Theory*. See Robert A. Dahl, *Further Reflections on "The Elitist Theory of Democracy,"* in *POLITICAL ELITES IN A DEMOCRACY* 93, 103-04 (Peter Bachrach ed., 1971) (describing Dahl's plea for increased voter participation); see also A. S. McFarland, *Interest Groups and Theories of Power in America*, 17 *BRIT. J. POL. SCI.* 136, 136-37 (1987).

chronicling the exclusion of most citizens from the governance of their own municipalities.⁹⁹

Economists, who focused their attention on political systems around the same time (though generally well from the right of their colleagues in political science departments) arrived at similar conclusions. James Buchanan and Gordon Tullock's *The Calculus of Consent* (1962) and Mancur Olson's *The Logic of Collective Action* (1965) demonstrated, with dismal economic precision, that politicians' interest in reelection inevitably led to governmental action on behalf of powerful interest groups. Indeed, with relentless logic, they argued that collective action problems and the costs of acquiring information resulted in pressure groups made up of small numbers of powerful economic actors.¹⁰⁰ For individuals, the costs of political decision making, in time and effort as well as money, were simply too high to pay. Disparate individual interests were no match for the intense, concentrated interests of pressure groups. Even Anthony Downs, one of the more optimistic progenitors of this mixture of economics and political science known as public choice theory, conceded that favor-seekers looking to maximize their self-interest wielded disproportionate power at the expense of the public interest.¹⁰¹ Thus, by the mid-1960s, academics had rejected interest group pluralism's basic premise that it facilitated the representation of all Americans. As E. E. Schattschneider wrote in *The Semisovereign People* (1960), "[t]he vice of the groupist theory is that it conceals the most significant aspects of the system. The flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent."¹⁰²

Critiques of the group pluralist orthodoxy, whether coming from the right or the left, focused on the power of unrepresentative interest groups and their disproportionate influence on policy making. Not surprisingly, then, when these thinkers turned their attention from the political process as a whole to the administrative process in particular, they painted a picture of an administrative state controlled by interest groups. Of course, observers of agency

99. See generally ROBERT E. AGGER ET AL., *THE RULERS AND THE RULED: POLITICAL POWER AND IMPOTENCE IN AMERICAN COMMUNITIES* (1964); MURRAY B. LEVIN, *THE ALIENATED VOTER: POLITICS IN BOSTON* (1960); NELSON W. POLSBY, *COMMUNITY POWER AND POLITICAL THEORY* (1963); ROBERT PRESTHUS, *MEN AT THE TOP* (1964).

100. See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 283-95 (1962); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 132-67 (1965).

101. See ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 82-95 (1957).

102. E. E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE* 35 (1960).

behavior did not invent the idea of agency capture in the 1960s. Opponents of the Roosevelt administration had frequently accused various New Deal agencies of capture.¹⁰³ Similarly, during the 1950s, academics, most notably Samuel Huntington, leveled charges of capture against the federal administrative state.¹⁰⁴ In the climate of behaviorist optimism that pervaded the immediate post war period, however, these Cassandras were easily ignored.¹⁰⁵

Beginning in 1960, the climate had changed and critics of the pluralist vision of the administrative process began to get the upper hand. Kolko's *The Triumph of Conservatism* (1963) is correctly seen as a hallmark of the rise of capture theory, but it was hardly the first. Three years earlier James Landis, acting as a member of the Kennedy administration's transition team, issued a scathing report on the state of the federal administrative apparatus, which included concerns about agency capture.¹⁰⁶ The report appeared the same year as a congressional study of the federal independent agencies that catalogued a plethora of improper ex parte contacts and suspicious quid pro quos.¹⁰⁷ In 1962, Henry Friendly, a judge on the Second Circuit, used the bully pulpit of the Holmes lectures at Harvard Law School to deliver a similar assessment of agency operations.¹⁰⁸

By the mid-1960s, the pluralist vision of the administrative state was under full scale assault. Indeed, many of the critiques of behaviorist political science that flowed from the pens of scholars such as Theodore Lowi and Henry Kariel, as well as McConell and Morgenthau, cast a particularly critical eye on an administrative

103. During the debates over the Walter-Logan administrative procedure bill, conservative legislators alleged that New Deal agencies like the NLRB and the SEC were the pawns of labor unions and other left-wing interest groups. See 86th CONG. REC. 4544 (1940) (statement of Rep. Rees); *id.* at 4531-33 (statements of Rep. Cox). Wartime agencies, such as the Office of Price Administration, were also alleged to be captured by similar pressure groups. See Schiller, *supra* note 52 (manuscript at 16-17, 20).

104. See Samuel Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 YALE L.J. 467, 467-70 (1952); Louis Schwartz, *Legal Restriction of Competition in the Regulated Industries*, 67 HARV. L. REV. 436, 436-38 (1954).

105. See 1 DAVIS, *supra* note 83, at 14-24; Jaffe, *supra* note 62, at 1107-13.

106. See JAMES LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 70-72, 87 (1960).

107. See HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, SPECIAL SUBCOMMITTEE ON LEGISLATIVE OVERSIGHT, REPORT ON INDEPENDENT REGULATORY COMMISSIONS 7-12, 14-22, 48-56, 64-71 (1960)

108. See HENRY J. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES 19-22 (1962).

process they saw as subservient to vested interests.¹⁰⁹ Similarly, public choice theorists' dismal vision of the political process, when applied to the administrative state, described a regulatory apparatus that protected entrenched industries in a positively pre-capitalist, mercantile manner.¹¹⁰ Legal academics also jumped on the agency capture bandwagon. Charles Reich's famous *Yale Law Journal* article on the New Property was just one of three he wrote in the mid-1960s fretting over interest group control of the administrative process.¹¹¹ Ralph Nader's Center for the Study of Responsive Law published a series of muckraking monographs with evocative titles, *The Interstate Commerce Omission*, for example, aimed at the heart of the captured administrative state.¹¹² Even Kenneth Culp Davis, who in the late 1950s had responded to accusations of agency capture in a quintessentially group pluralist way—pro-industry bias exists in a pro-business political climate, anti-industry bias exists in a political climate hostile to business¹¹³—was singing a different tune. Political pressures, he wrote in 1969, were one of the factors that turned discretionary justice into discretionary tyranny.¹¹⁴

American intellectuals' shifting beliefs about the interactions between interest groups and the administrative state produced parallel changes in the thinking of administrative law theorists.

109. See HENRY S. KARIEL, *THE DECLINE OF AMERICAN PLURALISM* 47-48, 88-102, 181 (1961); THEODORE J. LOWI, *THE END OF LIBERALISM* 288-89 (1969); MCCONNELL, *supra* note 94, at 287-92; MORGENTHAU, *supra* note 95, at 311-14.

110. The two most famous articles applying public choice theory to the administrative state were actually published in the early 1970s. See Richard Posner, *Taxation by Regulation*, 2 *BELL J. OF ECON. & MGMT. SCI.* 21 (1971); George J. Stigler, *The Theory of Economic Regulation*, 2 *BELL J. OF ECON. & MGMT. SCI.* 3 (1971). However, there were many antecedents to these articles written during the previous decade making similar points. Michael Levine catalogues these antecedents in *Revisionism Revised? Airline Deregulation and the Public Interest*, 44 *LAW & CONTEMP. PROBS.* 179, 179 n.2, 182 n.10 (1981). Though not a public choice theorist, Milton Friedman made similar arguments of about agency capture as early as 1962. See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 125-28, 137-60 (1962).

111. See generally Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 *YALE L.J.* 1245 (1965); Charles A. Reich, *The Law of the Planned Society*, 75 *YALE L.J.* 1227 (1966); Charles A. Reich, *The New Property*, 73 *YALE L.J.* 733 (1964) [hereinafter Reich, *The New Property*].

112. See generally EDWARD F. COX ET AL., "THE NADER REPORT" ON THE FEDERAL TRADE COMMISSION (1969); JOHN C. ESPOSITO ET AL., *VANISHING AIR* (1970), ROBERT C. FELLMETH, *THE INTERSTATE COMMERCE OMISSION* (1970); JAMES S. TURNER, *THE CHEMICAL FEAST* (1970).

113. See 1 DAVIS, *supra* note 83, at 14-24.

114. See KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE* 24-25 (1969). For references to tyranny, see *id.* at 3.

With the decline of interest group pluralism, academics reevaluated the relationship between courts and the so-called "political branches." Many of the political scientists who decried interest group capture of the political process saw an activist judiciary as the institution that could protect individuals from elite-dominated policy making and, ultimately, rescue the legislature and the executive from the grasp of self-interested pressure groups.¹¹⁵ The very insulation of the federal judiciary from political pressures that had led process theorists to advocate a minimal judicial role became a justification for activism. As Anthony Lewis wrote in his immensely popular 1964 book *Gideon's Trumpet*, the Supreme Court could provide a voice "for those—the despised and rejected—who have no effective voice in the legislative chamber."¹¹⁶ The Warren Court's judicial activism, the "legal liberalism" so eloquently described by Laura Kalman, was an attempt to correct a political imbalance by making the judiciary the institution to counterbalance a legislative branch dominated by interest groups.¹¹⁷

This judicial activism vis-a-vis the legislature had an analog in administrative law. Legal academics called for the democratization of the administrative process. Once again, they argued that the least democratic branch, the judiciary, was best suited for this task because of its isolation from interest group politics. Friendly and Davis suggested that problems of agency capture could be solved by "legalizing" the administrative process; making agencies behave more like courts, and ensuring closer judicial oversight of the administrative actors.¹¹⁸ Like Davis, Jaffe, who had evidenced skepticism about agency capture in the 1950s, was himself calling for a larger judicial role in the administrative process by the mid-1960s.¹¹⁹ Indeed, by the end of the decade, both Davis and Jaffe were particularly intent in expanding standing so as to ensure that agencies would hear all segments of society.¹²⁰

115. See KARIEL, *supra* note 109, at 203-04; MORGENTHAU, *supra* note 95, at 255, 319-20.

116. ANTHONY LEWIS, *GIDEON'S TRUMPET* 211 (1964).

117. KALMAN, *supra* note 2, at 42-59; see also Robert A. Kagan, *The Political Construction of American Adversarial Legalism*, in *COURTS AND THE POLITICAL PROCESS: JACK W. PELTASON'S CONTRIBUTIONS TO POLITICAL SCIENCE* 19-39 (Austin Ranney ed., 1996).

118. See FRIENDLY, *supra* note 108, at 19-22; DAVIS, *supra* note 114, at 54-68; 157-61.

119. See Daniel B. Rodriguez, *Jaffe's Law: An Essay on the Intellectual Underpinnings of Modern Administrative Law Theory*, 72 *CHI.-KENT L. REV.* 1159, 1174-83 (1997).

120. See generally Kenneth Culp Davis, *The Case of the Real Taxpayer*, 36 *U. CHI. L. REV.* 364 (1969); Kenneth Culp Davis, *The Liberalized Law of Standing*, 37 *U. CHI. L. REV.* 450 (1970); Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hofeldian or Ideological Plaintiff*, 116 *U. PA. L. REV.* 1033 (1968).

A younger generation of scholars and legal activists, such as Joseph Sax, John Denvir, Robert Fellmeth, and Simon Lazarus, was even more explicit about the ability of the judiciary to democratize the administrative process.¹²¹ Courts were the institutions to make the administrative process genuinely participatory. John Denvir wrote that the courts were realistically "the political system's only point of access for the individual citizen."¹²² Consequently, the judiciary "has a greater claim to a democratic base than either its legislative or administrative governmental counterparts."¹²³ "[T]he administrative process," wrote Sax, "tends to produce not the voice of the people, but the voice of the bureaucrat—the administrative perspective posing as the public interest Litigation is thus a means of access to the ordinary citizen to the process of government decision-making. It is in many circumstances the only tool for genuine citizen participation in the operative process of government."¹²⁴ These younger scholars then linked their emphasis on participatory democracy with the assertions, which older thinkers like Jaffe, Friendly, and Davis had begun making, about the importance of the rule of law and judicializing the administrative process. Lazarus wrote, "[t]he defense of the public interest . . . [demands] that law be applied to situations where . . . unbridled discretion was formerly the rule."¹²⁵ Thus, courts were the institutions to make the administrative process genuinely participatory.

121. See generally SIMON LAZARUS, *THE GENTEEL POPULISTS* (1974); JOSEPH L. SAX, *DEFENDING THE ENVIRONMENT* (1971); Arthur Earl Bonfield, *Representation for the Poor in Federal Rulemaking*, 67 MICH. L. REV. 511 (1969); Roger C. Cramton, *The Why, Where, and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525 (1972); John Denvir, *Towards a Political Theory of Public Interest Litigation*, 54 N.C. L. REV. 1133 (1976); Simon Lazarus & Joseph Onek, *The Regulators and the People*, 57 VA. L. REV. 1069 (1971). For a detailed discussion of these lawyer/activists, see MICHAEL W. MCCANN, *TAKING REFORM SERIOUSLY: PERSPECTIVES ON PUBLIC INTEREST LIBERALISM* 106-21 (1986); see also Sidney M. Milkis, *Remaking Government Institutions in the 1970s: Participatory Democracy and the Triumph of Administrative Politics*, 10 J. POL. HIST. 51, 59-64 (1998).

122. MCCANN, *supra* note 121, at 114 (quoting John Denvir) (citation omitted).

123. *Id.*

124. SAX, *supra* note 121, at 56-57 (emphasis removed).

125. MCCANN, *supra* note 121, at 119 (quoting SIMON LAZARUS, *THE GENTEEL POPULISTS* 253 (1974)).

IV. FEDERAL COURTS AND THE CHANGING MODELS OF POLICY-MAKING

The federal judiciary was not reluctant to assume this role. It did so by changing a variety of administrative law doctrines in ways that increased judicial scrutiny of the administrative process and opened that process up to parties that it believed were systematically excluded. This form of judicial activism brought legal liberalism to administrative law. The judiciary would become the guardian of participatory administration, democratizing the administrative process, ensuring that it served the public good, and, if all else failed, simply asserting its own institutional prerogative to knock aside corrupt agencies and insert itself into their role.

A. Judicial Review of Administrative Action

If any one area of administrative law could represent the changing assumptions about the proper role of courts in the administrative process, it would be the doctrines relating to the intensity with which the judiciary reviews administrative decisions. During the heyday of interest group pluralism, from the mid-1940s until the end of the 1950s, federal courts approached administrative decision making in the same way that the academics did. While they were increasingly suspicious of expertise, this suspicion did not translate into intense judicial review. It was not until the 1960s and 1970s, with the rise of the ideas of agency capture and legal liberalism, that courts began to review administrative action with little or no deference.

The late 1930s and early 1940s were the high water mark of judicial deference to the administrative process. Federal courts deferred to administrative agencies on factual, legal, and even constitutional issues.¹²⁶ After the Second World War, the Supreme Court began to assert more authority over agencies. As early as 1944, a unanimous Court stated that an agency's legal interpretations should guide courts, but that these interpretations did not bind them.¹²⁷ That same year, in *Addison v. Holly Hill Fruit Farms*, the

126. See, e.g., *Gray v. Powell*, 314 U.S. 402, 411-13 (1941); *NLRB v. Bradford Dyeing Ass'n*, 310 U.S. 318, 342-43 (1940); *NLRB v. Waterman S.S. Corp.*, 309 U.S. 206, 208-09 (1940); *Swayne & Hoyt, Ltd. v. United States*, 300 U.S. 297, 303-07 (1937); *NLRB v. Federbush Co.*, 121 F.2d 954, 956-57 (2d Cir. 1941); see also PRITCHETT, *supra* note 56, at 167-77; JAFFE, *supra* note 1, at 343-44.

127. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944).

Court began to refashion its judicial review jurisprudence to reflect the increasing group pluralist assumptions of the time.¹²⁸

At issue in *Addison* was whether Congress or the administrator of the Fair Labor Standards Act defined the boundaries of an "area of production."¹²⁹ The majority opinion, written by Frankfurter, who was joined by Stone, Reed, and Jackson, was a model of judicial deference to the legislature, but not to the administrative agency. Congress, Frankfurter wrote, did not intend for the administrator to define the area of production. Thus, to give the administrator that power would be a " 'retrospective expansion of meaning which properly deserves the stigma of judicial legislation.' "¹³⁰ Justice Roberts concurred in the result, but for a quite different reason. Roberts believed that Congress did allow the administrator to define the area of production, but to do so was an impermissible delegation of legislative power to the administrator.¹³¹ Both Frankfurter's and Roberts' opinions marked a departure from the judicial role that the expertise-driven, New Deal assumptions about the administrative state required. Neither was deferential to the administrator's decision. Yet neither decision placed the judiciary in the role of aggressively policing administrative actions. Instead, these decisions embodied pluralist assumptions. Frankfurter's did so by deferring directly to the legislature and by suggesting that approval of the agency's acts would be impermissible judicial activism. Roberts' used the delegation doctrine to demand that the legislature rein in the discretion of administrative agencies. Both these visions of the judicial role were consistent with the assumptions of group pluralist policy-making. Not surprisingly, Frankfurter's decision presaged his protege Alexander Bickel's thinking with its emphasis on judicial passivity. Roberts' continued loyalty to the delegation doctrine foreshadowed the thinking of certain administrative law theorists, particularly Louis Jaffe, who manifested their fears of administrative absolutism by calling for a revivification of the doctrine.¹³²

Addison indicated that, on the eve of the passage of the Administrative Procedure Act, the Supreme Court was moving towards increasing judicial supervision of the administrative process, but in a tentative fashion. The Act itself took more steps in that

128. *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 612-19 (1944).

129. *See id.* at 608-10.

130. *Id.* at 618 (quoting *A.B. Kirschbaum Co. v. Walling*, 316 U.S. 517, 522 (1942)).

131. *See id.* at 623-25.

132. *See supra* notes 67-74.

direction, though rather ambiguously.¹³³ Section 10 of the Act created a presumption of reviewability of agency actions and defined uniform standards of review for different types of administrative actions. It seemed to require courts to review agency legal interpretations without any deference whatsoever.¹³⁴ Additionally, courts were to set aside agency actions that were "arbitrary, capricious [or] an abuse of discretion" or if they were "unsupported by substantial evidence."¹³⁵ The Act left these terms undefined, and much debate about their meaning, particularly regarding "substantial evidence" ensued. Some of the Act's proponents thought that this standard was replacing something called the "scintilla rule" wherein even a scintilla of evidence in support of an agency's decision required a court to uphold the agency's action.¹³⁶ Yet, they never referred to specific cases that invoked this rule. Presumably they were referring to New Deal-era cases in which courts simply rubber stamped administrative factual findings.¹³⁷ Indeed, subsequent judicial interpretations of the Act defined the standard in a manner that slightly increased the intensity of judicial review.

The Court's *Universal Camera Corp. v. NLRB* opinion in 1951 best exemplified this increase.¹³⁸ That case involved a NLRB decision to reinstate a worker whom a company had fired for giving unfavorable testimony to the National Labor Relations Board.¹³⁹ The Court had to determine whether the substantial evidence standard in the APA and the Taft-Hartley Act required reviewing courts to examine the entire record (and thus weigh conflicting evidence) or whether all they had to do was to check to see whether the evidence supporting the Board's conclusion was substantial without considering conflicting evidence.¹⁴⁰ Writing for a unanimous Court,¹⁴¹

133. See McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 200 (1999); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1664-65 (1996).

134. See Administrative Procedure Act, Pub. L. No. 79-404, § 10(e), 60 Stat. 237, 243-44 (1946).

135. *Id.*

136. COMM. ON THE JUDICIARY, UNITED STATES SENATE, ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY 377-78, 384 (statements of Sen. Springer and Sen. Robinson)

137. See *supra* note 126.

138. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

139. See *id.* at 476.

140. See *id.* at 477-78.

141. Black and Douglas agreed with Frankfurter's characterization of the standard of review but dissented from the Court's opinion because they agreed with the Court of Appeals that the NLRB's rejection of the trial examiner's findings was binding on the Court. See *id.* at 497.

Frankfurter noted that there was a tendency before the passage of the APA for courts to do the latter.¹⁴² He then examined the legislative history of the APA and concluded that Congress had intended to strengthen the substantial evidence standard so as to require the existence of substantial evidence on the record as a whole.¹⁴³ He also argued that beyond this specific clarification, Congress was expressing a more general desire to increase the degree to which courts supervised administrative agencies. Frankfurter observed that “[w]e should fail in our duty to effectuate the will of Congress if we denied recognition to expressed Congressional disapproval of the finality accorded to Labor Board findings by some decisions of this and lower courts, or even of the atmosphere which may have favored those decisions.”¹⁴⁴ Frankfurter believed that Congress was telling the courts to become more involved in the administrative process: “Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function.”¹⁴⁵ In passing the APA, he said, “Congress expressed a mood.”¹⁴⁶ This mood was to end the profound New Deal-era judicial deference to the administrative state.

Nevertheless, while *Universal Camera* represented a step away from complete judicial passivity, it is wrong to overestimate its effect on the definition of the scope of review. As Frankfurter noted in his opinion, many, if not most, courts examined the entire record when reviewing administrative decisions even before the passage of the APA.¹⁴⁷ Even after *Universal Camera*, the courts remained fairly deferential to the findings of administrative agencies. Most cases articulated the new, presumably tougher, standard of review given in *Universal Camera*, but then went on to engage in a lax review of the administrative legal and factual findings.¹⁴⁸ Indeed, even when agencies were making legal determinations—de-

142. *See id.* at 478.

143. *See id.* at 478-87.

144. *Id.* at 490.

145. *Id.*

146. *Id.* at 487.

147. *See id.* at 478.

148. Later Supreme Court decisions reaffirmed the *Universal Camera* standard but then rubber stamped the administrative findings. *See* NLRB v. Truck Drivers Local Union No. 449, 353 U.S. 87, 96-97 (1957); O’Loary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 508-09 (1951). Both Davis and Jaffe, writing in the late 1950s and mid 1960s, believed that the substantial evidence test was a fairly lax one requiring only that the evidence demonstrate that the decision-maker’s chain of reasoning was rational. *See* 4 DAVIS, *supra* note 83, at 118-30; 137-49; JAFFE, *supra* note 1, at 595-614.

fining statutory provisions, for example—the post-APA decisions were surprisingly deferential. While the language of the APA seemed to provide for vigorous review of agency statutory interpretations, the Supreme Court adopted a deferential attitude towards agency determinations of law. Though the Court stopped its New Deal-era passivity to agency decision-making,¹⁴⁹ it nevertheless recognized that agency expertise justified deference to administrative legal determinations. As the Court held in one of a series of cases upholding agency statutory interpretations in the late 1940s and early 1950s, “ ‘cumulative experience’ begets understanding and insight by which judgments not objectively demonstrable are validated.”¹⁵⁰ This remaining deference would disappear as distrust of the administrative state and of the political branches grew in the 1960s.

The decline of the group pluralist model of policy-making brought to administrative law and theory a profound fear that agencies had stopped serving the public interest and were simply representing the interests of the industries they regulated. This fear manifested itself in administrative law by a marked increase in the intensity with which courts reviewed agency determinations. The emergence of the so-called “hard look doctrine” in the mid-1960s typified this trend. Under this doctrine, the judiciary abandoned whatever degree of judicial deference remained after *Universal Camera*. In instances where it suspected that an agency was not furthering the public interest, it would engage in essentially de novo review of administrative decisions.

Though courts had been applying it since the mid-1960s, the hard look doctrine got its name from a 1970 D.C. Circuit case, *Greater Boston Television Corp. v. FCC*.¹⁵¹ *Greater Boston* involved the judicial review of the FCC’s decision to grant Boston Broadcasters Incorporated (“BBI”) a license to operate a television station serving the Massachusetts Bay area.¹⁵² In 1958, the FCC had granted the license to another company, WHDH. Two years later the Commission had reopened the proceedings when it discovered that the president of WHDH had had several ex parte meetings with the chair of the Commission while the station’s license application was pending. The Commission revoked WHDH’s license and

149. See, e.g., *NLRB v. Highland Park Mfg. Co.*, 341 U.S. 322, 324 (1951).

150. *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 349 (1953); see also *RCA v. United States*, 341 U.S. 412, 419-20 (1951); *SEC v. Chenery Corp.*, 332 U.S. 194, 207-09 (1947).

151. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970).

152. For the extensive and convoluted facts of this case, see *id.* at 844-50.

held a new licensing hearing at which BBI applied to take over WHDH's license. The FCC gave a limited four month license to WHDH, which, after various delays and appeals, came up for renewal in August of 1966. Before this case, FCC policy had been to give a heavy presumption in favor of renewing the licenses of the incumbent licensees. However, the FCC did not renew WHDH's license. After comparing the station's past performance with what it considered to be the great potential of BBI, the FCC awarded the license to BBI. WHDH then appealed to the D.C. Circuit.

On its face, the FCC's decision seemed like one that would be entitled to a great deal of deference. It involved an analysis of facts particularly related to the broadcasting industry that fell within the expertise of the Commission.¹⁵³ Nevertheless, the court engaged in a detailed review of all of the factors the Commission considered. The court stated that the judiciary had to aggressively check the work of administrative agencies. This was particularly true when the agency was required to choose between applicants and there had been instances of *ex parte* contact.¹⁵⁴ It was also true when, as in this case, the agency's policies were in flux.¹⁵⁵ The job of the court was to ensure that the agency had "taken a 'hard look' at the salient problems" and that it had "genuinely engaged in reasoned decision-making."¹⁵⁶ Thus, the D.C. Circuit claimed that "[a] court does not depart from its proper function when it undertakes a study of the record, hopefully perceptive, even as to the evidence on technical and specialized matters, for this enables the court to penetrate to the underlying decisions of the agency, to satisfy itself that the agency has exercised reasonable discretion."¹⁵⁷ Courts and agencies formed a " 'partnership' in furtherance of the public interest, and are 'collaborative instrumentalities of justice.' "¹⁵⁸ The court went on to uphold the FCC's decision, but only after a painstaking review of every factor that the agency had considered in making its determination.¹⁵⁹

153. The FCC was to consider certain facts: past performance, diversity of ownership, integration of management and ownership, and programming proposals. *See id.* at 846.

154. *See id.* at 850.

155. *See id.* at 852.

156. *Id.* at 851.

157. *Id.* at 850.

158. *Id.* at 851-52 (quoting *United States v. Morgan*, 313 U.S. 409, 422 (1941); *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 160 n.24 (D.C. Cir. 1967)).

159. *See id.* at 853-63.

Greater Boston illustrates the manner in which fears of agency capture created increasingly intense scrutiny of administrative decision-making. Ex parte contacts, groups competing for economic benefits, and unexplained shifts in administrative policy were all "danger signals" that interest group politics had subverted the administrative process.¹⁶⁰ The court's job in such a situation was to ensure that the public interest, the interests of those who were not represented before the agency, was satisfied.

The various "hard look" decisions decided before *Greater Boston* also indicated the degree to which fears of agency capture and a general suspicion of the administrative process drove intense judicial review. In *Scenic Hudson Preservation Conference v. FPC*, the Second Circuit in 1965 overturned a FPC decision to license a hydroelectric project in the lower Hudson River Valley.¹⁶¹ In rejecting the Commission's findings, the court chastised it for failing to consider the testimony of the consumer and environmental groups that had appeared before it. "In viewing the public interest, the Commission's vision is not to be limited to the horizons of the private parties to the proceeding[s]." ¹⁶² Instead, the court required the Commission to follow a more participatory philosophy and actively seek out the interests of the public: "[T]he Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission."¹⁶³

The D.C. Circuit demonstrated a similar philosophy in *Office of Communication of the United Church of Christ v. FCC*.¹⁶⁴ Like *Greater Boston*, *United Church of Christ* was an appeal of a licensing hearing. The court had previously ordered the FCC to consider the application of an African-American church group that was trying to revoke the license of a Mississippi television station that broadcast racially offensive material.¹⁶⁵ The Commission had considered the application but still refused to revoke the license. An

160. *See id.* at 851.

161. *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 624-25 (2d Cir. 1965).

162. *Id.* at 621 (quoting *Michigan Consol. Gas Co. v. FPC*, 283 F.2d 204, 226 (D.C. Cir. 1960)).

163. *Id.* at 620.

164. *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969).

165. *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1009 (D.C. Cir. 1966).

obviously annoyed Judge Warren Burger once again returned the case to the Commission: "The Examiner seems to have regarded Appellants as 'plaintiffs' and the licensee as 'defendant,' with the burdens of proof allocated accordingly We did not intend that [the] interveners . . . [would] be treated as interlopers."¹⁶⁶ Further, the court stressed that "[i]ntervenors, who were performing a public service under a mandate of this court, were entitled to a more hospitable reception in the performance of that function."¹⁶⁷ The problem with the Commission's proceedings was that it considered only the interests of the regulated industry and not the public interest: "[a] curious neutrality-in-favor-of-the-licensee seems to have guided the Examiner in his conduct of the evidentiary hearing."¹⁶⁸

The D.C. Circuit was even more forthright in *Moss v. Civil Aeronautics Board*, in which the court overturned a CAB fare formula because the CAB established the formula during meetings from which it excluded the public.¹⁶⁹ According to Judge Skelly Wright, the CAB completely ignored its duty to the public when it set the rates after a series of informal hearings with the airline companies. The Board's obligation to provide carriers with sufficient rates of return "cannot become a *carte blanche* allowing the Board to deal only with the carriers and disregard the other factors, such as the traveling public's interest in the lowest possible fares and high standards of service After all, there is more to rate-making than providing carriers with sufficient revenue to meet their obligations to their creditors and to their stockholders."¹⁷⁰ Wright believed that the airline industry had captured the CAB. It was "unduly oriented towards the interests of the industry it [was] designed to regulate, rather than the public interest it [was] designed to protect."¹⁷¹ The Board was supposed to service the public, not the airline industry: "we emphatically reject any intimation by the Board that its responsibilities to the carriers are more important than its responsibilities to the public."¹⁷²

Greater Boston, Scenic Hudson, United Church of Christ, and *Moss* all demonstrate the manner in which the courts rejected the group pluralist conception of policy making and replaced it with a

166. *United Church of Christ*, 425 F.2d at 546.

167. *Id.* at 549.

168. *Id.* at 547.

169. *Moss v. Civil Aeronautics Bd.*, 430 F.2d 891, 900 (D.C. Cir. 1970).

170. *Id.* at 900-901.

171. *Id.* at 893.

172. *Id.* at 902.

participatory one. The hard look doctrine justified closely scrutinizing agency decisions when the agency appeared to ignore the public interest. If agencies had been captured by the industries that they regulated, then activist courts had to step in to ensure that the public's interests were represented. The main assumption of interest group pluralism—that the interests of all were protected by the clash of organized group interests—was emphatically rejected in these decisions. Agencies that only considered organized interests would often neglect to consider the separate, and often antithetical, public interest. Legal liberalism required that activist courts ensure that the public was included in the administrative process.

The Supreme Court was hardly immune from this changed conception of the policy-making process. In 1971, the Court decided *Citizens to Preserve Overton Park v. Volpe*.¹⁷³ *Overton Park* involved a decision by the Secretary of Transportation to provide federal highway funds to build a freeway through a public park.¹⁷⁴ The Highway Act of 1968 prohibited the use of DOT funds to build highways through parks if a “feasible and prudent” alternative existed.¹⁷⁵ The Secretary found that there was no alternative and approved the funds. He did not, however, explain the rationale behind his decision. Scolding the Secretary for not making formal findings, the Court remanded the case to the district court so that it could determine the basis for his decision.¹⁷⁶

Two aspects of *Overton Park* demonstrate the way in which it harmonized with legal liberalism. First, it evidenced a suspicion that the Secretary did not attempt to discern the public good. The Court pointed out that he ignored a variety of suggestions for alternative routes that citizens' groups made and did not even bother to explain why he dismissed their suggestions.¹⁷⁷ By doing so he was ignoring his obligation to promote widespread participation in the administrative process as was envisioned under a participatory conception of policy making. Second, as in *Greater Boston* and the other hard look cases, the Court mandated a stringent standard of review. Activist courts were to be the method by which participatory government would be ensured. Without citing any case law, the Court declared that the reviewing court should engage in a “thor-

173. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

174. For a description of the facts of this decision, see *id.* at 404-08.

175. See *id.* at 405 (quoting 23 U.S.C. § 138 (1964)).

176. See *id.* at 421.

177. See *id.* at 408-09.

ough, probing, [and] in-depth review."¹⁷⁸ The district court was to exercise "plenary review of the Secretary's decision."¹⁷⁹ Since the Secretary had left no formal record, the Court suggested that the district court require testimony of the administrative officials who made the decision so that it could determine whether they had carried out their statutory duty.

Overton Park generated two responses among judges on lower federal courts. Some judges read it as the Supreme Court's ratification of intensive substantive review of administrative action.¹⁸⁰ In subsequent opinions, circuit courts continued to immerse themselves in the highly technical records of agency decisions in order to judge the merits of those decisions.¹⁸¹ Some of these opinions reflected judicial unease with an administrative process perceived as overly deferential to business interests. For example, in holding that the Atomic Energy Commission failed to comply with the requirements of the National Environmental Policy Act, Judge Wright wrote, "[i]n recent years, the courts have become increasingly strict in requiring that federal agencies live up to their mandates to consider the public interest. They have become increasingly impatient with agencies which attempt to avoid or dilute their statutorily imposed role as protectors of public interest values beyond the narrow concerns of industries being regulated."¹⁸²

Other judges responded to *Overton Park* differently. Uncomfortable with reviewing the substance of decisions about which they had little expertise, these judges required agencies to use particular procedures, such as cross-examination or oral hearings, which the APA did not require, to ensure that the agency made a reasoned decision.¹⁸³ This alternative strategy, however, was motivated by

178. *Id.* at 415.

179. *Id.* at 420.

180. See Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 512-15 (1974); Rabin, *supra* note 10, at 1301-03.

181. See, e.g., *Ethyl Corp. v. EPA*, 541 F.2d 1, 38-53 (D.C. Cir. 1976); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 392-401 (D.C. Cir. 1973); *Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 848-50 (D.C. Cir. 1972).

182. *Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n*, 449 F.2d 1109, 1119 n.21 (D.C. Cir. 1971); see also *Environmental Defense Fund, Inc. v. United States Dep't of Health, Educ., & Welfare*, 428 F.2d 1083, 1087 (D.C. Cir. 1970) (noting that the Secretary of the Department of Health, Education, and Welfare is required to make judgments "from the viewpoint of the food consumer").

183. See *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 650-53 (D.C. Cir. 1973) (Bazelon, J., concurring); David L. Bazelon, *Coping with Technology Through the Legal Process*, 62 CORNELL L. REV. 817, 824 (1977); see also Rabin, *supra* note 10, at 1307-08.

the same participatory concerns that drove the hard look cases. Courts repeatedly added procedures, such as increased notice requirements and requirements of specific agency responses to comments made during rulemaking, that encouraged wider participation in the administrative process.¹⁸⁴ In a 1977 case, the D.C. Circuit most clearly articulated the rationale behind these decisions in *HBO, Inc. v. FCC*.¹⁸⁵

The *HBO* case involved an FCC rulemaking regarding the types of programming that cable television stations would be permitted to carry. After the FCC held its public hearings on the issue and closed its files to the submission of comments, various interested parties, such as representatives of the broadcast and cable television industries, met with the FCC.¹⁸⁶ The subject of these discussions was never placed in the administrative record. The D.C. Circuit held that all of these ex parte contacts were "certainly consistent with often-voiced claims of undue industry influence over commission proceedings."¹⁸⁷ Accordingly, though the APA was silent on the subject, the court established procedures for regulating ex parte contacts during the rulemaking process. It forbade agency officials from having ex parte contact with parties interested in a particular rulemaking after the agency announced in the Federal Register that it would be receiving public comments about a proposed rule. All contacts between the agency and outsiders had to be made through the statutorily mandated notice and comments process. Every comment had to be a part of the administrative record.¹⁸⁸ To do otherwise was to invite agency capture:

[I]f the Commission relied on . . . apparently more candid private discussions in framing the final pay cable rules, then the elaborate public discussion in these dockets has been reduced to a sham. Even the possibility that there is here one administrative record for the public and this court and another for the Commission and those "in the know" is intolerable.¹⁸⁹

Thus, the court required specific procedures designed to prevent capture. The judiciary, once again, had acted as an agent of participatory democracy.

Overton Park and its progeny represent the pinnacle of judicial involvement in the administrative process, the apex of legal

184. See, e.g., *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1022-24 (2d Cir. 1986); *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 251-53 (2d Cir. 1977).

185. *HBO, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1997).

186. See *id.* at 53.

187. *Id.*

188. See *id.* at 57.

189. *Id.* at 54.

liberalism brought to administrative law. By the end of the 1970s, the Court began inconsistently to curtail the intensity of judicial review of administrative action.¹⁹⁰ The results have been ambiguous, with diminished judicial review in some areas and more vigorous review in others.¹⁹¹ During the early and mid-1970s, however, this incoherent regime had not yet come to pass. Instead, an activist judiciary was called upon to tame captured agencies, beholden to the special interests. Courts would force agencies to respond to the will of the people, the public interest, and not bend to the desires of interest groups. The administrative state would be made participatory.

B. The Transformation of Administrative Due Process

A similar shift from group pluralist to participatory legal rules took place in the Supreme Court's administrative due process decisions. Throughout the 1940s and 1950s judicial decisions perpetuated the disparate treatment of individuals and groups under the Due Process Clause. During the 1960s, the Supreme Court changed its interpretation of the Due Process Clause in a manner that promoted individual participation in the administrative process. The Constitution would require substantial procedural protections for all who came into contact with the administrative state, not just well-positioned interest groups. By the end of the 1960s, agencies had lost control of the procedures under which they operated, and an activist judiciary controlled their discretion.

During the immediate post war period, the "rights/privileges distinction" defined federal due process jurisprudence.¹⁹² The Due Process Clause of the Fifth Amendment prevented the federal government from depriving a person of "life, liberty, or property without due process of law . . ."¹⁹³ The rights/privileges distinction re-

190. See *Chevron, U.S.A., Inc. v. National Research Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984); *Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 523-25 (1978).

191. Compare *Chevron*, 467 U.S. at 842-45, and *Vermont Yankee*, 435 U.S. at 523-25, with *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229-34 (1994), and *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 40-57 (1983).

192. For a discussion of the application of the rights/privileges distinction in administrative law, see generally KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE: 1970 SUPPLEMENT* 334-50 (1970); and William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

193. U.S. CONST. amend. V.

lated to the restriction on property deprivations. As originally conceived, due process applied only to property that a person held as a matter of right, something, for example, that a person had purchased. The courts considered a benefit that a person received from the government, for example, a job or welfare benefits, as a privilege that could be revoked at will.

The demise of the rights/privileges distinction resulted from the rise of the participatory ideal of policy making. Before its decline, the distinction slanted administrative due process in favor of regulated groups, whose pre-existing property rights were affected by agency actions, and away from individuals who received gratuitous benefits from the government. With the rise of participatory conceptions of government came a more egalitarian concept of due process that benefited individual recipients of government largess as much as regulated industries.

Before the 1960s, the rights/privileges distinction was a staple of due process jurisprudence. "The benefits conferred by gratuities," wrote Justice Brandeis in 1934, "may be redistributed or withdrawn at any time in the discretion of Congress."¹⁹⁴ In so saying, Brandeis was simply repeating assumptions about due process that were as old as the nation. Many cases arose in the context of government pensions. Again and again, the Court held that since a "pension granted by the government [was] a matter of bounty," Congress could "give, withhold, distribute, or recall" it "at its discretion."¹⁹⁵ Due process only attached to things to which a person had a right, not to things given him as a gratuity.

By the beginning of the 1950s, the rights/privileges distinction was under attack in the Supreme Court. Justices Douglas and Black argued that due process rights existed independently of common law rights and that, consequently, the requirements of the Due Process Clause were triggered when a government action injured a person, regardless of whether a common law right was infringed.¹⁹⁶ Frankfurter and Jackson offered more muddled opinions on the distinction, sometimes embracing it, sometimes rejecting it, and sometimes simply expanding the definition of liberty or property rights so as to trigger the requirements of the Due Process

194. *Lynch v. United States*, 292 U.S. 571, 577 (1934).

195. *Frisbie v. United States*, 157 U.S. 160, 166 (1895) ("The whole control of that matter is within the domain of Congressional power."); *see also* *United States v. Teller*, 107 U.S. 64, 68 (1883); *United States v. Hall*, 98 U.S. 343, 354-55 (1878).

196. *See* *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 142 (Black, J., concurring) (1951); *id.* at 178 (Douglas, J., concurring).

Clause.¹⁹⁷ Until 1954, however, a majority of the Court including Chief Justice Vinson, as well as Justices Burton, Minton, Reed, and Clark, consistently endorsed the distinction.¹⁹⁸ Even after Warren replaced Vinson, Frankfurter's flip-flops ensured that throughout the 1950s the distinction was good law. Thus, the Supreme Court and lower federal courts repeatedly rejected due process claims because the government's action withdrew a privilege that it itself had granted. Aliens could be excluded from the United States without a hearing because citizenship was a privilege, not a right.¹⁹⁹ They could also be deported without hearing all the evidence against them.²⁰⁰ Similarly, the federal government could deny veterans benefits, government jobs, or even Social Security payments without a hearing because each was a "mere gratuit[us]."²⁰¹ In the Supreme Court, Black, Douglas, and, after 1954, Warren regularly dissented from these findings, but their arguments were not enough to carry the Court during the 1950s.²⁰²

As long as the rights/privileges distinction existed, economic interest groups had a profound advantage over individuals because of differences in how the two interacted with the administrative state. Economic actors, and the groups that represented them, possessed the type of rights that, under the rights/privileges distinction, entitled them to due process. Because the government was

197. See *id.* at 164 (Frankfurter, J., concurring); *id.* at 183 (Jackson, J., concurring). Frankfurter dissented from denials of due process in *Jay v. Boyd*, 351 U.S. 345, 370 (1956) (Frankfurter, J., dissenting); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 218 (1953) (Frankfurter, J., dissenting); and *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 547 (1950) (Frankfurter, J., dissenting), but followed the majority in *Flemming v. Nestor*, 363 U.S. 603, 608-11 (1960). Jackson also dissented in *Mezei*, 345 U.S. at 218 (Jackson, J., dissenting), and *Knauff*, 338 U.S. at 547 (Frankfurter, J., dissenting), but signed onto the majority opinion in *Jay*, 351 U.S. at 370 (Frankfurter, J., dissenting).

198. See *McGrath*, 341 U.S. at 137; *id.* at 202 (Reed, J., dissenting). Clark supported the distinction in *Mezei*, 345 U.S. at 207. For other decisions, see *supra* note 197.

199. See *Mezei*, 345 U.S. at 214-16; *Knauff*, 338 U.S. at 542.

200. See *Jay*, 351 U.S. at 354-56.

201. *Slocumb v. Gray*, 179 F.2d 31, 34 (D.C. Cir. 1949); see also *Flemming*, 363 U.S. at 608-11; *Bailey v. Richardson*, 182 F.2d 46, 55-58 (D.C. Cir. 1950), *aff'd*, 341 U.S. 918 (1951) (3-3 decision).

202. Frankfurter dissented from most of these opinions, but these dissents were generally based on statutory construction rather than on constitutional grounds. See *Jay*, 351 U.S. at 370; *Knauff*, 338 U.S. at 547. But see *Mezei*, 345 U.S. at 218 (Jackson, J., dissenting). On the other hand, Frankfurter joined the majority in the most egregious of these cases, *Flemming v. Nestor*, which stripped a naturalized citizen of his social security benefits without a hearing because he had been a member of the Communist party from 1933 until the 1939 Hitler-Stalin pact. *Flemming*, 363 U.S. at 608-11.

regulating their property, due process would attach. Individuals, on the other hand, usually encountered the administrative state when asking for a benefit, be it a free education, a government job, or welfare benefits. Because the court considered all of these to be "privileges," due process rights did not attach. Thus, throughout the 1940s and 1950s, organized economic interests benefited from due process rights to which most individuals had no access.

Organized interests also benefited from procedural rights that the administrative agencies created themselves. The rules of the administrative agencies that existed to regulate certain groups actually protected these same groups even when they were receiving benefits such as licenses. For example, the rules of procedure established by the SEC, the FTC, the ICC, the FCC, and the NLRB each provided the parties that appeared before them with a full range of trial-like procedural safeguards including adversarial hearings, rights to counsel and cross-examination, formal complaints and rules of evidence.²⁰³ By contrast, individuals who had to interact with agencies to get benefits were not guaranteed such rights. For example, the Social Security Administration allowed its officials wide discretion in conducting hearings and gave the parties that appeared before it none of the rights that regulated industries had.²⁰⁴ Accordingly, even if the courts did not require due process, agencies granted procedural rights to the groups that appeared before them. At the same time, individuals who interacted with the administrative state gained no such protections since the agencies that distributed government largess had underdeveloped procedures. Thus, as was fitting during the ascendancy of group pluralist thinking, both courts and agencies provided procedural protections for interest groups, but not for individuals.

This group pluralist regime disintegrated in the 1960s when the Court repudiated the rights/privileges distinction. The first blow to the distinction came in the Court's 1959 case *Greene v. McElroy*.²⁰⁵ *Greene* involved an employee of a government contractor who lost his job after being denied a security clearance based on secret testimony that he had socialized with communists.²⁰⁶ Writing

203. See SEC Rules of Procedure, 17 C.F.R. §§ 201.5-201.13 (1949); FTC Rules of Procedure, 16 C.F.R. §§ 2.3-28 (1949); ICC Rules of Procedure, 49 C.F.R. §§ 1.15-1.98 (1949); FCC Rules of Procedure, 47 C.F.R. §§ 1.801-1.896 (1949); NLRB Rules of Procedure, 29 C.F.R. §§ 101.2-101.18 (1949).

204. See SSA General Rules of Procedure, 20 C.F.R. § 403.709 (1949).

205. *Greene v. McElroy*, 360 U.S. 474, 500-02 (1959).

206. See *id.* at 479.

for the Court, Warren overturned the denial because the National Security Act and the executive order establishing the military's security clearance process did not authorize denials based on undisclosed sources.²⁰⁷ He thus dodged the constitutional issue, but took the opportunity to castigate the executive branch's behavior. He had harsh words for the procedures that the Defense Department used, and he stated explicitly that the Court should judge Congress's and the President's intent against the background of the judiciary's "zealous" protection of the "ancient rights" of cross-examination and confrontation.²⁰⁸ While the majority's rationale was passive enough to get Frankfurter, Harlan (who had replaced Jackson) and Whittaker (who had replaced Reed) to concur, they explicitly distanced themselves from Warren's implications about the validity of the procedures.²⁰⁹

Justice Clark dissented. He first argued that Congress and the President explicitly authorized the procedures that the Department of Defense used.²¹⁰ Clark considered the majority's focus on authorization to be nothing more than a "sleight of hand" by which it turned Greene's privilege to have a security clearance into a right.²¹¹ "[T]he Court . . . has in some unaccountable fashion parleyed [Greene's] employment with [the contractor] into a 'constitutional right.' What for anybody else would be considered a privilege at best has . . . been enshrouded in constitutional protection."²¹² Clark missed the point. The significance of Warren's opinion was not his belief that Greene's job was held as a matter of right, though he did say this.²¹³ Instead, what was most significant was Warren's implication that the existence of the right was irrelevant to a requirement of due process:

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.²¹⁴

207. *See id.* at 504.

208. *Id.* at 496-97.

209. *See id.* at 508 (Frankfurter, J., concurring).

210. *See id.* at 512 (Clark, J., dissenting).

211. *Id.* at 511 (Clark, J., dissenting).

212. *Id.* (Clark, J., dissenting).

213. *See id.* at 492.

214. *Id.* at 496.

For Warren, any injury that the government caused created an independent right of due process. Within a year it would appear that a majority of the Court agreed with him.

In 1961, the Court decided another security clearance case, *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*.²¹⁵ In *Cafeteria Workers*, a cook at a military base was dismissed from her job without a hearing because she had failed to meet the unspecified security requirements of the base. The cook claimed that the dismissal violated her due process rights. The Supreme Court, however, rejected her claim. Even though the majority refused to reinstate the cook, its decision explicitly rejected the rights/privileges distinction. Justice Stewart, who had replaced Burton, explained that whether the cook had a right to a hearing was a question that "cannot be answered by easy assertion that, because she had no constitutional right to be there in the first place, she was not deprived of liberty or property by the Superintendent's action."²¹⁶ Instead, "consideration of what procedures due process may require . . . must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by the governmental action."²¹⁷ Stewart had replaced "right" with "interest." While the majority held that the cook's interest in her job was not great enough to warrant a hearing when contrasted with the security needs of the military base, this substitution marked the death knell of the right/privilege distinction. As the dissent pointed out, the Court "recognize[d]" a new right, the right "not to be arbitrarily injured by the Government," that generated due process protection when governmental action affected a right or a privilege.²¹⁸

The demise of the rights/privilege distinction in *Cafeteria Workers* resulted in a spate of lower court cases mandating due process protections where none had existed before. Before *Cafeteria Workers*, the government could dismiss its workers, expel students from school, revoke licenses, and deny draftees conscientious objector status without hearings. After *Cafeteria Workers*, such hearings were required.²¹⁹ In 1970, the Supreme Court held that welfare re-

215. *Cafeteria & Rest. Workers Union, Local 473 v. McElroy*, 367 U.S. 886 (1961).

216. *Id.* at 894

217. *Id.* at 895.

218. *Id.* at 900 (Brennan, J., dissenting).

219. See *Gonzalez v. Freeman*, 334 F.2d 570, 578-80 (1964) (license revocations). Compare *United States v. Nugent*, 346 U.S. 1, 5-10 (1953), with *United States v. Turner*, 421 F.2d 1251, 1255-56 (3d Cir. 1970), and *United States v. Owen*, 415 F.2d 383, 388-90 (8th Cir. 1969) (con-

ipients were entitled to hearings before the government terminated their benefits.²²⁰ That case, *Goldberg v. Kelly*, nicely illustrates how legal-liberal ideology had destroyed the rights/privileges distinction. "The constitutional challenge," Justice Brennan noted,

cannot be answered by an argument that public assistance benefits are a privilege and not a right The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be condemned to suffer grievous loss and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication.²²¹

Goldberg also illustrates the extent to which this new conception of due process was a product of the emergence of a participatory conception of public policy. Repeatedly citing Charles Reich's work on *The New Property*,²²² Brennan emphasized that government benefits were a method of including more people in the governance of the polity:

From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community.²²³

Thus, *Goldberg* was a prototypical participatory, legal-liberal Supreme Court case. It was an activist, rights-based opinion that sought to bring into the polity individuals who had previously been excluded. As Reich advocated, Brennan used the judiciary to buttress the strength of individuals against an administrative state upon which they had become increasingly dependent. Without such protections, Reich wrote, each person's individuality would be crushed.²²⁴ In *Goldberg*, the Court had established a mechanism for preventing this problem.

Thus, the rise of procedural due process during the 1960s was evidence of the increasing dominance of a participatory, legal-liberal vision of government. During the 1940s and 1950s, administrative due process existed primarily for property holders, labor

scientious objector status); compare *Bailey v. Richardson*, 182 F.2d 46, 56-59 (D.C. Cir. 1950), *aff'd*, 341 U.S. 918 (1951), with *Birnbaum v. Trussell*, 371 F.2d 672, 676-79 (2d Cir. 1966), and *Scott v. Macy*, 349 F.2d 182, 183-85 (D.C. Cir. 1965) (government employment); compare *Hamiltan v. Regents of Univ. of Cal.*, 293 U.S. 245, 262-65 (1934), with *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 155-58 (5th Cir. 1961) (expulsion from school).

220. See *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970).

221. *Id.* at 262-63 (citations and internal quotations omitted).

222. See *id.* at 262 n.8, 265 n.13 (citing Reich, *The New Property*, *supra* note 111).

223. *Id.* at 264-65.

224. See Reich, *The New Property*, *supra* note 111, at 787.

unions, and regulated industries. Only at the beginning of the sixties, when a majority of Justices on the Supreme Court embraced an activist, individual-rights-oriented vision of their role, did administrative due process become something to which all citizens were entitled. Only after eliminating the rights/privileges distinction could the Court satisfy the demands of the participatory vision of government to protect the entire citizenry from administrative abuses.

The demise of the rights/privileges distinction was a triumph for legal liberalism. Courts created a due process doctrine that allowed the judiciary to shape and control administrative procedures. They then structured those procedures in a manner that promoted participatory administration. If the political branches could not be trusted to ensure that individual citizens received the same rights before administrative agencies as powerful interest groups received, then the courts would have to do so.

C. Standing

The rise and fall of group pluralist assumptions about policymaking and their replacement with participatory, legal-liberal beliefs are also evident in changes in standing doctrine. In the context of administrative law, standing doctrine defines who may ask a court to review administrative actions. Accordingly, broader standing doctrine allows courts to exercise greater control over the administrative process because more people can ask courts to review what an agency does. Additionally, if standing doctrine favors certain types of litigants, agencies will be more eager to please, or at least to mollify, these litigants to avoid judicial second guessing of agency judgements.²²⁵

Standing doctrine has never been particularly coherent, but certain generalizations can be made. By the end of the 1930s, the federal judiciary, finally sympathetic to New Deal regulatory programs after six years of Democratic appointees to the bench, articulated a very narrow standing doctrine. To have standing to challenge an administrative action, a litigant had to demonstrate that he had suffered a particular type of injury at the hands of the agency. The party had to have a legal right; that is, a right recognized by the Constitution, statutes, or the common law. A person

²²⁵ See Petor L. Strauss, *Revisiting Overton Park: Political and Judicial Controls Over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251, 1324-25 (1992).

might be injured by an agency, but if that injury did not result from an interference with a legal right, the federal courts would decline to review the administrative action.²²⁶ Thus, power companies that faced increased competition from federally subsidized municipal power providers or from the Tennessee Valley Authority were denied standing to challenge those programs.²²⁷ Similarly, a steel company forced to pay specific wages if it wished to receive government contracts had no standing to challenge the law establishing the rates because it had no right to a government contract in the first place.²²⁸

With the rise of group pluralist ideas about policy making, such a narrow conception of standing became increasingly problematic. Justified, as it was, by notions of administrative expertise,²²⁹ it seemed inappropriately undemocratic, particularly at a time when Americans gazed with horror at the political manifestations of bureaucratic totalitarianism in Europe.²³⁰ Accordingly, by the beginning of the 1940s, courts transformed standing doctrine to bring it into line with the group pluralist assumptions of the time. This change was first intimated in *FCC v. Sanders Bros. Radio Station*.²³¹ *Sanders Bros.* called on the Court to determine whether a competitor had standing to challenge the FCC's decision to grant a radio license. Writing for a unanimous Court, Justice Roberts said that it did. According to Roberts, the issue could be decided by simply looking at Congress's intent in enacting the Communications Act of 1934. Congress provided for an appeal by an applicant for a license or "by any other person aggrieved or whose interests are adversely affected by any decision of the Commission."²³² Roberts reasoned that this language indicated that Congress "may have been of the opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in

226. This doctrine, known as *damnum absque injuria*, was defined in the years before the New Deal. See, e.g., *Moffat Tunnel League v. United States*, 289 U.S. 113, 118-21 (1933); *Alexander Sprunt & Son, Inc. v. United States*, 281 U.S. 249, 254-61 (1930); *Edward Hines Yellow Pine Trustees v. United States*, 263 U.S. 143, 148-49 (1923).

227. See *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118, 142-46 (1939); *Alabama Power Co. v. Ickes*, 302 U.S. 464, 478-85 (1938).

228. See *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125-27 (1940).

229. See *id.* at 127-28.

230. See Schiller, *supra* note 52 (manuscript at 7-8).

231. *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 473-78 (1940).

232. *Id.* at 476.

the action of the Commission in granting the license."²³³ Since Congress had the power to allow this type of litigant into the courts, Roberts found that competitor standing existed.

Sanders Bros. is remarkable for deciding so much with so little analysis. The opinion is so understated that it does not call attention to the fact that it offered no case law to support its outcome,²³⁴ thereby ignoring twenty years of precedent on both sides of the issue of competitor standing.²³⁵ Roberts' assertion that by using the "aggrieved" and "adversely affected" language, Congress intended to allow competitor standing ignored the fact that the Court had held that similar language in the Securities and Exchange Act and the Public Utilities Holding Companies Act did not create competitor standing.²³⁶ Roberts also assumed that Congress had the power to create standing where courts, on their own, had not recognized it.

An explanation of the jurisprudential theory, if not the legal basis, upon which *Sanders Bros.* rested was forthcoming two years later in *Scripps-Howard Radio, Inc. v. FCC*.²³⁷ The question before the Court was similar: Could a competitor challenge the FCC's decision to grant a license? The only difference was that *Sanders Bros.* was a challenge to the license itself, while in *Scripps-Howard* the competitor was asking the Court to stay the granting of the license until the merits of the appeal were heard.²³⁸ Like Roberts' opinion in *Sanders Bros.*, Frankfurter's opinion was curiously lacking in case law. However, *Scripps-Howard* explained the judicial rationale behind both decisions. Like Roberts, Frankfurter based his opinion on Congress's intent. Letting competitors appeal FCC decisions in order to protect the public interest was a worthy goal and one that the Court should respect.

233. *Id.* at 477.

234. Roberts cites a single case, *ICC v. Oregon-Washington Railroad & Navigation Co.*, 288 U.S. 14 (1933). See *Sanders Bros.*, 309 U.S. at 477 n.9. That case, which interpreted the "aggrieved parties" language of the Urgent Deficiencies Act, did not involve competitor standing at all. See *Oregon-Washington*, 288 U.S. at 24-26. At issue was whether an aggrieved party—a state railroad commission—could pursue an appeal with the ICC. See *id.* at 21-22.

235. Compare *Edward Hines Yellow Pine Trs. v. United States*, 263 U.S. 143, 148-49 (1923), with *Baltimore & Ohio R.R. v. United States*, 264 U.S. 258, 266-70 (1924) ("Chicago Junction Case").

236. See Kenneth Culp Davis, *Standing to Challenge and to Enforce Administrative Action*, 49 COLUM. L. REV. 759, 765-68, 787-95 (1949).

237. *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 14-15 (1942).

238. See *id.* at 5.

[T]he purpose of Congress [was] to utilize the courts as a means for vindicating the public interest. Courts and administrative agencies are not to be regarded as competitors in the task of safeguarding the public interest. Courts no less than administrative bodies are agencies of government. Both are instruments for realizing public purposes.²³⁹

Sanders Bros.' and *Scripps-Howard's* progeny demonstrate how this new law of standing, which allowed Congress to authorize parties who were injured "in fact" but not "at law" to appeal administrative decisions, harmonized with pluralist assumptions about policy making. Decisions about the breadth of standing were left to Congress, the most responsive branch of government. Indeed, congressional intent was the justification for this particular method of controlling agencies. Thus, this new standing doctrine was a deeply group pluralist way of envisioning the administrative state. Indeed, this is exactly how the judiciary saw it. In *Associated Industries v. Ickes*, the Second Circuit held that the Bituminous Coal Act gave an association of coal consumers the power to challenge the Secretary of the Interior's regulations setting the price of coal.²⁴⁰ According to the court, because Congress could empower the Attorney General to take legal action to prevent an administrative agency from acting outside of the scope of its powers, there was no reason that Congress could not draft deputies, in the form of interested public litigants, to do the same thing. "Such persons, so authorized, are, so to speak, private Attorney Generals."²⁴¹ Judge Frank thus envisioned a polity where a wide variety of interests could clash before agencies and courts. Justice Frankfurter saw things the same way. The promotion of interest group pluralism guided standing doctrine: "Regard . . . for the importance to correct decision of adequate presentation of issues by clashing interests restricts the courts of the United States to issues presented in an adversary manner."²⁴² Justice Jackson similarly spoke of the need to allow groups to raise the rights of their members, "[t]he only practical judicial policy when people pool their capital, their interests, or their activities under a name and form that will identify collective interests, often is to permit the association or corporation in a single case to vindicate the interests of all."²⁴³

239. *Id.* at 15 (citations omitted).

240. *Associated Indus. v. Ickes*, 134 F.2d 694, 705-08 (2d Cir. 1943), *vacated as moot*, 320 U.S. 707 (1943).

241. *Id.* at 704.

242. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 151 (1951) (Frankfurter, J., concurring) (citation omitted).

243. *Id.* at 187 (Jackson, J., concurring).

Standing had thus become a vehicle for interest representation. Agencies would make their decisions and then interest groups would clash in the courts to determine the validity of the decision. Indeed, throughout the late 1940s and 1950s, courts construed statutes to allow economic interests to battle over the validity of administrative actions in the courts despite the absence of actual legal injuries. Consumers challenged coal and pharmaceutical companies;²⁴⁴ oil, gas and coal companies clashed;²⁴⁵ and advertisers and media outlets met to resolve their differences in the nation's federal courts.²⁴⁶

The beneficiaries of this broadening of standing were, for the most part, a narrow group of interests. After all, under *Sanders Bros.* and *Associated Industries*, Congress still had to authorize appeals by individuals or groups with non-legal injuries. Since this authorization came in the form of regulatory statutes, it was the regulated industries that benefited from the doctrinal change. Additionally, since these injuries were almost always competitive, the main beneficiaries of *Sanders Bros.* and its progeny were commercial competitors and industry groups. Indeed, even in cases which purported to vindicate the rights of consumers, like *Associated Industries*, the consumers at issue were large commercial concerns, not individual people.²⁴⁷ Throughout the 1950s, the only type of non-legal injuries the courts recognized were economic ones. The courts' attitude towards broadened conceptions of standing for non-economic injuries, even where individual liberties were at issue, was considerably more miserly. Indeed, frequently throughout the 1940s and 1950s, the Supreme Court used restrictive doctrines of justiciability to avoid hearing cases involving the rights of individuals.²⁴⁸ Thus, standing doctrine was susceptible to the participatory critique of administrative law; it seemed to have expanded only for the interest groups that represented various vested interests.

244. See *Reade v. Ewing*, 205 F.2d 630, 632-33 (2d Cir. 1953); *Associated Indus.*, 134 F.2d at 704-05.

245. See *City of Pittsburgh v. FPC*, 237 F.2d 741, 746-55 (D.C. Cir. 1956); *National Coal Ass'n v. FPC*, 191 F.2d 462, 463-67 (D.C. Cir. 1951).

246. *Philco Corp. v. FCC*, 257 F.2d 656, 658-59 (D.C. Cir. 1958); *NBC v. FCC*, 132 F.2d 545, 546-49 (D.C. Cir. 1942), *aff'd*, 319 U.S. 239 (1943).

247. It is also worth noting that the only two cases finding that consumers had standing, *Associated Industries* and *Reade*, were both written by Judge Frank. It is unclear whether other judges throughout the country subscribed to this wide conception of standing.

248. See, e.g., *Doremus v. Board of Educ.*, 342 U.S. 429, 430-35 (1952); *Colegrove v. Green*, 328 U.S. 549, 550-56 (1946); *Tileston v. Ullman*, 318 U.S. 44, 44-46 (1943).

The law of standing, like the rest of the administrative apparatus, had been captured.

Considering the power of this critique and its ubiquity during the 1960s, it is not surprising that courts responded to it by broadening standing considerably. This is apparent from the decision in a case we have seen before, *Office of Communication of the United Church of Christ v. FCC*.²⁴⁹ The 1969 decision regarding scope of review was the D.C. Circuit's second one regarding the licensing of WLBT, a Mississippi television station that presented programming supporting racial segregation.²⁵⁰ Four years earlier, when the station's license came up for renewal, the FCC refused to let a church group representing the interests of the black community intervene in the proceedings. The FCC claimed that the station's actions had not injured the church group specifically, and thus the group had no interest in the license renewal.

The D.C. Circuit overturned the FCC's decision and held that the church group must be allowed to intervene. Standing to vindicate the public interest, wrote Judge Burger, could stem from non-economic injuries, such as those which African-Americans suffered when WLBT failed to broadcast programming responsive to the needs of the community it served. That Congress had not authorized courts to hear cases based on this injury, as was required by *Sanders Bros.* and *Scripps-Howard*, was irrelevant. In rationalizing its decision, the court adopted the participatory critique of the administrative state. The Commission was not representing the public interest.

The theory that the Commission can always effectively represent the listener interests in a renewal proceeding . . . is one of those assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear, as it does to us now, that it is no longer a valid assumption . . . neither we nor the Commission can continue to rely on it.²⁵¹

It was clear to the court that the Commission was not looking after the public interest. "We cannot fail to note that the long history of complaints against WLBT beginning in 1955 had left the Commission virtually unmoved in the subsequent renewal proceedings, and it seems not unlikely that the 1964 renewal application might well have been routinely granted except for the determined and sus-

249. *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969).

250. The facts of the case can be found in the D.C. Circuit's first opinion. See *Office of Communications of the United Church of Christ v. FCC*, 359 F.2d 994, 997-98 (D.C. Cir. 1966).

251. *Id.* at 1003-04.

tained efforts of Appellants”²⁵² Only by expanding standing to include people without economic injuries would the genuine public interest be served.

Unless the listeners . . . can be heard, there may be no one to bring programming deficiencies or offensive overcommercialization to the attention of the Commission in an effective manner [Community groups] usually concern themselves with a wide range of community problems and tend to be representative of broad as distinguished from narrow interests, public as distinguished from private or commercial interests.²⁵³

The implication was that the Commission had been captured. Because it routinely dealt with commercial interests, it would not represent the interests of the general public unless prodded to do so.

The Second Circuit made a similar finding in another case we have seen before, *Scenic Hudson*.²⁵⁴ In that case, the court held that people who could claim an injury to an “aesthetic, conservational, or recreational” interest in a particular area of land had standing to intervene in a Federal Power Commission hearing to license a power plant on that land.²⁵⁵ To ensure that the FPC would protect these types of interests, the court required that they be allowed to appeal the Commission’s decision to license the plant. Similarly, in *Palisades Citizens Ass’n, Inc. v. Civil Aeronautics Board*, the court required that the CAB allow a citizens group concerned about noise pollution to intervene in a proceeding to determine whether to approve helicopter service between Washington and Baltimore.²⁵⁶ By excluding the group, the CAB was hindering its own ability to promote the public interest. “The Civil Aeronautics Board has been given the scales of public interest. It must effect a balance.”²⁵⁷ “Its decisions affect not only its primary interest groups but also the general public at large.”²⁵⁸ Thus, by expanding the type of injuries that could give rise to standing, the D.C. Circuit sought to ensure that the administrative process would be representative of all the possible interests bearing on a particular decision. Additionally, consistent with the tenets of legal liberalism, courts, not Congress, would define the injuries that gave rise to standing.

252. *Id.* at 1004.

253. *Id.* at 1004-05.

254. *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 612-15 (2d Cir. 1965).

255. *Id.* at 616.

256. *Palisades Citizens Ass’n, Inc. v. Civil Aeronautics Bd.*, 420 F.2d 188, 193 (D.C. Cir. 1969).

257. *Id.* at 192.

258. *Id.* at 191.

Thus, by the beginning of the 1970s, the scope of standing had become entirely participatory, open to all who were interested in participating in the administrative process, and entirely defined by the judiciary. For example, in *United States v. Students Challenging Regulatory Agency Procedure* ("SCRAP"), the Supreme Court held that a group of law students had standing to challenge an ICC order imposing a transportation surcharge that would increase the price of recycled goods.²⁵⁹ The students' injury was highly attenuated. The surcharge would raise the price of transporting recyclables, which in turn would raise the price of the recycled products themselves. This would lead to a reduction in demand for the products, which would lead to less recycling. Less recycling would cause an increased use of natural resources, which might be taken from the Washington, D.C. area, and increased production of trash, which might be discarded near D.C. The loss of the resources and the increase in garbage would injure the students since they lived in and around the District.²⁶⁰ Despite the extended chain of causation, the Court held that the students had pleaded enough facts to give them standing.²⁶¹ Significantly, the Court stated that the potential for large numbers of people to suffer a similar injury was not a valid reason to deny standing.²⁶² Under the participatory conception of policy-making, this was, in fact, a particularly good reason to allow it.

Admittedly, *SCRAP* was an exceptional case, and the Court has since cut back on standing by adding causation requirements²⁶³ and rejecting claims based on broad societal injuries.²⁶⁴ But viewed at the time, *SCRAP*, along with *Flast v. Cohen*,²⁶⁵ a non-administrative law case decided in 1968 that seemed to put the Court on the road towards allowing taxpayer standing, represented the logical extent of standing in a participatory state. What better way was there to ensure widespread participation in policy-making decisions than by allowing a broad section of the population to challenge any particular decision in court.

259. *United States v. Students Challenging Regulatory Agency Procedure* ("SCRAP"), 412 U.S. 669 (1973).

260. *See id.* at 688.

261. *See id.* at 690.

262. *See id.* at 687.

263. *See Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37-40 (1976).

264. *See United States v. Richardson*, 418 U.S. 166, 169-71 (1974).

265. *See Flast v. Cohen*, 392 U.S. 83, 100-06 (1968).

D. Conclusion

The changes in administrative law that courts made during the 1960s adhered to the tenets of participatory democracy and legal liberalism. The administrative process had to be rescued from the grip of unrepresentative interest groups and placed in the control of the people. Courts were the institution chosen to carry out this task. The judiciary transformed standing and due process doctrines in a manner that required agencies to respond to people and groups that had previously been excluded from the administrative process. Furthermore, courts, not Congress or the agencies themselves, would decide whom the agencies had to listen to and what procedural protections had to be given to them. If an agency failed to respond to this democratization of the administrative process, the courts asserted the power to review and reject administrative decisions that did not comport with the public interest. The administrative state would be forced to listen to the voice of the people, and this voice, it seemed, was most powerfully amplified by unelected federal judges.

V. PARTICIPATORY LEGISLATION

One of the premises of legal liberalism and the participatory critique of interest group pluralism was that the legislative process, like the administrative process, had a difficult time representing the will of the people because entrenched special interests dominated legislatures. It is somewhat ironic, then, that the participatory assumptions that underlay legal liberalism played themselves out in the legislative arena as well as the judicial one. During the 1960s, legislation concerning the administrative state reflected the participatory critique of administration. The two pieces of legislation I will examine in this Section, the Freedom of Information Act ("FOIA") and the citizen suit provision of the Clean Air Act ("CAA"), both trace their genesis to the participatory, legal-liberal thinkers and litigators of the 1960s. Both sought to make the administrative state more inclusive by giving courts more power over agency actions. In a manner that perfectly symbolizes the legal-liberal impulse, both sought to democratize the administrative state by judicializing it.

A. The Freedom of Information Act

The legislative change in administrative law that most obviously reflected participatory assumptions about how public policy was supposed to be made was the Freedom of Information Act, which was signed into law by Lyndon Johnson in 1966.²⁶⁶ FOIA's legislative history hardly began as a tale of participatory democracy. The initial impetus for the legislation came from Joseph McCarthy and his anticommunist allies in Congress who were frustrated by the amount of discretion § 3 of the Administrative Procedure Act gave agencies to refuse to make public internal documents. As the Eisenhower administration used this discretion to stymie anticommunist fishing expeditions into executive agency personnel files, some members of Congress sought to limit agency discretion in determining which materials it would release.

By the end of the 1950s, new participatory rationales for the legislation, which had remained bottled up in committee since 1953, emerged. Several instances in which agencies had used security rationales to cover up corrupt behavior came to light in the late fifties and early sixties. In 1956, it was disclosed that the Bureau of the Budget, the Atomic Energy Commission, the Securities and Exchange Commission, and highly placed White House officials had used § 3 to hide a conflict of interest in an arrangement to sell electrical power to government facilities.²⁶⁷ In 1962, the National Science Foundation became embroiled in a scandal when it was revealed that it had used § 3 to cover up its failure to award certain contracts to the lowest bidders.²⁶⁸

Consequently, supporters of the legislation began to use accusations of capture and other participatory themes to promote its passage. "Access to information about . . . Government," explained Senator Sam Ervin, "is crucial to the citizen's ability to cope with

266. For a complete history of the Freedom of Information Act, see generally BERT A. BRAVERMAN & FRANCES J. CHETWYND, *INFORMATION LAW* 9-12 (1985); Raoul Berger, *Executive Privilege v. Congressional Inquiry*, 12 UCLA L. REV. 1044, 1288 (1965); Thomas C. Hennings, Jr., *A Legislative Measure to Augment the Free Flow of Public Information*, 8 AM. U. L. REV. 19 (1959); and Robert Kramer & Herman Marcuse, *Executive Privilege—A Study of the Period 1953-1960*, 29 GEO. WASH. L. REV. 623, 827 (1961).

267. See Kramer & Marcuse, *supra* note 265, at 689-717.

268. See H.R. REP. NO. 1497, at 5 (1966), reprinted in 1966 U.S.C.C.A.N. 2418, 2422.

the bigness and complexity of government today.”²⁶⁹ The House Committee that reported the bill favorably to the floor used similar language:

A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies. A danger signal to our democratic society in the United States is that such a political truism needs repeating . . . The repetition is necessary because the ideals of our democratic society have outpaced the machinery which makes that society work.²⁷⁰

By phrasing their support of the freedom of information bill in terms of participatory democracy, its supporters attacked the interest group pluralist model of policy-making. Giving information directly to the people, rather than solely to interest groups, would allow the people themselves to make the decisions. As Eugene Patterson, representing the Newspaper Editors Association, testified at the Senate Hearings: “This section has been drawn upon the theory that administrative operations are public property which the general public, rather than a few specialists or lobbyists, is entitled to know or to have the ready means of knowing with definiteness and assurance.”²⁷¹

The final version of FOIA, which unanimously passed both houses of Congress in 1966, was a quintessential piece of participatory policy-making. All agency information was assumed to be public except for materials falling within nine limited, and specifically defined, exceptions.²⁷² Information could be requested by “any person” rather than only by persons “properly and directly concerned” with the information, as was the case with the APA before the FOIA amendments.²⁷³ Finally, FOIA embodied the legal-liberal belief that courts were the best institution for controlling the abuses of the administrative state. While the APA originally made the agency the “primary judge” of whether particular documents should be disclosed,²⁷⁴ FOIA gave that power to the judiciary. Federal district courts were given jurisdiction to enjoin agencies from with-

269. *Hearings on S.1160, S.1336, S.1758, and S.1879 Before the Subcomm. on Administrative Practice and Procedure of the Comm. on the Judiciary on Bills to Amend the Administrative Procedure Act and for Other Purposes*, 89th Cong. 4 [hereinafter *Hearings on S.1160*].

270. H.R. REP. NO. 1497, at 12 (1966), reprinted in 1966 U.S.C.A.N. 2418, 2429.

271. *Hearings on S.1160*, supra note 268, at 130-31.

272. Act of June 5, 1967, Pub. L. No. 90-23, § 552(b), 81 Stat. 54, 55 (1967).

273. *Id.* § 552(a)(3), 81 Stat. at 55.

274. U.S. DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 24 (1947).

holding records.²⁷⁵ Indeed, the statute required courts to place FOIA requests at the front of their dockets and allocated the burden of justifying decisions to withhold materials to agencies whose showing was then subject to de novo review by a court.²⁷⁶

B. The Citizen Suit Provision of the Clean Air Act

While FOIA is the most obvious example of participatory thinking in 1960s administrative legislation, the citizen suit provision of the Clean Air Act of 1970 was more influential in shaping the relationship between courts and the contemporary administrative state. Additionally, the story of how participatory thinking made its way from an abstract idea to a concrete policy—one of the purposes of this Article—can be most completely told in this context. Every link in the chain of causation exists, originating with thinkers and litigators, proceeding to courts and judicial decisions, and resulting in legislation. The creation of the citizen suit provision demonstrates how conceptions of policy-making made their way into case law and how, in reverse of what one might expect, they then traveled from case law into legislation. Newly assumed judicial roles affected the content of legislation.

It is difficult to imagine a statutory provision that embodies the ideology of legal liberalism and participatory administration more perfectly than the Clean Air Act's citizen suit provision. This provision, § 304 of the Act, allowed "any person [to] commence a civil action" against any entity, private or governmental, that was violating the Act or against the administrator of the EPA for failing to perform the mandatory duties required by the Act.²⁷⁷ Thus, the Act invited judicial enforcement if the administrative agency failed to carry out its mandate, thereby tightening judicial control over the administrative process. Additionally, it allowed anyone to trigger judicial involvement. As with the standing and due process cases from the early and mid 1960s, § 304 forced agencies to heed the demands of a broad range of interests because everyone possessed the power to challenge agency action.

That § 304 is a profoundly participatory piece of legislation is evident not only from its effect but also from the stated intentions

275. See § 552(a)(3), 81 Stat. at 55.

276. See *id.*

277. Clean Air Amendment of 1970, Pub. L. No. 91-604, sec. 12(a) § 304(a)(1)-(2), 84 Stat. 1676, 1706 (1970).

of the legislators who enacted it. Advocates of the provision, such as Senators Muskie, Hart, and Cook, repeatedly expressed their fears that agencies were not consistently pursuing the public interest with respect to the environment.²⁷⁸ Witnesses at the hearings held by Muskie and Hart voiced similar fears but in a more sophisticated manner. Their concerns included the problems of agency capture, the political liabilities of enforcement, the insufficient resources of certain agencies, and the various economic incentives to ignore breaches of existing laws designed to protect the environment.²⁷⁹ The solution to this problem was to allow the public to participate in the administrative process by invoking the judicial power against recalcitrant agencies. Not surprisingly environmental advocates stated this principle with great vigor at the hearings. Environmental lawyer David Sive testified that "the best way in which a breath of fresh outdoor air can be mixed into the bureaucratic smoke . . . is by litigation process, in which the tools of the adversary artist, the lawyer, can be so sharply effective I sincerely believe . . . that there is no better way to get at the truth buried in pompous professions of platitudinous positiveness."²⁸⁰ On the Senate floor, the participatory values of legal liberalism were forcefully articulated as well.²⁸¹ Senator Hart quoted from Ramsey Clark's testimony at the hearings:

"The extension of private right [to] . . . persons directly effected or concerned will be essential if private interests are to be protected [H]owever hard it might try, government will never have the manpower, the techniques, or the awareness necessary to enforce the law for all. Private enforcement is the only way the individual can be assured that the rights cannot be violated with impunity [Citizen suits] provide powerful supplementary enforcement . . . and an effective and desirable prod te officials to do their duty."²⁸²

278. COMM. ON PUBLIC WORKS, UNITED STATES SENATE, LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1970, at 349-75; 436-39 (1974) (hereinafter CLEAN AIR ACT)

279. *Hearings on S. 3229, S. 3466, S. 3546 Before the Subcomm. on Air and Water Pollution of the Comm. on Public Works*, 91st Cong. 840 (1970) [hereinafter *Hearings on S. 3229*] (statement of David Sive, environmental lawyer); *Hearings on S. 3575 Before the Subcomm. On Energy, Natural Resources, and the Environment of the Comm. on Commerce*, 91st Cong. 27, 31-32, 35, 40, 112 (1970) [hereinafter *Hearings on S. 3575*] (statement of Joseph L. Sax, University of Michigan Professor of Law and David Sive).

280. *Hearings on S. 3575*, *supra* note 278, at 120.

281. For sentiments similar to those quoted in this paragraph, see CLEAN AIR ACT, *supra* note 277, at 138, 262, 230, 369.

282. *Id.* at 355.

Senator Muskie placed his own conclusions from the hearings in the record: "The concept of compelling bureaucratic agencies to carry out their duties is integral to a democratic society."²⁸³

The connection between the CAA's citizen suit provision and the rise of a participatory conception of the administrative state becomes even clearer when one examines the role that legal-liberal thinkers and litigators played in its enactment. These actors, and the cases they litigated during the early and mid-1960s, established the model for the provision. The most obvious progenitor of § 304 was Joseph Sax, then a law professor at the University of Michigan. Sax, as we have seen, was one of a collection of scholars advocating the use of the judiciary to democratize the administrative process.²⁸⁴ During the early 1960s, Sax observed the difficulty that environmental organizations had getting courts to hear the merits of challenges to governmental actions that endangered the environment.²⁸⁵ He argued that these cases stemmed from an obvious disregard that the administrative state had for environmental considerations in its decision-making process.²⁸⁶ His solution to this problem was quintessentially participatory. America's natural resources should be conceived of as a "public trust,"²⁸⁷ incursions into which any citizen had a right to prevent through the use of the courts: "Public trust law is . . . a technique by which courts may mend perceived imperfections in the legislative and administrative process [It] is, more than anything else, a medium for democratization."²⁸⁸

Sax had a chance to put his ideas into action in the late 1960s when the Environmental Defense Fund approached him to draft legislation for the Michigan legislature limiting pesticide use.²⁸⁹ Though the EDF had requested narrow legislation, Sax instead drafted a law that empowered any person to sue the state or a private party whose actions threatened to damage a natural resource

283. *Id.* at 351.

284. *See supra* text accompanying notes 121-124.

285. *See* Interview with Joseph Sax, Boalt Hall School of Law Professor of Environmental Regulation (Mar. 7, 2000); *see also* *Hearings on S. 3575, supra* note 278, at 28, 45; SAX, *supra* note 121, at 125-48.

286. *Hearings on S. 3575, supra* note 278, at 31-32, 35, 40; SAX, *supra* note 121, at 3-51.

287. SAX, *supra* note 121, at 158-74; Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473, 473-74 (1970).

288. Sax, *supra* note 286, at 478.

289. *See* Interview with Joseph Sax, *supra* note 285.

within the state.²⁹⁰ In March of 1970, as the considerably more moderate Clean Air Act sat in committee, Senators Hart and McGovern introduced a version of Sax's bill in the Senate.²⁹¹ This made the CAA's more constrained citizen suit provision more palatable to potential opponents.²⁹² Sax's thinking also affected the CAA directly. Senator Muskie, the CAA's sponsor, and his staff were all familiar with Sax's ideas.²⁹³

While Sax's fingerprints were all over § 304, he was hardly the only participatory thinker intimately involved with the drafting of the statute. The other link between legal liberalism and the Act, however, was not through the academy; it was through the courts. The successes and failures that environmental litigants had had before the courts during the early and mid-1960s stimulated Sax's own thinking about citizen intervention in the administrative process.²⁹⁴ These cases, most notably the *Scenic Hudson* case and the non-environmental *Church of Christ* case, were mentioned repeatedly throughout the hearings and legislative history of § 304.²⁹⁵ Indeed, the Nixon administration, when it signaled its approval of the proposed legislation, indicated that it believed § 304 was simply reflecting "the trend of existing law."²⁹⁶ The connection between these cases and § 304 was not merely coincidental. David Sive, who had orchestrated the litigation that led to the *Scenic Hudson* opinion as well as several other environmental standing cases, testified in support of the citizen suit provisions of both the CAA and the

290. Sax's statute is reprinted as an appendix to DEFENDING THE ENVIRONMENT. See SAX, *supra* note 121, at 249-52.

291. See *id.* at 247 n.1.

292. See Interview with Leon Billings, former staff member, Senato Committee on Public Works, (Mar. 17, 2000) (active in drafting the Clean Air Act); Interview with Joseph Sax, *supra* note 284.

293. See Interview with Leon Billings, *supra* note 292. See also CLEAN AIR ACT, *supra* note 278, at 352; see Interview with Leon Billings, *supra* note 291. Compare *Hearings on S. 3575*, *supra* note 278, at 27-48 (Sax's testimony on behalf of the Hart-McGovern bill), with CLEAN AIR ACT, *supra* note 278, at 353 (Muskie's memorandum in the legislative history of the CAA).

294. See Interview with Joseph Sax, *supra* note 284.

295. *Hearings on S. 3575*, *supra* note 278, at 28, 32, 33, 43, 46-48, 113, 115, 121; *Hearings on S. 3229*, *supra* note 278, at 841; CLEAN AIR ACT, *supra* note 277, at 356.

296. CLEAN AIR ACT, *supra* note 278, at 214.

Hart-McGovern bill.²⁹⁷ Indeed, Sive met repeatedly with Muskie's staff as they drafted the language of what would become § 304.²⁹⁸

It is not surprising that legal-liberal ideas moved from litigators and courts into legislation. Legal liberalism was based on the premise that courts were the institutions most capable of protecting the rights of individuals. Procedural innovations that promoted participatory administration originated in the courts because liberal lawyers believed courts were the best place to go to bring participatory values to American government.²⁹⁹ These lawyers, in partnership with the judiciary, developed a model for participatory administration. By the end of the 1960s, they also were able to impose the model legislatively; section 304 of the Clean Air Act was the result.

The passage of the Clean Air Act ushered in a period of uncontested judicial dominance of the administrative process that lasted through the 1970s. Section 304 served as a model for citizen suit provisions in no less than fourteen federal statutes.³⁰⁰ Indeed, when the citizen suit provisions of the Clean Air Act and its progeny were combined with changes in judicial review of administrative actions, the broadening of administrative standing, the new due process doctrine, and FOIA, they inserted courts into the administrative process to an extent unmatched since before the Great Depression. Legal liberalism had come to administrative law. Agencies and courts had become partners in the administrative state, but, as Henry Friendly observed with barely disguised satisfaction, "[t]here is little doubt who is considered to be the senior partner."³⁰¹

VI. CONCLUSION

Friendly's quote brings us back to Louis Jaffe. Americans' beliefs about the policy-making process defined Jaffe's psychological conditions for administrative legitimacy. Between 1945 and 1970,

297. *Hearings on S. 3229*, *supra* note 278, at 840-46; *Hearings on S. 3575*, *supra* note 278, at 109-22. Sive described his involvement with this litigation at the hearings as well as in later publications. See David Sive, *The Litigation Process in the Development of Environmental Law*, 13 PACE ENVTL. L. REV. 1, 2-3, 5-7 (1995).

298. See Interview with Leon Billings, *supra* note 292.

299. See MCCANN, *supra* note 121, at 106-21; Kagan, *supra* note 117, at 30-33.

300. For a list of the fourteen environmental statutes, see Cass Sunstein, *What's Standing After Lujan? Of Citizens Suits, Injuries, and Article III*, 91 MICH. L. REV. 163, 165 n.11 (1992); see also 15 U.S.C. § 2073 (1994) (Consumer Product Safety Act).

301. Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1311 n.221 (1975).

the way American intellectuals viewed the political, administrative, and judicial processes of government changed dramatically. The naively optimistic pluralism of the 1950s gave way to a more fragmented and divisive pluralism of the 1960s. In these changed circumstances, different governmental institutions saw their legitimacy wax and wane. In particular, legislative and administrative action was viewed with increasing suspicion while judicial action was defended, perhaps ironically, as the best protector of democratic, pluralist values. In this intellectual context, the psychological requirements of administrative legitimacy shifted. Courts asserted control over the administrative process because American political culture demanded it.

This story of the interaction between political culture and legal rules begins to fill the gaps left by the institutionalists' narratives. Far from being pushed to the periphery of the policy-making process by the growth of the administrative state, by the late 1960s, courts had dramatically inserted themselves into that process, bringing with them an ideological commitment to rights-based, participatory government. Indeed, throughout the twentieth century, judicial involvement with the administrative state ebbed and flowed with the political and ideological currents of the time.³⁰² As this Article has demonstrated, this involvement provided a conduit for ideological interests that clashed with, and provided context for, the growth of the modern administrative state.

My narrative also suggests a place to start as we try to understand the incoherence that has developed in contemporary administrative law. What does contemporary political culture demand of the judiciary? The Supreme Court proclaims its desire to limit judicial review of agency legal decisions, yet subjects the factual predicates of administrative rules to painstaking analysis.³⁰³ It decries the destabilizing effect of lower federal courts' proceduralization of the administrative process, yet it creates an amorphous due process doctrine that begs for judicial manipulation and under-

302. For other examples of this ebbing and flowing, see generally SALYER, *supra* note 9; TOMLINS, *supra* note 9; and Schiller, *supra* note 9.

303. Compare *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-47 (1984), with *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 40-56 (1983). As then-Judge Breyer noted, this allocation of tasks between courts and agencies seems to be "the exact opposite of a rational system[.]" Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 397 (1986). For an illustration of this strange division of duties manifest within a single case, see generally *Allentown Mack Sales & Serv. v. NLRB*, 522 U.S. 359 (1998).

mines predictability.³⁰⁴ It declares citizen suit provisions unconstitutional and then oscillates madly on the breadth with which it will read congressional intent to protect particular litigants.³⁰⁵ It seems that the Court's conception of the proper relationship between the judiciary and the administrative state has lost the coherence that it had since the end of World War II.

When viewed through the lens of political culture, this incoherence becomes easier to understand. The 1980s witnessed two occurrences, the decline of legal liberalism and the political ascendancy of a Republican party committed to a profoundly anti-regulatory agenda.³⁰⁶ On the surface, these phenomena seem compatible. Both are part of a laissez-faire, anti-statist ideology that swept Ronald Reagan into power. They were attacks on two succeeding generations of liberalism, the New Deal's attempt to re-fashion the economic and social order through the administrative state during the 1930s and legal liberalism's attempt to do the same thing through the courts in the 1960s. However, as I have argued, these two reform impulses were profoundly at odds with one another. Attacking them simultaneously was difficult. On the one hand, courts were told that they were to return to their (somewhat mythical) pre-Warren Court days of judicial passivity. On the other hand, continued hostility towards the administrative state supported a substantial judicial role in controlling the administrative process. The political thought of the 1980s provided no clear message to the judiciary as to how it was to interact with the massive administrative apparatus that deregulatory impulses were unable to sweep away. When anti-statist ideology met the reality of an administrative state that could not be eliminated, courts were left to shape legal rules in a political and intellectual environment that

304. Compare *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553-58 (1978), with *Mathews v. Eldridge*, 424 U.S. 319, 332-34, 349 (1976). Then-Justice Rehnquist, the author of the *Vermont Yankee* opinion, later criticized this nebulous due process test. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 559-63 (1985) (Rehnquist, J., dissenting).

305. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571-78 (1992). For the Supreme Court's confusing see-sawing with respect to the zone-of-interest test, see *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 492-95 (1998); *Air Courier Conference of Am. v. American Postal Workers Union*, 498 U.S. 517, 523-31 (1991); and *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 396-403 (1987).

306. See THOMAS FERGUSON & JOEL ROGERS, *RIGHT TURN* 78-133, 114-37 (1986) (regarding the shift to the right and President Reagan's policies); KALMAN, *supra* note 2, at 77-88; Ernst, *supra* note 11, at 207-08; Steve Fraser & Gary Gerstle, *Introduction*, in *THE RISE AND FALL OF THE NEW DEAL ORDER* at xxiii - xxiv (Steve Fraser & Gary Gerstle eds., 1989).

gave them incoherent, contradictory messages. The resulting confusion in administrative law should be no surprise.

