2005

Willis's American Counterparts: The Legal Realists’ Defence of Administration

Robert W. Gordon
Yale Law School

Follow this and additional works at: https://digitalcommons.law.yale.edu/fss_papers

Part of the Law Commons

Recommended Citation
Gordon, Robert W., "Willis's American Counterparts: The Legal Realists' Defence of Administration" (2005). Faculty Scholarship Series. 1403.
https://digitalcommons.law.yale.edu/fss_papers/1403

This Article is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
I Introduction

To an American lawyer, or at least any lawyer familiar with the debates over administrative law and government in the critical years from 1920 through 1940, the voice of John Willis is instantly recognizable. He is clearly one of the gang—the legal realists who were concerned to expand the authority of administrative agencies to govern new areas of economic life; to promote their virtues as policy makers and adjudicators over those of their chief rivals, the courts; to defend them against charges of arbitrariness and absolutism; and to limit the scope of judicial review of their decisions. The voice is familiar in style as well as in substance—the slashing sharp-pointed satirical barbs aimed to puncture the inflated claims of judicial ‘formalism’ and the blunt no-nonsense plain style used to highlight the virtues of civil servants’ ‘functionalism.’ Close your eyes and you could be listening to Thurman Arnold, Reed Powell, or Jerome Frank. Willis is just as witty and quite a bit more succinct.

So Willis and the American realists are evidently steeped in a common set of argumentative modes and rhetorics as well as common aims. Part of my purpose here is to identify those commonalities; but another part is to point to significant points of difference as well, both among the principal American realists and between them and Willis. I find that the exercise of reading through a sizeable chunk of the realist literature on administration has stirred in me a modest rehabilitative urge. The realists did more than make sport of judges, courts, and legal reasoning and naively praise the expertise of bureaucrats, though, to be sure, they did plenty of both. Although the realists were by no means above crude polemics, their arguments at their best are both interesting and complex. My focus here will be on a group of lawyers who were the principal intellectual defenders of the administrative state: John Dickinson, Thurman Arnold, Jerome Frank, and James Landis. These men taught at law schools (Dickinson at Pennsylvania, Arnold and Frank at Yale, Landis at Harvard) but wrote for wide public audiences as well as for academic law reviews. They all had at some point held important administrative posts in the New Deal: Frank as
general counsel for the Agricultural Adjustment Authority, Landis and Frank as SEC Commissioners, Arnold as assistant attorney-general for antitrust, Dickinson as a draftsman (in the Commerce Department) of the National Industrial Recovery Act and defender (in the Justice Department) of other New Deal legislation in litigation challenging its constitutionality. Finally, I want to look at some of the criticisms that have been made of Willis and the American realists – both in their own time and in our own – and consider if they are well deserved.

In the early phases of the great debate over administrative discretion, the American realists were mostly playing defence, responding to a series of wholesale intemperate assaults on administrative arbitrariness and absolutism. Some of these came in the form of decisions and dicta of the US Supreme Court itself in reviewing decisions of administrative agencies and the constitutionality of the legislation creating them.¹ To judge by a casual inspection of the law review, speech, and pamphlet literature, most of the attackers were conservative lawyers who represented business clients, such as those who formed the notorious Lawyers’ Committee of the Liberty League as a public-interest group to denounce and litigate the constitutionality of New Deal legislation. (Such lawyers, incidentally, were evidently motivated as much or more by ideological passion as by clients’ interests. Not surprisingly, lawyers whose actual work for clients most frequently brought them into contact with administrative agencies tended to be much more moderate and circumspect in their criticisms of those agencies and of administrative procedure generally.) The attacks borrowed liberally from English critics such as Lord Hewart: in fact, one of the best-known lawyers of the time, the former solicitor general James Beck, wrote Our Wonderland of Bureaucracy (1932) in open imitation of Hewart’s The New Despotism (1929).² The attacks gained their most powerful domestic intellectual support from Roscoe Pound, the former Harvard dean. Pound had earned a reputation as a critic of the delays and inefficiencies of judicial procedure and of classical jurisprudence as

¹ See, e.g., Jones v. SEC, 298 U.S. 1 (1936) at 23–4, 28 (per Sutherland J.): ‘The action of the Commission [in issuing a “stop order” denying a registrant of securities permission to withdraw its registration statement after the SEC had found it materially misleading] finds no support in right principle or law. It is wholly unreasonable and arbitrary. It violates the cardinal precept upon which the constitutional safeguards of personal liberty ultimately rest – that this shall be a government of laws – because to the precise extent the mere will of an official or an official body is permitted to take the place of allowable official discretion or to supplant the standing law as a rule of human conduct, the government ceases to be one of laws and becomes an autocracy. ... [The SEC’s action could be classed] among those intolerable abuses of the Star Chamber, which brought that institution to an end at the hands of the Long Parliament in 1640.’

'mechanical' and based on outworn dogmas of 'natural law' designed for a 'frontier society.' By the 1930s this eminent legal reformer had become a fierce critic of the New Deal and administrative procedure. Pound wrote the report of the Special Committee on Administrative Procedure of the American Bar Association in 1938 and several follow-up books and articles in 1942 and 1944. His work laid the foundation for legislation, the Walter–Logan Bill of 1939, which sought to impose on all federal agencies a uniform formal quasi-judicial procedure for decision making. The bill would have required all agency decisions to be based on 'substantial evidence' gathered in trial-type hearings and subject to intensive judicial review in the federal courts. Roosevelt vetoed the Walter–Logan Bill in 1940.

Much of the debate on both sides was conducted in exceedingly abstract and general terms. Each side constructed and critiqued a caricature of the other and opposed to the other's vices a romantic conception of its own side's virtues. Critics of administration portrayed it as essentially lawless. Agencies made decisions without announcing in advance what issues were at stake or what the governing rules would be; they found facts without affording any or adequate opportunities for affected interests to challenge the findings; they issued decisions without reasons or explanations; and they sought to insulate these decisions from judicial review. They violated basic principles of separation of powers by using non-judicial process to adjudicate and by combining the functions of prosecutor, investigator, judge, and jury in a single official. The opposite and antidote to administrative arbitrariness and despotism was the rule of law, which could be produced only by ordinary judges in ordinary courts, deciding issues of fact by adversary trials and of law by common law and constitutional principles protecting individual rights to property and liberty.

Defenders responded in kind. At its most abstract, their critique of the judicial conception of the 'rule of law' simply extended the realist critique of 'formalism' and 'conceptualism,' of the idea of law as a 'science

---

5 S. 915, H.R. 6324, 76th Cong. (1939).
6 Roosevelt appointed his own committee, headed by Dean Acheson, to study administrative procedure. That committee's report was the basis for the Administrative Procedure Act of 1946, which remains, though so layered over by statutory exceptions and judicial glosses as to be almost unrecognizable, the general code of US administrative procedure: c. 324. 60 Stat. 327 (1946) (now 5 U.S.C. § 551ff).
of great symmetrical principles,'7 a gapless system from which all sub-rules and particular applications might be derived by an autonomous process of logical deduction. Actual systems of substantive law were riddled with gaps, conflicts, and ambiguities. Juristic conceptions, supposedly transcendent and apolitical, were either outworn dogmas of earlier times (Willis's '18th century constitution,'8 Dickinson's 'Locke petrified into an immortality of infallibility,'9 Holmes's 'Mr. Herbert Spencer's Social Statics'), or simply incorporated political-economic biases reflexively favourable to business interests or comfortable classes. Generalist judges were ignorant of social and economic facts informing administrative policies. The civil trial procedures fetishized by attackers of bureaucracy were mocked as 'trial by combat' – inefficient, protracted, favouring wealthier litigants, able to consider only issues raised by the parties, ludicrously trusting that the clash of opposing distortions will produce truth.11 The antidote to (empty) formalism and (outdated and biased) conceptualism is 'functionalism,' a pragmatic cast of mind bent upon solving concrete problems and armed with expert non-legal knowledge of specialized facts and experience.

At this level the debate, consisting as it did mostly of name-calling, was relatively unilluminating. It got more interesting as the parties got more specific.

II Realist institutional description as argument

Some defenders simply tried to refute the caricatures by detailing how actual agency practice incorporated the due process safeguards that the critics said were missing. Frank asserted that in every SEC proceeding, the agency held public hearings, announced explicit standards for its decisions, made a record, and explained its decisions. It set elaborate procedural safeguards when it was both prosecuting and deciding. It also consulted with the industry about every rule.12 Bureaucracies, he points out in If Men Were Angels, prefer adopting rules to standardless discretion; it is safer. Landis agreed: the prime failing of administrators was using legalism to avoid responsibility for exercising discretion, not exercising

10 Lochner v. New York, 198 U.S. 45 (1905) at 75 (per Holmes J. dissenting).
11 See, e.g., Arnold, Symbols, supra note 7 at 172–98.
12 Jerome Frank, If Men Were Angels: Some Aspects of Government in a Democracy (New York: Harper, 1942) at c. 5 [If Men Were Angels].
discretion arbitrarily. Frank added that agencies have discretion because industries want it. Business groups complain about discretion, but when the time comes to amend statutes, they ask for more; they prefer the speed and informality of relatively informal processes and of dispositions tailored to their particular needs rather than rigid rules. 'Rigid and inflexible prohibitions might well paralyze an industry.' The bureaucratic clumsiness of which regulated interests complain often comes from the effort to make agencies more like courts.

Is the judicial process a superior upholder of the rule of law? Only, the realists argued, if one idealizes the process and ignores its actual functioning. In fact-finding, juries make decisions that are inscrutable, unexplained, and accepted as final and unreviewable. Why should such decisions be considered intrinsically superior to fact-finding by experts? Anyway, even jury trial was more process than most people got from the courts. Many of the decisions nominally issuing from courts were actually made by administrators exercising a practically unreviewable discretion. The police had discretion to arrest, bring charges, and extract confessions from suspects by the third degree. Prosecutors, combining prosecutorial and judicial powers, decided almost all criminal cases through plea bargains. Courts overlooked violations of formal rights and ratified almost all these decisions against the most vulnerable members of society without any real review or oversight. As the field of government action broadened, the 'earlier method of administration through the District Attorney' had been transferred to administrative agencies, usually subject to much stricter constraints. Contrast to prosecutors, Frank points out, the SEC, which has only limited remedies, which it can only enforce after notice and hearing, to businesses well able to defend themselves.

Arnold generalizes the point: all decision processes, including those of courts, have both formal and informal elements. The informal are used when the institution needs to do quick, practical, flexible decision making on the side. Courts preserve their ideal image as repositories of fundamental legal principle by recategorizing practical problem-solving functions as issues of 'procedure' or spheres of 'fact' to which an entirely different logic applies, so that decisions may be made by juries, or special masters, or by reference to criteria apart from substantive law doctrines.

14 Frank, *If Men Were Angels*, supra note 12 at 148, 150.
16 Frank, *If Men Were Angels*, supra note 12 at App. VI.
18 Frank, *If Men Were Angels*, supra note 12 at App. VI.
Finally, the realists ridiculed the notion that judges are more impartial because more independent than administrators of political pressures and influences.  

III Historical critique

Advocates for a broad scope of judicial authority to review acts of administrative agencies often bolstered their case through arguments from Whig history: that Coke in *Bonham’s Case* had declared the principle that acts of irresponsible commissions and even of Parliament must be subject to review, and if necessary adjudged void, for violations of fundamental law in the common law courts; and that this principle had been ratified by the American Revolution and thereafter encoded in American constitutional practice. Most realists did not bother much with these arguments, being content with modernist assertions that times had changed considerably since then and we ought not to be governed by an eighteenth-century, much less a seventeenth-century, constitution. Dickinson accepted the orthodox history but questioned the relevance of Coke’s view of judicial supremacy – part of a search for ‘an effective practical check on a dangerous and otherwise irresponsible sovereign not ruling by popular right’ – to modern democratic government.  

Frank, as usual, took a more iconoclastic approach. He debunked the ‘legendary’ Coke, pointing out that Coke never objected to the Privy Council or Star Chamber; he reproved Coke for hindering the development of flexible equity jurisprudence; he alleged that the procedures of High Commission, except where Puritans were concerned, were generally more efficient and more fair to the accused than those of common law; he debunked the claim that the American founders’ understanding supported judicial supremacy, arguing that Hamilton and Madison distrusted popular government but wanted energy in the executive; he believed that the current vogue for courts as a check on government was a response to the expansion of democracy in the late nineteenth century.

IV Critique of judicial review in practice

To judge by volume of writing, the realists spent more time describing and criticizing how courts had actually reviewed agency actions than they

---

22 Frank, *If Men Were Angels*, supra note 12 at 227
23 Ibid. at 182.
24 Ibid. at 247.
25 Ibid. at 230.
26 Ibid. at 258.
spent on any other topic of administrative law. This emphasis is perhaps more than a little ironic, since the realists' academic agenda was to try to redirect legal studies away from the study of courts. But to make their case that judicial review of administration needed to be limited, it was crucial to show how it had actually been carried out. Dickinson's classic *Administrative Justice and the Supremacy of Law in the United States* (1927), the first major analytic book on administrative adjudication, is largely devoted to examination of Supreme Court cases reviewing agency action.

Dickinson notes that statutory and case law on judicial review of action was usually structured around the distinction between law and fact. Statutes made some agency determinations of fact 'conclusive' or presumptively so. Courts often said that their role was only to inquire into whether the agency had acted within its jurisdiction and, if so, had acted 'arbitrarily.' 'What is substantially the same rule is elsewhere stated in the form that courts will review for error of law, but not findings of fact, at least where, on the evidence, the findings are within the bounds of reason.' Dickinson gives the fact/law distinction the usual realist acid bath. Take *U.S. v. Ju Toy*, where a statute authorized the immigration agency to exclude aliens of Chinese nationality. Ju Toy said he had been born in the United States; the agency 'found' he had been born in China. The Supreme Court said the agency's official determination was conclusive. Dickinson points out that if a court refuses to give any review to agency findings of 'fact,' it is allowing the agency to determine its own jurisdiction.

[Questions of law and fact] are not two mutually exclusive kinds of question, based upon a difference of subject-matter. Matters of law grow downward into roots of fact, and matters of fact reach upward, without a break, into matters of law. The knife of policy alone effects an artificial cleavage at the point where the court chooses to draw the line between public interest and private right. It would seem that when the courts are unwilling to review, [they call the question one of fact]; and when otherwise disposed, they say that it is a question of 'law.'

Yet the courts made even more serious mistakes when, moving in the opposite direction from cases like *Ju Toy*, they converted virtually every question of fact into a question of jurisdiction or law and insisted upon *de novo* review or something close to it. Here Dickinson joined a swelling chorus of Progressive critics of Supreme Court review of rate-making by public utility commissions. To simplify this now tedious but once burning issue: the Supreme Court, since the 1880s, had made itself into a high

---

27 Dickinson, *Administrative Justice*, supra note 9 at 50.
28 198 U.S. 253, cited ibid. at 51.
29 Dickinson, *Administrative Justice*, supra note 9 at 55.
30 The best account I know of this controversy and its centrality to Progressive legal-economic thought is in Barbara Fried, *The Progressive Assault on Laissez-Faire: Robert Hale*
court of errors and appeals from decisions of state regulatory commissions. The Court had held that investors' expectations of a reasonable rate of return were 'property' protected by the Fourteenth Amendment against expropriation by state governments, so that if a commission fixed rates that were unreasonably low because not based on 'fair value,' it was violating the federal Constitution. This doctrine put the federal courts in the unhappy position of having to review rate-making records to police against confiscatory rates. In the famous Ben Avon case of 1919, the Supreme Court said that reviewing courts could not simply accept commission findings based on substantial evidence but must reach a 'determination upon [their] own independent judgment as to both law and facts.'

The obvious problem with allowing objections to jurisdiction or constitutionality to require an independent judicial hearing on all subsidiary facts that might have a bearing on those issues is that it would seem to vitiate the purpose of setting up the agency in the first place. According to Dickinson,

It destroys the effectiveness of administrative regulation by reducing the administrative body to a practical nullity with a barren power of initial recommendation; and it yields no gain in security for the rights of property. Indeed there is an actual loss in security, because greater confusion and not greater certainty is bound to be the outcome of the practice.

Similarly, Landis writes,

In the field of rate-making the effect of the [Ben Avon] case has been to prolong interminably the process of administrative rate-making. A delay of ten or fifteen years, an expenditure of millions of dollars, constant interruption of administrative proceedings by appeals to the courts, have brought the regulator process into contempt. The practice of appealing to the Court on every issue of fact


32 Ibid. at 289. The Ben Avon doctrine of the need for independent review of facts was reaffirmed in St. Joseph Stock Yards v. United States, 298 U.S. 38 (1936) (upholding order of Secretary of Agriculture fixing maximum rates charged by a stockyard company, but stating that reviewing court had to find of its own accord that court would reach the same conclusion about the value of the property); and Crowell v. Benson, 285 U.S. 22 (1932) (holding that federal Longshoreman's and Harbor Workers' Compensation Act, setting up an administrative workers' compensation program for maritime workers, was a constitutional exercise of federal power only if applied to workers falling within the admiralty jurisdiction of the United States, hence whether employee was a maritime worker and about his employer's business at the time of his injury were 'jurisdictional' facts requiring independent judicial determination).
33 Dickinson, Administrative Justice, supra note 9 at 201.
THE LEGAL REALISTS' DEFENCE OF ADMINISTRATION 413

relating to valuation has transformed what should be a businesslike proceeding into a bitter, wrangling lawyers' battle.34

Landis adds, quoting Brandeis J. speaking of the effects of the doctrine on workers' compensation claims, that the 'advantage of prolonged litigation lies with the party able to bear heavy expenses.'35 Lord Hewart argued in The New Despotism that judicial review would lead to less, not more, litigation because agencies would render only decisions they could defend before a court.36 The critics of review of fact asserted that experience had proved otherwise.

But the problem was broader: it was that courts sitting as judges of facts so often judged them ineptly or inappropriately. Again, the public utilities cases presented ample targets for ridicule. By insisting on making an independent assessment of 'fair value,' the courts had waded into the economics of valuation, which, in case after case, it became evident that they grasped only dimly. Their preferred standard seemed to be that 'fair value' meant 'exchange value,' but, as countless writers point out, the test is circular: 'Exchange value is a logically impossible basis for rate-fixing because it depends on prospective income, and so on the rates to be fixed.'37

Also, of course, since courts were often hostile to the purposes of administrative regulation, to allow a broad scope of review of fact was an invitation to the practical nullification of regulatory statutes.38

The main vice of courts as reviewers of law—besides political bias—was the parochialism of lawyers' vision. They tended to assimilate new social problems that arose to the categories and doctrines they were used to and to be suspicious of unfamiliar remedies. Confronted with labour strikes, judicial minds classified them as 'conspiracies.' Reviewing the SEC's 'stop-order' procedure, the Supreme Court decided that the agency could not be allowed to prohibit issuers from withdrawing registrations found to be based on fraudulent or misleading statements because equity courts traditionally lacked that power. 'Legal interference with social forces,' Dickinson declares, in language any realist might have used, 'is hurtful wherever the law pays no regard to the nature and meaning of those forces, but crudely seeks to apply to them rules derived by a mechanical logic from other rules or cases showing formal resemblances that conceal substantial differences.'39

34 Landis, The Administrative Process, supra note 13 at 133.
36 Hewart, New Despotism, supra note 2 at 161–3.
37 Dickinson, Administrative Justice, supra note 9 at 209.
39 Dickinson, Administrative Justice, supra note 9 at 218.
Interestingly, Dickinson did not conclude that the solution was to do away with judicial review. He believed that judges had a potentially valuable function in their role as developers of general principles, concepts, and rules to guide the administrative process. The technical expertise of agencies is narrow; the 'limited and specialized nature of their work, in a measure operate to unfit them for the task of developing general rules of law.' A utility commission looks to solve one case; legal rules have to be founded on 'broader considerations.' Formal legal concepts and categories are useful in that they keep lawyers' eyes on the broad picture, not just the equities of particular cases, and leave room for balancing various interests and equities over a wide run of cases. 

Unfortunately, judicial review in actual practice was often useless, because the courts simply second-guessed administrative decisions case by case, without articulating decisional standards other than vague contentless ones, and gave agencies no guidance in the form of rules or operational standards. For proper performance of the judicial function, a whole new cadre of judges would have to be trained. (More on this below.)

Most of Dickinson's fellow public law realists, however, were more distrustful of courts' capacity, ideology, and equipment.

V Corporate managers have more unaccountable discretion than agencies

Realists thought the more important comparison was not between agencies and courts but between agencies and the private (usually corporate) parties whose decisions agencies sought to regulate or influence. Although personified as individuals, corporations are really organized in bureaucratic hierarchies just as government agencies are; they regulate, tax, and coerce those subject to their power; and although their subjects in theory consent to such exactions, as a practical matter they are often less able to influence their corporate rulers or hold them accountable than they are to respond to many acts of democratic governments. '[P]enalties that private management can impose possess a coercive force and effect that government even with its threat of incarceration cannot equal.' Thus Arnold, referring to the decision of the A&P Grocery Company to close three stores in Cleveland, throwing 2200 people out of work:

In that control over our affairs by a governing force usually referred to as business, we permit great employers almost absolute power over the livelihood of

40 Ibid. at 234
41 Ibid. at 142–51.
42 Landis, The Administrative Process, supra note 13 at 11.
perhaps the greatest percentage of our population, and allow them to use this power without even giving reasons for their action. We do this through a slogan which clothes our great employers with a mystical sanction not differing in effect from the divine right of kings.\textsuperscript{45}

Frank more prosaically points to the defects in the theory that corporations need no regulation because they are restrained by competition and by duties to their shareholders. Corporate managers are not answerable to diffuse shareholders; large firms operate in markets of ‘monopolistic competition’ and take no account of externalities such as effects on employment.\textsuperscript{44} The modern corporation, as Walton Hamilton, a Yale and New Deal colleague of Arnold’s put it, is a private government:

As its anatomy has become rigid, the authority of the corporation has become enlarged. In the good old days, the business unit was a private affair. For the concern was small, there were many to an industry, its contracts were made at arms [length], it was one of two parties of equal power in shaping the terms of the bargain. But, as the business unit has become the corporate estate, it has gone far to usurp the office of the market. Where goods are trademarked, put up in standard packages, passed along routine channels, made notorious by advertising, detail cannot be left to the impersonal operation of economic forces. A flexible price hardly accords with the rigidities of intricate organizations. Decisions in respect to cost, design, promotion, volume of product must be made months before goods are ready to be sold [The] market, when its chance comes, can only confirm or rebut managerial judgment. Where a concern, singly or in concert with its fellows, enjoys a sheltered market, it decrees price, and between itself and its customers becomes both party and judge. Thus one of the two parties to the bargain has been catapulted into a public office.\textsuperscript{45}

Government regulation through administrative agencies, by limiting and imposing rules upon private discretion to coerce, thus enlarges rather than contracting the sphere of liberty. New rights such as the ‘right of reasonable security in bank deposits,’ the right to worker’s compensation, and the rights of labour under the Wagner Act have ‘swelled the charter of liberties.’\textsuperscript{46} The point of legislation requiring the SEC to submit reports on reorganization plans to courts whose approval is sought for those plans is to protect parties, such as small creditors and

\textsuperscript{43} Arnold, \textit{Symbols}, supra note 7 at 217.

\textsuperscript{44} Frank, \textit{If Men Were Angels}, supra note 12 at 167ff.


\textsuperscript{46} James M. Landis, ‘Law and the New Liberties’ (1939) 4 Mo.L.Rev. 105. Compare Willis on the assumption (of legal critics of administration) that danger to liberty comes from the government, ‘not the predatory real estate developers, suppliers of goods and services, salesmen of mining shares etc.’ Willis, ‘Lawyers’ Values,’ supra note 8 at 353.
stockholders, who cannot adequately protect their interests through contract.\textsuperscript{47}

\section*{VI. Arnold's symbolic theory}

Thurman Arnold made a distinct contribution to the debate over the relative virtues of agencies and courts. Like other realists, he debunked the caricatured picture of agencies and the idealized picture of courts in conservative rhetoric:

The distinction between bureaus and courts is important. Courts are bound by precedent, and bureaus are bound by red tape. Of course courts are forced to follow precedent even when it leads to absurd results because of their solemn obligation[s]. But bureaus in allowing themselves to be bound by red tape do so out of pure malice and disregard for the fundamentals of freedom. The distinction between a bureau which is a very bad sort of thing and a commission with quasi-judicial powers is that the commission is more like a court than it is like a bureau. Therefore if we are very watchful of these commissions and see [that their work] occurs only on lower levels, and in comparatively minor matters such as the valuation of railroads, the fixing of rates, workmen’s compensation, banking, taxation, trade regulation, zoning, immigration, irradiation of arid lands, drainage, insurance, and similar things which do not involve the great principles of freedom – as for example a suit for libel and slander, replevin or criminal conversation – we may escape this new form of despotism.\textsuperscript{48}

But Arnold did not find these symbols simply ridiculous: they serve a function – the same kind of function as religious ritual. Societies operate on ‘spiritual’ as well as ‘temporal’ planes. The temporal is the domain of instrumental function and reason, the use of practical means of experimenting to practical ends. The spiritual is the world of (popular, irrational) folklore, meaning, and ideals, the symbols that help people to believe that the world is as they think it ought to be. The dogmas that courts simply apply legal authority, the authority of the constitution, or common law and therefore act as guardians of tradition and principle; that they follow directions of legislatures and are therefore not responsible for the silly things they do; and that they can oversee and correct the decisions of administrative agencies are all necessary to uphold the idea of the rule of law, not men, a beautiful dream of transcendent principles.


\textsuperscript{48} Thurman W. Arnold, 'The Role of Substantive Law and Procedure in the Legal Process' (1932) 45 Harv.L.Rev 617 at 624–5, 626 (substantially repeated in Arnold, Symbols, supra note 7).
above politics and factional interest. Law professors act as the ‘high priests’ of these dogmas and rituals, constantly working to harmonize the output of courts into systems of grand principle.\(^4\)

When the symbol of ‘government by law’ is attacked, the gaunt specter of bureaucracy arises to haunt us. The arbitrary treatment which is accorded us in our daily lives threatens to be no longer tempered by the thought that somewhere above in some cool calm judicial chamber is stored a great mass of counterprinciples which would rise to our aid if we only had time and money to get at them. [Judicial institutions] represent justice in a world where there is little of fairness to the common man.\(^5\)

His realist contemporaries, including Willis, used Arnold’s language in referring to exaltation of the judicial process and idealization of the courts as ‘ritual,’ ‘theology,’ or ‘superstition.’ (Willis greatly admired Arnold and wrote very favourable reviews of his *Symbols of Government* and *Folklore of Capitalism.*\(^6\)) But for the most part they seem to have regarded the ‘spiritual’ plane as simply superfluous mystification, dispensable once people had been helped to see through it and outgrow it. Arnold considered it a permanent aspect of human nature and social life; he saw the social engineer’s job as one of learning how to manipulate symbols and rituals as well as finding functional solutions.

**VII Agencies have distinct advantages in knowledge, functions, and procedures**

Most of what has been reported so far is the realists’ negative case for administrative authority and autonomy: that the judicial process and private governments were just as arbitrary if not more so; that aggressive judicial review, advanced by the reformers as a cure for the ills of administration, was only likely, to judge by the record, to make things worse. But of course they also made a positive case.

The minimum positive case was that the administrative process at its best is just as fair as or more so than the judicial process and that it is also more reliable and more efficient. As previously noted, Frank pointed out that his own agency, the SEC, had in every proceeding explicit standards, public hearings, a record, and published decisions with reasons. The agency consulted with the industry beforehand about every rule. Its procedural rules provided safeguards in the form of internal separation


\(^{50}\) Arnold, *Symbols*, supra note 7 at 224–5.

of functions when the agency was both investigating and prosecuting. On the whole, the agency offered more predictability to affected parties than did courts and common-law procedures. The agency made rules as well as deciding case by case, though it had the advantage over courts of greater flexibility to change the rules if experience suggested that was necessary. It also gave advance interpretive or advisory opinions to industries that requested them.  

More generally, the realists argued that administrative fact-finding is superior because better informed. Agencies conduct their own proactive investigations with expert staff rather than waiting for parties to bring facts to them. They hear evidence from a wide variety of interests, not just the regulated industries. Agency heads and staff are more expert than generalist courts and far more so than lay juries; their investigations of fields of industrial conditions and experience of like cases have soaked them in contextual knowledge. A specialist is more likely to get at the truth of a fact and the meaning of a fact and its implications for policy than a generalist judge who 'cannot maintain a long-time uninterrupted interest in a relatively narrow and carefully defined area of economic and social activity.'  

Best of all, agency staff — certainly as compared to litigation adversaries — are capable of achieving relatively independent and disinterested knowledge and perspective — something more closely akin to science than to advocacy. Landis liked to tell the story of how the SEC went about deciding whether corporations should be compelled to disclose salaries of management and cost of goods sold. Companies complained that disclosure would encourage competitors and large customers to force deep cuts in prices. The SEC sent off a team of lawyers, financial analysts, and accountants. The team found that the information was rarely used in setting prices and that most players in the industry

52 Thurman Arnold, of all people, was eventually to dissent from the general realist view that agencies are more efficient. When he became head of the Antitrust Division and constrained to use the courts as his enforcement instrument, he began to argue that it is precisely the superior symbolic appeal of courts in the political culture that makes them more efficient organs for the carrying out of general state policies, because they can legitimately operate with fewer encumbrances:

Administrative tribunals are never able to apply principles which we regard as fundamental in such a way as to escape constant and harassing judicial reviews. In such situations the administrative process does not save time; it wastes it.... A real investigation without artificial limitations can be conducted in secret before a grand jury. This is a faster and far more efficient process than is possible before any commission. No one argues that the defendants are being denied due process, because the judicial system is the symbol of due process itself.


knew it anyway.⁵⁴ This technique 'could not possibly have characterized the judicial process,' which would have produced only party-supplied information 'subjected merely to the cross-fire of nonspecialized counsel.'⁵⁵

Administrators are also better positioned than courts, the realists argued, to represent the views and interests of constituencies usually frozen out of the judicial process because they are too weak and unorganized.⁵⁶

The main defence of administrators was not, however, that at least in their special fields they do what courts do but do it better: it was that their functions are very different from those of courts. Dickinson, writing in 1927, well before the coming of the New Deal, states those differences modestly. Agencies often adjudicate matters of privilege, government-created rights and benefits, rather than matters of common right. When dealing with common rights, agencies have a different remedial approach: they regulate to prevent future harm, not just to redress or sanction after it has occurred; they look out for the interests of the general public, not just litigants in a particular action; and their instrument is flexible rules based on discretion.⁵⁷

By the time we get to Landis's full-throated paean to administration in 1938, the account of its functions has considerably expanded. The central tasks of administration are not to be compared with adjudication (either of matters reassigned to agencies from the ordinary courts or of claims to government privileges), nor even to legislation, but to executive statesmanship and corporate governance. The function of administration is to formulate 'broad and imaginative' national policy, to become co-partners in management of dysfunctional industries. In this century, 'banking, insurance, utilities, shipping, communications - industries with sicknesses stemming from misdirection as to objective or from failure adequately to meet public needs - all came under the fostering guardianship of the state. The mode of the exercise of that guardianship was the administrative process.'⁵⁸ To the newly created SEC, for example,

It soon became apparent that regulation in this field implied the governance of an industry consisting of investment banker, broker, and dealer. [T]he mere proscription of abuses was insufficient to effect the realization of the broad

⁵⁴ Ibid. at 42-4.
⁵⁵ Ibid. at 45.
⁵⁶ Ibid. at 37. Landis gives the examples of complaints of unfair labour practices; of small creditors or stockholders, given the short end of the stick in corporate reorganizations, who consent to plans because they have no resources to investigate their fairness or contest them in litigation.
⁵⁷ Dickinson, Administrative Justice, supra note 9 at 14.
objectives that lay behind the movement for securities legislation. The primary emphasis of administrative activity had to center upon the guidance and supervision of the industry as a whole. [A]dministrative power, though it may begin as an effort to adapt and make efficient police protection within a particular field, moves soon to think in terms of the well-being of an industry [and thus to] supervision over the economic integrity of industries and their normal development. [The agencies'] tasks are regulatory but regulatory in a broad sense, for to them is committed the initial shaping and enforcement of industrial policies. 59

Given these functions, government agencies are more like corporate managers than judges. 'If in private life we were to organize a unit for the operation of industry, it would scarcely follow Montesquieu's lines. The direction of any large corporation presents difficulties comparable in character to those faced by an administrative commission. [W]hen government concerns itself with the stability of an industry it is only intelligent realism for it to follow the industrial rather than the political analogue.' 60

Landis praises an administrator who 'I believe never read, at least more than causally, the statutes that he translated into reality. He assumed they gave him power to deal with the broad problems of an industry, and upon that understanding, he sought his own solutions.' 61

This account of administration would seem to be the nightmare of Hewart, Pound, & Co. made flesh. 62 But Landis argues that the managerial theory of administration, given effect, among other ways, by the combination of investigating, prosecuting, and adjudicating functions, is subject to important checks - in addition to limited delegation of authority from the legislature and judicial review. Its process moves 'in a narrow field' - and, indeed, the more specialized the agency's mandate, the better. Its 'singleness of concern quickly develops a professionalism of spirit.' (This is particularly true, Landis believed, of the 'independent' commissions set up outside regular executive departments.) Its discretion rapidly becomes structured by rules and regularities: 'Precedents and habits as to the disposition of claims quickly tend to make its discretion, such as it is, the "equitable discretion" of a Court of Chancery.' The

59 Ibid. at 15–6.
60 Ibid. at 10–2.
61 Ibid. at 75.
62 Even Dickinson, who, as we have seen, was relatively sympathetic to administrative authority, thought Landis was going too far: 'Congress would doubtless be greatly surprised if it were to learn that by regulatory statutes, whose enforcement is entrusted to a commission, it has surreptitiously nationalized some of the leading industries of the country by vesting their actual management in a government agency.' John Dickinson, 'Judicial Characteristics of Administrative Regulation' (1948) 29 N.Y.U.L.Q. 239 at 243.
agency usually wants to get the policy 'right' for the industry it regulates; this too constrains its discretion. But the main checks (as Willis, of course, also argued) are political: ‘Placing responsibility directly upon a specific group means that a finger can be publicly pointed at a particular man or men who are charged with the solution of a particular question.’

VIII Some observations looking back

The usual critique of the realist apologists for administration is that they were naïve and arrogant technocrats. They believed that immersion in the ‘facts’ of a social situation or problem would point the way to its correct solution. They posited efficiency, or a utilitarian pragmatism divorced from any ethical or moral foundation, as a unique and sufficient norm. Thus they sought to locate decision-making authority in an elite of civil-service boffins who had the command of facts and practical intelligence to know what to do and the competence to carry it out. They were contemptuous of, or at best indifferent to, both the rule of law and its value as protection of the vulnerable from arbitrary government act, and democratic accountability; yet at the same time naïve about how easily their corps of elite administrators could be captured by and turned to the ends of political and economic power holders. David Dyzenhaus, in his contribution, has made a strong case that at least some of these strictures apply to John Willis. I will leave the defence of Willis to colleagues more competent to make it, and ask how far the critique applies to his American counterparts.

The charge of naïve instrumentalism seems to fit Arnold and Landis pretty well, as of course it does a host of Progressive intellectuals and policy makers. A persistently irritating feature of Arnold’s writing is the blithe assumption that, once the formalist scales of illusion have been scraped from their eyes, smart sensible fellows immersed in the technical facts of policy problems will briskly arrive at the appropriate practical solutions. Over and over Arnold identifies particular solutions to hard problems—like deterring and punishing criminal conduct—as obviously correct and desirable if one only faces the problems with a mind uncluttered by mythic illusions and ideologies. (Arnold did not, however, put much faith in either the objectivity or the immediate practical payoff of social science; he had done too much of it himself.) We have seen in Landis’s defence of administration a similar confidence in disinterested

---

64 Ibid. at 28.
specialized expertise. Frank, who had devoted his intellectual efforts to debunking the illusion of determinacy and objectivity in the ‘facts’ found by courts, was fully aware that administrative fact-finding was just as much a value-laden dispute-riddled enterprise. He simply thought that specialists not in the pay of industry, informed by research and experience, could probably do a better job of finding facts and proposing solutions than generalist and ideologically hostile courts, adversary advocates, and lay juries. Policy making based on objective truth might be impossible, but comparatively superior inquiry was achievable.66

In all these writers there is some uncertainty about where the norms and aims of the administrative enterprise are to come from. For Landis they come from general legislative directives identifying a problem and asking the agency to solve it. Arnold seems more disposed to have the administrator identify norms from his own practical analysis of the efficient consequences of policy; in practice, as head of anti-trust enforcement, this led him to dispose of some traditional aims of policy such as controlling bigness and protecting small business in favour of ‘efficiency,’ defined solely as benefits to the consumer. His entire declared normative agenda is set by the ‘standard that it is a good thing to produce and distribute as much goods as the inventive and organizing genius of man makes possible.’67 (This is, of course, a norm, if a rather pinched one.) Frank always saw himself as a lawyer acting for a client, though, to be sure, a rather vague client such as ‘the President’s program’ and ‘the purposes of the statute’ as rather liberally interpreted by the administrator; but also in the service of what he believed were the New Deal government’s general norms of preserving the market system by enforcing its preconditions (adequate disclosure of company information to the financial markets), taming its worst excesses, and limiting its harmful externalities.

Were they hostile to the ideal of the rule of law – and, in particular, to its protections of the vulnerable? On this count I think they must mostly be acquitted. The leading administrative realists – Frankfurter, Arnold, Landis, Hale, Frank, Douglas, and Dickinson, among others – were also civil libertarians. They fully appreciated the benefits of legal processes to protect the vulnerable. But, unlike the American Bar Association and other critics of administration, they were unwilling to equate the judicial process and its norms as they then existed with the rule of law. As we have seen, they complained that criminal defendants got virtually no process

66 Frank, If Men Were Angels, supra note 12 at 136-7.
67 Thurman W. Arnold, The Folklore of Capitalism (New Haven, CT: Yale University Press, 1937) at 177. I say ‘declared’ because one cannot read Arnold’s work without perceiving his strong attachment to humanitarian commitments, albeit rationalized in the hardboiled language of efficiency.
at all. Administrative decisions affecting vulnerable individuals such as immigrants were rarely reviewed or reversed by courts. As Frank and Arnold repeatedly point out, ordinary people — especially people seeking redress or relief from arbitrary and tyrannical acts of corporations — got very little protection from courts, since they could neither contract for fair treatment nor afford access to litigation; and even if they got to a court, it was likely to be hostile to their claims. Sometimes their best hope was an administrative process that undertook guardianship of their interests.

In other words, most of the US realists actually accepted many of what Willis called lawyers' values; they just denied that these were consistently or reliably followed by judges, corporate lawyers, and their clients or adequately protected through common law procedures, *laissez-faire* constitutionalism, and ham-handed and hostile review of regulatory action. Dickinson, the jurist most sympathetic to judicial review of administrative decisions, thought current judges trained in formalist habits performed it very ineptly; his book ends with an entire chapter outlining how a new corps of lawyers and judges would have to be educated to do the job properly. (They must be educated to see law as dynamic and evolving, serving broad social and ethical purposes, requiring application to rapidly changing environments that can be appreciated only by study of history and social and economic facts.)

What about the charge of indifference to democratic processes and values? Again, this best fits Arnold — ironically, the only realist with actual experience of electoral politics, as a member of the Wyoming state assembly and later mayor of Laramie. Arnold's view of the *demos* in his principal writings was of a superstitious herd that could, and should, be managed by the manipulation of symbols while an elite of private and public managers attended to the utilitarian agenda of maximizing welfare. At times this led him towards an admiration of extremely antidemocratic and even fascist administration, if it proved itself 'efficient,' though he was a strong critic of the persecutions of fascist and communist regimes, usually for the typically hardboiled reason that they were inefficient. As administrator of the anti-trust division, he was extraordinarily effective in using the resources of the office to bring a record number of prosecutions but ultimately hampered by the fact that his technocratic or functional view of anti-trust had, as Alan Brinkley has put

---


69 This critique was levelled against the realists generally, and Arnold specifically, in their own time. It was revived in a fine article by Douglas Ayer, 'In Quest of Efficiency: The Ideological Journey of Thurman Arnold in the Interwar Period' (1971) 23 Stan.L.Rev. 1029, and is developed at length in an excellent recent comprehensive treatment of Arnold's ideas: Mark Fenster, 'The Symbols of Governance: Thurman Arnold, Post-Realist Legal Theory, and Social Criticism' (2003) 51 Buffalo L.Rev. 1053.
it, 'no symbolic foundation and no real constituency beyond the small cadre of lawyers and experts he recruited to the field of antitrust law.'

Most New Deal realists, however, thought they had amply sufficient democratic mandate in Roosevelt’s popularity and Congressional majorities. As the realists saw it, powerful institutions and their lawyers were using rule of law rhetoric – out of professional or class parochialism or outright bad faith – in order to delegitimate attempts to tackle society-wide problems through bureaucratic government and to develop doctrines to effectively hamstring executive action. In short, they were using rule of law values to sabotage urgently needed and democratically approved efforts to recover from the Great Depression and to place controls on capitalism that would enable it to function in the public interest. The realist counter-effort was to try to build up the authority, prestige, and legitimacy of an alternative model of professional action in the public service, exemplified by lawyers and economists such as themselves.

This could not be a purely antiseptic, apolitical model of governance: there was no way to separate ‘administration’ from ‘politics,’ given broad delegations of discretion to administrators to set policies. Landis, Frank, and Arnold, among others, understood that agency heads would have to help build broad political support for their policies in Congress and among outside interest groups, cultivate political friends and alliances, and publicize the agency’s accomplishments.

Given the realists’ commitment to thickly contextual description of institutional functioning, it is, to say the least, a curiosity of the realist literature on administration that it has so little to say about political influences on the administrative process. Obviously they were aware of the problem of ‘capture,’ as it came to be called, or anyway of ad hoc

70 Alan Brinkley, ‘The Antimonopoly Idea and the Liberal State: The Case of Thurman Arnold’ (1993) 80 J.Am.Hist. 557 at 579. I am not entirely persuaded that this is true. Arnold spent a good deal of his abundant time and energy going around the country giving speeches to business and consumer groups and radio audiences and writing articles for popular periodicals trying to advocate and popularize the goals of his antitrust policy. He did, however, blow much of his political capital by bringing a major antitrust prosecution against a union – admirably even-handed, but so offensive to an important pillar of the New Deal constituency that both President Roosevelt and the new Supreme Court majority slapped him down for it. As Brinkley points out, the major reason for the collapse of his program was that anti-trust policy gave way to the corporatist alliances that were forged to win business cooperation in the war effort.

71 There was an interesting internecine controversy over whether these should be permanent career civil servants who were coming up the ranks or bright-plumed birds of passage, brilliant lawyers and economists on leave from academia or private practice. The realists generally favoured exemptions from civil-service requirements that would permit hiring the latter for important New Deal jobs.

72 See, e.g., Landis, The Administrative Process, supra note 13 at 62.
attempts of special interests to intervene into administrative decisions, since, as agency heads, they had to deal with it all the time. Political scientists had extensively described and analysed the phenomenon.\textsuperscript{73} Landis refers to several such instances in his book.\textsuperscript{74} The main concern for defenders of administration was to try to insulate agencies from such \textit{ad hoc} pressures. Landis, for one, believed that part of the solution was to locate agencies outside executive departments; in 1938 (though he was later dramatically to revise this view) he believed that 'independence seems to be the rule of political growth for economic power.'\textsuperscript{75} The realists assumed that 'politics' in the sense of special-interest-group pressure on agencies was an obstruction to 'democracy,' understood as the mandate to solve problems in the public interest. It is a fair critique of them that, in the service of the project to defend administration and to promote its independence, they tended to romanticize the process in the same ways, though hardly to the same extent, as conservative lawyers romanticized courts and the judicial process.\textsuperscript{76}

\textsuperscript{73} See, \textit{e.g.}, E. Pendleton Herring, \textit{Public Administration and the Public Interest} (New York: McGraw-Hill, 1936), especially c. 13 ('Shielding Regulatory Commissions from Politics').

\textsuperscript{74} See, \textit{e.g.}, Landis, \textit{The Administrative Process}, supra note 13 at 61–2, 111–2.

\textsuperscript{75} Ibid. at 112–3.

\textsuperscript{76} Of all the realists, Walton Hamilton seems to have been most alert to problems of capture, articulating them as early as 1940. See, \textit{e.g.}, Walton Hamilton & Irene Till, 'Antitrust: The Reach after New Weapons' (1940) 26 Wash.U.L.Q. 1. This made him leery of the independent-commission model of administration; he leaned rather towards syndicalist or corporatist sorts of arrangements, such as governance by representatives of business, labour, and consumers. I am indebted for this insight to work in progress of Professor Malcolm Rutherford of the University of Victoria, 'Walton H. Hamilton and the Public Control of Business' (10 May 2004) [unpublished].