

**The “Administrative Process” at the 1940s Court:  
A Study in Intellectual and Jurisprudential History**

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## INTRODUCTION

The decade between 1940 and 1950 can fairly be characterized as one of the most momentous in the formation of modern American government. The decade began with an unsuccessful attempt to enact a code of administrative procedure to govern the actions of federal agencies, many recently created during the New Deal.<sup>1</sup> It continued with the Nation's entry into a global war that, on the domestic front, brought on an expansion in the size and scope of government typical of countries engaged in military conflict.<sup>2</sup> Following the culmination of World War II, the decade saw a second effort to enact a code of administrative procedure, this one successful when Congress passed, and President Truman signed into law, the Administrative Procedure Act of 1946 (APA) — the principal substance of which still survives, and still governs agency action, to this day.<sup>3</sup>

Matters were no less momentous at the Supreme Court. During the first half of the decade, the composition of the Supreme Court shifted, as several Justices who had at times displayed hostility to increased government power at the federal level were replaced by Justices who had played a role in the federal government's expansion during the Roosevelt Administration.<sup>4</sup> Substantively,

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<sup>1</sup> See, e.g., Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L. J. 908, 981-85 (2017).

<sup>2</sup> Mariano-Florentino Cuéllar, *Administrative War*, 82 Geo. Wash. L. Rev. 1343, 1422 (2014) (“During the period of World War II and its immediate aftermath, the federal government carried out unusually challenging administrative feats while gradually orienting itself towards expanding the regulation of markets and administering public benefits.”); see also Adrian Vermeule, *Leviathan Had a Good War*, JOTWELL (Feb. 29, 2016) (“Cuellar explains that the war, rather than the New Deal, represented the key ‘inflection point’ in the growth of the administrative state. . . . [T]he burgeoning administrative state was cemented into place during and by World War II, and by the odd political consensus that created the Administrative Procedure Act of 1946—a key legitimating mechanism for Leviathan.”).

<sup>3</sup> 5 U.S.C. 501 *et seq.*

<sup>4</sup> See, e.g., STEPHEN G. BREYER & RICHARD B. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 22 (3d ed. 1992) (“In a relatively short time, the Supreme Court (and with it, much of the lower federal judiciary) swung from almost undisguised hostility toward the new programs of the administration to conspicuous deference.”). The new Justices were Felix Frankfurter, Hugo Black, Stanley Reed, William Douglas, Frank Murphy, James Byrnes (briefly), Robert Jackson, Wiley Rutledge, and Harold Burton. They replaced Willis Van Devanter, George Sutherland, Benjamin Cardozo, Louis Brandeis, Pierce Butler, James McReynolds, Harlan Stone, Charles Evans Hughes, and Owen Roberts.

both before and after the enactment of the APA, the Court issued a series of decisions, many still taught in introductory courses on “administrative law” and still compiled in treatises on the subject.<sup>5</sup> On the question of judicial deference to executive interpretation of statutes, the Court decided *Gray v. Powell* (in 1941),<sup>6</sup> *Skidmore v. Swift & Co.* (in 1944),<sup>7</sup> *NLRB v. Hearst Publications* (also in 1944),<sup>8</sup> and *Packard Motor Car Co. v. NLRB* (in 1947)<sup>9</sup> — all staples of the introductory administrative law curriculum.<sup>10</sup> On the question of judicial deference to executive interpretation of agency utterances, the Court decided *Bowles v. Seminole Rock & Sand Co.* (in 1945)<sup>11</sup> — which gave birth to a doctrine still sometimes called “*Seminole Rock* deference.”<sup>12</sup> On the question of agency decisionmaking, the Court decided two cases (in 1943 and 1947) captioned *SEC v. Chenery Corp.*<sup>13</sup> Other lesser-known cases were no less important in the development of the Twentieth Century American state. Through the decade, the terms “administrative law” and “administrative process” — previously unknown in Supreme Court opinions — were used with increasing frequency.<sup>14</sup>

This article — part of a larger project to unearth the development of administrative law by the 1940s Court — discusses the development of administrative law during the 1940s in three distinct areas. First,

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<sup>5</sup> By contrast, the seminal cases decided by the Court during the 1930s tend no longer to be the focus of an administrative law course. To the extent that they are raised, they are typically used to illustrate doctrines, such as the nondelegation principle, that have been all but discarded.

<sup>6</sup> 314 U.S. 402 (1941).

<sup>7</sup> 323 U.S. 134 (1944).

<sup>8</sup> 322 U.S. 111 (1944).

<sup>9</sup> 330 U.S. 485 (1947).

<sup>10</sup> WALTER GELLHORN ET AL., ADMINISTRATIVE LAW, CASES AND COMMENTS 379-80 (8th ed. 1987) (stating that, during the 1940s, the “historical building blocks” for deferential judicial review of agency legal interpretation were put in place).

<sup>11</sup> 325 U.S. 410 (1945).

<sup>12</sup> It also known as “*Auer* deference” after a more recent case. See *Auer v. Robbins*, 519 U.S. 452 (1997).

<sup>13</sup> 332 U.S. 194 (1947); 318 U.S. 90 (1943).

<sup>14</sup> The term “administrative process” first appears in a Supreme Court opinion in *Helvering v. Wilshire Oil Co.*, 308 U.S. 90, 101 (1939) (Douglas, J.) (“Such dilution of administrative powers would deprive the administrative process of some of its most valuable qualities—ease of adjustment to change, flexibility in light of experience, swiftness in meeting new or emergency situations. It would make the administrative process under these circumstances cumbersome and slow.”). The term, of course, was the title of an influential book on administrative law by James M. Landis, *The Administrative Process* (1938). The term “administrative law” first appears in *ICC v. Jersey City*, 322 U.S. 503, 514 (1944) (“This raises an important but not a new question of administrative law . . .”).

I address the standard of review for judicial control of agency action using newly found draft opinions by members of the Supreme Court in two seminal cases, *Gray v. Powell* and *Bowles v. Seminole Rock*.<sup>15</sup> The jurisprudence of the 1940s Supreme Court — and these two cases specifically — set the stage for the doctrine of judicial deference most famously associated in modern times with the Supreme Court’s 1984 decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>16</sup> Second, I address the shifting constitutional standard under the Fourth Amendment for obtaining evidence by subpoena in the course of a government investigation. The jurisprudence of the 1940s Court in this area provided the jurisprudential building blocks for the large-scale government investigations that characterize the work of many administrative agencies today. Finally, I address the subtle change in the rules governing the authority to delegate within an agency, specifically, the greater flexibility that the Court began to grant agency heads who sought to “subdelegate” tasks to their subordinates.<sup>17</sup>

Viewed in isolation, these three doctrines may appear to address vastly different aspects of American administrative law — and, indeed, law in general. But taken together, they set the contours for the life cycle of government action during the formative years of the post-War administrative state. First, who was to initiate and to conduct an investigation? (The jurisprudence of delegation helped answer that question.) Second, what investigative techniques were available to investigators? (The jurisprudence of subpoenas helped answer that question.) And finally, once a decision was reached, what standard governed the relationship between courts and administrators in review of the decision? (The jurisprudence of judicial review of agency action helped answer that question.)

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<sup>15</sup> Some of my thoughts regarding the draft opinion in *Seminole Rock* were previously published as a blog post at Aditya Bamzai, *Henry Hart’s Brief, Frank Murphy’s Draft, and the Seminole Rock Opinion*, Yale J. on Reg.: Notice & Comment (Sept. 12, 2016). At present, I have selected these two cases because I have sufficient research about them to include a discussion that enhances our knowledge of the development of administrative law during the 1940s. In the Library of Congress, I have also discovered letters between Felix Frankfurter and others touching upon these issues. When I obtain further information about other cases, my intention is to expand this article to create a narrative of the law’s development from 1940 to 1950. In addition to those two cases, I have obtained (or am in the process of obtaining) draft opinions and correspondence about the other opinions previously mentioned in the text.

<sup>16</sup> 467 U.S. 837 (1984).

<sup>17</sup> For a recent analysis of the question of “subdelegation,” see Jennifer Nou, *Subdelegating Powers*, 117 Colum. L. Rev. 473 (2015).

There are at least three reasons to explore the development of administrative law during the 1940s. *First*, and most concretely, the Court's opinions issued during that era may still be relevant to us today — either because the cases remain the governing law or because they provide some evidence of Congress's understanding of technical terms it elected to use when it enacted the APA in 1946. To take one example, the law of agency evidence-gathering depends in large part on cases decided during the 1940s that relaxed the Fourth Amendment standard for agency investigative techniques. As one casebook explains, “[m]odern courts still profess to recognize several sources of limitation on the subpoena power of agencies, but none of them are especially stringent” — because of the decisions of the Court during the 1940s.<sup>18</sup> This state of affairs is now taken for granted, but that was not always the case. Writing in 1953, Louis Jaffe remarked that “[n]othing in the law . . . better illustrates the enormously increased reach of government in the last fifty years than does the broadening of the power of administrative investigation.”<sup>19</sup> The broadening of agency investigative techniques in this manner has had surprising ripple effects throughout American law — including the ability of the government to compel by subpoena information held by businesses that bears on the privacy of third-party private individuals.<sup>20</sup>

To take another example, witness the Solicitor General's argument in the recent *Perez v. Mortgage Bankers Association* case<sup>21</sup> that the “leading decisions of [*Skidmore*] and [*Seminole Rock*] . . . were both decided more than a year before the APA's enactment” and that the “Court's *Seminole Rock* decision . . . confirmed—prior to the enactment of the APA—that [ ] deference principles apply on judicial review.”<sup>22</sup> Based on this premise, the Solicitor General contended that “[t]he Congress that enacted the APA would have understood that courts construing agency regulations would defer to [interpretive rules].”<sup>23</sup> The date of the Court's decisions in these cases, according to the Solicitor General, provided some evidence of the meaning of the APA.

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<sup>18</sup> Ronald A. Cass et al., *ADMINISTRATIVE LAW: CASES AND MATERIALS* 711 (7th ed. 2016).

<sup>19</sup> Louis L. Jaffe, *ADMINISTRATIVE LAW: CASES AND MATERIALS* 274 (1953).

<sup>20</sup> This topic, which I address below, is soon to be the subject of a Supreme Court decision, which technically addresses the Fourth Amendment's “third-party doctrine.” See *Carpenter v. United States* (cert. granted 2017).

<sup>21</sup> 135 S.Ct. 1199 (2015).

<sup>22</sup> Br. for the United States, *Perez v. Mortgage Bankers Association*, at 13, 21.

<sup>23</sup> *Id.* at 21.

To be sure, there is a broader question whether this exercise in what may be termed “APA originalism” is a sound approach to administrative law.<sup>24</sup> Several recent articles have adopted this approach to understanding administrative-law questions.<sup>25</sup> The justifications for such an approach range from the superiority on policy grounds of the APA as a governing document to the claim that the APA is, simply put, the law.<sup>26</sup> But the alternative — involving what might be termed “common law” development of administrative principles unmoored from a statutory foundation — has, in many respects, been the dominant approach at the Supreme Court.<sup>27</sup> If the “APA originalism” approach is a sound one — an issue that cannot be fully explored in the space of this Article — the jurisprudential and intellectual debates of the 1940s may inform our understanding of the text of the APA, as the Solicitor General’s argument in *Perez v. Mortgage Bankers* suggests.<sup>28</sup>

*Second*, and more abstractly, the jurisprudential developments reflect the intellectual undercurrents of their time — and, hence, tell us how a generation of Supreme Court Justices viewed the problems of judicial review of agency action. Justice Reed’s draft opinions in *Gray v. Powell* reflect his intense study of the distinction between agency review of questions of fact and questions of law, a matter that was the subject of significant debate in the immediately preceding decade.<sup>29</sup> Justice Murphy’s draft opinion in *Bowles v. Seminole Rock* suggests that the case turned in significant part on the Court’s belief that the agency interpretation at issue in the case reflected the “original intent” of the operative regulation.<sup>30</sup> More

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<sup>24</sup> See, e.g., Michael E. Herz, *Breaking News: New Form of Superior Agency Guidance Discovered Hiding in Plain Sight*, JOTWELL (Feb. 16, 2017); Gary Lawson, *Federal Administrative Law* 310-11, 351-52 (7th ed. 2016).

<sup>25</sup> See, e.g., Kevin Stack, *Preambles as Guidance*, 84 G.W.U. L. Rev. 1252 (2016).

<sup>26</sup> See, e.g., Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 NYU J. of Law & Liberty 475 (2016) (“By adopting the APA, the Congress intended to apply th[e] tradition [of limited government, checks and balances, and strong protection of individual rights] to governance of the administrative state. Yet courts have since declined to give full effect to the judicial review provisions of the APA.”).

<sup>27</sup> Gillian E. Metzger, *Embracing Administrative Common Law*, 80 G.W.U. L. Rev. 1294 (2012); John F. Duffy, *Administrative Common law in Judicial Review*, 77 Tex. L. Rev. 113 (1998).

<sup>28</sup> To be sure, there is an additional question — also not addressed in this Article — whether the use of draft opinions, correspondence, and other forms of “judicial history” to understand the meaning of judicial opinions is valid. See, e.g., Adrian Vermeule, *Judicial History*, 108 Yale L. J. 1311 (1999).

<sup>29</sup> Bamzai, *Origins of Judicial Deference*, at 971-76.

<sup>30</sup> *Id.* at 930-47.

broadly, the fifth section of Kenneth Culp Davis' influential treatise on Administrative Law, published in 1951, contains an extended narrative to illustrate how some (contrary to Davis' view) might believe that "[t]he rapid shift of power from business to government, with the increasing centralization in Washington, contributes to what may easily become an uncontrollable force pulling the nation irresistibly into dictatorship."<sup>31</sup> "A book which develops this thesis," Davis' treatise observes, "is Hayek, *The Road to Serfdom* (1944), which has been a best seller."<sup>32</sup> Here, we see an unusually close connection between the thought leaders of administrative law, the thought leaders of economics, and the public — a subject worthy of reflection to understand why American governance evolved as it did.

*Third* — and perhaps most abstract of all — we ourselves live in a period during which extensive reforms to the APA are being contemplated and may well be enacted.<sup>33</sup> And such enactments (should they occur) may well happen against the backdrop of a shifting Court, both in terms of personnel and also, it would appear, in terms of jurisprudential approach to judicial review of agency action.

The entire premise of the current Congress' actions is that something like "APA originalism" will be the methodology that courts use to understand the new reform proposals — if the legislature enacts them. Yet the Court's simultaneous alterations of the underlying interpretive framework make it hard to establish the backdrop against which the Congress is legislating. The parallels with the state of 1940s administrative law, both statutory and judicial, are striking: Shifting jurisprudence and new statutory enactments. Reflecting on the developments of the 1940s, as a result, may provide tools with which we may assess the developments of our own age.

This article begins in Part I with an outline of the general analytical framework that the Justices of the 1940s Court inherited. In Part II, I address the changes that the Court made during the decade of the 1940s, including by assessing the drafting process in two important opinions of the 1940s, *Gray v. Powell* and *Bowles v. Seminole Rock*.

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<sup>31</sup> Kenneth Culp Davis, *Administrative Law* § 5, at 20 (1951).

<sup>32</sup> *Id.* at 20 n.52. Later, Davis criticizes Hayek for believing that the "exercise of delegated power is undemocratic." *Id.* § 16, at 56 n.75 (citing Hayek, *Road to Serfdom* at 68-69).

<sup>33</sup> See Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 Admin. L. Rev. (forthcoming 2017).

In Part III, I address implications from the changes made by the 1940s Court for American law and governance today.

## I. The Preexisting Legal Regime

To understand the Supreme Court’s administrative law jurisprudence of the 1940s, one must appreciate the foundation upon which the Justices built.<sup>34</sup> In this Part, I summarize the then-existing law in three discrete areas — standard of review, Fourth Amendment limits on administrative investigation, and subdelegation — to set the stage for how the Court in the 1940s changed the jurisprudential framework. In addition, where sources are available, I spell out the criticisms that this framework received from prominent commentators — some of whom would very shortly thereafter become members of the Court themselves.

### A. The Standard for Judicial Review of Agency Action

For present purposes, I will illustrate the then-prevailing consensus on judicial review of agency action with a single case — the Court’s 1932 decision in *Crowell v. Benson*.<sup>35</sup> In *Crowell*, the Court addressed a decision by an agency that adjudicated workman’s compensation cases involving injured maritime workers. *Crowell*, the Deputy Commissioner of the United States Employees’ Compensation Commission, had entered an award in favor of an employee (Knudsen) against his employer (Benson) under the Longshoremen’s and Harbor Workers’ Compensation Act.<sup>36</sup> The Deputy Commissioner found that Knudsen was injured while employed by Benson and performing services on the navigable waters of the United States.<sup>37</sup> Benson sought to enjoin the

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<sup>34</sup> Exemplary recent accounts of this era can be found in *Tocqueville’s Nightmare: The Administrative State Emerges in America, 1900-1940* (2014), and Mark Tushnet, *Administrative Law in the 1930s: The Supreme Court’s Accommodation of Progressive Legal Theory*, 60 *Duke L. J.* 1565 (2011); see also Caleb Nelson, *Adjudication in the Political Branches*, 107 *Colum. L. Rev.* 559 (2007).

<sup>35</sup> 285 U.S. 22 (1932). The selection is not a random one. As Professor Vermeule notes, “the true climax” of Professor Daniel Ernst’s recent book on early twentieth-century administrative law “occurs in 1932” when “the great Chief Justice Charles Evans Hughes undertook his titanic effort to forge a charter of compromise, a treaty of peace, between the administrative state and the rule of law” in *Crowell v. Benson*. Adrian Vermeule, *Portrait of an Equilibrium*, *New Rambler Review* (Apr. 24, 2015); see also Adrian Vermeule, *Law’s Abnegation* 12 (2017). The story of the process by which the Court reached *Crowell* has been well told elsewhere. See, e.g., Henry P. Monaghan, *Constitutional Fact Review*, 85 *Colum. L. Rev.* 229, 247-54 (1985).

<sup>36</sup> 285 U.S. at 36 (citing Act of Mar. 4, 1927, ch. 509, 44 Stat. 1424; 33 U.S.C. 901-950).

<sup>37</sup> *Id.* at 37.

enforcement of the award in federal district court, arguing that Knudsen was not at the time of his injury Benson's employee and that, hence, Knudsen's claim was not "within the jurisdiction" of the Deputy Commissioner.<sup>38</sup> The district court granted a *de novo* hearing on the facts and the law, and held after a bench trial that Knudsen was not employed by Benson — a judgment that the court of appeals affirmed.<sup>39</sup>

The issue before the Court turned on whether the Due Process Clause of the Fifth Amendment or Article III required the fresh review of the questions of fact decided by the Deputy Commissioner. The parties agreed, and the Court acknowledged, that the "[r]ulings of the deputy commissioner upon questions of law are without finality" such that "full opportunity is afforded for their determination by the Federal courts through proceedings to suspend or to set aside a compensation order."<sup>40</sup> With respect to questions of fact, however, "[a]part from cases involving constitutional rights,"<sup>41</sup> the Court understood the Act to "contemplate[]" that the Deputy Commissioner's findings "supported by evidence and within the scope of his authority, shall be final."<sup>42</sup>

The Court addressed the questions of Due Process briefly,<sup>43</sup> and considered the "contention based upon the judicial power of the

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<sup>38</sup> *Id.*

<sup>39</sup> See 45 F.2d 66; 38 F.2d 306; 33 F.2d 137.

<sup>40</sup> 285 U.S. at 45-46. The statute authorized a reviewing court to "suspend[] or set aside, in whole or in part, through injunction proceedings" any order "not in accordance with law." See also 285 U.S. at 49 ("The Congress did not attempt to define questions of law, and the generality of the description leaves no doubt of the intention to reserve to the Federal court full authority to pass upon all matters which this Court has held to fall within that category.")

<sup>41</sup> *Id.* at 46 (noting that "the statute contains no express limitation attempting to preclude the court . . . from making its own examination and determination of facts whenever that is deemed to be necessary to enforce a constitutional right properly asserted" and that "no such limitation is to be implied"). The Court was thinking of cases such as *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 289; *Ng Fung Ho v. White*, 259 U.S. 276, 284-85; *Prendergast v. New York Telephone Co.*, 262 U.S. 43, 50; *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 443-44; *Phillips v. Commissioner*, 283 U.S. 589, 600; *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 390.

<sup>42</sup> 285 U.S. at 46.

<sup>43</sup> The Court concluded that "[t]he use of the administrative method for these purposes, assuming due notice, proper opportunity to be heard, and the findings are based upon evidence, falls easily within the principle of the decisions sustaining similar procedure against objections under the due process clauses of the Fifth and Fourteenth Amendments." *Id.* at 47; see also *Long Island Water Supply Co. v. Brooklyn*, 166 U.S. 685, 695; *Crane v. Hahlo*, 258 U.S. 142, 147; *FTC v. Curtis Publishing Co.*, 260 U.S. 568, 580; *Silberschein v. United States*, 266 U.S. 221, 225; *Virginian Ry. Co. v. United States*, 272 U.S. 658, 663; *Tagg*

United States” to be “a distinct question.”<sup>44</sup> Relying on the Court’s 1856 decision in *Murray’s Lessee v. Hoboken Land and Improvement Company*, Chief Justice Hughes noted that Congress could not “withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.”<sup>45</sup> The Court distinguished between “cases of private right” and “those which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the legislative and executive departments.”<sup>46</sup> Although the case was, the Court noted, one of “private right” (because it involved “the liability of one individual to another under the law as defined”), there was no “constitutional obstacle” to Congress’s adoption of a factfinding “method” that, in the Court’s view, was “shown by experience to be essential in order to apply its standards to the thousands of cases involved, thus

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*Bros. & Moorhead v. United States*, 280 U.S. 420, 442; *International Shoe Co. v. FTC*, 280 U.S. 291, 297; *Dohany v. Rogers*, 281 U.S. 362, 369; *Hardware Dealers Mutual Fire Ins. Co. v. Glidden*, 284 U.S. 151; *N.Y. Cent. R.R. Co. v. White*, at 194, 207-08; *Mountain Timber Co. v. Washington*, at 233; *ICC v. Louisville & Nashville R. Co.*, 227 U.S. 88, 93; *The Chicago Junction Case*, 264 U.S. 258, 263; *United States v. Abilene & Southern Ry. Co.*, 265 U.S. 274, 288; *ICC v. Baird*, 194 U.S. 25, 44; *Spiller v. Atchison, T. & S.F. Ry. Co.*, 253 U.S. 117, 131.

<sup>44</sup> 285 U.S. at 49.

<sup>45</sup> *Id.* at 49 (quoting 59 U.S. 272 (1856)).

<sup>46</sup> *Id.* at 50 (noting that *Murray’s Lessee* distinguished between “matters, involving public rights . . . which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper”); *see also id.* (“Thus the Congress, in exercising the powers confided to it, may establish ‘legislative’ courts (as distinguished from ‘constitutional courts in which the judicial power conferred by the Constitution can be deposited’) which are to form part of the government of territories or of the District of Columbia, or to serve as special tribunals ‘to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it.’”) (footnote omitted). The Court relied on *Ex parte Bakelite*, 279 U.S. 438; *American Ins. Co. v. Canter*, 1 Pet. 511; *Keller v. Potomac Electric Power Co.*, 261 U.S. 428, 442-44; *Postum Cereal Co. v. California Fig Nut Co.*, 272 U.S. 693, 700. The Court further observed that “[f]amiliar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans.” 285 U.S. at 51; *see Virginia Ry. Co. v. United States*; *Tagg Bros. & Moorhead v. United States*; *International Shoe Co. v. FTC*; *Phillips v. Commissioner*; *United States v. Ju Toy*, 198 U.S. 253, 263; *United States v. Babcock*, 250 U.S. 328, 331; *Burfenning v. Chicago, St. P., M. & O. Ry. Co.*, 163 U.S. 321, 323; *Bates & Guild Co. v. Payne*, 194 U.S. 106, 109; *Houston v. St. Louis Packing Co.*, 249 U.S. 479, 484; *Passavant v. United States*, 148 U.S. 214, 219; *Silberschein v. United States*, 266 U.S. 221, 225.

relieving the courts of a most serious burden while preserving their complete authority to insure the proper application of the law.”<sup>47</sup>

But the flexibility to use administrative factfinding, even in “private rights” cases, extended only to claim determinations “within the purview of the Act.”<sup>48</sup> “A different question,” the Court concluded, “is presented where the determinations of fact are fundamental or ‘jurisdictional,’ in the sense that their existence is a condition precedent to the operation of the statutory scheme.”<sup>49</sup> The term “jurisdictional,” the Court observed, “although frequently used, suggests analogies which are not complete when the reference is to administrative officials or bodies.”<sup>50</sup> In this context, “[i]n relation to administrative agencies, the question in a given case is whether it falls within the scope of the authority validly conferred.”<sup>51</sup> And in this instance, with respect to the Longshoreman’s Act, the “fundamental requirements are that the injury occur upon the navigable waters of the United States and that the relation of master and servant exist,” because “[t]hese conditions are indispensable to the application of the statute . . . because the power of the Congress to enact the legislation turns upon the existence of these conditions.”<sup>52</sup> That was because Congress was unable to “reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction.”<sup>53</sup>

The Court continued:

In relation to these basic facts, the question is not the ordinary one as to the propriety of provision for administrative determinations. Nor have we simply the question of due process in relation to notice and hearing. It is rather a question of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions. It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an

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<sup>47</sup> 285 U.S. at 54.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* (footnote omitted).

<sup>50</sup> *Id.* at 54 n.17.

<sup>51</sup> *Id.*; see also *ICC v. Humboldt Steamship Co.*, 224 U.S. 474, 484.

<sup>52</sup> 285 U.S. at 54-55.

<sup>53</sup> *Id.* at 55 (“If the person injured was not an employee of the person sought to be held, or if the injury did not occur upon the navigable waters of the United States, there is no ground for an assertion that the person against whom the proceeding was directed could constitutionally be subjected, in the absence of fault upon his part, to the liability which the statute creates.”).

administrative agency — in this instance a single deputy commissioner — for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law.<sup>54</sup>

The contours of the *Crowell* framework could be expressed in the following three statements. First, the Court presupposed, though it did not expressly hold, that courts reviewed questions of law *de novo*, without deference to agencies. Second, where private rights were concerned, agencies could give deferential judicial review, under a “substantial evidence” standard to a factual determination made by the agency itself. Third, as to “jurisdictional facts” and “constitutional facts,” courts could not defer to agency factual determinations, but rather would have to conduct independent fact-finding.<sup>55</sup>

Justice Brandeis, joined by Justices Roberts and Stone, dissented. He found no basis to conclude that Article III required a *de novo* trial of the existence of the employer-employee relation.<sup>56</sup> Off the Court, the *Crowell* opinion received the attention of Judge Learned Hand and then-Professor Frankfurter.<sup>57</sup> Three weeks after *Crowell* was decided, Hand wrote Frankfurter that he had “read the long opinions in the case about the Workmens Compensation and

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<sup>54</sup> *Id.* at 56-57.

<sup>55</sup> For later Hughes Court opinions addressing the same subject, see *Morgan v. United States* (1936).

<sup>56</sup> *Id.* at 80 (Brandeis, J., dissenting).

<sup>57</sup> Additional color on the case may be found in two blog posts by Professor Daniel Ernst: <http://legalhistoryblog.blogspot.com/2015/09/note-walter-gellhorn-on-crowell-v-benson.html> and <http://legalhistoryblog.blogspot.com/2012/05/crowell-v-benson-view-from-butlers.html>.

Brandeis certainly floored them for fair.”<sup>58</sup> “It seems,” Hand continued, “to me one of the most unnecessary and wanton distinctions that they have got off of late.”<sup>59</sup> Frankfurter responded that he, too, disagreed with Hughes’ opinion. He sarcastically continued,

and so it came to pass that Alexander Hamilton and James Madison and the other Fathers, by conferring the “judicial power” upon the courts, wrote into the Constitution the requirement that whether a longshoreman suffered an injury in connection with admiralty matters or was the employee of the boss or sub-boss, must forever, world without end, be tried *de novo* in federal court and cannot be determined upon the record of a hearing before some other functionary.<sup>60</sup>

Frankfurter’s correspondence with then-Justice Stone portrayed the result in *Crowell* in even more apocalyptic terms. In a letter, Frankfurter said that he was “in mourning” and that *Crowell* made him “wonder whether law is really my beat.”<sup>61</sup> Chief Justice Hughes’ opinion, in Frankfurter’s opinion, was “the result of a very jejune, unreal conception of administrative law,” with the notion that employment was any “more jurisdictional than any other fact upon which liability depends” a game “much more sterile than the speculations of the Schoolmen.”<sup>62</sup>

### **B. Fourth Amendment Limitations on Administrative Investigations**

In addition to a standard of review requiring — for constitutional reasons — *de novo* review of agency resolution of legal questions and some factual questions, the governing legal framework before the 1940s imposed serious limitations on agency fact-gathering

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<sup>58</sup> Letter from Learned Hand to Felix Frankfurter (Mar. 16, 1932) (on file with author)

<sup>59</sup> *Id.*

<sup>60</sup> Letter from Felix Frankfurter to Learned Hand (Mar. 18, 1932) (on file with author).

<sup>61</sup> Letter from Felix Frankfurter to Harlan Fisk Stone (Feb. 29, 1932). This letter has previously been uncovered and discussed in Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 Mich. L. Rev. 399, 412 & nn.65-66 (2007), and Gordon G. Young, *Public Rights and the Federal Judicial Power: From Murray’s Lessee through Crowell to Schor*, 35 Buff. L. Rev. 765, 775 (1986).

<sup>62</sup> *Id.*

capabilities.<sup>63</sup> The conceptual framework for these limitations itself changed over time in the early part of the Twentieth Century.

At first, it appeared that courts might impose limitations derived from Article III's requirement that federal courts adjudicate only constitutional "cases or controversies." In an 1887 case — *In re Pacific Railway Commission*<sup>64</sup> — Justice Field, as a circuit court judge, wrote an opinion questioning the Article III authority of courts to assist an agency to compel the production of evidence. The case involved the Pacific Railway Commission's investigation of the Central Pacific Railroad Company under a statutory provision that authorized it "to invoke the aid of the courts of the United States in requiring the attendance and testimony of witnesses, and the production of books, papers, and documents."<sup>65</sup> The railway commission sought a court order requiring a witness to answer a set of interrogatories. Justice Field's analysis hinged on the observation that the Pacific Railway Commission was "not a judicial body," but rather a "mere board of inquiry" that was "directed to obtain information upon certain matters, and report the result of its investigations to the president."<sup>66</sup> The Commission therefore "possesse[d] no judicial powers" by which it "can determine [the] rights of the government, or of the companies whose affairs it investigates."<sup>67</sup> According to Justice Field, the Commission's use

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<sup>63</sup> See, e.g., Cass *et al.*, ADMINISTRATIVE LAW at 710 ("Judicial acceptance of administrative authority to compel the production of information developed slowly.").

<sup>64</sup> 32 F. 241 (C.C. N.D. Cal. 1887).

<sup>65</sup> 32 F. at 250 (noting that "the act provides that the circuit or district court of the United States, within the jurisdiction of which the inquiry of the commission is had, in case of contumacy or refusal of any person to obey a subpoena to him, may issue an order requiring such person to appear before the commissioners and produce books and papers, and give evidence touching the matters in question"). Congress created the Pacific Railway Commission as an investigative tribunal in 1887 — the same year as the Interstate Commerce Commission — to examine federally subsidized railroads, which had fashioned political machines on the West Coast, including one that was later described "as the most successful, if the most corrupt, political organization in the history of California politics." J. Owens, E. Constantini & L. Weschler, *California Politics and Parties* 31-32 (1969).

<sup>66</sup> 32 F. at 249.

<sup>67</sup> *Id.* Justice Field's analysis of this Article III question is intriguing in its own right and — though it is outside the scope of this Article — deserves greater attention. Field appeared to address the status of the federal government's information-gathering activities and record-keeping requirements circa 1887, when he wrote the opinion. In this regard, he took pains to distinguish "the inquiries authorized upon taking the census," which (according to him) were constitutionally authorized and, accordingly, permitted the imposition of a "small penalty" "fir a refusal of any one to answer" questions. *Id.* at 250. That inquiry,

of “[c]ompulsory process to produce such papers, not in a judicial proceeding, but before a commissioner of inquiry, is as subversive” as the “general warrants” prohibited by the Fourth Amendment.<sup>68</sup> But though he spoke of the Fourth Amendment’s protections, Field ultimately resolved the case on different grounds. Under Article III, Field reasoned, the “federal courts . . . cannot be made the aids to any investigation by a commission or a committee into the affairs of any one.”<sup>69</sup>

Less than a decade later, however, the Supreme Court rejected Field’s theory and upheld the ability of the Interstate Commerce Commission to turn to a court to seek a judicial order compelling witnesses to appear before the agency, answer questions, and produce documents.<sup>70</sup> In *ICC v. Brimson*,<sup>71</sup> the Court held that enforcement of the subpoena was a case or controversy within the meaning of Article III, but only because the statute required that they be enforced in the federal courts where the party subpoenaed was entitled to a de novo determination of the order’s validity. Since only Article III courts could punish for contempt said the Court, only those courts could enforce a subpoena.

Although the Court’s decision in *Brimson* removed an Article III barrier to agency evidence-gathering, there was still the Fourth Amendment to contend with. That Amendment, of course, secures the “right of the people . . . in their persons, houses, papers, and effects, against unreasonable searches and seizures.”<sup>72</sup> It therefore prohibited unreasonable — warrantless — searches of documents. And while the issuance of a subpoena was not a “search” in the sense that no government official intruded upon personal property to cart off papers, the Court in the 1886 case of *Boyd v. United States* held that an order requiring the production of papers for government

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according to Field, did not involve the government’s “attempt . . . to pry into the private affairs and papers of any one” — and to the extent the government attempted to do so — would be “controlled by the same guards against the invasion of private rights which limit the investigations of private parties into similar matters.” *Id.*

<sup>68</sup> *Id.* at 251.

<sup>69</sup> *Id.* at 259.

<sup>70</sup> See An Act to Regulate Commerce, 24 Stat. 379, § 12 (1887), as amended by 25 Stat. 855 (1889), and 26 Stat. 743 (1891) (authorizing circuit courts, where a person refused to obey an ICC subpoena, to order such a person to appear before the commission and give evidence on pain of punishment by contempt of court).

<sup>71</sup> 154 U.S. 447 (1894). Three Justices — Chief Justice Fuller, Justice Brewer, and the first Justice Jackson — dissented without opinion.

<sup>72</sup> U.S. Const. Amend. IV.

inspection was a “constructive search” that required a showing of probable cause that a crime has been committed.<sup>73</sup>

Against this backdrop, administrative subpoenas were understood to issue only where there was cause to believe that a violation of a law had occurred. In *Harriman v. ICC*,<sup>74</sup> the Court denied enforcement of an ICC subpoena on the ground that the statute limited “the power to require testimony . . . as it usually is in English-speaking countries . . . to the only cases where the sacrifice of privacy is necessary — those where the investigations concern a specific breach of the law.”<sup>75</sup> These interpretations of statutes granting administrative subpoena authority greatly curtailed agency investigative authority. As the Court later put it in *FTC v. American Tobacco*, “It is contrary to the first principle of justice to allow a search through all the respondent’s records, relevant or irrelevant in the hope that something will turn up.”<sup>76</sup> In that case, Justice Holmes expressly linked the limits on agency investigative authority with the requirements of the Fourth Amendment — reasoning that the Court could not “attribute to Congress an intent to defy the Fourth Amendment, or even to come so near to doing so as to raise a serious question of constitutional law.”<sup>77</sup>

These cases were closely followed by scholars of the emerging field of administrative law, including then-Professor Frankfurter. In his notes for lectures for a course on public utilities, Frankfurter remarked on “the problem of compelled disclosure,” saying that “the start of the whole thing is the *Brimson* case.”<sup>78</sup> He regarded Justice Harlan’s opinion in *Harriman* as “very practical” and observed that “[f]or effective exercise of these powers, the commissions must have knowledge” and hence the “power to compel disclosure.”<sup>79</sup> In Frankfurter’s words to his students it was “[t]errible to think what would have happened if the decision had gone the other way” — if, in other words, the ICC had been unable to turn to the courts to

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<sup>73</sup> 116 U.S. 616 (1886).

<sup>74</sup> 211 U.S. 407 (1908).

<sup>75</sup> *Id.* at 419-20.

<sup>76</sup> 264 U.S. 298, 306 (1924).

<sup>77</sup> *Id.* at 307.

<sup>78</sup> Frankfurter, *Notes on a course for public utilities* (Frankfurter files) (on file with author).

<sup>79</sup> *Id.*

obtain an order to compel the investigated party to turn over documents.<sup>80</sup>

### C. Delegation within the Agency

Equally importantly, the Supreme Court imposed limits on the authority of officials statutorily named by Congress to delegate their duties to subordinates. Unlike the limits on judicial review of agency action and agency investigative techniques — both of which were of constitutional status — the Court’s jurisprudence in this regard was simply a matter of statutory interpretation. The question raised in each of these cases was whether the naming of a particular official by statute required that official, and that official alone, to perform the assigned functions — or whether the official could have a subordinate perform the function. The Court enforced a relatively robust view of the notion that, when Congress legislated, it specified the officials who would perform actions with some degree of precision.

That principle applied to the President in some circumstances. Thus, for example, in *Runkle v. United States*,<sup>81</sup> the Court held that the President was required to take action personally to approve the decision of a court-martial before the judgment became final. According to the Court, the language of the statute and the nature of court-martial proceedings meant that “he is himself to consider the proceedings laid before him, and decide personally whether they ought to be carried into effect.”<sup>82</sup>

The same principle carried over for the heads of agencies. In *Cudahy Packing Co. v. Holland*, the Court forbade agency heads from delegating statutory power to issue subpoenas without express legislative authority.<sup>83</sup> According to the Court, there was “a Congressional purpose that the subpoena power shall be delegable only when an authority to delegate is expressly granted.”<sup>84</sup> The consequence was that, where Congress specified by statute that the

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<sup>80</sup> *Id.* Frankfurter’s notes also observe that “[i]n recent years a number of questions have arisen as to the scope of the inquiry of the Federal Trade Commission,” which “cannot search in the hope that something will turn up.”

<sup>81</sup> 122 U.S. 543 (1887).

<sup>82</sup> *Id.* at 557. Well before the 1940s, the Court effectively abandoned limits on the authority of the President to delegate to his subordinates. *United States v. Chemical Foundation*, 272 U.S. 1, 16 (1926). And Congress ratified by statute that interpretive approach. Pub. L. No. 673, 64 Stat. 419 (1951), codified at 3 U.S.C. §§ 301-303.

<sup>83</sup> 315 U.S. 356 (1942).

<sup>84</sup> *Id.* at 366

agency head was to accomplish a certain task, the agency head was required to do so him- or herself. Each subpoena would have to be reviewed, authorized, and signed by an agency head unless Congress expressly authorized delegation.

#### **D. Summation**

The background principles of jurisprudence that the new Justices of the Court inherited in the early 1940s thus imposed substantial limitations on the administrative process. With respect to the standards for judicial review, *Crowell* provided the governing framework for almost a decade, requiring de novo review of legal questions and some factual questions.<sup>85</sup> With respect to investigative techniques, the Court narrowly construed agency administrative subpoena authority and imposed Fourth Amendment limitations on obtaining documents from private parties. With respect to delegation within an agency, the Court required that the party named by Congress by statute perform the task envisioned by the statute.

But as the exchange between Judge Hand and Professor Frankfurter suggests, the framework was subject to important challenges.<sup>86</sup> After the Supreme Court's composition shifted in the early 1940s (in part with the conversion of Professor Frankfurter into Justice Frankfurter), the Court began to trim the framework along a number of dimensions.

### **II. The “Administrative Process” at the Court**

Beginning in the late 1930s, a new generation of Justices was appointed to the Court by the Roosevelt and Truman administrations. These new Justices, in shifting coalitions, began to change the three doctrines that I have discussed. The changes in the Court's jurisprudence during the 1940s did not occur in a vacuum. Many years before those changes occurred, scholars had laid an intellectual foundation for modern administrative law. Other more traditional strains of interpretive theory continued to be a part of the

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<sup>85</sup> To be sure, elements of the doctrine were undermined during the 1930s. *See, e.g., St. Joseph Stock Yards v. United States*, 298 U.S. 38 (1936) (holding that an independent record was not required for independent review); *see also* Monaghan, *supra* note \_\_\_, at 254-59.

<sup>86</sup> Schiller, *supra* note \_\_\_, at 412 (stating that, for a generation of New Deal legal theorists, *Crowell* was “an awful specter, haunting their dream of expert-driven, prescriptive policymaking”).

intellectual mix. In this Part, I describe the changes that occurred through the course of the 1940s.

### **A. Changes to the Standard for Judicial Review of Agency Action**

In this section, I discuss two cases, *Gray v. Powell* and *Bowles v. Seminole Rock*, relying on the case files of the opinions' authors, Justices Stanley Reed and Frank Murphy.

#### **1. *Gray v. Powell* and the Standard of Review for Statutory Construction**

The procedural history suggests that the Court struggled with the question presented in the seminal 1941 case of *Gray v. Powell*, which has long been thought of as one of the foundational cases establishing the modern doctrine of judicial deference to executive statutory interpretation.<sup>87</sup> *Gray* concerned a dispute over the meaning of the Bituminous Coal Act of 1937. The Director of the Bituminous Coal Division of the Department of Interior had construed the word “producer,” and the question before the Court was whether that construction should be subject to *de novo* review.<sup>88</sup> The case was argued twice before the Court, with the members of the Court changing in between each argument.

During the first hearing, the Court was missing a member due to Justice McReynolds' retirement. The Justices divided equally and affirmed the judgment below, thereby leaving in place the court of appeals' reversal of the administrative order at stake in the litigation.<sup>89</sup> In this iteration of the litigation, Justice Roberts, then-Justice Stone, Justice Frankfurter, Chief Justice Hughes voted to affirm the judgment, with Justices Reed, Black, Douglas and Murphy voting to reverse.

Following the Court's order, however, Chief Justice Hughes resigned from the Court, with Justice Stone taking his place as Chief Justice and Justice Jackson appointed to a newly vacant seat. Justice Byrnes was appointed to Justice McReynolds' spot. Upon the

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<sup>87</sup> Lawson, *Federal Administrative Law*, at 545-55; see also Bamzai, *Origins of Judicial Deference*; Gary Lawson & Stephen Kam, *Making Law out of Nothing at All: The Origins of the Chevron Doctrine*, 65 Admin. L. Rev. 1, 13-23 (2013).

<sup>88</sup> 314 U.S. 402, 411-12 (1941).

<sup>89</sup> 312 U.S. 666 (1941). Remarkably, given the centrality of *Gray* to the development of administrative law, this fact about the case appears to have gone unexplored. I have found only a single reference to the initial 4-4 split in Lawson, *Federal Administrative Law*, at 549 n.13.

Department of Justice’s motion, the Court then granted rehearing,<sup>90</sup> but found itself shorthanded once again, because Justice Jackson was recused due to his participation in the litigation as Solicitor General. According to the docket books of Justices Stone, Roberts, and Murphy — which are available at the Supreme Court and which I have reviewed — Justice Frankfurter then switched his vote in order to provide a majority.<sup>91</sup> The Court then reversed the lower court, ruling 5-3 in favor of the government’s position.

The Court held that *de novo* review was inappropriate, because Congress had “delegate[d] th[e] function” of interpreting the statutory term “to those whose experience in a particular field gave promise of a better informed, more equitable” judgment, and that “this delegation will be respected and the administrative conclusion left untouched.”<sup>92</sup> Although the Court acknowledged that there was “no dispute as to the evidentiary facts,” it nevertheless viewed the issue as outside the “province of a court” because Congress did not intend judicial tribunals “to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact finding bodies deprived of the advantages of prompts and definite action.”<sup>93</sup> Interpreting the statute, according to the Court, “call[ed] for the expert, experienced judgment of those familiar with the industry.”<sup>94</sup> In a dissenting opinion, Justice Roberts noted that there was no “single disputed fact” and the agency’s “error was a misconstruction of the Act . . . and that error, under all relevant authorities, is subject to court review.”<sup>95</sup> He accused the majority of “obviously fail[ing] in performing its duty,” of “abdicat[ing] its function as a court of review,” and of “complete[ly] revers[ing] . . . the normal and usual method of construing a statute.”<sup>96</sup>

*Gray* does not expressly speak of the relationship between review of questions of “fact” and questions of “law” to the Court’s analysis,

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<sup>90</sup> 313 U.S. 596 (1941).

<sup>91</sup> The Curator’s Office of the Supreme Court has provided me the relevant sheets of the docket books containing information regarding this vote switch.

<sup>92</sup> *Id.* at 412 & n.7.

<sup>93</sup> *Id.* at 412.

<sup>94</sup> *Id.* at 413 (reasoning that, unless the agency’s action could be characterized as not “a sensible exercise of judgment, it is the Court’s duty to leave the Commission’s judgment undisturbed”).

<sup>95</sup> 314 U.S. at 418 (Roberts, J., dissenting); *see also id.* at 420 (arguing that, if an agency fails to “observe . . . guides in applying the statute . . . , it is the obligation of the courts to observe them in performing their statutory duty to review [its] determination”).

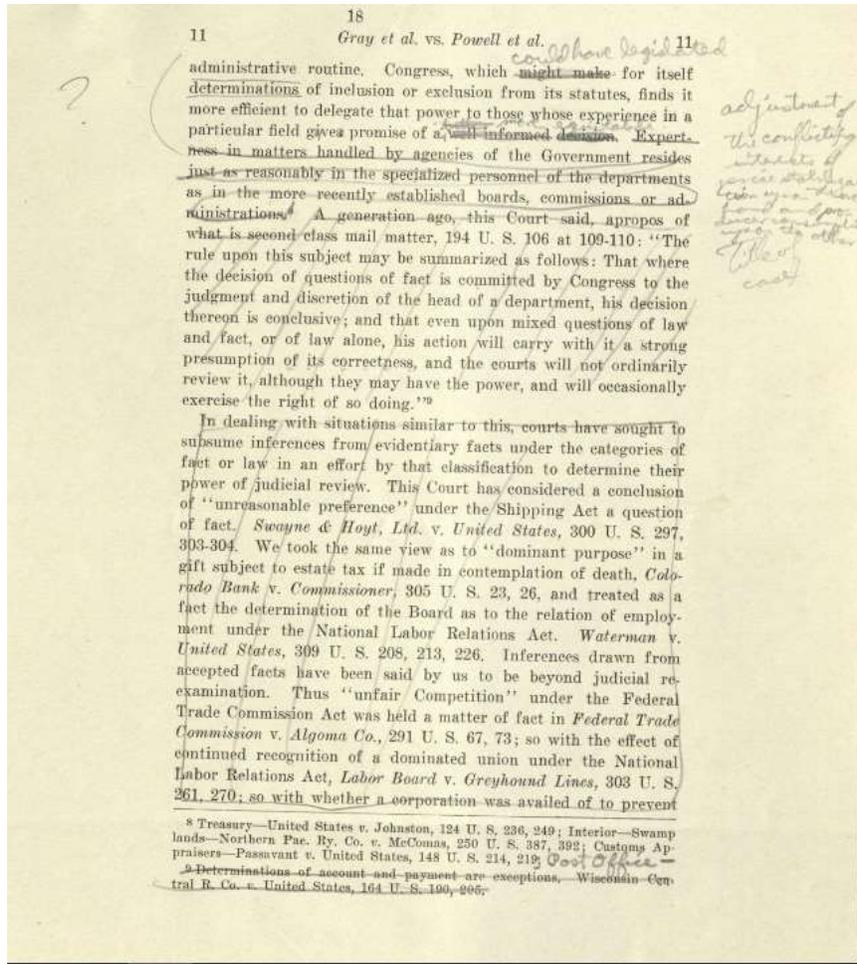
<sup>96</sup> *Id.* at 420-21.

though that is the way in which the case has been understood. But Justice Reed's draft opinions for the Court make abundantly clear that this issue was foremost on his mind. His draft reasoned that in addressing the appropriate standard of review for agency decisions, "courts have sought to subsume inferences from evidentiary facts under the categories of fact or law in an effort by the classification to determine their power of judicial review."<sup>97</sup> He further reasoned that "[e]ven though th[e] [Bituminous Coal Act] forbids plenary review of facts and allows it for legal issues, the need for accurate separation of the two is not often essential."<sup>98</sup> His draft opinion contained several paragraphs of analysis seeking to separate and understand cases that gave different kinds of review to questions of "law" and "fact," which were ultimately cut from the case when Justice Douglas suggested that they were not necessary for the Court's disposition. Moreover, Justice Reed's case file includes a number of pages seeking to categorize precedents, case by case, using the law-fact distinction.

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<sup>97</sup> Draft Opinion of Justice Stanley Reed (on file with author).

<sup>98</sup> *Id.*



Reed draft opinion removing text from *Gray v. Powell*

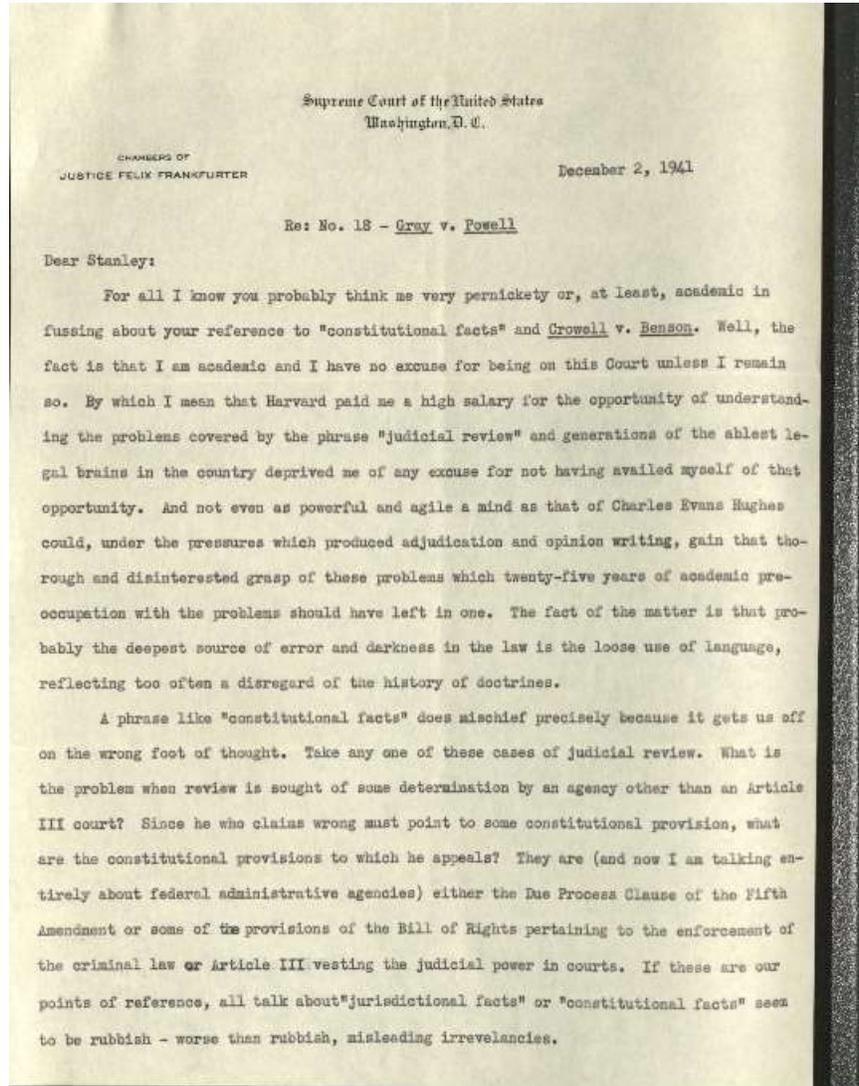
Justice Reed's draft, moreover, engaged with (though he ultimately rejected application of) the "constitutional fact" doctrine that *Crowell v. Benson* elaborated. After he circulated his opinion, he received a letter from Justice Frankfurter objecting to the "reference to 'constitutional facts' and *Crowell v. Benson*."<sup>99</sup> The letter reflected Frankfurter's famous high-handed style, which would soon become a source of friction between him and his colleagues: "[N]ot even as powerful and agile a mind as that of Charles Evans Hughes," Frankfurter began, could "gain that through and disinterested grasp of the[] problems [of judicial review] which twenty-five years of academic preoccupation with the problems" had left Frankfurter himself.<sup>100</sup> "A phrase like 'constitutional facts,'" he contended, did

<sup>99</sup> Letter from Felix Frankfurter to Stanley Reed (Dec. 2, 1941) (on file with author).

<sup>100</sup> *Id.*

Rough draft of June 1, 2017  
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“mischief precisely because it gets us off on the wrong foot of thought” — “all such talk about ‘jurisdictional fact’ or ‘constitutional fact’ was to be rush . . . worse than rubbish, misleading irrelevancies.”<sup>101</sup> Reed removed the reference to *Crowell v. Benson* and the doctrine.



Letter from Frankfurter to Reed regarding *Gray v. Powell* draft

These takeaways from Justice Reed’s case files do not dramatically alter our understanding of *Gray* itself. The case has long been viewed as applying a doctrine of “mixed question of law and fact” to judicial review of agency action. Justice Reed’s draft opinions in

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<sup>101</sup> *Id.*

*Gray v. Powell* show his concern with separating “law” from “fact” in judicial review of agency action, and his ultimate view that such separation was hard, if not impossible, to achieve. That argument had been made by John Dickinson in a 1927 book, *Administrative Justice and the Supremacy of Law*, which contended that the scope of judicial review over administrative decision making “focus[ed] ultimately upon the distinction which the courts draw between ‘questions of law’ and ‘questions of fact.’”<sup>102</sup> And he argued that “any factual state or relation which the courts . . . regard as sufficiently important to be made decisive for all subsequent cases of similar character becomes thereby a matter of law,” it was impossible “to establish a clear line between so-called ‘questions of law’ and ‘questions of fact.’”<sup>103</sup> These concerns appeared to have been front and center in Justice Reed’s mind during the drafting process for *Gray*.

No less importantly, the draft and final opinions demonstrate just how far the Court had moved from the *Crowell* framework in the span of a few years. Under *Crowell*, *de novo* review was to be given to legal questions and some set of factual questions deemed to be “jurisdictional.” In *Gray v. Powell*, Justice Reed had started the drafting process by seeking to fit the facts of the case within this preexisting framework. His drafts suggest, however, that at least he had come to view “the need for accurate separation of [law and fact] [as] not often essential,” with some questions of law requiring agency expertise making it appropriate for courts to defer to agency judgment. His correspondence with Justice Frankfurter, moreover, indicate that the “jurisdictional fact” component of the *Crowell* framework was not long for this world, at least so far as the Supreme Court was concerned.<sup>104</sup>

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<sup>102</sup> John Dickinson, *Administrative Justice and the Supremacy of Law* viii (1927)

<sup>103</sup> *Id.* at 312.

<sup>104</sup> The internal debates over *Crowell* do tend to explain why the “fate of *Crowell v. Benson* . . . is surprisingly unclear” and why “the case [was never] overruled with triumphant references to the expertise of agencies.” Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 Mich. L. Rev. 399, 438 (2007). As Professor Schiller observes, “the federal courts treated *Crowell* as if it had never been decided,” *id.*, no doubt in no small part because Justice Frankfurter refused to join fully opinions that embraced its framework. These developments prompted one commentator, as early as 1940, to wonder “*What has happened to Crowell v. Benson?*” Robert O. Klausmayer, “*Jurisdictional Fact*” *Theory: What Has Happened to Crowell v. Benson?*, 25 Cornell L.Q. 274 (1940); see also Schwartz, *Does the Ghost of Crowell v. Benson Still Walk*, 98 U. Pa. L. Rev. 163, 171 (1949).

## 2. *Bowles v. Seminole Rock* and the Standard of Review for Regulations

The Court's 1945 decision in *Bowles v. Seminole Rock & Sand Co.* picked up on a different strand of preexisting interpretive theory.<sup>105</sup> The case was argued by Professor Henry M. Hart, Jr., who had temporarily left the Harvard Law faculty to become an associate general counsel at the Office of Price Administration, an agency responsible for setting prices throughout the World War II-economy.<sup>106</sup>

Justice Murphy's opinion for the Court has long been understood to provide that a reviewing court defers to an agency's interpretation of its own ambiguous regulation. The opinion states that "the ultimate criterion [in such cases] is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."<sup>107</sup> But scholars have long observed that *Seminole Rock* can be read in several different ways.<sup>108</sup> The opinion at one point claims that the regulation "clearly applies to the facts of this case," and at another point stresses that the agency's interpretation was "issued . . . concurrently with" the regulation.<sup>109</sup>

Murphy's draft suggests that he intended the narrower understanding of the case. Specifically, following his initial circulation, Justice Murphy changed the language in the critical paragraph of the opinion that sets forth the standard of review. Murphy's circulated draft provided that "[t]he intention of Congress or the principles of the Constitution have no direct relevance when the sole issue is to resolve a dispute as the meaning that an administrative agency intended to attach to one of its regulations."<sup>110</sup> It was for that reason, the draft proceeded to contend, that "the administrative interpretation becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."<sup>111</sup> In

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<sup>105</sup> 325 U.S. 410 (1945).

<sup>106</sup> Hart had left the Harvard faculty to join the Office of Price Administration in the summer of 1942. See <http://www.thecrimson.com/article/1942/7/13/appoint-hart-to-opa-legal-staff/>. Hart, incidentally, was Justice Brandeis' law clerk during the Term that the Court decided (and Justice Brandeis dissented from) *Crowell v. Benson*.

<sup>107</sup> 325 U.S. at 414.

<sup>108</sup> See, e.g., Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of Seminole Rock*, 65 Emory L.J. 47, 59-63 (2015).

<sup>109</sup> *Id.* at 415, 417.

<sup>110</sup> Draft of Murphy opinion (on file with author).

<sup>111</sup> *Id.*

joining the opinion, Justice Rutledge remarked that he was “dubious” that the “intention of Congress or the principles of the Constitution have *no direct relevance*” to the proper construction of a regulation, because (as Rutledge put it) “in case of doubt or ambiguity construction to conform with constitutional or statutory requirements would seem to be both relevant and necessary.”<sup>112</sup> Rutledge proposed an edit to this sentence, which Murphy adopted with minor changes. In principal part, this edit replaced Murphy’s earlier contention that congressional intent or the Constitution has “no direct relevance” with the language of the final opinion.<sup>113</sup> Those sources, the opinion now said, “in some situations may be relevant in the first instance in choosing between various constructions.”<sup>114</sup> Most pertinently, in making that edit, Murphy also cut the remainder of the sentence that suggested that the “dispute [was about] the meaning that an administrative agency intended to attach to one of its regulations” — so that the opinion no longer contains an express reference to what the “administrative agency *intended*” about its own regulation.<sup>115</sup>

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

914  
Mr. Justice Rutledge  
from  
Murphy, J.  
May 31

Constitutional  
or statutory  
requirements  
would seem  
to be both  
relevant &  
necessary.

(10) 20

I agree  
6/1/45, W.R.

I am dubious  
of the question  
sentence on p. 3,  
because in case  
of doubt or am-  
biguity construction  
to conform with

Rutledge Letter to Murphy regarding *Bowles v. Seminole Rock* draft

Second, Murphy’s circulated draft claimed that “[t]he *plain words* of Maximum Price Regulation No. 188 . . . compel[led]” the holding reached in the case.<sup>116</sup> When Justice Frankfurter joined the opinion, however, he sent Murphy a note suggesting that this language be changed. The note remarked that “[c]onsidering the not-so-plain formulation of No. 188, do you think it wise to say the ‘plain words’ compel?”<sup>117</sup> Murphy responded by striking the reference to the regulation’s “plain words” and replacing it with “[o]ur reading of the language of” the relevant section of Maximum Price Regulation No. 188.<sup>118</sup>

Murphy’s draft mirrored the arguments in the government brief filed by Hart. In the brief, the government first argued that the “plain terms” of the regulation supported its interpretation.<sup>119</sup> The brief

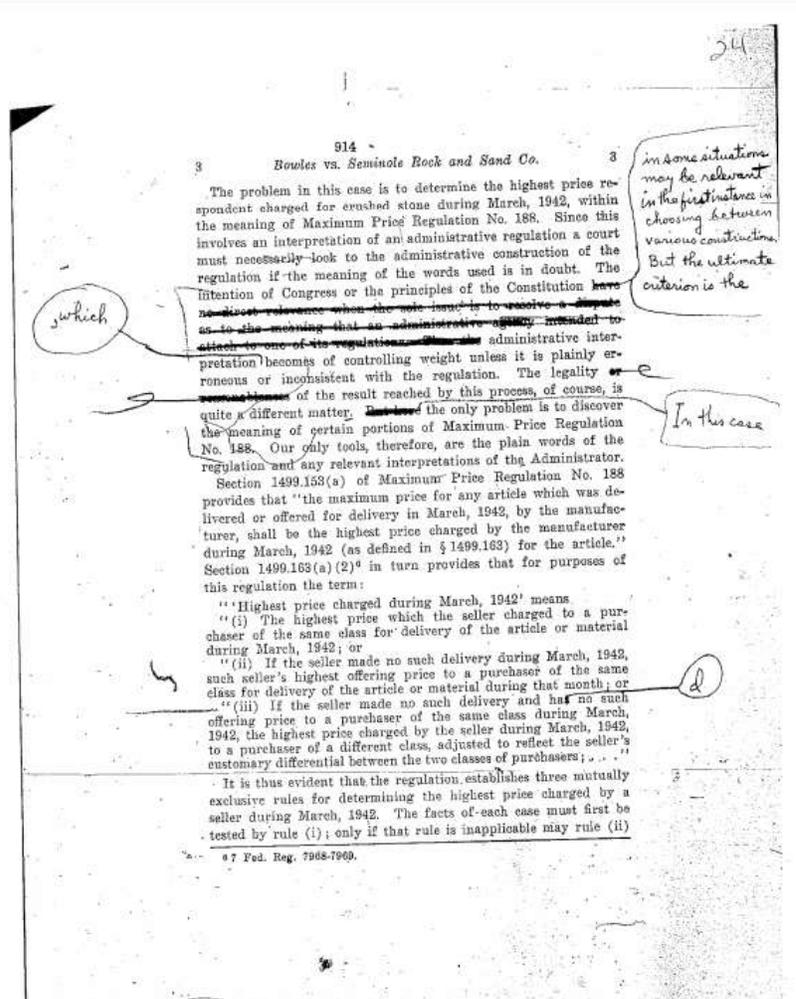
<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> U.S. Br. at 12-16.

then argued that the Court should give “weight” to the agency’s “settled administrative construction” and its “consistently and repeatedly reaffirmed administrative interpretation,” which was embodied in a bulletin issued “[c]oncurrently with the issuance of the” regulation.<sup>120</sup> In light of the “[m]illions upon millions of transactions [that] have been settled” under the government interpretation, the brief continued, “[t]hat construction can [ ] claim for itself all the weight to which settled practice in human affairs is entitled.”<sup>121</sup> And the brief criticized the lower court for treating the “settled administrative construction of the regulation . . . as if it were a position taken for the first time in this lawsuit.”<sup>122</sup>



Edits made by Murphy to the *Seminole Rock* opinion

<sup>120</sup> *Id.* at 12, 16, 18-20.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

The fundamental point, the brief contended, was that “weight” ought “to be given to [the administrator’s] construction of his own regulations” in part because “he is explaining his own intention, not that of Congress.”<sup>123</sup> In this respect, the brief faulted the lower court for concerning itself “with how the administrative discretion should have been exercised in order to conform to the statute, and not with what the Administrator’s regulation was intended to mean.”<sup>124</sup> “The court’s sole function,” the brief argued, “was to interpret the regulation—that is, to give it the meaning which the Administrator intended it to have” — with “the ultimate criterion [being] the intention of the writer of the document.”<sup>125</sup>

The exchanges between the Justices thus tend to point in the direction of an understanding of the fundamental ambiguities in the opinion. Murphy, it appears, was quite willing to rely on a “plain language”-style argument about Maximum Price Regulation No. 188, but Frankfurter was not. As a result, the opinion contains much of Murphy’s “plain language” argumentation, but lacks his “plain words” punchline.

More importantly, Murphy’s remedy for Justice Rutledge’s edit removed his prior text that the “dispute” in the case hinged on “the meaning that an administrative agency *intended* to attach to one of its regulations.” Justice Murphy’s draft opinions in *Seminole Rock* indicate that he was interested in capturing the “original intent” or “original meaning” of an agency’s regulation when he used the agency’s position to interpret its language. That interpretive approach has a long pedigree in Anglo-American law.<sup>126</sup> But in responding to Justice Rutledge’s proposed edit, Murphy made an inadvertent change to the meaning — in the sense that neither Murphy nor Rutledge appeared to have any objection to this aspect of the sentence.

Critically, the change had the effect of removing the link between the rule announced in *Seminole Rock* (“the administrative interpretation becomes of controlling weight”) and the justification for the rule (the court must find “the meaning that an administrative agency intended to attach”). That removal is potentially relevant

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 21.

<sup>125</sup> *Id.* at 21-22.

<sup>126</sup> Bamzai, *Origins of Judicial Deference*.

because the justification for the announced rule may well tell us something about the envisioned scope of the rule. And the envisioned scope of the rule announced in *Seminole Rock* may tell us something about the envisioned scope of the APA, where references to the original understanding of statutory text was clearly among the mix of approaches available to those writing in 1946

### **B. Changes to the Fourth Amendment’s Limitations on Agency Investigations**

Writing in 1953, Louis Jaffe remarked that “[n]othing in the law . . . better illustrates the enormously increased reach of government in the last fifty years than does the broadening of the power of administrative investigation.”<sup>127</sup> During the 1940s, the changes in the investigative powers of administrative agencies were even more dramatic than the changes to the standard for judicial review of agency action.

The first step along the path came in 1943 in the Court’s decision in *Endicott Johnson Corp. v. Perkins*.<sup>128</sup> In that case, the Endicott Johnson Corporation sought to resist a subpoena issued by the Secretary of Labor in the midst of administrative proceedings under the Walsh-Healey Contracts Act. The Court, in an opinion by Justice Jackson, held that judging the propriety of the subpoena “was primarily the duty of the Secretary” and ought not to be second-guessed in federal court.<sup>129</sup> In doing so, the Court relied on the observation that the Act was not “of general applicability to industry,” but rather “applie[d] only to contractors who voluntarily enter into competition to obtain government business.”<sup>130</sup> The Court’s decision could have been read, in other words, to be premised on the notion that the corporation had waived any objection on Fourth Amendment grounds by agreeing to enter into a contract with the government.

Any such limiting principle to *Endicott Johnson*, however, was abandoned three years later in *Oklahoma Press Publishing Company v. Walling*.<sup>131</sup> In that case, the Administrator of the Fair Labor Standards Act sought to compel a newspaper’s financial records to determine whether the company was violating federal minimum wage and hour requirements. The Court held that any showing of “probable cause” necessitated by the Fourth Amendment

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<sup>127</sup> Louis L. Jaffe, ADMINISTRATIVE LAW: CASES AND MATERIALS 274 (1953).

<sup>128</sup> 317 U.S. 501 (1943).

<sup>129</sup> *Id.* at 507.

<sup>130</sup> *Id.*

<sup>131</sup> 327 U.S. 186 (1946).

was “satisfied by the Administrator’s showing in this case, including not only the allegations of coverage, but also that he was proceeding with his investigation in accordance with the mandate of Congress and that the records sought were relevant to that purpose.”<sup>132</sup> In reaching that conclusion, the Court drew a distinction between instances of “actual search and seizure” and instances of constructive search — what the Court described as “orders of court for the production of specified records have been validly made.”<sup>133</sup> That distinction suggested that any time a “constructive search” was occurring, the standard was something less than “probable cause.” As the Court put it, “[t]he primary source of misconception concerning the Fourth Amendment’s function lies perhaps in the identification of cases involving so-called ‘figurative’ or ‘constructive’ search with cases of action search and seizure.”<sup>134</sup>

But other aspects of the Court’s opinion suggested a somewhat narrower holding. The Court emphasized that “[t]he confusion, obscuring the basic distinction between actual and so-called ‘constructive’ search has been accentuated where the records and papers sought are of corporate character.”<sup>135</sup> That was so because, “[h]istorically, private corporations have been subject to broad visitatorial power” and “it long has been established that Congress may exercise wide investigative power over them . . . when their activities take place within or affect interstate commerce.”<sup>136</sup> For that reason, the Court said, “it has been settled that corporations are not entitled to all of the constitutional protections which private individuals have in these and related matters.”<sup>137</sup> This part of the Court’s opinion suggested that the judgment — and the Court’s holding that the Fourth Amendment’s protections did not apply — turned on the corporation’s status as a corporation.

The Court’s 1950 decision in *United States v. Morton Salt Company* was to the same effect and completed the arc of the case law from 1940 to 1950.<sup>138</sup> Justice Jackson, writing for the Court, claimed that “neither incorporated nor unincorporated associations can plead an unqualified right to conduct their affairs in secret” and “can claim no equality with individuals in the enjoyment of a right to privacy.”<sup>139</sup> Corporations, according to the Court, “have a collective impact upon society, from which they derive the privilege of acting

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 195.

<sup>134</sup> *Id.* at 202

<sup>135</sup> *Id.* at 204.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 205.

<sup>138</sup> 338 U.S. 632 (1950).

<sup>139</sup> *Id.* at 652.

as artificial entities” and the “Federal Government allows them the privilege of engaging in interstate commerce.”<sup>140</sup>

Jackson’s opinion expressly recognized the change in the Court’s jurisprudence in this regard. As he explained:

We must not disguise the fact that sometimes, especially early in the history of the federal administrative tribunal, the courts were persuaded to engraft judicial limitations upon the administrative process. The courts could not go fishing, and so it followed neither could anyone else. Administrative investigations fell before the colorful and nostalgic slogan “no fishing expeditions.” It must not be forgotten that the administrative process and its agencies are relative newcomers in the field of law, and that it has taken and will continue to take experience and trial and error to fit this process into our system of judicature. More recent views have been more tolerant of it than those which underlay many older decisions. . . .

The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. . . .<sup>141</sup>

As *Morton Salt* suggested, the Court had come a far way from its earlier views that any compelled acquisition of documents was a “constructive search” requiring probable cause of statutory violations.

### **C. Changes to the Ability of Agency Heads to Delegate within the Agency**

Although the Court had limited the authority of agency heads to delegate their authority within the agency in 1942,<sup>142</sup> it relaxed that requirement just five years later. In *Fleming v. Mohawk Wrecking & Lumber Company*, the Court allowed the wartime Price Administrator to delegate his authority to issue subpoenas to district directors. The Court relied on subtle distinctions between the act at stake in *Fleming* and other provisions that it had previously held not to permit delegation, such as differences in the statutory history and

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 642-43.

<sup>142</sup> *See Cudahy Packing Co. v. Holland*, 315 U.S. 357 (1942).

other provisions in the whole act.<sup>143</sup> Notably, however, the Court supplemented its reasoning by noting the “overwhelming nature of the price control program entrusted to the Administrator,” which according to the Court suggested that “the Act should be construed so as to give it the administrative flexibility necessary for prompt and expeditious action on a multitude of fronts.”<sup>144</sup> Given these complexities, the Court declared that it “would hesitate to conclude that all the various functions granted the Administrator need be performed personally by him or under his personal direction.”<sup>145</sup> Were that the law, the Court claimed, “law enforcement would be apt to end in paralysis.”<sup>146</sup>

### III. The Long Shadow of 1940s Administrative Law

In this Part, I address some of the consequences of the administrative-law developments of the 1940s in these three areas — judicial review, investigative limits, and delegation.

#### A. Statutes, Common Law, and the Standard of Review

One of the reasons why seeking to uncover the meaning and arc of cases from the 1940s may be relevant is that we now live in a world in which a governing statute enacted in 1946, the Administrative Procedure Act, addresses many of the same questions. The interaction between cases and statute in this area gives us some insight into the judicial role in matters of administrative law.

For one thing, notwithstanding the passage of the Administrative Procedure Act, it remains true that much administrative law is “common law” created and elaborated by courts, specifically, the Supreme Court. As Professor Metzger observes, the field is scattered with “administrative law doctrines and requirements that are largely judicially created as opposed to those specified by Congress, the President, or individual agencies.”<sup>147</sup> It may well be that the common law is the right analytical framework with which to approach the set of questions ordinarily categorized under the rubric of “administrative law,” either because administrative common law has a “constitutional character” or because it is “ubiquitous” and “inevitable.”<sup>148</sup> If so, a close reading of the

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<sup>143</sup> *Id.* at 119-22.

<sup>144</sup> *Id.* at 122.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 123.

<sup>147</sup> See, e.g., Gillian E. Metzger, *Embracing Administrative Common Law*, 80 G.W.U. L. Rev. 1294 (2012).

<sup>148</sup> *Id.* at 1297.

precedents, including those of the 1940s, will provide insight into the future path of the law as it would in any other “common law” field.<sup>149</sup>

For another thing, if one assumes that statutory administrative law is more desirable (or legitimate) than common-law elaboration in this area, the cases nevertheless help us understand the meaning of the APA. That is so because, as Professor Vermeule notes, Chief Justice Hughes’ opinion in *Crowell* “in many ways laid down lines of demarcation that were written into the Administrative Procedure Act of 1946.”<sup>150</sup> There are at least four implications for the APA from the preceding discussion.

*First*, in its standard-of-review provision, the APA distinguishes between questions of law, which the “court shall decide” as it “interpret[s] constitutional and statutory provision” and “determine[s] the meaning or applicability of the terms of an agency action.”<sup>151</sup> The standard for review of questions of fact, by contrast, is much lower, with courts to “hold unlawful and set aside . . . findings . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” or not supported by “substantial evidence.”<sup>152</sup>

The apparent import of this dichotomy is to reassert the law-fact distinction that Justice Reed found so difficult to resolve in *Gray v. Powell*. One plausible (though by no means the only) approach to trying to distinguish questions of “fact” from questions of “law” in this context is by tethering those categories to the categories that had been created, however imprecisely, at the time of the APA’s adoption. In this regard, the immense efforts of Justice Reed in drafting *Gray v. Powell* may well be instructive of the type of analysis that courts would be obligated to conduct should the law-fact distinction achieve the salience that it once had (about which more in a moment).

*Second*, the limited understanding of *Seminole Rock* that I have spelt out above reconciles it with the text of the APA. That is because, in the realm of constitutional law, a reviewing court may well “interpret [a] constitutional . . . provision” by reference to Executive

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<sup>149</sup> See Roscoe Pound, *The Spirit of the Common Law* 174-75 (1921), cited in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, n843 n.10 (1984).

<sup>150</sup> Adrian Vermeule, *Portrait of an Equilibrium*, New Rambler Review (Apr. 24, 2015).

<sup>151</sup> 5 U.S.C. 706.

<sup>152</sup> *Id.*

Branch interpretations, so long as those interpretations provide evidence for what the drafters of the constitutional provision “intended” at the time of enactment or evidence of a “settled construction” of the provision by the political branches.<sup>153</sup> The same ought to be true, both as a matter of logic and as a matter of the APA’s text, for executive branch interpretations of regulations. Both the Murphy draft opinions and the Hart brief point to this understanding of *Seminole Rock*, which (if accepted) would harmonize the case with the practice of constitutional interpretation and, as a result, retain the APA’s parallelism between the interpretation of constitutional and other provisions.<sup>154</sup>

*Third*, the discussion has implications for the notion that courts need not give deferential review to agency determinations of their “jurisdiction.” The APA requires the setting aside of agency “findings . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” Notwithstanding this language, all three opinions in the Court’s recent decision in *City of Arlington v. FCC* agreed that “there is no principled basis for carving out some arbitrary subset of [ ] claims” that an agency has

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<sup>153</sup> See, e.g., *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2561-62 (2014) (observing that “[h]istory [ ] offers strong support” for the Court’s interpretation of the Recess Appointments Clause by relying, in part, on Attorney General opinions construing the Clause from 1867 and 1868).

<sup>154</sup> Indeed, the broader question is how courts ought to interpret legal text contained in public documents generally — and specifically, whether one set of generalized interpretive principles should govern constitutional provisions, statutes, and regulations alike, or whether a cluster of disparate doctrines (each associated with idiosyncratic Supreme Court pronouncements like *Chevron* and *Seminole Rock*) ought to govern different kinds of legal documents differently. In this regard, the recent efforts to construct a constitutional separation-of-powers argument against *Seminole Rock*’s validity strike me as misguided, because they tend to stress the differences between interpreting regulations and interpreting other public documents. If (as I have suggested above) *Seminole Rock* was about “deferring” to an agency’s contemporaneous or settled construction of its own regulation, then Justice Murphy merely applied background interpretive techniques (about authorial intent) to an arguably new context (rulemaking). If that was the case, there was nothing constitutionally problematic about his interpretive approach. If later cases have extended *Seminole Rock*, then the proper objection to those later holdings would hinge on the formal argument that the extension departs from the text of the APA (and the interpretive principles it incorporated), as well as the prudential argument that maintaining one set of interpretive principles for constitutional and regulatory text alike is both easier for courts and better for an enlightened citizenry.

exceeded its statutory authority as “jurisdictional.”<sup>155</sup> But there is such a principled basis if one takes the text of the APA seriously.<sup>156</sup>

There is, moreover, some support for the proposition Congress used this language to incorporate the preexisting framework in *Crowell v. Benson*. In his 1965 treatise, Louis Jaffe observed that “[i]t is true that the distinction between a decision in excess of jurisdiction and a decision which is merely incorrect in law is not an exact one . . . . But a court will not lightly assume that an agency has been empowered to adjudicate any controversy which it chooses, and once this is granted, the notion of ‘jurisdictional’ limit enters the picture.”<sup>157</sup> Thus, “[t]hough the category of jurisdictional fact does not have that strict logic which the phrase seems to imply, it is not a completely arbitrary concept.”<sup>158</sup> Whether Jaffe’s thesis about the import of this language is correct is outside the scope of this article. But the suggestion is an intriguing one, because it brings us back to the possibility that as the Court was shifting from the framework of *Crowell v. Benson* to *Gray v. Powell*, Congress through the APA sought to reimpose *Crowell*’s analytical approach.

In some respects, the broader issue is the familiar one regarding whether the APA’s statutory text or common law principles ought to govern in this context.<sup>159</sup> And to be sure: For those who take the statute seriously, it may well be that the “excess of statutory jurisdiction” language did not apply in *City of Arlington* itself. But whatever the merits or demerits of Congress’s decision to use a nebulous term in the APA, it was incumbent on the Court to interpret that term or to explain it as subject to some kind of common law analysis, rather than ignore it.<sup>160</sup>

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<sup>155</sup> 133 S. Ct. at 1868.

<sup>156</sup> See Thomas W. Merrill, *Step Zero after City of Arlington*, 83 Fordham L. Rev. 753, 771-72 (2014) (observing that *City of Arlington* “made no effort to square [its] extension of *Chevron* to questions of agency jurisdiction with the text of the APA”); compare Vermeule, *Law’s Abnegation* at 35 (arguing that “the key point” in *City of Arlington* “is that even the dissenters refused to defend the line between ‘jurisdictional’ determinations and other determinations in judicial review of agency authority”).

<sup>157</sup> Louis L. Jaffe, *Judicial Control of Administrative Action* 154 (1965).

<sup>158</sup> *Id.* at 631.

<sup>159</sup> Compare Duffy, *supra* note \_\_\_, at 121 (observing that “[w]ith the enactment of the APA in 1946, the judicial method in most administrative law cases should have shifted to the task of interpreting the new statute, rather than continuing to formulate and apply judicially-created doctrines”).

<sup>160</sup> See, e.g., *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 439 (2006) (applying statutory balancing test while acknowledging that “task assigned by Congress to the courts [by statute] . . . is [not] an easy one”).

*Fourth*, the doctrinal history has implications for the present efforts to reform the APA. Any effort to amend the APA presupposes that statutory law in this area is meaningful. If statutory law has no purchase with the judiciary, the enactment of statutes — in this or any area — is a waste of the Congress’s time and the public’s resources. This contention may sound elementary — and so it is — but it cuts against much contemporary Supreme Court administrative-law precedents, as well as academic commentary in this area that argues for a “common law” approach to administrative cases. One of the chief proponents of a common-law approach is Professor Adrian Vermeule, who has argued that judges have voluntarily relegated themselves to the sidelines in embracing the doctrine of judicial deference to executive statutory interpretation and that this “self-abnegation” is normatively appropriate.<sup>161</sup> Professor Vermeule, for example, contends that “many of the assumptions underpinning the APA, and many of the constraints it assumed would govern agencies, have given away over time,” with “[p]erhaps the most fundamental constraint—stemming from *Crowell v. Benson* (1932)—[ ] that courts would declare what the law meant.”<sup>162</sup> “[I]t must be said,” as Professor Vermeule puts it, “that the equilibrium Hughes brought into being is a thing of the past” and that the “line of demarcation between administration and law, the frontier of the administrative state, has shifted markedly, with law giving way to administration across almost every margin identified in *Crowell*.”<sup>163</sup> *Crowell* thus “no longer fairly represents the prevailing equilibrium between administration and law,” because “[t]he main elements of the framework have come undone, in ways that have shifted power from courts to agencies.”<sup>164</sup>

The legitimacy of the “coming undone” of the *Crowell* framework, however, depends on how we understand the APA. If indeed the APA was intended to incorporate Chief Justice Hughes’ principal distinctions, on what ground can the Court ignore that congressional decision?

To the extent that Congress reasserts that issues of law are to be determined *de novo* by courts, the resulting framework will place increased importance on the distinction between questions of law (to

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<sup>161</sup> Adrian Vermeule, *Law’s Abnegation: From Law’s Empire to the Administrative State* (2017).

<sup>162</sup> Adrian Vermeule, *Leviathan Had a Good War*, JOTWELL (Feb. 29, 2016).

<sup>163</sup> Adrian Vermeule, *Portrait of an Equilibrium*, New Rambler Review (Apr. 24, 2015) (observing that the APA “later adopted a similar approach” to “the *Crowell* framework”).

<sup>164</sup> *Id.*

be reviewed *de novo*) and questions of fact (to be reviewed deferentially). Is the question whether an individual is an “employee” of an “employer” a legal or a factual one? What about the “reasonableness” of rate? Courts no longer give these questions, once at the heart of judicial review, the same degree of analysis, because the answer to the question no longer counts as much. Were the law to change, the importance of this analysis would, too. As a result, the difficulties that Justice Reed confronted in *Gray*, which have been obviated by *Chevron* and judicial deference to executive legal interpretation, would come once again to the forefront.

In this regard, timing will matter a great deal. The very fact that the APA was enacted against a shifting jurisprudential backdrop in 1946 makes understanding its terms a challenge. Should the same happen seven decades later, as seems well within the realm of possibility, the shifting jurisprudential landscape may once again muddy the waters on Congress’s intent.

### **B. Administrative Subpoenas and Investigative Power**

The Court’s other shift during the 1940s, which permitted government investigators to obtain the business records of corporations at a substantially lower threshold under the Fourth Amendment, also has consequences for the present day. As an initial matter, the case law developed in the 1940s governs the scope of agency subpoena power to this day. In the more recent case of *University of Pennsylvania v. Equal Employment Opportunity Commission*, for example, the Court held that subpoenaed faculty peer review evaluations during the tenure process bore a reasonable relationship to the agency’s investigation.<sup>165</sup>

But the principle has had far-reaching consequences, causing ripple effects in the fabric of Fourth Amendment law. The government’s ability to obtain by subpoena vast quantities of information held by businesses has taken on a different meaning when businesses — such as banks, telephone companies, and internet service providers — began to hold information on behalf of private individuals on a grand scale. The Supreme Court confronted this issue in a series of cases, first holding in 1976, in *United States v. Miller*,<sup>166</sup> that customers had no Fourth Amendment interest in records turned over to their bank. The *Miller* Court cited and relied the proposition from *Oklahoma Press Publishing* that the Fourth Amendment “at the

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<sup>165</sup> 493 U.S. 182 (1990).

<sup>166</sup> 425 U.S. 435 (1976).

most guards against abuse only by way of too much indefiniteness or breadth in the things required to be ‘particularly described’ if [ ] the inquiry is on the demanding agency is authorized by law to make and the materials specified are relevant.”<sup>167</sup> Later, the Court held in *Smith v. Maryland* that phone numbers dialed by a private individual, and collected by a telephone company, similarly received no Fourth Amendment protection.<sup>168</sup>

In the upcoming Term, the Court is poised to revisit this doctrine in the context of cell-site locational information — data accumulated by cellular phone companies that discloses the location of the dialer’s cell phone.<sup>169</sup> At issue in the case is whether the dialer of the phone number may assert a Fourth Amendment interest in the data held by the phone company.

The critical point is that this question — regarding the rights of an individual in records about him or her held by a corporation — has taken on outsized significance *precisely because of* the administrative-law cases of the 1940s that relaxed the standard for obtaining information from corporations. The two doctrines — the privacy interests of an individual and the privacy interests of the business who collects information — are inevitably connected. Had there been no evolution of the standard governing the Fourth Amendment rights that a business could assert against the administrative process, there would be less of a reason to adjust the Fourth Amendment protection for individuals whose information is held by a business.

### C. Delegation

Finally, we turn to the Court’s decisions on the narrow question whether statutory authorization allowing the head of a department to perform an act permits the department head to delegate the duty to a subordinate. As compared to the other doctrines I have discussed in this paper, this one may seem exceedingly narrow. After all, Congress can assuredly change the default rule by making clear its intention that a statute authorizing the “Attorney General” to perform a given task includes performance by the Attorney General and each subordinate within the Department of Justice.

But the shift in this doctrine during the 1940s is quite telling, because it is a particularized instance of a generalized shift in

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<sup>167</sup> *Id.* at 445-46.

<sup>168</sup> 442 U.S. 735 (1979).

<sup>169</sup> *Carpenter v. United States* (cert. granted 2017).

American governance — from a time in which Congress could specify with particularity the conduct of administrative agencies to a time in which Congress simply lacked the institutional capabilities (or resources or interest) to do so. In this instance, the Court's changed doctrine reflected an assumption that it was unreasonable to believe that Congress still surveyed the vast horizon of the federal bureaucracy and elected to confer tasks upon particular agency officials in a precise and targeted manner.

### CONCLUSION

In this Article, the first step toward a study of the Court's administrative law jurisprudence of the 1940s, I have examined the Court's decision in *Crowell v. Benson*, as well as the Justice's drafts in *Gray v. Powell* and *Bowles v. Seminole Rock*, to provide a further understanding of the development of the standard of review for judicial control over administrative action in the early half of the Twentieth Century. I have also examined the dramatic changes that occurred in the law governing investigative techniques for administrative agencies, as well as the authority of department heads to delegate duties within their agency.

This study gives us a glimpse into what the Justices might have been thinking when they issued pathbreaking administrative law decisions seven decades ago, and also a glimpse into what Congress might have meant when it copied terminology from those decisions into the provisions of the APA. Finally, it gives us reason to reflect on the difficulty of changing the background rules of decision in this area via statute, given that the Court appears to believe interpretation and the standards of judicial review to be a uniquely judicial task.