The "Administrative Process" in the 1940s Court

Aditya Bamzai*

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.[1] 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.[2] 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.[3]

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.[4] Substantively,

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

[2] 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.").

[3] 5 U.S.C. 501 *et seq.*

[4] *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

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.[5] On the question of judicial deference to executive interpretation of statutes, the Court decided *Gray v. Powell* (in 1941),[6] *Skidmore v. Swift & Co.* (in 1944),[7] *NLRB v. Hearst Publications* (also in 1944),[8] and *Packard Motor Car Co. v. NLRB* (in 1947)[9] — all staples of the introductory administrative law curriculum.[10] On the question of judicial deference to executive interpretation of agency utterances, the Court decided *Bowles v. Seminole Rock & Sand Co.* (in 1945)[11] — which gave birth to a doctrine still sometimes called "*Seminole Rock* deference."[12] On the question of agency decisionmaking, the Court decided two cases (in 1943 and 1947) captioned *SEC v. Chenery Corp.*[13] Through the decade, the terms "administrative law" and "administrative process" — previously unknown in Supreme Court opinions — were used with increasing frequency.[14]

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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.

[5] 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 used to illustrate doctrines, such as the nondelegation principle, that have been all but discarded.

[6] 314 U.S. 402 (1941).

[7] 323 U.S. 134 (1944).

[8] 322 U.S. 111 (1944).

[9] 330 U.S. 485 (1947).

[10] 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).

[11] 325 U.S. 410 (1945).

[12] It also known as "*Auer* deference" after a more recent case. *See Auer v. Robbins*, 519 U.S. 452 (1997).

[13] 332 U.S. 194 (1947); 318 U.S. 90 (1943).

[14] 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 "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 . . .").

This article — part of a larger project to unearth the development of administrative law by the 1940s Court — discusses newly found draft opinions by members of the Supreme Court in two seminal cases, *Gray v. Powell* and *Bowles v. Seminole Rock*.[15] 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.

There are at least three reasons to explore the development of administrative law in 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. Witness, for example, the Solicitor General's argument in the recent *Perez v. Mortgage Bankers Association* case[16] 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."[17] 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]."[18] The date of the Court's decisions in these cases, according to the Solicitor General, provided some evidence of the meaning of the APA.

To be sure, there is a broader question whether this exercise in what may be termed "APA originalism" is a sound approach to

[15] 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). 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.
[16] 135 S.Ct. 1199 (2015).
[17] Br. for the United States, *Perez v. Mortgage Bankers Association*, at 13, 21.
[18] *Id.* at 21.

administrative law.[19] Several recent articles have adopted this approach to understanding administrative-law questions.[20] 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.[21] 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.[22] 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.[23]

Second, and more abstractly, the draft opinions 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.[24] 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.[25]

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[19] *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).

[20] *See, e.g.*, Kevin Stack, *Preambles as Guidance*, 84 G.W.U. L. Rev. 1252 (2016).

[21] *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.").

[22] 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).

[23] 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). I welcome thoughts on this issue.

[24] Bamzai, *Origins of Judicial Deference*, at 971-76.

[25] *Id.* at 930-47.

More 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."[26] "A book which develops this thesis," Davis' treatise observes, "is Hayek, *The Road to Serfdom* (1944), which has been a best seller."[27] Here, we see an unusually close connection between the thought leaders of administrative law, the thought leaders of economics, and the public.

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.[28] 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.

I.

To understand the Supreme Court's administrative law jurisprudence of the 1940s, one must appreciate the foundation upon which the Justices built.[29] For present purposes, I will illustrate the

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[26] Kenneth Culp Davis, *Administrative Law* § 5, at 20 (1951).

[27] *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).

[28] Cross reference to Chris Walker contribution.

[29] 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*

then-prevailing consensus on judicial review of agency action with a single case — the Court's 1932 decision in *Crowell v. Benson*.[30]

A.

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.[31] The Deputy Commissioner found that Knudsen was injured while employed by Benson and performing services on the navigable waters of the United States.[32] Benson sought to enjoin the 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.[33] 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.[34]

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."[35] With respect to questions

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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).

[30] 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).

[31] 285 U.S. at 36 (citing Act of Mar. 4, 1927, ch. 509, 44 Stat. 1424; 33 U.S.C. 901-950)

[32] *Id.* at 37.

[33] *Id.*

[34] *See* 45 F.2d 66; 38 F.2d 306; 33 F.2d 137.

[35] 285 U.S. at 45-46.

of fact, however, "[a]part from cases involving constitutional rights,"[36] 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."[37]

The Court addressed the questions of Due Process briefly,[38] and considered the "contention based upon the judicial power of the United States" to be "a distinct question."[39] Relying on the 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."[40] 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."[41] Although the case was, the Court noted, one of

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[36] *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.

[37] 285 U.S. at 46.

[38] 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 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.

[39] *Id.* at 49.

[40] *Id.* at 49 (quoting 59 U.S. 272 (1856)).

[41] *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

"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 relieving the courts of a most serious burden while preserving their complete authority to insure the proper application of the law."[42]

But the flexibility to use administrative factfinding, even in "private rights" cases, extended only to claim determinations "within the purview of the Act."[43] "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."[44] The term "jurisdictional," the Court observed, "although frequently used, suggests analogies which are not complete when the reference is to administrative officials or bodies."[45] 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."[46] 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

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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 Virginian 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.

[42] 285 U.S. at 54.

[43] *Id.*

[44] *Id.* (footnote omitted).

[45] *Id.* at 54 n.17.

[46] *Id.*; *see also ICC v. Humboldt Steamship Co.*, 224 U.S. 474, 484.

conditions."[47] That was because Congress was unable to "reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction."[48]

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 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.[49]

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.[50]

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[47] 285 U.S. at 54-55.

[48] *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.").

[49] *Id.* at 56-57.

[50] *Id.* at 80 (Brandeis, J., dissenting).

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.[51]

B.

Off the Court, the *Crowell* opinion received the attention of Judge Learned Hand and then-Professor Frankfurter.[52] Three weeks after *Crowell* was decided, Hand wrote Frankfurter that he had "read the long opinions in the case about the Workmens Compensation and Brandeis certainly floored them for fair."[53] "It seems," Hand continued, "to me one of the most unnecessary and wanton distinctions that they have got off of late."[54] 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.[55]

II.

Crowell provided the governing framework for judicial review of agency action for almost a decade. But as the exchange between

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[51] For later Hughes Court opinions addressing the same subject, see *Morgan v. United States* (1936).

[52] 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.

[53] Letter from Learned Hand to Felix Frankfurter (Mar. 16, 1932) (on file with author)

[54] *Id.*

[55] Letter from Felix Frankfurter to Learned Hand (Mar. 18, 1932) (on file with author).

Judge Hand and Professor Frankfurter suggests, the framework was subject to important challenges. 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. In this Part, 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.

A.

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.[56] *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.[57] 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.[58] 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 Department of Justice's motion, the Court then granted rehearing,[59] but found itself shorthanded once again, because Justice Jackson was recused due to his participation in the litigation as Solicitor General.

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[56] 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).

[57] 314 U.S. 402, 411-12 (1941).

[58] 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.

[59] 313 U.S. 596 (1941).

The Court nevertheless 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.[60] 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."[61] Interpreting the statute, according to the Court, "call[ed] for the expert, experienced judgment of those familiar with the industry."[62] 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."[63] 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."[64]

Justice Roberts' dissent was joined by Chief Justice Stone and Justice Byrnes. One can assume that the earlier Court order was a result of Justice Roberts, then-Justice Stone, and Chief Justice Hughes voting to affirm, joined by a mystery fourth Justice from among the five in the ultimate majority (Justices Reed, Black, Frankfurter, Douglas, and Murphy).[65] Counting the Justices thus indicates that a member of the Court switched his vote from the first to the second argument.

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[60] *Id.* at 412 & n.7.
[61] *Id.* at 412.
[62] *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").
[63] 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").
[64] *Id.* at 420-21.
[65] An employee of the Curator's Office of the Supreme Court has told me that the docket books available at the Court contain information regarding this vote switch. The Curator's Office is presently awaiting approval from within the Court to release this information.

Gray does not expressly speak of the relationship between review of questions of "fact" and questions of "law" to the Court's analysis. 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."[66] 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."[67] 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.

The contrast with *Crowell* is instructive. 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*, by contrast, the Court's drafts suggest that at least Justice Reed viewed "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.

B.

The Court's 1945 decision in *Bowles v. Seminole Rock & Sand Co.* picked up on a different strand of preexisting interpretive theory.[68] 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.[69]

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[66] Draft Opinion of Justice Stanley Reed (on file with author).
[67] *Id.*
[68] 325 U.S. 410 (1945).
[69] 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*.

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."[70] But scholars have long observed that *Seminole Rock* can be read in several different ways. 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.[71]

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."[72] 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."[73] In 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."[74] 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.[75] Those sources, the opinion now said, "in some situations may be relevant in the first instance in choosing between various constructions."[76] Most pertinently, in making that edit, Murphy also cut the remainder of the sentence that suggested that the "dispute [was about] the

[70] 325 U.S. at 414.
[71] *Id.* at 415, 417.
[72] Draft of Murphy opinion (on file with author).
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*

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.[77]

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.[78] 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"?[79] 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.[80]

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.[81] The brief 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.[82] 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."[83] 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."[84]

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."[85] 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

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[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] U.S. Br. at 12-16.
[82] *Id.* at 12, 16, 18-20.
[83] *Id.*
[84] *Id.*
[85] *Id.*

what the Administrator's regulation was intended to mean."[86] "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."[87]

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." That removal seems inadvertent — in the sense that neither Murphy nor Rutledge appeared to have any objection to this aspect of the sentence. But it 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 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.

III.

In this Part, I address some possibilities for what a study of the administrative law decisions of the 1940s might tell us. First, I address the possibilities for understanding governing cases and the governing statute in this area, the APA. Second, I address the theoretical implications of the interpretive debates among the Justices. Finally, I address the implications for administrative reform proposals of our own time.

A.

Part of the strangeness of seeking to uncover the meaning and arc of cases from the 1940s is that we now live in a world in which a governing statute, the Administrative Procedure Act, addresses

[86] *Id.* at 21.
[87] *Id.* at 21-22.

many of the same questions. One might wonder why understanding cases remains relevant in our statutory world.

There are at least two responses to this question. First, notwithstanding the passage of the Act, it remains true that much administrative law is "common law" created and elaborated by courts, specifically, the Supreme Court. Under these circumstances, a close reading of the cases provides the same insight into the future path of the law as it would in any other "common law" field.

Second, 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."[88] There are at least three 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."[89] 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."[90] 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*.

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

[88] Adrian Vermeule, *Portrait of an Equilibrium*, New Rambler Review (Apr. 24, 2015).
[89] 5 U.S.C. 706.
[90] *Id.*

constitutional interpretation and, as a result, retain the APA's parallelism between the interpretation of constitutional and other provisions.[91]

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 exceeded its statutory authority as "jurisdictional."[92] But there is such a principled basis if one takes the text of the APA seriously.

There is evidence, moreover, that 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."[93] Thus, "[t]hough the category of jurisdictional fact does not have that

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[91] 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.

[92] 133 S. Ct. at 1868.

[93] Louis L. Jaffe, *Judicial Control of Administrative Action* 154 (1965).

strict logic which the phrase seems to imply, it is not a completely arbitrary concept."[94]

The issue is the familiar one regarding whether the APA or common law principles ought to govern.[95] 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, rather than ignore it.[96]

B.

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 intellectual mix. The draft opinions and correspondence map onto these debates.

Justice Reed's draft opinions in *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.'"[97] 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.'"[98] These concerns appeared to be on Justice Reed's mind during the drafting process for *Gray*.

By contrast, Justice Murphy's draft opinions in *Seminole Rock* indicate that he was interested in capturing the "original intent" or

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[94] *Id.* at 631.
[95] *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").
[96] *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").
[97] John Dickinson, *Administrative Justice and the Supremacy of Law* viii (1927)
[98] *Id.* at 312.

"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,[99] and was clearly among the mix of approaches available to those who adopted the APA in 1946.

C.

Finally, we should turn to the implications of this doctrinal history to the present efforts to reform the APA. The implications are threefold.

First, 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. Perhaps the chief proponent of this vision 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.[100] 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."[101] "[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*."[102] *Crowell* thus "no longer fairly represents the prevailing equilibrium between administration and law," because "[t]he main elements of the

[99] Bamzai, *Origins of Judicial Deference*.
[100] Adrian Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (2017).
[101] Adrian Vermeule, *Leviathan Had a Good War*, JOTWELL (Feb. 29, 2016).
[102] 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").

framework have come undone, in ways that have shifted power from courts to agencies."[103]

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?

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

Third, and finally, timing is everything. 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.

CONCLUSION

In this paper, the first step toward a study of the Court's administrative law jurisprudence of the 1940s, I have studied the Court's decision in *Crowell v. Benson*, as well as the Justice's drafts in *Gray v. Powell* and *Bowles v. Seminole Rock*. 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

[103] *Id.*

via statute, given that the Court appears to believe interpretation and the standards of judicial review to be a uniquely judicial task.