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# The Administrative State, Front and Center: Studying Law and Administration in Postwar America

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# The Administrative State, Front and Center: Studying Law and Administration in Postwar America

REUEL E. SCHILLER

## I. Blinded by *Brown*

More than any other case from the postwar period, *Brown v. Board of Education* has captured the attention of historians and the public alike. The case itself, and the NAACP's campaign that led to it, have been the subject of books and articles beyond counting.<sup>1</sup> In many history textbooks it is the only court case mentioned between the end of World War II and the early 1960s.<sup>2</sup> It is one of a handful of cases that is recognized by the

1. A search of the system-wide catalog of the libraries of the University of California reveals eighty-one entries for books with "*Brown v. Board of Education*" in the title. Only eleven contain the words "Roe" and "Wade"; seven contain the words "Plessy" and "Ferguson"; and seven contain "Marbury" and "Madison." Only the words "Dred Scott" come close to *Brown*, generating seventy-seven entries. The Library of Congress subject heading "Topeka (Kan) Board of Ed—Trials, Litigation, etc" has forty-three entries, including twelve under the subheading "juvenile literature."

2. See Daniel J. Boorstin and Brooks Mather Kelley, *A History of the United States* (Needham, Mass.: Prentice Hall, 1996), 705–71 (*Brown* is the only judicial decision mentioned in the section entitled "Postwar Problems, 1945–1960"); Paul Boyer, *Boyer's American Nation* (Boston: Houghton Mifflin, 2001) (chaps. on the "Cold War" and on "Society after World War II" mention *Brown* and *Sweat v. Painter*, but no other cases); Andrew Cayton, Elisabeth Israels Perry, and Allan M. Winkler, *America: Pathways to the Present* (Needham, Mass.:

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public at large and is surely the only Supreme Court case that has its own National Historic Site.<sup>3</sup>

The intense focus on this single case is not without reason. While recent years have seen a debate about the importance of *Brown* in actually promoting desegregation,<sup>4</sup> no one doubts that it is a potent symbol of the major elements of postwar liberalism. The case demonstrated the increasing commitment of national institutions to pluralism and racial egalitarianism. It presaged the Warren Court's reconceptualization of the Supreme Court's role as the protector of certain kinds of civil rights and civil liberties. It was also a potent bellwether for the increasing importance of federal institu-

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Prentice Hall, 1995) (*Brown* is only Supreme Court decision from the 1950s that is mentioned); Gary Nash, *American Odyssey: The United States in the Twentieth Century* (New York: Glencoe/McGraw-Hill, 1999) (*Brown* is the only judicial decision from the 1950s that is mentioned, although the book does discuss the trial of the Hollywood Ten). These textbooks are four of the six most popular high school American history textbooks according to the American Textbook Council. [www.historytextbooks.org/adoptions.htm](http://www.historytextbooks.org/adoptions.htm). College textbooks are not appreciably better. Alan Brinkley's *The Unfinished Nation* mentions no cases other than *Brown* in its chapters on the postwar period. See Alan Brinkley, *The Unfinished Nation: A Concise History of the United States*, 3rd ed. (New York: McGraw-Hill, 2001), 844–913. Another leading college text, *America, Past and Present*, mentions *Yates v. United States*, but otherwise focuses solely on *Brown*. Robert A. Divine, T. H. Breen, George Fredrickson, R. Hal Williams, *America, Past and Present*, 3rd ed. (New York: HarperCollins, 1991), 881. As Mary Dudziak has noted, even legal history texts, which obviously discuss more than just *Brown* in their sections in the postwar period, have the unfortunate tendency to segregate the race cases and the anticommunism cases from one another. Mary L. Dudziak, "Brown as a Cold War Case," *Journal of American History* 91 (2004): 32. As both Lee and Tani's articles indicate, these cases need to be woven together as part of the narrative of postwar legal history.

3. <http://www.nps.gov/brvb/>. The courthouse in Saint Louis where the trials in the *Dred Scott* case were held is also a National Historic Site. However, this site is not devoted exclusively to *Dred Scott*. It instead memorializes the many links that the courthouse has to slavery, including the slave auctions that occurred there and its relationship to the Underground Railroad. It also has exhibitions on Virginia Minor's 1870 challenge to women's disfranchisement, nineteenth-century law in general, and the architecture of historic courthouses. <http://www.nps.gov/jeff/planyourvisit/och.htm>.

4. Michael Klarman and Gerald Rosenberg are the two leading *Brown* skeptics. See Gerald Rosenberg, *The Hollow Hope* (Chicago: University of Chicago Press, 1991), 42–71; Michael Klarman, "Brown, Racial Change, and the Civil Rights Movement," *Virginia Law Review* 80 (1994): 7; Michael Klarman, "How *Brown* Changed Race Relations: The Backlash Thesis," *Journal of American History* 81 (1994): 81; Michael Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford: Oxford University Press, 2005), 344–442. For some impassioned defenses of *Brown*, see David J. Garrow, "Hopelessly Hollow History: Revisionist Devaluing of *Brown v. Board of Education*," *Virginia Law Review* 80 (1994): 151; Mark Tushnet, "The Significance of *Brown v. Board of Education*," *ibid.*, 173; and Paul Finkelman, "Civil Rights in Historical Context: In Defense of *Brown*," *Harvard Law Review* 118 (2005): 973.

tions in public policy creation. Finally, *Brown* established a model for what has been called “structural reform litigation” in which interest groups use litigation campaigns to affect public policy by bringing executive and, to a lesser extent, legislative institutions under on-going judicial control.<sup>5</sup>

Nevertheless, *Brown’s* dominance of the narrative of postwar legal history has come with a cost. Just as objects placed next to a blazing light may be difficult to see, *Brown’s* notoriety has distracted legal historians from other significant legal-historical events of the postwar period. While there have been wonderful works of legal history about certain postwar subjects,<sup>6</sup> legal historians have been largely AWOL as political, cultural, and social historians have deepened the narrative of postwar American history. Surely the rise of consumer culture, the growth of suburbanization, and the resurgence of domesticity, to name just three subjects successfully incorporated into the narrative of postwar history, have legal components that are worth investigating.<sup>7</sup>

5. The germinal works discussing the rise of structural reform litigation are Abram Chayes, “The Role of the Judge in Public Law Litigation,” *Harvard Law Review* 89 (1976): 1281 and Owen Fiss, *The Civil Rights Injunction* (Bloomington: Indiana University Press, 1978). A contemporary, less sanguine, view of structural reform litigation is Ross Sandler and David Schoenbrod, *Democracy by Decree: What Happens When Courts Run Government* (New Haven: Yale University Press, 2003).

6. Two areas that have received scholarly attention are anticommunism and legal thought. On anticommunism see Michal R. Belknap, *Cold War Political Justice: The Smith Act, the Communist Party, and American Civil Liberties* (Westport, Conn.: Greenwood Press, 1977); Stanley I. Kutler, *The American Inquisition: Justice and Injustice in the Cold War* (New York: Hill and Wang, 1982); and Arthur J. Sabin, *In Calmer Times: The Supreme Court and Red Monday* (Philadelphia: University of Pennsylvania Press, 1999). On postwar legal thought see G. Edward White, *Patterns of American Legal Thought* (Indianapolis: Bobbs-Merrill, 1978), 136–62; Laura Kalman, *Legal Realism at Yale, 1927–1960* (1986), 145–231; Neil Duxbury, *Patterns of American Jurisprudence* (Oxford: Oxford University Press, 1995), 206–99; Laura Kalman, *The Strange Career of Legal Liberalism* (New Haven: Yale University Press, 1996), 22–42; and William N. Eskridge, Jr. and Philip P. Frickey, “The Making of Legal Process,” *Harvard Law Review* 107 (1994): 2031. Of course, more synthetic surveys of twentieth-century legal history have sections on postwar developments. See Morton Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992); William E. Nelson, *The Legalist Reformation: Law, Politics, and Ideology in New York, 1920–1980* (Chapel Hill: University of North Carolina Press, 2001); and Lawrence M. Friedman, *American Law in the Twentieth Century* (New Haven: Yale University Press, 2002). Friedman has a particularly useful bibliography.

7. On these subjects see Kenneth T. Jackson, *The Crabgrass Frontier: The Suburbanization of the United States* (New York: Oxford University Press, 1985); Elaine Tyler May, *Homeward Bound: American Families in the Cold War Era* (New York: Basic Books, 1988); Lizabeth Cohen, *A Consumer’s Republic: The Politics of Mass Consumption in Postwar America* (New York: Knopf, 2003); and Meg Jacobs, *Pocketbook Politics: Economic Citizenship in Twentieth-Century America* (Princeton: Princeton University Press, 2004).

The largest lacuna (or at least the one that bothers me the most) is the absence of any sustained legal history of the administrative state. This historiographic hole is particularly perplexing. No one would disagree that the growth of the administrative state (including the welfare state) is one of the key elements of postwar liberalism. Yet its legal dimensions are profoundly understudied. In the last several decades political historians have fruitfully turned their attention to the administrative state,<sup>8</sup> yet legal historians have not followed.<sup>9</sup> Elsewhere I have called political historians to task for ignoring the role of courts in the administrative state.<sup>10</sup> But the fault is ours as well. Legal historians have not generated a legal history of the postwar period that includes the interaction of courts and agencies.

Indeed, *Brown* may have led us astray. The story of *Brown*—litigators using the federal courts to bludgeon recalcitrant state actors into creating specific policies—is simply not the manner in which most public policy was made during the postwar period. Courts were not alone in the driver seat. They may not even have been in the front of the car. In the years following World War II administrative agencies created increasing amounts of law. Postwar legal history must begin to reflect this. The fact

8. For the basic bibliographical references to the so-called “state-building” or “American Political Development” literature, see Reuel E. Schiller, “Enlarging the Administrative Polity: Administration and the Changing Definition of Pluralism, 1945–1970,” *Vanderbilt Law Review* 53 (2000): 1389, 1393–96. For monographs from this literature that focus on the postwar period in particular, see Brian Balogh, *Chain Reaction: Expert Debate and Public Participation in American Commercial Nuclear Power, 1945–1975* (Cambridge: Cambridge University Press, 1991); Julian Zelizer, *Taxing America: Wilbur D. Mills, Congress, and the State, 1945–1975* (Cambridge: Cambridge University Press, 1998); Jennifer Klein, *For All These Rights: Business, Labor, and the Shaping of America’s Public-Private Welfare State* (Princeton: Princeton University Press, 2003); Merl E. Reed, *Seedtime for the Modern Civil Rights Movement: The President’s Committee on Fair Employment Practice, 1941–1946* (Baton Rouge: Louisiana State University Press, 1991); Meg Jacobs “How About Some Meat?: The Office of Price Administration, Consumption Politics, and State Building from the Bottom Up, 1941–1946,” *Journal of American History* 84 (1997): 910–41; as well as several excellent essays in parts one and two of *The Politics of Social Policy in the United States*, ed. Margaret Weir, Ann Shola Orloff, and Theda Skocpol (Princeton: Princeton University Press, 1988).

9. For three legal historians who have truly given the administrative state its due, see Lucy E. Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (Chapel Hill: University of North Carolina Press, 1995); William J. Novak, *The People’s Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996); and Barbara Young Welke, *Recasting American Liberty: Gender, Race, Law, and the Railroad Revolution, 1865–1920* (Cambridge: Cambridge University Press, 2001). Of course, none of these books address the postwar period.

10. Reuel E. Schiller, “‘Saint George and the Dragon’: Courts and the Administrative State in Twentieth-Century America.” *Journal of Policy History* 17 (2005): 110.

that both Sophia Lee and Karen Tani's wonderful articles do so is a cause for optimism.

Both articles place the administrative state front and center in the legal history of postwar America. They do so in different ways, each of which suggests a fruitful path for legal historians who wish to explore the interaction between administration and law in the years following the Second World War. To simplify: Lee demonstrates that agencies were a completely independent locus of law creation, even at a constitutional level; Tani shows how studying the interaction between courts and agencies is crucial to understanding policy development during the postwar period. Using these articles as a springboard, in the next two sections I will suggest some directions for legal historians to take as they pursue either approach to this subject.

## II. The Untold Administrative Dimension of Legal Liberalism

Lee's narrative is compelling proof of the importance of studying administrative institutions as law-makers. By showing how the NAACP used the NLRB in its battle for fair employment practices, she not only throws light on a heretofore unstudied element of the NAACP's campaign for racial equality. She also shows how, in the years following the Second World War, agencies became a locus of law creation—a locus that cries out for further examination by legal historians.

For example, Lee's description of the litigation campaign to outlaw racial discrimination by unions under the NLRA was only one of several doctrinal innovations that civil rights litigators pressed on the Board. Two years prior to *Hughes Tool*, the Board declared that it would set aside elections in which employers used racially inflammatory rhetoric.<sup>11</sup> In 1964, the year it decided *Hughes Tool*, the Board held that concerted activities aimed at promoting non-discriminatory employment practices were protected by the Act.<sup>12</sup> In 1969, the NAACP and other civil rights organizations argued before the Board that it should allow unionized African-American workers to bargain separately with their employer if they believed that their union was not representing their interests.<sup>13</sup> While the Board rejected that argument, the D.C. Circuit did not.<sup>14</sup> Indeed, that same year the D.C. Circuit

11. *Sewell Manufacturing*, 138 NLRB 66 (1962).

12. *Tanner Motor Livery*, 148 NLRB 1402 (1964).

13. See Reuel E. Schiller, "The Emporium Capwell Case: Race, Labor Law, and the Crisis of Postwar Liberalism," *Berkeley Journal of Employment and Labor Law* 25 (2004): 129, 145–49.

14. *Emporium Capwell*, 192 NLRB 173 (1971), reversed and remanded sub nom *Western Addition Community Organization v. NLRB*, 485 F.2d 917 (D.C.Cir. 1973).

instructed the Board to find that racial discrimination by an employer was, in and of itself, a violation of the NLRA.<sup>15</sup>

As with *Hughes Tool*, none of these innovations had much lasting impact. Some were rejected by higher courts,<sup>16</sup> while others, like *Hughes Tool*, simply faded away.<sup>17</sup> But the fate of these doctrines is not what was significant about them, historically speaking. Their significance lies in the fact that they demonstrate how aggressively civil rights litigators used administrative agencies to further their goals.

Indeed, there exists an essentially unchronicled legal history of the interaction between the Civil Rights Movement and the administrative state.<sup>18</sup> The “unremitting struggle” that civil rights activists demanded required as much legal action before agencies as it did before courts.<sup>19</sup> The short-lived Fair Employment Practice Committee and the Equal Employment Opportunity Commission were obvious places for the NAACP and other groups to focus their attention, but people within the Civil Rights Movement hardly limited themselves to agencies that were designed to address their concerns. To do so would have been to profoundly restrict their opportunities to shape policy through the administrative state. Instead, lawyers in the Civil Rights Movement used agencies that were not designed to address issues of racial equality.

For example, the Interstate Commerce Commission was less than two months old when, in May of 1887, William H. Councill filed a complaint against the Western and Atlantic Railroad Company after being violently expelled from an all-white, first-class car as he traveled, with a first-class ticket, from Chattanooga to Atlanta.<sup>20</sup> In Councill’s case, as well as in two others that were brought in the next two years, the Commission held that the railroad companies violated the Interstate Commerce Act by failing to provide African-American passengers with accommodations equal to

15. *United Packing House, Food, and Allied Workers v. NLRB*, 416 F.2d 1126 (D.C. Cir. 1969).

16. *Emporium Capwell v. Western Addition Community Organization*, 415 U.S. 913 (1975); *NLRB v. Tanner Motor Livery*, 419 F.2d 216 (9th Cir. 1969).

17. *Sewell* is still good law. See *KI (USA) Corp.*, 309 NLRB 1063 (1992); *Zartic, Inc.*, 315 NLRB 495 (1994). *United Packing House*, on the other hand, has been narrowed by the Board. *Jubilee Manufacturing*, 202 NLRB 272 (1973). Consequently, racial discrimination rarely serves as the basis for a section 8(a)(3) claim. *J. S. Alberici Construction Co.*, 231 NLRB 1030 (1977); *Dispatch Printing Co.*, 306 NLRB 9 (1992).

18. A notable exception to this is Welke, *Recasting American Liberty*, particularly chap. 9.

19. This phrase was William Henry Hastie Jr.’s. See Genna Rae McNeil, *Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights* (Philadelphia: University of Pennsylvania Press, 1983), 211.

20. Charles A. Lofgren, *The Plessy Case: A Legal-Historical Interpretation* (New York: Oxford University Press, 1987), 142.



those of whites.<sup>21</sup> Thus, the ICC created the doctrine of separate but equal almost a decade before *Plessy v. Ferguson* was decided.

In the 1880s, this was seen as something of a triumph, since most railroads provided no first-class accommodations for blacks.<sup>22</sup> By the end of World War II, the goals of the litigants had changed substantially, particularly as the ICC backed away from requiring even segregated equality. Their choice of forums did not change, however. The NAACP continued litigating before the ICC, ultimately securing in 1950 a decision by the Supreme Court that the Interstate Commerce Act prohibited segregated railroad cars.<sup>23</sup> It also used the ICC as a forum for attacking segregated bus facilities in the context of the Freedom Rides in 1961.<sup>24</sup> The 1960s also saw cases brought before the Civil Aeronautics Board to desegregate southern airports and prohibit racial discrimination in air transportation.<sup>25</sup>

Similarly, during the 1960s, civil rights organizations used the Federal Communication Commission (FCC) as a forum for advancing their agenda of racial egalitarianism. During 1964, organizations participating in Freedom Summer in Mississippi petitioned the FCC, requesting that the agency not renew the licenses of white-owned radio and television stations that refused to carry black-oriented programming or that broadcast biased information about civil rights activities.<sup>26</sup> As a result, by early 1970s, the FCC was adjudicating dozens of petitions from African-American listeners demanding that local programming reflect the interests of all elements of the community. Indeed, even by the mid-1960s, the simple threat of such petitions forced southern media outlets to begin, albeit tentatively, to cover civil rights activities.<sup>27</sup>

21. Welke, *Recasting American Liberty*, 344–48; Lofgren, *Plessy Case*, 142–44; Catherine A. Barnes, *Journey from Jim Crow: The Desegregation of Southern Transit* (New York: Columbia University Press, 1983), 6–7.

22. Note that this was all that Council and the other early litigants were asking for. Lofgren, *Plessy Case*, 142–43; Welke, *Recasting American Liberty*, 344–45.

23. *Henderson v. United States*, 339 U.S. 816 (1950). Barnes, *Journey from Jim Crow*, 74–76.

24. Barnes, *Journey from Jim Crow*, 168–75.

25. *Ibid.*, 172; *Fitzgerald v. Pan American World Airways*, 132 F. Supp. 798 (S.D.N.Y. 1955).

26. For a tantalizing, but brief, description of these events see Brian Ward, *Radio and the Struggle for Civil Rights in the South* (Gainesville: University Press of Florida, 2004), 274–77. Also see Kay Mills, *Changing Channels: The Case That Transformed Television* (Jackson: University Press of Mississippi, 2004). The FCC was exceptionally resistant to considering such petitions until it was twice rebuked by the D.C. Circuit for its intransigence. *Office of Communications of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C.Cir. 1966); *Office of Communications of the United Church of Christ v. FCC*, 425 F.2d 543 (D.C.Cir. 1969).

27. Ward, *Radio and the Struggle for Civil Rights*, 277.

All of these instances of administrative law-making involved the civil rights of African-Americans. However, the growth of the administrative state during the postwar period provides a plethora of opportunities to study, as Lee did for the NLRB, the way in which individuals and interest groups generated policy as they litigated before agencies on a host of subject matters. As Tani demonstrates, anticommunism is an obvious locus for such studies. The Subversive Activities Control Board, the Attorney General's list, and countless state equivalents, have already generated some legal-historical scholarship, but nowhere near enough.<sup>28</sup> Similarly, despite an explosion of historical work about the development of the American welfare state, legal historians have just begun to explore its legal and doctrinal elements.<sup>29</sup> And what about the administrative entities associated with the other elements of postwar social change: the federal, state, and local entities that shepherded millions of Americans from the cities into the suburbs; or agencies that helped to generate consumer culture through loans and subsidies? Or, what about the actions of less "sexy" agencies, like the Atomic Energy Commission, the Federal Power Commission, and the Food and Drug Administration, each of which transformed the way they regulated profoundly important areas of the economy in the late 1950s and the early 1960s?<sup>30</sup>

Finally, this focus on the legal aspects of agency actions must reflect one of Lee's key points: agencies can be constitutional actors. *Marbury v. Madison* to the contrary, the growth of the administrative state has, on occasion, created a demimonde of constitutional interpretation in which agencies, not courts, are the primary actors. Consider freedom of expression: During the first third of the twentieth century, judicial deference to administrative action limiting free speech was routine.<sup>31</sup> Even as the judiciary asserted itself as the primary guardian of this right, agencies strongly and successfully asserted their own power to interpret the First Amendment. In the 1930s and 1940s, the NLRB engaged in a struggle with the judiciary over its power to restrict the speech of employers in the context

28. See note 6, above. Ellen Schrecker's *Many are the Crimes: McCarthyism in America* (Boston: Little, Brown, 1998), the definitive narrative history of McCarthyism, discusses many legal issues.

29. In addition to Tani's piece in this Forum, see Felicia Kornbluh, *The Battle for Welfare Rights: Politics and Poverty in Modern America* (Philadelphia: University of Pennsylvania Press, 2007), particularly chap. 3, and Martha F. Davis, *Brutal Need: Lawyers and the Welfare Rights Movement, 1960-1973* (New Haven: Yale University Press, 1993).

30. Reuel E. Schiller, "Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s," *Administrative Law Review* 53 (2001): 1139, 1147-49.

31. Reuel E. Schiller, "Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment," *Virginia Law Review* 86 (2000): 1, 21-51.

of union representation elections. Even after the Supreme Court explicitly prohibited the Board from doing so in 1941, the agency continued until Congress and new appointees reined it in.<sup>32</sup>

Similarly, for most of the twentieth century the FCC (and its predecessor, the Federal Radio Commission) acted in a constitutional capacity by strictly regulating the content to radio and television broadcasts.<sup>33</sup> In the 1920s and 1930s, the agency would revoke licenses of stations that broadcast “distasteful” or even “uninteresting” content.<sup>34</sup> Stations that broadcast political opinions contrary to those of the Roosevelt Administration also found themselves in hot water.<sup>35</sup> In 1940, the FCC simply prohibited editorializing.<sup>36</sup> During the postwar period, the agency overturned its ban on editorializing and instituted the “fairness doctrine” that required stations to broadcast “all sides of controversial public issues.”<sup>37</sup> It also denied licenses to stations if their broadcasting did not “sufficiently represent local interests.”<sup>38</sup> Each of these actions was taken without any judicial interference. Indeed, when, in 1987, the FCC abolished the fairness doctrine and committed itself to a libertarian (or market driven) conception of free speech, it did so completely on its own, without any prompting from courts.<sup>39</sup> Whether restricting expression or not, the agency, not the courts, was the constitutional decision-maker.

Lacking knowledge (or a fecund imagination), I won’t hazard a guess at what other agencies have engaged in such behaviors (perhaps local land-use agencies with respect to takings, or the SEC with respect to free speech when it preapproves prospectuses). Instead, let me simply amplify Lee’s point: courts do not have a monopoly on constitutional interpretation. In certain instances, they don’t even have the last word. Accordingly, the rapid growth of the administrative state during the New Deal and the postwar period gives legal historians an ample opportunity to tell the story of twentieth-century extra-judicial constitutionalism.

32. Harry A. Millis and Emily Clark Brown, *From the Wagner Act to Taft-Hartley: A Study of National Labor Policy and Labor Relations* (Chicago: University of Chicago Press, 1950), 174–78; Reuel E. Schiller, “The Era of Deference: Courts, Expertise and the Emergence of New Deal Administrative Law,” *Michigan Law Review* 106 (2007): 399, 436–38.

33. Schiller, “Free Speech and Expertise,” 43–41, 96–101.

34. *Ibid.*, 45–46.

35. *Ibid.*, 49.

36. *Ibid.*, 50.

37. *Ibid.*

38. *Ibid.*, 98.

39. Indeed, in the late 1960s, at the height of the Supreme Court’s commitment to libertarian free speech, the Court reaffirmed the FCC’s power to restrict and direct the expression of its licensees. *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969). For the FCC’s abandonment of the fairness doctrine see *Syracuse Peace Council*, 2 F.C.C.R. 5043 (1987).

### III. Courts v. Agencies: The Contradictions within Legal Liberalism

Karen Tani's narrative sits at the exceptionally fertile intersection of the study of anticommunism, the development of the welfare state, and the rise of rights-based legal thought. While covering a similar period and touching on some similar issues as Lee's piece, Tani's article has a different institutional focus. She is interested in the interaction of courts and the administrative state. While courts left Lee's actors alone, allowing the NLRB to craft the *Hughes Tool* doctrine with essentially no judicial supervision, Tani writes about a doctrinal development—the luxuriation of procedural due process—that pit agencies and courts against each other. Reich's notion of the New Property, she demonstrates, was an explicit reaction to administrative overreaching. It was created, quite consciously, as a tool to allow courts to control the administrative process. This story is an example of another facet of the legal history of the administrative state that has been profoundly understudied: the relationship between courts and agencies and how that relationship changed over time. If, as I have argued, legal historians need to focus more attention on agencies as a locus of policy-creation, then we also need to understand the relationship between courts and agencies. How do changes in the way the two institutions interact shape the nature of the policy they create?

The effect of *Goldberg v. Kelly* on the welfare state is a potent example of this phenomena. Tani does a wonderful job of describing the connections among anticommunism, the growth of the welfare state, and judicial behavior by tracing the emergence of the idea of the New Property from Barbara Nestor's Social Security claim through Reich's encounter with anticommunism to the Supreme Court's decision in *Goldberg*. In doing so, she demonstrates how the very presence of the welfare state became an impetus for more judicial control over the administrative process. Not surprisingly, this control had a profound effect on the institutions of the welfare state. After all, *Goldberg* required social service agencies to add procedural mechanisms. Thus, Tani's narrative can be continued forward in a manner that shows how the welfare state responded to the Court's requirements. Faced with limited resources, agency officials mechanized and bureaucratized the process of applying for government benefits: decisions were made less subjective; procedural rules were enforced strictly; discretion was taken away from agency personnel.<sup>40</sup>

Because *Goldberg v. Kelly* transformed due process law, it would be surprising if it had not had a profound effect on agency behavior and the

40. Jerry L. Mashaw, *Due Process in the Administrative State* (New Haven: Yale University Press, 1985), 33–34.

development of the administrative state. Many agency-court interactions, however, take place on a much more modest scale. Yet exploring these interactions is nonetheless crucial to understanding the development of the administrative state. When faced with vague policy pronouncements from a legislature, courts and agencies frequently collaborate to flesh out the procedural and substantive dimensions of these mandates. Legal historians must turn their attention to this collaborative process. Consider, for example, the development of one of the main components of the modern welfare state: federal disability compensation law.<sup>41</sup>

Workers who have paid Social Security taxes or who have been injured while employed in certain risky professions are entitled to receive federal benefits if they become disabled. Officials at the Social Security Administration adjudicate thousands of such claims each year. Not surprisingly the agency has, over the years, developed procedural mechanisms for hearing these claims. For example, to streamline the process, the agency created “medical-vocational” guidelines that determine whether a disability exists, thereby eliminating the need to have vocational experts testify at every hearing. Similarly, the agency created a particular burden of proof (called the “true doubt rule”), designed to facilitate the payment of claims in close cases. Each of these procedural innovations was reviewed by federal circuit courts and, ultimately, by the Supreme Court. The medical-vocational guidelines were, in most circumstances, allowed, while the true doubt rule was not.

On their face these cases don’t seem to represent the most fascinating corner of the legal history of the administrative state. Yet considering the importance of Social Security to the modern welfare state,<sup>42</sup> the doctrinal machinations surrounding its administration should be of interest to legal historians. The development of both the true doubt rule and the medical-vocational guidelines illustrate the importance of examining the dialogue that occurs between agencies and courts as they generate public policy.

41. These examples stem from two Supreme Court cases *Heckler v. Campbell*, 461 U.S. 458 (1983) and *Director, Office of Workers’ Compensation Programs v. Greenwich Collieries*, 512 U.S. 267 (1994).

42. In a single year the Social Security Administration hears more claims than the federal courts hear on all subjects within their jurisdiction. (In 2005, 652,011 cases were commenced before the Social Security Administration. That same year 253,273 civil cases and 92,226 criminal cases were filed in federal district court. Federal courts of appeals heard another 68,473 appeals. Social Security Administration, Annual Statistical Supplement, 2006, Table 2.F9; Administrative Office of the United States Courts, *Judicial Business of the United States Courts*, [2006], pp. 102, 165, 214.) In 2005, almost fifty million people received old age benefits and seven and a half million people received disability benefits from the Social Security Administration. The value of these benefits was over \$520 billion. SSA, Annual Statistical Supplement, 2006, p. 2.

Each rule was created by the agency based on its expert opinion of how best to administer the disability program. Courts brought different interests to the table: ones based on more “legal” concerns such as canons of statutory construction and the requirements of due process. A complete legal history of the administrative state requires historians to understand these interests and, most importantly, to see how they change over time. Only by doing this can we generate an accurate picture of how law was created in the twentieth century.

Consider, for example, judicial attitudes towards administrative expertise during the postwar period. The more a court believed in an agency’s expertise, the less invasive that court would be in reviewing administrative action. The more suspicious of expertise a court was, the more it would force agencies to comport their actions to its own notions of what public policy should be. These notions might be informed by a judge’s philosophical predisposition, by his crass political preferences, or by institutional interests that are autonomous from politics (the desire to promote legal formalism or institutional prestige, for example). Regardless of their motivation, as courts put less faith in expertise, they become more powerful actors in the administrative process.

As it happens, the postwar period was a time when the judiciary became increasingly suspicious of the idea of expertise. Encounters with the administrative manifestations of fascism and Stalinism during the 1940s soured many Americans on efficient, expertise-driven notions of government.<sup>43</sup> Tani beautifully illustrates how domestic anticommunism had the same effect. Liberals like Reich and Brennan embraced the notion of the New Property as a bulwark against an administrative state of which they had become increasingly distrustful—an administrative state that implemented the political dictates of McCarthyism rather than the New Deal.

Indeed, this is the key irony that Tani’s article illustrates. Postwar liberalism was built on a foundation of both increasing statism (a product of the New Deal) and increasing rights consciousness (a product of America’s fight against totalitarianism abroad and racial discrimination at home). Yet these two elements were potentially antagonistic. Tani demonstrates that the rise of the administrative state stimulated a type of rights consciousness that was inimical to agency freedom of action. Harlan understood this in *Flemming v. Nestor* and sided with the agency. Brennan understood it as

43. Reuel E. Schiller, “Reining-in the Administrative State: World War II and the Decline of Expert Administration,” in *Total War and the Law: The American Home Front in World War II*, ed. Daniel Ernst and Victor Jew (Westport, Conn.: Praeger, 2002), 185–206; Horwitz, *The Transformation of American Law*, 213–46; Edward Purcell, *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* (Lexington: University Press of Kentucky, 1973), 115–78.

well and, in *Goldberg v. Kelly*, he chose to side with the individual. As legal historians study the postwar administrative state in greater detail, they will see this conflict writ large as agencies and courts interacted, some times cooperatively, sometimes antagonistically, to create law.

The notion of writing about administrative law or the administrative state can be a daunting one. Does anybody really have the attention span to write a legal history of the true doubt rule? Does any one have the attention span to read such a history? The complex administrative state that emerged after World War II has generated doctrinal administrivia that may be important but is certainly not thrilling. Yet the thrill is in the context. Lee and Tani's essays place the legal history of the administrative state in the context of the Civil Rights Movement and anticommunism, of grass-roots politics and postwar legal thought. These contexts are only the beginning. All the manifestations of the anxious prosperity of the 1950s—anticommunism, domesticity, civil rights, suburbanization, Beat culture, consumer culture, behavioralism, and the military industrial complex, to name just a few—affected and were affected by administrative laws and regulations.<sup>44</sup> If legal historians are to strive for a deeper, richer narrative of postwar legal history we must begin to draw these connections.

44. Don't believe me about Beat culture? That's just because nobody, to my knowledge, has examined how licensing regimes (which frequently included restrictions on speech and conduct) in places like San Francisco and New York allowed certain subcultures to flourish. Similarly, how many Beat-era writers benefited, like Norman Mailer and Lawrence Ferlinghetti, from the G.I. Bill? See Edward Humes, *Over Here: How the G.I. Bill Transformed the American Dream* (Orlando: Harcourt, 2006), 154–86. Indeed, there is great potential in studying the legal facets of the connection between art and the administrative state. See Donna M. Binkiewicz, *Federalizing the Muse: United States Arts Policy and the National Endowment for the Arts, 1965–1980* (Chapel Hill: University of North Carolina Press, 2006); Richard McKinzie, *The New Deal for Artists* (Princeton: Princeton University Press, 1973); and Monte Penkower, *The Federal Writers' Project: A Study in Government Patronage of the Arts* (Urbana: University of Illinois Press, 1977).

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