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THE INTERSTATE COMMERCE COMMISSION AND THE GENESIS OF AMERICA'S JUDICIALIZED ADMINISTRATIVE STATE[1]

Abstract
Revisiting the origins of the Interstate Commerce Commission (ICC) created in 1887 and offering a fresh interpretation that the commission was conceived and operated as a highly court-like agency, this paper argues that its emergence triggered the judicialization of the U.S. administrative state. It has been argued that the blueprint of the ICC took after existing railroad commissions. Its proponents in Congress, however, redesigned it with judicial courts as a model after facing criticisms based on the common-law principle of the supremacy of law allowing adjudication only to judicial courts. In accordance with such an institutional scheme, both the president and judiciary promoted the commission's judicialization by appointing lawyers as its members and reviewing its decisions. By the early twentieth century, the ICC was a prototypical agency whose court-like features permeated the administrative state. This paper thus offers a corrective to the literature on the U.S. administrative state building that has come to trivialize the role of the rise of the ICC. It was, instead, a critical juncture in the emergence of the modern administrative state in which being "quasi-judicial" was the norm rather than the exception for an administrative agency.

"The creation of national commissioners of railroads … involves a very important and delicate extension of administrative functions."[2] The year 1887, which saw the formation of the Interstate Commerce Commission (ICC) as well as the publication of Woodrow Wilson's "The Study of Administration"—quoted above—has been acknowledged as a major "starting point" of the U.S. administrative state and its research.[3] In his classic work on the subject, Stephen Skowronek took up the rise of the ICC as a turning point in the development of the "national bureaucracy."[4] Many works on the subject published in or around 1987 acknowledged, if not celebrated, the centennial of the "founding of the administrative state" along with the bicentennial of the Constitutional Convention.[5] The idea of the ICC as an origin of the administrative state was one of the few points of agreement among students of history, law, and political science for most of the twentieth century.

The past generation, however, has seen numerous challenges to such a view. It has been demonstrated that not only did the federal bureaucracy develop in the nation's first hundred years, but that agencies also often took the initiative in designing and implementing public policies. Synthesizing such research, Brian Balogh argues that the

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sense of "statelessness" pervasive in early America derived from the fact that much of the work done by the federal government remained "out of sight" of many contemporaries. Taking a different tack, administrative law scholar Jerry Mashaw has studied the operations of administrative agencies in the nation's first century and undermined the prevalent notion that pre-ICC agencies lacked substantive discretion in performing their missions. He has unearthed a rich tradition of discretionary administrative adjudication and rulemaking in its course. There now is widespread agreement that the administrative state has always been with the United States in some substantive form.[6]

While this paper shares in this emerging consensus, it nonetheless contends that important questions of the ICC's significance in the administrative state building remain unanswered. First, if the administrative state did not begin with the ICC, did the commission still have substantial impact on the course of the state building? More specifically, if many pre-ICC agencies had already penetrated deep into the society, was the ICC any different in its effect? Second, if the ICC was not the first administrative agency, why was it treated as such for a whole century?

These questions are worth asking because, compared to the vast amount of ink spilled on the emergence of the ICC, scholars have written little about the nature of the agency and its influence on the administrative state's mode of operation. Interested in elucidating what caused the departure of the administrative state, the plethora of works on the subject focus on identifying the political force primarily responsible for the railroad legislation and neglected the institutional form of the regulatory policy.[7] Another reason for such dismissal was a strong agreement, at least since Robert Cushman's seminal 1941 work, that the ICC was largely modeled after state-level railroad commissions.[8] The origins of the ICC, which used to be a popular research topic, quickly went out of vogue once the ICC's status as the first administrative agency became questionable.

Historical inquiry on the ICC did not just lose popularity, however; such research came under attack as unproductive. In his influential work on the forging of bureaucratic autonomy, Daniel Carpenter harshly criticizes early scholars of American political development such as Skowronek, Scott James, and Elizabeth Sanders, for their excessive attention to the ICC and other so-called independent regulatory commissions modeled after it, viewing them as "figur[ing] little in the American policy state." He instead encourages researchers to analyze the executive bureaucracy, as he does in his work.[9] Behind such a view is a widely shared understanding that the commissions are peculiar agencies that could even be harmful to American governance. They have repeatedly been criticized for irresponsibility and inefficiency due to their multimember panel system and autonomy from the three branches of the government. Such accusations usually accompany the well-known passage of the 1937 report of the Brownlow Committee denouncing the commissions as "a headless 'fourth branch' of the Government."[10] Further, beginning with scholars such as Samuel Huntington and Marver Bernstein, many have suggested that the commissions were eventually "captured" by the industry they were supposed to regulate. As Louis Jaffe notes in his review of Bernstein's work, the attack on the commissions went so far as to make them "a scapegoat."[11]

But the critics are not alone in treating the commissions as institutional outliers. In the mainstream, it has become commonplace to describe them as "quasi-judicial." This expression usually means two things. First, it refers to the commissions' panel system and strong autonomy from other components of the U.S. government that seem to make them

more similar to judicial courts than hierarchically structured executive departments responsive to the president. Second, the modifier implies that the commissions belie the constitutional principle of separation of powers by its use of judicial powers or even all three powers of the government.[12]

The independent commissions, however, have not always been seen as peripheral in the administrative state. Mark Allen Eisner argues that the commissions were primary regulators in the pre-New Deal regulatory regime. Even Bernstein, known for his vicious attack on the commissions, still concedes that they were the most important regulatory mechanism before 1940. As Thomas McCraw and others have noted, the commissions collectively controlled such important policy domains as finance, securities market, antitrust issues, labor relations, energy, transportation, and communication, for most of the twentieth century.[13] A search for the ICC's lasting influence on the American administrative state must therefore grapple with the mystery of how agencies long considered marginal have yet played a central role in regulation.

This paper solves the puzzle and offers a corrective to a view that trivializes the ICC and other commissions by undermining the notion of their institutional peculiarity. Its goal is twofold. First, this study offers a fresh interpretation of the origins of the ICC's institutional form. It shows that the widely accepted view tracing the agency's institutional roots in preexisting railroad commissions is largely unfounded. Although the blueprint of the proposed commission was indeed based on railroad regulators, the promoters of the ICC later redesigned it in the wake of strong criticism from the advocates of judicial regulation, relying on judicial courts as its model. What was at work was not simple path dependence from existing commissions assumed by earlier works, but more of a similarity to what Gerald Berk and Dennis Galvan call "creative syncretism." The drafters of the Interstate Commerce Act crossed institutional boundaries and combined the elements of an administrative commission and courts to create a new, highly *judicialized* administrative agency.[14]

Second, this paper demonstrates that the ICC indeed acted in a court-like manner from the beginning and paved the way to the *diffusion* of its judiciality to other parts of the administrative state. As Mashaw shows, some pre-ICC agencies such as the Patent Office and the Land Office had conducted court-like adjudications. But in those cases, judicialization remained in the realm of "the internal administrative law" created within each agency and attracted little outside attention.[15] In contrast, agency procedures were subjected to intensive debate in the legislative process of the 1887 act, and after its enactment, the executive and judicial branches promoted the judicialization of the ICC by appointing lawyers as its members and encouraging the adoption of court-like procedures in reviewing its decisions. By the early twentieth century, the judicialized ICC was considered a model, archetypal administrative agency.

The findings of this paper strongly suggest that the emergence of the ICC was a critical juncture that set off the systemic judicialization of the U.S. administrative state, thereby introducing procedural uniformity to public administration. Studies of the early American state in different disciplines have discovered that federal agencies carried out manifold tasks in very *different* ways. In contrast, studies of early twentieth-century public administration have stressed that there was an expectation that the manner in which agencies unsanctioned in the Constitution conducted adjudication would emulate court proceedings. As Morton Horwitz and others have shown, many of the political battles

fought during the twentieth century around administrative agencies were over how judicialized their procedures ought to be in light of "court-centered conceptions of legitimacy."[16] This paper bridges the two strands of research by situating the emergence of the court-like ICC in the U.S. administrative state building as a turning point in *how* the state operated.

Although a full account of the ICC's repercussions for other agencies in the early twentieth century is outside the scope of this paper, legal scholars agree that various agencies, including executive departments, adopted court-like procedures that had been developed by the ICC (and the Federal Trade Commission (FTC) explicitly modeled after it) under the supervision of the judiciary. Provisions of many statutes requiring agencies to hold hearings were modeled after those governing the ICC.[17] Formal, that is, court-like, adjudication was made a permanent and standard method of policy implementation with the enactment of the 1946 Administrative Procedure Act. That bill's drafters heavily relied on the "better practices" of independent commissions, especially the ICC and FTC. The hearing examiners (later renamed Administrative Law Judges) authorized under the Act to preside over formal trials, for instance, had their institutional roots in the ICC's trial-examiner system introduced by the Hepburn Act of 1906.[18]

The court-like ICC provided an institutional template of administrative agency at once constitutional and effective, setting the stage for the politics of administrative state institutionalization in the twentieth century. It was the ICC's status as the foundation of the modern, judicialized state that led people to see the commission as the beginning of the administrative state for such a long time. The ICC and other commissions remained representative agencies in the administrative state in which being quasi-judicial was the norm rather than exception, at least until the dominant mode of administrative policy making shifted from adjudication to rulemaking in the midcentury.[19]

Judicialization of the administrative state merits careful consideration because it has characterized American public administration to a degree unobserved elsewhere in the world. Administrative law scholars have long recognized that, when compared to their foreign counterparts, modern American administrative agencies have had a strong tendency to make policy using court-like adjudication that involves, among other things, adversarial settings and the production of full records. By contrast, the notion of administrative adjudication as a policy tool is almost absent in most other jurisdictions around the world. Even in fellow common-law jurisdictions, adjudications have been used largely in appeals, if used at all.[20] But the ICC already conducted more than 1800 court-like hearings per year in the mid-1920s. Today, around 200,000 deportation cases are yearly decided by "immigration courts," actually a part of the Department of Justice, presided over by "immigration judges," who are agency officials clothed in black robes.[21]

Among the ways in which judicialization has characterized the American administrative state, the most widely discussed and relevant to this paper is the promotion of equity (legality) at the expense of efficiency.[22] There is an inherent tradeoff between these two core values of public administration, and the value the administrative state sets above the other has a critical impact on its nature.[23] In the United States, the systemic adoption of institutional features of judicial courts embodying equity made the administrative state highly fairness oriented and prone to inefficiency. This has long been a subject of political debate. Most notably, in 1961 President John F. Kennedy launched the Administrative Conference of the United States with the aim of rectifying the negative effects of the

judicialization and introducing "more informal methods" to administrative procedures.[24] Thousands of backlogs annually produced by the abovementioned immigration courts are much attributed to the hearings' formal procedures, and their reform has constituted the conference's top agenda.

The tension between equity and efficiency was felt as early as at the birth of the ICC. The agency, later being criticized for its inefficiency in comparison to executive departments, was actually proposed as an efficient alternative railroad regulator to judicial courts. Its opponents countered by pointing out its lack of features guaranteeing equitable treatment of private parties. This clash between the two imperatives triggered the creative syncretism that engendered the judicialization of the ICC.

The rapid construction of railroads in the United States from the mid-nineteenth century led to intense competition among lines, which led to forms of price discrimination such as rebates and drawbacks to large-scale shippers. In addition, a railroad company operating in many regions often tried to compensate for extremely low freight charges in highly competitive sectors by charging more in the sectors where competition was less severe or nonexistent. Consequently, there were occasional cases in which the charge for hauling goods over a part of a line was higher than that for a longer haul along another segment of the same line. While such a situation was frustrating to shippers, carriers were no happier than their customers. Since railroad construction required enormous initial capital outlay, waging a "rate war" often involved the risk of bankruptcy. In hopes of avoiding this, railroads attempted to form "pools," regional associations in which a uniform rate system was required and monitored. Most of these arrangements, however, broke down because of violations and failure to attract enough lines to ensure their implementation.[25]

To solve the "railroad problem," from the 1870s, several states began to create administrative commissions. Some states tried to eliminate discrimination by giving the commission the authority to fix a new rate while others gave their commissions the power to investigate and expose discriminatory behaviors of carriers. In 1886, fifteen states would have the "strong" commissions with rate-setting power and ten "weak" ones without it.[26] But as the number of lines crossing state borders increased, there was mounting fear that the regulation of such lines was constitutionally beyond the reach of state governments. By the late 1870s, there was a national consensus about the necessity of federal regulation. Rep. John Reagan (D-TX) proposed in every Congress from 1878 a bill that listed forms of rate discrimination to be penalized by courts. In the Senate, Shelby M. Cullom (R-IL) submitted a regulation bill (S. 840) containing the establishment of a national commission to counter unjust rate discrimination immediately after joining the chamber in 1883. Intensive debate on these bills in the Forty-Eighth and Forty-Ninth Congresses resulted in the adoption of the Interstate Commerce Act.

The commission that Cullom proposed in the Forty-Eighth Congress was considered to be loosely modeled after state-level railroad commissions, especially that of Illinois. The ICC was to consist of five commissioners appointed to staggered six-year terms. The agency was to collect information on railroad management and was authorized to inspect the books of railroad companies, from which the commission could request the submission of annual reports. Unlike the "weak" commissions, the commission was charged with investigating individual cases of rate discrimination either upon the

filing of complaints or at its own initiative. At the same time, it lacked, unlike the "strong" commissions including that of Illinois, the power to set a new rate and to enforce its decisions. Still, the *Chicago Tribune* described the commission as "the adoption substantially of the system that has been practiced … by the Railroad Commission of Illinois."[27] Such a comment was only natural when Cullom, the speaker of Illinois's lower house at the time of the state commission's installment, had also overseen the early workings of the commission as governor.[28]

Cullom's ICC also bore some similarities to judicial courts. It was to conduct investigative hearings and was given powers commonly associated with courts, such as summoning witnesses and subpoenaing information. Such resemblance to courts was more pronounced in another bill proposing a railroad commission. Originally drafted by Rep. John Stewart (R-VT) and reported to the House floor by the Committee on Interstate Commerce, the bill (H.R. 5461) was almost identical to the Cullom bill in its key aspects including those on the ICC. Stewart admitted that the provisions on the commission's powers were "drawn in conformity and analogy with the English practice," in a reference to the English Railway Commission established in 1873.[29] But there was a crucial difference between Stewart's ICC and its English model. Although an administrative agency assigned with both investigative and adjudicative functions, the English commission could rule with finality and was widely perceived as a de facto railroad court.[30]

While almost completely overlooked in the literature on the origins of the Interstate Commerce Act, the debate in the Forty-Eighth Congress on these commission bills and the Reagan bill (which substituted the Stewart bill in its course) played a crucial role in paving the way for the judicialization of the ICC, which Cullom described as a "kind of board of arbitration" to engage in "the adjudication of complaints by arbitration."[31] The proposed commission's similarity to a court and the fact that it was pitted against the Reagan bill made comparison with a court the focus of the debate. The opponents of the ICC brought up charges against it such as the possible capture by railroad interests and the absurdity of a commission of five regulating a continent-wide business.[32] But in both chambers, much time was spent on how the authority and capacity of the ICC should be understood in terms of a judicial court, especially whether the commission was going to exercise judicial power and whether the proposed powers were enough to enable the ICC to regulate railroads.

On the question of the nature of the commission's power, the Reaganites, believing that it included judicial power, criticized the supposed unconstitutionality of the commission bill.[33] In his section-by-section scrutiny of the Cullom bill, Sen. Augustus Garland (D-AR) remarked that the bill was going to "make the commission a court to try the question of extortion and to assess damages for it," as its hearing was tantamount to "a judicial proceeding." In his view, the commission was "clothed with all the essential features as well as all the paraphernalia of a court."[34] Sen. Thomas Bayard (D-DE) also commented more generally that a "government by commission" had a strong suggestion of "an unwarranted delegation of discretion."[35]

Such support for regulation by the judiciary on the part of the commission's opponents, almost invariably Democratic, might seem like a straightforward expression of their characteristic anti-statism. But curiously, judicial courts had a strong reputation of being unfavorably inclined toward shippers such as farmers and merchants, important constituents of Democrats. Legal historians have shown that federal courts, which came

to monopolize the handling of railroad-related litigations, were known to be friends of big business, especially railroads.[36] Such was not surprising when, as of early 1884, every Supreme Court justice and a large majority of lower-court judges were Republican.

Why, then, did anti-commission lawmakers see courts as the only legitimate regulator of railroads? There were two reasons behind such strong commitment to judicial regulation. First, the Reaganites' perception of the complexity of the railroad market and difficulty of its regulation differed markedly from that of the proponents of the ICC who perceived that policy expertise was indispensable to railroad regulation. In introducing his bill to the House, Reagan argued that Congress need not even regulate railroads; he was merely attempting to prohibit them from doing the things everyone knew ought not to be done, which he believed required no help from any expert commission.[37] The commission's advocates criticized such an outlook as simplistic and portrayed the Reagan bill as little more than a codification of highly ambiguous common-law rules on common carriers. The Reaganites countered that all that was necessary was to "declare what is right and enforce it; declare what is wrong and prohibit it" through courts. In their mind, ideological orientation of the judiciary should hardly affect the outcome of litigations as long as the provisions in the statute were clear-cut.[38]

Second, and more importantly, the dominant constitutional theory limited the power to regulate railroad rates to the judicial courts. The Supreme Court had set the scope of non-judicial adjudication in *Murray's Lessee v. Hoboken Land & Improvement Co.*, handed down in 1856.[39] The decision was grounded on the separation of powers and the common-law principle of the supremacy of law.[40] According to the court, cases on "private rights" regarding "the common law, or in equity, or in admiralty" had to be ruled by Article III courts. Since railroads were governed by the common-law rule of common carriers, allowing a new regulatory body to judge railroad rate disputes was a constitutional impossibility in the 1880s. The court, however, did not totally prohibit administrative adjudication. Agencies could hear cases involving "public rights," people's rights involving the government such as those on patent and tax. Dealing with such rights, the major agencies taken up by Mashaw's work could adjudicate en masse without raising judges' eyebrows. Well aware of the distinction between the two types of rights, the legislators did not discuss these agencies as the ICC's precedent.[41]

To the Reaganites' charges that the proposed commission would infringe on judicial power, Cullom had a simple answer: the commissioners were not going to exercise any "absolute power." He labeled what was to be conferred to the commission "a quasi power of arbitration."[42] In the end, courts would deal with any controversies "in case either party" chose to "take the controversy to the courts." This way, the commission did not have "any absolute power whatever so far as the finality of any finding that they may make" was concerned.[43] Sen. Benjamin Harrison (R-OH) joined Cullom by commenting that the commission's powers were "simply supervisory."[44]

Cullom expected the ICC, armed with policy expertise, to tackle the "railroad problem" more efficiently than judicial courts even without the power to decide with finality. He believed that administrative adjudication had the advantage of rendering "recourse to the tedious processes of the courts unnecessary." At the same time, Cullom, an experienced lawyer, shared the critics' strong attachment to equity. This is why he quickly added to the above statement that judicial proceedings must be selected if it were "considered to the advantage of either party in interest."[45] The tension between

public administration's equity and efficiency was already casting its shadow on the legislative process.

Cullom's answer made perfect constitutional sense. But by conceding to the powerlessness of the proposed commission, it had the effect of inviting its opponents to interrogate the capacity of the commission. What good could it do with such limited authority? The question was frequently raised in both Houses, and the answer usually was "not much, if any." Aside from the smallness of size, a point frequently raised, the proposed ICC had two related deficiencies. First, there was nothing it could do to penalize a noncompliant carrier other than request the district attorney to file a suit against it. Second, the commission's report neither bound the attorney's action on the matter nor guaranteed the use of the commission's findings as evidence during court proceedings. As a Reaganite suggested, a shipper who had submitted a complaint to the ICC could, after spending more than a month with the commission, end up landing "in the court (a place where we had a right to go in the first instance) for an investigation of the case *de novo*."[46]

The proponents of the commission were trapped in a double bind. The proposed ICC could not simultaneously be effective and fit into the constitutional structure, at least according to its adversaries. If it were to have judicial power, it might be effective but unconstitutional—and vice versa. After criticizing the duties of the commission listed in the Senate bill as "very vague and indefinite," Sen. Samuel Maxey (D-TX) aptly summarized the situation:

> One of the grand characteristics of a court is that it can hear and determine. Is this [the commission] a court? Is it designed to be a court? If so, undoubtedly the Senate bill is unconstitutional, because judges of the courts of the United States must hold their office during good behavior, and these commissioners do not hold their office during good behavior, but for a term of years. Are they invested with judicial powers? Then where have you the authority to invest a commission outside of a court with judicial powers? No such authority exists…. It is admitted that the commissioners can not adjudge between the parties, because that would make them a court beyond all peradventure, but these facts are sent up, as gathered, as memoranda to the United States district attorney for him to prepare an indictment…, to bring the railroad company complained of before the court. Then, after all this has been done, what next do you do? … So I can not see for the life of me what is the object of this commission.[47]

Interestingly, the railroad commissions that had inspired the drafters of the commission bills offered them little help. Because state-level commissions had powers different from the proposed ICC, they were almost never mentioned in the debate. Reference to the English commission was frequent, with the Reaganites calling attention to the ICC's weakness, helping them discredit the proposed commission. The English commission possessed "all the powers and attributes of a court" and could "do everything that any other court can do," which made it "no such powerless thing" as the commission in the Cullom bill.[48]

By the time the two chambers concluded their debate on the reform bills, it was painfully obvious that the double bind in which the ICC found itself was a serious one. Reagan argued that what was proposed was "a commission which means nothing" and "not intended to mean anything."[49] Some even surmised that railroads supported the commission precisely because of its impotence.[50] The ICC advocates' counterargument that the authority of its commissioners and the public opinion behind the commission

would be sufficient to pressure railroads into complying with its decisions ringed hollow.[51] The Cullom bill nonetheless passed the Senate by a largely party-line vote. But in the House, the Stewart bill died a silent death when it was substituted by the Reagan bill, which later passed. The attempt to organize a conference committee ended in failure.

Despite the defeat of the commission bill, the debate in the Forty-Eighth Congress had a crucial impact on the course of railroad regulation. It made Cullom realize that in order to create the ICC, he needed to break the double bind by revamping the commission, giving due consideration to equity of administrative railroad regulation. Such a purposeful thought triggered the creative syncretism to which I now turn.

Before adjourning, the Senate of the Forty-Eighth Congress appointed the Select Committee on Interstate Commerce, with Cullom as its chair. With fresh memories of the debate, the committee immediately went to work, determined to end the double bind that incapacitated the ICC. It first sent out circulars to those with stakes in railroad regulation and expertise in railroad management, such as state railroad commissioners and railroad managers, requesting information of, and their views on, existing and desirable regulation. The committee then held six months of hearings starting in May 1885, inviting them to make extensive testimonies. The new Cullom bill drafted at the end of the committee's work contained the ICC that took on more attributes of the judicial body.

The members of the select committee apparently first considered the possibility of giving judicial power to the ICC and making it a special railroad court. They routinely asked witnesses whether the commission ought to have judicial power. But the committee in the end decided against the idea for two reasons. First was the risk involved in making the ICC part of the federal judiciary. The witnesses who answered in the affirmative to the above question—and many did—were quickly reminded that ICC commissioners had to be given life tenure if the commission were to have judicial power. At that point, most had second thoughts, now thinking that appointing someone for life to an untested institution was simply too risky, and the committee obviously shared this view.[52] Second, the commission would have had to sacrifice much of its strength in exchange to judicial power, as the Supreme Court had resisted the imposition of non-adjudicatory tasks to judicial courts out of consideration for separation of powers. If it were to become a court, the ICC would neither be able to conduct investigation nor initiate a case on a complainant's behalf, and this seemed too much of a concession to the drafters.[53]

If the commission were not to receive judicial power, its effectiveness had to come through other means. And the committee's hearings came to revolve around a new proposal: to make the ICC's findings prima facie evidence in judicial proceedings. The logic behind this proposal was that even if the commission could not enforce its decisions by itself, its finding should carry significant weight in court if the findings were considered prima facie correct, which would induce the parties to obey the commission's decisions. The idea, later enshrined in the act, freed Cullom's committee from the double bind. Its members used every occasion in the hearings to test the soundness of this idea against witnesses, who invariably approved it. In introducing his new bill (S. 1532) in the Forty-Ninth Congress, Cullom would refer to the prima facie provision as "one of the most important features of the new bill."[54]

From where did this idea derive? Cullom would later comment in the Senate that it came from John D. Kernan, chair of the New York Railroad Commission, who testified

in the first hearing of his committee.[55] This matches Scott James's finding that the new Cullom bill was based on the model bill Kernan offered to the select committee. James uses this connection between Kernan and the new commission bill as an evidence of the political clout of "business mugwumps," of which he was a constituent, and attributes it to the group's special position in the partisan balance of power. While this paper does not contest James's view, it does not see that the Kernan bill was in any way foisted upon Cullom, at least as far as the ICC was concerned. Bypassing the ordeal the commission idea had undergone in the preceding Congress, James fails to grasp the congruence of views on the ICC's power between the two men and the meaning of their proposal.[56]

What has eluded notice is that Kernan had also grappled with the legal implications associated with the ICC's double bind. While he thought that no law was "better worthy of imitation than the English act," Kernan was well aware that the American constitutional constraints hampered the duplication of the English railroad court, and the prima facie provision was specifically devised to overcome those constraints.[57] It would, in Kernan's words, help the commission "aiding the courts in carrying out any law" on railroad regulation" and the resulting regulatory framework would come "as near to the English systems as our different conditions will permit."[58] Kernan's intention here was to make the commission's power analogous to that of a judicial court.

For his part, Cullom adopted Kernan's idea precisely because he came to believe it was a way to break the double bind. During Kernan's testimony in the hearings, Cullom inquired if he were suggesting the prima facie idea as an alternative to "giving the board itself any absolute power to settle disputes," that is, judicial power. Kernan answered in the affirmative.[59] By the end of the hearings, Cullom was certain that it was the course to take. It was, to use Cullom's own words, "about as far as you could go without making it [the ICC] a tribunal in the nature of a court, appointed for life."[60]

Cullom made his own efforts to judicialize the ICC, which resulted in parts of his bill not being traceable to Kernan's. Whereas the latter simply allowed the commission to establish its own rules, the new Cullom bill instructed the commission to ensure that its rules would "conform, as nearly as may be, *to those in use in the courts of the United States*" [emphasis added]. This clause, later forming Section Seventeen of the Interstate Commerce Act, clearly states its author's intent: to create an administrative agency that resembled a court as closely as possible.[61]

It should be evident that the institutional form of the remodeled ICC was anything but the result of path dependence from state-level commissions. Existing works either assume that the Cullom bills in the Forty-Eighth and Forty-Ninth Congresses were identical or treat the commission proposed in the latter Congress as if it were created out of nothing, but neither was the case. Cullom was engaged in creative syncretism, in which he crafted an administrative commission with institutional features of judicial courts fully integrated to it. In its course, he made a conscious choice between the commission's efficiency and equity. In order to legitimize adjudication by the ICC, Cullom decided to judicialize it even at the cost of its efficiency.

How was the revised bill treated in the Forty-Ninth Congress? Most of the debate on the commission took place in the Senate, to which the select committee submitted its bill, and it confirmed that Cullom had discovered a way around the double bind. This was visible in the complete switch from the preceding Congress in how the lawmakers described the commission's powers. Instead of ridiculing it as ineffective as they had

done before, critics now accused the ICC of having *too much* power.[62] In contrast, the proponents, who had failed to highlight the strengths of the commission, now argued that its powers were far from excessive.

This shift in the tone of the debate was manifest from the outset. Cullom stressed in his introduction of the bill that its provisions would not "abridge or alter the common-law remedies" already open to the shipper. They should instead be considered "as in addition to such remedies," and no one was "obliged to appeal to the commission."[63] Behind this statement was a sense of confidence that the proposed commission was effective and yet compromised neither the separation of powers nor the supremacy of law. Sen. Orville Platt (R-CT), a member of Cullom's committee, also assured that the bill had been "carefully drawn so as to avoid the exercise of judicial powers by these commissioners, so as to deprive it of any constitutional objection."[64]

What best illustrates the impact of the revisions of the Cullom bill was the presence of a senator who switched his stance from opposition to support the commission. Sen. Maxey, who had belittled the commission's powers in the preceding Congress as "very vague and indefinite," now praised the new bill, especially its prima facie clause:

> Mr. President, when the bill reported by the Senator from Illinois [Cullom] in the Forty-Eighth Congress was before the Senate I opposed that bill for the reason which I thought satisfactory, that there was nothing whatever effective in that measure; because the evidence gathered by the commission under that bill could not be used in the courts or anywhere else; because … practically all the testimony would simply be a guide to the district attorney…. But this bill is entirely different. This is a very great advance, in my judgment, upon the bill of the Forty-Eighth Congress. This bill does make the testimony taken by the commissioners *prima facie* evidence in proceedings in court, and to that extent it does start in motion something which will result in a judgment one way or the other.[65]

In the House, where the Cullom bill that had passed the Senate was subsequently replaced with the Reagan bill, the situation was largely the same. Reagan now denounced the commission as despotic. While he thought that Americans generally had great respect for the judiciary, they were "not accustomed to the administration of the civil law through bureau orders."[66] To this, the proponents of the Cullom bill countered that the commission system, having been tried both in the states and overseas, was a "system … of experience." They now argued it was the Reagan bill, containing "nothing to soften the inflexible strictness of the prohibition applied elsewhere," that was a "system of experiment," worthy of avoiding at all costs.[67] Ironically, the pro-commission lawmakers could now employ state-level commissions to their aid after the proposed commission had been judicialized.

There was another notable change in the debate over the ICC; the commission now came to be understood as something very *similar* to one. This is evident in the floor debates after the conference committee had shaped a compromise bill retaining most of the commission-related provisions in the Cullom bill, including those above. After pointing out the constitutional difficulty of giving summary judicial powers to the commission, Sen. George Edmunds (R-VT) described the bill as coming "the nearest" to doing what they could do.[68] It was not just the supporters of the commission who thought it resembled a court. Its opponents referred to the commission's powers as "quasi-judicial" and "half judicial," reflecting the syncretic nature of the ICC.[69] But

despite all the association they made with courts, they no longer criticized it as unconstitutional.

While the Reaganites continued to attack the ICC, the compromise bill was a much better deal for them than it seemed on the surface. Most importantly, the bill inherited from the Reagan bill the prohibition of certain practices by carriers, including pooling. In addition, because relevant actors were free to bypass the ICC and take their case directly to a court, the judiciary could theoretically fully implement the bill, just as the Reaganites wished.[70] And even if complaints were to come before the commission, there still was a good chance that it would rule in favor of shippers. In contrast to the Republican-dominated judiciary, the act guaranteed the appointment of two or more Democrats to the commission. Further, since it was the high cost of litigation that had deterred many shippers from suing carriers, the commission's role as an attorney for complainants could very well shift the balance to the advantage of shippers.

As is known, the 1886 *Wabash* Supreme Court decision forbidding states from regulating interstate lines made imperative the passage of a railroad regulation law in the Forty-Ninth Congress.[71] The pressure from the decision and the abovementioned nature of the compromise bill probably induced lawmakers to swallow the bill. It passed the Senate on January 14, 1887, and the House followed suit a week later, both with a lopsided majority. President Grover Cleveland signed it into law on February 4.

The ICC, initially modeled largely after existing railroad commissions, was thus transformed into a strongly court-like agency. But the actual implementation of an act does not always reflect lawmakers' intentions. To elucidate why the ICC turned out to be a "quasi-judicial" institution, it is worthwhile to look into its formation and early operations. This is particularly important, as the 1887 act was silent on two of the commission's fundamental structural elements. First, the statute said nothing about the qualifications of the commissioners except that no more than a bare majority of them could come from the same political party and that no member could have a pecuniary interest in railroads. Second, while the act stipulated that the rules of the commission should conform to those of federal courts, the commissioners were free to fix and amend them as they saw fit. Under these conditions, who the commissioners were going to be and how they would steer the ICC would have a tremendous impact on its character.

The selection of commissioners came to attract much attention even before the president signed the bill because of the importance of the railroad problem and the authority—and perhaps also the large salary—they were to enjoy. Available evidence suggests that, throughout the candidate selection process, which took more than a month, his eyes were firmly set on a particular category of professionals: the lawyers. This was most visible in the search for the commission's chair. Cleveland, himself a seasoned lawyer, sought advice from Benjamin H. Bristow, best known today as the treasury secretary of the second Grant administration who later bolted the Republican Party in 1884 over the presidential nomination of James G. Blaine. It also should be noted, however, that Bristow was one of the leading American lawyers at the time. He had served as the first U.S. solicitor general (1870–1872) and then become the president of the American Bar Association later in the decade. Such a career made him one of the best people to consult in selecting talented lawyers of different political stripes. Bristow's recommendation to Cleveland was Walter Q. Gresham, an old friend by then a federal circuit judge headquartered in Chicago.[72]

Although the biographers of Bristow and Gresham disagree on why Gresham's name eventually fell out of consideration, Cleveland then turned to Thomas M. Cooley, who accepted the nomination.[73] As the author of influential articles on the railroad problem and the receiver of the Wabash railway from late 1886, his expertise in the railroad problem was so recognized by the mid-1880s that his name arose periodically during congressional debates on the commission bills as a strong candidate for the commissionership.[74] It was doubtful, however, that Cooley's knowledge on the railroad issue alone brought to him the post. After all, this ex-chief justice of the Michigan Supreme Court, on which he had served for two decades from 1865, and the dean of the University of Michigan Law School was a towering figure in law during the postbellum period whose treatises were required readings for lawyers. Cooley's prestige in the legal community made the difference.[75]

As it turned out, all the first five nominations intended to give "the new law a good start by appointing men of the highest character and national repute who would command the confidence of the country" went to lawyers.[76] Of the commissioners other than Cooley, Walter Bragg had been the chairman of the Alabama Railroad Commission, and Aldace F. Walker had had extensive railroad experience, which made him instrumental in the creation of Vermont's railroad commission. But the career of the other two, William Morrison and Augustus Schoonmaker, had no immediate connection to railroads.

This preference for lawyers was not unique to Cleveland. In appointing the successor to Cooley in 1891, President Benjamin Harrison wrote him asking for recommendations, lamenting that it was "very difficult to find a lawyer of the first eminence in active practice who would consent to accept" a commissionership. In fact, the pattern persisted for a generation; all except one of the commissioners appointed during the ICC's first twenty years turned out to be lawyers.[77]

It should then come as no surprise if the lawyer-filled commission's conduct of business resembled that of a court. Cooley, to whom other commissioners deferred during his four-year term as chair, had the vision "to understand that proceedings before the commission required simplicity and not complexity in procedure."[78] He stated in the ICC's first annual report that the proceedings before the commission "should be made as informal as should be consistent with order and regularity."[79] The ICC, then, began its work amid an inherent tension between judicialization and the pursuit of efficiency. Just as the FTC continued to experience creative syncretism after its formation, as Gerald Berk has shown, the ICC still had much room for institutional evolution.[80] And probably because there was no other precedent to follow, the procedural rules the commission adopted were made very similar to those of courts—its Rules of Conduct explicitly borrowed some provisions from the rules on court proceedings—although were also kept very general, enabling flexible operation.[81]

While the ICC was long destined to deal with the tradeoff between the two imperatives, the pendulum initially tilted strongly toward judicialization. In its inaugural year, the commission repeatedly stated that it would not decide "on abstract questions, nor on questions presented by ex parte statements of fact, or on questions of construction of the statute presented for its advice but without any controversy pending before it on complaint of violation of law."[82] This was a declaration that it would act exactly like a court. The commission also began to publish its decisions from a legal publisher, just like courts, and occasionally used a federal courtroom when conducting its hearings

outside of Washington, D.C. In its 1888 report, the ICC proudly stated that "[p]ower, judicial in its nature," was conferred upon it.[83]

It should be clear that the ICC was highly judicialized from its first days. Administrative law scholar Paul Verkuil attributes the way the ICC came to "emulate" courts to Cooley's chairship.[84] He intimated that things would have been different had Cooley not been appointed to the ICC. But even if Cooley had not been available, Cleveland would almost certainly have named a lawyer, albeit perhaps not someone of equal stature. It was Congress that had produced a judicialized commission, and the president was following its lead by assigning lawyers. A railroad magazine observed after the organization of the ICC that the commissioners realized that they constituted "a new court," and that they were to "lay the foundations of a new body of American law."[85]

The judiciary, however, did not readily allow the ICC to take the initiative in railroad regulation and instead severely narrowed the scope of its authority. In the 1896 decision of *ICC v. Cincinnati, New Orleans and Texas Pacific*, the Supreme Court prohibited the commission from fixing a new rate when it found the existing one inappropriate. This case, coupled with the *ICC v. Alabama Midland Railroad Co.* decision in the following year nullifying the commission's interpretation of the long-haul/short-haul clause, led to Justice John Marshall Harlan's famous dissent that it went "far to make that commission a useless body." The early ICC was so toothless that the railroads hardly needed to capture it.[86]

These decisions may give the impression that the judiciary did not seriously treat the ICC as a tribunal. But in denying the rate-setting power to the ICC, the court explained that it was part of legislative power. The court never squarely prohibited the commission from exercising quasi-judicial power and actually offered much support when it came to the ICC's role as an adjudicator. First, the court backed the commission when the prima facie provision came to suffer from carriers' withholding their evidence from the commission's proceedings, which severely undermined its fact-finding role. The ICC first complained of such a situation in 1891 and recommended confining the hearings by courts "to the record of proceedings had before the Commission."[87] In the 1896 *Cincinnati* decision, the court condemned the carriers' practice, arguing that courts should be resorted to only "when the Commission prefers to enforce the provisions of the statute by a direct proceeding in the court, or when the orders of the Commission have been disregarded."[88] By 1907, the court had full confidence in the judgment of the commission, which it now treated as "a tribunal appointed by law and informed by experience."[89]

Second, the judiciary, commonly understood as very restrictive in dealing with agency procedures, came to regard the commission's procedure as something different from their own but still similar enough to it to pass the due process test. By 1904, the Supreme Court noted that the ICC's largely investigative function "should not be hampered … by those narrow rules which prevail in trials at common law."[90] Five years later, in declaring that "strict rules of pleading should not be held applicable" to the ICC, the circuit court headquartered in New York added that it had "established rules of practice analogous to those in courts."[91] These statements indicated that the ICC had successfully struck a balance between efficiency and equity with the judiciary.

Many Americans shared this outlook on the commission. The fate of the Commerce Court created in 1910 to review ICC-related cases best illustrates this. President William H. Taft insisted on the inclusion of such a court in the Mann-Elkins Act to

extend the commission's authority that had begun with the adoption of the Elkins Act in 1903. His belief that a special railroad court could regulate better than the ICC, based on the strict adherence to the separation of powers, however, found few sympathizers, even among Taft's fellow Republicans. Once organized, the court began to strike down the commission's orders, only to have the Supreme Court reinstate most of them. Criticism quickly mounted from both sides of the political aisle, and with the court's abolition coming in 1913.[92]

Not surprisingly, then, the ICC came to play a central role in the nascent academic study of administrative law. Felix Frankfurter, an authority in the field and future Supreme Court justice, published a casebook on the Interstate Commerce Act in 1915. In its preface, he encouraged lawyers to be trained as experts in the subject, noting that the works by the ICC and judicial courts regarding the act had created "one of the most vital branches of the law," which provided the basis for the FTC Act and state utility commissions.[93] That many deemed regulation by commissions primarily as court-like appears in a comment of Ernst Freund, another giant of the discipline, who stated in 1921 that "We associate the new government control of business with administrative commissions. The commission form was intended to express the quasi-judicial spirit in which that control was to be exercised."[94]

Such an understanding of commissions accorded perfectly with that of the ICC's creators. The commission was not a court, but it did what courts used to do in a way highly similar to courts. All three branches of the U.S. government promoted the ICC to become, to use the term in frequent use by this time, an *administrative tribunal*.

Scholars usually explain the judicialization of the U.S. administrative state in terms of the political influence of lawyers as an interest group. America, according to Bernard Schwartz, is a "lawyer-dominated society," and lawyers have imposed judicial procedures on administrative agencies out of strong preference for and stakes in formal adjudication.[95] The profession's heavy involvement in the adoption of the APA through the American Bar Association, its national organ, is a most notable case.[96] Later in 1979, the association stated that "[f]amiliarity of lawyers with formal courtroom procedures led them to assume that these or some close approximation are the only proper way to reach an official decision," in its report proposing a wholesale reform of administrative procedure aimed at making it "swifter and less expensive without sacrificing fairness."[97]

That lawyers played a central role in the judicialization is indisputable—almost all major actors in the present narrative were members of the profession, for instance. But the attribution of the judicialization exclusively to the influence of lawyers inside and outside the courtroom, introduced when the accepted wisdom held that the administrative state did not exist before the ICC, has lessened in its validity. Now that the administrative state is considered to have been present since the birth of the nation, the thesis cannot explain why the state's judicialization came *only with* the ICC even though the profession had always been powerful in American politics. Administration may have won its place in the American polity "only on terms fixed by lawyers," but it took the rise of the court-like ICC as a prototypical agency for them to start setting the administrative process "in the courtroom mold."[98]

Overemphasizing the role that the judicialization of the ICC documented in this paper had played in the American administrative state building is therefore quite difficult. To

appreciate this, we need only to think of a counterfactual: how would have the commission been constructed if the first Cullom bill had somehow passed in the Forty-Eighth Congress? Although it already had several court-like characteristics, the ICC in the bill was treated as an agency alien from courts in the Congress. If adopted as such, the commission could even have been constructed as an *anti*-court-like agency, which could have severely delayed, if not prevented, the systemic judicialization of the administrative state. It was the bill's later revision, driven by creative syncretism, that triggered the infusion of judicial DNA into the U.S. administrative state.

NOTES

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[3]Lawrence M. Friedman, *A History of American Law*, 3rd ed. (New York: Touchstone, 2005), 329.

[4]Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920* (New York: Cambridge University Press, 1982).

[5]Richard J. Stillman II, "The Constitutional Bicentennial and the Centennial of the American Administrative State," *Public Administration Review* 47 (Jan.–Feb. 1987): 4–8. Also see Ralph Clark Chandler, ed., *A Centennial History of the American Administrative State* (New York: Free Press, 1987); Geoffrey P. Miller, "Independent Agencies," *The Supreme Court Review* 1986 (1986): 41–97; Larry S. Lutton, "History and American Public Administration," *Administration and Society* 31 (May 1999): 205–21.

[6]Brian Balogh, *A Government Out of Sight: The Mystery of National Authority in Nineteenth-Century America* (New York: Cambridge University Press, 2009); Jerry Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* (New Haven, CT: Yale University Press, 2012). Stephen Rockwell argues that America has always had a "big government." Rockwell, *Indian Affairs and the Administrative State in the Nineteenth Century* (New York: Cambridge University Press, 2010).

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[8]Robert E. Cushman, *The Independent Regulatory Commissions* (New York: Oxford University Press, 1941).

[9]Daniel P. Carpenter, *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies* (Princeton, NJ: Princeton University Press, 2001), 8–9.

[10]The President's Committee on Administrative Management, *Report of the Committee, with Studies of Administrative Management in the Federal Government* (Washington, D.C.: Government Printing Office, 1937), 5. Also see James O. Freedman, *Crisis and Legitimacy: The Administrative Process and American Government* (New York: Cambridge University Press, 1978), esp. ch. 3; John A. Rohr, *To Run a Constitution: The Legitimacy of the Administrative State* (Lawrence: University Press of Kansas, 1986), 152–53.

[11]Samuel P. Huntington, "The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest," *Yale Law Journal* 61 (Apr. 1952): 467–509; Marver H. Bernstein, *Regulating Business by Independent Commission* (Princeton, NJ: Princeton University Press, 1955); Louis L. Jaffe, "The Independent Agency: A New Scapegoat," *Yale Law Journal* 65 (June 1956): 1068. William Novak offers a critical new look at the development of the capture thesis in "A Revisionist History of Regulatory Capture" in Daniel Carpenter and David A. Moss, eds., *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (New York: Cambridge University Press, 2014), 25–48.

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[15]Mashaw, *Creating the Administrative Constitution*, 310.

[16]Morton J. Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992), 222; Paul R. Verkuil, "The Emerging Concept of Administrative Procedure," *Columbia Law Review* 28 (Mar. 1978): 258–329; Stephen G. Breyer et al., *Administrative Law and Regulatory Policy: Problems, Text, and Cases*, 7th ed. (New York: Aspen Publishers, 2011), 18; Robert L. Rabin, "Federal Regulation in Historical Perspective," *Stanford Law Review* 38 (1986): 1188–1326; Morton Keller, *Regulating a New Economy: Public Policy and Economic Change in America, 1900–1933* (Cambridge, MA: Harvard University Press, 1990); Daniel R. Ernst, "*Morgan* and the New Dealers," *Journal of Policy History* 20 (2008): 447–481; and Ernst, *Tocqueville's Nightmare: The Administrative State Emerges in America, 1900–1940* (New York: Oxford University Press, 2014); Reuel Schiller, "'Saint George and the Dragon': Courts and the Development of the Administrative State in Twentieth-Century America," *Journal of Policy History* 17 (2005): 110–24; Anthony M. Bertelli and Laurence E. Lynn Jr., *Madison's Managers: Public Administration and the Constitution* (Baltimore: Johns Hopkins University Press, 2006); Joanna L. Grisinger, *The Unwieldy American State: Administrative Politics since the New Deal* (New York: Cambridge University Press, 2012). Also see Joanna L. Grisinger, "Law and the Administrative State" in Sally E. Hadden and Alfred L. Brophy, eds., *A Companion to American Legal History* (Chichester, UK: Wiley-Blackwell, 2013), 367–86.

[17]G. Edward White, *The Constitution and the New Deal* (Cambridge, MA: Harvard University Press, 2000), ch. 4; Henry J. Friendly, "Some Kind of Hearing," *University of Pennsylvania Law Review*, 123 (1975): 1267–1317; James M. Landis, *The Administrative Process* (New Haven, CT: Yale University Press, 1938); Carl McFarland, *Judicial Control of the Federal Trade Commission and the Interstate Commerce Commission, 1920–1930: A Comparative Study in the Relations of Courts to Administrative Commissions* (Cambridge, MA: Harvard University Press, 1933); Joseph P. Chamberlain, Noel T. Dowling, and Paul R. Hayes, *The Judicial Function in Federal Administrative Agencies* (New York: The Commonwealth Fund, 1942).

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[19]Richard E. Levy and Sidney A. Shapiro, "Administrative Procedure and the Decline of the Trial," *University of Kansas Law Review* 51 (May 2003): 473–508.

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[21]Compiled from data in ICC Reports; Lilibet Artola, "In Search of Uniformity: Applying the Federal Rules of Evidence in Immigration Removal Proceedings," *Rutgers Law Review* 64 (Spring 2012): 863–93; Rebecca

Hamlin, *Let Me Be a Refugee: Administrative Justice and the Politics of Asylum in the United States, Canada, and Australia* (New York: Oxford University Press, 2014).

[22]Robert Kagan has suggested that the judicialized administrative procedures have also led to "adversarial legalism" in Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge, MA: Harvard University Press, 2001); Eugene Bardach and Robert Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (Philadelphia: Temple University Press, 1982).

[23]David H. Rosenbloom, "Public Administrative Theory and the Separation of Powers," *Public Administration Review* 43 (May–June 1983): 219–27; Marcus E. Ethridge III, "Judicialized Procedures in Regulatory Policy Implementation," *Law and Policy Quarterly* 4 (Jan. 1982): 119–36. The idea of the tradeoff is usually traced back to Arthur Okun's *Equality and Efficiency: The Big Tradeoff* (Washington, D.C.: Brookings Institution, 1975).

[24]John F. Kennedy, "Special Message to the Congress on the Regulatory Agencies," Apr. 13, 1961, John T. Woolley and Gerhard Peters, *The American Presidency Project*, http://www.presidency.ucsb.edu/ws/?pid=8058 (accessed Apr. 22, 2013).

[25]Hoogenboom and Hoogenboom, *History of the ICC*.

[26]Frederick C. Clark, "State Railroad Commissions and How They May Be Made Effective," *Publications of the American Economic Association* 6 (Nov. 1891): 11–110.

[27]*Chicago Tribune*, Apr. 2, 1884.

[28]Shelby M. Cullom, *Fifty Years of Public Service: Personal Recollections of Shelby M. Cullom* (New York: Da Capo Press, [1911] 1969), 306; Skowronek, *Building a New American State*, 146.

[29]*Congressional Record*, 48th Congress, 2nd sess. (Dec. 10, 1884), 165, (Dec. 11, 1884), 194–95.

[30]Henry Parris, *Government and the Railways in Nineteenth-Century Britain* (London: Routledge & Kegan Paul, 1965); Marshall E. Dimock, *British Public Utilities and National Development* (London: G. Allen & Unwin, 1933), 70–72; Chantal Stebbings, *Legal Foundations of Tribunals in Nineteenth-Century England* (Cambridge: Cambridge University Press, 2006), 180–81.

[31]*Congressional Record*, 48th Congress, 2nd sess. (Dec. 18, 1884), 328–30. A newspaper noted that the Cullom bill's ICC was "really a court to try certain specified railroad offences." *Chicago Tribune*, Feb. 4, 1885.

[32]*Congressional Record*, 48th Congress, 2nd sess. (Dec. 2, 1884), 31, (Dec. 12, 1884), 200–01.

[33]The term "Reaganite" was used in the 1880s to refer to the supporters of the Reagan bill. See, for instance, *The Statist*, Jan. 22, 1887, 92.

[34]*Congressional Record*, 48th Congress, 2nd sess. (Feb. 12, 1885), 1568.

[35]*Congressional Record*, 48th Congress, 2nd sess. (Jan. 7, 1885), 516.

[36]Philip L. Merkel, "The Origins of an Expanded Federal Court Jurisdiction: Railroad Development and the Ascendancy of the Federal Judiciary," *Business History Review* 58 (Autumn 1984): 336–58; Tony Allan Freyer, *Forums of Order: The Federal Courts and Business in American History* (Greenwich, CT: JAI Press, 1979); Howard Gillman, "How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891," *American Political Science Review* 96 (Sept. 2002): 511–24.

[37]*Congressional Record*, 48th Congress, 2nd sess. (Dec. 2, 1884), 31.

[38]*Congressional Record*, 48th Congress, 2nd sess. (Dec. 11, 1884), 195; James, *Presidents, Parties, and the State*, 42–43.

[39]59 U.S. 272 (1856). The Supreme Court later admitted agency adjudication of private rights in *Crowell v. Benson*, 285 U.S. 22 (1932).

[40]The latter principle would later play a central role in the battles over administrative procedures owing much to Albert V. Dicey's seminal work, *Lectures Introductory to the Study of the Law of the Constitution* (London: Macmillan, 1885).

[41]In the Forty-Ninth Congress, however, Sen. John Morgan (D-AL) attacked the Cullom bill stating that the ICC would take away the power "for the settlement of the private rights" from the judiciary. *Congressional Record*, 49th Congress, 2nd sess. (Jan. 6, 1887), 399.

[42]*Congressional Record*, 48th Congress, 2nd sess. (Jan. 7, 1885), 517.

[43]*Congressional Record*, 48th Congress, 2nd sess. (Jan. 17, 1885), 808.

[44]*Congressional Record*, 48th Congress, 2nd sess. (Feb. 2, 1885), 1152.

[45]*Congressional Record*, 48th Congress, 2nd sess. (Dec. 18, 1884), 330.

[46]*Congressional Record*, 48th Congress, 2nd sess. (Dec. 9, 1884), 132. Also see *Congressional Record*, 48th Congress, 2nd sess., (Feb. 3, 1885), 1197.

[47]*Congressional Record*, 48th Congress, 2nd sess. (Jan. 20, 1885), 859.

[48]*Congressional Record*, 48th Congress, 2nd sess. (Jan. 21, 1885), 884. Also see *Congressional Record*, 48th Congress, 2nd sess., (Dec. 11, 1884), 188–92, (Dec. 12, 1884), 194–95.

[49]*Congressional Record*, 48th Congress, 2nd sess. (Jan. 7, 1885), 527.

[50]*Congressional Record*, 48th Congress, 2nd sess. (Dec. 9, 1884), 128.

[51]*Congressional Record*, 48th Congress, 2nd sess. (Feb. 3, 1885), 1205.

[52]"Report of the Senate Select Committee on Interstate Commerce," 49th Cong., 1st sess. (Jan. 18, 1886), S. rept. 46, pt. 2, 60–61, 107, 167, 267.

[53]Justin Crowe, *Building the Judiciary: Law, Courts, and the Politics of Institutional Development* (Princeton, NJ: Princeton University Press, 2012).

[54]*Congressional Record*, 49th Congress, 1st sess., (Apr. 14, 1886), 3474.

[55]*Congressional Record*, 49th Congress, 2nd sess., (Jan. 14, 1887), 659.

[56]James, *Presidents, Parties, and the State*, 43.

[57]"Report of the Senate Select Committee," pt. 2, 23.

[58]"Report of the Senate Select Committee," pt. 2, 19–20.

[59]"Report of the Senate Select Committee," pt. 2, 22.

[60]"Report of the Senate Select Committee," pt. 2, 981.

[61]Also, in Section Eighteen, the commissioners' salaries were made to be "payable in the same manner as the salaries of judges of the courts of the United States."

[62]*Congressional Record*, 49th Congress, 1st sess. (May 10, 1886), 4307.

[63]*Congressional Record*, 49th Congress, 1st sess. (Apr. 14, 1886), 3471.

[64]*Congressional Record*, 49th Congress, 1st sess. (May 12, 1886), 4422.

[65]*Congressional Record*, 49th Congress, 1st sess. (May 6, 1886), 4225.

[66]*Congressional Record*, 49th Congress, 1st sess. (July 21, 1886), 7289.

[67]*Congressional Record*, 49th Congress, 1st sess. (July 21, 1886), 7296.

[68]*Congressional Record*, 49th Congress, 2nd sess. (Jan. 14, 1887), 646. Also see *Congressional Record*, 49th Congress, 2nd sess. (Jan. 18, 1887), 786.

[69]*Congressional Record*, 49th Congress, 2nd sess. (Jan. 11, 1887), 529, (Jan. 14, 1887), 639. Also see Williamjames Hull Hoffer, *To Enlarge the Machinery of Government: Congressional Debates and the Growth of the American State, 1858–1891* (Baltimore: Johns Hopkins University Press, 2007), 160; Rohr, *To Run a Constitution*, 96–97.

[70]Contrary to James's view, Reagan's acceptance of the ICC may not have meant the jettisoning of his "core agrarian conviction" against regulation by agencies. James, *Presidents, Parties, and the State*, 102–3. In the Forty-Eighth Congress, some Reaganites had expressed their readiness to support a commission bill with provisions specifying the practices to be banned. *Congressional Record*, 48th Congress, 2nd sess. (Dec. 4, 1884), 64, (Jan. 20, 1885), 858.

[71]*Wabash, St. Louis & Pacific Railway Company v. Illinois*, 118 U.S. 557 (1886).

[72]Ross A. Webb, *Benjamin Helm Bristow, Border State Politician* (Lexington: University Press of Kentucky, 1969), 296.

[73]Charles W. Calhoun, *Gilded Age Cato: The Life of Walter Q. Gresham* (Lexington: University Press of Kentucky, 1988), 90.

[74]Cullom also recommended Cooley for the chairmanship of the ICC. Kolko, *Railroads and Regulation*, 47.

[75]Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*, 3rd ed. (Boston: Little, Brown, 1874) and Cooley, *The General Principles of Constitutional Law in the United States of America* (Boston: Little, Brown, 1880).

[76]Benjamin Helm Bristow to Walter Q. Gresham, Feb. 9, 1887, box 34, Walter Q. Gresham Papers, Manuscript Division, Library of Congress.

[77]Benjamin Harrison to Thomas M. Cooley, Oct. 29, 1891, box 5, Thomas M. Cooley Papers, Bentley Historical Library, University of Michigan; Clarence A. Miller, "The Interstate Commerce Commissioners: The First Fifty Years: 1887–1937," *George Washington Law Review* 5 (Mar. 1937): 580–700. Also see I. L. Sharfman, *The Interstate Commerce Commission: A Study in Administrative Procedure* (New York: Harper & Row, [1937] 1969), 4: 28.

[78]Elmer A. Smith, "Practice and Procedure before the Interstate Commerce Commission," *George Washington Law Review* 5 (Mar. 1937): 413. Also see Paul D. Carrington, "Law and Economics in the Creation of Federal Administrative Law: Thomas Cooley, Elder to the Republic," *Iowa Law Review* 83 (Jan. 1998): 379.

[79]*First Annual Report of the Interstate Commerce Commission* (Washington, D.C.: Government Printing Office, 1887), 27–28.

[80]Berk, *Louis D. Brandeis and the Making of Regulated Competition.*

[81]*First Annual Report of the Interstate Commerce Commission*, 130, 133; Henry Carter Adams, "A Decade of Federal Railway Regulation," *Atlantic Monthly* (Apr. 1898): 433–43.

[82]*Interstate Commerce Commission Reports* 1 (New York: L. K. Strouse, 1888), 8.

[83]*Second Annual Report of the Interstate Commerce Commission* (Washington, D.C.: Government Printing Office, 1888), 104; Leonard S. Goodman, "Getting Started: Organization, Procedure and Initial Business of the ICC in 1887," *Transportation Law Journal* 16 (1987): 7–34.

[84]Paul R. Verkuil, "The Purposes and Limits of Independent Agencies," *Duke Law Journal* 1988 (Apr.–June 1988): 261, n. 17.

[85]*The Railway and Corporation Law Journal*, June 25, 1887.

[86]162 U.S. 184 (1896); 168 U.S. 144 (1897) at 176; Hoogenboom and Hoogenboom, *History of the ICC*; James W. Ely, Jr., *Railroads and American Law* (Lawrence: University Press of Kansas, 2001), 93–96.

[87]*Fifth Annual Report of the Interstate Commerce Commission* (Washington, D.C.: Government Printing Office, 1891), 18–20.

[88]162 U.S. 184 (1896), at 196.

[89]*Illinois Central Railroad Co. et al. v. ICC*, 206 U.S. 441, at 454. Also see *ICC v. Union Pacific Railroad Co. et al.*, 222 U.S. 541 (1912).

[90]*ICC v. Baird*, 194 U.S. 25 (1904). Also see *ICC v. Louisville & Nashville Railroad Co.*, 227 U.S. 88 (1913).

[91]*New York Central & Harbor Railroad Co. et al. v. ICC*, 168 Fed. 131 (1909), at 138–39.

[92]Felix Frankfurter and James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* (New York: Macmillan, 1928), 156–74.

[93]Felix Frankfurter, *A Selection of Cases under the Interstate Commerce Act* (Cambridge, MA: Harvard University Press, 1915), vii; G. Edward White, *Intervention and Detachment: Essays in Legal History and Jurisprudence* (New York: Oxford University Press, 1994), esp. part 2.

[94]Ernst Freund, "Legislative Problems and Solutions," *ABA Journal* 7 (1921): 657.

[95]Bernard Schwartz, *Administrative Law* (Boston: Little, Brown, 1976), 292. Also see Loren A. Smith, "Judicialization: The Twilight of Administrative Law," *Duke Law Journal* 1985 (1985): 427–66.

[96]Ronen Shamir, *Managing Legal Uncertainty: Elite Lawyers in the New Deal* (Durham: Duke University Press, 1995); George B. Shepard, "Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics," *Northwestern University Law Review* 90 (1996): 1557–1683; Nicholas S. Zeppos, "The Legal Profession and the Development of Administrative Law," *Chicago-Kent Law Review* 72 (1997): 1119–57.

[97]American Bar Association, Commission on Law and the Economy, *Federal Regulation: Roads to Reform* (Washington, D.C.: American Bar Association, 1979), 7 and 10. Also see Ernst, *Tocqueville's Nightmare*.

[98]Daniel R. Ernst, "Law and the State, 1920–2000: Institutional Growth and Structural Change" in *The Cambridge History of Law in America* (New York: Cambridge University Press, 2008), 3:2; Bernard Schwartz, "Administrative Law: The Third Century," *Administrative Law Review* 29 (Summer 1977): 300.