YAKUS AND THE ADMINISTRATIVE STATE

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George Mason University
Legal Studies Research Paper Series
LS 15-43

This paper is available on the Social Science Research Network
at ssrn.com/abstract=2698833
In *Yakus v. United States* (1944), the U.S. Supreme Court sustained the conviction of a Boston meat dealer accused of violations of the Emergency Price Control Act and of price regulations issued by the federal Office of Price Administration (OPA)—without affording the accused an opportunity to challenge the validity of the rules under which he was convicted. The case is now mostly forgotten; in Supreme Court opinions and scholarly treatises, it appears (if at all) as a wartime embarrassment or a marginal case about the exhaustion of administrative procedures. At the time, though, *Yakus* was viewed by combatants on all sides as a case that would define the contours of constitutional government and of the emerging administrative state. Prominent textbooks of the post-War era afford prominent status to *Yakus* as a foundational case for Administrative Law.

This article tells the story of *Yakus v. United States*. Close examination of the litigation and its context, we argue, shows that *Yakus* was not an awkward wartime case that is easily cabined in technical exhaustion doctrines: it is in fact foundational to the modern administrative state. The *Yakus* lessons that we have forgotten are the ones that we want to forget.
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INTRODUCTION

“If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board, or commission, and, if that authority depends on determinations of fact, those determinations must be shown.”1 Panama Refining Co. v. Ryan.

On February 24, 1943, a grand jury in Boston returned a criminal indictment against Albert Yakus, the President of the Brighton Packing Company, for selling cuts of beef in violation of the Emergency Price Control Act of 1942 (the “EPCA”).2 The indictment was part of the Office of Price Administration’s (“OPA”) enforcement campaign to suppress the vast “black market” in meat that developed during the war.3 OPA’s price control regulations imposed a particularly heavy toll on meat packers:4 while OPA placed price ceilings on wholesale and retail cuts of meat, OPA did not—and for political reasons could not—place price ceilings on cattle.5 The resulting “price squeeze” between the uncontrolled cattle prices set by the invisible hand of the market and the wholesale meat prices set by OPA’s regulations required many packers to sell meat below the actual cost of production.6 Big, integrated packers could offset their losses by selling meat byproducts (i.e., sausages, hamburgers, spam, leather etc.). In contrast, independent meat dealers like Albert Yakus were forced to choose between facing criminal sanctions for selling “overpriced” meat, or obeying the regulations and going bankrupt.7

From the halls of Congress, down Constitution Avenue to the halls of the New Deal bureaucracy, the meat dealers complained that they were being squeezed out of existence by OPA’s regulations. They also fought back in court; their various challenges to OPA’s regulations and to the EPCA reached the Supreme Court on several occasions.

The most foundational challenge to the Act was Yakus v. United States.8 In earlier decisions, the Supreme Court had held that Congress’s decision to channel judicial

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5 Hyman & Nathanson, Battle of Meat Regulations, supra note 4, at 596-600.
7 Hyman & Nathanson, Battle of Meat Regulations, supra note 4, at 598.
review of OPA’s orders into a single “Emergency” Court posed no constitutional problems.9 In Yakus, the meat dealers argued that any statutory review scheme had to provide defendants with some effective means of testing, in an independent court, the validity of a rule under which they were being prosecuted. The EPCA, they argued, violated that cardinal principle. However, on this as in all other occasions, the Supreme Court roundly rejected the meat dealers’ contenotions. Without any great misgivings, it sustained a regime under which criminal defendants had no real way of contesting, in an independent court, the validity of the administrative regulation at issue.10

On any fair reading, Yakus is a true “counter-Marbury for the administrative state.”11 The stakes at issue in the case were very well understood at the time—by the litigants on both sides, and, in the aftermath of the decision, by leading scholars, including the founders of the then-emerging disciplines of Federal Courts and Administrative Law. Some sought to cabin the disturbing teaching of Yakus;12 others celebrated the case as the triumph of the administrative process over antiquated rule-of-law notions.13 Nowadays, in contrast, Yakus is but a hiccup in the standard Federal Courts curriculum and scholarship; and so far as the Administrative Law profession is concerned, the case seems to have slipped down a memory hole.14 Unlike the contemporaneous pre-APA decisions in Chenery v. SEC, NLRB v. Hearst, Skidmore v.

10 Cf. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 167 (1803). In our view, Marbury derived judicial review from the structural principle that Article III courts have an independent duty to avoid applying rules of decision that violate the constitution and from the traditional concept of “Due Process” of law, which require courts to apply settled law in all proper cases involving liberty or property. See e.g., Nathan S. Chapman & Michael W. McConnell, Due Process as Separation of Powers, 121 YALE L.J. 1672, 1679 (2012) (“From at least the middle of the fourteenth century, however, due process consistently referred to the guarantee of legal judgment in a case by an authorized court in accordance with settled law.”); Id. at 1738 (deriving Marbury’s notion of vested rights from the separation of powers.); Saikrishna B. Prakash and John C. Yoo, The Origins of Judicial Review, 70 U. CHI. L. REV. 887, 891 (2003); THE FEDERALIST NO. 78 (Alexander Hamilton).
11 See Cass Sunstein, Law and Administration after Chevron, 90 COLUM. L. REV. 2071, 2075 (1990) (characterizing Chevron in that fashion). With all respect to Professor Sunstein and other prominent scholars writing in the same vein (see, e.g. Henry P. Monaghan, Marbury and the Administrative State, 83 COLUM L. REV. 1 (1983)); whatever one may think of Chevron, it bears no comparison to Yakus. Not even close.
12 Foremost among those scholars was Henry Hart. See infra, note 351 and accompanying text.
Swift, or Seminole Rock (an OPA case, no less), Yakus is no longer a part of the Administrative Law canon.\(^{15}\) Textbooks and treatises mention Yakus as a case about the exhaustion of administrative remedies\(^{16}\) or preenforcement review\(^{17}\)—but never as a foundational case.

It is not difficult to think of plausible reasons for this denouement. For starters, Yakus was a wartime case.\(^{18}\) At a time when hundreds of thousands of men were being sent into war, the Supreme Court was unlikely to deny the political branches the power to control beef prices.\(^{19}\) Perhaps, as some have argued, Yakus simply “turned on the fact that adequate judicial review of the validity of the regulation was available in another forum.”\(^{20}\) Moreover, one can argue that legitimate apprehensions about Yakus’s anti-Marbury implications were addressed in the immediate aftermath: Congress enacted the Administrative Procedure Act, with sufficiently robust procedural and judicial review protections to block unchecked administrative authority. Obviously, the APA is merely a default regime. However, Congress has rarely legislated EPCA-style preclusions of review. The courts apply a firm presumption in favor of reviewability of administrative action, and the executive has relied on Yakus, by way of defense, only in extremis.\(^{21}\)

The story is comforting—but, we believe, wrong in virtually every respect. The true story of Yakus is rather more disturbing. The EPCA was emphatically not a response to war; rather, wartime exigencies provided an occasion to institutionalize long-held New Deal notions of rational administration. Yakus was not a mere exhaustion case; rather, the Supreme Court sustained a regulatory regime that was calculated to frustrate all meaningful judicial review. And in our story, the APA was not a repudiation of Yakus but rather embraced its central premises: in lieu of Marbury, it gave us the “administrative process.”\(^{22}\)


\(^{16}\) Breyer et al., Administrative Law and Regulatory Policy 1159 (5th ed. 2002).


\(^{19}\) Adamo Wrecking Co. v. United States, 434 U.S. 275, 290 (1978)(Powell, J., concurring)(“As important as environmental concerns are to the country, they are not comparable -- in terms of an emergency justifying the shortcutting of normal due process rights -- to the need for national mobilization in wartime of economic as well as military activity.”).


\(^{22}\) Cf. Mariano-Florentino Cuellar, Administrative War, 82 Geo. Wash. L. Rev. 1344, 1430 (2014)(arguing that Yakus offers “a microcosm” of the debates that led to the APA).
More is at stake than historical accuracy. In recent years, we have witnessed an outpouring of legal scholarship and judicial opinions articulating grave concerns over the scope of administrative power. The debate on and off the Bench reflects a renewed awareness of the difficulty of accommodating administrative regimes to the constitutional structure. Those difficulties loomed front and center in Yakus. For those who entertain apprehensions about the administrative state, the case makes a splendid illustration or at least, an in terrorem cite. For those who embrace the administrative state, Yakus should remain a foundational case. But Yakus commands attention in a more specific and to our minds vital respect.

The practical operation of the administrative state hangs on combining legislative, executive, and judicial powers in administrative agencies. Its constitutional legitimation, in contrast, hangs on splicing and dicing constitutional doctrines: the separation of powers and delegation; due process; judicial review and reviewability. The legal canons that sustain the administrative state provide separate and distinct answers to those concerns: an “intelligible principle” of delegation; legal process; a “presumption of reviewability,” coupled with judicial deference canons. Recent scholarship, in contrast, has argued that by constitutional logic and design, all those issues really belong together. Some judicial opinions have struck a similar chord.

Precisely this conflict between an integrated and an unbundled view of the legal world was at the heart of the litigation in Yakus v. United States. However remote or abstruse the difference may now appear, the separation of powers issues were vivid and obvious to the participants. During the Progressive Era, the courts had developed doctrines of administrative law to accommodate regulatory commissions to the constitutional structure and the “supremacy of the law.” While many of these (now mangled) constitutional doctrines survived the New Deal, they did not survive the Supreme Court’s wartime decisions. Constitutional unbundling was the deliberate strategy of the New Dealers who drafted and then defended the EPCA. It was the principal obstacle for the meat dealers, who were forced to attack the statute one piece at a time in the courts. Yakus was their last-ditch effort to re-connect the constitutional pieces. It failed.


24 The point is forcefully articulated in Chapman & McConnell, supra note 10, at 1688, and in PHILLIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014).


26 See infra, Part I.2.

Yakus thus settled “long-continued and hard-fought contentions”—in favor of the New Deal. In the aftermath of Yakus, Congress replaced the “supremacy of the law” with the APA, and the courts filled the structural holes with administrative procedure and deference. Less than a decade after Yakus, Professor Kenneth Culp Davis celebrated the passing of this “old” administrative law—“limited” as it was to judicial review, “with concentration on the separation of powers and non-delegation.” In lieu of the separation of powers, administrative law could now focus “upon the administrative process itself.”

Students of contemporary administrative law will have some difficulty reconnecting the pieces when reading Yakus in isolation. The opinion can be understood only in the context of the operation of the Emergency Price Control Act and the varied legal attacks on the statute—and, more broadly yet, largely forgotten but then-still-operative constitutional and administrative law doctrines. And so we present the story of Yakus v. United States. Part I describes the EPCA’s origins and historical context, as well as the legal and especially the constitutional framework within which Yakus played out. Part II recounts the drama—the OPA’s aggressive enforcement campaign; Congress’s sporadic and, by and large, feckless interventions; and the meat dealers’ desperate, multi-pronged litigation and the ultimate death of the Office of Price Administration. Part III discusses the aftermath—the compromise of the APA; the rise of the administrative process; and Yakus’s drift into near-oblivion and its place in contemporary administrative (and constitutional) law. Our central goal is limited. We intend to impress the continued (or perhaps renewed) relevance of a case that, beyond its political salience, loomed very large at the foundation of the post-New Deal administrative state. The legacy of Yakus v. United States, we conclude, haunts administrative law to this day.

I. Price Controls and Administrative Law

As just advertised, this Part describes the background of the Yakus litigation. Section A. describes the origins and the operation of the EPCA. The central feature of the statute was the deliberate foreclosure of judicial review through a fiendishly clever set of procedural devices. Section B, describes the legal and especially the constitutional obstacles that confronted the EPCA’s designers: the Ex Parte Young doctrine; the delegation doctrine of Schechter Poultry; and the “constitutional fact” doctrine of Crowell v. Benson. The doctrines remained operative in 1942, and the EPCA’s architects had to contend with them. Section C. discusses their strategies and arguments.

28 The “Chenery Saga” is a striking illustration of this change in disposition. See Chenery v. SEC, 313 U.S. 80 (1941) (“Chenery I”); Chenery v. SEC, 332 U.S. 194 (1947) (“Chenery II”). The Court’s astonishing reversal prompted Justice Robert Jackson to complain in dissent that “it is clear that there has been a shift in attitude between that of the controlling membership of the Court when the case was first here and that of those who have the power of decision on this second review.” Chenery II, 332 U.S. at 210.

29 DAVIS, supra note 13, at § 1; JAFFE & NATHANSON, supra note 15, at 1 (“our purpose, here, is to consider the making and enforcing of law conceived as public policy by means of what is now called the administrative process.”).

A. The New Deal Goes to War

The *Yakus* litigation was long in the making. As War World II approached, gold reserves from foreign countries flowed into the United States; an expanded United States defense program and the Lend-Lease Act increased global demand for U.S. commodities, triggering inflation.\(^{31}\) When German tanks crossed the Maginot line, President Roosevelt took formal steps to prepare for wartime inflation, establishing a Price Stabilization Division within the National Defense Advisory Commission (“NDAC”).\(^{32}\) Roosevelt appointed Leon Henderson, a former SEC commissioner, to head the NDAC’s Price Stabilization Division.\(^{33}\) Henderson in turn hired David Ginsburg as the chief legal advisor to the NDAC’s Price Stabilization Division. A graduate of Harvard Law School and a former clerk to Justice Douglas, Ginsburg would draft the statute at issue in *Yakus*.\(^{34}\) His initial challenge was more modest: he had to find authority for price controls in the statute books.

NDAC published its first price control “regulation” on February 17, 1941.\(^{35}\) The regulation was advisory: it did not purport to bind individuals through sanctions.\(^{36}\) Ginsburg believed that the imposition of binding sanctions without a specific delegation from Congress would have invited legal challenges, and he sought to avoid the courts at this early stage.\(^{37}\) By August of 1941, however, the Administration had established a vast price control bureaucracy and issued 105 (still advisory) price schedules.\(^{38}\) The Administration also acquired the power to ration commodities: in May of 1941 Congress granted the President the power to “allocate” scarce strategic goods by prioritizing military contracts.\(^{39}\) This Act was followed by the First War Powers Act in December 1941\(^{40}\) and the Second War Powers Act in March of 1942, which granted the Administration the power to ration meat.\(^{41}\) Seeking to centralize the rationing and price

\(^{31}\) Milton Friedman & Anna J. Schwartz, From New Deal Banking Reform to War World II Inflation 129-131 (1980).

\(^{32}\) Cuellar, *supra* note 22 at 1356-57.

\(^{33}\) In addition to the Price Stabilization Division, the NDAC included a “Consumer Division,” a Division of “State and Local Cooperation,” and an “Agricultural Division.” Harvey C. Mansfield, A Short History of OPA 16-19 (1946).

\(^{34}\) Mansfield, *supra* note 33, at 16.

\(^{35}\) Mansfield, *supra* note 33, at 19.

\(^{36}\) The basis for the regulation was astonishingly weak—NDAC claimed to regulate prices under the President’s “commandeering” powers and his implied authority under the Vinson Act and the Selective Service Act. David Ginsburg, The Price Control Act: Authorities and Sanctions, 9 Law & Contemp. Probs. 22, 24 n. 7 (1942); Mansfield, *supra* note 33, at 20.

\(^{37}\) While the Supreme Court had increasingly been willing to give agencies the power to “fill in the details” of a statutory provision, sanctions were usually available only when a statute gave regulations the “force of law” or when the statute expressly provided the punishment for a violation of agency regulations. See Thomas W. Merrill & Kathryn Tongue Watts, Agency Rules with the Force of Law: The Original Convention, 116 Harv. L. Rev. 467, 493-528 (2002); Walter Gellhorn, Administrative Prescription and Imposition of Penalties, 1970 Wash. U. L. Q. 265 (1970).

\(^{38}\) Mansfield, *supra* note 33, at 20.


control missions in a single agency, President Roosevelt created the Office of Price Administration and Civilian Supply.\textsuperscript{42} When the civilian supply function was later transferred to another agency, OPA acquired the name it would bear for the rest of the war.

Despite its broad rationing powers, OPA still lacked the power to promulgate binding price control regulations. David Ginsburg and Leon Henderson accordingly sat down to draft a bill that would give OPA the power to promulgate “legislative rules”—rules with the force of law.\textsuperscript{43} But their ambition reached considerably further. Their draft bill created an administrative machinery that sought to place the courts at OPA’s disposal for enforcement purposes, while making OPA’s regulations effectively unreviewable in the regular courts.\textsuperscript{44} The draft bill was submitted to Congress in October 1941. With minor alterations, the bill was approved by the Senate and signed by the President on January 30, 1942.\textsuperscript{45}

As the timing suggests, the EPCA obviously responded to the perceived exigencies of war. In all material respects, however, the statute incorporated the principles of the New Deal. It embodied a demand-centered economic theory that, while now widely viewed as seriously misguided (if not downright exotic), was deeply engrained in New Deal thinking.\textsuperscript{46} Beyond that, it reflected a political compromise among key New Deal

\begin{footnotes}
\footnotetext[42]{Exec. Order 8734, 6 Fed. Reg. 1917 (April 11, 1941).}
\footnotetext[43]{H.R. 862 at 4. The APA codified a then familiar distinction between legislative rules, or rules with the force of law, and interpretive and procedural rules that did not bind individuals through sanctions or rules of conduct. See Merrill & Watts, \textit{supra} note 36, at 523-526.}
\footnotetext[44]{As Congressional committee would later find, “one of the purposes of the legislation which they drafted was to place, so far as possible, final and non-reviewable power and authority in the hands of the Administrator to be created by the proposed legislation.” H.R. No. 862, at 4. The committee based this conclusion on Ginsburg’s personal files, which the committee subpoenaed from Ginsburg’s home in Huntington, West Virginia, after David Ginsburg left OPA to serve in the war. Id. The bill sought to mimic continental price control regimes while preserving the façade of the rule of law. According to OPA historian Harvey Mansfield, most “industrial nations, in setting up their economic controls for World War II, had followed the lead of Germany, which in 1936 had given its price commissioner autocratic powers.” As Mansfield described it, “the German price commissioner had the legal and judicial system of the Reich entirely at his command for enforcing his regulations. At the same time, he could override any court in the land with respect to prices, rationing, and similar matters.” “But”, Mansfield insisted, “[t]he American law was different…in its legal provisions, as much as in its origin, it was within the traditional framework of American constitutional government—or so said six of the nine justices when [the law] later came before them.” Mansfield, \textit{supra} note 33, at 24. In practice, however, the price control bill was not so “different”; as we shall argue, the EPCA simply disguised a lawless void with a façade of administrative process and judicial review. While the “social benefits” of this kind “hypocritical lip-service to the rule of law” are fairly open to academic debate, it did not make much of a practical difference for Mr. Yakus. \textit{Cf.} Vermeule, \textit{supra} note 30, at 1132 (defending hypocrisy).}
\footnotetext[45]{MANSFIELD, \textit{supra} note 33, 19-23.}
\footnotetext[46]{Historian Meg Jacobs has insightfully described OPA’s “Keynesian” economic theory: “Though others at the time and economic historians since have pointed to the importance of monetary forces and the underinvestment in and disruption of the capital goods market to explain the length and depth of the Great Depression, this group saw the world through the prism of consumption. Their prevailing assumptions held that the American economy would avoid future difficulties only if wage earners had enough disposable income to consume all the goods that the nation's manufacturers were}
\end{footnotes}
constituencies, and it enshrined the New Dealers’ institutional commitments—foremost, an abiding faith in bureaucratic expertise and a corresponding, unremitting hostility to markets, interloping courts, and the separation of powers.

Political Compromise. The ambition to control prices from cradle to grave and from sea to shining sea was bound to meet with the opposition of potent New Deal constituencies. Among them was labor. Unions were prepared to support the price control bill, provided that OPA was denied jurisdiction to control wages. In the final EPCA statute, Congress “encouraged” federal agencies “to work toward a stabilization of prices, fair and equitable wages, and cost of production” while specifically prohibiting OPA from regulating wages.

A second formidable constituency was the farm bloc. Accommodating farmers to a regime of commodity price ceilings was no small difficulty, especially inasmuch as price inflation was precisely the goal of earlier New Deal farm programs. Naturally, the farm bloc viewed the Administration’s new quest to contain price inflation with suspicion. Congress yielded to farm-group pressures: the final bill included a controversial “110% parity guarantee,” which in effect prohibited OPA from controlling prices set by farmers and ranchers. This “parity” guarantee would trigger the regulatory disruptions that led to meat shortages.


47 Andrew H. Bartels, The Office of Price Administration and the Legacy of the New Deal, 1939-1946, 5 THE PUB. HISTORIAN 5, 10-11 (1983). Roosevelt emphasized that under war-time inflation, “the burden of the defense is thrown haphazardly on those with fixed income or whose bargaining power is too weak to secure increases in income commensurate with the cost of living.” See Hearings before the Committee on Banking and Currency on H.R. 5479, 77th Cong. (1941). Senator Albert Gore introduced a bill instructing OPA to “stabilize wages,” but the bill lacked labor’s support and it was defeated in the House. MANSFIELD, supra note 33, 29. The bill would have applied uniformly to all commodities and services. See Ginsburg, supra note 35, at 27 & n.20; J.M. Clark, Wartime Price Control and the Problem of Inflation, 9 LAW & CONTEMP. PROBS. 6, 17 (1942).

48 EPCA § 1(a). To control labor wages, the Roosevelt Administration eventually created the National War Labor Board to mediate labor disputes between union demands and producers stripped of profits under wartime price controls and taxes. See MANSFIELD, supra note 33, 29; E. Riggs McConnell, The Organization and Procedure of the National War Labor Board, 9 LAW & CONTEMP. PROBS. 567 (1942).


50 Armour & Co. v. Bowles, 148 F.2d 529, 532 (1945); H. R. No. 79-505, at 5-16 (1945). Harvey Mansfield describes the regulation over beef and meat as the most “grueling assignment” of the Emergency Court of Appeals. MANSFIELD, supra note 33, at 282.
Institutional Choice. The EPCA was not a product of wartime hysteria; it was a deliberate institutional choice. The executive’s proposed bill incorporated a veritable New Deal wish list—vast grants of executive discretion, accompanied by a set of administrative and appellate review procedures that, while not entirely unprecedented, were wholly new in combination. That choice did not go unnoticed in Congress. The initial House Bill authorized OPA’s Price Administrator to issue temporary regulations lasting sixty days without a hearing, but otherwise required the Administrator to institute formal rulemaking procedures before a Board of Review, subject to appellate judicial review “on the record.” The Senate rejected this option. Another bill, sponsored by Senator Robert Taft, would have required OPA to conduct formal hearings subject to judicial review before price regulations became final. The Taft bill was never brought to the floor. Instead, Congress enacted the executive’s proposed statute.

The EPCA’s institutional design rested on three key foundations. First, the EPCA gave OPA, acting under exceedingly general legislative standards, the power to promulgate binding legislative rules with the force of law. Second, the EPCA channeled all regulatory challenges through an administrative procedure that was designed to be ineffective. Third, the EPCA placed the regular courts at OPA’s immediate disposal for enforcement purposes, even while the validity of the regulations was being challenged through the specialized administrative procedure. In combination, the provisions created an ingenious one-way ratchet that made OPA regulations binding in the courts (even in criminal cases), without a meaningful opportunity for judicial review. As Harvey Mansfield described the situation, a seller “confronted with a regulation which the Administrator had no right to impose might have had to choose between conviction for a crime…and compliance, possibly to his financial ruin, for the months or years before the regulation was finally adjudged invalid. Yet not court anywhere could give him relief for this dilemma.”

Title I of the Act set out the general purposes of the statute and the powers of the Price Administrator. Section 1 provided a broad statement of Congressional purposes,
including “stabilizing prices”; protecting “the American standard of living”; promoting fair and equitable wages; permitting cooperation between producers; ensuring that defense appropriations were not “dissipated by excessive prices”; and eliminating and preventing “profiteering, hoarding, manipulation, speculation, and other disruptive practices.” Section 2 of the Act delegated to the Administrator the power to issue “generally fair and equitable” price controls “whenever in his judgment…the price or prices of commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act.” Anticipating the APA’s dubious definitional effort, the Act “clarified” that the “term order or regulation” meant a “regulation or order of general applicability and effect,” and it required the Administrator to publish a “statement of considerations” alongside a regulation. Section 2 also vested the Administrator with the power to make exceptions or adjustments and to prevent and prohibit all practices as “necessary or proper” to carry out the purposes of the Act; and it granted the Administrator broad powers to purchase commodities and grant subsidies in order to attain maximum production. Section 4 of Act gave OPA regulations and orders “the force of law.”

Title II of the Act set out the administrative procedure, judicial review, and enforcement provisions of the EPCA. Section 201 formally created OPA and the position of Price Administrator; provided appropriations; and granted a variety of administrative authorities to the Price Administrator (rulemaking, investigating, and subpoena powers). Along with the subpoena power, the Administrator also had the power to require regulated sellers to “keep records and other documents” of the same kind as those “customarily kept” by the industry open for the Price Administrator’s inspection. While section 202(g) abolished the privilege against self-incrimination, the EPCA purported to grant prosecutorial immunity to any person whose records were subpoenaed by the Price Administrator— a provision that OPA honored in breach.

Section 205 gave broad enforcement powers to OPA and to consumers “harmed” by inflation. OPA could sue violators for injunctive relief and treble damages, as could

60 See APA 551(4)
61 EPCA § 2(a).
62 EPCA § 2(c)-(d)(emphasis added).
63 EPCA § 2(e).
64 EPCA § 4(a). The Act provided that “it shall be unlawful…for any persons to sell or deliver any commodity, or in the course of business to buy or receive any commodity, or to demand or receive any rent…. in violation of any regulation or order under section 2.” As Thomas Merrill and Kathryn Watts explain, the courts required that Congress delegate to the agency the power to “fill in the details” with the force of law expressly or by clear implication. See generally Merrill & Watts, supra note 36.
65 EPCA § 201.
66 The Supreme Court consented to this breach of the Fifth Amendment in spectacular fashion. See Shapiro v. United States, 335 U.S. 1 (1948). Mr. Shapiro owned a small proprietorship in New York City, selling fruits and vegetables at wholesale. When OPA subpoenaed Mr. Shapiro’s sales records, Mr. Shapiro claimed his privilege against self-incrimination and produced the documents. OPA later used the records to indict Mr. Shapiro. Chief Justice Vinson, a former director of the Office of Economic Stabilization and Emergency Court of Appeals judge, reasoned that because Mr. Shapiro was required to keep the records under OPA’s regulations, and because he sold his fruits subject to OPA’s licensing power, he was not entitled to any protection under the law or the Fifth Amendment. Id.
affected consumers.\textsuperscript{67} OPA could also bring criminal actions in district court to punish “willful” violations of any regulation or order promulgated under section 4. OPA was also granted licensing and suspension powers, which the Price Administrator could enforce by petitioning a court for a suspension order lasting “no more than twelve months.”\textsuperscript{68} In practice, OPA used its criminal authority to generate useful publicity and coerce compliance (convictions were a relatively small part of its enforcement program).\textsuperscript{69} After all, convicting a person of a crime under the Act required a grand jury to return a true bill, and—with an exception at issue in \textit{Yakus}—it required a district court to hold a trial under the ordinary rules of evidence and criminal procedure, before a petit jury.\textsuperscript{70}

Sections 203 and 204 set out the administrative procedure and judicial review mechanisms of the Act. As enacted by Congress, the EPCA allowed pre-enforcement protests filed before the Administrator “within a period of sixty days of the effective date” of the regulation; any protest filed after that period was precluded as untimely.\textsuperscript{71} If the Price Administrator denied a protest or at “a reasonable time” thereafter, the challenger could bring an “original” suit in the Emergency Court of Appeals, which would set aside OPA’s regulations if they were “arbitrary and capricious or contrary to law.”\textsuperscript{72}

The administrative procedure, however, did not require OPA to make formal findings before promulgating a regulation.\textsuperscript{73} If a regulated party filed a protest, the Price Administrator could respond with a conclusory document stating the grounds for his decision.\textsuperscript{74} And the Price Administrator could set forth his view of the legal and factual matters at issue after a complaint had been filed in the Emergency Court. Moreover, the EPCA’s procedures allowed the Administrator broad discretion to protract administrative proceedings and delay judicial review—even while he brought suits to

\begin{itemize}
  \item \textsuperscript{67} The Supreme Court urged that courts should liberally grant injunctions in enforcement suits. See \textit{Hecht Co. v. Bowles}, 321 U.S. 321, 331 (1944) (“The Administrator does not carry the sole burden of the war against inflation. The courts also have been entrusted with a share of that responsibility. And their discretion…should reflect an acute awareness of the Congressional admonition that ‘of all the consequences of war, except human slaughter, inflation is the most destructive’ and that delay or indifference may be fatal.”)(internal citation omitted.).
  \item \textsuperscript{68} EPCA § 205.
  \item \textsuperscript{69} Ernest Gellhorn, \textit{Adverse Publicity by Administrative Agencies}, 86 HARV. L. REV. 1386, 1403-1404 (1973) (“Perhaps the most serious criticism leveled against OPA was that it sometimes filed chargers merely to call public attention to its program and to coerce compliance rather than try the allegations in court. In response, one newspaper even refused to report OPA charges until proceedings reached the trial stage.”).
  \item \textsuperscript{71} EPCA § 203(a).
  \item \textsuperscript{73} \textit{Yakus} v. United States, 321 U.S. 414, 453 (1943) (Roberts, J., dissenting) (the Administrator “need not make findings of fact.”).
  \item \textsuperscript{74} EPCA § 203(a)-(c).
\end{itemize}
enforce those regulations in district court. In practice, most sellers were prosecuted before any regulation was finally upheld by the Emergency Court. As explained by a special committee’s report on OPA’s practices:

“[T]he Act has been studiously and adroitly used by the Office of Price Administration in a great many instances as a means of indefinitely delaying the right to judicial review. The 30-day time limitation within which the Administrator must act has been interpreted and determined by the agency as being no longer applicable once the Administrator has either set the given protest for hearing or has provided an opportunity for the presentation of further evidence. In other words, the Administrator may, by the use of either of these two alternative provisions, delay indefinitely the right of a protestant to present his case in court.”

The Emergency Court was staffed with sympathetic judges who practically never set a regulation aside. In any event, the burden of proving the invalidity of a regulation in the Emergency Court at all times rested with the party protesting the regulation or order; a challenger had the insurmountable burden of showing that a regulation was not “generally fair and equitable” or did not promote one of the vague purposes of the Act. In practice, the EPCA’s administrative procedure effectively combined with the judicial review provisions to deny judicial review of price regulations. A “challenged regulation remained in full force until the regulation was found to be invalid, and the Emergency Court was forbidden to grant injunctive relief in advance of a determination of the merits.”

Meanwhile, section 204(d)—the heart of the Marbury problem—divested “Federal, State, or Territorial” courts of “all power and jurisdiction” to consider “the validity of any such regulation, order, or price schedule” and “to restrain or enjoin the enforcement of any such provision.” The scope of section 204(d) was breathtaking. On its face, section 204(d) prohibited judges from reviewing even a patently invalid rule: if OPA brought a criminal prosecution to enforce the rule, judges had to defer. Some even argued that OPA could enforce a rule set aside by the Emergency Court of Appeals, and judges had no say. This argument was not entirely fanciful. Under OPA’s official interpretation, the United States could prosecute defendants under regulations set aside

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75 See e.g., Armour & Co. v. Bowles, 148 F.2d 529, 530 (Em. Ct. App. 1945); OPA brought over two-thousand successful enforcement actions by the end of 1943 (a total of 2,219 cases, not accounting for private cases or administrative sanctions). Only 19 protests were decided by the Emergency Court in 1943, compared to 91 in 1944 and somewhere in between 80 and 120 during the years following the war. Since most price control regulation were enacted during the 1942-1943 period, the numbers suggest administrative delay. HARVEY C. MANSFIELD, A SHORT HISTORY OF OPA 271-279 (1947).

76 H.R. No. 862 at 7.


79 MANSFIELD, supra note 33, at 275.

80 EPCA § 204(d)(emphasis added).

81 Hyman & Nathanson, Battle of Meat Regulations, supra note 4, at 589 & n.16. See also Yakus v. United States, 321 U.S. 414, 467 (1944) (Rutledge J., dissenting)(“the prohibition is unqualified”).
by the Emergency Court, as long as the underlying violation happened before the regulation was finally set aside.\textsuperscript{82} In other words, a defendant could prevail on the merits in the Emergency Court, and yet remain liable in a subsequent criminal suit to enforce a (concededly invalid) regulation.\textsuperscript{83} A clearer violation of the “due process of law” is hard to imagine.\textsuperscript{84} Chief Justice Stone, writing for a majority of the Court in \textit{Yakus}, purported to sidestep the issue, since the meat dealers had “failed to exhaust their remedies.”\textsuperscript{85}

\textbf{B. The OPA, and the Old Legal Order}

\textit{Yakus} lies at the end of a history of judicial efforts, spanning a rough half-century, to accommodate a rapidly growing administrative state to the constitutional order.\textsuperscript{86} Central to that order was a premise going back to \textit{Marbury v. Madison}: official deprivations of private right had to be subject to full-scale review by independent courts.\textsuperscript{87} That rock-bottom presumption came under severe pressure during late 19th and early 20th century.\textsuperscript{88} Professor Davis, writing a few years after War World II, called those decades the “supremacy of law” period, when (Davis observed with barely disguised scorn) “some writers have tried unsuccessfully to confine administrative power through a concept called ‘the rule of law.’”\textsuperscript{89}

This Section provides a brief review of the interconnected doctrines that constituted that “concept.” All of them were directly at issue in \textit{Yakus}. Most of them have long been rejected. They were already fraying at the time of \textit{Yakus}. Still, they remained operative. Our review illustrates, if nothing else, the New Deal lawyers’ ingenuity in

\textsuperscript{82} MANSFIELD, \textit{supra} note 33, at 277; Rottenberg v. United States, 137 F.2d 850, 858 (1st Cir. 1943).

\textsuperscript{83} Relatedly, OPA’s interpretation of section 204(d) seems to flout principles of judicial finality. See Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995); Hayburn’s Case, 2 U.S. 408 (1792).

\textsuperscript{84} By this, we mean the requirement that courts try the case of private right “by the law of the land.” Chapman & McConnell, \textit{supra} note 10, at 1679 (“From at least the middle of the fourteenth century […], due process consistently referred to the guarantee of legal judgment in a case by an authorized court in accordance with settled law.”). \textit{Cf.} Hamdi v. Rumsfeld, 542 U.S. 507, 552 (2004)(Souter J., dissenting in part, and concurring in the judgment)(“we are heirs to a tradition given voice 800 years ago by Magna Carta, which, on the barons’ insistence, confined executive power by "the law of the land.").


\textsuperscript{86} Jerry Mashaw has forcefully argued that far from accommodating a fourth branch, the constitution’s allocation of powers had a “hole” that was naturally filled in by an administrative state to meet the needs of an expanding nation. JERRY L. MASHAW, \textit{CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW} 193 (2012). With the possible exception of steamboats that could travel in the high seas, however, Mashaw’s evidence fails to show that administrative agencies could bind citizens outside the law and the courts in cases of private right involving liberty or property. \textit{Cf.} HAMBERGER, \textit{supra} note 24, at 83-111, 191-226.

\textsuperscript{87} As Professor Merrill has noted, \textit{Marbury} is our first great case in administrative law, establishing a long-standing benchmark for (de novo) judicial review of executive action. Thomas W. Merrill, \textit{Marbury v. Madison as the First Great Administrative Law Decision}, 37 J. MARSHALL L. REV. 481 (2004)(noting that in \textit{Marbury} “the Court engaged in de novo consideration of questions of both fact and law, thereby establishing a benchmark against which subsequent debate about the proper standard of review has unfolded.”). \textit{See also}, Little v. Barreme, 6 U.S. 170 (1804); Cary v. Curtis 44 U.S. 236 (1845); Lee v. United States, 106 U.S. 196 (1882). \textit{See generally} Caleb Nelson, \textit{Adjudication in the Political Branches}, 107 COLUM. L. REV. 559 (2007).

\textsuperscript{88} See e.g., Walton H. Hamilton, \textit{Affectation with Public Interest} 8 YALE L.J. 1089 (1930); Hugh Evander Willis, \textit{When is a Business Affected with a Public Interest?} 3 INDIANA L. J. 383 (1928).

\textsuperscript{89} See DAVIS, \textit{supra} note 13, at § 8.
overcoming “rule of law” barriers and the Yakus Court’s eager acceptance of their arguments.

**The Supremacy of the Law and Appellate Review.** The concept of the “supremacy of the law” is a mainstay of the classical liberal (Anglo-Saxon) separation of powers. Only representative legislatures, it holds, can make binding law. Executive officers, in turn, can use force against their own citizens only under and through statutory law made in the legislature. And in cases of private or “common” right (deprivations of rights of liberty or property enjoyed by all subjects), executive officials must be accountable to settled law before independent courts, charged with a duty to decide cases in accordance with the law of the land.\(^90\) Only this coordinated institutional arrangement, it was thought, would satisfy the constitutional requirement that all three branches act with the “due process of law” when depriving subjects of their liberty or property.\(^91\)

As administrators increasingly acquired the power to promulgate rules with the force of law, “rule of law” advocates like British scholar Albert Venn Dicey gradually abandoned the first classical precept (only the legislature can make binding law) and began to focus on the role of judicial review in constraining and containing the executive branch. In Dicey’s account, the “supremacy of the law” required that independent judges try all cases of private right by the law of the land, according to settled procedure (usually, a *de novo* trial).\(^92\) This account of the supremacy of the law had a strong hold on American lawyers at the turn of the century.\(^93\) However, in confrontations between the old order and the regulatory commissions, a new “appellate review” model of judicial review gradually took hold.\(^94\) The appellate review model allowed agencies to act as primary fact-finders in licensing or rate-making schemes, subject to *ex post* formal adjudication procedures and judicial review “on the record.”\(^95\)

Although the model emerged as a social response to granger and progressive demands, the intellectual ascendancy of this model model over traditional forms of *de novo* review owes a great deal to the scholarship of Professor John Dickinson.\(^96\) Under Dickinson’s version of the “supremacy of the law,” only pure questions of law were reviewed *de novo*; judicial review of questions of fact could be limited to a record and reviewed under a relatively deferential jury standard.\(^97\) According to Dickinson, by

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\(^92\) DANIEL R. ERNST, TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA 1900-1940 32 (2014).


\(^95\) See BREYER ET AL., ADMINISTRATIVE LAW & REGULATORY POLICY 19-21 (5th ed. 2002).


allowing judges to focus on general principles while leaving to agencies matters of
detail, the appellate model would preserve the dignity of the judicial office. These
arguments played into judicial anxieties over the bureaucratization and contamination of
the courts: judges increasingly worried that judicial rate-making and similar forays into
administrative schemes would transform the courts into high commissions for the
administrative state.

Even so, for a generation of jurists, judicial independence as to “law” did not fully
satisfy the demands of the due process of law. By removing independent fact finding
from the province of the courts, the appellate review model opened the courts to the risk
of the “unscrupulous administrator.” As Chief Justice Hughes remarked before the
American Bar Association in 1931, “‘[a]n unscrupulous administrator may be tempted
to say, ‘let me find the facts for the people of my country, and I care little who lays
down the general principles.’” At stake was not only the possible evasion of the
general law expounded by judges; by forcing the courts to give force to administrative
acts without first-hand knowledge of the facts, the appellate review model also
threatened to contaminate the independence of the courts.

To conform the appellate review model to the then-prevailing understanding of the
rule of law, the courts developed several interlocking strategies. First, federal courts
moved—sometimes aggressively—to preserve judicial review of arguably unlawful
legislation through the unconstitutional conditions doctrine. Second, federal courts
insisted on their power to prevent ultra vires agency action and preserve de novo review
through equitable anti-suit injunctions when remedies at law were perceived to be
“inadequate.” Third, the Supreme Court developed the doctrine of “constitutional
fact” to review agency decisions on appeal. Once “at the center of administrative
law,” the doctrine required “appellate” courts to review important constitutional and

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99 In one striking illustration, the Supreme Court held that Congress could not constitutionally vest the
federal courts with jurisdiction over the grant of radio broadcasting licenses. See Federal Radio
the Elmira Chamber of Commerce, May 3, 1907, in ADDRESSES OF CHARLES EVANS HUGHES, 1906–1916
185 (2d ed. 1916).
100 Merrill, Origins of Appellate Review, supra note 94, at 979 & n. 194 (citing John Dickinson, Crowell
v. Benson: Judicial Review of Administrative Determinations of Questions of Constitutional Fact, 80 U.
PA. L. REV. 1055, 1077-82 (1932)). While we focus on private rights, Ann Woolhander has noted the
connection between delegation and due process of law in matters of “public right.” See Ann Woolhander,
Delegation and Due Process: The Historical Connection, 2009 SUP. CT. REV. 223
101 Laird Bell, Let Me Find the Facts…, 26 A.B.A. J. 552, 552 (1940).
102 See e.g., Ex Parte Young, 209 U.S. 123, 147 (1908); Willcox v. Consolidated Gas Co., 212 U.S. 19, 53
(1909); Wadley Southern Ry. v. Georgia, 235 U.S. 651, 659 (1915).
103 Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94, 108 (1902) (“The acts of all its officers
must be justified by some law, and in case an official violates the law to the injury of an individual the
courts generally have jurisdiction to grant relief.”)
104 See e.g., Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920); Ng Fung Ho v. White,
105 ROBINSON & GELLHORN, supra note 15, at 35. By 1951. Professor Davis later declared that the
constitutional fact doctrine was “of little interest except as history.” DAVIS, supra note 13, at § 244.
Compare with Frank R. Strong, The Persistent Doctrine of “Constitutional Fact, 46 N.C. L. REV. 223
jurisdictional findings in cases of private right “de novo,” without deference to administrative findings.\textsuperscript{106}

The first strategy is exemplified by the Supreme Court’s foundational decision in \textit{Chicago, Milwaukee & St. Paul Railway Company v. Minnesota.}\textsuperscript{107} The Minnesota legislature had vested the Railroad and Warehouse Commission with final power to promulgate rates binding against the railroads. The Supreme Court struck down Minnesota’s entire act, holding that the legislature violated the “due process of law” when it delegated the legislative power to make rates while failing to provide for judicial review of confiscatory rates.\textsuperscript{108} Final rates had to be set by the legislature, or through the coordinated act of the executive and the courts.

The second strategy is exemplified, of course, by \textit{Ex Parte Young}.\textsuperscript{109} Decided in 1908, \textit{Ex Parte Young} upheld the validity of an anti-suit injunction against Minnesota Attorney General Edward Young, restraining him from instituting criminal proceedings under a statute that made ordinary judicial review of the Railroad Commission’s regulations well-nigh unavailable.\textsuperscript{110} The questions of due process of law and delegation presented by the case were already settled; \textit{Ex Parte Young} merely confirmed that state officials could be subjected to anticipatory proceedings in equity (and de novo review) when the officials threatened to prosecute defendants under an unlawful statute (a statute that failed to provide due process of law).\textsuperscript{111}

The third strategy, i.e., the constitutional fact doctrine, is often traced to \textit{Smyth v Ames}.\textsuperscript{112} The case is widely understood (mistakenly, we believe) as a fair return “substantive due process” case.\textsuperscript{113} Smyth, however, was particularly aimed at the then


\textsuperscript{107} \textit{Chi., Milwaukee & St. Paul Ry. Co. v. Minnesota}, 134 U.S. 418, 456-457 (1890); Justice Black would later describe it as the “case in which a majority of this Court was finally induced to expand the meaning of ‘due process’ so as to give courts power to block efforts of state and national governments to regulate economic affairs.” \textit{FPC v. Hope Natural Gas Co.} 320 U.S. 591, 620 (1944) (Black, J., concurring).

\textsuperscript{108} The Minnesota Supreme Court interpreted the act as making the rates found by the commission final, subject to no judicial review. Minnesota v. Chi., Milwaukee & St. Paul Ry. Co., 37 N.W. 782 (Minn. 1888). On review, the Supreme Court held the act violated due process. Chi., Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U.S. 418, 456-457 (1890). Thus began the “long history of judicial review of rate regulation” that would eventually lead to the litigation in \textit{Yakus}. \textit{Jaffe & Nathanson}, supra note 15, at 43. For an application of the same principles to “administrative detention,” see \textit{Wong Wing v. United States}, 163 U.S. 228 (1896) (“It is not consistent with the theory of our government that the legislature should, after having defined an offence as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents.”)

\textsuperscript{109} 209 U.S. 123 (1908).

\textsuperscript{110} \textit{Ex Parte Young}, 209 U.S. 123, 147-149 (1908).

\textsuperscript{111} \textit{See General Oil Co. v. Crain}, 209 U.S. 211, 226 (1908).


emerging stateside commission form of regulation, and the case sought to operationalize a rule of separation of powers: courts (through a writ of certiorari, a regular appeal, or another procedure) were required to exercise independent judgment when determining questions of law and fact involving a deprivation of private rights. In the Minnesota Rate Cases, a consolidated rate-making case involving (yet again) Minnesota and the Railroad and Warehouse Commission, then Associate Justice Charles Evans Hughes enshrined a fully operationalized “fair return” doctrine into constitutional law.\footnote{Minnesota Rate Cases, 230 U.S. 352 (1913). For a summary, see Allan P. Matthew, Minnesota Rate Cases, 1 CAL. L. REV. 439 (1913). For a recent discussion of “fair return” cases in regulated industries, see Verizon Commc’n Inc. v. FCC, 535 U.S. 467, 477-488 (2002).} In a unanimous opinion, Hughes invalidated the rates at issue as “confiscatory” as applied to one of the railroads.\footnote{ERNST, supra note 92, at 40-41.} In \textit{Ohio Valley Water Co. v. Ben Avon Borough (“Ben Avon”),} the Supreme Court read \textit{Smyth} as requiring an “independent judicial determination” of the facts on the record when a petitioner alleged a denial of a “fair return” on its investment.\footnote{253 U.S. 287 (1920).}

In later years, the “constitutional fact” doctrine would come to be associated with the case of \textit{Crowell v. Benson}. In \textit{Crowell}, the Supreme Court reviewed a federal compensation commission’s adjudication finding an employer liable for an employee’s injuries in the course of riverboat work in the port of Mobile, Alabama.\footnote{Id. at 289. See also Nelson, supra note 87, at 597 (briefly explaining this model).} Writing for the majority, Chief Justice Hughes articulated a distinction between judicial review of constitutional (and jurisdictional) facts and judicial review of ordinary facts.\footnote{See Mark Tushnet, The Story of Crowell: Grounding the Administrative State, in FEDERAL COURTS STORIES 359 (Vicki C. Jackson & Judith Resnik, eds, 2000); Nelson, supra note 87, at 598-602.} Judicial review of ordinary facts—such as the extent of the worker’s injury—could be limited to the administrative record. In contrast, questions of constitutional and jurisdictional fact—whether the accident occurred on waters of the United States, or whether the injured worker was actually in the defendant’s employ—would be reviewed \textit{de novo}. Federal judges could supplement the record by holding hearings, allowing in extrinsic evidence, or by ordering full-scale trials on contested jurisdictional and constitutional issues.\footnote{Crowell, 285 U.S. at 62-63. 285 U.S. 22 (1932). As Mark Tushnet has explained, the facts tried in Crowell were necessary to assert constitutional power over the employer. If the employee was not in the navigable waters, the adjudication was illegal under the commerce clause. And if there was no employment relationship, the adjudication would have effected an arbitrary transfer from A to B in violation of the takings clause. Tushnet, supra note 118, at 359.}

Despite this attempt at judicial reconciliation, the “supremacy of the law” remained at loggerheads with the appellate review model. This tension is illustrated by \textit{St Joseph Stock Yards}, a case decided at the height of the New Deal.\footnote{Crowell, 285 U.S. at 62-63. 285 U.S. 22 (1932). Daniel Ernst argues that Chief Justice Hughes initially reasoned that the trial court had an obligation to try the case entirely \textit{de novo}. Justice Brandeis prevailed on Hughes to embrace a more limited concept of judicial review. ERNST, supra note 92, at 54 n.12.} In \textit{St. Joseph Stock Yards}, Chief Justice Hughes sustained a “quasi-legislative” regulation by the Secretary of
Agriculture setting maximum rates for stockyards. In the course of upholding the rule, Chief Justice Hughes reaffirmed *Crowell* and confirmed its application to “quasi-legislative” (i.e., regulatory) proceedings. In proceedings involving property and liberty, Hughes believed, the courts had a judicial duty to examine important administrative findings *de novo*. By contrast, Justice Brandeis—an appellate review “purist”—urged the court to adopt Dickinson’s model without reservations. But even under the Brandeis/Dickinson appellate review model, “[t]he supremacy of the law demands that there shall be an opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which the facts were adjudicated was conducted regularly.”

**The Delegation Connection.** *Crowell, Ex Parte Young,* and *Chicago, Milwaukee & St. Paul Railway Company* hung together with a problem that, in the contemporary legal imagination, seems several steps removed: the delegation of legislative power to the executive. The Supreme Court tackled the question in two seminal New Deal cases: *A.L.A. Schechter Poultry Corp. v. United States,* and in *Panama Refining Co.* (the “Hot Oil” case), both decided in 1935, three years after *Crowell* and only a year before *St. Joseph Stockyards*. The holding of those cases has been distilled into the proposition that Congress must supply an “intelligible principle” for executive action; failing that, a delegation of legislative power is unconstitutional. That shorthand, however, gravely distorts the broader structural concerns that underpin—and are articulated in—those decisions. The Court was not concerned with legislative transfers of authority *per se*. Rather, *Schechter* and *Hot Oil*—like *Chicago, Milwaukee & St. Paul Railway Company, Ex Parte Young,* and *Crowell*—upheld supremacy of the law principles; properly understood, *Schechter* stands for the principle that Congress may not simultaneously vest executive officials with the power to regulate and bind individuals in matters of private right, at least not without outlining a regular course of administrative procedure and providing a meaningful opportunity for independent judicial review in cases of private right.

*Hot Oil* involved an injunctive suit by the Panama Refining Company and a criminal prosecution against the Amazon Petroleum Company under a (repealed) section of a Petroleum “code” promulgated by the Secretary of Interior under section 9(c) of the

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123 Id. at 52-53.
125 St Joseph Stock Yards Co., 298 U.S. at 84.
126 A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388, 430 (1935). *See also* Carter v. Carter Coal Co., 298 U.S. 238, 296 (1936)(“a judicial tribunal, clothed by that instrument with complete judicial power, and, therefore, by the very nature of the power, required to ascertain the law to the facts in every case or proceeding brought for adjudication, must apply the supreme law and reject the inferior statute whenever the two conflict.”).
127 In fact, the Court assumed that such transfers were generally permissible, within an established “course of procedure” and subject to independent judicial review over certain questions of law and fact. *See* St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 51 (1936).
NIRA. After concluding that section 9(c) of NIRA provided no intelligible standard, Chief Justice Hughes went on to consider whether the statute satisfied a cardinal principal of constitutional government:

“If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board, or commission, and, if that authority depends on determinations of fact, those determinations must be shown.”

In this respect, the order in Hot Oil was deficient:

“The executive order contains no finding, no statement of the grounds of the President's action in enacting the prohibition…. And findings by him as to the existence of the required basis of his action would be necessary to sustain that action, for otherwise the case would still be one of an unfettered discretion as the qualification of authority would be ineffectual.”

Similarly, in the Schechter case, Chief Justice Hughes affirmed the importance of judicial review and regular procedure to sustain delegations. The NIRA did not require any reviewable findings of fact, and it provided no regular course of procedure to constrain official discretion.

Although sounding in “due process of law,” the principles upheld in Schechter and Hot Oil were not the requirements of a distinct constitutional clause; the “course of procedure” that the Court found lacking was required by the structural need to confine executive officials by the law of the land. This ”general principle” required Congress to constrain all delegations through adequate procedural safeguards, and it required all administrative officials to support all deprivations of property and liberty through reviewable findings of fact, showing that the deprivation was in conformity with the

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128 After the petition for review was granted by the Supreme Court, the Solicitor General discovered that the relevant paragraph in the Petroleum Code criminalizing a violation of the quotas had been amended and revoked by the agency. See Panama Refining Company v. Ryan, 293 U.S. at 412; United States v. Smith, 293 U.S. 633 (1934). The incident, known as the “Hip Pocket Law”—because the amended code was found in the hip pocket of an administrative official—led to the creation of the Federal Register. For a discussion, see LOUIS JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 61-62 (1965); EDWARD S CORWIN, THE PRESIDENT 367 (1940); Note, 49 HARV. L. REV. 827 (1936).


130 Panama Ref. Co., 293 U.S. at 431.

131 A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 538 (1935)( “[w]hile this is called a finding, it is really but a statement of an opinion as to the general effect upon the promotion of trade or industry of a scheme of laws.”).

132 Panama Ref. Co. v. Ryan, 293 U.S. 388, 432-33 (1935)(quoting Wichita R. & Light Co. v. Pub. Utilities Comm. of the State of Kan., 260 U.S. 48, 59 (1922)(“the Legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function.”) Wichita, like other “fair return” cases, involved a state regulatory commission, which confirms that the Supreme Court viewed the “non-delegation” doctrine through the lens of due process and the separation of powers.
law. Under this constitutional system, Chief Justice Hughes declared, even “the
President…necessarily acts under the constitutional restriction applicable to such a
delegation.”

An emaciated, a-contextual “intelligible principle” doctrine does appear in the
cases—in Justice Cardozo’s dissent in Hot Oil. Under Cardozo’s opinion, “what the
standard is becomes the pivotal inquiry,” and the elusive “intelligible principle”
becomes the controlling test. According to Cardozo, the the intelligible principle
doctrine requires the recognition of a lawless “twilight zone” of discretion in which the
President is subject to “the restrictions, if any, accompanying the legislative grant, but
not to any others.” Cardozo’s “intelligible principle” doctrine was a far cry from the
structural principles that drove the majority in Schechter and Hot Oil. Instead of
requiring executive officials to act through and under the law, it gave executive officials
free reign to pursue public policy outside the law, as long as they rationally pursued the
public policy goals declared by Congress.

The Administrative Process. Schechter’s signal, though poorly understood today,
was apparent to many New Dealers: the Supreme Court was willing to accomodate New
Deal demands, provided the New Deal preserved the structure of appellate review
demanded by Crowell. The FTC and the SEC, both discussed approvingly in Schechter,
provided the New Deal with a blueprint, which Roosevelt’s lawyers used to draft the
National Labor Relations Act. The act required orders to proceed through notice and
hearing; to be enforced in court; reviewed on the record under the substantial evidence
rule; all questions of “constitutional right and authority” in an enforcement suit were
subject to judicial review. In NLRB v. Jones & Laughlin Steel Corp., the Court
upheld the National Labor Relations Act. Leading New Dealers, however, harbored
grander visions of the administrative process.

In his magnum opus, The Administrative Process, Professor James Landis launched
a frontal assault on Crowell, Ben Avon, and the entire notion of an “essentialist”—read
constitutional—separation of powers. Landis attacked Crowell and Ben Avon as

133 Id.
134 Panama Ref. Co., 293 U.S. at 432-33.
136 Id. at 447 (emphasis added). This debate on the bench between the Hughes and Cardozo harkened
back to the debates between Lord Chancellor Ellsmere and Lord Coke. See Chapman & McConnell,
supra note 10, at 1672.
137 Ernst, supra note 92, at 67-69.
139 Professor Davis later argued that given “many unequivocal holdings” to the contrary, either Justice
Brandeis’s dictum was “mishaken” or Brandeis used the term “law” as “excluding the body of rules that
grow out of the exercise of administrative discretion.” Davis, supra note 13, at § 8. But although he might
have regretted his reasoning, Justice Brandeis authored a seminal “supremacy of the law” opinion holding
that the due process of law required that the question of alienage underlying a deportation order be tested
before an independent court. See Ng Fung Ho v. White, 259 U.S. 276 (1922). Justice Brandeis did attempt
to distinguish Ng Fung Ho in Crowell, but not very convincingly. Crowell v. Benson, 285 U.S. 22, 90 n.2
(1932).
flawed “syllogistic” reasoning stemming from the anxieties of the judicial “class.”\textsuperscript{141} Other New Dealers joined in Landis’s criticism of these doctrines.\textsuperscript{142}

The New Dealers ultimate goal was to replace the supremacy of the law with what they called the “administrative process.” Landis envisioned an administrative process that would elevate judges to “new heights where the great judge, like a conductor of a many-tongued symphony…makes known through the voice of many instruments the vision that has given him of man’s destiny upon this earth.”\textsuperscript{143} Unleashed from “essentialist” straightjackets, judges could shape judicial review in partnership with the agencies through the concept of institutional competence: the comparative “expertness” of administrators, “the procedure employed” by the agency, and notions of “fairness” and “expedience,” rather than the separation of powers, would shape review.\textsuperscript{144} Under this arrangement, Landis prophesied, judges would give administrator-made “law” binding effect as required by public policy and “expertness.”\textsuperscript{145}

Concurrent with Landis’s writings, the New Dealers vision of “man’s destiny upon this earth” was taking hold in judicial opinions. Justice Harlan Fiske Stone articulated this vision in a case involving a rate-making proceeding under the Packers and Stockyards Act.\textsuperscript{146} According to Justice Stone, it was a “cardinal principle” of law that “court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice…. [c]ourt and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action.”\textsuperscript{147} And in words that would ring true in the decades after Yakus, Justice Frankfurter instructed future generations of lawyers that while “the administrative process…pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice.”\textsuperscript{148}

In due course, these expansive notions of an administrative process would triumph. And it is true that in retrospect, the formula of Crowell and Schechter may look like something of a halfway house, and a highly unstable one at that. By 1942, a vastly expanded Commerce Clause had swept aside the jurisdictional-cum-constitutional questions that had loomed large in 1932,\textsuperscript{149} and the Supreme Court had upheld several

\textsuperscript{141} LANDIS, supra note 140, at 127-131.
\textsuperscript{142} See ERNST, supra note 92, at 46-50.
\textsuperscript{143} LANDIS, supra note 140, at 155. This conception of judicial review was not unique to the more radical New Dealers. Justice Jackson’s notions of “judicial review” and “judicial supremacy” followed along similar lines. See generally ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY (1941).
\textsuperscript{144} LANDIS, supra note 140, at 144, 153.
\textsuperscript{145} LANDIS, supra note 140, at 144.
\textsuperscript{147} Morgan III, 307 U.S. at 191.
\textsuperscript{148} Morgan IV, 313 U.S. at 422.
\textsuperscript{149} See Wickard v. Filburn, 317 U.S. 111 (1942); NLRB v. Jones & Laughlin Steel Corp. 301 U.S. 1 (1937).
broad delegations of legislative discretion. Prof. Davis could confidently argue—quoting liberally from Justice Cardozo’s dissenting opinion in *Hot Oil*—that although requiring procedural safeguards and findings of fact by statute was in general a “good idea,” the Constitution did not require administrative agencies to find facts according to regular procedure. At the time of *Yakus*, though, answers that now look like foregone conclusions were still open questions. The EPCA was the New Dealers’ frontal attack on lingering supremacy-of-law notions.

**C. The New Dealers Respond**

By 1942, New Deal lawyering was no longer a children’s crusade. The New Dealers had learned their lessons from prior defeats (such as *Schechter* and *Hot Oil*). In the EPCA, they combined ideological ambition with careful—if aggressive—legal drafting and lawyering. Moreover, by the time of the litigation in *Yakus*, the Government could claim the benefit of some favorable Supreme Court precedents. Still, the particular combination of sham administrative procedure and binding regulations presented in the EPCA had never been tested. The Act’s unbounded delegation to OPA without any real procedural safeguards ran up against *Schechter*; the limitation on judicial remedies, against *Ex Parte Young*; and the limitations on judicial review, against *Crowell v. Benson* and, by implication, *Marbury*. Viewed as a whole, the EPCA’s institutional architecture was at war with the constitutional structure it sought to replace.

Instead of defending the law as a whole, the New Dealers artfully defended the law provision-by-provision and precedent-by-precedent. Viewed in isolation, the provisions of the law would seem less revolutionary. The EPCA’s architects set out their legal strategies in a symposium on the Emergency Price Control Act held at Duke Law School.

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151 *DAVIS, supra* note 13, at § 162.

152 For the full memorandum of law prepared for the Congress, see *Hearings Before the Comm. on Banking and Currency on H.R. 5479*, 77th Cong. 302-338 (1941). Although the list is non-exhaustive, the Government relied on the following precedents to support discrete aspects of the law: Olsen v. Nebraska, 313 U.S. 236 (1941); Virginian Ry. Co. v. Railway Employees, 300 U.S. 515, 558 (1937); Nebbia v. New York, 291 U.S. 502 (1934); Block v. Hirsh, 256 U.S. 135 (1921) (for the proposition that legislative price controls were reviewable only under the rational basis test and did not violate the Fifth Amendment’s due process clause); Opp. Cotton Mills v. Administrator, 312 U.S. 126 (1941); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1937); H.P. Hood & Sons v United States, 307 U.S. 588 (1939); United States v. Rock Royal Cooperative, 307 U.S. 533 (1939); Radio Commission v. Nelson Bros. Co., 289 U.S. 266 (1933) (EPCA’s standards were not so vague as to amount to a violation of the non-delegation doctrine); United States v. Grimaud, 220 U.S. 506, 519 (1911) (Congress may delegate to an agency power to issue legislative rules with the force of law); United States v. Morgan, 313 U.S. 409 (1941); Knox v. Lee, 79 U.S. 457, 551 (1871) (EPCA did not violate the fair return doctrine or the just compensation clause); Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294 (1933) (individual notice of a legislative rule is not a matter of right); Bi-Metallic Investment Co. v. Colorado, 239 U.S. 441 (1915) (individual hearing is not required to validate a legislative rule); Myers v. Bethlehem Steel Corp., 303 U.S. 41 (1938) (all administrative remedies provided by statute must be exhausted before resort to the courts, and the additional proposition that Congress could provide exclusive avenues to judicial relief); Pacific States Box & Basket Co. v. White, 296 U.S. 176, 185-186 (1935) (facts necessary to uphold the validity of a regulation should be presumed until the factual support for the decisions is affirmatively shown to be arbitrary and capricious, and for the additional proposition that quasi-legislative acts did not require evidentiary support to bind the public).
School. OPA General Counsel David Ginsburg discussed the EPCA’s legislative framework. Nathaniel Nathanson, then Assistant General Counsel for OPA (on leave from Northwestern Law School), set out the legal strategy to defend the administrative procedure and judicial review provisions. Constitutional scholar and Assistant Solicitor General Paul Freund presented the Administration’s general defenses against delegation and fair-return challenges.

Professor Nathanson began by defending (now textbook) principles of administrative law. The promulgation of “generally fair and equitable” price regulations, he observed, raises pure questions of legislative fact; therefore, under the venerable case of Bi-Metallic Investment Co. v. Colorado, no “trial-like” hearing was required. Professor Nathanson had a more difficult time defending the Emergency Court’s “exclusive jurisdiction” over all regulatory challenges, and section 204(d)’s prohibition on judicial review. To sidestep Marbury problems, Professor Nathanson relied chiefly on the doctrine of exhaustion of administrative remedies articulated in Myers v. Bethlehem Shipbuilding Corporation. In that case, the company had sued the NLRB in equity, seeking to restrain the Board from holding adversarial hearings on the company’s allegedly unfair labor practices. The Bethlehem Shipbuilding Corporation invoked the constitutional fact doctrine, asserting that the NLRB hearing itself would cause the Corporation “irreparable injury”—not exactly the stuff of Ex Parte Young, nor for that matter the fate that regulated parties would soon suffer under the EPCA. In Bethlehem Steel, the Supreme Court interpreted the statute as granting exclusive original “jurisdiction” to the NLRB and found the company’s contention “at war with the long-settled rule that no one is entitled to relief for a supposed threatened injury until the prescribed administrative remedy has been exhausted.” Nathanson seized on this particular ruling to argue, rather boldly, that the EPCA merely codified “the usual rule of exhaustion of remedies.”

Paul Freund took on both the Ben Avon and Ex Parte Young doctrines. Section 4(d) of the EPCA provided that no person was “required” to “sell any commodity.” The statutory purpose of this seemingly curious section was to defeat “fair return” claims.

154 See generally Nathanson, supra note 52.
156 239 U.S. 441, 445 (1915).
157 303 U.S. 41 (1938).
158 In its original bill of complaint, the company had alleged that the National Labor Relations Act was unconstitutional as applied to its intrastate business.303 U.S. 41, 43-44 (1938). By the time the appeals reached the Supreme Court, the Supreme Court had already decided Jones & Laughlin Steel Corporation (upholding the NLRA), but the Supreme Court granted certiorari after the lower courts denied a rehearing to lift the preliminary injunction against the Board. Id. at 47.
159 Id. at 50-51. Only months after the Supreme Court’s ruling, a Michigan state court enjoined NLRB officials from holding a hearing. The lessons from this injunction probably motivated the EPCA’s ban on the exercise of state as well federal judicial power. For discussion, see A.J. Coffman, Power of a State Court to Enjoin National Labor Relations Board Officials, 36 MICH. L. REV. 1344 (1938).
160 Nathanson, supra note 52, at 70. For comment see infra .
161 Rottenberg v. United States, 137 F.2d. 850, 855 (1st Cir. 1943).
Freund argued that while regulated utilities had an affirmative duty to provide public services, private sellers subject to general price controls could go out of business without losing specific property assets.\footnote{Freund, supra note 155, at 83-84.} Accordingly, \textit{Ex Parte Young} and \textit{Ben Avon} did not apply to price controls outside the context of utility rate-making. Moreover, unlike in \textit{Ex Parte Young}, Freund audaciously argued, the EPCA allowed challengers to assert their defenses in a non-criminal forum.\footnote{Id.}

These arguments were hardly airtight. Nathanson’s argument that \textit{Crowell} was irrelevant to regulatory schemes was contradicted the Supreme Court’s opinion in \textit{St. Joseph Stockyards}.\footnote{St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 49-50 (1935).} Freund’s theory that the \textit{Ben Avon} doctrine applied exclusively to regulated utilities was flatly contradicted by Chief Justice Hughes’s concurring opinion in \textit{Carter Coal}.\footnote{Carter v. Carter Coal Co., 298 U.S. 238, 319 (1936) (Hughes, C.J., concurring in part and dissenting in part) (“The exercise of the power of regulation is subject to the constitutional restriction of the due process clause, and if in fixing rates, prices, or conditions of competition, that requirement is transgressed, the judicial power may be invoked to the end that the constitutional limitation may be maintained.”).} His argument that \textit{Ex Parte Young} was irrelevant because of the availability of a civil administrative procedure turned the rationale of the case on its head. \textit{Ex Parte Young} turned on the fact that no adequate judicial review was available in practice, not on the civil or criminal nature of the forum. Moreover, the statute in \textit{Ex Parte Young} at least allowed railroad officers to raise constitutional defenses in a criminal trial; the EPCA did not even pretend to extend that favor. Nor, contrary to Nathanson, did \textit{Bethlehem Shipbuilding} validate the administrative procedure sustained in \textit{Yakus}. Unlike the NLRA, the EPCA precluded all judicial review of orders and regulations in enforcement proceedings. Moreover, in \textit{Bethlehem Shipbuilding}, the Supreme Court had made much of the NLRA’s “adequate” procedure: the NLRB proceeded by individual order; no penalty accrued before a court of law entered a final judgment. All of these features were conspicuously lacking in the EPCA.\footnote{See \textit{Yakus} v. United States, 321 U.S. 414, 475 & n.32 (Rutledge, dissenting). Another case relied on by Nathanson in passing was \textit{Lauf v. E.G. Shinner & Co.}, which upheld a provision of the Norris-La Guardia Act of 1932 prohibiting federal courts from enjoining union picketing and other union activities that interfered with a business. See \textit{Lauf v. E.G. Shinner & Co.}, 303 U.S. 323, 327-330 (1938). Unlike the EPCA, however, the Norris-La Guardia Act of 1932 left state courts open, and the Norris-La Guardia Act did not prohibit federal courts from considering the “validity” of a regulation in an enforcement context, criminal or otherwise.}

If the New Dealers could nonetheless repose a great deal of confidence in their arguments, that was because President Roosevelt’s long tenure had allowed him to stack the courts with New Deal judges. By 1941, the Supreme Court consisted of eight Roosevelt appointees (including Chief Justice Stone), with Justice Owen Roberts as the single holdover from a Republican Administration. The pattern was much the same in the lower courts; and of course, the Emergency Court of Appeals established under the EPCA was entirely stacked with loyal Roosevelt appointees.

\section*{II. The Beef over Beef Prices}
Yakus v. United States was part of a dramatic, fast-paced story. Some two years lay between the enactment of the EPCA and the Supreme Court’s decision. Another two years later, the war was over, price regulation had lost public support, and a different political climate produced a slight pull-back from the ambitions embodied in the EPCA.

It is tempting to tell the story as yet another confrontation between the New Deal and its reactionary opponents—the last big battle of this sort, perhaps, fought under wartime conditions. That narrative arc, though, misses important features of the story. In some ways, Yakus was a replay of Schechter—a constitutional attack on a massive regulatory scheme, brought by marginal (and Jewish) producers in defense to a prosecution. However, Schechter was a test case litigated principally by the whitest of white shoe New York law firms; financed by corporate interests with the hope of arresting the New Deal’s grander ambitions; and brought to a Supreme Court that was likely to be receptive to the challengers’ legal arguments (and, in the event, endorsed those arguments unanimously).167 Yakus differs in all those respects. There is something desperate about the meat dealers’ opposition to an administrative regime that threatened their very existence—about their pleas for legislative and regulatory relief, and about their varied attempts to obtain judicial protection, under a statute that effectively foreclosed all conventional avenues of relief.

Yakus must be understood against this backdrop. Thus, we begin by recounting OPA’s implementation of the EPCA (Section A.) and, in particular, the regulation of the meat industry (Section B.). Section C. describes the EPCA’s trajectory in the courts including the Yakus litigation in the lower courts. Section D. discusses the Supreme Court’s opinions and decision. Section E. provides a brief account of the aftermath.

A. The OPA Goes to Work

Price Administrator Leon Henderson and his OPA staff pursued their price control mission with almost fanatic zeal.168 An army of public economists and lawyers enlisted in OPA’s mission to experiment on American merchants and consumers.169 OPA’s economists were aware that price control “necessitates replacing the myriad of price decisions made by thousands of individual buyers and sellers in peacetime with the judgments of a relatively few government experts. Nevertheless, OPA officials “boldly and persistently” resolved to substitute the price system with “expertness.”170

168 MANSFIELD, supra note 33, at 7.
169 Between 1942 and 1946, OPA’s “paid and volunteer staff numbered over a quarter of a million and included twice as many economists as the Treasury Department.” Jacobs, supra note 46, at 911. A young John Kenneth Galbraith was appointed Deputy Price Administrator. See JOHN K. GALBRAITH, A LIFE IN OUR TIMES 124-141 (1981).
170 See Donald Wallace & Phillip H. Coombs, Economic Considerations in Establishing Maximum Prices in Wartime, 9 LAW & CONTEMP. PROBS. 89, 89 (1942); Franklin D. Roosevelt, Address at Oglethorpe University, (May 22, 1932), reprinted in 1 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 1928-32, 639 (1938).
Tasked with the role of choosing some objective standard to implement Congress’s instruction that price controls be “generally fair and equitable,” Administrator Leon Henderson chose the broadest possible standard and insisted on fixing prices at a level that would allow the over-all industry to realize the same level of profits as during peacetime (despite the wartime increase in demand). OPA soon settled on this “overall industry earnings” standard (industry net income before taxes, compared to historical profits for the 1936-1939 period) and rejected a more traditional “cost plus a fair profit” standard championed by Bernard Baruch. The “overall industry earnings” standard gave OPA the flexibility to set prices for entire industries without worrying about marginal producers. As a safeguard, however, Henderson promised that “if a particular product in a multiproduct industry was subject to a maximum price which was below the current industry cost attributable to that product, the maximum price would be increased to cover such cost.”

Problems that would have afflicted the most “rational” system of price controls were exacerbated by the Roosevelt Administration’s eagerness to stamp out wartime “profiteering.” On October 3, 1942, President Roosevelt directed the Price Administrator to prevent “unreasonable and exorbitant” war profits, a goal that Congress promptly incorporated into the statement of purposes in the October Amendments to the Act. Regulatory unreasonableness reached its apotheosis with the President’s “hold the line order:” Roosevelt ordered all executive agencies to work to freeze all wages, rates, and prices across the entire economy at pre-War levels, insisting on the need to create artificial economic scarcity to control inflation. Under the order, each and every price increase was prohibited, “regardless of whether it be justified by cost or productivity increases and regardless of its distributional effects.” As noted, these regulatory ambitions were subject to Congressionally crafted exceptions for the farm bloc and other influential groups. Far from ameliorating the general situation, however, special interest guarantees and subsidies to marginal enterprises contributed to the market distortions created by OPA’s price controls. As Joseph Schumpeter scornfully observed, “unless intended to force the surrender of private enterprise,” OPA’s system of price controls was “irrational and inimical to the prompt expansion of output.”

B. Regulating Meat

171 EPCA § 2(c).
172 By convention, OPA used the same period as the Administration used to calculate the “Excess Profits Tax” levied during the war. See Mansfield, supra note 33, at 31; Cuellar, supra note 22, at 1379-1381.
173 MANSFIELD, supra note 33, at 32.
174 MANSFIELD, supra note 33, at 281.
175 See Gillespie-Rogers-Pyatt Co. v. Bowles, 144 F.2d 361 (Em. Ct. App. 1944); JAFFE & NATHANSON, supra note 15, at 73.
177 Exec. Order 9328, 8 Fed. Reg. 4681 (Apr. 8, 1943) (“we cannot stop inflation solely by wage and price ceilings. We cannot stop it solely by rationing. To complete the job, Congress must act to reduce and hold in check the excess purchasing power. We must be prepared to tax ourselves more, to spend less and save more.”).
179 JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 387 (1942).
OPA’s meat regulations and in particular the price ceiling that would produce the Yakus litigation unfolded in stages. For OPA officials, it was a foregone conclusion that meat had to be controlled to protect consumers. For those who “intimately knew the industry,” it was “a foregone conclusion that price ceilings would not work well.”

The regulation of meat prices began in earnest when Price Administrator Leon Henderson issued the General Maximum Price Regulation, freezing commodity prices across the entire economy at the level of March 1942. As OPA’s staff eventually acknowledged, “General Max” (as the regulation was called), proved “as disruptive and unsatisfactory to the industry as to the consumer.” Accordingly, in June of 1942, Leon Henderson signed Maximum Price Regulation No. 169, a new order regulating beef and veal prices. Both OPA and the meat industry soon came to regard this regulation as “inadequate.” For OPA, the basic problem was that meat sold by independent packers and slaughterers was sold “without grade designation or on the basis of private grading systems” that could easily be manipulated to avoid price controls. For the meat dealers, the basic problem was that the price control regulation did nothing to stem the continued rise in cattle costs.

During the summer of 1942, Boston’s butchers began to experience empty shelves; several meat dealers declared bankruptcy, and grocery shops could not meet demand. A committee of more than four-hundred Boston slaughterers, hotel suppliers, and meat dealers, rallied to petition the Roosevelt Administration to place a price ceiling on cattle. Sidney H. Rabinowitz, the director of the New England

180 Arant, supra note 6, at 908.
182 Arant, supra note 6, at 908 & n.7.
184 Hyman & Nathanson, Battle of Meat Regulations, supra note 4, at 594.
185 Hyman & Nathanson, Battle of Meat Regulations, supra note 4, at 594. Although large integrated packers sold 85% of all meat products in the United States, the number of independent small packers and slaughterers was very large, and they sold most of the fresh beef available in northeast cities. Id. at 605-606.
186 Arant, supra note 6, at 908 (“a few weeks after the imposition of ceilings on meats, the uncontrolled prices of livestock rose to such an extent that the margins of many meat packers were seriously squeezed.”).
188 Little Beef Expected in Boston Now, None Expected Next Week, BOSTON GLOBE, July 23, 1942, at 1 & 6.
189 Solution to ‘squeeze’ on Prices Sought, BOSTON GLOBE, July 23, 1942, at 6.
190 Sidney Rabinowitz was born in Lithuania and immigrated to the United States in 1903. He was the founder and president of the Colonial Provision Company, a very successful meat processing firm. Rabinowitz started his own business in 1918 after working in a meat processing plant. Later, in the 1950s, the Colonial company was reportedly one of the largest meat dealers in the country. Rabinowitz was also one of the 10 founders of Brandeis University. See Deaths and Funerals: Throngs Pay Last Tribute To

Along with the “Big Four” Chicago packers, slaughterers and packers were a political force to be reckoned with, and only vehement opposition from the Texas and Southwestern Cattle Raisers’ Association prevented them from getting their way in Congress. Nevertheless, when Congress amended the EPCA in October of 1942, Senator McKellar inserted a vague provision into the legislation for the benefit of the meat processors. The McKellar Amendment required the Price Administrator to provide a “generally fair and equitable” margin for the processing of farm commodities, “including livestock.” Wilbur LaRoe Jr., counsel for the Independent Meat Packers Association, proclaimed “hurrah, the battle is done, because Congress has told O.P.A. they have to do it.”

LaRoe’s enthusiasm was misplaced. On December 10, 1942, Price Administrator Leon Henderson signed Revised Maximum Price Regulation 169 (“RMPR 169”), the eventual subject of the litigation in Yakus. Taking the Kansas City market as a baseline, the rule divided the country into price zones and allowed for “dollars and cents” increments based on OPA’s geographic estimate of cost. The rule (for the first time) established grading standards for independent meat dealers and packers. As the meat dealers later complained, RMPR 169 “revolutionize[d] the meat industry by eliminating terms and cuts of meat upon which trade was founded and so recognized by custom for so many years.”

RMPR 169’s “statement of considerations” cited to Executive Order 9250 (requiring OPA to control “profiteering”) and perfunctorily stated that the regulation furthered the purposes of the Act. OPA also filed an unpublished study alongside the regulation.


Solution to ‘squeeze’ on Prices Sought, BOSTON GLOBE, July 23, 1942, at 6; Little Beef Expected in Boston Now, None Expected Next Week, BOSTON GLOBE, July 23, 1942, at 6.


Hyman & Nathanson, Battle of Meat Regulations, supra note 4, at 599 & n.47.


Hyman & Nathanson, Battle of Meat Regulations, supra note 4, at 596 (“wholesale cuts were precisely defined in anatomical detail, and the sale of cuts not in compliance was prohibited.”).


discussing the history and economic conditions of the meat industry. As the Emergency Court of Appeals would later find, OPA’s estimates of “cost” were based on the (grossly) mistaken assumption that cattle prices would not continue to rise. But rise they did, in response to increasing wartime demand. And yet: in the face of overwhelming evidence of a “price squeeze” and the desperate pleas of the middlemen, the Price Administrator refused to reconsider the rule.

As RMPR 169 went into effect, Harold Widetzy and Sydney Rabinowitz met with OPA’s staff and Secretary of Agriculture Claude R. Wickard to negotiate a food stamp subsidy program. Several meat industry groups filed protests before the Administrator and challenges in the Emergency Court of Appeals, claiming that the resulting price squeeze violated the terms of the Act. The Armour Company, one of Chicago’s “Big Four” packers, was the largest corporate litigant. The National Independent Meat Packers Association, represented by Wilbur LaRoe Jr., also filed a protest on behalf of a class of independent packers and slaughterers.

Responding to the several protests, the Price Administrator perfunctorily replied that the evidence of a price squeeze was unconvincing. Even assuming, arguendo, that a “squeeze” existed, he argued that only “vigorous enforcement” against black market profiteers would redress the problem without triggering dangerous inflation. When OPA’s bellicose response failed to appease the meat dealers, the Price Administrator proceeded to stonewall the litigation by prolonging administrative discovery, while suing the meat dealers in federal district court. It would take more than two years for the Emergency Court of Appeals to reach a final judgment on the merits of the regulatory challenge. Throughout this period, RMPR 169 was effective and unassailable, leaving many marginal meat dealers with the grim choice of going out of business or into the black market, and possibly to jail.

Meanwhile in Congress, meat packers and independent slaughterers appeared before a Senate small business committee in March 1943 for dramatic hearings. Testifying for the independent packers, Wilbur LaRoe’s stated that at present prices, some 25% to

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202 Id. at 532.
203 Id.
204 In November 1943, a report published by the House Select Committee to Investigate Executive Agencies supported some of the allegations of the non-processing slaughterers. According to the House report, “it was obvious that the Regulation would ultimately result in the destruction of all nonprocessing slaughterers as a class. It was shown in the testimony before this committee…that a large number of nonprocessing slaughterers had been force out of business because of the losses incurred through their efforts to operate under this illegal order.” House Report No. 78-898 (1943). Even the price lawyers admitted that by the end of the summer, OPA had realized that certain segments of the industry were in serious financial trouble. Hyman & Nathanson, Battle of Meat Regulations, supra note 4, at 601 & n.51.
206 Armour, 148 F.2d at 529.
208 Hyman & Nathanson, Battle of Meat Regulations, supra note 4, at 597.
209 See Hearings, supra note 195.
40% of the wholesale meat industry could not make a return on investment under current price ceilings. As LaRoe explained, while OPA regulations capped the wholesale price of hogs at $13.50, the market price for hogs had climbed to $15 in the uncontrolled market for farm products. The price squeeze between producers and “middlemen” had created the worst black market “in the history of the country,” prompting the slaughtering of hogs under unhealthy conditions.

Edgar Danahy, a small Buffalo meat processor, told the committee that he had stopped selling meat to the military and would soon go bankrupt. He further testified that a local banker, after unceremoniously denying him a loan, had added insult to injury by telling him that he would soon have to obey the law and go broke “or violate the law and go into the penitentiary.” Senator Taft introduced several letters from Ohio constituents into the record. One constituent questioned how the “pseudo-economists in Washington” could introduce a price ceiling on meatpackers and retailers without placing corresponding ceilings on farmers and ranchers. Another constituent argued that “the only relief for the meat packers is in the courts” and urged “immediate adoption of Price Control Act amendment to allow review of this situation in district court.”

OPA officials acknowledged that RMPR 169 had caused serious economic difficulties, but they remained opposed to lifting price controls. Instead, they advocated more enforcement. While “fully aware of the squeeze from which the packers are suffering at the present time,” OPA’s new Price Administrator (and former Illinois Senator) Prentiss Brown informed Congress that “nothing could be done in this emergency.” OPA, he noted, had filed more than eight-hundred criminal lawsuits to stop unlawful sales, which would “force” cattle prices down and “increase the supply.” Unconvinced Senators inquired why OPA’s staff continued to flout the McKellar Amendment. With some trepidation, Prentiss Brown admitted that meat regulations probably did violate the McKellar Amendment. However, he argued, raising a ceiling on beef “at this time” would be “impractical”: “you would have to change it every day” in response to changing livestock prices. When an OPA official suggested that the McKellar Amendment was subject to “interpretation,” Senator James Mead of New York chided that “when the casualty list reached 20 percent [that] it

210 *Hearings, supra* note 195, at 7.
211 *Hearings, supra* note 195, at 2.
212 *Hearings, supra* note 195, at 2.
213 *Hearings, supra* note 195, at 7.
214 *Hearings, supra* note 195, at 7.
216 *Hearings, supra* note 195, at 11.
217 *Hearings, supra* note 195, at 11.
218 *Hearings, supra* note 195, at 16.
219 *Hearings, supra* note 195, at 16.
220 *Hearings, supra* note 195, at 20.
certainly does apply, because certainly Congress did not have in mind a mortality rate that high.”221

Sidney Rabinowitz and Harold Widetzky testified last, on behalf of the New England Meat Dealer Association. Rabinowitz explained the dire situation faced by meat dealers in New England:

“You will find the following situation for our industry, and I speak for New England, and I might as well speak for the entire country, and that is, they either are in jail or they are blowing their brains out; and I think it’s a terrible situation. And I think these articles and these newspapers about them engaging in the black market, I think there is nothing to it. It is nothing but men in the industry that are either falling by the wayside and going to jail or into bankruptcy, or, if they have the courage, blowing their brains out.”222

Albert Yakus would go to jail.

C. Litigation

Meat dealers pursued three avenues to challenge the price control scheme and OPA’s regulations. First, they sought to avail themselves of the option provided by the statute: a protest before the agency and litigation before the Emergency Court. Second, they sought non-statutory equitable relief by means of an Ex Parte Young challenge. Third, they raised legal and constitutional defenses against the regulations in criminal prosecutions and civil enforcement proceedings.

That third scenario, of course, is Yakus. The case, though, must be understood in the context and chronology of the other two approaches. The first option, resort to the statutorily provided options for legal redress, was designed to fail. It eventually did fail—well after the decisions in Lockerty and Yakus.223 However, it played a crucial role in the Supreme Court’s majority opinion in Yakus (and for that matter Henry Hart’s later, somewhat shame-faced apologia pro vita sua defense of Yakus as an exhaustion case): Congress had not foreclosed but merely channeled judicial relief, as surely it could do under its copious powers. The second option, Ex Parte Young relief, was rejected by the Supreme Court in Lockerty (1943), a week after the Yakus defendants had filed their petition for certiorari. The Court in Lockerty reserved the precise question presented in Yakus; but it also narrowed the petitioners’ case.

EPCA Proceedings. Associations of independent wholesale dealers, small slaughterers, and large meat processors, filed protests before the Price

221 Hearings, supra note 195, at 33.
222 Hearings, supra note 195, at 81.
As Justice Owen Roberts would later remark in his *Yakus* dissent, “a procedure better designed to prevent the making of an issue between the parties could scarcely be conceived.” Under the EPCA’s procedures, the Price Administrator had vast discretion to control the administrative record, to exclude evidence, and to delay judicial review by requiring additional discovery. As noted, OPA made ample use of those devices.

The Emergency Court of Appeals was not a promising venue, either. Staffed with partisans loyal to the Act’s aspirations, the Emergency Court set aside the Administrator’s decisions in only 30 cases (out of 397); and, as Harvey Mansfield noted, “most of the adverse decisions dealt with peripheral problems. OPA’s construction of the statute and development of the standards under it were approved by the court on all essential points.” Moreover, in most instances judicial review occurred long after OPA’s enforcement campaigns. The Emergency Court did not hear any protests on the merits of RMPR 169 until October 1944, months after the Supreme Court upheld the conviction in *Yakus*. The judge in that case, Calvert Magruder, was well-familiar with the matter: as a judge on the First Circuit Court of Appeals, he had written the appellate opinion in *Yakus v. United States*.

After years of delay before the Emergency Court, independent packers and slaughterers petitioned the Supreme Court for review. But as the drafters of EPCA certainly understood, a certiorari petition was an unfit vehicle to review an administrative record covering the prices and practices of an entire industry. Without notice and comment, without an opportunity to cross-examine witnesses or to present evidence before an impartial tribunal, and with a sprawling self-serving record compiled by OPA’s staff, the meat packers had no chance of showing in any judicial forum, let alone on Supreme Court review, that OPA officials had exceeded its delegated authority. The Supreme Court denied certiorari.

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224 The Emergency Court meat litigation is explained in detail in Hyman & Nathanson, *Battle of Meat Regulations*, supra note 4.
226 *Id.* at 454-459 (1943).
227 MANSFIELD, supra note 34, at 279.
228 Armour & Co. v. Bowles, 137 F.2d 233 (Em. Ct. App. 1943). Judge Calvert Magruder, a Roosevelt appointee, had clerked for Justice Brandeis and later served as General Counsel for the Wage and Hour Division of the Department of Labor during the height of the New Deal. In the Yakus case, Judge Magruder stressed the need for administrative expediency (see infra). On the Emergency Court of Appeals, he granted the Price Administrator’s an effective put-option over judicial review. In a consolidated test case brought by a major grocery store in October 1943, he dismissed a complaint alleging that the Price Administrator had intentionally stonewalled several protests by failing to grant or deny any hearings within the statutory period, by failing to notice the protests for a hearing on the merits, and by failing to provide an opportunity to present further evidence before the Administrator. Judge Magruder held that the Emergency Court’s jurisdiction could only be invoked after the Administrator affirmatively denied a protest. Safeway Stores v. Brown, 132 F.2d 278, 279-280 (Em. Ct. App. 1943).
229 See E. Kahn’s Sons Co. v. Bowles, Brief for Respondent in Opposition, No. 99, at 9 (Jun. 26, 1945) ("The issue here, however phrased by petition, is essentially one of factual determination, subject to judicial review by the Emergency Court of Appeals as to the reasonableness of his determination. Petitioner has fallen far short of showing any justification for further review of administrative findings of face which have been sustained"). *See also* Yakus v. United States, 321 U.S. 414, 458-459 (1943).
Equitable Relief: Lockerty. New Jersey meat dealers filed an *Ex Parte Young* injunction against the acting New Jersey United States Attorney in his personal capacity, seeking to restrain criminal prosecutions under the Act. The meat dealers’ bill of complaint alleged that RMPR 169 was irrational and oppressive class legislation and, further, that threat of substantial fines and prison under the Act, combined with the Act’s defective judicial review procedures, deprived the meat dealers of their right to be tried according to the due process of law. On March 29, 1943, Judge Maris granted the government’s motion to dismiss in a panel opinion. Judge Guy Fake, a Coolidge appointee, dissented. In his view, the Act left “plaintiffs herein stripped of their constitutional rights in the only forum where they may be tried on the indictments pending against them. It deprives them of due process of law guaranteed by the Fifth Amendment and also invades their right to a full and complete trial in the state where the alleged crimes were committed as guaranteed by Article 3, Sec. 2, Clause 3 of the Constitution.”

The Supreme Court affirmed the district court’s dismissal in May of 1943, holding that the court lacked jurisdiction to hear “collateral attacks” against the regulation in an equitable proceeding—even when criminal charges were pending in district court. The opinion was written by Chief Justice Stone over a single weekend, a feat accomplished by preserving the question presented in *Yakus* (i.e., whether section 204 was constitutional as applied in an enforcement action). The justices likewise made short shrift of a case, manifestly contrived between a landlord and his tenant, in which an Indiana district judge had struck down the entire EPCA as a violation of the principles enunciated in *Hot Oil*. The Supreme Court vacated the judgment as lacking

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234 *Lockerty v. Phillips*, Brief for Appellants, No. 934, at 6 (Apr. 30, 1943) (specifically alleging that “the Administrator’s assistants have publically declared that it was the intention of the Administrator to drive appellants and those similarly situated out of business”).
238 The Court heard oral argument on May 3, 1943. On May 6, Chief Justice Stone circulated a memorandum to the associate justices stating that he wanted to dispose of the case “promptly” and asking them to respond by noon if this was “agreeable.” All the justices agreed, provided that Stone reserve the question of whether section 204 was constitutional as applied in an enforcement action. Box 68, HARLAN FISKE STONE PAPERS, MANUSCRIPT DIVISION, LIBRARY OF CONGRESS, WASHINGTON D.C. (copy on file with author). The opinion was released on May 10.
a genuine controversy. Next on the docket (the following Supreme Court Term) would be Yakus.

Criminal Defenses: Yakus. In Boston, an Assistant United States Attorney pressed criminal charges against Albert Yakus, Benjamin Rottenberg, and their respective companies and agents, charging them with committing several violations of RMPR 169. On February 24, 1943 a grand jury returned a true bill. The meat dealers moved to quash the indictment on several grounds: The price ceiling established by OPA was an “arbitrary and capricious” invasion of property rights; RMPR 169 was unreasonable class legislation; OPA had failed to follow proper procedures; and the EPCA violated the separation of powers and due process. The motions were heard by District Judge Charles E. Wyzanski, Jr., a consummate New Dealer. Unsurprisingly, Judge Wyzanski denied the motion. He set forth his reasons in a memorandum opinion filed on March 2, 1943. After overruling all objections to the statute, Judge Wyzanski considered the dealers’ objections to RMPR 169. Wyzanski started by noting that a motion to quash an indictment is the equivalent of a civil “demurrer,” testing the validity of the regulation “as it appears upon its face.” “Viewed in this limited aspect,” Wyzanski held, the regulation was “plainly” valid. The United States had urged Judge Wyzanski to hold that section 204(d) of EPCA prohibited district courts from reviewing the validity of the regulation in an enforcement action. Agreeing with this position, the judge articulated a distinction, “familiar in the area of administrative law,” between a regulation “invalid on its face” and one “invalid because of circumstances of its adoption and application.” Because the regulation was not facially “invalid,” Wyzanski continued, he only had to consider whether Congress could constitutionally preclude the introduction of “extrinsic” evidence to support an “as applied” challenge to a general regulation. As Judge Wyzanski noted, the EPCA’s procedures allowed the meat dealers to present extrinsic evidence before the Emergency Court of Appeals. Viewed in this light, Judge Wyzanski argued, the administrative procedure was “not so novel.”

239 The facts are taken from the “Transcript of Record” filed in the Supreme Court, unless otherwise noted.
240 Judge Wyzanski was a graduate of Harvard Law School and a former protégé of Felix Frankfurter. As solicitor for the Department of Labor under Frances Perkins, Wyzanski helped to draft the National Industrial Recovery Act. PETER H. IRONS, THE NEW DEAL LAWYERS 23-24 (1982). Later, Wyzanski served in the Solicitor General’s Office under Attorney General (by then Justice) Stanley Reed, where he earned a reputation as an able lawyer defending New Deal legislation, most notably the Wagner Act. IRONS, at 272-289
243 Id. at 916.
244 Id.
245 Id.
246 Id. at 917. Judge Wyzanski’s citation to the provisions of the Hepburn Act was inapposite. Although the Hepburn Act made ICC orders automatically enforceable within 30 days, precluding later challengers, the railroads could immediately appeal the order to a court of law, which would decide all questions of jurisdictional fact de novo. See ICC v. Illinois Cent. R.R. Co., 222 U.S. 452, 470 (1910); ICC v. Union
The meat lawyers went to trial knowing the proceeding would be a farce, but they had to make offers of proof and file the appropriate exceptions to preserve their right to appeal Judge Wyzanski’s order. During the trial of Albert Yakus, in March of 1943, the lawyers for Mr. Yakus offered in evidence the testimony of Sidney Rabinowitz. According to the expert report, Rabinowitz would show that RMPR 169 required Albert Yakus and similarly situated meat dealers to sell meat below the cost of production, in violation of the McKellar amendment and the “fair return” doctrine. The meat dealers also sought to introduce Administrator Prentiss Brown’s testimony before Congress, in which he “admitted” that the meat and veal regulations were not “fair and equitable.” Judge Healey, presiding over the trial, excluded all extrinsic evidence under Wyzanski’s previous order. Albert Yakus was fined 1,000 dollars and sentenced to six months in prison. The meat lawyers filed an exception, and the convictions were stayed pending appeal.

The New England meat lawyers filed their notice of appeal for Mr. Yakus on May 4, 1943, six days before the Supreme Court decided Lockerty. Judges Calvert Magruder, John Mahoney, and Peter Woodbury, all Roosevelt appointees, heard the appeal in the First Circuit. In an August 23rd, 1943 opinion written by Judge Magruder, The court rejected the meat dealers’ request for a narrowing construction of 204(d), which would have allowed Albert Yakus to raise (and prove) an as applied defense of invalidity in a criminal enforcement suit. Magruder took a “plain meaning” view of section 204(d), holding that the validity of the regulation under the Act was simply “immaterial” to Albert Yakus’s criminal liability. Analogizing OPA to a military operation, Judge Magruder extolled OPA’s efforts at the “home front” and stressed the need for administrative “expediency.” While “venture[ing] no opinion” on the pending administrative protests, Magruder held that the EPCA’s judicial review provisions were “constitutionally adequate” and that the delegation challenge “was not well taken.”

D. Yakus in the The Supreme Court

The meat dealers filed a petition for a writ of certiorari on September 23, 1943. Despite the lack of a circuit conflict, certiorari review was likely. The Supreme Court had already expressly reserved the question presented by Yakus in Lockerty, and many lower cases (75 to 100 cases, on the petitioner’s estimation) were pending in the lower courts. 

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247 Brighton Packing Co. Held Guilty of Violating OPA Beef Ceilings, BOSTON GLOBE, April 8, 1943, at 6; Another Meat Dealer is Held in U.S. Court, THE CHRISTIAN SCI. MONITOR, March 5, 1943.
250 Rottenberg, 137 F.2d. at 855.
251 Id. at 858.
252 Id. at 856.
253 Id. at 857.
254 Id. at 858.
Confident in his test case—and with the regulatory protests still pending before OPA—Solicitor General Fahy did not oppose the grant. On November 8, 1943, the Supreme Court granted the petition and set the case for argument.

**The Briefs.** The briefs for the meat dealers read as a frontal assault on the Act. The meat dealers claimed that the statute unlawfully delegated legislative power to the Administrator; violated their liberty and property without due process; violated the separation of powers; and violated their sixth amendment right to a trial by jury. Their legal strategy seems to have been to raise all possible due process-ish issues and hope that at least one would stick with the Supreme Court. Alternatively, they sought to convince the Court that the Act was not only unconstitutional but very unconstitutional, and should therefore to be struck down in its entirety.

Consistent with *Hot Oil* and *Schechter*, the meat dealers argued that the Act did not require the Administrator to make regulations on the basis of reviewable factual findings and that the procedural requirements were meaningless. Moreover, as in *Hot Oil* and *Schechter*, the Act gave broad regulatory latitude to the Administrator while granting his regulations the immediate force of law, without adequate judicial review. The meat dealers also pointed out that the Price Administrator’s “statement of considerations” involved no actual findings of fact; the considerations were mere statements of economic opinion parroting the language of the statute. The Act, in other words, provided no procedural “means of guaranteeing that cases shall be decided according to evidence and the law, rather than arbitrarily or from extralegal considerations.”

Invoking *Marbury*, the meat dealers further argued that under settled principles, “the court has not only the power but the constitutional duty to say what the law is.” The petitioners presented the Supreme Court with two options, both destined to fail. First, they argued that the district court could at least consider whether the price regulation was “really” promulgated “under” of Section 2 of the Act. If the rule did not meet the requirements of the Act, they argued, the regulation was not promulgated “under” Section 2, and the rule lacked binding effect in a criminal trial. Second, the meat lawyers argued—in the teeth of the statute—that Congress had not meant to deprive district courts of the power to review OPA’s regulations in criminal trials. However, the petitioners’ brief continued, if the court concluded that Congress had intended this...
result, Congress had violated Article III. Congress could not simultaneously draw the courts into the Act’s enforcement scheme, while depriving them of the judicial power “to say what the law is” in particular cases.265

Solicitor General Fahy and Paul Freund, briefing for the United States, argued that the EPCA was entirely unexceptional under the current emergency. Fahy took the position that section 204(d) categorically prohibited the courts from considering “any defense addressed to the validity of the regulation.”266 His merits brief began with a long discussion of the serious dangers of a “spiral” of runaway inflation, followed by a discussion of the policy merits of price controls, and the risk of regulatory paralysis under “regular” judicial review procedures. The EPCA’s administrative features, Fahy argued, served the need for continuous regulation; for simplified enforcement and expert review; and for administrative flexibility.267 Fahy then argued that Albert Yakus had opportunistically “chosen” to forego the EPCA’s “orderly” procedure, inviting criminal prosecutions to undermine the Act’s important policy goals.268 If everyone shared Albert Yakus’s cavaliers disregard for the administrative procedure, Fahy continued, “the price control program would collapse.”269

Having established this policy argument, Fahy proceeded to argue that section 204(d) was constitutional. But instead of actually defending the act on the merits, Fahy (echoing Professor Nathanson) argued that EPCA’s administrative process merely codified the usual rule of exhaustion of remedies.270 The present challenge was simply a “collateral attack.” 271

Next, Fahy argued that the Act’s provision denying the courts the power to stay enforcement proceedings or otherwise issue interlocutory injunctive orders was constitutional.272 Fahy began by questioning Yakus’s standing to attack the stay provisions; he also argued that any limitations on the court’s equity power were “unexceptional,” citing examples.273 Moreover, Fahy argued (following Freund), Ex Parte Young and other cases involving public utilities and regulated industries “were not on point:” Unlike the railroads in Ex Parte Young, the meat dealers in this case had an opportunity to challenge the regulation in a non-criminal forum; and unlike public utilities, they were not subject to a continuous confiscation of property.274

Fahy’s brief devoted few pages to the delegation issue, as if to confirm that the meat dealers challenge was a frivolous collateral attack on a perfectly sensible scheme. In

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265 Brief for the Petitioners, No. 375, at 60-64.
267 Brief for the United States, No. 374-375, at 24-35.
268 Brief for the United States, No. 374-375, at 10-11. We doubt Albert Yakus welcomed OPA’s indictment.
269 Brief for the United States, No. 374-375, at 34.
270 Brief for the United States, No. 374-375, at 36.
271 Brief for the United States, No. 374-375, at 40.
272 Brief for the United States, No. 374-375, at 44.
274 Brief for the United States, No. 374-375, at 10-11.
Fahy's view, the regulatory standards set in the Act were adequate. Moreover, OPA’s unpublished report on the general economic conditions of the meat industry satisfied any requirement of findings of fact necessary under the constitution to uphold deprivations of property and liberty—even if, in retrospect, the report’s findings were grossly mistaken.275

The Court Decides. After briefing had concluded, Supreme Court decisions in pending cases rendered the petitioners’ already-difficult yet more unpromising. A week before oral argument in Yakus, the Supreme Court released two opinions that undermined the meat dealers’ arguments.

In Falbo v. United States,276 the Court upheld the conviction of a Jehovah’s Witness for resisting an order to report for duty under the Selective Training and Service Act of 1940.277 Like other Witnesses, Falbo resisted the order in district court on the basis that the local board had erroneously and arbitrarily classified him as a conscientious objector, instead of a religious minister.278 The Supreme Court held that Congress had foreclosed Falbo’s defense (leaving open the question of habeas corpus review). Alongside Hirabayashi v. United States,279 Falbo provided the only precedent in support of the Government’s position that Congress could foreclose a defense of invalidity in a suit to enforce an administrative order.280

On the same day, the Supreme Court also released its decision in FPC v. Hope Natural Gas Co.,281 overruling the Ben Avon doctrine for all practical purposes.282 As the Supreme Court would confirm during the same term,283 administrative agencies were now free to formulate general rules of law through the administrative process. With the fair value doctrine in tatters, and with at least one precedent to sustain a prohibition on judicial review of administrative deprivations, the stage was set for Yakus v. United States.

275 Brief for the United States, No. 374-375, at 63-71.
276 320 U.S. 549 (1944).
277 Id. at 544. Justice Rutledge issued a narrow concurrence, reasoning that Falbo had not properly preserved his right to protest the classification. Falbo v. United States, 320 U.S. 549, 555 (1944)(Rutledge J., concurring).
278 That the Board was biased against Jehovah’s Witnesses is clear. As Justice Murphy pointed out, one of the local board members classifying Falbo announce during the hearings that he had “no damned use for Jehovah’s Witnesses.” Falbo v. United States, 320 U.S. 549, 557 (1944)(Murphy J., dissenting).
280 In a sense, the holding in Falbo was no surprise. A Supreme Court that was willing to allow federal and state governments to visit criminal punishment on Jehovah’s witnesses for failing to pledge allegiance to the flag was unlikely to preserve their procedural rights in the draft process. See Jeffrey S. Sutton, Hallows Lecture: Barnette, Frankfurter, and Judicial Review, 96 MARQ. L. REV. 133 (2012) (discussing discrimination against Jehovah’s Witnesses during the war).
283 322 U.S. 111 (1944).
We have been unable to locate a transcript or account of the oral argument.\footnote{284} By all appearances, it cannot have gone well for the petitioners. On March 27, 1944, the Supreme Court sustained the validity of Albert Yakus's conviction by a vote of 6 to 3. Chief Justice Stone wrote for the Court. Justices Roberts, Murphy, and Rutledge dissented.

The Majority Opinion. The majority opinion, artfully crafted by Chief Justice Stone, strove to make the EPCA’s review procedures seem entirely unexceptional. It subtly transformed a defense in a criminal enforcement case into a facial challenge to a hypothetically “adequate” administrative process. Brushing aside the petitioners’ (and the dissenters’) explanations that the actual process was little more than a charade, the majority opinion assumed a posture of extreme deference. “We cannot assume” and “we cannot say,” the Court shrugged throughout, that the Administrator would have declined to afford relief—if only the petitioners had filed a protest.

In addition to this willful blindness, two features of the majority opinion are striking. One of them is the Court’s treatment of the wartime nature of the EPCA. Chief Justice Stone’s opinion refers to the exigencies of war several times—in each instance, as a warrant for the statute and not once as a limiting consideration.\footnote{285} Any statute enacted during wartime, and any judicial decision rendered under those circumstances, presents a danger that a one-off response to a dire emergency might become the new normal, and Yakus presented that problem in sharp relief. Far from a hysterical wartime response, the EPCA embodied long-held New Deal precepts and ambitions that were surely familiar to a justice who had served over the preceding decade. The government’s merits brief did little to dispel the impression that war was simply a particularly suitable occasion to exercise government’s broad powers. Its brief did advert to the urgency of the occasion. But then, it is difficult to imagine a situation in which government might not see a need for continuous regulation, simplified enforcement and expert review, and administrative flexibility—the rationales on which the government relied in defense of the EPCA.\footnote{286} Justice Roberts’ dissent articulated the fear that the Court’s reasoning in support of the EPCA might come to stand as law for all times.\footnote{287} Not one word in the majority’s opinion disavows that proposition.

The second striking feature of the majority opinion is what one might call its disaggregation principle. Where the dissents—\footnote{288}—insisted on viewing the EPCA, its procedures, and the constitutional structure in context and as a whole, Chief Justice Stone neatly divided the opinion into four isolated questions for decision: (1) delegation; (2) the interpretation of 204(d); (3) due process; (4) the sixth
amendment and the judicial power of the United States. Stone began by noting that the Act appropriately channeled the Administrator’s discretion toward the goal of avoiding inflation and its “destabilizing” consequences. The means of “maximum price fixing” were a proper constraint. Moreover, relying on Hirabayashi and other recent cases, the majority found the Act’s standards “sufficiently definite and precise” to satisfy the non-delegation doctrine. The opinion distinguished Schechter on the highly dubious ground that Schechter was a “private delegation” case. The true distinction, noted in Justice Roberts’ dissent, was that the majority had denuded the non-delegation doctrine of its context and reduced it to a toothless “intelligible principle” test.

Chief Justice Stone dealt swiftly with the second question of whether section 204(d) prohibited the courts from questioning the validity of a regulation in an enforcement proceeding. For Stone, the answer was obvious: the text of 204(d) should be interpreted literally, “at least” before an administrative rule had been held invalid under the Act’s procedure. The qualifying phrase allowed that that there might be an affirmative defense for a person convicted under a rule that had been found unlawful by the Emergency Court—assuming, against all experience and probability, that such a rule and ruling might materialize.

Chief Justice Stone then proceeded to consider whether the EPCA violated due process. Stone began by noting that when the EPCA was enacted “it was common knowledge” that “there was a grave danger of wartime inflation and the disorganization of our economy from excessive prices.” Given the “emergency” conditions, it was a “sufficient answer” to the meat dealers’ contentions that nothing on the face of the statute required the courts to uphold “their conviction for violation of a regulation before they could secure a ruling on its validity.” Because the meat dealers had failed to exhaust their administrative remedies, Chief Justice Stone continued, “we cannot

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290 Id. at 423.
291 Id.
292 Id. at 426.
293 Id. at 424. The Schechter paragraph was added in a subsequent draft, to the delight of Justice Frankfurter and in response to Justice Roberts’s argument that the court had overruled Schechter. Box 70, HARLAN FISKE STONE PAPERS, MANUSCRIPT DIVISION, LIBRARY OF CONGRESS, WASHINGTON D.C. (copy on file with author). In our view, Stone’s argument deliberately misreads Schechter. It could not be “seriously contended,” the Schechter Court wrote, that Congress could delegate legislative authority to some trade association. “The question, then, turns upon the authority which § 3 of the Recovery Act vests in the President to approve or prescribe.” A.L.A. Schechter Poultry v. United States, 295 U.S. 495, 537 (1935) (emphasis added).
294 Infra n. and accompanying text
295 The case is correctly cited for this proposition to this day. See Whitman v. American Trucking Ass’ns, 531 U.S. 457, 474 (2001).
296 Id. 430.
297 Id. 431
298 Yakus, 321 U.S. at 432.
assume” that they would have been convicted without due process of law if they had filed a protest.\textsuperscript{299}

The opinion willfully ignored the realities on the ground. The challenge to the regulation was ongoing, and it was absurd to expect the entire industry to join in futile administrative proceedings based on a mere expectation that the administrator would choose to exercise his unilateral discretion to “defer” enforcement proceedings. To avoid facing the facts, Chief Justice Stone transformed a criminal enforcement case into a “facial” challenge to a regulatory scheme. According to Chief Justice Stone, because the meat dealers had not exhausted their administrative remedies, it followed that “only if we could say in advance of resort to the statutory procedure that it is incapable of affording due process to petitioners could we conclude that they have shown any legal excuse for their failure to resort to it or that their constitutional rights have been or will be infringed.”\textsuperscript{300} On its face, the majority continued, the administrative procedure was “not incapable of affording the protection to petitioner’s required by due process”:\textsuperscript{301} it was “conceivable” that the Emergency Court could enter a final judgment before the Government secured a conviction. But this unlikely chain of events bore no resemblance to the situation in \textit{Yakus}. The majority’s proposition is that due process is satisfied by any administrative procedure that \textit{might} provide relief—even if the use of that procedure is concededly left to the administrator’s well-nigh unreviewable discretion.

Proceeding from that premise, the majority hacked through EPCA’s due-process problems one by one, showing how, on their face and interpreted with reference to the present “emergency,” they did not violate “traditional” due process.\textsuperscript{302}

Chief Justice Stone distinguished \textit{Ex Parte Young} by (again) ignoring the facts on the ground and declaring that the meat dealers were “not confronted with the choice of abandoning their business or subjecting themselves to the penalties of the Act before they have sought and secured a determination of the Regulation’s validity.”\textsuperscript{303} This crabbed reading of \textit{Ex Parte Young} was not a fair interpretation of that case, nor a fair account of the situation: on any account, the meat dealers had no adequate legal remedy.

\textsuperscript{299} \textit{Id.} at 434.
\textsuperscript{300} \textit{Id.} at 435.
\textsuperscript{301} \textit{Id.} at 435. Several due process challenges were later brought “as applied” in the Emergency Court of Appeals claiming a right to a hearing. In all cases, “some means was contrived to avoid passing upon the crucial issue.” \textit{Davis, supra} note 13, at § 148. The Emergency Court held that it would only find a violation of due process “where it plainly appears there has been an abuse of discretion.” \textit{Mortgage Underwriting & Realty Co. v. Bowles}, 150 F.2d 411, 414 (Em. Ct. App. 1945).
\textsuperscript{302} \textit{Id.} at 445-443. Like Judge Wyzanski, Chief Justice Stone relied on cases arising chiefly under the Hepburn Act and the Packers and Stockyards Act, to argue that Congress could constitutionally allow agencies to enforce penalties while precluding judicial review and confining review to a special review. The analogy he argued, was “complete and obvious.” \textit{Id.} at 446. Chief Justice Stone greatly exaggerated the actual support for his claim. Most of the statutes cited imposed penalties only \textit{after} a special proceeding, conducted through a formal hearing process. Many of those cases even included dictum indicating that a statute like the one in \textit{Yakus} was patently unconstitutional. [cites, quotes] In any event, none of those cases remotely resembled the situation in \textit{Yakus}. See \textit{Yakus v. United States}, 321 U.S. 414, 473-474 (1944)(Rutledge, J., dissenting).
\textsuperscript{303} \textit{Id.} at 438.
Nevermind: “we cannot assume that [the Price Administrator]” would decline to “suspend or ameliorate the operation of a regulation during the pendency of proceedings to determine its validity.” This move was truly breathtaking. The majority refused to give Albert Yakus due process on the assumption that the Price Administrator could exercise a discretionary dispensing power that he had plainly declined to exercise in the case under review.

The Dissents. Two separate dissents in Yakus reflect differing responses to the majority’s make-way-for-the-administrative-state opinion. Justice Owen Roberts, the lone hold-over from a Republican administration, mounted a last stand in defense of the old order. The purported “standards” to guide the Price Administrator’s discretion, Justice Roberts argued, were broad enough to allow the Administrator to adopt “any conceivable policy.” By upholding the Administrator’s roving commission to stabilize profits, Roberts wrote, the majority had overruled Schechter. Moreover, the delegation, when combined with the Act’s judicial review provisions, violated due process:

“When these cumulative burdens placed upon the protestant who seeks review are fairly appraised it becomes apparent that he must carry an insupportable load, and that, in truth, the court review is a solemn farce in which the Emergency Court of Appeals, and this court, on certiorari, must go through a series of motions which look like judicial review but in fact are nothing but a catalogue of reasons why, under the scheme of the Act, the courts are unable to say that the Administrator has exceeded the discretion vested in him.”

In his closing paragraphs, Justice Roberts accused the majority of relying on the pretext of war to surrender the constitution to an autocrat. The majority did not dignify his accusations with a response.

Justice Rutledge’s dissent, joined by Justice Murphy, was narrower. It embodies a deep ambivalence, and a genuine difficulty, that has characterized American administrative law throughout. In a crucial passage, Justice Rutledge stated that

“Once it is held that Congress can require the courts criminally to enforce unconstitutional laws or statutes, including regulations, or to do so without regard for their validity, the way will have been found to circumvent the supreme law and, what is more, to make the courts parties to doing so. This Congress cannot do... whenever the judicial power is called into play, it is

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304 Id. at 438 (emphasis added).
305 Cf. Chenery v. SEC, 332 U.S. 194, 214 (1947)(Jackson, J., dissenting)(“I give up. Now I realize fully what Mark Twain meant when he said, ‘The more you explain it, the more I don't understand it.’”).
307 Id. at 452.
308 Id. at 458.
309 Id. at 459-460.
responsible directly to the fundamental law and no other authority can intervene to force or authorize the judicial body to disregard it. The problem therefore is not solely one of individual right or due process of law. It is equally one of the separation and independence of the powers of government and of the constitutional integrity of the judicial process, more especially in criminal trials.\(^{310}\)

Half *Marbury* and *Ex Parte Young*, half *Hayburn's Case* and *Crowell*, this splendid paragraph aims to hold the constitutional pieces together. And yet: Justice Rutledge acknowledged that judges could be replaced with an administrative process, even in criminal cases.\(^{311}\) But, Justice Rutledge insisted, the courts should consent to enforce such regulations in a criminal enforcement context only when

> “the special proceeding is clearly adequate, affording the usual rights to present evidence, cross-examine, and make argument, characteristic of judicial proceedings, so that, if followed, the party would have a substantial equivalent to defense in a criminal trial. And the opportunity should be long enough so that the failure to take it reasonably could be taken to mean that the party intends, by not taking it, to waive the question actually and not by forced surrender. So safeguarded, the foreclosure of such questions in this way would not work a substantial deprivation of defense.”\(^{312}\)

Justice Rutledge’s dissent in *Yakus* persuaded Congress to amend the EPCA’s administrative procedures.\(^{313}\) The Stabilization Extension Act of 1944, enacted on June 30, 1944, extended price controls for a year.\(^{314}\) But the new law included several procedural safeguards. It allowed defendants to stay enforcement proceedings until the regulation was finally adjudicated by the Emergency Court; provided that the final invalidity of a regulation would be an absolute defense in all criminal actions, even for violations committed before the regulation was set aside; eliminated the 60 day time limit to file a protest before the Administrator; and expressly provided for an action in the nature of mandamus against the Administrator for undue delay.\(^{315}\) Congress also required OPA to conduct formal adjudications before promulgating a regulation, “a


\(^{311}\) *Bowles v. Willingham*, was a companion case decided on the same day as *Yakus*. For the majority, it was evident that a “nation which can demand the lives of its men and women in the waging of war is under no constitutional necessity of assuring landlords a ‘fair return’ on their property.” *Bowles v. Willingham*, 321 U.S. 503, 519 (1944). Justice Rutledge concurred on the basis that *Willingham* involved “civil” deprivations of “property,” which, in his view, were subject to less due process protections than criminal deprivations of liberty. *Bowles v. Willingham*, 321 U.S. 503, 525 (1944)(Rutledge, J., concurring).

\(^{312}\) *Id.* at 489 & n.41. Rutledge added the note on March 24, 1944, as an afterthought, three days before the opinion was released to the public. BOX 70, HARLAN FISKE STONE PAPERS, MANUSCRIPT DIVISION, LIBRARY OF CONGRESS, WASHINGTON D.C. (copy on filed with author).

\(^{313}\) MANSFIELD, *supra* note 33, at 277-278.


\(^{315}\) MANSFIELD, *supra* note 33, at 277-278. In previous dictum, the Emergency Court had stated that a mandamus action would be available for undue delay. *See* Safeway Stores v. Brown, 138 F.2d 278, 280 (Em. Ct. App. 1943).
provision which anticipated in effect one of the features of the Administrative Procedure Act of 1946.”\textsuperscript{316}

E. And in the End

By the time the Emergency Court of Appeals eventually entertained a challenge to RMPR 169, the Supreme Court had already decided \textit{Yakus}.\textsuperscript{317} Soon afterwards, the regulations came to an abrupt end.

On the same day that Judge Magruder had ruled against Albert Yakus in the First Circuit, the Price Administrator consolidated several protests, requiring more evidence of a price squeeze.\textsuperscript{318} One non-processing slaughterer—like Mr. Yakus, a defendant in a criminal proceeding—was actually heard by the Emergency Court, on the question of whether the court should issue a writ of mandamus compelling the Price Administrator to act on the pending protest.\textsuperscript{319} The hearing was immediately followed by a government subsidy: non-processing slaughterers—by sheer numbers, the largest industry group—would receive subsidies from the Office of Economic Stabilization. (This group did not include independent meat packers like Albert Yakus).\textsuperscript{320} With the subsidy in place, OPA denied all the consolidated protests, and the litigation started anew.\textsuperscript{321} Parties wishing to challenge the regulation had to file motions to reconsider before the Price Administrator within 30 days, and they had to introduce new evidence taking into account the effects of the subsidy program.\textsuperscript{322}

Armour & Company filed a complaint in the Emergency Court in November of 1943, but the Emergency Court—buying time for the Supreme Court to hear and decide \textit{Yakus}—remanded the case for “further presentation” of the evidence before the Price Administrator.\textsuperscript{323} On June 21, 1944, almost three months after \textit{Yakus}, the Price Administrator finally denied Armour’s protest.\textsuperscript{324} Armour filed a complaint before the Emergency Court of Appeals, which heard the case on the merits on October 4, 1944.

\textit{Armour} arose, yet again, over OPA’s cherished “industry earnings standard.” The Price Administrator had earlier established a practice of considering out-of-pocket

\textsuperscript{316} MANSFIELD, \textit{supra} note 33, at 278. The formal adjudication procedure did not apply retroactively; it was applicable only at the request of any aggrieved party filing a protest after September 1, 1944. \textit{Id.} For this reason, the meat dealers did not get the benefit of the new rulemaking procedure.

\textsuperscript{317} Armour & Co. v. Bowles, 148 F.2d 529, 530 (Em. Ct. App. 1945). The formal rulemaking provisions did not apply retroactively to pending litigation.

\textsuperscript{318} Armour & Co., 148 F.2d at 530. The Price Administrator’s proposal to place a price ceiling on live cattle prices landed OPA’s staff before the House Committee on Agriculture for some unpleasant hearings. See \textit{Hearings on the Proposed Ceiling on Live Cattle before the H. Comm. on Agriculture}, 78th Cong. (1943); Hyman & Nathanson, \textit{Battle of Meat Regulations, supra} note 4, at 608-609.

\textsuperscript{319} Hyman & Nathanson, \textit{Battle of Meat Regulations, supra} note 4, at 609.


\textsuperscript{321} Armour & Co. v. Bowles, 148 F.2d 529, 530 (Em. Ct. App. 1945).

\textsuperscript{322} Armour & Co., 148 F.2d at 530.

\textsuperscript{323} \textit{Id.}

\textsuperscript{324} \textit{Id.}
losses on particular products to mitigate the effect of general price regulations. In the orders at issue in Armour, the Price Administrator refused to consider industry production costs, arguing that the industry’s accounting method was flawed because the packers could offset losses on dressed beef with gains from the sale of meat by-products. The Administrator rejected the industry’s “cost” evidence without proposing any alternative method of accounting for production costs. On March 29, 1945, Judge Magruder issued an opinion generally upholding RMPR 169, holding that the rule was “not without rational support” in the record. Displaying what OPA’s lawyers described as “rare impartiality” toward the packers, Judge Magruder expressed concern that under the industry earnings standard “there would be no legal limitation to the extent to which the Administrator could depress prices of a given commodity so long as industry as a whole maintained its base period earnings.” He proposed to cure the delegation problem by judicial fiat: he propounded, *sua sponte*, a “secondary product standard,” which allowed the Price Administrator discretion to consider profits on the sale of by-products. Judge Magruder then reviewed the evidence under the new standard—and held that Armour had not proven its case. The Supreme Court denied Armour’s petition for certiorari.

In a related opinion, Judge Magruder found that the price ceilings did not afford an equitable margin to non-processing slaughterers (notwithstanding the subsidies), a holding that he would later vacate. Without much further explanation, Magruder sustained the regulation as applied to the independent meat packers as a class. When the Supreme Court denied the meat dealers petition for certiorari on October 8, 1945, the independent meat dealers as a class lost their last chance to prove the invalidity of RMPR 169.

By then, all was over but the shouting. The war was over, and a prolonged meat shortage led the Price Administrator to propose abandoning the meat regulations. In June of 1945, Congress responded to the industry’s plight with the Barkley-Bates Amendment to the Stabilization Act, requiring the Price Administrator to assure a fair profit on the processing of each separate species of livestock. This, of course, meant

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326 *Id.* at 614-615. The evidence showed that integrated meat processors were experiencing “flourishing financial conditions” due to the sale of meat by-products. *Id.* at 602.
330 *Id.*
331 *Id.* 541
332 *Id.*
333 *Id.*
335 *Heinz v. Bowles, 149 F.2d 277, 281 (Em. Ct. App. 1945).*
336 *Heinz, 149 F.2d at 280.*
337 *E. Kahn’s Sons Co. v. Bowles, 326 U.S. 719 (1945).*
338 *See Danz v. Reconstruction Finance Corp., 192 F.2d 1012, 1012-1013 (1952)(Magruder, J)(discussing the amendment).*
the wholesale abandonment of the “critical” industry earnings standard “which had been so long fought for” by OPA.339

In November of 1945 wartime rationing came to an end,340 and the sense of shared sacrifice that sustained OPA dissolved before the “more focused opposition” of the meat industry.341 During the summer of 1946, the meat packers “went for the kill:”

“[T]he packers withheld their meat from the market in an attempt to panic the public into submission. After a week of renewed controls in August, slaughtering decreased 25 percent from the week before. Secretary Anderson urged meat to market and insisted that ‘price adjustments are now behind us,’ but his empty rhetoric was too little, too late. By the middle of September, slaughtering dropped 80 percent from the figure for the same period in 1945. The Bureau of Labor Statistics soon had to cease making such comparisons because they could not find enough beef, pork, and veal in the stores to measure. As one commentator put it, price controls had indeed become ‘political pot-roast.’ While their cattle grew fatter and fatter, the packers would wait it out. All they had to do was win the public to their side.”342

Just before the 1946 November elections, President Truman ordered the deregulation of meat prices as the “only solution” to the shortages.343 New Deal Democrats paid a steep political price for the meat shortages: during the “beefsteak elections” of 1946, the Republicans took control of the House of Representatives.344

On November 10, 1947, more than two years after the end of the war, and one year after the end of price controls, Judge Magruder held that RMPR 169 had been invalid as applied to a non-processing slaughterer during the month of October, 1943. “At some time before October 6, 1943” he found, “the Price Administrator knew that corrective action was a pressing necessity.”345

For Albert Yakus, the farce was tragedy.

III. Concluding Thoughts: Yakus and the Administrative State

We would like the story of Yakus to speak for itself; but a few concluding thoughts may nonetheless be in order.

On (Not) Forgetting Yakus: From Supremacy of Law to Legal Process. Yakus v. United States, we suggested at the outset, is a foundational Administrative Law case. Supreme Court citations or scholarly commentary over the decades would hardly seem

339 Hyman & Nathanson, Battle of Meat Regulations, supra note 4, at 625 & n.107.
340 Hyman & Nathanson, Battle of Meat Regulations, supra note 4, at 625.
343 Hyman & Nathanson, Battle of Meat Regulations, supra note 4, at 627.
345 Hyman & Nathanson, Battle of Meat Regulations, supra note 4, at 624.
to warrant that description. *Yakus* occasionally finds its way into string citations to the effect that congressional delegations require no more than an “intelligible principle.” At other times, *Yakus* is cited for the (supposedly unexceptional) proposition that Congress may preclude judicial review of administrative orders in enforcement proceedings so long as some avenue remains available to challenge the regulation in another forum. What is conspicuously missing in the case law and the scholarship of the past half-century is any serious engagement with the due process and separation-of-powers questions that loomed so large in the litigation.

Just about the only substantive discussion of *Yakus* in a Supreme Court case appears in *Adamo Wrecking Co. v. United States*. The Clean Air Act requires pre-enforcement challenges to certain emission standards within sixty days and (with a narrow exception) bars all judicial review thereafter. The defendant in *Adamo Wrecking* argued that the regulation under which he had been prosecuted was not in fact an “emission standard.” Chief Justice Rehnquist’s majority opinion deemed that challenge permissible (and, in the end, meritorious). The statute at issue in *Yakus*, the Chief Justice wrote, broadly foreclosed any challenges outside the Emergency Court. The Clean Air Act, in contrast, permitted a challenge—and *de novo* review—on the question of whether or not the underlying regulation was in fact an emission standard but not on any other question. Four dissenters took issue with the majority’s artful statutory reconstruction. Neither the dissenting justices nor the majority intimated that an across-the-board preclusion of review might pose constitutional problems—a due process problem, and a *Marbury* problem. Only Justice Powell’s brief concurrence adverted to the due process issue—and proposed to distinguish *Yakus* as a wartime case.

Attempts to escape the troubling implications of *Yakus* are almost as old as the case itself. Foremost, Professor Henry Hart Jr. sought to dismiss *Yakus* as a wartime exhaustion case. The departures from due process, he wrote in his famous *Dialectic*, were sanctioned “only because an alternative procedure had been provided which, in the exigencies of the national situation, the Court found to be adequate.” And perhaps, *Yakus* can in fact be cabined, with an adequate margin of safety, in a wartime/exhaustion/pre-APA corner. The Administrative Procedure Act, on conventional accounts, was a “fierce compromise” that brought “opposing forces to

349 *Yakus* is entirely consistent with *Adamo Wrecking*, as the Supreme Court limited its holding to the introduction of “extrinsic evidence” in a criminal proceeding. See *Yakus v. United*, 321 U.S. 414, 446-447 (1944) (“We have no occasion to decide whether one charged with criminal violation of a duly promulgated price regulation may defend on the ground that the regulation is unconstitutional on its face.”).
352 *See, e.g., United States v. Mendoza-Lopez*, 481 U.S. 828, 838 n.15 (1987) (Yakus “was motivated by the exigencies of wartime, dealt with the propriety of regulations rather than the legitimacy of an adjudicative procedures, and, most significantly, turned on the fact that adequate judicial review of the validity of the regulation was available in another forum.”).
rest.”\footnote{George Shepard, \textit{Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics}. 90 NW. U. L. REV. 1557 (1996).} Its “grudging acceptance of federal power”\footnote{Shepard, supra note 353, 1641-49.} was conditioned, as Justice Rutledge insisted in \textit{Yakus}, on an “adequate” regime of “procedural regularity.”\footnote{Cuellar, supra note 22, at 1430-1432.} To this end, the APA prescribed elaborate formal procedures, a separation of administrative functions, and professional hearing examiners. Moreover, and perhaps in response to \textit{Yakus}, section 10(b) of the APA provided that agency action “shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.”\footnote{5 U.S.C. § 703. Despite the obvious connection between this provision and Justice Rutledge’s dissent in \textit{Yakus}, the Attorney General’s APA manual argued that there was nothing to “indicate that the Congress intended to repeal by implication such special statutory arrangements for compliance pending orderly judicial review, or to preclude itself from making similar arrangements in the future.” \textsc{ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT} 100 (1947).} This reassuring story, however, strikes us as questionable. As we have shown, EPCA’s architects did not think of the statute as a wartime expedient; rather, war provided an occasion to legislate and then implement a grand New Deal experiment. And while certain passages in Chief Justice Stone’s opinion may lend some plausibility to a limiting “wartime exhaustion” reading, nothing in the opinion so limits the holdings. Nor did \textit{Yakus} “turn on the fact” that adequate judicial review was available in another forum. The exhaustion rationale advanced by Chief Justice Stone was simply an excuse to place the administrative scheme beyond the reach of due process precepts. If the Government prevailed in \textit{Yakus}, it was only because the Supreme Court accepted the Solicitor General’s wildly implausible representations and transformed a criminal case into a “facial” challenge with an accompanying, impossible-to-meet burden of proof. In that light, \textit{Yakus} is best read as a triumph of the New Deal over hoary “supremacy of law” notions. Leading scholars of the Administrative Law profession, writing contemporaneously with Professor Hart, read \textit{Yakus} in this light and viewed it as foundational for precisely this reason.\footnote{\textit{See supra}, notes 13 & 15, and accompanying text.} The tenets of \textit{Yakus}, moreover, survived the war and the APA.\footnote{\textit{See SEC v. Chenery}, 332 U.S. 194, 217 (1947) (Jackson, J., dissenting); \textit{Aircraft & Diesel Equipment Corp. v. Hirsch}, 331 U.S. 752, 774 (1947).}

\textit{Administrative Process}. The OPA experience, \textit{Yakus} included, was formative for the “Legal Process” school that took hold after the war. As William Eskridge and Phillip Frickey explain:

“[Henry] Hart's experience in OPA exposed him to the integrated legal system in action. The agency devised general economic plans at the same time it confronted myriad particular problems of application all over the country. The OPA experience filled Hart with a new enthusiasm for teaching legislation. In contrast to its pre-war predecessor, Hart's post-war legislation class was more optimistic about the possibilities of
developing law as a policy science to facilitate the smooth operation of society; offered a more sophisticated theory of institutional competence; and, more explicitly normativist, insisted that law be developed through a process of reasoned application of basic principle.”

For a post-war generation steeped in “Legal Process,” law was a “policy science” and a means of allocating authority between different “systems” according to their perceived comparative advantages. In its operation, all law, including constitutional law, was a system of “institutional settlement” and a process to generate acceptable answers—acceptable, that is, in a post-New Deal order. A core precept of this “institutional settlement” was that only administrative agencies were sufficiently dynamic enough to deal with modern problems. Accordingly, statutes should be construed as purposive, living acts that could be dynamically administered to confront changing problems. It followed, Hart argued, that agencies should be free to change the controlling interpretation of the law. Judges should defer to their “reasoned elaboration” of the “intelligible principles” and “purposes” of legislation.

Legal Process had a tremendous influence; “the most influential public law scholars of the post-World War II generation utilized the vocabulary and built on [its] ideas”. Administrative law scholars called for procedure. Instead of affording broad injunctive relief, courts required industries to exhaust their remedies before expert agencies through doctrines like “primary jurisdiction” and “exhaustion.” Instead of requiring administrators to prove constitutional facts de novo before an independent court, expert agencies had to meet a deferential “arbitrary and capricious” standard. Instead of protecting private rights, judges invited competitors and interest groups into a partnership to uphold “the public interest.” Instead of requiring structural “due process,” judges required discrete hearing rights only when notions of “fairness” clearly outweighed the need for “expedience.” Instead of requiring administrative findings of fact, the notion of “legislative facts” entrenched the belief that some evidence was entirely outside the province of the courts and entirely within the province of

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360 Cf. Jaffe & Nathanson, supra note 15 at 1 (“our purpose, here, is to consider the making and enforcing of law conceived as public policy by means of what is now called the administrative process.”).
361 See HENRY M. HART, JR., NOTES AND OTHER MATERIALS FOR THE STUDY OF LEGISLATION (1950).
362 Eskridge & Frickey, supra note 359, at 2038.
363 Id.
administrators. And, in the spirit of the cooperation, instead of setting aside a rule as unlawful, the courts remanded without vacatur.

Yakus embodied all of those Legal Process notions, before the emergence and without the benefit of a full-blown, worked-out legal theory. However, Yakus also posed the awkward question of what the administrative process can actually do for those whose ordinary private conduct—the buying and selling of goods—are deemed to interfere with “the smooth operation of society” or the Administrator’s “reasoned elaboration” of public policy. Yakus’s “go directly to jail” response plainly troubled Henry Hart. “Exhaustion” was his way of escaping the dilemma. There was a process—if only the defendant had used it.

Perhaps on account of its disturbing implications, Yakus has receded into the mists of pre-APA history. Yet its holding and spirit are embodied in the now dominant “institutional settlement.” Congress supplies an “intelligible principle;” its “reasoned elaboration” is left to the collaborative play of agencies and courts. The apprehension that such schemes contaminate independent courts and turn them into the mere adjuncts of an administrative machinery was a standard theme of the old supremacy of law model. It still resounds in Justice Rutledge’s Yakus dissent, even if the author could no longer quite articulate it: Congress may not simultaneously grant jurisdiction to enforce regulations and divest the courts of the power of judicial review. The majority in Yakus conspicuously failed to respond to this point. In that regard, and in the majority’s deference to a scheme that was obviously intended to preserve a veneer of due process without the substance, the Court’s opinion in Yakus foreshadows the administrative process to come.

One of the most forceful articulations of the new partnership model comes from Judge Harold Leventhal, a former OPA lawyer and a Korean War “price tzar.” In exuberant style, Judge Leventhal famously celebrated the unfolding of a “total administrative process” that

“combines judicial supervision with a salutary principle of judicial restraint, an awareness that agencies and courts together constitute a ‘partnership’ in furtherance of the public interest, and are ‘collaborative instrumentalities of justice.’ The court is in a real sense part of the total

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370 See e.g., North Carolina v. EPA, 531 F.3d 896, 901 (D.C. Cir. 2008) (vacating rule due to “fatal flaws”), modified, 550 F.3d 1176, 1177-78 (D.C. Cir. 2008) (amending judgment to remand rule without vacatur). Ther practice is usually traced to Judge Leventhal. See Kemecott Copper Corp v. EPA, 462 F.2d 846 (D.C. Cir. 1972) (Leventhal, J.). Judge Leventhal was familiar with the Emergency Court’s practice of “remanding” protests to the Price Administrator without vacatur. See infra n. 373 and accompanying text.
371 See supra, note 101 and accompanying text.
administrative process, and not a hostile stranger to the office of first instance.”

Tellingly, another comprehensive scheme of price control regulation would display the “total administrative process” at work. Under the Economic Stabilization Act of 1970, Congress vested President Nixon with the authority to “stabilize prices, rents, wages, and salaries at levels not less than those prevailing on May 25, 1970” and authorized civil penalties and injunctions to enforce Presidential orders. On August 15, 1971, President Nixon announced a nationwide price freeze and created a Cost of Living Council to implement the freeze. The legislative delegation was even more boundless than the delegation upheld in Yakus, providing virtually no intelligible standard or fact-finding requirements. In a challenge brought (fittingly) by the Amalgamated Meat Packers Union, Judge Leventhal upheld the Act on the authority of Yakus.

But he did not stop there. Declining to “accept the contention of the Government that the court must pass on the Constitutionality of the Act without any conception of its content,” Judge Leventhal read the legislation as including the “context” of previous price control schemes, the problem of cost-push inflation, and a “standard of broad fairness and avoidance of gross inequity.” And while Judge Leventhal conceded that the delegation contained no “formal finding” requirements and none of the administrative procedure required in Schechter, the new administrative process required nothing beyond an “on-going…intelligible administrative policy that is corollary to and implementing of the legislature’s ultimate standard and objective.” Perhaps recalling his days as a litigator before the Emergency Court, Judge Leventhal acknowledged that if “the courts are open only nominally, they would enhance rather than inhibit executive absolutism.” This danger, though, would be met by “‘imaginative interpretation,’

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376 Id.
379 Id. at 758.
380 Id.
381 Id. at 759.
382 Amalgamated Meat Cutters & Butcher Workmen of N. Am., AFL-CIO v. Connally, 337 F. Supp. 737, 755 (D.D.C. 1971). The question of whether and when courts have turned from “partners” into accomplices in a charade was forcefully present in Yakus (though ignored by the majority); it retains urgency. See Thomas W. Merrill & Margaret L. Merrill, Dodd-Frank Orderly Liquidation Authority: Too Big for the Constitution?, 163 U. PENN. L. REV. 165 (2014)
leaving the courts to see whether the executive, using its experience, ‘has fairly exercised its discretion within the vaguish penumbral bounds.”

The Forms and Formalities of Administrative Law. In conventional histories of administrative law, not much is left of the Legal Process school. Exalted notions of a “total administrative process” and overtly functionalist, purposivist jurisprudence have long given way to formalism,\textsuperscript{384} textualism,\textsuperscript{385} presidentialism,\textsuperscript{386} judicial deference,\textsuperscript{387} a statutory “non-delegation doctrine,”\textsuperscript{388} and relatedly, \textit{Vermont-Yankee’s razor}\.\textsuperscript{389} Current architects and practitioners of administrative law do not seem to care much about “partnering” with agencies; they would rather have the courts keep their distance and insist on the constitutional forms.\textsuperscript{390} But their principal means of maintaining that distance is not the supremacy of law; it is judicial deference.

Under that framework, too, \textit{Yakus} remains unexamined—and in the end, foundational. If \textit{Yakus} can be read as a font of a judicial “partnership,” it can also be read as a leading example of judicial deference: “we cannot say.” \textit{Yakus} also underpins contemporary administrative law in a more specific and perhaps more fateful sense. The genius of Stone’s opinion in \textit{Yakus}, we have argued, was the careful splintering of legal doctrines that, in the supremacy-of-law imagination, belonged together: the separation of powers; due process of law; delegation. Conjoin those elements: there is no very good answer to \textit{Crowell} or \textit{Schechter}. Pull them apart: there is no very good answer to \textit{Yakus}.

Contemporary law reflects the \textit{Yakus} approach. Even as the Supreme Court insists in recognizing only three departments, it preserves constitutional formalities merely by asking whether Congress has stated an “intelligible principle” for its delegation. The answer is a foregone conclusion, and the considerations so prominent in \textit{Schechter}—to \textit{whom} the power had been delegated; \textit{for what purposes; with what procedural safeguards}—are cabined in separate legal boxes.\textsuperscript{391} The Supreme Court seizes on the separation of powers when specific constitutional clauses appear readily at hand—and blinks when the case calls for a more systematic inquiry.\textsuperscript{392} Likewise, the Court loudly insists that “\textit{all} legislative powers” are vested in Congress. But when confronted with

\textsuperscript{383} \textit{Id} at 759 (citing FCC v. RCA Communications, Inc., 346 U.S. 86, 90-91 (1953)).
\textsuperscript{389} See United States v. Home Concrete & Supply LLC, 132 S. Ct. 1836, 1848 (2012)(Scalia, J., concurring)(arguing that “the romantic, judge-empowering image,” of the partnership model of administrative process “was obliterated by this Court” in \textit{Vermont-Yankee}.").
\textsuperscript{390} Cf. Merrill, supra note 366, at 1044.
the harsh fact that agencies routinely issue rules with the force of law, the Court blithely responds that those rules must be executive.\(^{393}\) The Court insists on protecting the prerogatives of Article III judges in bankruptcy cases, over state law claims that fall barely (if at all) into the province of federal courts. All the while, the adjudicatory powers of administrative agencies remain well-nigh unchallenged. Formalism and clause-bound textualism offer little to contain or constrain the holdings or the logic of *Yakus*, and in some ways may have reinforced it.\(^{394}\)

Recent Supreme Court opinions reflect increasing unease about the “administrative state.”\(^{395}\) Individual justices have questioned and invited challenges to particular doctrines or precedents (foremost, *Chevron* and its related canons),\(^{396}\) and one member of the Supreme Court (Justice Thomas) has urged a broad re-examination of administrative law in light of first constitutional principles and with a view to their over-all architecture.\(^{397}\) A reorientation along those lines is hardly a foregone conclusion.\(^{398}\) It cannot be accomplished by private litigants, who will usually founder on the shoals of judicial deference and constitutional disjunction.\(^{399}\) Nor can it be the work of Supreme Court Justices, encumbered as they are by the vagaries of the legal process, their own past opinions and commitments, and the perceived demands of their office. A revision of administrative law would require a broader scholarly and public debate.

Sooner or later in that debate, the participants will meet Albert Yakus.

\(^{393}\) *Id.* Justice Thomas alone has openly embraced the consequences of the formalist position for the administrative state. Dep’t of Transp. v. Ass’n of Am. Railroads, 135 S. Ct. 1225, 1243 (2015) (Thomas J., concurring).


\(^{395}\) See supra, note 23.


\(^{398}\) See cass r. sunstein & adrian vermeule, the new coke (rejecting a “new coke” critique of administrative law and noting that for now, “the center holds”).

\(^{399}\) See e.g., consumer fin. prot. bureau v. itt educ. servs., 2015 u.s. dist. lexis 28254, *29-30 (s.d. ind. mar. 6, 2015) (mocking the defendant’s “mosaic theory” of the constitution).