

YAKUS AND THE ADMINISTRATIVE STATE

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"SEDER—Albert Yakus (left), president of Men's Associates of Boston's Jewish Memorial Hospital, joins Rabbi and Mrs. David Alpert for Seder service at hospital last night in commemoration of Passover." Leo Shapiro, *Days of Passover Welcomed in Hub*, BOSTON GLOBE, Mar. 30, 1972, at 6.

INTRODUCTION

On February 24, 1943, a grand jury in Boston indicted Albert Yakus, president of the Brighton Packing Company, for selling beef in violation of the Emergency Price Control Act of 1942 (the "EPCA").¹ The indictment was part of the Office of Price Administration's ("OPA's") aggressive enforcement campaign to suppress the vast black market in meat that developed during the war as a result of OPA's price control regulations.²

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1. Emergency Price Control Act of 1942, Pub. L. No. 77-421, 56 Stat. 23; Brief for the Petitioner at 4, *Yakus v. United States*, 321 U.S. 414 (1944) (No. 374), 1944 WL 42275.

2. Along with Albert Yakus, the grand jury indicted several other New England meat dealers and their employees. The litigation attracted substantial press attention. See, e.g., *Beef Company's Lawyers Assail Methods of OPA*, THE CHRISTIAN SCI.

OPA's regulations imposed a particularly heavy toll on meat packers.³ OPA controlled the price of wholesale and retail meat—but not of livestock.⁴ The result was a “price squeeze”: unregulated livestock prices kept rising, but regulated meat dealers could not raise prices in response to higher costs.⁵ Small independent meat dealers like Albert Yakus were forced to choose between facing criminal sanctions for selling “over-priced” meat, or obeying the regulations and going out of business.⁶

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

Yakus v. United States was the final, most significant challenge. The meat dealers argued that any statute had to provide criminal defendants with *some* effective means of testing, in an independent court, the validity of a rule under which they were being prosecuted.⁷ The EPCA, they argued, violated that cardinal principle. In an opinion authored by Chief Justice Harlan Fiske Stone, the Supreme Court roundly rejected the meat dealers' contentions. Petitioners, the Court declared, had failed to exhaust the administrative remedies provided by the EPCA.⁸ Thus, the fact that the statute categorically barred courts from entertaining challenges to OPA's regulations in enforcement proceedings posed no constitutional problem.⁹ Albert Yakus, a

MONITOR, Jan. 15, 1943, at 4; *Boston Lawyers Argue OPA Price Fixing Illegal*, BOSTON GLOBE, Jan. 16, 1943, at 3; *Brighton Packing Co. Held Guilty of Violating OPA Beef Ceilings*, BOSTON GLOBE, Apr. 8, 1943, at 5; *Meat Dealers to Face Trial in U.S. Court*, THE CHRISTIAN SCI. MONITOR, Mar. 2 1943, at 2; *Meat Inquiry Brings More Indictments*, THE CHRISTIAN SCI. MONITOR, Mar. 16, 1943, at 5.

3. See Jacob Hyman & Nathaniel Nathanson, *Judicial Review of Price Control: The Battle of Meat Regulations*, 42 U. ILL. L. REV. 584, 603–10 (1947).

4. See *id.* at 596–600.

5. See Willard D. Arant, *Wartime Meat Policies*, 28 J. FARM ECON. 903, 909 (1946).

6. See *infra* notes 210, 214 and accompanying text.

7. *Yakus v. United States*, 321 U.S. 414, 433–44 (1944).

8. *Id.*

9. *Id.*

highly respected member of the local community and leader of his synagogue, went to jail.¹⁰

This Article recounts the story of *Yakus v. United States* in considerable, often depressing detail. The enterprise, we readily acknowledge, may seem of interest mostly to legal historians, rather than doctrinally or practically oriented scholars. *Yakus* is little more than a footnote cite in current Constitutional Law textbooks,¹¹ and a hiccup in the standard Federal Courts curriculum.¹² And so far as the administrative law profession is concerned, the case seems to have slipped down a memory hole. Textbooks and treatises mention *Yakus* as a case about the exhaustion of administrative remedies,¹³ pre-enforcement review,¹⁴ or similar issues¹⁵—but always in passing. As for the case law, stray cites aside, *Yakus* has figured in only a handful of Supreme Court decisions.¹⁶ Nevertheless, we persist. Our close examination aims to show that the near-forgotten *Yakus* case should command attention in the contemporary, ideologically fraught debate over the administrative state and its law.

Yakus v. United States arose over an extraordinary statute—a veritable monument to the New Dealers’ vision of the administrative process and administrative government. As we shall

10. See *Convicted Meat Dealers Label Price Act as Unconstitutional*, BOSTON GLOBE, June 30, 1943, at 13. Al Yakus returned to the meat business after the war, serving as president of the Yakus Beef Company. He was a “leader in Boston’s Jewish community,” active in “numerous Jewish civic and philanthropic organizations[,]” including Boston’s Jewish Memorial Hospital. Obituary, *Albert Yakus, 86: Was Head of Beef Company*, BOSTON GLOBE, Sept. 21, 1986, at 55.

11. See, e.g., LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW § 3-5, at 271 n.19 (3d ed. 2000).

12. See, e.g., DAVID P. CURRIE, FEDERAL COURTS 105–06 (4th ed. 2008); RICHARD H. FALLON, JR. ET AL., HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 343–44 (7th ed. 2015); MARTIN H. REDISH ET AL., FEDERAL COURTS: CASES COMMENTS AND QUESTIONS 132–138 (7th ed. 2011). The usual question is Congress’s power over the federal courts’ “jurisdiction.”

13. See, e.g., STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 1159 (5th ed. 2002); RICHARD J. PIERCE, JR., 2 ADMINISTRATIVE LAW TREATISE § 15.2 (5th ed. 2010).

14. See, e.g., GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 1114–16 (6th ed. 2013).

15. See, e.g., KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., FEDERAL ADMINISTRATIVE LAW: CASES AND MATERIALS 35 (2010) (citing *Yakus* in passing as a non-delegation case); ALFRED C. AMAN, JR., ADMINISTRATIVE LAW IN PROCESS (2d ed. 2006) (using the companion case to discuss “hearing rights”).

16. See *infra* notes 342–47 and accompanying text.

show,¹⁷ the EPCA entrusted OPA with virtually boundless discretion to set prices across the entire economy. Its administrative procedures were designed to frustrate regulated parties while presenting a mirage of fairness. And the statute's judicial review provisions were carefully calculated to block effective judicial review—even as the statute mobilized federal and state courts to enforce OPA's dictates. Arguably, Congress had enacted comparable provisions in earlier statutes, and the Supreme Court had sustained those enactments. But the EPCA's individual mechanisms and provisions had never been presented, let alone been judicially sanctioned, *in combination*, and in a form that threatened to accomplish what Congress and the Executive may not do directly: sport away the rights of individuals, and make the courts accomplices in the enterprise. That, at bottom, was the meat dealers' principal contention in *Yakus*.¹⁸ Their challenge failed; and because it failed, the EPCA's innovations and in particular the foreclosure of judicial review in enforcement proceedings became standard tools of administrative government.

Closer examination reveals a subtler but to our minds equally consequential aspect of the *Yakus* litigation. The preceding thumbnail account of the statute suggests the range of the constitutionally grounded administrative-law doctrines that were implicated in *Yakus*: the separation of powers and delegation; due process; and judicial review. Contemporary law provides separate, compartmentalized answers to those doctrinal questions: an "intelligible principle" of delegation;¹⁹ procedural requirements for administrative rulemaking;²⁰ and a presumption of reviewability,²¹ coupled with judicial deference canons.²² *Yakus*, however, was litigated against a constitutional understanding under which all the doctrinal answers still hung together, as mutually reinforcing "outworks of an elaborate

17. *Infra* Part II.A.

18. For detailed discussion see *infra* Part III.D.1.

19. See *Whitman v. Am. Trucking Ass'ns.*, 531 U.S. 457, 472 (2001).

20. See, e.g., *Chrysler Corp. v. Brown*, 441 U.S. 281, 302–03 (1979).

21. See *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986); *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967).

22. See *Auer v. Robbins*, 519 U.S. 452, 462 (1997); *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

structure” that buttressed “the supremacy of the law.”²³ That understanding was not rigidly formalist: there could be some give in this or that doctrine, provided that the overarching purpose remained in view. Wrenched out of that context, however, the limiting doctrines cease to be integral parts of a recognizable constitutional structure. It then becomes harder to see their point or purpose. To disjoin the doctrines is to render them marginal and in the end nugatory.

That, we shall endeavor to show, makes *Yakus* a milestone in what Professor Adrian Vermeule has called “Law’s Abnegation,” meaning the surrender of effective legal constraints on administrative discretion.²⁴ The combatants at the time understood the point perfectly well. The EPCA’s architects defended its unprecedented combination of administrative instruments—broad delegation, bare-bones procedures, the separation of the courts’ review and enforcement functions—by way of compartmentalizing the limiting constitutional doctrines. The meat dealers’ challenge was a last-ditch effort to keep the pieces of the older order together. It failed: the *Yakus* majority fully embraced the New Dealers’ administrative process model. The victory was sufficiently triumphant to make us forget what the fight was actually about.

Our exhumation of *Yakus* proceeds in four Parts. Part I reconstructs the legal universe as it presented itself to the EPCA’s architects and, in short order, to the parties in incessant litigation over the statute, including the *Yakus* case.

Part II describes the origins and contours of the EPCA, as well as its architects’ legal defense of the statute, one piece at a time. Part III recounts the OPA’s aggressive enforcement campaign; Congress’s sporadic and, by and large, feckless interventions; the meat dealers’ desperate, multi-pronged litigation, culminating in *Yakus*; the Supreme Court’s decision and opinions in the case; and, in the aftermath, the demise of the OPA after the war.

23. JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF THE LAW IN THE UNITED STATES 75 (1927) (discussed *infra* notes 37–50 and accompanying text).

24. ADRIAN VERMEULE, LAW’S ABNEGATION 6–7 (2016).

The concluding Part IV sketches our thoughts on the legacy of *Yakus* and its lessons for the contemporary administrative law debate. We believe that the conflict between the integrated constitutional view of the (pre-)New Deal Era and the disaggregated approach of the postwar, post-APA decades remains—or rather should remain—an enduring question of administrative law. For scholars who embrace the administrative state, *Yakus* should regain its status as a milestone in the marginalization of constitutionally grounded doctrines.²⁵ For those who entertain apprehensions about an “unlawful” administrative state,²⁶ the case suggests the same lesson in reverse: there may be little mileage in agitating for the revision of discrete doctrines unless one can somehow re-connect the constitutional pieces.

I. THE OUTWORKS OF AN ELABORATE STRUCTURE:
ADMINISTRATIVE LAW, CIRCA 1940

Yakus lies at the end of a history of judicial efforts, spanning a rough half-century, to accommodate a growing administrative state to the constitutional order. The demands of that order are distilled in familiar propositions: only the legislature can make law—that is, rules with binding effect.²⁷ In matters of private right, citizens must have access to an independent court and its *de novo* judgment.²⁸ Roll the tape; cue *Marbury v. Madison*.²⁹

25. See *id.* at 44–45.

26. See, e.g., PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

27. See *Dep’t Of Transp. v. Ass’n of Am. Railroads*, 135 S. Ct. 1225, 1241 (2015) (Thomas, J., concurring in the judgment).

28. See *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856) (“[W]e do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination”); see also Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 568–70 (2007) (explaining the doctrine of private rights).

29. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); Thomas W. Merrill, *Marbury v. Madison as the First Great Administrative Law Decision*, 37 J. MARSHALL L. REV. 481, 483 (2004) (describing *Marbury* as “a benchmark against which subsequent debate about the proper standard of review has unfolded”).

In constitutional practice, these rock-bottom propositions can and must tolerate a fair amount of slack and doctrinal blurriness. The jurisprudence of the nineteenth century provides impressive evidence of the difficulties that surround the scope of enumerated powers,³⁰ the delegation of legislative authority,³¹ the notion of “private right,”³² the characteristics of industries “affected with a public interest,”³³ and other concepts and doctrines that are central to the constitutional order. Still, institutional innovations that may seem dubious from a rigidly formalist vantage may well be bearable so long as constitutional principles are kept in view—and so long as those principles are understood as interconnected elements of a coherent constitutional order.

This frame of mind informed the jurisprudence of the early twentieth century, when the courts sought to accommodate regulatory commissions to the constitutional structure. Famous cases from the Progressive to the New Deal Era illustrate the point. Regulatory agencies *may* engage in ratemaking, the Supreme Court held—*provided* that the regulated entities have access to timely and effective judicial relief.³⁴ Congress *may* entrust fact-finding to an administrative agency, even in matters of private right—*provided* that questions of law and of constitutional fact and jurisdiction remain subject to full-scale, *de novo* judicial review in an independent court.³⁵ Congress *may* delegate to an independent agency the power to enforce prohibitions against “unfair trade practices”—*provided* that the agency proceeds in a fair and orderly fashion that permits meaningful judicial review.³⁶

30. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410–25 (1819).

31. See, e.g., *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825).

32. See, e.g., *Murray's Lessee*, 59 U.S. (18 How.) at 284; see also Nelson, *supra* note 28, at 587–90 (discussing the case); Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L.J. 1015, 1020–22 (2006) (discussing the notion of private and public rights).

33. See, e.g., *Munn v. Illinois*, 94 U.S. 113, 125–26 (1876); see also BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 48–51 (1998) (discussing *Munn* and its progeny).

34. *Ex Parte Young*, 209 U.S. 123, 148 (1908).

35. See *Crowell v. Benson*, 285 U.S. 22, 56–57 (1932).

36. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 533 (1935) (noting, in striking down the statute, that “[i]n providing for codes, the National

These positions were embodied in a series of doctrines: a constitutional due process doctrine, the *Ex Parte Young* doctrine, the “constitutional and jurisdictional fact” doctrine of *Crowell v. Benson*, and the non-delegation doctrine of *Schechter Poultry*. In Professor John Dickinson’s apt phrase, those doctrines were “but the outworks of an elaborate structure devised to buttress from different sides the central doctrine of the supremacy of the law.”³⁷ Though fraying and weakened by the New Deal, this “elaborate structure” would survive the 1930s. In *Yakus*, though, each of its “outworks” came under attack—and crumbled. A rough survey of the legal landscape circa 1940 helps to understand the significance of the case, both as it presented itself to the principal actors at the time and with an eye to its role in the development of administrative law.

The legal doctrines of the pre–New Deal Era were heavily influenced by the concept of the “supremacy of the law.”³⁸ In Albert Venn Dicey’s influential (though ultimately ill-fated) account, the “supremacy of the law” converged on two principles: “every citizen is entitled, first, to have his [private] rights adjudicated in a regular common-law court, and, secondly, to call into question in such a court the legality of any act done by an administrative official.”³⁹ In the ordinary case, this entailed access to an independent court and *de novo* review (typically, a full trial).⁴⁰

In confrontations between Dicey’s supremacy of the law and the regulatory commissions, an “appellate review” model of judicial review gradually took hold.⁴¹ The model allowed agencies to act as primary fact-finders in licensing or rate-making

Industrial Recovery Act dispenses with . . . any administrative procedure of an analogous character” to that of the FTC).

37. DICKINSON, *supra* note 23, at 75.

38. *Id.* at 32–33.

39. *Id.* at 35; *see also* DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940*, at 32–33 (2014).

40. *Id.*; *see also* DICKINSON, *supra* note 23, at 33 (“[N]othing has been held more fundamental to the supremacy of law than the right of every citizen to bring the action of government officials to trial in the ordinary courts of the common law.”).

41. *See* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 953–64 (2011).

schemes, subject to stringent formal procedures and pre-enforcement judicial review on the record.⁴²

The appellate model soon found influential intellectual support in the scholarship of Professor John Dickinson.⁴³ Under Dickinson's conception of the "supremacy of the law," only pure questions of law were to be reviewed *de novo*; judicial review of questions of fact could properly be limited to a record and reviewed under a deferential jury standard.⁴⁴ According to Dickinson, this arrangement would allow judges to focus on general principles of law, while leaving to agencies matters of detail and evidence.⁴⁵

Dickinson's arguments played off of the anxieties of the bench: judges increasingly worried that judicial forays into administrative rate-making schemes would transform the courts into high commissions for the administrative state.⁴⁶ Even so, for many jurists at the time, independent judgment merely as to questions of law was inadequate.⁴⁷ By removing fact-finding from the province of the courts, the appellate review model threatened to expose the courts to "unscrupulous administrators," and to turn federal courts into rubber stamps for the executive branch.⁴⁸ The key distinction between law and

42. *E.g.*, the Hepburn Act, ch. 3591, § 4, 34 Stat. 584, 589 (1906), vested the Interstate Commerce Commission (ICC) with the power to set binding "just and reasonable" rates for carriers through self-executing administrative orders. Carriers could challenge these orders by petitioning a circuit court to "enjoin, set aside, annul, or suspend" the order. *Id.* § 5, at 592. Simultaneously, the ICC or injured third parties could ask a circuit court to enforce an ICC order. In such cases, courts were required to enforce an order if "upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served," and "that the carrier is in disobedience of the same." *Id.* § 5, at 591.

43. Merrill, *supra* note 41, at 939, 945, 953, 973-76, 979. For a short but impressive account of Professor Dickinson's life and many accomplishments, see George L. Haskins, *John Dickinson 1894-1952*, 101 U. PA. L. REV. 1 (1952).

44. Merrill, *supra* note 41, at 974, 976.

45. *Id.* at 940-42.

46. *Id.* at 987-94 (discussing how the "fear of judicial contamination" drove the appellate review model); *see also, e.g.*, *Federal Radio Comm'n v. Gen. Elec. Co.*, 281 U.S. 464, 470 (1930) ("Our conclusion is that the proceeding in that court was not a case or controversy in the sense of the judiciary article, but was an administrative proceeding, and therefore that the decision therein is not reviewable by this Court.").

47. ERNST, *supra* note 39, at 32.

48. As Chief Justice Hughes remarked before the American Bar Association in 1931, "[a]n unscrupulous administrator might be tempted to say, '[I]et me find the

fact was hardly airtight, so finality as to agency findings of fact could easily shade into finality as to agency determinations of law—"pure executive regulation."⁴⁹ As John Dickinson explained:

"[T]he tendency toward pure executive regulation takes the form of an effort to require the courts to treat the order or decision of the executive body as final and enforce it without looking behind it to the merits. Should this effort succeed, the action of the courts would become in such cases merely an automatic stage in the executive process, and they would be reduced to formally registering, and directing the enforcement of, executive decrees."⁵⁰

The federal courts developed several safeguards against this scenario. First, they moved to preserve judicial review through a structural "due-process" doctrine.⁵¹ Second, and relatedly, courts reviewed agency action through equitable anti-suit injunctions when legal remedies were perceived to be inadequate.⁵² Third, the Supreme Court developed a doctrine of "constitutional and jurisdictional facts" to preserve judicial fact-finding powers on important questions.⁵³ Once "at the cen-

facts for the people of my country and I care little who lays down the general principles.'" Laird Bell, *Let Me Find the Facts . . .*, 26 A.B.A. J. 552, 552 (1940).

49. See DICKINSON, *supra* note 23, at 55 ("In truth, the distinction between 'questions of law' and 'questions of fact' really gives little help in determining how far the courts will review; and for the good reason that there is no fixed distinction."); *id.* at 309–13 (discussing the difficulty of determining "jurisdictional facts.").

50. *Id.* at 11.

51. See, e.g., *Chi., Milwaukee & St. Paul Ry. v. Minnesota*, 134 U.S. 418, 456–57 (1890).

52. *Ex Parte Young*, 209 U.S. 123, 148 (1908); see also *Wadley S. Ry. v. Georgia*, 235 U.S. 651, 662–67 (1915) (explaining the due process doctrine of *Ex Parte Young*).

53. See *Crowell v. Benson*, 285 U.S. 22, 63–65 (1932); see also *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922); *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 289 (1920).

ter of administrative law,"⁵⁴ this doctrine allowed courts to review critical factual findings in cases of private right *de novo*.⁵⁵

The first strategy is exemplified by the Supreme Court's 1890 decision in *Chicago, Milwaukee & St. Paul Railway Co. v. Minnesota*.⁵⁶ The Minnesota legislature had vested the Railroad and Warehouse Commission with final and unreviewable power to promulgate railroad rates.⁵⁷ The Supreme Court declared the act void, holding that the legislature had violated due process of law by delegating power to the commission while failing to provide for judicial review of confiscatory rates.⁵⁸

The second strategy is exemplified by *Ex Parte Young*.⁵⁹ Decided in 1908, *Ex Parte Young* upheld the validity of an anti-suit injunction against Minnesota's 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.⁶⁰ *Ex Parte Young* confirmed that state officials could be subjected to anticipatory proceedings in equity when an administrative scheme failed to provide timely and effective judicial review of agency regulations.⁶¹

The third strategy, the "constitutional fact" doctrine, is often traced to *Smyth v. Ames*.⁶² As articulated in a later case, courts had a duty to exercise their "independent judgment" to deter-

54. GLEN O. ROBINSON & ERNEST GELLHORN, *THE ADMINISTRATIVE PROCESS* 35 (1974). By 1951, Professor Davis declared that the doctrine was "of little interest except as history." KENNETH C. DAVIS, *DAVIS ON ADMINISTRATIVE LAW* § 244 (1951). The doctrine remains alive only in the First Amendment context. PIERCE, *supra* note 13, § 17.9 ("The requirement of independent judicial determination of constitutional facts continues to exist only in the unique context of determinations that a particular expression is, or is not, protected by the First Amendment.")

55. *Crowell*, 285 U.S. at 51-54.

56. 134 U.S. at 456-57.

57. The Minnesota Supreme Court had held that rates fixed by the commission were not subject to judicial review. *State ex rel. R.R. & Warehouse Comm'n v. Chi., Milwaukee & St. Paul Ry. Co.*, 37 N.W. 782, 784 (Minn. 1888), *rev'd*, 134 U.S. 418 (1890).

58. *Chi., Milwaukee & St. Paul Ry.*, 134 U.S. at 456-57.

59. 209 U.S. 123 (1908).

60. *Id.* at 147-49.

61. *See id.* at 163-65.

62. 169 U.S. 466, 546-49 (1898).

mine facts when a petitioner alleged a constitutional violation.⁶³ At the dawn of the New Deal Era, this doctrine had come into considerable tension with a growing number of public utility cases in which courts had reviewed agencies' factual findings quite deferentially.⁶⁴ Perhaps for that reason, the doctrine found its canonical formulation in a case involving an ordinary workers' compensation dispute: In *Crowell v. Benson*, the Supreme Court reviewed an order of a federal workers compensation commission finding an employer liable for an employee's injuries in the course of riverboat work.⁶⁵ Writing for the majority, Chief Justice Hughes articulated a distinction between constitutional facts and ordinary facts.⁶⁶ 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 fact—whether the accident occurred on waters of the United States, or whether the worker was actually in the defendant's employ—would be reviewed *de novo*.⁶⁷ Federal judges could supplement the record by holding hearings, by allowing in extrinsic evidence, or by ordering full-scale trials on these issues.⁶⁸

Despite this attempt at judicial reconciliation, the “supremacy of the law” remained in tension with the emerging appellate review model. The tension is illustrated by *St. Joseph Stock Yards*,⁶⁹ a case decided at the height of the New Deal. In the course of upholding a regulation by the Secretary of Agricul-

63. See *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 289 (1920) (“[I]f the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause.”).

64. See DICKINSON, *supra* note 23, at 200 (arguing that the *Ben Avon* case was contrary to “the substantially unanimous agreement” of a growing body of public utility caselaw).

65. See Mark Tushnet, *The Story of Crowell: Grounding the Administrative State*, in *FEDERAL COURTS STORIES* 359 (Vicki C. Jackson & Judith Resnik eds., 2010).

66. *Crowell v. Benson*, 285 U.S. 22, 62–63 (1932). The facts tried in *Crowell* were necessary for the agency—and for that matter Congress—to assert constitutional power over the employer. See Tushnet, *supra* note 65, at 359.

67. *Crowell*, 285 U.S. at 65.

68. See *id.* at 62–64.

69. 298 U.S. 38 (1936). Intriguingly, the case was argued by none other than John Dickinson, then Assistant Attorney General. *Id.* at 41.

ture setting maximum rates for stockyards, Chief Justice Hughes reaffirmed *Crowell* and confirmed its application to “quasi-legislative” (*i.e.*, regulatory) proceedings.⁷⁰ In cases involving “rights either of persons or of property [that are] protected by constitutional restrictions,” Hughes wrote, courts had a duty to examine constitutional findings *de novo*.⁷¹ Justice Brandeis, by contrast, urged the court to adopt the appellate review model without reservations.⁷² Even under Brandeis’s approach, however, “[t]he supremacy of law demands that there shall be 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.”⁷³ Facts could be surrendered to administrative agencies; law could not.

The interrelated doctrinal “outworks” just described, all implicated in the EPCA and in *Yakus v. United States*, hung together with a fourth doctrine that would also meet its denouement in that litigation: the delegation of legislative power. In the contemporary legal imagination, that problem seems several steps removed from questions regarding administrative procedure and the timing, availability, and standard of judicial review. The modern delegation test is whether Congress has supplied an “intelligible principle,” and neither the availability of review nor, for that matter, the regularity of the agency’s procedures or its checks and balances is a systematic, integral part of that inquiry.⁷⁴

This constricted view, however, is a post-*Yakus* construct. In the 1930s, the questions were still linked through a straightforward logic. Congress, the theory went, may authorize spe-

70. *Id.* at 52; *see also* *Carter v. Carter Coal Co.*, 298 U.S. 238, 319 (1936) (“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.”).

71. *St Joseph Stock Yards Co.*, 298 U.S. at 52–53.

72. *Id.* at 84 (Brandeis, J., concurring).

73. *Id.*

74. *See* *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472–77 (2001); Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 *YALE L.J.* 952, 989 n.158 (2007) (citing modern Supreme Court cases that ignore the “due process” aspects of the New Deal Era’s non-delegation doctrine).

cialized agencies to make binding rules.⁷⁵ Such delegations, however, require fair, regular agency procedures and meaningful judicial review on the record. The “principle” supplied by Congress must be sufficiently “intelligible” for a reviewing court to discern whether or not the agency has acted within the scope of its legal authority. Those structural concerns, closely linked to due process and the separation of powers, are articulated in *A.L.A. Schechter Poultry Corp. v. United States* and in *Panama Refining Co.* (the “Hot Oil” case), two seminal cases decided in 1935—three years after *Crowell* and one year before *St. Joseph Stockyards*.⁷⁶

Hot Oil struck down Section 9(c) of the National Industrial Recovery Act (NIRA) as unconstitutional.⁷⁷ As part of its “non-delegation” holding, the Court insisted on the need for procedural regularity, observing that “the Legislature, to prevent its being a pure delegation of legislative power, must enjoin upon [the agency] a certain course of procedure and certain rules of decision in the performance of its function.”⁷⁸ The Court also reaffirmed the constitutional need for judicial review of agency findings of fact.⁷⁹ In *Schechter*, too, the Court affirmed the importance of regular administrative procedure to sustain delegations. The NIRA did not require any reviewable findings of fact to limit official discretion, and it provided no regular course of administrative procedure to secure due process.⁸⁰ Moreover, in response to the government’s argument that the Court had sustained comparably broad delegations (for example, to the Federal Trade Commission), the *Schechter* Court noted that the

75. See *United States v. Grimaud*, 220 U.S. 506, 517–18 (1911).

76. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan (Hot Oil)*, 293 U.S. 388, 430 (1935). For a similar reading of the cases, see Stack, *supra* note 74, at 986–989.

77. *Hot Oil*, 293 U.S. at 430 (“Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited.”).

78. *Id.* at 432 (quoting *Wichita R.R. & Light Co. v. Pub. Utils. Comm’n*, 260 U.S. 48, 59 (1922)).

79. *Id.* (“If the citizen is to be punished for the crime of violating a legislative order of an executive officer . . . due process of law requires that . . . if [its] authority depends on determinations of fact, those determinations must be shown.”).

80. See *Schechter*, 295 U.S. at 533–34 (contrasting the administrative procedure governing the FTC with the lack of procedure in the NIRA).

open-ended, prescriptive nature of the NIRA's codes of "fair competition" rendered them suspect, delegation- and due process-wise, in a way in which the FTC's more conventional, proscriptive orders against unfair competition were not.⁸¹

Schechter's signal, though poorly understood today, was apparent to many New Dealers: the Supreme Court was willing to accommodate New Deal demands, but only under arrangements that preserved the judiciary's role as a rival check. The statutes governing 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 (NLRA).⁸² In *NLRB v. Jones & Laughlin Steel Corp.*, the Court upheld the NLRA not only against a Commerce Clause challenge (the best-known part of the case), but also against due process and separation-of-powers attacks.⁸³

The attempted compromise proved short-lived: leading New Dealers harbored grander visions of the administrative state. In his influential book, *The Administrative Process*, Professor James Landis launched a frontal assault on lingering "supremacy of the law" notions.⁸⁴ Landis attacked *Crowell* as "syllogistic" reasoning stemming from the anxieties of the judicial "class."⁸⁵ His goal was to replace the supremacy of the law with the "administrative process." Instead of applying "essentialist" separation of powers concepts, judges would exercise judicial review in light of the comparative "expertness" of administrators, "the

81. *Id.* To our minds the distinction is best understood in light of interrelated considerations of administrative regularity and judicial reviewability. The piecemeal development of common-law-like prohibitions imposes a certain discipline on administrators, and courts are institutionally equipped to review the product under legal standards, *de novo*. *FTC v. Gratz*, 253 U.S. 421, 427 (1920) ("The words 'unfair method of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include."). In contrast, prescriptive codes of fair competition will tend to reflect unguided interest group compromises, which courts cannot assess by any genuinely legal means at their disposal.

82. ERNST, *supra* note 39, at 67–69. The NLRA required adjudications to proceed through notice followed by a hearing on the record. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 47 (1937). The NLRB was required to seek judicial enforcement of its orders before they were effective, and "all questions of constitutional right or statutory authority" were subject to judicial review. *Id.*

83. *NLRB*, 301 U.S. at 46–48.

84. JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 123–155 (1938).

85. *Id.* at 127–131, 135.

procedure employed" by the agency, and judicial notions of "fairness" and expediency.⁸⁶ As Roosevelt appointees came to dominate the Supreme Court and the appellate courts, that vision of the administrative process gained ground in judicial opinions. In a 1939 opinion, Justice Douglas praised the "valuable qualities" of the "administrative process" in Landis-like fashion: "ease of adjustment to change, flexibility in light of experience, swiftness in meeting new or emergency situations."⁸⁷ Shortly thereafter, Justice Stone announced the "cardinal principle[]" that "court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice Court 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."⁸⁸ In the same vein, Justice Frankfurter admonished that "although the administrative process . . . pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice[.]"⁸⁹ This "collaborative" vision well-nigh invited "pure executive regulation" and left little if any room for judicial review as a rival, independent check.

That vision triumphed in *Yakus*, and perhaps, that *had* to happen. In retrospect, the formula of *Ex Parte Young* and *Crowell* and *Schechter* seems unstable.⁹⁰ Already by the time of *Yakus*, a vastly expanded Commerce Clause had swept aside the jurisdictional-cum-constitutional questions that had loomed large in 1932,⁹¹ and the Supreme Court had upheld many broad

86. *Id.* at 124, 142, 144.

87. *Helvering v. Wilshire Oil Co.*, 308 U.S. 90, 101 (1939).

88. *United States v. Morgan (Morgan III)*, 307 U.S. 183, 190–191 (1939).

89. *United States v. Morgan (Morgan IV)*, 313 U.S. 409, 422 (1941); *see also* *United States v. Ruzicka*, 329 U.S. 287, 295 (1946) ("In construing the enforcement provisions of legislation like the Marketing Act, it is important to remember that courts and administrative agencies are collaborative 'instrumentalities of justice,' and not business rivals.").

90. This is Professor Vermeule's decided view. *See* VERMEULE, *supra* note 24, at 24–29, 213–15 (discussing the instability of "half-measures" like *Crowell*). For discussion *see infra* Part IV.A.

91. *See, e.g.*, *Wickard v. Filburn*, 317 U.S. 111 (1942); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).

delegations.⁹² However, answers that now look like foregone conclusions were still open questions at the time. The New Dealers were well aware of the constraints posed by lingering supremacy-of-law doctrines. The EPCA was a frontal attack on all of those doctrines and an embrace of pure executive regulation. Part II describes the statute and the New Dealers' defense.

II. THE NEW DEAL GOES TO WAR

A. *The Emergency Price Control Act: Origins and Structure*

As War World II approached, President Roosevelt took steps to prepare for inflation. Roosevelt appointed Leon Henderson, a former SEC commissioner, to head a Price Stabilization Division within the National Defense Advisory Commission ("NDAC").⁹³ Henderson, in turn, hired young David Ginsburg as his chief legal advisor.⁹⁴ Ginsburg would be the key drafter of the statute at issue in *Yakus*.⁹⁵

Without statutory authorization to promulgate binding price controls, NDAC published its first "advisory" price regulation on February 17, 1941.⁹⁶ By August 1941, NDAC had issued 105 "advisory" price schedules.⁹⁷ On May 31, 1941, the Administration also acquired the power to ration strategic commodities.⁹⁸

92. See, e.g., *Opp Cotton Mills, Inc. v. Adm'r of the Wage & Hour Div. of the Dep't of Labor*, 312 U.S. 126 (1941); *H.P. Hood & Sons, Inc. v. United States*, 307 U.S. 588 (1939); *United States v. Rock Royal Coop.*, 307 U.S. 533 (1939).

93. See HARVEY C. MANSFIELD ET AL., *A SHORT HISTORY OF OPA* 16–19 (1946).

94. *Id.* at 19. David Ginsburg worked at the SEC during the 1930s after being recommended by Felix Frankfurter. Later, he clerked for Justice Douglas. After he resigned from OPA in 1943, he enlisted in the military. He dedicated much of his later life to racial integration. Ginsburg died in 2010 at the age of 98. See William Grimes, *David Ginsburg, Lawyer, Dies at 98; Led 1960s Panel on Race Relations*, N.Y. TIMES, May 26, 2010, at A25; see also John Q. Barret, *David Ginsburg (1912–2010), Lifelong New Dealer*, JACKSON LIST (2010), <http://thejacksonlist.com/wp-content/uploads/2014/02/20100714-Jackson-List-David-Ginsburg.pdf> [<https://perma.cc/4UB5-4FM2>].

95. See MANSFIELD ET AL., *supra* note 93, at 20.

96. David Ginsburg, *The Emergency Price Control Act of 1942: Basic Authority and Sanctions*, 9 L. & CONTEMP. PROBS. 22, 23 (1942).

97. *Id.* at 25 n.14.

98. Act of May 31, 1941, Pub. L. No. 77-89, 55 Stat. 236 ("Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material for defense or for private account or for export, the President may allocate such material in such manner

Shortly thereafter, Congress granted the President broad powers to ration ordinary goods, including meat.⁹⁹ Seeking to centralize rationing and price control functions in a single agency, President Roosevelt created the Office of Price Administration and Civilian Supply, later known as OPA.¹⁰⁰

But OPA still lacked statutory authority to promulgate binding price controls. Ginsburg and Henderson accordingly drafted a bill that would give OPA that power. But their draft went considerably further: it placed district courts at OPA's disposal for enforcement purposes, while making OPA's regulations effectively unreviewable. As a 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."¹⁰¹ The draft was submitted to Congress in August 1941, approved by Congress with minor modifications, and signed by the President on January 30, 1942.¹⁰²

As the timing suggests, Congress enacted the EPCA in response to the perceived exigencies of war. However, the EPCA was *not* a product of wartime hysteria; it was a deliberate political and institutional choice, crafted by skilled New Deal lawyers.¹⁰³

First, the statute incorporated the political economy principles of the New Deal. It embodied a demand-centered econom-

and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."); *see also* Ginsburg, *supra* note 96, at 24 n.7.

99. First War Powers Act of 1941, Pub. L. No. 76-354, 55 Stat. 838 (1941); Second War Powers Act of 1942, Pub. L. No. 77-507, 56 Stat. 176, 178 (1942) (authorizing the President to "allocate" any material or facility as necessary "in the public interest and to promote the national defense").

100. *See* Exec. Order No. 8734, 3 C.F.R. 921 (1938-1943).

101. H.R. Rep. No. 78-862, at 4 (1943). The committee based this conclusion on Ginsburg's personal files. *Id.*; *see also* JOHN H. CRIDER, *THE BUREAUCRAT* 144 (1944) (asserting that the Ginsburg files showed "the excess zeal which characterized the whole Henderson-Ginsburg operation").

102. *MANSFIELD ET AL.*, *supra* note 93, 20-21. The Senate "began its consideration of the bill on December 9, 1941, the day after Congress declared the existence of a state of war." *Shapiro v. United States*, 335 U.S. 1, 10-11 (1948).

103. Cf. Joseph W. Aidlin, *The Constitutionality of the 1942 Price Control Act*, 30 CALIF. L. REV. 648, 649-50 (1942) ("Upon a careful reading of the Act one is impressed with the skill and thoroughness evident in its preparation.").

ic theory that, while now widely viewed as seriously misguided, was deeply engrained in New Deal thinking.¹⁰⁴

Second, the EPCA reflected fateful political compromises to accommodate potent New Deal constituencies. One of them was labor. Unions were prepared to support the price control bill, if OPA was denied jurisdiction to control wages.¹⁰⁵ A second formidable constituency was the farm bloc. Accommodating farmers was no small difficulty, especially inasmuch as inflating food prices had been the goal of earlier New Deal farm programs.¹⁰⁶ Congress yielded to farm-group pressures: the final bill included a 110% parity guarantee, which in effect prohibited OPA from controlling prices set by farmers and ranchers.¹⁰⁷ This guarantee would trigger the market disruptions that eventually led to the litigation in *Yakus*.¹⁰⁸

Third, and most important for present purposes, the EPCA enshrined the New Dealers' institutional commitments—

104. See Meg Jacobs, "How About Some Meat?": *The Office of Price Administration, Consumption Politics, and State Building from the Bottom Up, 1941–1946*, 84 J. AM. HIST. 910, 915 (1997) (" [OPA policy makers] saw the world through the prism of consumption Indeed, the Office of Price Administration served as a magnet for these mass-consumption activists").

105. Andrew H. Bartels, *The Office of Price Administration and the Legacy of the New Deal, 1939–1946*, 5 PUB. HISTORIAN 5, 10–11 (1983). Senator Albert Gore introduced a bill instructing OPA to "stabilize wages," but the bill was defeated in the House. See MANSFIELD ET AL., *supra* note 93, at 29; see also J.M. Clark, *Wartime Price Control and the Problem of Inflation*, 9 LAW & CONTEMP. PROBS. 6, 17 (1942). In the final statute, Congress merely 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. Emergency Price Control Act of 1942, Pub L. No. 77-421 § 1(a), 56 Stat. 23, 23–24. The Administration eventually created the National War Labor Board to mediate union demands. See MANSFIELD ET AL., *supra* note 93, at 29; see also E. Riggs McConnell, *The Organization and Procedure of the National War Labor Board*, 9 LAW & CONTEMP. PROBS. 567 (1942).

106. Clark, *supra* note 105, at 14. The New Deal farm programs sought to return farm producers to the purchasing power "parity" levels prevailing before World War I through a vast system of price supports and regulatory cartels. See, e.g., *Parker v. Brown*, 317 U.S. 341, 355 n.3 (1943); *United States v. Butler*, 297 U.S. 1, 7, 25, 58–59 (1936); see also Harold F. Breimyer, *Agricultural Philosophies and Policies in the New Deal*, 68 MINN. L. REV. 333, 336 (1983) (explaining the New Deal's "parity" ideology).

107. Emergency Price Control Act of 1942, § 3(a), 56 Stat. at 27.

108. See *Armour & Co. v. Bowles*, 148 F.2d 529, 532 (Emer. Ct. App. 1945) (explaining that the theory behind ceilings on retail and wholesale meat prices failed when livestock prices rose; "the cattle prices on which the regulation appears to have been predicated were soon left behind in the rising market").

foremost, an abiding faith in bureaucratic expertise and a corresponding, unremitting hostility to markets, interloping courts, and the separation of powers. The executive's proposed bill combined vast grants of executive discretion with a set of administrative and appellate review procedures that, while not entirely unprecedented, were wholly new in combination.¹⁰⁹ That choice did not go unnoticed in Congress. A bill sponsored by Senator Robert Taft would have authorized OPA to issue temporary regulations lasting sixty days without a hearing, but otherwise required OPA to institute formal rulemaking procedures before promulgating a rule.¹¹⁰ The Taft bill was never brought to the floor.¹¹¹ Instead, Congress enacted the executive's proposed statute.

The EPCA's institutional design rested on four foundations. First, the EPCA gave OPA, acting under an exceedingly broad delegation, the power to promulgate binding regulations.¹¹² Second, the EPCA channeled all regulatory challenges through an administrative procedure that was designed to delay judicial relief.¹¹³ Third, the EPCA gave a newly created Emergency Court of Appeals exclusive jurisdiction to adjudicate challenges to OPA's regulations.¹¹⁴ Fourth, the EPCA placed the regular courts at OPA's disposal for enforcement purposes, even while the regulations were being challenged through the administrative process or in the Emergency Court.¹¹⁵ The provisions made OPA's regulations binding in the courts, even in criminal cases, without a meaningful opportunity for judicial review.¹¹⁶

109. Justice Rutledge's dissent in *Yakus* emphasized this feature of the statute. See *Yakus v. United States*, 321 U.S. 414, 474 (Rutledge J., dissenting) ("[N]o one of these [earlier] arrangements goes as far as the combination presented by this Act.").

110. See Nathaniel L. Nathanson, *The Emergency Price Control Act of 1942: Administrative Procedure and Judicial Review*, 9 LAW & CONTEMP. PROBS. 60, 61 n.9 (1942).

111. *Id.*

112. Emergency Price Control Act of 1942 §§ 2, 4, 56 Stat. at 24–28.

113. *Id.* §§ 203, 204, at 31–33.

114. *Id.* § 204, at 31–33.

115. *Id.* § 205, at 33–35; Hyman & Nathanson, *supra* note 3, at 584.

116. MANSFIELD ET AL., *supra* note 93, at 276 (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 adjudged to be invalid. Yet no court anywhere could give him relief for this dilemma.").

Title I of the Act set out the purposes of the statute and OPA's powers. Section 1 provided a broad statement of congressional purposes, including "stabiliz[ing] prices"; protecting the "standard of living" of "persons with relatively fixed and limited incomes"; promoting "fair and equitable wages"; permitting cooperation between producers and the government; ensuring that defense appropriations were not "dissipated by excessive prices"; and "eliminat[ing] and prevent[ing] profiteering, hoarding, manipulation, speculation, and other disruptive practices."¹¹⁷ Section 2 granted the Administrator the power to issue "generally fair and equitable" price controls "[w]henever in [his] judgment . . . the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act."¹¹⁸ Section 4 of Act gave OPA regulations and orders the force of law.¹¹⁹

Title II of the Act set out the administrative procedure, judicial review, and enforcement provisions of the EPCA. Section 205 gave broad enforcement powers to OPA and to consumers harmed by inflation.¹²⁰ OPA could sue violators for injunctive relief and treble damages, as could aggrieved consumers.¹²¹ OPA was also granted licensing and suspension powers,¹²² and OPA could petition the Attorney General to bring criminal actions in district court to punish "willful[]" violations of OPA regulations or orders.¹²³

117. Emergency Price Control Act of 1942 § 1(a), 56 Stat. at 23–24.

118. *Id.* § 2(a), at 24–25. Section 2 further vested OPA with the power to prohibit certain practices and to make exceptions as "necessary or proper" to carry out the purposes of the Act. *Id.* § 2(c)–(d), at 26.

119. *Id.* § 4(a), at 28.

120. *Id.* § 201, at 29.

121. *Id.* § 205(e), at 34. The EPCA's expansive enforcement provisions reflect its architects' determination to enlist the courts in the regulatory enterprise. *See, e.g.,* *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." (citation omitted)).

122. Emergency Price Control Act of 1942 § 205(f), 56 Stat. at 34–35.

123. *Id.* § 205(b), at 33. OPA gained a reputation of often filing criminal charges for publicity purposes. *See* Ernest Gellhorn, *Adverse Publicity by Administrative*

Sections 203 and 204 set out the administrative procedure and judicial review mechanisms of the Act. As Justice Rutledge explained in dissent, the administrative process consisted of “short-cut proceedings, trimmed almost to the bone of due process, even for wholly civil purposes, and pared down further by a short statute of limitations.”¹²⁴ While the EPCA required OPA to publish a “statement of . . . considerations” alongside a regulation,¹²⁵ it did not require OPA to make any reviewable findings.¹²⁶ The EPCA allowed administrative protests to be filed only “within a period of sixty days after the issuance of any regulation or order unless based solely on grounds arising after the expiration of such sixty days.”¹²⁷ Upon denying a protest, OPA was required to state the grounds for its denial.¹²⁸ Once OPA denied a protest, the challenger could bring suit in the Emergency Court of Appeals, which could set aside OPA’s regulations if they were “arbitrary or capricious” or “not in accordance with law.”¹²⁹ At that point, however, regulated parties had no opportunity to present additional evidence to the court.¹³⁰

OPA had broad discretion to delay its decision on a protest—even while it brought suits to enforce its regulations in court.¹³¹ OPA made ample use of that discretion.¹³² In practice,

Agencies, 86 HARV. L. REV. 1380, 1403–04 (1973) (“Perhaps the most serious criticism leveled against OPA was that it sometimes filed charges merely to call public attention to its program and to coerce compliance rather than to try the allegations in court. In response, one newspaper even refused to report OPA charges until proceedings reached the trial stage.”).

124. *Yakus v. United States*, 321 U.S. 414, 474 (1944) (Rutledge, J. dissenting).

125. Emergency Price Control Act of 1942 § 2(a).

126. *Yakus*, 321 U.S. at 454 (Roberts, J., dissenting) (OPA “need make no findings of fact.”).

127. Emergency Price Control Act of 1942 § 203(a), at 31.

128. *Id.*

129. *Id.* § 203(a)–(b), at 31.

130. *Yakus*, 321 U.S. at 475 (Rutledge, J. dissenting). Parties could argue before the Emergency Court that evidence rebutting OPA’s grounds for decision “could not reasonably have been offered” at the time of the protest, but the only remedy was a remand to OPA. Emergency Price Control Act of 1942 § 204(a), 56 Stat. at 31–32.

131. See Emergency Price Control Act of 1942 § 203(a), 56 Stat. at 31 (“Within a reasonable time after the filing of any protest . . . the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith.”).

most sellers were prosecuted before the Emergency Court ever reached a decision on the merits.¹³³ That new court was staffed with New Deal judges who practically never set a regulation aside.¹³⁴ 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.¹³⁵ A challenger had the burden of showing that a regulation *was not* “generally fair and equitable” or *did not* promote any of the vague purposes of the Act. In practice, then, the EPCA foreclosed well-nigh all meaningful judicial review of price regulations in the Emergency Court.¹³⁶

At the same time, Section 205(c) vested federal district courts, state courts, and territorial courts with jurisdiction over OPA’s criminal enforcement actions. Section 204(d) simultaneously divested “Federal, State, or Territorial” courts of “all jurisdiction or power to consider the validity of any such regulation, order, or price schedule” and “to restrain or enjoin the enforcement of any such provision.”¹³⁷

The scope of Section 204(d) was breathtaking. On its face, the provision allowed for what Professor Dickinson had called “pure executive regulation”: if OPA brought a criminal prosecution, judges had to treat the regulation “as final and enforce

132. H.R. REP. NO. 78-862, at 7 (1943) (finding that “the 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”).

133. OPA had brought 2,219 enforcement actions by the end of 1943 (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 between 80 and 120 during the years following the war. See MANSFIELD ET AL., *supra* note 93, at 271, 276.

134. The Emergency Court set aside the Administrator’s decisions in only 30 cases (out of 397) as of February 28, 1947, and “[m]ost of the adverse decisions dealt with peripheral problems. OPA’s construction of the statute and development of standards under it were approved by the court on all essential points.” MANSFIELD ET AL., *supra* note 93, at 279. This centralization mechanism to avoid “hostile courts” “has been credited to Judge Harold Leventhal.” James R. Elkins, *The Temporary Emergency Court of Appeals: A Study in the Abdication of Judicial Responsibility*, 1978 DUKE L.J. 113, 118 n.17.

135. See *Cudahy Bros. Co. v. Bowles*, 142 F.2d 468, 470 (Emer. Ct. App. 1944); see also *Montgomery Ward & Co. v. Bowles*, 138 F.2d 669, 671 (Emer. Ct. App. 1943).

136. See Ralph F. Fuchs, *Prerequisites to Judicial Review of Administrative Action*, 51 IND. L.J. 817, 876–77 (1976).

137. Emergency Price Control Act of 1942, Pub L. No. 77-421, §§ 204(d), 205(c), 56 Stat. 23, 32–33.

it without looking behind it to the merits."¹³⁸ Enforcing courts were thus "reduced to formally registering, and directing the enforcement of, executive decrees."¹³⁹

The EPCA's review-stripping provision was so broad that Solicitor General Charles Fahy took the extraordinary position (before the Supreme Court) that OPA could bring criminal cases to enforce rules that had been set aside by the Emergency Court, as long as the underlying violation happened before the regulation was finally set aside.¹⁴⁰ On that theory, a defendant could prevail on the merits in the Emergency Court and still remain subject to a subsequent criminal suit to enforce an invalidated regulation. This position was not entirely fanciful: it was accepted by the Court of Appeals for the First Circuit.¹⁴¹

This highly unusual set of institutional arrangements demanded a careful legal defense. EPCA's architects had worked it out, long before *Yakus*.

B. *The New Dealers' Defense*

According to Peter H. Irons's masterful account, early New Deal statutes often foundered in the Supreme Court due, in no small part, to inartful drafting and lawyering.¹⁴² The *Yakus* litigation presents a very different picture. The New Deal lawyers had learned their lessons from prior defeats (such as *Schechter* and *Hot Oil*). In the EPCA, they combined ideological ambition with careful—if aggressive—lawyering. Moreover, by the time of *Yakus*, the federal judiciary was composed predominantly of Roosevelt appointees, and the lawyers could claim the benefit of some favorable precedents.¹⁴³

For all that, the New Dealers recognized that the EPCA's defense would require a bit of work. The Act's combination of

138. DICKINSON, *supra* note 23, at 11.

139. *Id.*

140. Hyman & Nathanson, *supra* note 3, at 591; *see also* *Yakus v. United States*, 321 U.S. 414, 467 (1944) (Rutledge J., dissenting) (noting that "[t]he prohibition is unqualified").

141. *See* *Rottenberg v. United States*, 137 F.2d 850, 858 (1st Cir. 1943).

142. *See generally* PETER H. IRONS, *THE NEW DEAL LAWYERS* (1982).

143. The administration's review of the available precedents is reflected in a memorandum prepared for Congress. *See Hearings Before the Comm. on Banking and Currency on H.R. 5479, 77th Cong.* 302–39 (1941).

review-preclusive mechanisms had never been tested. Its 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*. The EPCA architects' response was both simple and ingenious lawyering: instead of defending the law as a whole, they defended the statute provision-by-provision and precedent-by-precedent. Viewed in isolation, the provisions of the law would seem less revolutionary, perhaps even ordinary.

The EPCA's architects set out their strategy in a symposium held at Duke Law School in 1942. OPA General Counsel David Ginsburg discussed the EPCA's general framework.¹⁴⁴ Nathaniel Nathanson, Assistant General Counsel for OPA, presented the strategy to defend the administrative procedure and review provisions;¹⁴⁵ Assistant Solicitor General Paul Freund, the strategy to counter delegation and fair-return challenges.¹⁴⁶

Professor Nathanson rested his case on (now textbook) principles of administrative law. The promulgation of "generally fair and equitable" price regulations, he observed, involved questions of legislative fact; therefore, under the venerable case of *Bi-Metallic Investment Co. v. State Board of Equalization*,¹⁴⁷ no trial-like hearing was required.¹⁴⁸ To sidestep Section 204(d)'s *Marbury* problem, Nathanson relied chiefly on the exhaustion doctrine articulated in *Myers v. Bethlehem Shipbuilding Corp.*¹⁴⁹ In that case, Bethlehem Shipbuilding had sought to restrain the Board from holding adversarial hearings on the company's allegedly unfair labor practices.¹⁵⁰ Bethlehem Shipbuilding argued that the statute violated the Commerce Clause and asserted that the NLRB hearing itself would cause the company "irreparable damage."¹⁵¹ The Supreme Court found the compa-

144. Ginsburg, *supra* note 96, at 26–33.

145. See generally Nathanson, *supra* note 110.

146. See generally Paul A. Freund, *The Emergency Price Control Act of 1942: Constitutional Issues*, 9 LAW & CONTEMP. PROBS. 77 (1942).

147. 239 U.S. 441, 445 (1915).

148. See *id.* at 445.

149. 303 U.S. 41 (1938).

150. *Id.* at 44–46.

151. *Id.* at 47.

ny's contention "at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."¹⁵² Nathanson seized on this ruling to argue that the EPCA's review-stripping arrangement "merely codifie[d] the usual rule of exhaustion of administrative remedies."¹⁵³

Paul Freund took on the fair return and *Ex Parte Young* doctrines. Section 4(d) of the EPCA provided that no person was "require[d]" to "sell any commodity."¹⁵⁴ The purpose of this seemingly odd provision was to defeat "fair return" claims. According to Freund, *Ex Parte Young* and *Ben Avon* did not apply to price controls outside the common carrier context: although regulated utilities had an affirmative duty to provide public services, private sellers had no such duty.¹⁵⁵ Moreover, unlike in *Ex Parte Young*, Freund argued, the EPCA allowed challengers to assert their defenses in a non-criminal forum.¹⁵⁶

These arguments were hardly airtight. Nathanson's argument that *Crowell* was irrelevant to legislative rules contradicted the Supreme Court's opinion in *St. Joseph Stockyards*.¹⁵⁷ Freund's theory that the fair return doctrine applied exclusively to regulated utilities was flatly contradicted by Chief Justice Hughes's concurring opinion in *Carter Coal*,¹⁵⁸ and his argument that *Ex Parte Young* did not apply manifestly misstated

152. *Id.* at 50–51. Only months after the Supreme Court's ruling, a Michigan *state* court enjoined NLRB officials from holding a hearing. That probably motivated the EPCA's ban on the exercise of *state* judicial power. For discussion, see generally Amos J. Coffman, Comment, *Power of a State Court to Enjoin National Labor Relations Board Officials*, 36 MICH. L. REV. 1344 (1938).

153. Nathanson, *supra* note 110, at 70.

154. Emergency Price Control Act of 1942, Pub L. No. 77-421, § 4(d), 56 Stat. 23, 28.

155. See Freund, *supra* note 146, at 83–84.

156. *Id.*

157. See *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 49–50 (1936).

158. *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.").

the rationale of that case.¹⁵⁹ Nor, contrary to Nathanson, did *Bethlehem Shipbuilding* validate EPCA. As the Supreme Court emphasized, the NLRB held hearings and created a record, and its orders were not binding until a court of law entered a final judgment enforcing the NLRB's orders.¹⁶⁰ All of those safeguards were lacking in the EPCA.¹⁶¹ Moreover, the exhaustion doctrine announced in *Bethlehem Shipbuilding* merely prevented a pre-enforcement challenge in equity, not a defense in an enforcement action.¹⁶²

The short of it is that no Supreme Court case had ever held that anything roughly analogous to the EPCA's jurisdiction-stripping framework would be constitutionally "adequate" under the Due Process Clause.¹⁶³ Shortly after the war (and after *Yakus* was decided), Nathanson acknowledged the pioneering nature of the statute he and others had been tasked with defending.¹⁶⁴ Unlike prior statutes, he observed, the EPCA "contemplated the enforcement of price and rent regulations in the regular courts even while their validity was being challenged in the Emergency Court of Appeals."¹⁶⁵ Moreover, "unlike . . . other statutes, there was no way in which the courts could suspend operations of [EPCA] regulations while their

159. Nothing in *Ex Parte Young* indicates that it turned on the civil or criminal nature of the hypothetical forum. See *Ex Parte Young*, 209 U.S. 123, 165 (1908). Moreover, the statute in *Ex Parte Young* at least allowed railroad officers to raise legal defenses in a criminal trial. *Id.* at 164–65. The EPCA did not even pretend to extend that favor.

160. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 49–50; see also *Yakus v. United States*, 321 U.S. 414, 474 n.26 (1944) (Rutledge, J., dissenting) (distinguishing the NLRA from the EPCA on these grounds) ("[N]o penalty attaches until the [NLRB] has sought and obtained an order from the court for enforcement. With this done, there is no danger the individual will be sentenced for crime for failure to comply with an invalid order. And there is none that the court will be called upon to lend its hand in enforcing an unconstitutional edict or, for that matter, one merely in excess of statutory authority.").

161. See *Yakus*, 321 U.S. at 475 & n.32 (Rutledge, J., dissenting).

162. Cf. Raoul Berger, *Exhaustion of Administrative Remedies*, 48 Yale L.J. 981, 985–986 (1939) ("From the beginning, the exhaustion rule was formulated in terms of equity jurisdiction, that is to say, a litigant who failed to avail himself of administrative avenues of redress could not 'maintain a suit in equity.'").

163. See *Yakus*, at 476–77 & n.33 (Rutledge, J., dissenting).

164. See Hyman & Nathanson, *supra* note 3, at 591–92.

165. *Id.* at 584.

validity was contested.”¹⁶⁶ Thus, prior precedents “[did] not entirely meet . . . the due process” challenge to the statute.¹⁶⁷ The statute did break new ground, after all—and so would the *Yakus* decision. Part III chronicles the litigation and describes the decision.

III. 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 in *Yakus*. Another two years later, the war was over, price regulation had lost public support, and a different political climate produced the APA’s settlement. In some ways, *Yakus* was a replay of *Schechter*—a constitutional attack on a massive regulatory scheme, brought by small ethnic middlemen in defense to a prosecution. *Schechter*, however, was a test case litigated in part by the whitest of white shoe New York law firms, financed by corporate interests with the hope of arresting the New Deal’s ambitions, and brought to a Supreme Court that was likely to be receptive to the challengers’ legal arguments.¹⁶⁸ *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 attempts to obtain judicial protection under a statute that foreclosed all conventional avenues of relief. *Yakus* must be understood against this backdrop.

A. *The OPA Goes to Work*

Price Administrator Leon Henderson and his OPA staff pursued their price control mission with enthusiasm.¹⁶⁹ A veritable army of lawyers and economists enlisted in OPA’s price control

166. *Id.* at 590 n.18.

167. *Id.*

168. See AMITY SHLAES, *THE FORGOTTEN MAN: A NEW HISTORY OF THE GREAT DEPRESSION* 239–41 (2007) (narrating the oral argument).

169. See MANSFIELD ET AL., *supra* note 93, at 7; see also CRIDER, *supra* note 101, at 140 (“[OPA] could be criticized on numerous other grounds, but never for lack of sincerity, or energy, or courage. Indeed, the most conspicuous fault of the team was excess of zeal.”).

mission.¹⁷⁰ Their task was daunting. As an OPA economist put it, price control “necessitate[d] 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.”¹⁷¹ Undaunted, OPA imposed nationwide price controls on almost every consumer commodity.

Tasked with the role of choosing *some* objective standard to implement Congress’s instruction that price controls be “generally fair and equitable,” Henderson decided to use a historical benchmark and to fix prices at a level that would allow industry to realize the same level of profits as it did during peacetime, despite the much greater demand.¹⁷² OPA soon settled on this “overall industry earnings” standard (industry net income before taxes, compared to historical industry profits for the 1936-1939 period) and rejected the “cost plus a fair profit” standard championed by Bernard Baruch, the World War I price control czar.¹⁷³ The “overall industry earnings” standard gave OPA flexibility to set prices for entire industries without worrying about the financial viability of marginal producers.¹⁷⁴ Henderson promised, however, 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.”¹⁷⁵

Problems that would have afflicted even the most sophisticated system of price controls were exacerbated by the Admin-

170. Between 1941 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 104, at 911. A young John Kenneth Galbraith was appointed Deputy Price Administrator. See JOHN KENNETH GALBRAITH, *A LIFE IN OUR TIMES* 124–41 (1981).

171. Donald Wallace & Phillip H. Coombs, *Economic Considerations in Establishing Maximum Prices in Wartime*, 9 *LAW & CONTEMP. PROBS.* 89, 89 (1942).

172. By convention, OPA used the same period as the Administration used to calculate the “Excess Profits Tax” levied during the war. See MANSFIELD ET AL., *supra* note 93, at 31.

173. *Id.* at 32.

174. *Id.* at 281.

175. See *Gillespie-Rogers-Pyatt Co. v. Bowles*, 144 F.2d 361 (Emer. Ct. App. 1944).

istration's crusade against wartime profiteering.¹⁷⁶ In 1943, Roosevelt ordered all executive agencies to work to freeze all wages, rates, and prices across the entire economy at prewar levels to combat inflation.¹⁷⁷ Each and every price increase was prohibited, "regardless of whether it would be justified by cost or productivity increases and regardless of its distributional effects."¹⁷⁸ As noted, though,¹⁷⁹ these requirements were subject to exceptions for the farm bloc and other influential interests. Far from ameliorating the general situation, these exceptions compounded the distortions created by OPA's price controls. As Joseph A. Schumpeter scornfully observed at the time, "unless *intended* to force the surrender of private enterprise," OPA's system of price controls and exemptions was "irrational and inimical to the prompt expansion of output."¹⁸⁰ Among the most severely affected economic sectors was the meat industry.

B. *Regulating Meat*

OPA's meat regulations unfolded in stages. For those who actually knew the meat industry, it was "a foregone conclusion that price ceilings would not work well."¹⁸¹ For OPA officials, in contrast, it was a foregone conclusion that meat prices had to be controlled.

The regulation of meat prices began in earnest when Price Administrator Henderson issued a General Maximum Price Regulation, freezing commodity prices across the entire economy at the level of March 1942.¹⁸² As OPA's staff eventually acknowledged, "General Max" (as the regulation was popular-

176. On October 3, 1942, President Roosevelt directed OPA to prevent "unreasonable and exorbitant" war profits. 3 C.F.R. 1213 (1938-1943).

177. See Exec. Order 9328, 3 C.F.R. 1267 (1938-1943).

178. ROBERT A. KAGAN, *REGULATORY JUSTICE: IMPLEMENTING A WAGE PRICE FREEZE* 43 (1978).

179. *Supra* notes 105-07 and accompanying text.

180. JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 387 (1942).

181. Arant, *supra* note 5, at 908.

182. General Maximum Price Regulation, 7 Fed. Reg. 3153 (April 28, 1942). Wittingly or not, OPA's title for the regulation harkened back to the "General Maximum" of 1793, a staple of the Reign of Terror in revolutionary France. See Henry Bourne, *Food Control and Price-Fixing in Revolutionary France*, 27 J. POL. ECON. 73 (1919).

ly known) proved “as disruptive and unsatisfactory to the industry as to the consumer.”¹⁸³ Accordingly, in June 1942, Henderson signed Maximum Price Regulation No. 169, a new order regulating beef and veal prices.¹⁸⁴ Both OPA and the meat industry soon came to regard this regulation, too, as “inadequate.”¹⁸⁵ OPA’s 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 be manipulated to avoid price controls.¹⁸⁶ The meat dealers’ problem was the continued rise in cattle costs and the resulting price squeeze.¹⁸⁷

During the summer of 1942, Boston began to experience serious meat shortages.¹⁸⁸ Several meat dealers declared bankruptcy, even as grocery shops could not meet demand.¹⁸⁹ Four hundred Boston slaughterers and meat dealers rallied to petition the Administration to place a price ceiling on cattle.¹⁹⁰ Sidney H. Rabinowitz,¹⁹¹ the director of the New England Wholesale Meat Dealers Association, urged collective protest.¹⁹² Harold Widetzky, general counsel for the Wholesale Meat Dealers Asso-

183. Arant, *supra* note 5, at 908 n.7; Hyman & Nathanson, *supra* note 3, at 593.

184. Maximum Price Regulation No. 169, 7 Fed. Reg. 4653 (June 19, 1942).

185. Hyman & Nathanson, *supra* note 3, at 594.

186. *Id.* 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 605–06.

187. Arant, *supra* note 5, at 908.

188. *Little Beef Expected in Boston Now, None Expected Next Week*, BOSTON GLOBE, July 23, 1942, at 1.

189. *Id.*

190. *Solution to “Squeeze” on Prices Sought*, BOSTON GLOBE, July 23, 1942, at 6.

191. Sidney Rabinowitz was born in Lithuania and immigrated to the United States in 1903. Rabinowitz started his own business (the Colonial Provision Company) in 1918 after working in a meat processing plant. Later, in the 1950s, the Colonial company became one of the largest meat dealers in the country. Rabinowitz was also one of the founders of Brandeis University. See *Deaths and Funerals: Throngs Pay Last Tribute To Sidney Rabinowitz*, BOSTON GLOBE, Aug 23, 1961, at 23; *Colonial Provision Co. Starts Big Campaign*, BOSTON GLOBE, May 8, 1932, at A53. Rabinowitz had a long history defending the civil rights of immigrants. See, e.g., *Delicatessen Men Protest*, N.Y. TIMES, Mar. 25, 1935, at 14.

192. *Solution to “Squeeze” on Prices Sought*, *supra* note 190, at 6; *Little Beef Expected in Boston Now, None Expected Next Week*, *supra* note 188, at 6.

ciation and the National Association of Hotel and Meat Purveyors, also urged action in opposition to farmer privileges.¹⁹³

Independent slaughterers and packers were a political force to be reckoned with. Despite opposition from the Texas and Southwestern Cattle Raisers' Association,¹⁹⁴ Congress amended the EPCA in October of 1942 to require OPA to provide a "generally fair and equitable" margin for the processing of farm commodities, "including livestock."¹⁹⁵ Upon the enactment of the McKellar Amendment (as it was called), Wilbur LaRoe, Jr., counsel for the Independent Meat Packers Association, proclaimed, "Hurrah, our battle is done, because Congress has told OPA they have to do it."¹⁹⁶

LaRoe's enthusiasm was misplaced. On December 10, 1942, OPA issued Revised Maximum Price Regulation 169 ("Rule 169"), the subject of the *Yakus* litigation.¹⁹⁷ The rule divided the country into price zones and allowed for "dollars and cents" increments based on OPA's geographic estimates of cost.¹⁹⁸ The rule also required meat dealers to follow prescriptive grading standards.¹⁹⁹ As the meat dealers later complained, Rule 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."²⁰⁰

Rule 169's "statement of considerations" cited to Executive Order 9250 (requiring OPA to control "profiteering") and per-

193. *Little Beef Expected in Boston Now, None Expected Next Week*, *supra* note 188, at 6.

194. Hyman & Nathanson, *supra* note 3, at 599 & n.47.

195. Stabilization Act of 1942, Pub. L. No. 77-729, 56 Stat. 765.

196. See *Hearings Before S. Special Comm. to Study and Survey Problems of American of Small Business Enterprises & H. Select Comm. to Conduct a Study and Investigation of the National Defense Program in its Relation to Small Business in the United States*, 78th Cong. 1st Sess. (Mar. 1, 3, 10, 1943), at 2 [hereinafter *Hearings*]; see also *Hearings Before the Select Committee to Investigate Executive Agencies Pursuant to H. Res. 102, Part 2*, 78th Cong. (1943-44), at 1329-458 (collecting hearings related to OPA's meat regulations).

197. Revised Maximum Price Regulation 169, 7 Fed. Reg. 10,381 (Dec. 12, 1942).

198. *Armour & Co. v. Bowles*, 148 F.2d 529, 531 (Emer. Ct. App. 1945).

199. Hyman & Nathanson, *supra* note 3, at 596 ("Wholesale cuts were precisely defined in anatomical detail, and the sale of cuts not in compliance was prohibited.").

200. Brief for Petitioners at 67, *Yakus v. United States*, 321 U.S. 414 (1944) (No. 375) (*Rottenberg* was consolidated with *Yakus*).

functionarily stated that the regulation furthered the purposes of the Act.²⁰¹ OPA also filed an unpublished study of the industry's costs alongside the regulation.²⁰² These cost estimates were based on the mistaken assumption that cattle prices would not continue to rise.²⁰³ But rise they did, in response to increasing demand.²⁰⁴ And yet: in the face of overwhelming evidence of a price squeeze and despite the meat dealers' pleas, OPA refused to reconsider the rule.²⁰⁵

As Rule 169 went into effect, several meat industry groups filed protests before OPA, claiming that the rule and the resulting price squeeze violated the terms of the Act. The Armour Company, one of Chicago's "Big Four" integrated packers, was the largest corporate litigant.²⁰⁶ The National Independent Meat Packers Association, represented by Wilbur LaRoe, Jr., also filed a protest on behalf of independent packers and slaughterers.²⁰⁷

Responding to the protests, OPA replied that the evidence of a price squeeze was unconvincing. Even assuming that a "squeeze" existed, OPA argued, only "vigorous enforcement" against black market profiteers would redress the problem.²⁰⁸ OPA then proceeded to delay the beef litigation by prolonging administrative discovery. It would take more than two years for the Emergency Court of Appeals to reach a judgment on the merits of the challenge.²⁰⁹ Throughout this period, Rule 169 remained in effect, leaving many meat dealers with a grim choice of going out of business or into the black market, and possibly to jail.

201. 7 Fed. Reg. at 10,381-82.

202. *Armour & Co.*, 148 F.2d at 531-32.

203. *Id.* at 532.

204. *Id.*

205. See H.R. No. 78-898 (1943) ("[I]t was obvious that the Regulation would ultimately result in the destruction of all nonprocessing slaughterers as a class."). Even the price lawyers admitted that segments of the industry were in serious financial trouble by then. Hyman & Nathanson, *supra* note 3, at 601 & n.51.

206. See *Armour & Co.*, 148 F.2d at 529.

207. *Heinz v. Bowles*, 149 F.2d 277 (Emer. Ct. App. 1945), *vacated and dismissed*, 150 F.2d 546, *cert. denied sub. nom. E. Kahn's Sons Co. v. Bowles*, 326 U.S. 719 (1945).

208. Hyman & Nathanson, *supra* note 3, at 597.

209. See *Armour & Co.*, 148 F.2d at 529.

Meanwhile, in March 1943, meat packer and independent slaughterer groups appeared before a Senate small business committee. Testifying for the independent packers, Wilbur LaRoe stated that at present prices, some 25% to 40% of the wholesale meat industry could not make a return on investment.²¹⁰ This price squeeze, he argued, had created the worst black market “in the history of the country.”²¹¹ OPA officials acknowledged that the meat regulations were causing difficulties, but they continued to insist that vigorous enforcement would “increase the supply.”²¹² When Senators asked why OPA was flouting the McKellar Amendment by failing to take account of rising livestock prices, Price Administrator Prentiss Brown argued that relief was “impractical” because “you would have to change [the cost margin] every day” in response to increasing livestock prices.²¹³

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

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.²¹⁴

Albert Yakus would go to jail.

C. *Litigation*

Meat dealers pursued three avenues to challenge the EPCA and OPA's regulations. First, they availed themselves of the option provided by the statute: a protest before the agency and litigation before the Emergency Court. Second, they sought re-

210. See *Hearings*, *supra* note 196.

211. *Id.* at 2.

212. *Id.* at 16.

213. *Id.* at 20.

214. *Id.* at 81.

lief by means of an *Ex Parte Young* challenge. Third, they raised legal defenses against the regulations in 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 statutory avenues for legal redress, was designed to fail. It eventually did fail—well *after* the decision in *Yakus*.²¹⁵ However, it played a crucial role in the *Yakus* majority's opinion: Congress, it said, 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 v. Phillips*,²¹⁶ a week after the *Yakus* defendants had filed their petition for certiorari. *Lockerty* reserved the precise question presented in *Yakus*, but it also narrowed the petitioners' case.

1. EPCA Proceedings

As mentioned, Armour & Co., as well as associations of independent wholesale dealers (like *Yakus*) and independent (non-processing) slaughterers, filed protests before OPA.²¹⁷ OPA consolidated the protests and demanded more evidence of a price squeeze, thus delaying the protestors' right to judicial review.²¹⁸ However, one non-processing slaughterer—a defendant in a pending criminal proceeding—was actually heard by the Emergency Court, on the question of whether the court should issue a writ of mandamus compelling OPA to make a decision.²¹⁹ Following the hearing, but before the Emergency Court decided whether to grant the writ, the government announced that non-processing slaughterers (the most vulnerable group) would receive subsidies from the Office of Economic

215. See *Armour & Co. v. Bowles*, 148 F.2d 529 (Emer. Ct. App. 1945); *Heinz v. Bowles*, 149 F.2d 277 (Emer. Ct. App. 1945).

216. 319 U.S. 182 (1943).

217. The Emergency Court meat litigation and the surrounding politics are explained in great detail in Hyman & Nathanson, *supra* note 3.

218. *Armour & Co.*, 148 F.2d at 530.

219. Hyman & Nathanson, *supra* note 3, at 609.

Stabilization.²²⁰ With the subsidy in place, OPA denied *all* the consolidated protests, and the litigation started anew before the agency.²²¹ Parties wishing to challenge the regulation had to introduce new evidence taking into account the effects of the subsidy program.²²² This additional delay bought time for the Supreme Court to decide *Yakus*.

2. *Equitable Relief*: Lockerty

New Jersey meat dealers (represented by Arthur T. Vanderbilt, later Chief Justice of New Jersey's Supreme Court) filed an *Ex Parte Young* action against the acting New Jersey United States Attorney, seeking to restrain criminal prosecutions.²²³ The meat dealers' complaint alleged that Rule 169 was irrational and oppressive class legislation and, further, that the threat of criminal sanctions, combined with the Act's defective judicial review procedures, deprived the meat dealers of due process.²²⁴ On March 29, 1943, a three-judge district court panel granted the government's motion to dismiss.²²⁵ Judge Guy Fake, a Coolidge appointee, dissented. In his view, the Act left the plaintiffs "stripped of their constitutional rights in the only forum where they may be tried on the indictments pending against them."²²⁶

The Supreme Court affirmed the district court in May of 1943, holding that it lacked jurisdiction to hear "collateral attacks" against the regulation.²²⁷ 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

220. See 8 Fed. Reg. 14,641 (Oct. 26, 1943). This group did not include independent meat packers like Albert Yakus. The subsidy is explained in Hyman & Nathanson, *supra* note 3, at 609–10.

221. *Armour & Co.*, 148 F.2d at 530.

222. *Id.*

223. The U.S. Attorney had already filed charges against them. *Lockerty v. Phillips*, 319 U.S. 182, 184–85, 188 (1942).

224. See *id.* at 184–85; Brief for Appellants at 6, *Lockerty v. Phillips*, 319 U.S. 182 (1943) (No. 934), 1943 WL 54797 (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").

225. *Lockerty v. Phillips*, 49 F. Supp. 513, 515 (D.N.J.), *aff'd*, 319 U.S. 182 (1943).

226. *Id.* at 516 (Fake, J., dissenting).

227. *Lockerty*, 319 U.S. at 189.

section 204, barring all courts except the Emergency Court from examining the validity of OPA regulations, was constitutional as applied in an enforcement action).²²⁸ The Justices also made short shrift of a case, manifestly contrived by a landlord and his tenant, in which an Indiana district judge had struck down the entire EPCA as a violation of the separation of powers.²²⁹ The Supreme Court vacated the judgment as lacking a genuine controversy.²³⁰ Next on the docket (the following Supreme Court Term) would be *Yakus*.

3. 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 Rule 169.²³¹ On February 24, 1943, a grand jury returned the indictment. The meat dealers moved to quash it on several grounds: the price ceiling established by OPA was an “arbitrary and capricious” invasion of property rights; Rule 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.²³² Unsurprisingly, Judge

228. 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 of 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. *Lockerty*, 319 U.S. at 182.

229. *Roach v. Johnson*, 48 F. Supp. 833, 834 (N.D. Ind.), *vacated sub nom.* *United States v. Johnson*, 319 U.S. 302 (1943).

230. *United States v. Johnson*, 319 U.S. 302 (1943).

231. The facts recounted here and below are taken from the “Transcript of Record” filed in the Supreme Court, unless otherwise noted. The record and briefs were retrieved from *The Making of Modern Law: U.S. Supreme Court Records and Briefs, 1832–1978*, GALE, <http://www.gale.com/c/making-of-modern-law-us-supreme-court-records-and-briefs-1832-1978> [<https://perma.cc/93TN-GUAM>].

232. Judge Wyzanski was a protégé of Felix Frankfurter. As solicitor for the Department of Labor under Frances Perkins, Wyzanski helped to draft the National Industrial Recovery Act. See PETER H. IRONS, *THE NEW DEAL LAWYERS* 23–24 (1982). Later, Wyzanski served in the Solicitor General’s Office under Attorney

Wyzanski denied the motion. After overruling all objections to the statute, Judge Wyzanski considered the dealers' objections to Rule 169. He noted 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."²³³ "Viewed in this limited aspect," Wyzanski held, the regulation was "plainly" valid.²³⁴ The United States had urged Judge Wyzanski to hold that the EPCA's Section 204(d) prohibited district courts from reviewing the validity of the regulation in an enforcement action.²³⁵ 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 or application."²³⁶ Because the regulation was not facially invalid, Wyzanski continued, he only had to consider whether Congress could preclude the introduction of extrinsic evidence to support an as-applied challenge to a general regulation.²³⁷ 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."²³⁸

General (by then Justice) Stanley Reed, where he earned a reputation as an able lawyer defending New Deal legislation, most notably the Wagner Act. *Id.* at 272–89.

233. *United States v. Slobodkin*, 48 F. Supp. 913, 915 (D. Mass. 1943).

234. *Id.* at 915–16.

235. *Id.*

236. *Id.* at 916.

237. *Id.* at 915–16.

238. *Id.* at 917. While Judge Wyzanski analogized the EPCA to the Hepburn Act, that analogy does not hold. Although the Hepburn Act made ICC orders enforceable within 30 days and precluded later challenges, the Commission first had to go through formal rulemaking. Regulated entities could immediately appeal the order to a court of law, and the court could enter a preliminary injunction to "suspend[]" the order during the pendency of the challenge. Hepburn Act, ch. 3591, § 4, 34 Stat. 584, 589 (1906) (amending Interstate Commerce Act of 1887, ch. 104, § 15, 24 Stat. 379, 384); *see also* *Yakus v. United States*, 321 U.S. 414, 473–74 (1944) (Rutledge, J. dissenting) (same); *ICC v. Louisville & Nashville R.R. Co.*, 227 U.S. 88, 91–92 (1913) (rejecting the argument that ICC rate orders are conclusive on the courts and noting that the Hepburn Act "gave the right to a full hearing . . . conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved").

The resulting trial would be a farce, but the meat dealers had to go through the motions to preserve their right to appeal.²³⁹ During the trial in March of 1943, the lawyers for Mr. Yakus offered as evidence the testimony of Sidney Rabinowitz. According to the expert report, Rabinowitz would show that Rule 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 ruling. Albert Yakus was fined \$1,000 and sentenced to six months in prison.²⁴⁰ The meat lawyers filed an exception, and the convictions were stayed pending appeal.

The New England meat lawyers filed their appeal 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.²⁴¹ On August 23, 1943, the court rejected the meat dealers' appeal.²⁴² Judge Magruder's opinion dismissed the meat dealers' argument by holding that as a matter of law, any evidence showing the invalidity of the regulation was "entirely immaterial" under the statute.²⁴³ Analogizing OPA to a military operation, Magruder extolled OPA's efforts at the "home front"

239. See *Brighton Packing Co. Held Guilty of Violating OPA Beef Ceilings*, BOSTON GLOBE, Apr. 8, 1943, at 5; see also *Another Meat Dealer is Held in U.S. Court*, CHRISTIAN SCI. MONITOR, March 5, 1943.

240. Brief for the United States at 4-5, *Yakus*, 321 U.S. 414 (Nos. 374, 375), 1944 WL 42926.

241. *Rottenberg v. United States*, 137 F.2d 850, 851 (1st Cir. 1943); see also *Convicted Meat Dealers Label Price Act as Unconstitutional*, BOSTON GLOBE, 13 June 30, 1943, at 13. Judge Calvert Magruder, a Roosevelt appointee and former professor at Harvard, 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. See generally George Dargo, *Calvert Magruder of the First Circuit: The Law Professor as Judge*, 74 MASS. L. REV. 239 (1989); see also Felix Frankfurter, *Calvert Magruder*, 72 HARV. L. REV. 1201 (1959).

242. *Rottenberg*, 137 F.2d. at 858.

243. *Id.*

and stressed the need for expediency.²⁴⁴ Venturing no opinion on the protests pending before OPA, Magruder held that the EPCA's provisions were constitutionally adequate,²⁴⁵ and that the delegation challenge was "not well taken."²⁴⁶

D. *Yakus in 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 was likely. The Supreme Court had already expressly reserved the question presented in *Lockerty*, and many similar enforcement cases (75 to 100, on the petitioners' estimation) were pending in the lower courts.²⁴⁷ Confident in his case, Solicitor General Fahy did not oppose the grant.²⁴⁸ On November 8, 1943, the Supreme Court granted the petition and set the case for argument.²⁴⁹

1. *The Briefs*

The briefs for the meat dealers read as a frontal assault on the Act. The petitioners claimed that the statute unlawfully delegated legislative power, violated their liberty and property without due process, violated the separation of powers, and violated their sixth amendment right to a jury trial.²⁵⁰ Echoing *Schechter's* themes, the meat dealers argued that the Act did not require OPA to make regulations on the basis of reviewable factual findings and that the procedural requirements were meaningless.²⁵¹ Moreover, the Act gave OPA broad regulatory

244. *Id.* at 856.

245. *Id.* at 857.

246. *Id.* at 858.

247. Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit and Brief in Support of the Petition at 9, *Rottenberg v. United States*, 321 U.S. 414 (1944) (No. 375). In one case, a district court had held that section 204(d) of EPCA violated *Marbury v. Madison*, and had invalidated the rent control provisions of the Act because it did not require OPA to make findings of fact. See *Payne v. Griffin*, 51 F. Supp. 588, 597 (M.D. Ga. 1943).

248. Memorandum of the United States at 9, *Rottenberg v. United States*, 321 U.S. 414 (1944) (No. 375).

249. *Yakus v. United States*, 320 U.S. 730 (1943).

250. See Brief for the Petitioners at 6–7, 78–81, *Rottenberg v. United States*, 321 U.S. 414 (1944) (No. 375).

251. See *id.* at 8–22.

latitude while granting its regulations the force of law, without adequate judicial review. The meat dealers also pointed out that OPA's "statement of considerations" involved no actual findings of fact; the considerations were mere statements of opinion parroting the language of the statute.²⁵² The Act provided no means of guaranteeing that cases would "be decided according to evidence and the law, rather than arbitrarily or from extra-legal considerations."²⁵³ Invoking *Marbury*, the meat dealers urged that "the court has not only the power but the [constitutional] duty to say what the law is."²⁵⁴

The petitioners presented the Supreme Court with several alternative lines of arguments. They argued that the district court could at least consider whether the price regulation was really promulgated "under" Section 2 of the Act, and therefore within the scope of Section 204(d).²⁵⁵ Alternatively, 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.²⁵⁶ However, the petitioners continued, if the court concluded that Congress *had* intended that result, Congress had violated Article III.²⁵⁷ 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.²⁵⁸

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 in an enforcement proceeding.²⁵⁹ This was necessary, he argued, "to safeguard the nation against the perils which inhere in de-

252. *Id.* at 32–33.

253. *Id.* at 28–29.

254. *Id.* at 25.

255. *Id.* at 6, 33–34.

256. *Id.* at 7, 48.

257. *Id.* at 60–63,

258. *Id.* at 64.

259. Brief for the United States at 16, *Yakus v. United States*, 321 U.S. 414 (1944) (Nos. 374, 375) ("The defendant may not . . . raise any defense addressed to the validity of the regulation . . .").

lay, premature interruption, or nonuniform application of inflation controls in wartime."²⁶⁰ His merits brief began with a long discussion of why price controls were "a matter of the most urgent necessity for a nation at war today."²⁶¹ The serious dangers of runaway inflation created a need for "expeditious . . . regulation."²⁶² Appealing to the New Deal Court's conception of the "administrative process," Fahy argued that the EPCA's administrative mechanisms served the need for continuous regulation, for simplified enforcement and expert review, and for administrative flexibility.²⁶³ Moreover, Al Yakus had merely "chosen" to forego the EPCA's "orderly" procedure and "invited criminal prosecutions."²⁶⁴ If everyone shared Yakus's disregard for the administrative procedure that Congress had enacted, Fahy urged, "the price control program would collapse."²⁶⁵

Fahy then defended Section 204(d) as constitutional. He argued that the provision plainly served the need of

ensuring well-advised judicial consideration, uniformity of judgment, and due reliance on a proper administrative record, in determining the complex questions presented by a challenge to a price regulation; and by ensuring that persons who disregard the statutory opportunities for review will not be permitted to convert prosecutions for violation of price ceilings into controversies resembling peacetime rate litigation.²⁶⁶

Echoing Professor Nathanson,²⁶⁷ Fahy argued that the validity of Section 204(d) was "fortified by established principles of administrative law."²⁶⁸ The defendants' inability to challenge the regulation, he argued, was "a normal consequence of their failure to exhaust their administrative remedies."²⁶⁹ The present

260. *Id.* at 25.

261. *Id.*

262. *Id.* at 27.

263. *Id.* at 25–34.

264. *Id.* at 33.

265. *Id.* at 34.

266. *Id.* at 35.

267. See *supra* note 153 and accompanying text.

268. See Brief for the United States, *supra* note 259, at 36.

269. *Id.*

challenge was simply a “collateral attack” that had to be rejected under *Bethlehem Steel*.²⁷⁰ Moreover, lower courts had previously upheld similar administrative arrangements against due process challenges.²⁷¹

Next, Fahy argued that the Act’s provision denying the courts the power to stay enforcement proceedings or to issue interlocutory injunctions was also constitutional.²⁷² Fahy questioned Yakus’s standing to attack the stay provisions and urged that congressional limitations on the court’s equity power in the public interest were unexceptional, citing precedents.²⁷³ Moreover, Fahy argued—now following Freund²⁷⁴—that *Ex Parte Young* and its progeny 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 their property.²⁷⁵

Fahy’s brief devoted few pages to the delegation issue. In 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 to support a delegation.²⁷⁶

2. *The Court Decides*

Barely a week before oral argument in *Yakus*, the Supreme Court released an opinion that further undermined the meat dealers’ position. In *Falbo v. United States*,²⁷⁷ the Court upheld

270. *Id.*

271. *Id.* at 38–39. This portion of the brief misstated the law. The most analogous case cited by the Solicitor General was *United States v. Vacuum Oil Co.*, 158 F. 536 (W.D.N.Y. 1908) (construing the Elkins Act to deprive a shipper of the right to contest a filed rate in a criminal prosecution and upholding the statute against a due process challenge). However, as the district court had stressed in that case, the shipper could still seek to enjoin the rates and sue the railroads for damages. *Id.* at 540.

272. Brief for the United States, *supra* note 259, at 44.

273. *See id.* at 45–56.

274. *See supra* note 155 and accompanying text.

275. Brief for the United States, *supra* note 259, at 59.

276. *See id.* at 63–71.

277. 320 U.S. 549 (1944).

the conviction of a Jehovah's Witness for resisting an order to report for duty under the Selective Training and Service Act of 1940.²⁷⁸ 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. The Supreme Court held that Congress had foreclosed Falbo's defense (while leaving open the possibility of habeas corpus review).²⁷⁹ Alongside *Hirabayashi v. United States*,²⁸⁰ *Falbo* was the only precedent supporting the Government's position that Congress could foreclose a defense of invalidity in a suit to enforce an administrative order. With that, the stage was set for *Yakus v. United States*.

We have been unable to locate a transcript or account of the oral argument.²⁸¹ 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 six to three. Chief Justice Stone wrote for the Court. Justices Roberts, Murphy, and Rutledge dissented.

3. *The Majority Opinion*

The majority opinion, expertly crafted by Chief Justice Stone, made the EPCA seem entirely unexceptional. Brushing aside the petitioners' (and the dissenters') explanation that the administrative process was a charade, the majority opinion assumed a posture of extreme deference: "[W]e cannot assume," "we cannot pass upon," and "we cannot say," the Court reiterated throughout, that OPA would have declined to afford relief—if only the petitioners had filed a protest.²⁸² However, the Court's attempt to make *Yakus* look like a routine case over the exhaustion of administrative remedies barely disguises the bolder, bare-knuckles aspects of the majority opinion.

278. *Id.* at 555.

279. *Id.* at 554–55. In a later, post-*Yakus* case, the Supreme Court limited its holding in *Falbo* to exhaustion and allowed Jehovah's Witnesses to raise the invalidity of an induction board's order as a defense. *Estep v. United States*, 327 U.S. 114, 123 (1946).

280. 320 U.S. 81 (1943).

281. The Library of Congress does not have a transcript of the oral argument, and no transcript is available in the Gale online collection or in the Supreme Court Library.

282. *Yakus v. United States*, 321 U.S. 414, 434, 436, 438, 439, 440 n.7 (1944).

The first noteworthy feature is the Court's treatment of the wartime nature of the EPCA. Draconian statutes enacted during wartime, and judicial decisions that uphold or enforce them, pose a danger that one-off responses to a dire emergency might become the new normal. *Yakus* presented that problem in sharp relief. Moreover, the Government, while emphasizing the overriding need for an administrative apparatus adequate to the challenges of war, subtly worked to suggest that war was simply a particularly stark example of the sort of real-world challenges that administrators must be prepared to meet and conquer at all times. 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 review, and administrative flexibility—the rationales which the Government invoked in defense of the EPCA²⁸³ and which the majority opinion embraced. Justice Roberts's dissent articulated the fear that the Court's reasoning in support of the EPCA might come to stand as law for all times.²⁸⁴ Not one word in the majority's opinion disavows that proposition. Chief Justice Stone's opinion refers to the exigencies of war several times—in each instance, as a warrant for the statute, but never as a limit on the precedential scope of the Court's ruling.²⁸⁵

A second striking feature of the majority opinion is its rhetorical evasion of the precise question presented by the case. At the end of the day, Albert Yakus had one central claim: before a citizen may be sent to jail for violating a generally applicable rule of private conduct originating in an administrative agency, that person must have some effective means of testing, in an independent court, the validity of that rule vis-a-vis the congressionally enacted statute said to authorize it. The claim can be viewed from multiple perspectives. It can be said that a violation of this proposition unconstitutionally empowers agen-

283. See *supra* note 263 and accompanying text.

284. *Yakus*, 321 U.S. at 459–460 (Roberts, J., dissenting).

285. *Id.* at 419–20, 422–23, 431–32, 435, 439, 441–43 (majority opinion). In this regard, *Yakus* differs from the Japanese internment cases, which struggle to insist that exceptional wartime measures might well be unacceptable under peacetime conditions. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 223 (1944); *Hirabayashi*, 320 U.S. at 101.

cies (a non-delegation framing); or that it unconstitutionally eviscerates judicial review (an Article III or separation-of-powers framing); or that it unconstitutionally subjects citizens to arbitrary, tyrannical government (a due-process framing). But however one frames the problem, the basic rule of law problem of pure executive regulation remains.

Against this backdrop, the most jarring feature of the majority opinion, bearing directly on the contention of this Article, is the majority's acceptance of the EPCA's and the Government's disaggregation strategy. Where the dissenters—in different ways—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 that disconnected the inquiry from any systematic constitutional perspective: (1) delegation; (2) the interpretation of 204(d); (3) due process; and (4) the Sixth Amendment and the judicial power of the United States.

The Chief Justice began by noting that the Act appropriately channeled the Administrator's discretion toward the goal of avoiding inflation and its consequences.²⁸⁶ The means of "maximum price fixing" were constrained,²⁸⁷ and the Act's standards were "sufficiently definite and precise"—when considered together with "the 'statement of the considerations' required to be made by the Administrator"—to satisfy the non-delegation doctrine.²⁸⁸ The opinion also distinguished *Schechter* on the ground that *Schechter* involved a delegation "to private individuals engaged in the industries to be regulated."²⁸⁹ That is untenable.²⁹⁰ The true distinction, noted in Justice Roberts's dis-

286. See *Yakus*, 321 U.S. at 423.

287. *Id.*

288. *Id.* at 426.

289. *Id.* at 424. The *Schechter* paragraph was added—to the delight of Justice Frankfurter—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).

290. Chief Justice Stone's argument deliberately misread *Schechter*. It could not be "seriously contended," the *Schechter* Court had written, that Congress could delegate legislative authority to a 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 Corp. v. United States*, 295 U.S. 495, 537 (1935) (emphasis added).

sent,²⁹¹ was that the majority had denuded the non-delegation doctrine of its context and reduced it to a toothless “intelligible principle” test.²⁹²

Chief Justice Stone dealt swiftly with the question of whether Section 204(d) prohibited the courts from questioning the validity of a regulation in an enforcement proceeding.²⁹³ The text of 204(d) should be interpreted literally, “at least” before a regulation was held invalid by the Emergency Court.²⁹⁴ The qualifying phrase allowed 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 odds, that such a ruling might materialize someday.

Chief Justice Stone then proceeded to consider whether the EPCA violated due process. When the EPCA was enacted, he noted, “it was common knowledge” that “there was a grave danger of wartime inflation and the disorganization of our economy from excessive prices.”²⁹⁵ 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.”²⁹⁶ Because the meat dealers had failed to exhaust their administrative remedies, Chief Justice Stone continued, “we cannot assume” that they would have been convicted without legal redress if they had filed a protest.²⁹⁷ “Only if we could say in advance of resort to the statutory procedure that it is incapable of affording due process to petitioners,” the majority explained, “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.”²⁹⁸ In this case, it was at least conceivable that the

291. See *infra* note 310 and accompanying text.

292. *Yakus* is cited for that proposition to this day. See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001).

293. *Yakus*, 321 U.S. at 429–430.

294. *Id.* at 430–431.

295. *Id.* at 432.

296. *Id.* at 434.

297. *Id.*

298. *Id.* at 435.

Emergency Court could enter a final judgment on the legality of Rule 169 before the Government secured a conviction.

In stipulating this chain of events, the opinion ignored reality.²⁹⁹ The majority's position is that due process *in a criminal prosecution* is satisfied by any administrative procedure that *might* provide relief under some conceivable set of circumstances, even when the effectiveness of that procedure is concededly left to the agency's well-nigh unreviewable discretion. Proceeding from that premise, the majority hacked through the 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.³⁰⁰ Moreover, said the Court, the Act's splintering of enforcement proceedings from regulatory challenges "presents no novel constitutional issue."³⁰¹ The Court recognized

no principle of law or provision of the Constitution . . . which precludes the practice, in many ways desirable, of splitting the trial for violations of an administrative regulation by committing the determination of the issue of its validity to the agency which created it, and the issue of violation to a court which is given jurisdiction to punish violations.³⁰²

To support its proposition that this feature presented no "novel" question, the Court relied on administrative schemes like the Hepburn Act, the Packers and Stockyards Act, and the Radio Act of 1927, which (it argued) also barred defenses to administrative orders when the defendant failed to avail itself of the administrative process.³⁰³ The analogy to these peacetime

299. Even conceding the majority's exhaustion rationale, the result "was a harsh one toward the extremely numerous small enterprises which might be affected and, realistically, might not have had an opportunity to invoke the prescribed remedies." Fuchs, *supra* note 136, at 877.

300. *Yakus*, 321 U.S. at 443-444. Chief Justice Stone exaggerated. The statutes he cited imposed penalties only *after* a special proceeding, conducted through a formal hearing process followed by immediate judicial review. *See id.* at 473-74 (Rutledge, J., dissenting); *see also* *Wadley S. Ry. Co. v. Georgia*, 235 U.S. 651, 667 (1915) ("There is no room to doubt the power of the state to impose a punishment heavy enough to secure obedience to such orders *after* they have been found to be lawful" (emphasis added)).

301. *Yakus*, 321 U.S. at 444.

302. *Id.*

303. *Id.* at 445-47.

administrative schemes, the Court said, was “complete and obvious.”³⁰⁴ As Justice Rutledge argued in dissent, however, none of those statutes presented quite the combination of devices at issue in *Yakus*. In fact, the Supreme Court had never decided a case that squarely presented the “due process” question presented in *Yakus*.³⁰⁵

Chief Justice Stone distinguished *Ex Parte Young* by (again) 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.”³⁰⁶ This was not a fair account of the situation: on any realistic account, the meat dealers had no adequate legal remedy. Never mind: “we cannot assume that [OPA]” would decline to “suspend or ameliorate the operation of a regulation during the pendency of proceedings to determine its validity.”³⁰⁷ In this fashion, the majority rejected a due process challenge on the assumption that OPA could exercise a dispensing power it had plainly declined to exercise in the case under review.³⁰⁸

4. *The Dissents*

Two separate dissents in *Yakus* present differing responses to the majority’s opinion. Justice Owen Roberts, the lone holdover from a Republican administration, mounted a last stand in defense of the old order. The purported standards to guide OPA’s discretion, Justice Roberts pointed out, were broad enough to allow the Administrator to adopt “any conceivable policy.”³⁰⁹ By upholding OPA’s roving commission to control prices, Justice Roberts wrote, the majority had effectively overruled *Schechter*.³¹⁰ Moreover, the broad delegation of power, when

304. *Id.* at 446.

305. *Id.* at 476–77 & n.33 (Rutledge, J., dissenting).

306. *Id.* at 438 (majority opinion).

307. *Id.* at 438 (emphasis added).

308. OPA lawyers would later criticize this holding. See Hyman & Nathanson, *supra* note 3, at 590 n.18 (arguing that a “more realistic answer would seem to lie in the nature of the emergency that the statute was designed to meet.”).

309. *Yakus*, 321 U.S. at 451 (Roberts, J., dissenting).

310. *Id.* at 452.

combined with the Act's procedures and judicial review provisions, was

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.³¹¹

In his closing paragraphs, Justice Roberts bitterly protested the majority's failure to limit its holding to Congress's war powers.³¹²

Justice Rutledge's dissent, joined by Justice Murphy, was more ambivalent. In a crucial passage, Justice Rutledge stated:

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 [W]henver the judicial power is called into play, it is 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.³¹³

Crowell v. Benson would be a perfectly fine cite here: by its terms, the quoted passage echoes the themes of the "supremacy of the law" jurisprudence.³¹⁴ Even so, Justice Rutledge was prepared to concede that "Congress [may], by offering the individual a single chance to challenge a law or an order, foreclose for him all further opportunity to question it, though requiring the courts to enforce it."³¹⁵ In civil proceedings, he

311. *Id.* at 458.

312. *Id.* at 459-460.

313. *Id.* at 468 (Rutledge, J., dissenting).

314. *Cf.* *Crowell v. Benson*, 285 U.S. 22, 62 (1932). Like the *Crowell* opinion, Justice Rutledge's *Yakus* dissent viewed due process and judicial independence as two sides of the same coin. A surrender of the constitutional baseline threatens both government overreach and judicial contamination.

315. *Yakus*, 321 U.S. at 471 (Rutledge, J., dissenting).

argued, Congress could compel enforcing courts to automatically enforce regulations in most circumstances, as long as the regulation was not “invalid on its face.”³¹⁶ In other words, the result in *Yakus* would have been constitutionally permissible, even perhaps in times of peace, if only OPA had refrained from sending *Yakus* to jail and instead sought civil penalties. Justice Rutledge even conceded that Congress could require courts to enforce regulations without regard to their validity in criminal cases—provided that “the special proceeding is clearly adequate, affording the usual rights to present evidence, cross-examine, and make argument, characteristic of judicial proceedings” and provided that the opportunity for an administrative appeal is “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.”³¹⁷ In short, the supremacy of the law could be largely replaced with administrative process in civil cases, and maybe even in criminal cases too.

For all its diffidence, Justice Rutledge’s dissent persuaded Congress to amend the EPCA’s administrative procedures.³¹⁸ The Stabilization Extension Act of 1944, enacted on June 30, 1944, extended price controls for a year.³¹⁹ But the law included several new procedural safeguards. It allowed courts to stay enforcement proceedings until the regulation was reviewed by the Emergency Court, provided that the invalidity of a regulation would be an absolute defense, eliminated the 60-day time limit to file a protest, and provided a mandamus action for undue delay.³²⁰ Congress also required OPA to conduct formal adjudications before promulgating a regulation, “a provision

316. *Bowles v. Willingham*, 321 U.S. 503, 526 (1944) (Rutledge, J., concurring). In this companion case decided on the same day as *Yakus*, 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. *Id.* at 525–26.

317. *Yakus*, 321 U.S. at 489 & n.41 (Rutledge, J., dissenting). Rutledge added the note on March 24, 1944, 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 file with authors).

318. *MANSFIELD ET AL.*, *supra* note 93, at 277–78.

319. Stabilization Extension Act of 1944, Pub. L. No. 383, 58 Stat. 632.

320. *MANSFIELD ET AL.*, *supra* note 93, at 277–78.

that anticipated in effect one of the features of the Administrative Procedure Act of 1946."³²¹ This belated recognition of rule-of-law concerns, it seems safe to say, casts doubt on the administration's full-throated defense of the original EPCA and on the *Yakus* Court's embrace of that position: was all that *really* necessary?

E. *And in the End*

On June 21, 1944, almost three months after *Yakus* was decided, OPA denied the renewed protests filed by the meat industry.³²² The Emergency Court did not hear any of the protests on the merits of Rule 169 until October 1944, several months after the Supreme Court had upheld the conviction in *Yakus*, and it did not decide the merits of the independent packers' challenge to the regulation until 1945, when the war was all but over.³²³ 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*.³²⁴

After years of delay, independent packers and slaughterers petitioned the Supreme Court for review. Justice Roberts was proven right: given the EPCA's breadth and rudimentary procedures, the meat packers had no chance of showing in any judicial forum, let alone on a petition for discretionary Supreme Court review, that OPA had exceeded its delegated authority.³²⁵ The Supreme Court denied certiorari.³²⁶

By that time, all was over but the shouting. In June 1945, Congress responded to the industry's plight by requiring the Price Administrator to assure a fair profit on the processing of

321. *Id.* at 278. The formal adjudication procedure was applicable only to aggrieved parties filing a protest after September 1, 1944. *Id.*

322. *Id.*

323. *Heinz v. Bowles*, 149 F.2d 277, 281 (Emer. Ct. App. 1945).

324. *See Rottenberg v. United States*, 137 F.2d 850, 851 (1st Cir. 1943).

325. *See Yakus v. United States*, 321 U.S. 414, 458–59 (1943) (Roberts, J., dissenting) (“[N]o court is competent, on a mass of economic opinion consisting of studies by subordinates of the Administrator . . . to demonstrate beyond doubt, that the considerations and conclusions of the Administrator from such material cannot support the Administrator’s judgment . . . but a few of the stated purposes of the act.”).

326. *E. Kahn’s Sons Co. v. Bowles*, 326 U.S. 719 (1945).

each species of livestock.³²⁷ This overturned the “critical” industry earnings standard “which had been so long fought for” by OPA.³²⁸ In November 1945, wartime rationing came to an end, and the sense of shared sacrifice that had sustained OPA during the war quickly dissipated before the “more focused opposition” of the meat industry.³²⁹ In time for the November elections, President Truman deregulated meat.³³⁰ But Democrats paid a political price for the meat shortages: during the “beefsteak elections” of 1946, Republicans took control of Congress for the first time in sixteen years.³³¹

IV. CONCLUDING REMARKS: THE LEGACY AND LESSONS OF *YAKUS*

Why should administrative lawyers and legal scholars care about *Yakus v. United States*? The case has generated neither copious Supreme Court citations nor sustained scholarly discussion. Its specific holdings regarding the exhaustion of administrative remedies and review preclusion bear no comparison to contemporary, foundational administrative law decisions, from *Seminole Rock*³³² to *Chenery*.³³³ And the procedural deficiencies that were ignored so cavalierly in *Yakus* were soon addressed by Congress—first in the 1945 amendments to the EPCA and then in the APA, whose administrative procedures and judicial review provisions afford regulated parties a fair measure of protection. One can even argue that the seemingly troublesome holding of *Yakus* makes perfect sense in an administrative system that has come to operate principally through informal rulemaking. Modern-day notice-and-comment proceedings are subject to elaborate procedural protections, and pre-enforcement review—a rough substitute for the *Ex Parte Young* relief denied in *Lockerty* and *Yakus*—is a

327. See *Danz v. Reconstruction Fin. Corp.*, 192 F.2d 1012, 1012–13 (Emer. Ct. App. 1952) (discussing the amendment).

328. Hyman & Nathanson, *supra* note 3, at 625 & n.107.

329. Jacobs, *supra* note 104, at 934.

330. Hyman & Nathanson, *supra* note 3, at 627.

331. Emelyn Rude, *The “Beefsteak Election”: When Meat Changed the Course of American Politics*, TIME (Aug. 30, 2016), <https://www.time.com/4471656/the-beefsteak-election/> [<https://perma.cc/3B5J-EH9B>].

332. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

333. *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

well-nigh foregone conclusion in any significant rulemaking proceeding. It is hard to see how that system could achieve bureaucratic rationality, uniform application, and stability *without* precluding subsequent collateral attacks in district courts.³³⁴ Viewed in that light, *Yakus* may be foundational in a good sense—blissfully ahead of its time, perhaps, in anticipating the demands of the regulatory state.

Our own view is not quite so sanguine. The EPCA, we hope to have shown, was a full-blown embodiment of a constitutionally unconstrained administrative state, and *Yakus* was quite arguably the most fulsome judicial endorsement of that vision. Our remarks in this Part concern that forgotten—but, we think, nonetheless foundational—aspect of the case. Subpart A describes what one might call, with apologies to Professor Henry Hart, *Yakus*'s true Dialectic:³³⁵ precisely because *Yakus* affirmatively laid to rest then-still-lingering notions of the supremacy of the law, the case itself receded from memory. It remained forgotten so long as, and again because, the basic constitutional presumptions of post-New Deal administrative law remained largely uncontested. Of late, however, those presumptions have become the subject of a vibrant and occasionally heated administrative law debate that resonates with supremacy-of-the-law themes last articulated in the 1930s.³³⁶ Subpart B sketches our thoughts on *Yakus*'s lessons in the context of that debate.

A. *Yakus v. United States: Dialectics*

The story of *Yakus*, we trust, leaves a sense of unease. In part, the discomfort stems from the gut sense that this should not have happened to Al Yakus. But that sentiment does not carry very far. Bad things happen to lots of good people in wartime, and while the meat dealers' fate was undoubtedly harsh, it is

334. Statutory law reflects this intuition. See, e.g., 33 U.S.C. § 1369(b)(2) (2012); 42 U.S.C. § 7607(b)(2); *id.* § 9613(a) (precluding judicial review of agency action in enforcement suits).

335. Cf. Henry Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953) (discussed *infra* Part IV.A).

336. See generally Gillian E. Metzger, *Foreword: 1930's Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

hardly the stuff of *Korematsu*³³⁷ or *Ex Parte Quirin*.³³⁸ The true source of discomfort—ours, at any rate—is that *Yakus* runs up very hard against basic constitutional precepts. Before we deprive citizens of their rights (and send them to jail), they must have a chance to contest the validity of the rule under which they are being convicted in an independent court. Professor Henry Hart—a former OPA attorney—confronted the problem in his famous *Dialectic*. Show me a case, he wrote, that abrogates that principle, “and I will rethink *Marbury*.”³³⁹ And to Hart’s mind, *Yakus* was an exceedingly close case.

There are several ways to address *Yakus*’s *Marbury* problem. The first, most obvious option is to park the EPCA and *Yakus* in a wartime exception corner. Henry Hart flirted with that interpretation³⁴⁰ but did not rely on it, for reasons that strike us as convincing. A big difference exists between a wartime statute or decision—a *genuine* emergency measure, recognized as such—and a statute or decision that uses war as a pretext to realize broader political ambitions. The EPCA and *Yakus* fit the latter description. The EPCA was a reenactment of the National Industrial Recovery Act, and *Yakus* was a replay of *Schechter*. Wartime exigencies merely served to lend added plausibility to the New Deal’s legal positions.³⁴¹

A second way of dealing with *Yakus* is to evade the constitutional difficulties. That move is exemplified by *Adamo Wrecking Co. v. United States*,³⁴² the only Supreme Court decision to feature any meaningful discussion of the case. *Adamo Wrecking*

337. *Korematsu v. United States*, 323 U.S. 214 (1944).

338. 317 U.S. 1 (1942).

339. Cf. Hart, *supra* note 335, at 1378–79 (“Name me a single Supreme Court case that has squarely held that, in a civil enforcement proceeding, questions of law can be validly withdrawn from the consideration of the enforcement court where no adequate opportunity to have them determined by a court has been previously accorded. When you do, I’m going back to re-think *Marbury v. Madison*.”).

340. *Id.* at 1379–80 (*Yakus* sanctioned departures from due process “only because an alternative procedure had been provided which, in the exigencies of the national situation, the Court found to be adequate.” (emphasis added)).

341. See *supra*, notes 103, 283–85 and accompanying text. *Ex post* evidence supports our interpretation. Even before the case was overturned in *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018), the United States government never relied on *Korematsu*. It relies on *Ex Parte Quirin* only *in extremis*. It relies on *Yakus* all the time, with no concession to wartime exigencies.

342. 434 U.S. 275 (1978).

concerned a Clean Air Act provision that requires parties to bring pre-enforcement challenges to certain emission standards within sixty days and, with a narrow exception, bars judicial review thereafter.³⁴³ The defendant in *Adamo Wrecking* argued that the regulation under which it had been prosecuted was not actually an “emission standard” subject to the preclusion provision. Chief Justice Rehnquist’s majority opinion deemed the 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.³⁴⁴ The Clean Air Act, by contrast, permitted a challenge—and *de novo* review—on the question of whether the underlying regulation was in fact an emission standard (but not on any other question).³⁴⁵ Four dissenters took issue with the majority’s artful statutory reconstruction.³⁴⁶ But neither they nor the majority intimated that an across-the-board preclusion of review might pose constitutional problems. Only Justice Powell’s brief concurrence adverted to the due process issue—and, predictably, proposed to distinguish *Yakus* as a wartime case.³⁴⁷

The third way of dealing with the uncomfortable teaching of *Yakus* is to read it as it as case about the exhaustion of remedies: there *was* a process, if only the defendants had used it. That, in the end, was Henry Hart’s answer.³⁴⁸ To our minds, it is not a convincing answer. Put aside any quarrels over Hart’s contention that constitutional minima are satisfied so long as some court in the United States remains open. Put aside, too, the fact that even the EPCA’s procedural charade evidently measured up to Hart’s standard of “adequacy”: the plausibility

343. 42 U.S.C. § 7607(b) (2012).

344. *Adamo Wrecking*, 434 U.S. at 278.

345. *Id.* at 284–85.

346. *Id.* at 291 (Stewart J., dissenting); *id.* at 293 (Stevens, J., dissenting).

347. *Id.* at 290–91 (Powell, J., concurring); see also *United States v. Mendoza-Lopez*, 481 U.S. 828, 838 n.15 (1987) (*Yakus* “was motivated by the exigencies of wartime . . . and, most significantly, turned on the fact that adequate judicial review of the validity of the regulation was available in another forum.”). More recently, Justice Alito questioned in oral argument whether *Yakus* “would be decided the same way today and not in wartime” and suggested that *Yakus* is troubling on due process grounds. Transcript of Oral Argument at 50, *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, No. 17-1705 (U.S. Mar. 25, 2019).

348. Hart, *supra* note 335, at 1369.

of his view depends on an a-contextual, compartmentalized view of constitutional constraints. For a ready example, it is one thing for Congress to withhold federal court jurisdiction or for that matter “adequate” administrative procedures in matters of “public” right, for an agency that is tightly controlled by legislative rules. It is a very different thing to dispense with judicial controls over an agency with roving rulemaking and enforcement authority over the entire economy.³⁴⁹ For an equally ready example, it is one thing to preclude effective judicial review, or for that matter to demand the exhaustion of chimerical administrative procedures. It is a very different thing to *then* mobilize the federal courts for enforcement purposes.³⁵⁰ In short, the plausibility of viewing *Yakus* as a mere exhaustion case hangs on one’s willingness to splinter and so to marginalize “supremacy-of-law” notions, the better to make way for a virtually unconstrained administrative process.

To be sure: *Yakus* is not the only case to reflect that program and orientation. However, the case was widely recognized as emblematic by numerous leading scholars, including the founders of the then-emerging disciplines of Administrative Law and Federal Courts scholarship. Early casebooks and treatises place *Yakus* at the heart of the administrative law enterprise and discuss it prominently.³⁵¹ Writing in 1951, for example, Professor Kenneth Culp Davis looked back on the “supremacy of law” period, when “some writers . . . tried unsuccessfully to confine administrative power through a concept called ‘the rule of law.’”³⁵² Professor Davis’s treatise celebrated the passing of that “old” administrative law—“limited” as it was to judicial review, “with concentration on the separation of

349. See *Yakus*, 321 U.S. 414, 451–52 (1944) (Roberts, J., dissenting).

350. See *id.* at 468 (Rutledge, J., dissenting).

351. See DAVIS, *supra* note 54, §§ 12, 68, 91, 179, 190; WALTER GELLHORN, ADMINISTRATIVE LAW: CASES AND COMMENTS 142–151, 812 (2d ed. 1947) (excerpting and discussing *Yakus*); WALTER GELLHORN & CLARK BYSE, ADMINISTRATIVE LAW: CASES AND COMMENTS 99–101, 747–55 (3d ed. 1954) (excerpting and prominently discussing *Yakus* and *Willingham* as delegation and due process cases); LOUIS L. JAFFE & NATHANIEL L. NATHANSON, ADMINISTRATIVE LAW: CASES AND MATERIALS 34–48, 72–74, 107–139, 761, 906–909 (4th ed. 1976); ROBINSON & GELLHORN, *supra* note 54, 67–106 (prominently discussing and excerpting *Yakus* and the doctrines at issue in the case).

352. See DAVIS, *supra* note 54, § 8.

powers and non-delegation." In lieu of the separation of powers, administrative law could now focus "upon the administrative process itself."³⁵³ That view is manifestly inconsistent with constitutionally grounded doctrines of administrative law.³⁵⁴ If the "administrative process itself" is to become the core of the enterprise, the constitutional doctrines must be severed and marginalized. The EPCA's architects and defenders saw the point, and the *Yakus* Court embraced it. And precisely because their vision triumphed so completely, *Yakus* eventually receded from the legal debate and the case law.

Professor Adrian Vermeule has recounted this dialectic in an ambitious, often compelling book.³⁵⁵ His examination begins where this Article began, many pages ago: with the jurisprudence at the dawn of the New Deal, and *Crowell v. Benson* in particular. Though limited to questions of pure fact, Vermeule argues, the judicial deference embraced by the *Crowell* Court proved the undoing of a constitutionally grounded framework of administrative law.³⁵⁶ *Crowell* made room for administrative discretion for compelling reasons, including the commission's fact-finding expertise and the economy of the overall administrative system.³⁵⁷ The question then becomes how much courts can in the end contribute to administrative rationality and the smooth functioning of the system, and the answer is, not a great deal.³⁵⁸ Over time, law "abnegated" and gave way to deference—first on "mixed" questions of law and fact; then on questions of law and, eventually, even on questions of the agency's jurisdiction. Law in a formal and constitutional sense became marginal, both in the colloquial sense of "not very im-

353. *Id.* § 1; see also JAFFE & NATHANSON, *supra* note 351, at 1 ("[O]ur 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.").

354. DICKINSON, *supra* note 23, at 75.

355. VERMEULE, *supra* note 24.

356. *Id.* at 28–29, 214.

357. *Id.* at 24.

358. The *Crowell* Court, Professor Vermeule observes, already thought in such "marginalist" terms (except when it did not). Following David Currie, Vermeule describes *Crowell* as "schizophrenic." *Id.* at 28, 214. While that may be a tad harsh, some of Chief Justice Hughes's rule-of-law encomia do read like a dissent from the more "marginalist" portions of his opinion.

portant” and in the sense of operating as an outer boundary rather than an organizing principle.³⁵⁹

On Professor Vermeule’s own account, *Yakus* marks a milestone in the marginalization of constitutionally grounded doctrines of administrative law.³⁶⁰ Our microlevel analysis complements and qualifies the author’s account in one respect and rounds it in another. Whereas Professor Vermeule describes the trajectory just sketched as a self-driven, “internal” process of “abnegation,” our ground-level analysis shows real-world actors at work; and the EPCA and the *Yakus* case appear as an important moment of purposeful administrative state-building, not just an inflection point on “the arc of the law.”³⁶¹ And whereas Professor Vermeule describes the marginalization of rule-of-law constraints as a one-dimensional, law-versus-deference affair, we have described “law” at the time of *Crowell* as an “elaborate structure,” buttressed by constitutionally-based, interconnected “outworks.”³⁶² So long as the outworks remained connected, they were capable of bending without breaking. Isolate the “outworks”: they lose their purpose and the prospect of mutual reinforcement. That, we have argued at length, was the genius of *Yakus*—the deliberate splintering of legal doctrines that, in the supremacy-of-law imagination, belonged together: the separation of powers, delegation, due process, judicial review. Conjoin those elements: there is no very good answer to Justice Owen Roberts’s dissent in *Yakus*. Pull them apart: there is no very good answer to Chief Justice Stone’s majority opinion, or for that matter to Henry Hart’s *Dialectic*.

B. *The Lessons, Perhaps, of Yakus*

What ensured *Yakus*’s descent into a legal memory hole, we have just suggested, is the broad acceptance of its premises or perhaps better, its vision of an effectively unconstrained administrative process. But that consensus has been shaken. Long accepted administrative law canons, including *Chevron* defer-

359. *Id.* at 7.

360. *Id.* at 44–45.

361. *Cf. id.*, at 2.

362. *Supra* Part I.

ence, have become intensely controversial.³⁶³ The rise of an executive-led government and the corresponding decline of the powers of Congress have likewise sparked intense debate.³⁶⁴ Expansive delegations of legislative powers, coupled with highly deferential judicial review and increasingly “unorthodox” forms of lawmaking and regulation,³⁶⁵ have prompted scholars from diametrically opposed vantages to argue that administrative law is an unlawful break with constitutional government,³⁶⁶ or a thin veneer of law for an essentially “Schmittian” state above and beyond effective legal control.³⁶⁷ Even scholars who resist such dramatic claims have noted the improvisational nature of administrative law and called for a “constitutional reassessment.”³⁶⁸ Those scholarly contentions, moreover, are hardly academic; they have spilled over into judicial decisions and into the public debate.³⁶⁹ What, in that context, is one to make of, or learn from, *Yakus v. United States*?

For defenders of the administrative project, *Yakus* need not cause any great consternation. The *Dialectic* shows the way; and whatever misgivings one might have about the EPCA’s bare-bones procedures, they were soon supplemented and remedied, first by statutory amendments to the act and then by the APA. What remains to be done is what Professor Vermeule has done with commendable candor: face up to the case and its implications.³⁷⁰

363. See Kristin Hickman & Nicholas R. Bednar, *Chevron’s Inevitability*, 85 GEO. WASH. L. REV. 101, 125–26 (2017) (noting recent calls to overrule *Chevron*).

364. See, e.g., BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 4–12 (2010); Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953 (2016); Christopher C. DeMuth, *Can the Administrative State Be Tamed?* 8 JOURNAL OF LEGAL ANALYSIS 121 (2016).

365. See Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789 (2015).

366. See HAMBURGER, *supra* note 26.

367. Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1096 (2009).

368. Robert R. Gasaway & Ashley C. Parrish, *Administrative Law in Flux: An Opportunity for Constitutional Reassessment*, 24 GEO. MASON L. REV. 392 (2017).

369. See Metzger, *supra* note 336, at 3–4 (criticizing contemporary “anti-administrativism”); Cass Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41, 47–54 (discussing these judicial opinions).

370. VERMEULE, *supra* note 24, at 44–45.

We are less confident about *Yakus's* lessons for “anti-administrativists”³⁷¹—a camp that (for present purposes) we take to include not only declared foes of “the administrative state” but also and especially more diffident scholars who are uneasy about an enterprise that is poorly constrained by constitutionally unmoored, pragmatically improvised doctrines. But we do suggest that the case should prompt deeper thought about fundamental questions of administrative law and constitutional government.

In the scholarly literature, attacks on the administrative state and its law have generally taken one of two forms: high-level constitutional argument that declares the entire enterprise unconstitutional and unlawful *ab ovo*;³⁷² or else, attacks on particular doctrines, from *Auer* to *Baltimore Gas* to *Chevron* and on through the alphabet.³⁷³ Neither line of argument seems very plausible, even on the proponents’ own terms. Constitutional formalism’s most formidable proponent in the Administrative Law profession (Gary Lawson) has declared the enterprise effectively hopeless.³⁷⁴ And meliorist proposals for more demanding judicial review—to the extent that they are not simply placeholders for much larger discontents³⁷⁵—meet with Professor Vermeule’s ready reply: judicial deference expanded for perfectly good reasons, including the systemic cost of legalism.³⁷⁶ Thus, we suspect that a program to re-constitutionalize the administrative state cannot rest on grim-faced, uncompromising formalism or modest calls for somewhat less judicial deference. Rather, effective reform would have to build more comprehensively, coherently, and painstakingly on some for-

371. Metzger, *supra* note 336.

372. HAMBURGER, *supra* note 26; Lawson, *supra* note 26.

373. *Auer v. Robbins*, 519 U.S. 452 (1997); *Baltimore Gas & Electric Co. v. NRDC, Inc.*, 462 U.S. 87 (1983); *Chevron U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

374. See Lawson, *supra* note 26.

375. Sunstein & Vermeule, *supra* note 369, at 41–42.

376. See VERMEULE, *supra* note 24, at 209–15. Consistent with Professor Vermeule’s analysis and prediction, we frankly wonder whether the proponents of simply repealing *Chevron* (judicially or by statute) have fully considered the consequences of unleashing the courts on administrative agencies, in circumstances where the judiciary itself is deeply divided over constitutional and jurisprudential first principles. That concern, among others, prompted *Chevron* in the first place.

mula that retains the root aspirations of *Crowell* and *Schechter*, though not necessarily their specific doctrinal teachings—a formula that reconciles the demands of liberal constitutionalism with the inescapable realities of modern government.

If that is roughly right, such a re-articulation will hang on re-connecting the constitutional pieces torn asunder in *Yakus*. That is an exceedingly tall order. It is one thing to describe the conflict of visions between an integrated, structural view of the constitutional world and the slice-and-dice world of *Yakus*. It is much harder to ascertain precisely what—other than a generally shared sense of the legal universe—made the outworks hang together. (“Supremacy of the law” is no answer, only a different way of asking the question.) We suggest that *Yakus* may shed light even on that question.

All *Yakus* and merchants like him engaged in the most quotidian of private transactions: the sale of a basic commodity to willing customers, in a near-atomistic market and with no health or safety concerns anywhere in sight. Under a limited, constitutional government, a prohibition against that conduct—a pristine matter of private, common law right—is an extraordinary thing. It is yet more extraordinary to criminalize the transaction without affording the accused a full and fair defense, including a challenge to the rule under which he is being prosecuted. That, in fact, had been the common constitutional understanding from the Founding to the New Deal.³⁷⁷ In matters of “public right,” Congress may provide such process as it sees fit. In matters of private right, the process must be due process, and that can only be had in an independent court. That intimate connection between rights and structure is still vivid in *Crowell* and *Panama Refining* and *Schechter Poultry*. It gets buried in *Yakus*.³⁷⁸ Without a common baseline of private

377. Nelson, *supra* note 28, at 594–602.

378. We recognize the danger of overstating the point. The notion of private right had always been a mix of common-law background rules and intuitions, and thus somewhat fluid and messy. (Professor Nelson acknowledges the point. *Id.* at 567.) Nothing in the Constitution itself immunizes market transactions *per se*; and by the time of *Yakus*, the Supreme Court had given Congress a very wide berth in subjecting private transactions to public control. It had sanctioned minimum price regulations for products such as milk, *see Nebbia v. New York*, 291 U.S. 502 (1934); minimum wage regulations for ordinary services, *see W. Coast Hotel v. Parrish*, 300 U.S. 379 (1937); and the state cartelization of entire industries, *see Par-*

rights, though, the “outworks of an elaborate structure” are bound to become disconnected: there is nothing to connect them to, or to one another. What remains is an administrative process constrained only by stray remnants of constitutional doctrine that have lost their sense and purpose. At that point, maybe we should rethink *Marbury* after all.³⁷⁹

A few recent judicial opinions have sought to articulate a structural, integrated perspective.³⁸⁰ However, a re-engagement with the pre-*Yakus* body of administrative law cannot be accomplished by private litigants, who will founder on the shoals of doctrinal disjunction and judicial deference. Nor can it be the work of Supreme Court Justices, encumbered as they are by the vagaries of litigation. Rather, any such re-engagement would require a broad, deep, and sustained scholarly debate over the constitutional-administrative middle ground.³⁸¹ And sooner rather than later in that debate, the participants will encounter Albert Yakus.

ker v. Brown, 317 U.S. 341, 355 (1943). Even so, there is something gratuitous and (to our minds unnerving) about *Yakus*. The Court could have found any number of ways of keeping Al Yakus out of jail without thwarting the EPCA’s objective (for example, by staying the prosecution until the relevant rule had actually been subject to pre-enforcement review in the Emergency Court). And it could have found a way of re-articulating essential constitutional requirements (for example, by suggesting that the EPCA might not pass constitutional muster in peacetime). The Court said, and did, no such thing. Instead, the Court characterized the statute as the baseline and the defendants’ contentions as extraordinary and perhaps even extravagant. See *Yakus v. United States*, 321 U.S. 414, 444 (1944).

379. Cf. *supra* note 339 and accompanying text.

380. Justice Thomas in particular has urged a broad re-examination of administrative law in light of first principles. See *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1220 (2015) (Thomas, J., concurring); *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 135 S. Ct. 1225, 1243 (2015) (Thomas, J., concurring); *B & B Hardware, Inc. v. Hargis*, 135 S. Ct. 1293, 1310 (2015) (Thomas, J., dissenting).

381. Important contributions to the scholarly literature point in this direction. See, e.g., Gasaway & Parrish, *supra* note 368 (attempting such a reconciliation and contending that the common law provides an ingenious “adjudicatory baseline” that functions as our legal system’s “benevolent omnipresence on the ground”); Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 NW. U. L. REV. 1569 (2013); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672 (2012).