Realism Revisited: Reaffirming the Centrality of the New Deal in Realist Jurisprudence

Marcus J. Curtis*

INTRODUCTION

Legal realism was arguably the most important jurisprudential movement of the twentieth century. Iconoclastic at its core, it defined itself in opposition to the legal formalism that had dominated American legal thought for much of the preceding century. The academics who led or were otherwise associated with the movement sought to challenge conventional understandings of legal analysis and judicial decision-making—in particular, the idea that the law comprised a closed universe of scientifically-deductible principles that judges only need discover and apply. In the realist view, legal precedent and deductive reasoning were useful not because of their supposed contribution to the order and predictability of the legal system, but because they allowed judges to rationalize legal decisions reached on other grounds. The goal of legal realism was to expose this fiction, free the law from the shackles of precedent and other "scientific" principles, and promote an approach to legal reasoning that would keep the law "more nearly in step with the complex developments of modern life."[1] The fact that jurists today take many realist precepts for granted suggests that the realist movement largely succeeded.

Realism emerged more or less contemporaneously with the New Deal—the series of far-reaching domestic relief measures and economic recovery legislation enacted as part of the Roosevelt Administration's response to

* Yale Law School, J.D. expected 2015.

I thank David Marcus not only for sparking my interest in legal realism, but also for supervising the paper from which this Note originated. His input, feedback and general intellectual guidance were invaluable. I also thank Kristen Bushnell and the editors of the *Yale Journal of Law & the Humanities* for their thoughtful editorial assistance. Finally, I am deeply grateful to Danielle Curtis whose confidence in my work is a source of profound motivation.

1. SUMMARY OF THE STUDIES ON LEGAL EDUCATION BY THE FACULTY OF LAW OF COLUMBIA UNIVERSITY 20 (Herman Oliphant ed., 1928).

the Great Depression.[2] Indeed, many realists took leaves of absence from their academic posts to join the New Deal as administration officials, policymakers, and government lawyers. Other realist scholars remained in academia but worked for the New Deal in an advisory capacity. Temporal and ideational overlap seemed to make realism and the New Deal natural bedfellows.

Despite their contemporaneity, however, the nature of the relationship between realism and the New Deal has been woefully underanalyzed and generally dismissed as exaggerated. There exists in the literature substantial criticism of the claim that realism and the New Deal were closely related. This Note seeks to clarify and refine these existing understandings about the relationship between legal realism and the New Deal, and demonstrate the New Deal's formative role in the development of realist jurisprudence. The core thesis is that the New Deal is central to legal realism and should be used to define it. More specifically, the New Deal legal agenda should be viewed as realism in action—the operational complement to the theoretical exposition provided by realist academics.[3] While the main tenets of realism regarding legal rules and the importance of social realities may have been developed in scholarship primarily focused on private law, it was the deployment of these insights during the New Deal for public law that ultimately rounds out the picture of realist jurisprudence. Thus, a complete understanding of realism can only be achieved by examining the application of realist thought in the context of the New Deal policy agenda.

The literature attacking the "common assumption"[4] that realism and the New Deal were closely related does so in one of three non-mutually exclusive ways. The first thesis, which might be called the "no substantive effect" or "limited impact" thesis, holds that legal realism's focus on private law prevented it from making any substantive contribution to the New Deal's transformative ideas on public law.[5] In this view, the politico-intellectual milieu of the 1930s may have allowed realism and the New Deal to overlap in some amorphous sense, but not to the point where such overlap was anything more than a coincidence of ideas. The second main critique might be called the "sociological jurisprudence redux" thesis. This holds that realism is best viewed primarily as an extension of the

2. *See generally* ARTHUR SCHLESINGER, THE COMING OF THE NEW DEAL (2003).

3. This proposition has been vastly underanalyzed in the literature. *See, e.g.*, N.E.H. HULL, ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE 261 (1997); LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960, at 130 (1986). *But see* ROBERT JEROME GLENNON, THE ICONOCLAST AS REFORMER: JEROME FRANK'S IMPACT ON AMERICAN LAW 68-101 (1985) (suggesting ways in which legal realism influenced Jerome Frank's work as a New Deal lawyer).

4. NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 153 (1995).

5. DUXBURY, *supra* note 4, at 157–58 ("The conservatism of legal realism rested ultimately in the fact that it remained a private law jurisprudence in a public law world. The problems of modern administrative government never supplemented its original critical agenda.").

sociological jurisprudential movement that preceded it, rather than as a distinct theoretical movement in its own right.[6] The implication is that there is little about the relationship between the New Deal and legal realism that could not be said of the relationship between the New Deal and sociological jurisprudence. Thus, realism drew no independent definitional substance from the New Deal. The final critique, and one closely related to the first, is that realism waned as many of its most prominent theorists went to Washington to work for the New Deal.[7] Realist theory, in this view, gave way to the exigencies of governance. Instead of viewing the work of realist academics-turned-policymakers as key to understanding what realism was about, this critique suggests a clear delineation between realism as jurisprudential thought and the New Deal as political philosophy.

There is, of course, a degree of truth in each of these critiques, but overall they vastly understate the extent to which legal realism and the New Deal were mutually constitutive. Indeed, it was the exigencies of governance during the New Deal that allowed realism to reach its full expression. To the extent that claims to the contrary appear convincing, this likely reflects the relative lack of comprehensive analysis on the nature of the New Deal–legal realist relationship, rather than the strength of the counterclaim. This paper seeks to provide one such analysis and reaffirm the centrality of the New Deal in realist jurisprudence.

The Note proceeds as follows. Part I provides an overview of legal realism, focusing on its four key tenets. This sets the stage for understanding how realism helped advance the New Deal policy agenda, and in turn, how the New Deal helped define realist jurisprudence. Part II examines the intersection of legal realism and the New Deal, and argues that the interrelationship was more than a coincidence of ideas. This part demonstrates that the New Deal was the platform through which the realists sought to "put realism to work."[8] Part III then analyzes the

6. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 169–71, 209 (1992) ("[H]istorians have been misled into looking for sharper distinctions between sociological jurisprudence and Legal Realism than are justified. . . . For most purposes, . . . Legal Realism needs to be seen primarily as a continuation of the reformist attack on orthodox legal thought."); *cf.* RONEN SHAMIR, MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL 135 (1995) ("Some students of legal realism situate its development in the context of a rather straightforward progression of jurisprudential ideas in 'revolt against formalism,' or, in what is only another version of this tradition, as part of a series of continuities and breaks with past 'classical' legal thought.").

7. *See, e.g.*, DUXBURY, *supra* note 4, at 158 ("Rather than emerge as the jurisprudence of the New Deal, realism was outstripped by political and legal developments, and when various realists left their faculties to head for Washington they did so not out of a desire to put experimental jurisprudence into practice, but in search of promising career prospects."); *cf.* G. Edward White, *Recapturing New Deal Lawyers*, 102 HARV. L. REV. 489, 514 (1988) ("Graduates of law schools in the 1930's . . . did not necessarily join the New Deal because they had been imbued with Realist messages, nor did the existence of New Deal programs necessarily provide a stimulus for the articulation of Realist jurisprudential theories.").

8. KALMAN, *supra* note 3, at 130.

landmark New Deal Supreme Court case *Wickard v. Filburn* to illustrate the application of realism in judicial decision-making. As will be shown, Justice Robert Jackson's opinion in the case provides an especially compelling portrait of legal realism's impact on the New Deal and the New Deal's role in giving realist jurisprudence an "operational" component. A brief conclusion follows Part III.

I. DEFINING LEGAL REALISM

Legal realism emerged in earnest as a distinct school of American jurisprudential thought in the late 1920s and 1930s.[9] Acting both as a complement to the school of sociological jurisprudence that preceded it and as an attack against some of that movement's main assumptions, legal realism embodied a more fundamental critique of orthodox views on legal reasoning than had been advanced up to that point.[10] This intellectual assault was wide-ranging and not necessarily coordinated among the scholars associated with the realist movement.[11] Yet there are common themes in realist writings, and a shared intensity of passion by those writing on behalf of a realist approach to law, which make it possible to identify the characteristics of realism most essential to defining the movement.[12] In particular, there are four features of realism that provide insight into how realists believed that lawyers and judges should analyze legal problems and decide cases. These features provided the conceptual overlap that allowed realist jurisprudence not only to advance the New Deal, but also to achieve further expression through it. Before turning to the substance of that interrelationship, we begin first with an examination of realism's core characteristics.

A. Rule Skepticism

The first and most fundamental feature of the realist critique was a distrust of traditional legal rules and concepts as effective guidance for deciding cases. This skepticism was shared almost universally among scholars associated with the realist movement.[13] For example, in one of his

9. For two of the earliest theoretical treatments of legal realism, see Max Radin, *Theory of Judicial Decision: Or How Judges Think*, 11 A.B.A. J. 357 (1925); and Walter W. Cook, *Scientific Method and the Law*, 13 A.B.A. J. 303 (1927).

10. *See* HORWITZ, *supra* note 6, at 169–92; G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999 (1972).

11. *See* Karl Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1233, 1233–34 (1931) ("There is no school of realists. There is no likelihood that there will be such a school. There is no group with an official or accepted, or even with an emerging creed. . . . They are related, says [Jerome] Frank, only in their negations, and in their skepticisms, and in their curiosity.").

12. Llewellyn himself identified a "common core" of elements of realist jurisprudence. Llewellyn, *supra* note 11, at 1250.

13. HORWITZ, *supra* note 6, at 199–200; SHAMIR, *supra* note 6, at 143–44; AMERICAN LEGAL

early landmark articles outlining the contours of realism, Karl Llewellyn highlighted "a distrust of the theory that traditional prescriptive rule-formulations are *the* heavily operative factor in producing court decisions" as one of the "characteristic marks of the movement."[14] Realists believed that the so-called legal science approach to law established in the nineteenth century by Christopher Langdell during his time as Dean of Harvard Law School was too rigid and formulaic to serve as the basis of sound legal reasoning. Langdell had argued that law could be reduced to a few fundamental rules and principles that judges need only discern from previous cases and deductively apply to new facts.[15] This conceptual (or "formalist") approach was the dominant paradigm for legal analysis at the time of the realist emergence and served as the target that helped define the movement.[16]

The formalist conception of law as a "closed system," in which higher legal principles existed apart from outside influences, ensured that the classical approach espoused by Langdell was a distinctly apolitical one.[17] To ensure law's "purity" and internal consistency, Langdell and his successors emphasized that legal rules must remain free from political whims and policy concerns.[18] The categorization and abstraction of legal principles characteristic of the legal science approach was thought to be critical to the integrity of the legal system.[19] The realists, however, believed that policy considerations were, and indeed should be, at the center of legal reasoning. Their first priority, then, was to expose Langdell's rules, and their abstractions, as fictions.

Realists considered an attack on the rigidity of legal rules to be a critical step toward better legal decision-making and a more accurate understanding of what courts were actually doing when they decided cases.[20] For realists, the black-letter rules that had been pulled from opinions and compiled in casebooks and treatises were only useful to the extent that they might provide a *starting point* for analyzing a new legal issue, or where the facts of a new case closely tracked the facts underlying the precedent—the rules had no value in the abstract as rules *per se*.[21] The

---

REALISM 166 (William W. Fisher III et al. eds., 1993); Llewellyn, *supra* note 11, at 1237.

14. Llewellyn, *supra* note 11, at 1237–38.

15. KALMAN, *supra* note 3, at 11.

16. *Id.*; Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Max Radin, *Legal Realism*, 31 COLUM. L. REV. 824 (1931).

17. JUSTIN ZAREMBY, LEGAL REALISM AND AMERICAN LAW 14 (2014).

18. DUXBURY, *supra* note 4, at 22–24; ZAREMBY, *supra* note 17, at 9–10, 14.

19. *See, e.g.*, DUXBURY, *supra* note 4, at 24 (noting that the Restatement projects initiated by the American Law Institute in the early 1920s to categorize legal rules "bestowed professional credibility on the Langdellian idea that the basic principles of the law are simply there to be discovered by logical analysis and thereafter reported in a fashion which reflects their 'real'—meaning unambiguous—nature").

20. *See, e.g.*, *id.* at 119–25.

21. Radin, *supra* note 16, at 827 ("A robust realism, then, need not fear a syllogism, or even deny its limited value in determining as well as setting forth judicial results, and it can relegate

problem, as the realists saw it, was that rules that were supposed to serve as the foundation of "scientific" reasoning had become "unreal by life having left them behind."[22] No legal rule, no matter how longstanding, should be applied to a new legal problem without checking the rule against the underlying facts.[23] Felix Cohen, a prominent realist, captured this sentiment well in a seminal article in the *Columbia Law Review*:

> Our legal system is filled with supernatural concepts, that is to say, concepts which cannot be defined in terms of experience. . . . Against these unverifiable concepts modern jurisprudence presents an ultimatum. Any word that cannot pay up in the currency of fact, upon demand, is to be declared bankrupt, and we are to have no further dealings with it. . . . In other words . . . [a]ll concepts that cannot be defined in terms of the elements of actual experience are meaningless.[24]

For the realists, the facts of the case, rather than a menu of pre-existing black letter rules, should play the key role in legal decision-making.[25] The realists decried formalism's focus on achieving "doctrinal synthesis" by force fitting legal rules onto dissimilar factual circumstances. Karl Llewellyn, for example, wrote that efforts to maintain a well-defined, closed universe of rules tended to "distort all vision of the underlying reality" because such a synthesis "must always be in conceptual terms, in classes, in supposed uniformities, inclusive, exclusive."[26] In this view, "the battle ground of such synthesis . . . must always be the marginal and even pathological case which 'tests' the sweeping generalization."[27] For Max Radin, another prominent figure in the realist movement, this meant that judges needed to "keep themselves aware that they are required to base their judgments on *unique events* in which non-interchangeable individual human beings are concerned."[28] Rules tended to be "verbal excuses" that obscured the fact that courts were grouping disparate things together.[29] Attention to the facts would ensure that judges focused on the human behavior and societal interests that the law was being asked to

---

conceptualism to its place without running the risk of being effaced or pushed aside."); Herman Oliphant, *A Return to Stare Decisis*, 6 AM. L. SCH. REV. 215, 228 (1928) ("Neither deduction nor induction can do more than suggest the competing analogies and to indicate promising directions for trial and error testing.").

22. Oliphant, *supra* note 21, at 224.

23. Llewellyn, *supra* note 11, at 1223 ("[The realists] want to check ideas, and rules, and formulas by facts, to keep them close to facts. They view rules, they view law, as means to ends; as only means to ends; as having meaning only insofar as they are means to ends.").

24. Cohen, *supra* note 16, at 823, 826.

25. Karl Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 751 (1931) ("Overwhelming . . . is the conviction that broad forms of words are chaos, that only in close study of the facts salvation lies.").

26. *Id.* at 750.

27. *Id.*

28. Radin, *supra* note 16, at 824.

29. Karl Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 15 (1934).

reconcile.[30]

Realist skepticism of the value of legal rules stemmed from the realists' belief that the reification of these rules had forced judges into categorical thinking—that is, making either-or decisions devoid of the nuance demanded by the unique case in front of them.[31] For the realists, even when courts attempted to preserve the appearance that they were engaged in a simple application of a well-established rule to the present case, the reality was much different.[32] For example, Lon Fuller and William Purdue, writing in the *Yale Law Journal* in 1936 and 1937, argued that judges should more forthrightly recognize a "reliance interest" in contracts as a ground on which to award contract damages.[33] Instead of explicitly recognizing this interest, courts up to that point had confined the legal analysis in breach of contract cases to a narrow, "normal" rule that awarded a promisee the value of expected profits, but did not consider other possible measures of recovery. For Fuller and Purdue, limiting assessment of contract damages to expectation damages forced contract claims analysis into an arbitrary, all-or-nothing approach that denied damages to deserving plaintiffs. By adopting a more "flexible scheme of legal sanctions" that included the reliance interest, Fuller and Purdue believed that courts could more effectively and fairly effectuate the goals of contract law.[34]

Thurman Arnold's critique of the Restatement of the Law of Trusts is another example of the rule skepticism characteristic of the realist movement. Writing in the *Columbia Law Review* in 1931, Arnold criticized the Restatement's attempt to "ingeniously twist[]" ancient legal rules for the sake of "preserv[ing] as far as possible all of the logical machinery of the law."[35] For Arnold, this was an unwarranted elevation of the conceptual approach, of form over substance. The proper approach was to "frankly recognize[] that no closed philosophical system of the law of trusts is possible, because the cases included under the term are too unlike."[36] Instead of clinging to the notion that rules have value in the abstract, categorization efforts such as the Restatement should determine "which formulae and rules are useful in deciding cases, and which are useless."[37] For Arnold, as for other realists, the abstractions considered critical to an orderly systematization of the law prevented an inquiry into

30. *Cf. id.* at 8 (arguing that when there is doubt about how to classify the facts of a case, it is the classification of the facts ultimately adopted, rather than the legal rule, that will decide the outcome).

31. HORWITZ, *supra* note 6, at 199–206.

32. Radin, *supra* note 16.

33. Lon L. Fuller & William R. Purdue, *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52 (1936); Lon L. Fuller & William R. Purdue, *The Reliance Interest in Contract Damages: 2*, 46 YALE L.J. 373 (1937).

34. Fuller & Purdue, *The Reliance Interest in Contract Damages: 1*, *supra* note 33, at 419.

35. Thurman Arnold, *The Restatement of the Law of Trusts*, 31 COLUM. L. REV. 800, 803 (1931).

36. *Id.*

37. *Id.*

the appropriateness of the abstractions to actual situations. As a result, the rules obscured reality in a way that became "an impediment to intelligible judicial speech, and a trap for the unwary judge or lawyer."[38] Deference to legal abstractions prevented a more rational classification of the law of trusts that would have better reflected reality.

B. Consequentialism and the Functional Approach

The second core feature of legal realism was a belief that questions of law should be resolved with a view to the social consequences that would flow from a particular ruling. This was in many ways a corollary to the realist distrust of traditional legal rules and its insistence on the substitution of facts for concepts in legal analysis. The idea was that courts should depend primarily on consciously articulated social policies for guidance in decision-making.[39] For example, in *Some Realism About Realism*, Llewellyn explained that one of the central ideas of the realist movement was "[t]he conception of law as a means to social ends and not as an end in itself; so that any part needs constantly to be examined for its purpose, and for its effect, and to be judged in the light of both and of their relation to each other."[40] Other realist scholars expressed similar sentiments. Judges are realists, according to Radin, "when they are aware of what the results of their judgment are likely to be, both to the concrete human beings who have evoked it and to others who may be governed by their example."[41] For Felix Cohen, the realistic judge would approach the "delicate practical task of social adjustment" by "frankly assess[ing] the conflicting human values that are opposed in every controversy [and] apprais[ing] the social importance of the precedents to which each claim appeals."[42] Questions of social policy would be treated "not as an emergency factor in legal argument but rather as the gravitational field that gives weight to any rule or precedent."[43]

Legal historians have used the phrase "purposive adjudication" to describe this component of the realist program.[44] For the realists, applying legal rules through a purely deductive exercise did not produce results that reflected social reality. Courts instead needed to first discern the *purpose* of those rules and use that purpose as the point of departure for legal reasoning. It was the purpose of a rule, rather than its logical force, that ultimately defined the value of the rule as a guide for decision-making. The task of the realist judge was "not to find the preexisting but previously

38. *Id.* at 800.
39. AMERICAN LEGAL REALISM, *supra* note 13, at 167.
40. Llewellyn, *supra* note 11, at 1236.
41. Radin, *supra* note 16, at 824.
42. Cohen, *supra* note 16, at 842.
43. *Id.* at 834.
44. AMERICAN LEGAL REALISM, *supra* note 13, at 167.

hidden meaning of the terms in [legal] rules; it [was] to give them a meaning" that would reach the desired result.[45] This kind of approach would ensure that the law developed in a way that "kept more nearly in step with the complex developments of modern life."[46] Walter Cook, a key figure in the realist movement, framed the issue this way:

> The . . . situation confronting the judge in a new case being what it is, it is obvious that he must legislate, whether he will or no. By this is meant that since he is free so far as compelling logical reasons are concerned to choose which way to decide the case, his choice will turn out upon analysis to be based upon considerations of *social or economic policy*. . . . To do this, however, the judge will need to know two things: (1) what social consequences or results are to be aimed at; and (2) how a decision one way or other will affect the attainment of those results.[47]

The realist conception of law as turning on questions of social policy bears obvious resemblance to a defining feature of sociological jurisprudence, a philosophy of law expounded by the distinguished legal scholar Roscoe Pound in the early twentieth century, most notably in a series of articles in the 1911 and 1912 issues of the *Harvard Law Review*.[48] The shared view stemmed partly from the common influence of the Progressive era on both jurisprudential movements.[49] The convergence was not lost on the realists. In 1925, Llewellyn wrote an unpublished essay in which he acknowledged Pound's considerable influence on the development of realist thinking.[50] Legal historian Natalie Hull argues that, at this point in time, "Llewellyn's view of Realistic Jurisprudence almost totally coincided with Pound's description of Sociological Jurisprudence."[51] Morton Horwitz similarly has suggested that the intensity of Llewellyn's debate with Pound has misled historians "into looking for sharper distinctions between sociological jurisprudence and Legal Realism than are justified."[52]

Despite some baseline similarities, however, it is clear that the realists did not consider legal realism to be merely sociological jurisprudence

45. Cook, *supra* note 9, at 308.

46. Oliphant, *supra* note 1, at 20.

47. Cook, *supra* note 9, at 308.

48. Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence I*, 24 HARV. L. REV. 591 (1911); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence II*, 25 HARV. L. REV. 140 (1911); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence III*, 25 HARV. L. REV. 489, 512 (1912) ("The main problem to which sociological jurists are addressing themselves today is to enable and to compel law-making, and also interpretation and application of legal rules, to take more account, and more intelligent account, of the social facts upon which law must proceed and to which it is to be applied.").

49. HORWITZ, *supra* note 6, at 171.

50. DUXBURY, *supra* note 4, at 75.

51. N.E.H. Hull, *Reconstructing the Origins of Realistic Jurisprudence: A Prequel to the Llewellyn–Pound Exchange over Legal Realism*, 1989 DUKE L.J. 1302, 1314.

52. HORWITZ, *supra* note 6, at 171.

recast under a new name. Even while sharing a general belief that changes in the demands of modern society should help drive interpretation of the law, the differences between sociological jurisprudence and realism were not a matter of semantics or emphasis, but of substance. In particular, realism, while stressing the social purposes of law, also emphasized that there were no sacrosanct "traditional values" that should be treated as "authoritative starting points for legal reasoning"—a key feature of sociological jurisprudence.[53] Whereas Pound stressed what he saw as a constructive role of the "ideal element" for scoping legal analysis—a reference to certain political and ethical ideals of society that should guide judicial decisions—realists called for the "temporary divorce of Is and Ought" as a way to clarify the ends the law should be expected to serve.[54] For the realists, "received ideals"—ideals that Pound suggested "may be so generally established . . . as to be a form of law in the strictest sense"[55]—contained normative baggage that could distort any inquiry into the viability of a legal rule.[56] Instead, the realists embraced a social philosophy that "reject[ed] many of the accepted foundations of the existing . . . order."[57] In the realist view, rigid adherence to an "ideal element" could be just as detrimental to sound legal reasoning as blind deference to abstract legal principles.

In addition to their skepticism of the sociological jurists' emphasis on "received ideals" and "traditional values" as authoritative guides for legal reasoning, realists also believed that Pound and his adherents placed too much faith in the abstract legal categories that they purported to attack. For example, Llewellyn argued that the existing body of legal rules was "*central* to [Pound's] thinking about law," and that Pound was too willing to indulge traditional techniques for developing and applying legal principles.[58] For Llewellyn, Pound's insistence that legal categories had an important systematizing and ordering role to play in framing legal questions exposed him as "a man partially caught in the traditional precept-thinking of an age that is passing."[59] Jerome Frank, a leading realist and Llewellyn's comrade-in-arms in the attack against formalism, similarly charged that Pound had "never completely freed himself of rule-fetishism"[60] and was "reluctant to relinquish entirely the age-old legal myths."[61] For the realists, this deference to doctrine went against the

53. Roscoe Pound, *The Ideal Element in American Judicial Decision*, 45 HARV. L. REV. 136, 147 (1931).

54. Llewellyn, *supra* note 11, at 1236.

55. Pound, *supra* note 53, at 136.

56. Llewellyn, *supra* note 11, at 1236–37.

57. *Id.* at 1237.

58. Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 434 (1930); *see also* Cook, *supra* note 9, at 308.

59. Llewellyn, *supra* note 58, at 434.

60. JEROME FRANK, LAW AND THE MODERN MIND 228 n.8 (1930).

61. *Id.* at 230.

essence of a functional approach to law and unduly limited the extent to which legal questions could be resolved with an eye toward the social policies implicated. It also suggested that sociological jurisprudence, for all its insights, was not up to the task of bringing about the reconciliation of law with social effects.[62]

C. Social Science and Realism's Search for Reality

The realist belief that sociological jurisprudence was insufficiently oriented to social consequences points to a third feature of legal realism: a strong commitment to applying a social scientific approach to the study of law. Here, again, the realists viewed themselves as carrying out an unfulfilled promise of Pound.[63] The idea was that if a functional approach to law required constant reexamination of the fit between law and society, then legal analysis required empirical studies of social behavior to assess the interplay between law and human conduct.[64] Such studies would be the only way to ascertain whether the law was having the intended social effect. These studies would also provide the most reliable means of uncovering the facts the realists sought to use to displace the rigid categories characteristic of the formalist approach.

This sentiment was widely shared among realists.[65] Herman Oliphant, for example, called for "[a] systematized study, deliberately focused toward getting an adequate knowledge of the entire social structure as a functioning and changing but coherent mechanism."[66] This would be accomplished by "[a] return to a more rigorous and enlightened empiricism in the study and making of law" rooted in social scientific methods, particularly the use of statistics.[67] In his 1927 article *Scientific Method and the Law*, realist Walter Cook argued that "a scientific approach to the study of law will demand observation and study of the actual structure and functioning of modern social, economic, and political life" so that judges could rely on empirical data rather than "hit-or-miss information."[68] To accomplish this, the judge "will need to call upon the other social sciences" such as economics, psychology, and sociology.[69] Similarly, Max Radin stressed that for the law to secure "realistic results," legal reasoning needed to be rooted in the "instrumentalities" of "statistics,

62. HORWITZ, *supra* note 6, at 174.

63. *Id.* at 209 ("This realist turn to social science research was a direct extension of pre-war Progressive sociological jurisprudence.").

64. *See* DUXBURY, *supra* note 4, at 80; AMERICAN LEGAL REALISM, *supra* note 13, at 233.

65. HORWITZ, *supra* note 6, at 181 ("The core group on Llewellyn's list [of realists]–Clark, Moore, Oliphant, Yntema, Douglas, and Cook–were all deeply involved in the relationship between law and the social sciences.").

66. Oliphant, *supra* note 21, at 226.

67. *Id.* at 230.

68. Cook, *supra* note 9, at 308.

69. *Id.*

mathematics, terminology, [and] psychology."[70] Non-realists, argued Radin, had misused these methods, leading to "confusion and indirection" in the law.[71]

The realist commitment to integrating law and the social sciences manifested itself in a wide range of empirical studies.[72] One example was an early 1930s study spearheaded by the then Dean of Yale Law School, Charles E. Clark, with critical research conducted by prominent realists William O. Douglas and Thurman Arnold.[73] The study was intended to "illustrate and test the efficiency of our federal rules of procedure and our general methods of administering justice" in the federal courts by collecting "concrete factual, statistical information" on "congestion" in the system.[74] Researchers involved in the study collected information from various federal districts on the types of cases heard, the jurisdiction invoked, the method of termination of the cases, and the character of the parties involved. Clark believed that this data would help resolve "certain differences on points of fact concerning the actual operation of the present [jurisdictional] rules," a resolution he considered a prerequisite to any informed examination of efforts to reform those rules.[75] In an article highlighting one of the study's most topical discoveries, Clark presented no less than nine tables of statistics to show that a proposed bill that would treat a foreign corporation doing business in a state as a citizen of that state for diversity jurisdiction purposes "seem[ed] not only a reasonable compromise, but one also supported by inherent arguments of equity and fairness."[76] For Clark, the statistics exposed the strength and weaknesses of otherwise unexamined policy assumptions and helped clear a path to more objective analysis.[77]

The realist emphasis on empirical social science never quite lived up to the lofty expectations set by its proponents. Morton Horwitz maintains that "[v]irtually all [legal historians] agree that most of the social science research projects undertaken by Realists were either trivial attempts to prove the obvious through pseudo-scientific methodology or else naïve and misconceived efforts at social science research."[78] Even research studies conducted by prominent realists at the Johns Hopkins Institute of Law—an institute founded specifically for the purpose of supporting the

70. Radin, *supra* note 16, at 827.

71. *Id.* at 826–27.

72. JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE (1995).

73. *Id.* at 81–114.

74. John Henry Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFF. L. REV. 459, 501 (1979). *See generally* Charles Clark, *Diversity of Citizenship Jurisdiction of the Federal Courts*, 19 A.B.A. J. 499 (1933).

75. Schlegel, *supra* note 74, at 499.

76. Clark, *supra* note 74, at 503; Schlegel, *supra* note 74, at 507–08.

77. Clark, *supra* note 74, at 502–03.

78. HORWITZ, *supra* note 6, at 210.

empirical study of law—amounted to "little more than head counting."[79] Karl Llewellyn himself ultimately came to criticize the crude empiricism of many of the projects undertaken by his colleagues, remarking that "I read all the results, but I never dug out what most of the counting was good for."[80] Some moderate successes aside, there was a general sense that in many of these studies "[s]tatistics were collected without the benefit of tentative hypotheses to render their collection meaningful [and] figures were amassed without reference to any particular problem to be solved."[81] The realists, it seemed, were replacing "rule-fetishism" with "fact-fetishism."

Notwithstanding its shortcomings, the realist campaign to integrate law and empirical social science was an important and, perhaps surprisingly, enduring part of the realist legacy. While the studies themselves may largely have failed to produce much in the way of actionable data, "the realists' affair with the social sciences set the agenda for American jurisprudence of the future."[82] Following realism's foray into empirical research, American legal thought largely embraced the interdisciplinary study of law. The impact was felt not only in post-realist legal scholarship, but also in post-realist changes in legal education. Duxbury, for example, notes that "[t]he originality of legal realism was that it set the scene for the emergence of jurisprudential sub-disciplines of the 'law and' variety."[83] The Yale and Columbia Law Schools began to introduce textbooks of "cases and materials"—which included statutes, annotations, and social science statistics, in addition to appellate opinions—to ensure that the law was studied with an eye to social facts.[84] This trend continued long after the realist social science research agenda had been abandoned. Realism thus marked the official marriage of social science and law, a marriage that persists today.[85]

D. Judicial Modesty

The fourth and final feature of legal realism was a belief that judicial decision-making required a degree of deference to legislative purpose and administrative expertise. Admittedly, judicial restraint did not occupy realist writers to the same extent as other topics—rule-skepticism, the virtues of a consequentialist approach, and an appeal to the social sciences all featured much more prominently. And even when judicial restraint was discussed, consensus on the point was by no means universal.[86] Still,

79. KALMAN, *supra* note 3, at 32; SCHLEGEL, *supra* note 72, at 147–210.
80. KALMAN, *supra* note 3, at 33.
81. *Id.*
82. DUXBURY, *supra* note 4, at 92.
83. *Id.* at 92 n.129.
84. AMERICAN LEGAL REALISM, *supra* note 13, at 273.
85. DUXBURY, *supra* note 4, at 92.
86. Max Radin, to take a prominent example, argued that the intent of the legislature was either

judicial restraint was an idea expressed by, and more often implicitly endorsed by, key realist figures.[87] Furthermore, even if many realists did not voice an opinion on judicial restraint, it is an approach to public law that is not only quite consistent with, but naturally flows from, realism's other tenets.

To the extent that realism supported the idea of judicial deference toward legislative purpose, this almost certainly stemmed from the movement's functional orientation: if legal rules could only be effectively applied by keeping in view the social purposes served by those rules, then there needed to be a reliable way to ascertain those purposes in the first instance. The answer, for many realists, was to understand the policy goals the legislature sought to address when passing legislation. Since social and economic conditions were in constant flux, it was the legislature, rather than the judiciary, that was the institution most attuned to the public purposes behind the law.[88] The legislature had the resources and expertise for "extended investigation" into the social problems the law sought to address, and had "unlimited powers of choice between competing devices" for advancing the public interest.[89] Thus, legislative history and legislative processes would in many cases provide "accurate and compelling guides to legislative meaning," which would help ensure sound legal reasoning.[90] Ignoring legislative intent, on the other hand, raised the prospect that judicial decision-making would be divorced from social reality and run counter to the "political and economic forces of [the] time."[91]

This same reasoning also helps explain why the realist emphasis on empirical social science would promote support for judicial restraint. As noted above, realists viewed empirical data as a means of ensuring the legal system could take into account the "reality" of social relations. If

---

undiscoverable or irrelevant. *See* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 871 (1930).

87. *See, e.g.*, M. Witmark & Sons v. Fred Fisher Music Co., 125 F.2d 949, 967-68 (2d Cir. 1942) (Frank, J., dissenting) ("[T]he demolition of the purposes of Congress, through stingy statutory interpretation, is the most emphatic kind of judicial legislation. Our job is, so far as possible, to enforce the aims of Congress."); James Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886 (1930); *cf.* SHAMIR, *supra* note 6, at 151 (arguing that one strand of realism emphasized a move toward a socially informed law produced by Congress and the government's administrative machinery); Cohen, *supra* note 16, at 810 (suggesting that to engage in realistic decision-making, a court must address itself to such economic, sociological, political, and ethical questions as a "competent legislature" might have faced); Llewellyn, *supra* note 58, at 455 ("[C]entral as are the judges' actions in disputed cases, there is a vast body of other officials whose actions are of no less importance; quantitatively their actions are of vastly greater importance, though it may well be that the judge's position gives him a leverage of peculiar power.").

88. Landis, *supra* note 87, at 888 ("The tenure of the legislator, his parochial interests, his opportunities for extended investigation and debate, his unlimited powers of choice between competing devices, the numbers that he must convince, and the ephemerality of his conclusions, all make for emphasizing the importance of his intent.").

89. *Id.*

90. *Id.* at 889; *Fred Fisher Music Co.*, 125 F.2d at 969 ("The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed.").

91. Landis, *supra* note 87, at 892.

empirical data was supposed to help courts ascertain the utility and relevance of a legal rule, then deference to the branch of government best equipped to collect and make sense of that data seemed an appropriate posture for the judiciary.[92] Legislative findings could help provide the courts a window into social reality that might otherwise be obscured.

The realist call for judicial deference to administrative agencies similarly stemmed from a belief that these agencies' expertise and greater familiarity with social conditions made them better adjudicators of the proper scope of regulations than the courts. Karl Llewellyn, for example, noted that "[t]he actions of [administrative] officials touch the interested layman more often than do those of the judge," which counseled in favor of treating administrative action as the final expression of the law in disputed cases.[93] Similarly, in an article arguing against judicial review of administrative findings of fact, James Landis stressed that "the administrative, whose daily concern is the consideration of [practical] matters, is recognized to possess greater competence in appreciating the bearing and weight of testimony upon that issue than would characterize either a judge or a jury."[94] For Landis, "one [could] ask little more than to have issues decided by those best equipped for the task."[95] By declining judicial review over administrative determinations, courts would not only avoid unnecessary delay, but would also provide a bulwark against "judicial legislation" rooted in "political dogma or . . . righteous abstractions."[96]

II. LEGAL REALISM AND THE NEW DEAL: MORE THAN A COINCIDENCE OF IDEAS

The series of far-reaching domestic relief measures and economic recovery legislation enacted under President Roosevelt in the 1930s marked a transformative period in twentieth-century American history. Known as the New Deal, the laws passed during this period were directed toward addressing an economic crisis of historic proportions: staggering levels of unemployment, dismally low levels of industrial production, skyrocketing poverty, and a nationwide loss of confidence in the U.S. economy. Coming to power in 1933 with a mandate to take dramatic

92. *Cf.* Cohen, *supra* note 16, at 810 (suggesting that to engage in realistic decision-making, a court must address itself to such economic, sociological, political, and ethical questions as a "competent legislature" might have faced).

93. Llewellyn, *supra* note 58, at 455.

94. James Landis, *Administrative Policies and the Courts*, 47 YALE L.J. 519, 531 (1938).

95. Landis, *supra* note 94, at 536; *see also* James M. Landis, *The Place of Administrative Law*, 13 CONN. B.J. 71, 75 (1939) ("Among the reasons for utilizing the administrative method of attack was the obvious need for expertness. The newness and the complexity of the problems that were presented led to a general recognition that it would be unwise to entrust them to judges already busied with the handling of a great variety of claims.").

96. Landis, *supra* note 94, at 536.

action, President Roosevelt would ultimately oversee an unprecedented expansion of federal power over the national economy.[97]

In the first hundred days of his administration, Roosevelt led the creation of important new federal agencies and programs, including the Agricultural Adjustment Administration, the Federal Deposit Insurance Corporation, and the Civilian Conservation Corps. He also signed into law a raft of critical relief measures, including the Emergency Banking Act and the Federal Emergency Relief Act.[98] Later in his first term, Roosevelt signed into law the Act creating the Securities and Exchange Commission, the Social Security Act, and the country's seminal labor law statute, the National Labor Relations Act, which created the National Labor Relations Board. This and related New Deal legislation granted the government sweeping authority to implement price supports for key commodities, finance large-scale infrastructure projects to increase employment and output, manage labor relations and collective bargaining, and regulate banks and financial markets.[99] Federal regulatory authority, once relatively limited, had entered a new stage. As Roosevelt explained in his first State of the Union address in January 1934, ten months after the launch of the New Deal: "We have undertaken new methods. It is our task to perfect, to improve, to alter when necessary, but in all cases to go forward."[100] To consolidate gains and ensure a sustainable recovery, Roosevelt argued, New Deal legislation must focus on "mak[ing] our economic and social structure capable of dealing with modern life."[101] The depths of the economic depression left no room for traditional solutions. Bold new policy innovations, quickly and decisively implemented, were the order of the day.

It would be difficult to imagine a jurisprudential movement more conducive to the New Deal than legal realism. The four characteristic features of realism discussed in Part I—a distrust of traditional legal rules, a functional approach to law, a commitment to empiricism, and deference to governmental bodies with "expertise" on social questions—fit well with

---

97. President Roosevelt himself acknowledged during his first inaugural address the coming expansion of federal, in particular executive, authority:

> It is to be hoped that the normal balance of executive and legislative authority may be wholly adequate to meet the unprecedented task before us. But it may be that an unprecedented demand and need for undelayed action may call for temporary departure from that normal balance of public procedure.

Franklin D. Roosevelt, First Inaugural Address (Mar. 4, 1933), *in* 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 11, 15 (Samuel I. Rosenman ed., 1938).

98. ARTHUR SCHLESINGER, THE COMING OF THE NEW DEAL 20–21 (2003) ("In the three months after Roosevelt's inauguration, Congress and the country were subjected to a presidential barrage of ideas and programs unlike anything known to American history.").

99. *Id.*

100. Franklin D. Roosevelt, Annual Message to Congress (Jan. 3, 1934), *in* 3 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 8, 8 (Samuel I. Rosenman ed., 1938).

101. *Id.*

the New Deal's emphasis on pragmatism, policy, and experimentation.[102] Whereas classical legal thought was distinctly apolitical, emphasizing a closed system of transcendental legal rules that supposedly defined the law, realism treated policy concerns and social consequences as fundamental to legal inquiry. And unlike sociological jurisprudence, realism believed that there were no sacrosanct "traditional values" that should be shielded from questioning. These features of realism were consonant with the spirit of the New Deal.[103] Both realism and the New Deal sought to demythologize inherited principles as a way to achieve solutions better aligned with practical realities. Both saw law as a form of socially informed expertise and as a tool for shaping social policy.[104] In this way, there was a natural symbiosis between realism as an intellectual movement and the New Deal as governing philosophy.

The overlap between legal realism and the New Deal probably reflected more basic instrumental motives as well. The New Deal provided an opportunity for academics to land prestigious government positions, while the Administration was able to take advantage of a substantial influx of legal talent.[105] Prominent realists such as William Douglas, Thurman Arnold, Jerome Frank, James Landis, Felix Cohen, and Herman Oliphant, all assumed key governmental positions from which they helped design and implement New Deal policies.[106] Realist scholars who may not have taken leave of their academic posts nonetheless "provided public defense and justification for many of the administration's key laws, helped in drafting laws and suggesting new forms and types of legislation, wrote briefs, and helped to defend the administration in court."[107] Realists had a "hunger to make the law *do* something," and the New Deal provided a prime opportunity to demonstrate the utility of law as a tool for shaping social policy.[108]

---

102. GLENNON, *supra* note 3, at 84; Louis Jaffe, *Mr. Justice Jackson*, 68 HARV. L. REV. 940, 942 ("A constitutional technique sympathetic to the pressing interest of the moment [i.e., realism] was in tune with the prevailing mode of liberalism which had come to power in the New Deal."); White, *supra* note 10, at 999, 1025.

103. *See, e.g.*, Roosevelt, *supra* note 100, at 8 ("Now that we are definitely in the process of recovery, lines have been rightly drawn between those to whom this recovery means a return to old methods . . . and those for whom recovery means a reform of many old methods, a permanent readjustment of many of our ways of thinking and therefore many of our social and economic arrangements.").

104. *See, e.g.*, SHAMIR, *supra* note 6, at 151 ("The professor-realist 'revolution' . . . moved toward a socially informed law that was to be produced by Congress and the government's administrative machinery under the guidance of trained experts in the art of statutory legislation and administrative methods.").

105. *Id.* at 135, 156 ("The realist program was strongly tied to the agenda of the interventionist state and to the legislative plans of a reform-oriented administration; it legitimated the administration's experiments and in the process allowed the realists to assume positions of power and influence.").

106. HULL, *supra* note 3, at 260–61; KALMAN, *supra* note 3, at 130; SHAMIR, *supra* note 6, at 152 n.99.

107. SHAMIR, *supra* note 6, at 152.

108. Karl Llewellyn, *On What is Wrong With So-Called Legal Education*, 35 COLUM. L. REV. 651, 662 (1935); *see also* KALMAN, *supra* note 3, at 130 (noting that, with the coming of the New

There is little doubt that there was a degree of ideational overlap between legal realism and the New Deal. But the intersection was more than a mere coincidence of ideas, or a way for realist academics to land prestigious government positions. Instead, the contention here is that the New Deal was critical to defining realist jurisprudence. Critics that minimize or dismiss altogether the substantive interrelationship between legal realism and the New Deal hold too narrow a view of realist jurisprudence.[109] Realism in practice may not always have matched its theoretical exposition, but that in itself did not mean that realism was abandoned or had nothing to contribute once its leading expositors joined the New Deal. The New Deal should be viewed as where the practice of realism met the theory of realism. The result was the refinement of realism's definitional contours and a better understanding of the implications of realism for critical questions of constitutional law, something rarely addressed in the key realist writings. Realist jurisprudence was, in fact, New Deal jurisprudence—the latter marked the "operationalization" of the former.

A. The New Deal as a Constitutive Element of Realist Jurisprudence

To illustrate the importance of the New Deal for defining realist jurisprudence, this section draws upon key primary sources and biographical accounts: a speech and an article by Jerome Frank and Thurman Arnold, respectively, two realist expositors turned practitioners; an important law review article by Karl Llewellyn that outlines a realist theory of constitutional law; separate criticisms of legal realism's role in the New Deal by Roscoe Pound and Walter Kennedy; and biographical accounts of key realist policymakers that demonstrate how the New Deal facilitated the "operationalization" of realist jurisprudence.

Jerome Frank's December 1933 speech before the Association of American Law Schools offers one of the most compelling explications of the legal realist–New Deal nexus. Frank, a key realist figure who was then serving as General Counsel of the Agricultural Adjustment Administration, told his audience that "realistic jurisprudence" should be renamed "experimental jurisprudence" because realism's foremost commitment was to "find new principles [and] new guides for action" where old principles had proven inadequate.[110] For Frank, the realist commitment to challenging established ways of thinking was also the essence of the New Deal:

> We are to be primarily interested in seeking the welfare of the great majority of our people and not in merely preserving,

---

Deal, faculty and students at Yale Law School now had a chance "to put realism to work").

109. *See supra* notes 5–7 and accompanying text.

110. Jerome Frank, *Realism in Jurisprudence*, 7 AM. L. SCH. REV. 1063, 1064 (1933).

> unmodified, certain traditions and folkways, regardless of their effect on human beings. That important shift in emphasis is the vital difference between the "new deal" and the "old deal" philosophy.[111]

Frank emphasized that the ideal "experimentalist" government lawyer focused first on the "desirability or urgency of the proposed [government] project" when analyzing whether such a project would be permissible under existing law.[112] If the program would produce desirable social results, and the relevant statute was ambiguous, the experimentalist lawyer's first inclination and priority was to "work out an argument, if possible, so to construe the statute as to validate [the] program."[113] Existing legal principles should not be given controlling weight—social utility, rather than legal precedent, was the touchstone.

For Frank, realism's functional orientation found natural expression in the New Deal. Whereas realists as scholars emphasized the idea that changes in society justified changes in the law, realists as practitioners actually implemented these changes and helped create the new government bodies that would enforce these new laws:

> In many ways those who sympathize . . . with experimental jurisprudence [i.e. realism] have found it easy to work for the "new deal." It is not only because they are less procrustean and more flexible in their techniques. It is because legal institutions and devices are constantly viewed by them as human contrivances to be judged by their every-day human consequences. They [adopt] a kind of thinking which makes it easy to test legal postulates by their results in human lives. Accordingly, the experimentalists are stimulated by the opportunity to contrive new governmental agencies to be used experimentally as means for achieving better results[.][114]

Frank's vision is a far cry from those who contend that realism lost its way once the New Deal gained momentum. The picture Frank paints is one in which the success of the New Deal largely depended on the application of realist jurisprudence. Of course, Frank, a progenitor of realist thought, had every incentive to emphasize the importance of realism for the New Deal. But to concede that Frank may have been engaging in a bit of self-congratulatory rhetoric does not change the fact that realists saw in the New Deal a chance to apply realist theory. Frank's speech illustrates that realists did indeed "take their ideas with them" to Washington.[115] The

111. *Id.*

112. *Id.* at 1065–66.

113. *Id.* at 1065.

114. *Id.* at 1066.

115. Neil Duxbury argues that "while legal realists . . . may have flocked to Washington to work under Roosevelt, they did not necessarily take their realist ideas with them." DUXBURY, *supra* note 4, at 155.

New Deal, then, was very much part of the realist story.

Thurman Arnold's November 1933 article in *The New Republic* titled *The New Deal is Constitutional* provides another example of the close, substantive interrelationship between legal realism and the New Deal.[116] Arnold, who would eventually head the Justice Department's Antitrust Division, was a professor at the Yale Law School at the time he wrote the article, while also working for the Agricultural Adjustment Administration.[117] In the article, Arnold argued that New Deal lawyers were wrong to think that "huge fissures in constitutional logic" were required for the Supreme Court to uphold New Deal legislation, or that "[t]he language of economics and sociology" was needed to "fill in the gaps in the logical structure."[118] Instead, all that was needed was an appropriately expansive reading of Congress's power to regulate interstate commerce, a power that included business transactions and trade affected with a public interest:

> No actual dilemma between logic and expediency faces the Supreme Court if it supports the government. The fact is that the logic of the cases is in favor of the recent legislation, that new doctrine and new terminology are necessary only if the acts are held unconstitutional, and that resort to economics and sociology is required only of those who oppose the legislation.[119]

At first glance, Arnold's dismissal of the need to appeal to economics and sociology might be read to suggest that he did not view a realist approach as relevant to constitutional litigation of New Deal legislation. But realism was in fact central to the article's main thesis. Arnold was arguing for an interpretation of the "business affected with a public interest" doctrine that would take into account current economic conditions when assessing the constitutionally permissible boundaries of the government's commerce power. It was an interpretation, Arnold noted, that the Court had already shown a willingness to adopt.[120] For Arnold, that such an interpretation might stretch the previously recognized limits of the Commerce Clause did not make that interpretation unconstitutional—it was simply the natural result of adjusting existing legal principles to new facts:

> If the business is affected with a public interest, [then] price, production and employment may be regulated. We have only to determine, therefore, whether the present emergency has affected general business transactions and trade in agricultural commodities

116. Thurman Arnold, *The New Deal is Constitutional*, NEW REPUBLIC, Nov. 15, 1933, http://www.newrepublic.com/article/politics/93783/new-deal-constitutional.

117. KALMAN, *supra* note 3, at 130.

118. Arnold, *supra* note 116.

119. *Id.*

120. *Id.*

with a public interest. If it has, our logical inquiry has ended.[121]

Arnold thus applied realism's functional approach to the Court's Commerce Clause jurisprudence to show that there was no need to "invent new doctrine" to uphold the New Deal.[122] He also recognized that this approach was likely to produce an unprecedented expansion of the government's regulatory power. The key for Arnold, however, was that the legal doctrine, and the "constitutional logic" that underpinned it, did not contain, and could not be read to contain, a fixed rule for what the government could and could not regulate.[123] The "rule" ultimately relied for definition on the social conditions it was designed to manage. Arnold's argument, then, reflected the "rule skepticism" and preference for flexible legal categories that were a core characteristic of realist thought. Changes in social policy meant changes both in the scope of the controlling legal category, as well as in the substance of the legal rule or precedent:[124]

> It is probably true that never before in the history of the country have so many things become affected with a public interest (and therefore subject to regulation) at the same time. The government appears to have undergone a change. Persons who feel that constitutional logic always opposes change therefore talk about [New Deal legislation] as unconstitutional. But the doctrine that too many things may not be affected by a public interest at the same time has never been announced in any judicial decision. . . . It is therefore those who oppose the constitutionality of the act who must stretch the logic of constitutional law to the breaking point—not those who favor it.

Here, then, was realism applied to the constitutional problems of the day. While most of the seminal realist writings focused on private law, Arnold's article outlined how realist insights could apply in the public law context. Realism meant that "constitutional logic" needed to take into account that "conditions ha[d] changed."[125] The New Deal was constitutional not because of any new legal formulae, but because changed social conditions meant that doctrine now yielded different results. This was an important argument, and one that, like Frank's AALS speech on experimental jurisprudence, suggests how realism achieved fuller expression through the New Deal. Far from supplanting realism, or consigning it to irrelevance, the New Deal provided a means of more fully defining realist thought in the constitutional context.

The sentiment expressed in Arnold's *New Republic* article was followed a year later by a more refined theoretical analysis from Llewellyn. In an

121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*

important article in the *Columbia Law Review* titled *The Constitution as an Institution*, Llewellyn argued that a "sane theory of constitutional law" should be rooted in the actual practices and functioning of government rather than the text or original intent of the Constitution.[126] For Llewellyn, the Constitution was, in the first instance, an "institution"—a set of ways of living and doing—rather than a matter of words or rules.[127] In this view, only "practice" could legitimize the words "as being still part of the going Constitution"; the words could not legitimize the practice.[128] This meant that neither a formal ratification process nor altering the language of the document was needed to amend the Constitution. Instead, "the working Constitution [was] amended whenever the basic ways of government [were] changed."[129] Llewellyn's theory, then, was ultimately functional—"a theory built . . . in terms of scope for change."[130]

A constitutional theory built in terms of "scope for change" meant that the Constitution itself had to be treated as inherently flexible. A rigid adherence to text, original intent, or past decisions simply did not provide workable guidance for addressing the difficult judicial problems that lie in what Llewellyn called "the penumbra of the working Constitution."[131] This was the region where there existed little or conflicting precedent, or where contemporary issues of modern economic life clashed against the original intent of the founding Constitution. For Llewellyn, the key to ensuring that the Constitution remained a viable framework for solving modern problems was to allow for "leeway and give" in constitutional analysis.[132] "No institutional structure can be viable," Llewellyn noted, "save insofar as it contains within itself the wherewithal for give, for readjustment, for self-sanation [sic]."[133] In this view, the appropriate way to frame the judicial inquiry into the validity of a challenged statute or piece of legislation was to ask: "Is this within the leeway of change which our going governmental scheme affords? And even if not, does the nature of the case require the leeway to be widened to include it?"[134] Llewellyn believed that framing the inquiry this way would ensure that constitutional analysis was rooted "not in an ancient Text, but in a living Government."[135]

Llewellyn's theory of constitutional law not only embodied the flexible and experimental approach characteristic of the New Deal; it was also, in

126. Llewellyn, *supra* note 29, at 1.
127. *Id.* at 17.
128. *Id.* at 12, 17.
129. *Id.* at 22.
130. *Id.* at 32.
131. *Id.* at 30.
132. *Id.* at 31–33.
133. *Id.* at 31.
134. *Id.* at 33.
135. *Id.*

fact, partly defined in specific reference to the New Deal. In providing examples for his assertion that "the working Constitution is amended whenever the basic ways of government are changed," Llewellyn pointed to President Roosevelt's establishment of the National Recovery Administration as an instance calling for such "amendment."[136] Furthermore, after touching on the recent expansion of federal regulatory power in various places throughout the article, Llewellyn characterized the "lines of distribution [of power] between federal and local authorities" as "inane" and concluded that "[t]he federal government should be doing much that the states do now."[137] Llewellyn's theory, then, seems to have been formed with the New Deal as a point of departure. The government's economic recovery legislation and expanding regulatory power were inviting the realists to consider the implications of realism in new areas.

Roscoe Pound and Walter Kennedy's separate criticisms of realism's relationship to the New Deal provides another example of the centrality of the New Deal in realist jurisprudence. There are many examples from which to draw, but examination of a few will suffice.

As the New Deal became increasingly embedded in the nation's social and economic fabric, Pound's opposition to the administrative agencies created to adjudicate the legality of New Deal policies grew apace.[138] There was some irony in this opposition as Pound had previously spoken enthusiastically of the rise of the administrative state and the advantages of "administrative justice."[139] But as the power of these agencies grew, and the role of "traditional" courts retrenched, Pound sought to sound the alarm of an emergent "administrative absolutism."[140] In a 1938 report of the American Bar Association's Special Committee on Administrative Law, Pound explained the nature of the problem this way:

> [Since the advent of the New Deal,] administrative bureaus and agencies are constantly pressing upon legislatures for increased jurisdiction and for exemption from review, and in the nature of the case encroach continually on the domain of judicial justice. . . . In consequence, except as the bar takes upon itself to act, there is nothing to check the tendency of administrative bureaus to extend the scope of their operations indefinitely even to the extent of supplanting our traditional judicial regime by an administrative regime.[141]

"The ideal of administrative absolutism," warned Pound, "[was] a highly

136. *Id.* at 22.

137. *Id.* at 38.

138. HORWITZ, *supra* note 6, at 217–22; HULL, *supra* note 3, at 257–61; DUXBURY, *supra* note 4, at 153.

139. HORWITZ, *supra* note 6, at 218.

140. Roscoe Pound et al., Special Comm. on Admin. Law, *Report of the Special Committee of Administrative Law*, 63 ANN. REP. A.B.A. 331, 342–46 (1938).

141. *Id.* at 339.

centralized administration set up under complete control of the executive . . . , relieved of judicial review and making its own rules."[142] Administrative justice, which Pound once characterized as a superior form of justice, was now no justice at all.[143]

Pound blamed realist jurisprudence for fueling the rise of the administrative state and the erosion of a "traditional court-centered rule of law ideal."[144] In one passage of the Report, he referred to Felix Cohen's seminal legal realist article *Transcendental Nonsense and the Functional Approach*, and commented that "[t]hose who would turn the administration of justice over to administrative absolutism regard [authoritative legal principles] as illusory. They expect law in this sense to disappear."[145] In other parts of the Report, he chided Jerome Frank's views on experimental jurisprudence and the New Deal as too deferential to administrative agencies and tantamount to complicity in the politicization of the law.[146] And if there was any doubt about where he stood on the question of realism's role in the New Deal's embrace of administrative law, Pound later made clear his view that "realist doctrine . . . may be seen in action in administrative absolutism."[147] Pound, then, was convinced that realism had found operational expression in the New Deal's administrative regime.

Walter Kennedy's impassioned critiques of realism offer additional insight into the New Deal's constituent role in defining realist jurisprudence. His 1934 article *The New Deal in the Law* is but one example.[148] In the article, Kennedy characterized realism as the "legal New Deal" or the "New Deal in the law," and suggested that it would be a critical factor in deciding "the real juristic battles loom[ing] on the horizon" over the constitutionality of New Deal legislation.[149] In Kennedy's view, realism's insistence that "the main objective of the law is to "get things done," to consider the "desirable effects" and to be not too exacting about the law under which it is accomplished,"[150] meant the demise of "juristic anchors" such as precedent and traditional legal principles, with ominous implications for basic conceptions of the rule of law.[151] In one passage that captured the basic sentiment, Kennedy

142. *Id.* at 343.

143. HORWITZ, *supra* note 6, at 218–20.

144. *Id.* at 220.

145. Pound et al., *supra* note 140, at 340.

146. *Id.* at 336, 350.

147. ROSCOE POUND, CONTEMPORARY JURISTIC THEORY 20 (1940).

148. Walter Kennedy, *The New Deal in the Law*, 68 U.S. L. REV. 533 (1934); Walter Kennedy, *More Functional Nonsense—A Reply to Felix S. Cohen*, 6 FORDHAM L. REV. 75 (1937); Walter Kennedy, *Realism, What Next*, 7 FORDHAM L. REV. 203 (1938); Walter Kennedy, *A Review of Legal Realism*, 9 FORDHAM L. REV. 362 (1940).

149. Kennedy, *The New Deal in the Law*, *supra* note 148, at 533.

150. *Id.* at 538.

151. *Id.* at 539.

summarized the point this way:

> [The New Deal in the law] prides itself on action and law in action. But there are shortcomings to this generous "functional approach" which these well meaning and estimable gentleman [i.e., the realists] seem to miss. . . . [T]here is an approaching crisis in the law as a result of the so-called scientific, fact-finding, functional, psychological, and experimental theories of law and law-making—theories which contain everything except law as formerly defined, practiced and taught.[152]

For Kennedy then, the New Deal was breathing life into an upstart, potentially dangerous, jurisprudential movement that threatened to destabilize the very foundations of the legal order.

The government careers of realists-turned-practitioners also help illuminate the New Deal's role in defining the realist movement. In his excellent essay arguing for the importance of biography in understanding realist jurisprudence, Roy Kreitner presses the point that "in the context of the debate over the meaning of realism, career choices bear theoretical importance."[153] Kreitner bases this proposition on an "institutional" perspective of law that holds that, as an institution, "law cannot be captured without accounting for the people who populate it, those people who carry out its work, the personnel."[154] For Kreitner, the New Deal careers of prominent realists helped to "fill in a number of suggestive gaps in a realist conception of law, highlighting the importance of law as a going institution, and one that should be understood through the complex of "law-and-government" jobs."[155] To know what realism was, we have to understand what the realists did.

Kreitner's case is convincing. By way of a review of Dalia Tsuk Mitchell's intellectual biography of Felix Cohen, Kreitner argues that Cohen's work at the Department of Interior during the New Deal enriched Cohen's understanding of realism's relationship to law in practice.[156] As one example, Kreitner points to Cohen's drafting of the Indian Claims Commission Act. One of the challenges Cohen faced while drafting the Act was how to protect aboriginal conceptions of property in Alaska when those conceptions did not fall within the rigid categories of property recognized by the legal system. Cohen, Kreitner argues, responded in a quintessentially realist fashion: since an existing legal category was obstructing a socially desirable result, Cohen sought to either modify the category or apply, perhaps unconventionally, a different category.[157] In the

152. *Id.* at 538.
153. Roy Kreitner, *Biographing Realist Jurisprudence*, 35 LAW & SOC. INQUIRY 765, 769 (2010).
154. *Id.* at 769.
155. *Id.*
156. *Id.* at 770–72.
157. *Id.* at 772.

end, Cohen's answer was to recast what were essentially Indian *property* claims in *contractual* terms.[158] This reconceptualization gave the commission authority over a category of claims that otherwise would not have been recognized. "The legal strategy Cohen employed in pushing an expansive mandate for the claims commission," explained Kreitner, "was based in text-book realism, shifting almost seamlessly between legal categories."[159] In this way, Cohen's service in the New Deal helped to ground realist jurisprudence in social reality.

Kreitner's brief assessment of Thurman Arnold's New Deal service also illustrates the convergence of "practical experience and theoretical predilections" that occurred when realists entered government service.[160] Centering his analysis on a review of Spencer Weber's biography of Arnold, Kreitner argues that contrary to the critique of some prominent intellectual historians, there was not "an irresolvable tension between Arnold's [realist writings] and his work as a New Dealer."[161] It is true that Arnold as scholar and theorist had decried the antitrust laws as empty symbols, while as head of the Justice Department's Antitrust Division he vigorously enforced them, but Kreitner suggest this stemmed from Arnold's pragmatism and functional approach, rather than from an abandonment of realist thinking. Once Arnold was expected to enforce the antitrust laws, he did so not out of devotion to a feckless symbolism, but rather with an eye towards practical results:

> Arnold was willing to do whatever he thought could work in order to increase production, improve distribution, and benefit the ultimate consumer. In doing so, he was pursuing the realist spirit in its most direct form: it was simultaneously a critique of the empty formalism of principle, an attempt to reorganize institutions on the basis of function and results, and a willingness to embrace experimentalism in pursuing those results.[162]

Thus Arnold's service on behalf of the New Deal, like Cohen's, illustrates how the New Deal helped define realism. As government practitioners, realists were able to reconcile theory with practice, thereby elevating the importance of non-judicial institutions in the realist conception of law. For a jurisprudence theoretically rooted in a "functional approach" to law, the New Deal helped substantiate this foundational realist principle by giving realists direct experience with those institutions—executive departments, administrative agencies, the Congress—most central to the everyday functioning of law.

This Part has made the case that the New Deal was central to legal

158. *Id.*
159. *Id.*
160. *Id.* at 779.
161. *Id.* at 776.
162. *Id.* at 775.

realism and should be used to define it. The literature that minimizes the relationship between the two, or treats the ascendance of the New Deal as marking the beginning of the end of realism, fails to appreciate that the New Deal was the platform that took realism from theory to practice. The New Deal allowed realist jurisprudence to expand into areas that its expositors had yet to examine in depth in their writings—constitutional litigation, administrative law, and policymaking. As Shamir notes in arguing for the status-enhancing effect of the New Deal on realist academics: "It was [the] forceful combination of their academic standing and their political influence *during the New Deal* that enabled the realists to *reframe the spatial boundaries of law*."[163] Absent the New Deal, realism arguably was little more than a passing intellectual fad—a provocative and compelling one to be sure, but one that would have remained a degree removed from the actual formulation and implementation, as opposed to the adjudication, of law. Through the New Deal, however, realism was able to inject itself into the workings of government in a way that expanded the definitional bounds of realist jurisprudence.

III. WICKARD V. FILBURN: A REALIST REVOLUTION IN CONSTITUTIONAL LAW

The first two parts of the paper examined the core characteristics of legal realism and analyzed the relationship between legal realism and the New Deal. This Part situates the landmark 1942 case of *Wickard v. Filburn* in a realist context and argues that the Court applied a legal realist framework in deciding the case. As will be shown, Justice Robert Jackson's opinion in the case provides a compelling illustration of realist principles in action.

A. Prologue to Wickard*: Of Commerce and Categories*

Before turning to *Wickard*, it will be useful to assess the contours of Commerce Clause jurisprudence pre-*Wickard*. This review reveals the largely formalist nature of the Court's pre-*Wickard* Commerce Clause jurisprudence—one dominated by artificial distinctions and arbitrary legal categories. In short, the Court had constructed a framework of rigid, technical legal concepts to guide its Commerce Clause analysis. This allowed it to strike down New Deal legislation that was based on an expansive view of federal regulatory power commensurate with the breadth and depth of the economic crisis to which the legislation was directed. Indeed, the clash between the Court's conceptualist approach to resolving questions of the federal commerce power and the New Deal's

163. SHAMIR, *supra* note 6, at 135.

basic premise that the government must be able to "permanently readjust"[164] the previously accepted bounds of federal regulatory power was a paradigmatic example of the realist conception of "society in flux, and in flux typically faster than the law."[165] Understanding the Court's formalistic pre-*Wickard* approach to Commerce Clause controversies helps illustrate why this line of jurisprudence was a good target for realist thinking, and how the *Wickard* opinion in particular amounted to a realist turn.

Two opinions in particular provide a compelling illustration of the Court's hostility to the New Deal, and its use of a conceptual approach to invalidate key New Deal legislation. These decisions are *A.L.A. Schechter Poultry Corporation v. United States*[166] and *Carter v. Carter Coal.*[167] Both of these decisions highlight the rigid legal categories the Court had developed in previous years as a framework for analyzing the scope of the federal commerce power.

At issue in *Schechter* was a regulation called the "Live Poultry Code."[168] The Code had been promulgated under the National Industrial Recovery Act (NIRA), a key component of the New Deal, and included minimum wage and maximum hour provisions. Principals of the Schechter Poultry Corporation, which operated a Brooklyn slaughterhouse, were convicted of violating these minimum wage and maximum hour provisions.

The Supreme Court reversed the convictions. In a unanimous opinion written by Chief Justice Charles Hughes, the Court first held that section 3 of the NIRA, which granted the President the power to authorize new and controlling prohibitions through codes of law, was an unconstitutional delegation of legislative power.[169] This meant that the Live Poultry Code, including its minimum wage and maximum hour provisions, was void. The Court further held that even if the Code was a valid regulation, it could not be applied to the defendants because the defendants were not engaged in interstate commerce.[170]

To demonstrate that the Schechter Corporation was not engaged in interstate commerce, the Court began by emphasizing that the corporation's activities, as opposed to the activities of those who facilitated the business of the defendants, were not transactions in interstate commerce.[171] The poultry in question may have been transported

164. *See, e.g.*, Roosevelt *supra* note 103 (quoting Roosevelt's 1934 Annual Message to Congress).

165. Llewellyn, *supra* note 11, at 1236.

166. 295 U.S. 495 (1935).

167. 298 U.S. 238 (1936).

168. *Schechter*, 295 U.S. at 521–31.

169. *Id.* at 535–42.

170. *Id.* at 542–43.

171. *Id.*

from out of state, but once the poultry reached the defendant's slaughterhouses, the interstate aspect of the transaction ended. The Court acknowledged that the Code might have been a valid regulation if applied to the transportation of the poultry or the transactions underlying the transfer and eventual sale of the poultry to the slaughterhouses, but it could not be applied to a slaughterhouse operator's wage and hour policy. The activities of the slaughterhouse—slaughtering the poultry and selling it within the state—were local in nature. As Chief Justice Hughes noted:

> When defendants had made their purchases . . . the poultry was trucked to their slaughterhouses in Brooklyn *for local disposition.* The interstate transactions in relation to that poultry then ended. Defendants held the poultry at their slaughterhouse markets for slaughter and local sale to retail dealers and butchers who in turn sold directly to consumers. *Neither the slaughtering nor the sales by defendants were transactions in interstate commerce.*[172]

The Court's division of slaughterhouse commerce into interstate and local transactions was critical because it allowed the Court to demonstrate the absence of a continuous "current" or "stream of interstate commerce." The "stream of commerce" concept was one the Court had established in previous cases—most notably *Swift & Company v. United States* and *Stafford v. Wallace*—to permit government regulation of transactions that were not interstate when considered in isolation, but were nonetheless essential to facilitating the "flow" of interstate commerce.[173] It was meant to be a flexible notion, recognizing the difficulty of sorting business operations into neat categories. In *Schechter*, however, the Court treated it in formalistic terms. The "stream of commerce" theory could not save the Code, the Court stated, because the slaughtering and sale of the poultry at issue was not a necessary part of maintaining a broader flow of interstate commerce. In fact, the poultry "had come to permanent rest within the state"—the flow of interstate commerce had ceased.[174]

After holding that neither the goods nor the activities at issue in *Schechter* fell within a stream of interstate commerce, the Court then addressed the extent to which the defendant's transactions might have been said to "affect" interstate commerce. The Court's Commerce Clause jurisprudence recognized that the federal government could regulate local transactions, if such transactions had a close relationship to interstate commerce.[175] In assessing the relationship between local and interstate transactions, the Court noted that it followed a "necessary and well-

172. *Id.*

173. Stafford v. Wallace, 258 U.S. 495 (1922); Swift & Co. v. United States, 196 U.S. 375 (1905).

174. *Schechter*, 295 U.S. at 543.

175. *Id.* at 544.

established distinction between direct and indirect effects."[176] If the way in which the defendant set hours and wages at its slaughterhouses directly affected interstate commerce—that is, if Schechter's intrastate activities undermined interstate commerce in live poultry—then Congress might have the power to regulate hours and wages. "But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power."[177]

Applying the direct–indirect distinction, the Court found that the hours and wages of the slaughterhouse employees had no direct relation to interstate commerce. The government argued that the direct effect stemmed from the fact that a slaughterhouse operator paying lower wages and requiring longer hours could lower the sale price for its product thereby depressing prices industry wide.[178] The Court found this argument wholly unconvincing, and emphasized that if the government was permitted to regulate the manner in which a local business could control costs and prices, then the commerce power could be extended to almost all manner of local business policies, including "number of employees, rents, advertising, methods of doing business, etc."[179] "[T]he authority of the federal government," wrote Chief Justice Hughes, "may not be pushed to such an extreme as to destroy the distinction" between interstate commerce and local activities.[180]

The formalism of Chief Justice Hughes's opinion in *Schechter* was not lost on contemporary observers.[181] Writing shortly after the opinion, Edward Corwin viewed the decision as rooted in a dogmatic "conceptualism" and saw within its reasoning a "determination to resist the inrush of fact with the besom of formula."[182] The legal distinctions invoked in the decision were "artificial in the highest degree" and contrary to a "realistic mode of reasoning" that would have recognized the consequences of the Schechter Corporation's wage and hour policies—namely, diversion of the stream of interstate commerce in poultry toward themselves.[183] By approaching the case in categorical rather than consequentialist terms, the Court unduly constrained the federal government's ability to respond to a dire economic situation that called for innovative legal approaches.[184]

---

176. *Id.* at 546.

177. *Id.*

178. *Id.* at 548–49.

179. *Id.* at 549.

180. *Id.* at 550.

181. BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 158-59 (1998).

182. *Id.* at 158 (quoting E. S. Corwin, *The Schechter Case—Landmark, or What*, 13 N.Y.U. L. Q. REV. 151, 170 (1936)).

183. Corwin, *supra* note 182, at 186, 189.

184. *Id.* at 155 ("[I]t would seem that 'extraordinary conditions' *do* 'enlarge constitutional power.'").

In *Carter v. Carter Coal Co.*, the Court again analyzed the scope of the federal commerce power through a formalist lens. Among the questions presented in *Carter* was whether the labor provisions of the Bituminous Coal Conservation Act of 1935 could be upheld as an exercise of the federal power to regulate interstate commerce.[185] The labor provisions included protection of the right of mine workers to organize and bargain collectively, the regulation of minimum wages and maximum hours of labor for mine employees, and the creation of a labor board to adjudicate disputes.[186] In the preamble to the Act, Congress declared that the production and distribution of bituminous coal "[bore] upon and directly affect[ed] interstate commerce" and that the labor provisions were necessary "to avoid obstructions in interstate commerce that recur in industrial disputes over labor relations at the mines."[187]

In finding that the labor provisions of the Act were not a valid exercise of the federal commerce power, the Court applied its previously-established categories. First, the Court emphasized the distinction between manufacturing and production, on the one hand, and commerce on the other. Mining was a mix of manufacturing and production, and thus an activity separate and apart from the commercial intercourse that followed it. "Commerce succeeds to manufacture," noted the Court, "and is not a part of it."[188] Furthermore, manufacturing and production were local activities. Referencing a hypothetical business owner, the Court commented: "So far as he produces or manufactures a commodity, his business is purely local. So far as he sells and ships, or contracts to sell and ship, the commodity to customers in another state, he engages in interstate commerce."[189] As a result, labor issues at the mines—including the fixing of wages, hours, and working conditions—were incidents of local production, not of interstate trade. Summarizing the Court's analysis on this point, Justice Sutherland put it thus:

> A consideration of the foregoing . . . renders inescapable the conclusion that the effect of the labor provisions of the act, including those in respect of minimum wages, wage agreements, collective bargaining, and the Labor Board and its powers, primarily falls upon production and not upon commerce; and confirms the further resulting conclusion that production is a purely local activity. It follows that none of these essential antecedents of production constitutes a transaction in or forms any part of interstate commerce.[190]

The Court then turned to the current of commerce theory that had

185. Carter v. Carter Coal Co., 298 U.S. 238 (1936).
186. *Id.* at 279–84.
187. *Id.* at 280.
188. *Id.* at 300.
189. *Id.* at 303.
190. *Id.*

featured so prominently in *Schechter*. Again, the approach was categorical—either the coal was in the flow of interstate commerce or it was not. If the coal was in the flow of commerce, then Congress could regulate labor relations at the mines under *Swift* and *Stafford*, decisions that had authorized federal regulation of local activities that, if left unregulated, would interfere with the flow of interstate commerce.

The Court quickly dismissed the argument that the coal at issue, or the coal mines more broadly, were located within a current of interstate commerce. In *Swift* and *Stafford*, noted the Court, "live stock [sic] was consigned and delivered to stockyards[,] not as a place of final destination, but as . . . a throat through which the current flows."[191] Activities and transactions at the local stockyards in those cases could be regulated because the livestock was still moving through the current of commerce to other markets. In *Carter*, however, the coal was being produced and manufactured at local mines—it had not yet entered the flow of commerce. For the Court, this was the mirror image of *Schechter*. In that case, "the flow had ceased," while in this case the flow "had not begun."[192]

Finally, the Court analyzed whether labor relations at coal mines had a direct or indirect effect on interstate commerce. In a move that seemed to double down on the formalism inherent in the direct–indirect distinction, the Court framed its analysis by noting that the determination of whether the effect of a given activity was direct or indirect was separate from the question of the magnitude of the effect. "[T]he extent of the effect," remarked the Court, "bears no relation to its character."[193] And in this case, potential labor disputes at the mines did not "operate proximately" on interstate commerce:[194]

> Working conditions are obviously local conditions. The employees are not engaged in or about commerce, but exclusively in *producing* a commodity. And the controversies and evils, which it is the object of the act to regulate and minimize, are *local* controversies and evils affecting *local* work undertaken to accomplish that *local* result. Such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its character.[195]

This was clearly formalism par excellence. To hold that the magnitude of an effect on interstate commerce was irrelevant to the nature of that effect was to ignore the social consequences that could result from

191. *Id.* at 305.
192. *Id.* at 306.
193. *Id.* at 308.
194. *Id.* at 307.
195. *Id.* at 308–09.

contentious labor relations, particularly when viewed from an industry-wide perspective. The Court was allowing legal categories, rather than practical realities, to drive judicial decision-making. The result was invalidation of another key component of the New Deal program.

Schechter and *Carter Coal* illustrate the conceptualism that largely underpinned the Court's Commerce Clause jurisprudence prior to *Wickard*. The formalist edifice began to crack, however, when the Court decided *NLRB v. Jones & Laughlin Steel Corporation* in 1937.[196] In *Jones & Laughlin*, the Court began to "deformalize" the legal distinctions that had led the Court to hold to a narrow view of interstate commerce. *Jones & Laughlin* did not completely obliterate these distinctions—the Court would not do this until *Wickard*—but the case clearly provided an opening for the Court to view Commerce Clause doctrine in less categorical terms.

Conventional wisdom holds that Chief Justice Hughes's decision in *Jones & Laughlin* upholding the National Labor Relations Act as a valid exercise of the federal commerce power—a decision that was part of a broader shift in the Court's posture toward New Deal legislation—was primarily the result of political pressure stemming from President Roosevelt's "Court-packing plan" announced earlier in 1937.[197] This view, however, overlooks at least two things. First, as Barry Cushman points out, the Court had successfully ignored multiple legislative attempts to control judicial behavior in the years immediately preceding the Court-packing plan.[198] Given recent history, the justices need not have been overly concerned about Roosevelt's most recent proposal. Second, the NLRB's argument in *Jones & Laughlin* relied on a straightforward application of the current of commerce theory: industrial strife caused by unfair labor practices impeded the interstate movement of raw materials and products.[199] Hughes could have simply adopted the theory as presented without expanding the bounds of current doctrine. This would have allowed the Court to uphold the NLRA and still "avoid charges of trimming principles for political convenience."[200] But Hughes went beyond a deductive application of the current of commerce theory. Instead, he took the opportunity to, in effect, restate the area of commerce clause jurisprudence dealing with the distinction between local activities and nationwide commerce. A philosophical shift then, as much as political pressure, seemed to be at work. The result was a seminal chink in the conservative Court's formalist armor.

The issue in *Jones & Laughlin* was whether the National Labor

196. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

197. For a compelling historical account of President Roosevelt's court-packing plan, see JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT (2010).

198. CUSHMAN, *supra* note 181, at 12.

199. CUSHMAN, *supra* note 181, at 168.

200. *Id.*

Relations Act (NLRA)—a landmark New Deal law that regulated labor relations by safeguarding employees' right to organize and bargain collectively—could be upheld as a valid exercise of the commerce power.[201] The NLRB had found that Jones & Laughlin had violated the NLRA by engaging in unfair labor practices affecting commerce. After the corporation failed to comply with the NLRB's cease and desist order, the Board petitioned the Fifth Circuit Court of Appeals to enforce the order. The Fifth Circuit denied the petition on the grounds that the NLRB order exceeded the federal commerce power. The Court granted certiorari.

In his opinion upholding the NLRA, Hughes seemed to acknowledge that the main Jones & Laughlin steel plant was located in a current of commerce, but he declined to decide the case on that basis. After noting the reasons that Jones & Laughlin proffered to show that its plant was not in the current of commerce, the Court contended that the argument over whether the plant was inside or outside the flow of commerce did not resolve the constitutional question:

> We do not find it necessary to determine whether these features of defendant's business dispose of the asserted analogy to the 'stream of commerce' cases. The instances in which that metaphor has been used are but *particular, and not exclusive* illustrations of the protective power which the government invokes in support of the present act. The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources.[202]

This passage was an important indication of the Court's less categorical approach to questions of the federal commerce power. It was not necessary to locate a local activity within a stream of commerce to permit federal regulation of that activity, suggested Hughes. It was the extent to which the activity directly impeded interstate commerce that mattered, not the extent to which the activity was within or without a current of commerce.

> It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power. Acts having that effect are not rendered immune because they grow out of labor disputes. It is the effect upon commerce, not the source of the injury, which is the criterion.[203]

Hughes then identified the general principle that would save the NLRA.

"Although activities may be intrastate in character when separately

201. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
202. *Id.* at 36.
203. *Id.* at 31, 32.

considered," wrote Hughes, "if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."[204] The fact that the employees were engaged in local production, rather than interstate commerce, was not determinative. Jones & Laughlin's highly integrated, national network of supply, transportation, manufacturing, production, and distribution meant that their main steel plant could not be conceived of in local terms. Hughes explained that labor conflicts at the plant, while technically "local," could have "paralyzing consequences" for the steel industry, an obvious direct effect on national commerce.[205] With the *Jones & Laughlin* decision, one of the staunchest defenders of categorical thinking in Commerce Clause jurisprudence had just launched a shot across the bow of formalism. The stage was now set for a more frontal assault on the conceptual approach that had constrained the scope of the federal commerce power. *Wickard* would provide the opening.

B. Background to Wickard v. Filburn

At the heart of the litigation in *Wickard* was an iconic New Deal law called the Agricultural Adjustment Act of 1938, passed after the Court declared the original Agricultural Adjustment Act of 1933 unconstitutional.[206] The Act's main purpose was to achieve a "balanced flow" of agricultural commodities in interstate and foreign commerce to restore the market value of such commodities, which had been severely undercut by the depression and an ongoing overproduction of crops.[207] The Act sought to accomplish this goal by mandating subsidies for key crops, such as cotton, corn, and wheat; by establishing acreage allotments as a control on how much of these crops farmers could harvest; and by imposing marketing quotas that limited the amount of crops farmers could sell.[208] The Act and its amendments also included financial penalties to be assessed against farms that exceeded production quotas.[209]

The facts of the *Wickard* case are fairly straightforward.[210] A small farmer in Ohio named Roscoe Filburn violated his acreage allotment under the 1938 Act, cultivating twice as many acres of wheat as allowed and harvesting a couple hundred excess bushels. In accordance with the penalties contained in a then recently passed amendment to the Act,

204. *Id.* at 37.

205. *Id.* at 41.

206. United States v. Butler, 297 U.S. 1 (1936) (invalidating the Agricultural Adjustment Act).

207. Agricultural Adjustment Act of 1938, Pub. L. No. 75-430, 52 Stat. 31, 31 (1938).

208. *Id.*

209. *Id.* at 52–55.

210. *See generally* Jim Chen, *The Story of* Wickard v. Filburn: *Agriculture, Aggregation, and Commerce*, *in* CONSTITUTIONAL LAW STORIES (Michael C. Dorf ed., 2009); Jim Chen, Filburn*'s Legacy*, 52 EMORY L.J. 1719 (2003).

county officials in Ohio assessed the prescribed monetary penalty on Filburn's excess bushels and imposed a lien on his wheat crop. Filburn filed suit in the U.S. District Court for the Southern District of Ohio, challenging his marketing excess penalty. The District Court ruled in favor of Filburn and enjoined enforcement of the Act.[211] The majority opinion emphasized that farmers had not been given sufficient notice of the increased penalties and concluded that the amendment "retroactively" effected "a taking of . . . property without due process."[212]

By the time the case reached the Supreme Court, the parties had refocused the dispute squarely on the question of whether the Act's regulation of wheat harvested for home consumption was a valid exercise of the government's commerce power.[213] Filburn argued that his excess wheat could not be regulated as an exercise of the government's commerce power because the wheat was consumed on his farm rather than sold in the marketplace. This kind of production and home consumption was "local in character," and its effects upon interstate commerce were "at most indirect."[214] Such activities, argued Filburn, were beyond the reach of the federal commerce power.

The government argued that controlling the total available supply of wheat—including wheat consumed on the farm—was necessary to regulate both the amount of wheat marketed and the interstate price structure.[215] Wheat consumed on the farm was not "economically separable" from the total supply of wheat available for marketing, which meant that even wheat grown for home consumption had a substantial effect on interstate prices.[216] Furthermore, the more wheat that farmers grew and consumed on the farm, the less wheat that farmers would purchase commercially.[217] Only by addressing the economic relationship between the home consumption of wheat and the interstate price of wheat could Congress hope to achieve its goal of preventing an excessive supply from driving down prices to levels ruinous to the farmer.[218]

In a unanimous decision, the Court ruled in favor of the government. Focusing on the "economics of the wheat industry"—including the extent of commerce between wheat-importing and wheat-exporting states, the impact of foreign production and import restrictions on the national market, and regional variations in the use of wheat among American

211. Filburn v. Helke, 43 F. Supp. 1017 (S.D. Ohio 1942).

212. Chen, *Filburn's* Legacy, *supra* note 210, at 1737.

213. *Id.* at 1740.

214. Wickard v. Filburn, 317 U.S. 111, 119 (1942).

215. Brief for the Appellants on Reargument, Wickard v. Filburn, 317 U.S. 111 (1942) (No. 59), 1942 WL 75715, *18–21.

216. *Id.* at *10, 22, 25.

217. *Id.* at *18 ("In general, the more wheat is consumed on the farm where grown[,] the less will be purchased by farmers commercially.").

218. *Id.* at *18–26.

farmers—the Court found that home-consumed wheat had a "substantial influence" on price and market conditions.[219] Such influence was enough to subject even "local" activities to the federal commerce power. "[T]he power to regulate commerce," emphasized the Court, "includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices."[220] Since growing wheat for consumption on the farm was a practice affecting wheat prices, homegrown wheat was a valid object of congressional regulation under the Commerce Clause.

Justice Jackson's opinion for the Court provides a compelling example of legal realist thinking in judicial decision-making. All four features of the realist movement discussed in Part I manifest themselves in *Wickard*: skepticism of rigid legal rules; application of a functional approach to law focused on social consequences; use of the social sciences—in particular economic principles—to inform legal reasoning; and a willingness to defer to legislative purpose. The result was an opinion that produced the most expansive interpretation of congressional power to regulate interstate commerce in the Court's history.

C. The Wickard *Opinion: A Lesson in Applied Realism*

The Court's rule skepticism set the tone for the *Wickard* opinion and ultimately cleared the path to upholding congressional regulation of an activity—growing wheat for home consumption—that was neither interstate nor commerce. At the outset of his discussion of "the course of decision under the Commerce Clause," Justice Jackson made clear that legal categories that had been developed and sanctioned by the Court for deciding Commerce Clause cases in the past would no longer be used to set the bounds of the commerce power.[221] In doing so, Justice Jackson was signaling an intent to reframe the Court's Commerce Clause jurisprudence, which up to that point had been characterized by categorical thinking to determine what kind of economic activity fell within the scope of Congress's power under the Commerce Clause. Justice Jackson argued that these categories—local–national, direct–indirect, production–commerce—had contributed little to legal analysis because they were divorced from economic reality. "[Q]uestions of the power of Congress," wrote Justice Jackson, "are not to be decided by reference to any formula which would give controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon interstate commerce."[222]

Evidence of the thinking behind the Court's dismissal of artificial legal

219. *Wickard*, 317 U.S. at 128.
220. *Id.*
221. *Id.* at 120.
222. *Id.*

categories in *Wickard* could be found in memoranda Justice Jackson wrote to his law clerk in the summer of 1942, months before oral argument.[223] Even at that early stage, Justice Jackson expressed open skepticism of the utility of the legal standards the Court had used in recent Commerce Clause cases. The direct–indirect distinction, for example, was a "judicial shibboleth" with "almost no value for weighing economic effects and for applying them to the commerce power."[224] Furthermore, in a complex, highly integrated national economy, Justice Jackson believed it was nearly impossible to formulate workable criteria for distinguishing "local" from "interstate" economic activity. "In such a state of affairs," he wrote to his clerk, "the determination of the limit [of the commerce power] is not a matter of legal principle, but of personal opinion; not one of constitutional law, but one of economic policy."[225]

This lack of faith in the utility of judicially-created legal categories echoed the realist critique of legal formalism expressed by Llewellyn, Cohen, Radin, and others. Like the realists, Justice Jackson insisted that "economic facts" rather than "legal formulae" had to drive judicial decision-making. The legal distinctions that had emerged around the Court's Commerce Clause jurisprudence in an effort to preserve the "logical machinery of the law"[226] were "neither consistent nor well defined"[227] and thus should not be given deference. As Justice Jackson put it in a seemingly realist-inspired passage of his opinion, "Whether the subject of the regulation in question [i.e., wheat grown and consumed on the farm] was 'production,' 'consumption,' or 'marketing' is, therefore, not material for deciding the question of federal power before us."[228] For the Court, these labels had become a type of "transcendental nonsense."[229]

The Court's emphasis in *Wickard* on economic effects over "technical legal conceptions"[230] highlights the second characteristic of realism that comes through in the opinion—the idea that questions of law should be resolved with a view toward social consequences. Realism's consequentialist orientation was, of course, a corollary of its rule-skepticism—a consideration of social effects was thought to fill the gap left by analytically empty legal concepts. Justice Jackson adopted and applied this consequentialist view in setting out the standard that should be used to resolve the constitutionality of the marketing quota provisions of the Act. In one of the opinion's most memorable passages, Justice Jackson made clear that consequences, not categories, were the touchstone:

---

223. CUSHMAN, *supra* note 181, at 216–220.
224. *Id.* at 217.
225. *Id.*
226. Arnold, *supra* note 35, at 803.
227. CUSHMAN, *supra* note 181, at 217 n.53.
228. *Wickard*, 317 U.S. at 124.
229. *See* Cohen, *supra* note 16.
230. *Id.* at 122.

> But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress *if it exerts a substantial economic effect on interstate commerce*, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."[231]

The test, then, was whether homegrown wheat exerted a substantial effect on interstate commerce. The Court undertook a four-page exegesis of the economics of the wheat industry—both national and global—to show that wheat grown and consumed on the farm did have such an effect.[232] This effect stemmed from regional variations in crop usage between farmers in wheat-exporting and wheat-importing states. The data in the record indicated that "consumption of homegrown wheat . . . constitute[d] the most variable factor in the disappearance of the wheat crop."[233] Justice Jackson noted that such consumption "appear[ed] to vary in an amount greater than 20 percent of average production."[234]

Controlling this consumption was thus the critical factor in realizing the price control purposes of the Act—the government would find it nearly impossible to regulate the interstate price of wheat if some farmers could simply increase their consumption of homegrown wheat and opt out of the market altogether. Homegrown wheat and wheat in interstate commerce were not economically separable; consumption of the former inevitably impacted the price of the latter. The Court summarized the point this way:

> [B]eing in marketable condition [homegrown] wheat overhangs the market and if induced by rising prices tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce.[235]

Clearly, then, the question for Justice Jackson was not whether precedent allowed for homegrown wheat to be regulated via the commerce power; the question was whether not regulating homegrown wheat would thwart the primary purposes of the policy—to increase the market price of wheat and, to that end, limit the volume that could affect the market.[236] Framing the legal issue this way allowed the Court to interpret the scope of the government's regulatory power with much more flexibility, and in a way that placed questions of social policy at the forefront of the Court's analysis. By adopting this kind of framework—a functional approach centered on the impact of homegrown wheat on policy—Justice Jackson

231. *Id.* at 125.
232. *Id.* at 125–128.
233. *Id.* at 127.
234. *Id.*
235. *Id.* at 128.
236. *Id.*

was invoking one of the essential features of the realist program. This policy-oriented approach was captured well in the conclusion of the Court's Commerce Clause analysis. "This record leaves us in no doubt," wrote Justice Jackson, "that Congress may properly have considered that wheat consumed on the farm where grown if wholly outside the scheme of regulation would have a substantial effect *in defeating and obstructing its purpose* to stimulate trade therein at increased prices."[237]

Another characteristic of realist thought that featured prominently in the *Wickard* opinion was the use of the social sciences to inform judicial decision-making. In *Wickard*, Justice Jackson brought economic principles and data to the forefront of the Court's analysis. The point was not to use economics to "invent new doctrine" or ignore "constitutional logic"—something that realist and New Deal lawyer Thurman Arnold advised against in his *New Republic* article[238]—but instead to ensure that the Court's analysis properly accounted for empirical reality. If questions of law were best resolved with a full appreciation of the social facts upon which the law was built, as the realists maintained, then the Court's constitutional inquiry in *Wickard* had to be rooted in principles of supply and demand and the economic realities that drove passage of the law in the first place.

With farming data and economic principles at the center of the inquiry, the Court could be confident its analysis reflected the facts on the ground. The empirical reality also ensured that the Court would dismiss any claim that Filburn, as a single farmer, could not by himself upset market dynamics with his consumption of homegrown wheat. In the Court's view, the unit of analysis was not Filburn as an individual farmer, but rather all farmers who might engage in a similar consumption pattern—a consumption pattern that the challenged provisions were specifically designed to prevent. As Justice Jackson explained in a particularly noteworthy paragraph of the opinion:

> The maintenance by government regulation of a price for wheat undoubtedly can be accomplished as effectively by sustaining or increasing the demand as by limiting supply. The effect of the statute before us is to restrict the amount which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs. That appellee's own contribution to demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.[239]

In microeconomic terms, the Court was recognizing that Filburn's

237. *Id.* at 128–29.
238. See Arnold, *supra* note 116.
239. *Id.* at 127–28.

consumption, if aggregated, would produce a market demand curve that would defeat the purposes of the Act. The relationship between an individual demand curve and market demand curve, and the effect of a market demand curve on market price, are of course, the stuff of microeconomics.[240] This is not to say that the *Wickard* Court conducted its own independent economic analysis; Justice Jackson strongly believed that such an undertaking lay outside the province of the Court. But Justice Jackson seemed to take seriously the notion that the integration of social science and law would lead to a decision better aligned to social reality. "[W]e ground our decision on the *realities* disclosed," wrote Justice Jackson in a memorandum to the other Justices, "which afford no basis for judicial denial to Congress of the power to extend its regulation to the production of wheat not intended for commerce or sale."[241]

The Court's nod to empirical economics in *Wickard*, even as the Court refrained from conducting its own independent economic analysis, highlights the final feature of legal realism highlighted by the *Wickard* opinion—a belief in the importance of judicial deference to legislative purpose. This was a notion Justice Jackson preached even before his appointment to the Supreme Court. In *The Struggle for Judicial Supremacy*, Jackson emphasized that the legislature was due substantial deference on questions of government policy because it was the branch of government that most directly reflected the views of a "dynamic people."[242] The outcome of the legislative process, Jackson noted, was the "democratic conciliation of [contemporary] social and economic conflicts"[243]—the result of a collective struggle among the people to define social policy. The Court, on the other hand, was "almost never a really contemporary institution."[244] The combination of life tenure in the judiciary, and the short election intervals of the Congress, meant that "the average viewpoint of the two institutions" was usually "a generation apart."[245] Judicial modesty was critical, Jackson believed, to ensuring the legislature could meet the urgent needs of modern society without interference from an out-of-touch judiciary.[246]

The views on institutional competence that Jackson expressed in *The Struggle for Judicial Supremacy* were an important part of his decision-making in *Wickard*. Both in the opinion itself and in memoranda on the case, Justice Jackson made clear his belief that it was not the judiciary's role to second-guess economic policy decisions reached by the

240. AUSTAN GOOLSBEE ET AL., MICROECONOMICS 165–203 (2012).
241. CUSHMAN, *supra* note 181, at 221 n.86.
242. ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 315 (1941).
243. *Id.* at 321.
244. *Id.* at 315.
245. *Id.*
246. *Id.* at 288, 295, 320.

legislature.[247] For Justice Jackson, the Court's role was to ensure that there was a substantial relationship between the regulated activity and interstate commerce. Other issues, such as whether some farmers benefited more than others from the Act's marketing quota provisions, was no concern of the Court. "The conflicts of economic interest between the regulated and those who advantage by it," wrote Justice Jackson in *Wickard*, "are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process."[248] It was the Congress, not the Court, that was best equipped to resolve debates of economic policy.

Justice Jackson was clear-eyed about the far-reaching implications of his views. Judicial deference to legislative purpose on questions of economic policy would all but remove the Court from playing the primary role in deciding the scope of the federal commerce power. Justice Jackson, however, was undeterred. He was convinced that a more explicit recognition of judicial deference was the natural outgrowth of recent developments in the Court's Commerce Clause jurisprudence, even as the Court had tried to maintain a pretense of review.[249] In Justice Jackson's view, it was much better for the Court to frankly acknowledge that judicial standards had little applicability to questions involving the intersection of economic regulatory policy and the commerce power. "We have all but reached an era in the interpretation of the [C]ommerce [C]lause," wrote Justice Jackson to his law clerk, "of candid recognition that we have no legal judgment upon economic effects which we can oppose to the policy judgment made by Congress in legislation."[250] Justice Jackson repeated this sentiment in a letter written to then-Circuit Judge Sherman Minton explaining his *Wickard* opinion. "All of the efforts to set up formulae to confine the commerce power have failed," wrote Justice Jackson. "When we admit that it is an economic matter, we pretty nearly admit that it is not a matter which courts may judge."[251]

Justice Jackson's insistence in *Wickard* on judicial deference to Congress also reflected his deeper conviction that the success of the New Deal required a more flexible-minded judiciary. As a prominent New Dealer before his appointment to the Court, Jackson had defended New Deal policies in litigation and believed that the government should enjoy the freedom of action needed to respond to the unprecedented economic crisis. For Justice Jackson, a legal philosophy that looked backward to precedent was ill-suited to the demands of the times. "In dealing with a nation whose genius is invention," Jackson said in a speech he delivered as Assistant Attorney General of the Justice Department, "we cannot

247. Wickard v. Filburn, 317 U.S. 111, 129 (1942).
248. *Id.* at 126.
249. CUSHMAN, *supra* note 181, at 217–18.
250. *Id.* at 217 n.60.
251. *Id.* at 221 n.87.

outlaw every action that cannot show a precedent."[252] In Jackson's view, lawyers rooted in old ways of thinking were tying up "many major policies of government in legal doubts," undermining effective enforcement of important public policies.[253] Such obstructionism was detrimental to responsive government. "Judicial review of social policy," Jackson wrote in *The Struggle for Judicial Supremacy*, "load[ed] the dice in favor of the status quo and [made] the constructive task of liberal leadership impossible."[254] The New Deal could survive only if judges "let the realities of life influence . . . legal decisions"[255] and refrained from erecting "judicial barriers to the reasonable exercise of legislative powers."[256]

CONCLUSION

This Note has argued that the New Deal was central to realist jurisprudence and should be used to define it. The New Deal allowed proponents of realism to "operationalize" realist jurisprudence by putting its tenets into practice, while also allowing realist theoreticians to consider the implications of realism in new areas, such as constitutional and administrative law. It was realism that provided the theoretical justification for allowing the New Deal to guide the scope of the government's regulatory authority under the Constitution, as opposed to letting the Constitution constrain the New Deal. It was realism that helped provide the rationale for the rise of the administrative state. Those who would downplay the relationship between realism and the New Deal as a mere coincidence of ideas have not cast their analytical lens wide enough. Without the New Deal, we would be left with little understanding of realism's impact on public law and its effect on judicial decision-making.

Justice Jackson's *Wickard* opinion provides a compelling example of how the New Deal allowed realism to "reframe the spatial boundaries of law"[257] in a way that might otherwise not have been possible. The government sought to regulate an activity that was neither interstate, nor commerce, nor in the "stream" of commerce, and Jackson, applying realist principles, upheld this unprecedented expansion of the federal commerce power. In the opinion, the Court criticized the categorical thinking that had previously characterized its Commerce Clause jurisprudence; it adopted a functional approach focused on social context; it incorporated empirical research; and it showed deference to legislative purpose and expertise.

252. Robert Jackson, *Address Before the New York Bar Association* (Jan. 29, 1937), *in* 81 CONG. REC. Appendix 123, 124 (1937).

253. *Id.*

254. JACKSON, *supra* note 242, at 320.

255. Jackson, *supra* note 252, at 124.

256. JACKSON, *supra* note 242, at 175.

257. See *supra* note 163 and accompanying text.

Wickard, in short, was a realist decision. It was a decision that allowed for an examination of realism's impact on constitutional jurisprudence. And it was a decision that arguably would not have occurred but for the application of realist principles to the New Deal policy agenda.