Studies in American Political Development

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The Novice Administrative State: The Function of Regulatory Commissions in the Progressive Era

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Research Article

Cite this article: Glock J (2023). The Novice Administrative State: The Function of Regulatory Commissions in the Progressive Era. *Studies in American Political Development* **37**, 41–55. https://doi.org/10.1017/S0898588X22000190

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Abstract

Researchers have long argued that an important impetus for the creation of the administrative state was the desire to bring experts into government and especially into the regulation of business. Yet Progressive Era politicians did not focus on attracting experts when crafting one part of the administrative state, independent regulatory commissions. This article examines the contemporary understanding of regulatory commissions and shows that they were most often intended as a substitute for vacillating juries. Commissions' most important advantage over juries was that they acquired experience in investigations of a single subject over time, not that their appointees were already academics or experts in a particular subject. This article also shows that appointments to these commissions did not demonstrate a desire for apolitical expertise. This is the first examination of all members appointed to the Interstate Commerce Commission, Federal Trade Commission, Federal Power Commission, Federal Communications Commission, and the Securities and Exchange Commission in the period from 1887 to 1935. This article finds that political and sectional balance, rather than previous expertise, were the most important criteria for these commissions' members, at least until the late 1920s, after the end of the supposed Progressive Era.

For decades, American historians and political scientists have argued that one of the chief aims of the Progressive movement, and one of its chief successes, was bringing "experts" into government.[1] Most saliently, Progressives invented expert administrative commissions and insulated them at least partially from the hackery of party patronage machines.[2] Historian Richard McCormick claimed that the creation of regulatory commissions run by "impartial experts" was "progressivism's most distinctive governmental achievement."[3]

Yet the actual history and justifications for independent commissions belie the historical consensus. This article examines what contemporaries understood was distinctive about regulatory commissions, and what they thought such commissions could and should do in their regulation of business.[4] While previous researchers have noted that commissions substituted for executive, legislative, and judicial functions, they have ignored how commissions also

[1]See Samuel Hays, *Conservation and the Gospel of Efficiency: The Progressive Conservation Movement, 1890–1920* (Pittsburgh, PA: University of Pittsburgh Press, 1999; first published by Harvard University Press, 1959); Daniel Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* (Cambridge, MA: Harvard University Press, 1998), 107–11; Maureen Flanagan, "Progressives and Progressivism and the Age of Reform," *Oxford Research Encyclopedia of American History* (Oxford University Press online), http://americanhistory.oxfordre.com/.

[2]See, e.g., Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920* (Cambridge, UK: Cambridge University Press, 1982), 150, 160–62, 248–49; Daniel Ernst, *Tocqueville's Nightmare: The Administrative State Emerges in America, 1900–1940* (Oxford, UK: Oxford University Press, 2014); Thomas C. Leonard, "Progressive Era Origins of the Regulatory State and the Economist as Expert," *History of Political Economy* 47, supp. 1 (2015): 49–76; Joanna Grisinger, "The (Long) Administrative Century: Progressive Models of Governance," in *The Progressives' Century: Political Reform, Constitutional Government, and the Modern American State*, ed. Stephen Skowronek, Stephen Engel, and Bruce Ackerman (New Haven, CT: Yale University Press, 2016), 360–81. Okayama notes that the Interstate Commerce Commission was focused on legal issues and was populated by lawyers, which he defines as a type of expert: Hiroshi Okayama, "The Interstate Commerce Commission and the Genesis of America's Judicialized Administrative State," *Journal of the Gilded Age and Progressive Era* 15 (2016): 129–48. DeCanio notes that regulatory commissions were used to blunt moves toward more radical reform: Samuel DeCanio, *Democracy and the Origins of the American Regulatory State* (New Haven, CT: Yale University Press, 2015). Both of these works support some of the arguments advanced in this article. It should also be noted that the earliest regulatory commissions stretched back to the 1870s, before the supposed Progressive Era, but most historians treat them as early manifestations of progressive-style reform.

[3]Richard McCormick, "The Discovery that Business Corrupts Politics: A Reappraisal of the Origins of Progressivism," *American Historical Review* 86, no. 2 (April 1981): 271, 268. Quoted also in Grisinger, "The (Long) Administrative Century," 361.

[4]Despite the massive literature on the administrative state, almost all histories do not discuss the particular place of the commission form in early regulation: see, e.g., Ernst, *Tocqueville's Nightmare*; Jerry Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* (New Haven, CT: Yale University Press, 2012). Surprisingly, there is no work that I am aware of that focuses specifically at the history of commissions in the United States. One book examines the rise of equivalent tribunals in Great Britain but does not focus on their jury-like aspects. Chantal Stebbings, *Legal Foundations of Tribunals in Nineteenth Century England* (Cambridge, UK: Cambridge University Press, 2006).

substituted for another body called the "fourth branch" of government, the jury. This article demonstrates that politicians and lawyers believed that commissions would function as fact-gathering and fact-determining bodies, which contributed to traditional court proceedings in a manner similar to juries, but which provided more consistency and certainty, especially for the regulated businesses.[5]

The commissions' creators valued diverse backgrounds more than subject-matter expertise or political independence and believed that any expertise the commissions gained was acquired "on the job," through factual investigation, rather than by bringing independent specialists themselves into the government. Thus the expertise of such commissions was not reliant on modern concepts of independent academic knowledge of a subject, but on the practical knowledge acquired over time on the commission itself. In a word, the goal of such commissions was to accumulate "experience," not to hire existing "experts."

A comprehensive examination of appointments to federal commissions also demonstrates that independent or outside expertise was not central to their operation. A look at all of the appointments to the Interstate Commerce Commission (ICC), Federal Trade Commission (FTC), Federal Power Commission (FPC), Federal Communications Commission (FCC), and Securities and Exchange Commission (SEC) indicates that subject-area expertise was the exception rather than the rule among commissioners, at least in the early years. Far from being apolitical, a large number of appointees were former politicians. A tendency toward what we today think of as apolitical expertise in appointments did not become pronounced until the late 1920s, after the end of the supposed Progressive Era.

This reexamination of independent regulatory commissions should help us place them in a different tradition of government reform. One of the most important goals of the independent commissions was to supplant previous fact-finders, particularly juries. In this respect, they more closely mirrored some Progressive Era legal reforms, such as the creation of speciality courts or parole boards, rather than new scientific agencies, such as the Bureau of Chemistry or Bureau of Animal Industry, growing under the typical, civil service system of the government, where expertise did acquire a new prominence in this era.[6] These commissions were indeed part of a move away from what some have called a state of "courts and parties" to a state with more regularity and standardization.[7] Yet previous histories of this era's reforms have slighted how the jury was a barrier to such standardization, and how constitutional mandates about jury power had an important effect on the shape of the administrative state. This article also highlights how, even if the commissions did not attract experts, they could become training grounds for future specialists or experts themselves, especially in areas that had not yet acquired a body of academic knowledge.[8] This article will show that independent commissions, unlike other aspects of the Progressive regulatory state, were typicallyseen as substitutes for juries, and that their main advantage was their ability to acquire experience over time, a value that was only later replaced with a desire for outside, academic expertise.

1. Fact-Finding Commissions

The modern government "commission" has a deep genealogy. From as far back as the sixteenth century, England's Parliament created temporary "commissions" to investigate particular subjects.[9] In America, early state legislatures also formed temporary commissions whose job was to report back on subjects to those legislatures. The first permanent commissions did not arrive until the 1820s and '30s, when some states, such as New York and Massachusetts, formed bank commissions to keep tabs on bank balance sheets, with special subpoena power to investigate them outside of court proceedings.

[5]There has been some discussion about the general movement to limit jury input in this era in traditional court proceedings. See Morton Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge, MA: Harvard University Press, 1977), 28–29, 84–85, 141–43; "The Changing Role of the Jury in the Nineteenth Century," *Yale Law Review* 74, no. 1 (November 1964): 170–92; Renee Lettow Lerner, "The Rise of the Directed Verdict: Jury Power in Civil Cases before the Federal Rules of 1938," *George Washington Law Review* 81 (2013): 448–525. For similar movement in the United Kingdom, see Conor Hanly, "The Decline of the Civil Jury Trial in Nineteenth Century England," *Journal of Legal History* 26, no. 3 (2005): 253–78. For summaries of the U.S. Supreme Court cases that limited the role of the jury in the twentieth century, see Suja Thomas, *The Missing American Jury: Restoring the Fundamental Constitutional Role of the Criminal, Civil, and Grand Juries* (Cambridge, MA: Cambridge University Press, 2016). Merrill has explained how courts came to review administrative findings in a manner similar to appellate reviews of lower courts' or juries' findings. But his article does not focus on the jury-like nature of commissions or their pre-1906 history, and thus claims that the origin of the appellate review standard "remains something of a mystery." Thomas Merrill, "Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law," Columbia Law Review 111, no. 5 (June 2011): 939–1003, 963.

[6]See Michael Willrich, *City of Courts: Socializing Justice in Progressive Era Chicago* (Cambridge, UK: Cambridge University Press, 2003), esp. 124 (Willrich quoted a Children's Bureau report on the new court methods: "In the old courts the jury was the vital factor; in the new courts, in practice, the jury is discarded."); Carolyn Strange, *Discretionary Justice: Pardon and Parole in New York from the Revolution to the Depression* (New York: New York University Press, 2016). For examination of the growing power of the noncommission and nonindependent executive branch agencies, where subject-matter expertise was common, see James Harvey Young, *Pure Food: Securing the Federal Food and Drugs Act of 1906* (Princeton, NJ: Princeton University Press, 1989); Daniel Carpenter, *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862–1928* (Princeton, NJ: Princeton University Press, 2001). Many Progressive Era theorists did talk about the value of expertise in administration, but they were generally referring to their hopes for administration, as opposed to existing political practice, or they were referring to administration in general rather than commissions specifically, of which they were often suspicious. See, e.g., Herbert Croly's celebration of experts in *The Promise of American Life* (New York: Macmillan, 1911; first published by Macmillan, 1909), 157, 269, 328–29. But he simultaneously distrusted commissions: "government by commission … may be tolerated; but if they are tolerated for too long, they may well work more harm than good" (Croly, *The Promise*, 361).

[7]Robert Wiebe, *The Search for Order, 1877–1920* (New York: Macmillan, 1966); Skowronek, *Building a New American State*. For studies that demonstrate that government in the antebellum period moved far beyond "courts and parties," see Richard John, "Governmental Institutions as Agents of Change: Rethinking American Political Development in the Early Republic, 1787–1835," *Studies in American Political Development* 11 (Fall 1997): 347–80.

[8]Many independent groups tried to build up expertise in this era, but most of those were focused on social services or charities, and not the regulation of business. See Thomas Haskell, *The Emergence of Professional Social Science: The American Social Science Association and the Nineteenth-Century Crisis of Authority* (Baltimore, MD: Johns Hopkins University Press, 2000), which includes no discussion of railroads or antitrust; Dorothy Ross, *The Origins of American Social Science* (Cambridge, UK: Cambridge University Press, 1992). Carpenter's *Forging of Bureaucratic Autonomy* did focus on similar process of government building up expertise through experience in the Department of Agriculture, but it also noted the rise of outside professionalism and the high levels of education and qualifications of department officers. Although this article relates to the previous literature about bureaucratization and standardization, the novelty of commissions and their contrast with civil service bureaucracies means that it also speaks to the diverse ways the state expanded outside of typical bureaucracy; see Kimberley Johnson, *Governing the American State: Congress and the New Federalism, 1877–1929* (Princeton, NJ: Princeton University Press, 2007); Brian Balogh, *The Associational State: American Governance in the Twentieth Century* (Philadelphia: University of Pennsylvania Press, 2015). For the epistemological importance of continually revised "experience" as important for progressive policymakers, as opposed to expertise, see James Kloppenberg, *Uncertain Victory: Social Democracy and Progressivism in European and American Thought, 1870–1920* (New York: Oxford University Press, 1986).

[9]Thomas J. Lockwood, "A History of Royal Commissions," *Osgoode Hall Law Journal* 5, no. 2 (October 1967): 179–83.

https://doi.org/10.1017/S0898588X22000190 Published online by Cambridge University Press

The hidden nature of bank assets and liabilities seemed to demand such permanent and summary inspections, but they operated largely as extensions of earlier investigatory commissions.[10]

From early in their history, the state and the federal governments also created temporary commissions that could make consequential determinations in a limited number of situations.[11] Legislatures and Congress sometimes appointed temporary multimember commissions to make "findings" on complicated issues of "public rights," such as those concerning awards and grants from the government.[12] For instance, after conquering or purchasing new land, the federal government often created a "board of commissioners" to settle public land claims in the acquired territories. After the Mexican American War, Congress created such a board to deal with land claims in California. The board heard petitioners' cases and determined whether they held title to certain lands.[13] Congress allowed that either the petitioner or the United States could appeal to a regular court to overturn the board's finding. But the evidence provided by the board, including its final finding on who owned the land, would constitute all the evidence of the case unless the judges themselves chose to add more.[14] Since these and similar commissions could deal only with government grants and public rights at the government's plenary discretion, however, they were limited to a narrow set of situations.[15]

None of these commissions had the power to regulate private businesses. In this era, any legal order, fine, or action against private individuals had to be pursued through courts, and in common law courts all factual determinations had to be decided by a jury. Anglo-American law maintained a sharp line between the "facts" of any particular case, which were decided by a jury, and the "law," which was determined by judges. The Seventh Amendment to the U.S. Constitution, and similar amendments in state constitutions, cemented this division by stating that in common law cases "no fact tried by a jury, shall be otherwise re-examined in any court of the United States."[16] Federal and state constitutions thus made it impossible for commissions to make consequential decisions about facts in private cases, let alone to make their own decisions on orders or penalties without first convincing a jury.

Reformist lawyers in the nineteenth century, however, tended to be suspicious of the motives and capabilities of juries and tried to limit their reach.[17] One example of this movement came in the gradual limitation of the role of grand juries, which in many states were replaced by indictments by "information" at the discretion of prosecutors.[18] But a particular issue that raised lawyers' hackles in this era was the jury's determination of "mixed question of law and fact."[19] In traditional jurisprudence, such mixed questions meant the *application* of a set of facts to the law at hand, such as whether the facts indicated that "malice" was part of a defendant's actions, and therefore what the final verdict should be (say, manslaughter or murder). Since these mixed questions were decided by a jury, they were considered by definition questions of fact, even though they involved applying those facts to particular legal standards.[20] As vague legal rules came to govern many common law decisions such as torts and damage claims, however, lawyers questioned the ability of a jury to consistently evaluate these questions. Under these new standards a jury would have to decide whether, say, the leaving of a haystack in a fire-prone area near a neighbor's home was "unreasonable" and therefore negligent and subject to damages.[21]

Oliver Wendell Holmes was an early advocate of the movement to limit jury discretion in mixed question issues. In the opening of his 1881 opus *The Common Law,* Holmes famously argued that "The life of the law has not been logic; it has been

[10]Judge Glock, "The Forgotten Visitorial Power: The Origins of Administrative Subpoenas and Modern Regulation," *Review of Banking and Financial Law* 37 (Fall 2017-Spring 2018): 228–29; Lev Menand, "Why Supervise Banks? The Foundations of the American Monetary Settlement," *Vanderbilt Law Review* 74, no. 4, 951–1022. For the creation of later federal investigative commissions, such as the Mississippi River Commission in 1879 and the Inland Waterways Commission in 1907, see Hays, *Conservation and the Gospel of Efficiency*, 105–108, 201. Out of concern for the great distances traveled to and from courts in America, early state governments and the federal government created "commissioners," who were appointed by judges and who could take affidavits and depositions outside of traditional court proceedings, which somewhat limited court and jury access to witnesses and evidence and thus have some similarities with later regulatory commissions. See "An Act to provide for taking evidence in the courts of the United States in certain cases," 4 Stat. 197–200, January 24, 1827; Charles Lindquist, "The Origin and Development of the United States Commissioner System," *American Journal of Legal History* 14 (January 1970): 1–16.

[11]The federal government created "boards of commissioners" to determine land claims from the earliest years of the republic. See discussion in Malcolm Rohrbough, *The Land Office Business: The Settlement and Administration of American Public Lands, 1789–1837* (New York: Oxford University Press, 1968), 3–42.

[12]Some legislative committees also functioned like these independent commissions in their evaluation of public rights. To see how these committees' "fact-findings," similar to those of juries, shaped the administrative state, see Maggie McKinley, "Petitioning and the Making of the Administrative State," *Yale Law Journal* 127 (2018): 1538–637.

[13]David Hornbeck, "The Patenting of California's Private Land Claims, 1851–1885," *Geographical Review* 69, no. 4 (October 1979): 434–48.

[14]*United States v. Ritchie*, 58 U.S. 17 How. 525 (1854). Congress noted that the findings of such land commissions were "conclusive only against the United States" and therefore did not affect any private rights or claims between citizens (*Congressional Globe*, January 27, 1851, 347). See discussion of the limited nature of these tribunals, in reference to a similar situation in Florida, in *United States v. Ferreira*, 54 U.S. 40 (1851).

[15]For discussion of "public rights," see *Murray's Lessee v. Hoboken Land and Improvement Company*, 59 U.S. 272, 284 (1856); Ann Woolhandler, "Delegation and Due Process: The Historical Connection," *Supreme Court Review* 1 (2008): 228–33. Other purely public rights that could be decided by a commission included, for instance, the right to a public job, which decision could be delegated to a multimember agency such as the Civil Service Commission, created in 1883. The focus on public right distinguished many of the early regulatory bodies discussed by Mashaw from later regulators like the railroad commissions. See Mashaw, *Creating the Administrative Constitution*.

[16]U.S. Constitution, Amendment VII. For state and federal debate on limiting judicial review over jury factual decisions at the time of the founding, see Pauline Maier, *Ratification: The People Debate the Constitution, 1787–1788* (New York: Simon & Schuster, 2010), 111–13, 449–55; Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Vintage Books, 1996), 320–22.

[17]For discussions of lawyers' distrust of juries and the attempts to limit the power of juries in the nineteenth and early twentieth century, see all of n. 5 supra, as well as Douglas Smith, "The Historical and Constitutional Contexts of Jury Reform," *Hofstra Law Review* 25, no. 2 (1996): 444–45, noting the trend of the "greater distrust of the jury that accumulated in the nineteenth century"; Martin Kotler, "Reappraising the Jury's Role as Finder of Fact," *Georgia Law Review* 20, no. 1 (1985): 127–34. Even those legal writers who defended juries in the era often advocated reforms to streamline them and limit their input. See Alfred Coxe, "The Trials of Jury Trials," *Columbia Law Review* 1, no. 5 (May 1901): 286–97. For discussions of earlier attempts to revive juries' power, see Ariela Gross, "Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South," *Yale Law Journal* 108 (1998): 117; Laura Edwards, *The People and Their Peace: Legal Culture and Transformation of Inequality in the Post-Revolutionary South* (Chapel Hill: University of North Carolina Press, 2009). For popular support for juries, see discussion of Interstate Commerce Commission later in this article.

[18]See *Hurtado v. California*, 110 U.S. 516 (1884); Richard M. Calkins, "Abolition of the Grand Jury Indictment in Illinois," *University of Illinois Law Forum* 2 (Summer 1966): 423–48, 425–26.

[19]Earlier American legal reformers had limited the ability of juries to decide questions of law as well, see Smith, "Historical and Constitutional Contexts of Jury Reform," 446–50.

[20]John Houston Merrill, Charles Frederic Williams, Thomas Johnson Michie, and David Shephard Garland, *The American and English Encyclopedia of Law Volume 23*, 2nd ed. (1903), 545.

[21]For famous early cases creating a "reasonable man" standard for tort claims, in England and America, see *Vaughan v. Menlove*, 132 Eng. Rep. 490 (1837); *Brown v. Kendall*, 60 Mass. 292 (1850).

https://doi.org/10.1017/S0898588X22000190 Published online by Cambridge University Press

experience."[22] Holmes thus argued that legal standards, such as the "reasonableness" of certain actions, should come from "the teachings of experience" acquired over years and generations. Holmes's ideas had an important, although little noted, corollary. Juries did not have the capacity to gain experience over time in certain areas of law and thus accumulate the facts on which to base new standards. Holmes argued that at some point experience should be cemented in a rule emerging from judges. He asked about vague standards such as "reasonableness": "is it to be imagined that the court is to go on leaving the standard to the jury forever?" The answer was obvious: "A judge who has long sat at *nisi prius* [a lower court] ought gradually to acquire a fund of experience which enables him to represent the common sense of the community in ordinary instances far better than an average jury … the sphere in which he is able to rule without taking their opinion at all should be continually growing." By contrast, that of the jury should continually be shrinking.[23] The experiential logic of legal development in Holmes seemed to point away from the old common law system of juries, especially in difficult or developing areas of law.

Other Progressive Era legal reformers also noted the inconstancy of juries and the need for some more regular means to discover correct legal standards. Frederick Green, in the *Harvard Law Review* in 1901, argued that "mixed questions" should usually be decided by the judge. He said that any standard presented in instructions to the jury should be "stated in terms so definite and clear as to leave no room for difference of opinion as to what it is that the law requires." Like many other legal reformers, he also noted that juries had particular "prejudices" that seemed to prevent them from being fair arbiters of such standards and seemed to undermine the very goal of an independent jury. The jury prejudice he and others most noted at the time was that against corporations. Green worried about the "tendency in juries to make the law a respecter of persons, not to say a non-respecter of corporations."[24]

As many reformers noted, however, judges hearing multitudes of different types of cases could not acquire experience in one area, nor could they decide questions of fact still left to juries under federal and state constitutions. Railroad commissions, most often seen as the progenitor of the modern administrative state, were a potential solution to the problem of inconstant or prejudiced and antibusiness juries in the developing realm of railroad regulation. Starting with the Illinois Railroad and Warehouse Commission, created as a result of the Illinois state constitution in 1870 (which also eliminated the constitutional mandate for a grand jury), commission advocates hoped to use these agencies to create more concrete standards for vague, common law rules and to limit popular input into business decisions.[25]

There were two common law duties of common carriers, including railroads, that concerned commission advocates: first was the duty to not discriminate between similar customers; second was the duty not to charge an unreasonable fare. The problem, as advocates saw it, was that what constituted discriminatory or unreasonable conduct was impossible to know before presented to any particular jury. These vagueness issues were made more pressing because the new railroad or "Granger" laws, pushed most often by rural radicals, made any violation of the "reasonableness" or "nondiscriminatory" standards subject to penal or criminal actions, as opposed to mere civil damages claimed by injured parties. The Illinois commission, similar to many subsequent ones, would blunt some of that vagueness and establish a schedule of reasonable railroad rates for different lines and companies, which thus garnered it support from more pro-business interests.[26] One Illinois legislator objected that, legally, the "legislature could not fix a tariff, nor could it confer the power on any Commission. That was a question for a jury only," and another said that reasonable rates were "a question of fact for the jury."[27] But the advocates for the commission had a workaround. The commission's rate schedule would not be conclusive but would constitute "*prima facie*" evidence of what were reasonable and nondiscriminatory rates in any court case tried against the company.[28] Thus the commissioners' evidence and findings were brought into court with the assumption of correctness, and the burden on rebutting it placed on the opponent of the commission's decision, instead of having the reputability of the evidence and the finding of the mixed question decided entirely by a jury.[29]

To further displace the jury, subsequent commissions had the power to issue "orders," as they were called, for changing future railroad rates, which were enforced by courts through actions of mandamus or injunction. Importantly, these were actions in equity, which were a type of judicial ruling outside of common law rules. These actions did not require either a grand jury for indictment or a petite jury trial, because the orders did not require any money damages or criminal penalties for past actions, but only a demand that the railroad change future rate-setting or behavior. It was only after refusal to obey such orders that judges could claim that a defendant was in "contempt" of court, which again did not require a jury, and after which decision a judge

[22]Oliver Wendell Holmes Jr., *Common Law* (London: Macmillan, 1881), 1.

[23]Ibid., 123–24. Holmes's teacher at Harvard, James Bradley Thayer, held similar beliefs, see Thayer, "'Law and Fact' in Jury Trials," *Harvard Law Review* 4, no. 4 (1890): 161–66. Holmes was later able to implement these ideas. In his holding in *Baltimore & Ohio R. Co. v. Goodman*, 275 U.S. 66, 70 (1927), a negligence case, Justice Holmes held that "It is true … that the question of due care is very generally is left to the jury. But we are dealing with a standard of conduct, and when the standard is clear, it should be laid down once for all by the Courts."

[24]Frederick Green, "Mixed Questions of Law and Fact," *Harvard Law Review* 15, no. 4 (December 1901): 271–80, 79–80. See Professor Austin Scott's later claim that the "sympathetic and scientific" approach to law "is blocked by the provisions in the state and federal constitutions guaranteeing the right to trial by jury" in Austin Wakeman Scott, "Trial by Jury and the Reform of Civil Procedure," *Harvard Law Review* 31, no. 5 (March 1918): 669.

[25]For background and analysis of the passage of the railroad provisions of the Illinois constitution, see Mark Kanazawa and Roger Noll, "The Origins of State Railroad Regulation: The Illinois Constitution of 1870," in *The Regulated Economy: A Historical Approach to Political Economy,* ed. Claudia Goldin and Gary Libecap (Chicago: University of Chicago Press, 1994), 13–54. The first permanent railroad commission, created by Massachusetts in 1869, was merely investigatory and thus inspired few constitutional or legal questions, but it did manifest a similar desire to acquire information and "facts." See Thomas McCraw, *Prophets of Regulation* (Cambridge, MA: Harvard University Press, 1984), 57–79. For discussion of the legal aspects of railroad regulation, which, however, does not discuss issues of commission displacement of juries or "mixed questions," see James W. Ely Jr., *Railroads and American Law* (Lawrence: University Press of Kansas, 2001), 78–104.

[26]For a discussion of commissions blunting the more radical effects of new laws, see DeCanio, *Democracy and the Origins*, 222–237.

[27]"The State Capital," *Chicago Daily Tribune*, March 19, 1873.

[28]Illinois Supreme Court Judge Charles Lawrence first suggested the *prima facie* standard in striking down the earlier Illinois railroad law, which did not contain an independent commission and did not give "artificial persons" the "right of trial by jury" due to the nature of its standards. *Chicago and Alton Railroad Co. v. People ex rel. Koerner*, 67 Ill. 11 (1873). Illinois, and then other states, and eventually the federal government, took up the phrase of *prima facie* evidence andused it to describe the weight that should be given to evidence submitted by the commissions. On general *prima facie* meaning at time, see John Henry Wigmore, *A Treatise on the System of Evidence at Trials in Common Law*, vol. IV (Boston: Little, Brown, 1905), 3536–37.

[29]See *Chicago, Burlington, and Quincy Railroad v. People*, 77 Ill. 443 (1875).

https://doi.org/10.1017/S0898588X22000190 Published online by Cambridge University Press

could himself impose penalties. By using equitable procedures, the judge in a case involving future rates could decide entirely on the evidence brought to him by the commission, with no input from juries at all. Statutes demanding that judges sitting in equity should hear such complaints "speedily" and that they only hear evidence from the commission, discouraged them from taking new evidence on their own, or investigating too closely the commission's findings.[30]

Subsequent court cases show that railroad commissions' determinations of the reasonableness of railroad rates blunted accusations that the new penal railroad laws were excessively vague and unconstitutional. An Illinois Supreme Court decision upholding the constitutionality of the new commission argued that under the previous law, which had allowed juries to determine damages, "different persons would have different opinions as to what is a fair and reasonable rate. Courts and juries, too, would differ.… There would be no certainty of being able to comply with the law." Yet the court said that the commission demonstrated that the legislature "did not intend to leave the railroad companies … exposed to such seeming injustice."[31] When states passed railroad regulation laws without providing for commissions, and which therefore allowed juries to assess penalties whenever they thought a rate was unreasonable, courts struck them down. The Kentucky Court of Appeals said that under that state's railroad law, where any "unreasonable rate" as decided by a jury could lead to penalties, every railroad company rate would be subject to attack, "though it can not be known to be such until after an investigation by a jury, and then only in that particular case, as another jury may take a different view.… There is no standard whatever fixed by the statute." The lack of a standard meant that the act was not "due process of law" for railroad corporations and therefore was unconstitutional.[32]

By contrast, those states that passed railroad commission laws saw courts uphold them and their imposed penalties, since they provided railroads certainty and standardization. Supreme Court Justice David Brewer, ruling in a federal circuit court case, heard a challenge to the law forming the Iowa Railroad Commission. As was typical, the Iowa commission could bring cases for penalties against railroads before a jury whenever a railroad deviated from the commission's declared "reasonable" rate, with the commission's rate given the usual *prima facie* deference.[33] The railroad argued that under the law, it was subject to no constant standard: "no man being able to tell in advance what in fact is, or what any jury will find to be, a reasonable charge." Brewer agreed that "no penal law can be sustained unless its mandates are so clearly expressed than any ordinary person can determine in advance what he may and what he may not do under it." Yet in his mind the existence of the commission and its "recommendations" for reasonable rates saved the law, since the recommendations gave "definiteness and certainty." The certainty meant that the law, and therefore other penal laws against railroads based on commission findings, was constitutional.[34]

Some courts thought leaving even the ultimate decision about railroad penalties to a jury prevented the creation of a coherent and constitutional standard. One court found that an 1882 Tennessee state railroad commission law, which assessed penalties against "unreasonable" rates first decided by a commission, still left too much discretion to the jury. The court noted that the commission's decisions about rates were "*prima facie* evidence of the reasonableness and justice of the [rates]; but they are nevertheless subject to revision by juries." The court thought the Tennessee law was particularly problematic because the juries could assess penalties up to ten times the amount of actual damages suffered by the plaintiffs. The problem, as the court saw it, was that as long as the jury ultimately decided the amount, there "could be no reasonable approximation to uniform results; the verdicts of juries would be as variant as their prejudices, and this could not be tolerated. To thus relegate the administration of the law to the unrestrained discretion of the jury … would inevitably lead to inequalities and to injustice."[35] Here, the *prima facie* evidence of the commission was not enough to make "reasonableness" a uniform and definite standard, and the court thus recommended even more constraint on jury decisions, which they again noted were "prejudiced."

The U.S. Supreme Court was at first suspicious of state railroad laws that dispensed with the jury,[36] yet it soon came to the opinion that certainty was the chief desideratum of the railroad laws, which meant keeping the jury out of the process. As Chief Justice Melville Fuller said in 1902 in upholding the Kentucky Railroad Commission Act, "The mischief to be cured [by the railroad law] … was the want of certainty, and the remedy provided was the fixing of the rates by the railroad commission," quoting the decision on the Kentucky case cited above about the problem of one jury making a reasonableness decision when "another jury may take a different view."[37] The states and commissions thus

[30]See language of Oregon commission law in *Board of Railroad Commissioners v. Oregon Railway and Navigation Company*, 17 Ore. 65, 70 (1888) and Interstate Commerce Act, 24 Stat. 379, 384–85, February 3, 1887. Besides juries, commissions were occasionally analogized to a "special master in chancery," who heard the facts in an equity case and reported them to the judge. See, e.g., *Report of the Proceedings and Debates of the Constitutional Convention, State of Virginia*, vol. II (Richmond, VA: Hermitage Press, 1906), 2162, 2231.

[31]*Chicago, Burlington, and Quincy Railroad v. People*, 77 Ill. 443, 448 (1875).

[32]*Louisville & Nashville Railroad Company v. Commonwealth of Kentucky*, 99 Ky. 132 (1896).

[33]Damages were a common law action, not an equitable action, and thus had to be brought before a jury. If damages were increased by certain "penalties" decided by the government, they were analogized to criminal case. An attempt by the Oregon Board of Railroad Commissioners to enforce damages merely by an order and then a court hearing in equity was struck down by the state's supreme court, since defendants had "the right to a trial by jury before its repayment can be enforced." *Board of Railroad Commissioners v. Oregon Railway and Navigation Company*, 75.

[34]*Chicago & N.W.R. Co. v. Dey*, 35 F. 866 (1888). In another case, Brewer struck down an indictment alleging "unreasonable" benefits given to a shipper from railroads under the federal Interstate Commerce Act because there were no clear standards set in the law nor was there any commission decision to limit the act. He argued, "The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable." *Tozer v. United States*, 52 F. 917, 919 (1892). For a similar British case that found that the railroad commission must substitute for varying juries, see *Tobin v. London & N.W. Ry. Co.*, 2 Ir. R. 11, 18 (1893).

[35]*Louisville & N.R. Co. v. Railroad Commission*, 19 F. 679, 691 (1884). See also a report of the case in "The Tennessee State Commission Overthrown," *New York Times,* March 1, 1884, p. 2. This case and *Dey* were cited as recently as 2015 by the U.S. Supreme Court as the first discernable rulings that a law could be "void for vagueness." *Johnson v. United States*, 135 S. Ct. 2551, 2569 (2015).

[36]*Chicago M. & St. Paul Railway Company v. Minnesota*, 134 U.S. 418 (1890). In this case, the Court said that a Minnesota law made the commission's rates "not simply advisory, not merely *prima facie* equal and reasonable, but final and conclusive," which went too far. "It deprives the company of its right to a judicial investigation, by due process of law," including a hearing by a jury (ibid., 457). Most historians focus on the "substantive due process" decision of the court, which focused on the unreasonably low rate, and elide the issue of procedural due process, involving displacement of a jury's and court's factual findings. See, e.g., James W. Ely Jr., "The Railroad Question Revisited: *Chicago, Milwaukee & St. Paul Railway v. Minnesota*, and the Constitutional Limits on State Regulation," *Great Plains Quarterly* 12, no. 2 (Spring 1992): 121–34.

[37]*McChord v. Louisville & Nashville R. Co.*, 183 U.S. 483, 499 (1902). Eventually, the Court said that there was no due process concern at all in the state placing complete

https://doi.org/10.1017/S0898588X22000190 Published online by Cambridge University Press

had constitutional sanction and even encouragement to remove the jury from any fact-finding process.

State railroad commissions understood that their job was to try and supplant the jury, and they thus viewed juries with suspicion, specifically due to juries' supposed antirailroad animus. The Chair of the New York Railroad Commission wrote a letter to the *New York Times* in which he argued against giving any credence to jury decisions that came against a commission decision. He noted that in civil trials for penalties, "the railway company is always at a disadvantage, [since] the jury always leans towards the wounded, battered and perhaps crippled victim, and away from the inanimate 'soulless corporation." He complained that in another case, the fact that a "rustic and ignorant jury rendered a stupid verdict 'censuring' the railroad company, while the Railroad Commission believed the fault lay with the driver of the tally-ho coach … proves nothing against the commission's findings."[38] Judge Thomas Cooley of Michigan expressed similar concerns. He wrote in 1883 that the job of railroad commissioners was to be "friendly umpires" between the railroads and the public. In particular, he noted that the commission would operate without the "prejudice" of juries against railroads. He said that in a regular court case, even "if judges are firm and impartial, this is not to be expected of juries. Jurors are drawn from the community at large, where distrust and prejudice is common…. There are undoubtedly many who believe that every verdict awarded against a railroad company is so much recovered by the community from a grasping and heartless tyrant." A commission could view such cases objectively, without preconceived ideas emerging from previous study or prejudice against corporations.[39] Cooley would soon be appointed chair of the federal ICC.

2. Federal Railroad Regulation and Juries

Congress created the Interstate Commerce Commission (ICC), the grandfather of all subsequent federal regulatory commissions, in 1887 to create consistent legal standards while dispensing with variable and prejudiced juries in railroad cases, just as the state commissions had done.[40] One representative arguing for the bill claimed that "the advantage of a commission is obvious. It has the power to ascertain and report upon all questions of fact arising under the law."[41] These questions of fact, of course, included mixed questions, which otherwise would be decided by a jury under the Seventh Amendment to the Constitution. Many advocates noted specifically the problems with juries in railroad cases. One senator focused on jury "prejudice" that could be reined in by a commission. He said that railroads in general suffered from "discrimination" and "juries do them injustice. A jury of citizens … frequently gives five or ten times as much damage to a citizen against a railroad company" as they would in a case not involving railroads.[42] When Senator John Spooner argued that he would not entrust decisions on important questions of fact to the new commission, Senator George Hoar asked if he would rather it be "settled in one place by one jury one way and in another place by another jury another way?"[43] As was usual with state commissions too, the ICC could issue orders for future rate changes that were evaluated in equity courts by judges sitting alone. One proponent argued that using the tool of a "contempt of court will have far more effect than any possible penalty contingent on a jury."[44] The ICC thus acquired similar powers of fact-finding for cases against railroads as the state commissions.[45]

Representative John Reagan of Texas, by contrast, who had proposed an earlyversion of the Interstate Commerce Act, demanded that all standards such as the reasonableness of railroad rates be enforced through jury trials in normal court cases. Reagan was a fierce proponent of the rural radicals who wanted to lower railroad shipping costs, and he was suspicious that commissions would favor railroads more than juries would, as were other rural advocates for regulation.[46] One railroad attorney testifying against Reagan's bill explained why he thought Reagan's bill was unworkable. He said it came to "the vague word 'reasonable.' That refers the question of rates to a jury; and what the decision of a jury is going to be, Omnipotence may be able to tell, but we cannot."[47] Reagan, however, stood by juries' powers and remained opposed to the commission form of regulation. He said he knew the railroad companies wanted a commission "instead of that legislation which will enable the citizen to go right directly to an honest court and an honest jury."[48] Another supporter of Reagan claimed that a commission's decisions on discrimination would amount to the "application of law to a given state of facts, and that is what is called in law a judgment," which required a jury.[49] State

power over rates in commissions. *Robert Prentis v. Atlantic Coast Line Company*, 211 U.S. 210 (1908) (J. Holmes). Holmes later noted privately that the "leaks between the three watertight compartments (Legislative, Executive, Judicial) don't bother me." Holmes to Charles Warren, March 25, 1927, Oliver Wendell Holmes Jr. manuscript collections, Harvard Law School Library.

[38]Ashley W. Cole, "The Railroad Commission and Juries," *New York Times,* April 10, 1899, p. 5.

[39]Thomas Cooley, "The Importance of an Umpire Between Common Carriers and the Public," *Bullion* (1883), republished in *Eight Annual Report of the Railroad Commissioners of the State of Missouri* (Jefferson City, MO: State Journal Company, 1883), 30. Congress later quoted Cooley's article during the debate on the federal railroad commission: *Debate on Interstate Commerce in the 48th Congress, 2nd Sess.* (Washington, DC: Government Printing Office, 1885), 126. The other innovative commissions of this era, the workmen's compensation commissions, were even more clearly created with the goal of removing juries from decisions about vague awards based on common law standards of "reasonable care" and negligence in tort or damage cases, and they also involved business's demands that government blunt jury prejudice and inconstancy. See President William Taft's message supporting a Federal Worker's Compensation Commission, where he complained about "the undue emotional generosity of the jury": President William Taft, "Message of the President of the United States Transmitting the Report of the Employers' Liability and Workmen's Compensation Commission" (Washington, DC: Government Printing Office, 1912), 7. See also "Limited Review by Jury of Findings in Workmen's Compensation Commission," *Yale Law Journal* 42, no. 1 (November 1932): 135–37. Charles McCarthy, who participated in creating state regulatory commissions in Wisconsin, noted that the new progressive laws in that state had the same impetus: "that is, using the device of reasonableness as a standard enforceable by the commission." Charles McCarthy, *The Wisconsin Idea* (New York: Macmillan, 1912), 71.

[40]Jerry Mashaw discusses several earlier types of federal regulation and makes a strong claim that the Board of Supervising Inspectors, created in 1852 to police steamboat safety, was the first federal commission to deal with private claims, but its narrow focus on safety, and not price or other types of economic regulation, and its control over the "public right" of navigation on federal waters, meant it had less influence on future commissions than the ICC. Mashaw, *Creating the Administrative Constitution,* 194–95.

[41]*Debate on Interstate Commerce*, 104.

[42]*Congressional Record,* 48th Congress, 2nd Sess., 1885, 16, 759.

[43]*Congressional Record,* 49th Congress, 2nd Sess., 1887, 18, Appendix 38.

[44]*Debate on Interstate Commerce*, 168. See similar sentiment, *Congressional Record,* 48th Congress, 2nd Sess., 1884, 16, 64.

[45]It was not until 1906, however, that the ICC had the power to set maximum rates . These new ICC rates and orders were still subject to the same *prima facie* standard. See Hepburn Act, 34 Stat. 591, June 29, 1906.

[46]William R. Childs, *The Texas Railroad Commission* (College Station: Texas A&M Press, 2005), 36–38.

[47]*Arguments and Statements before the Committee on Commerce* (Washington, DC: Government Printing Office, 1882), 75.

[48]*Congressional Record,* 48th Congress, 2nd Sess., 1884, 16, 31.

[49]*Congressional Record,* 48th Congress, 2nd Sess., 1885, 16, 567.

https://doi.org/10.1017/S0898588X22000190 Published online by Cambridge University Press

opponents of commissions had made similar arguments.[50] The substitution of the commission's findings for juries', which were usually suspicious of railroads, helps explain why most early and radical advocates for federal railroad regulation were opposed to such commissions and favored Reagan's law, while more established and conservative business interests favored the commission.[51]

Lawyers understood that the main constitutional innovation of the ICC was the overturning of jury trials. The *American Law Review* provided the most extensive public discussion of the Interstate Commerce Act's constitutionality soon after its passage. The article cited just two constitutional issues with the law. First, it claimed that the commission's *prima facie* fact-finding overturned the Article III right to a trial before neutral parties, and, second, the act specifically overturned the right to a trial by jury under the Seventh Amendment.[52]

As it was finally passed, the Interstate Commerce Act did allow complainants against railroads to take their case to regular courts instead of to the commission if they so choose. Yet the court and jury option was progressively limited. For one, the original act did not allow people to bring their complaints to state courts, seemingly out of the same fear of "prejudice" in state courts, which tended to have less selective juries. During the debate on this clause, Representative William Fuller unsuccessfully asked, "Why not give the State courts jurisdiction and permit a jury of twelve men of the county to decide on the merits of the case.… The people are jealous of that old-fashioned right of trial by jury."[53] The proponents of the commission wanted to limit precisely this possibility.

It was not long before the Supreme Court read the right to jury trial out of the law entirely, arguing that the very nature of a regulatory commission was that it imposed universal standards that varying and prejudiced juries could not maintain. In the case of *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.* (1907), the Court said that "if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness." It said the commission standard should be accepted by courts in almost all cases.[54] The ICC itself later said that by this case the "Supreme Court has erected this Commission into what has been termed 'an economic court,' or to give it a more commonplace definition, but one perhaps of stricter legal analogy, a select jury to pass upon the reasonableness" of railroad actions.[55] One article in the *Columbia Law Review* agreed with Court's removal of the jury-trial option and proposed extending it to any matter involving railroad crimes, due to the problems of jury prejudice: "If the average jury is incompetent to decide the complex questions of reasonableness and discrimination in an action for damages, it can hardly be asked to do so in a criminal prosecution. Where experts honestly differ, twelve laymen would seldom be found to agree with a like number in another jurisdiction; and the consequence would be intolerable confusion as well as frequent injustice to defendant carriers, whose views on a nice question of railroad administration happened to conflict with those of a particular jury."[56]

The U.S. Supreme Court, in fact, began treating the ICC's findings not only as *prima facie* constraints on judge and jury decisions, but as the functional equivalents of jury decisions themselves. Although, traditionally, juries had to find all questions of fact, courts could overturn or remove a fact-based question or verdict from a jury if they believed there was no "substantial evidence" to convict or hold liable some party.[57] The findings of railroad commissions on "mixed questions" of reasonableness were at first not given the same weight. For instance, the Supreme Court noted that "the reasonableness of the rate in a given case depends on the facts, and the function of the Commission is to consider these facts and give them their proper weight." It said that judges could overturn such findings if they found other facts to the contrary.[58] By 1907, the Court was more deferential to such commission decisions, arguing that "whether the Commission gave too much weight to some parts of [the evidence] and too little weight to other parts of it is a question of fact, and not law," and, under this new, jury-like standard, such "facts" should be decided only by commission.[59] Eventually, the Court explicitly applied the same "substantial evidence" decision they used to apply to jury's decisions to overturning any case decided by a commission. In *ICC v. Union Pacific Railroad Company* in 1912, the U.S. Supreme Court noted that "the courts will not examine the facts [presented by the commission] further than to determine whether there was substantial evidence to sustain the order."[60] The *New York Times* noted that people now assumed that "the Commission's findings of facts were conclusive … so its

[50]See "The State Capital," where a Farmers' Club member called the Illinois commission a "fraud and humbug" that prevented "the jury, and the community" from getting to the railroads.

[51]See votes for and against different proposals: Keith Poole and Howard Rosenthal, "Congress and Railroad Regulation: 1874–1887," in *The Regulated Economy: A Historical Approach to Political Economy*, ed. Claudia Goldin and Gary Libecap (Chicago: University of Chicago Press, 1994), 81–120. Most historians and political scientists argue that this opposition emerged from rural partisans' distrust of government by "expert," without discussing their support of jury trials. See George Miller, *Railroads and the Granger Laws* (Madison: University of Wisconsin Press, 1971); Elizabeth Sanders, *Roots of Reform: Farmers, Workers, and the American State, 1877–1917* (Chicago: University of Chicago Press, 1999); Skowronek, *Building a New American State*; DeCanio, *Democracy and the Origins*. Rural radicals favored increased use of juries in other types of cases, as did many labor leaders: see William Jennings Bryan in *Proceedings of the Constitutional Convention of the Proposed State of Oklahoma* (Muskogee, OK: Muskogee Printing, 1907), 389; Samuel Gompers in "Praised By Gompers," *New York Times,* October 22, 1924, p. 13.

[52]Horace Stringfellow, "The Interstate Commerce Law," *American Law Review* 23 (January/February 1889): 84–99.

[53]*Congressional Record,* 49th Congress, 2nd Sess., 1887, 18, 843.

[54]*Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 440 (1907). For other judges' agreement with the need for the ICC to stop the inconstancy of juries, see "Sandusky Cement Case," *Wall Street Journal,* April 13, 1911, p. 7.

[55]In Re Investigation of Advances in Rates, No. 3500 (1911), *Decisions of the Interstate Commerce Commission, Volume 20* (Washington, DC: Government Printing Office, 1911), 317.

[56]Karl Kirchwey, "The Interstate Commerce Commission and the Judicial Enforcement of the Act to Regulate Commerce," *Columbia Law Review* 14, no. 3 (March 1914): 211–28, 227.

[57]See, e.g., *McFadin v. Catron*, 138 Mo. 197 (1899); *Gahagan v. Boston & M.R.R.*, 70 N.H. 441, 444 (1899) ("If there is any substantial evidence, the jury are to decide the balance of probabilities."); *Lionberger v. Pohlman*, 16 Mo. App. 392 (1885) ("where there is no substantial testimony to support the verdict of a jury upon a given issue the appellate court will reverse a judgment on the verdict").

[58]*Cincinnati, N.O. and Tex. Pac. Ry. Co. v. ICC*, 162 U.S. 184, 196 (1896).

[59]*Illinois Central R. Co. v. ICC*, 206 U.S. 441, 466 (1907). The Court noted again and again that reasonableness was a "factual" issue, and therefore one that should not be reviewed by a judge barring some significant error (without noting that the deference here was given to a commission and not a jury finding): "The question submitted to the Commission, as we have said, with tiresome repetition, perhaps, was one which turned on matters of fact."

[60]*ICC v. Union Pacific Railroad Company*, 222 U.S. 541, 548 (1912).

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findings could not be questioned any more than those of a jury."[61] When a commission's decisions concerning facts, including mixed questions of fact and law, were given the legal weight of jury decisions, the substitution of the commission for the traditional jury trial was complete.[62]

When courts had to decide if state or federal suggested railroad rates were so low as to become an unconstitutional "taking" of property, they also excluded a jury. In the case of *Ex Parte Young*, usually famous for its ruling concerning the immunity of states from lawsuits, the U.S. Supreme Court admitted that the question of whether a railway rate was "so low as to be confiscatory involves a question of fact," but that they felt "a jury cannot intelligently pass upon such a matter." Instead of forcing railroads to undergo cases decided by juries to determine if a rate was valid, they said courts should work in equity with "special masters," when these cases arose.[63] Courts also expanded the doctrine of the immunity of government officers from tort claims in order to protect their regulatory decisions from juries deciding damages.[64] Gradually, lawyers and pro-business reformers managed to exclude the jury from almost any decision involving railroads, and subjected them to "unprejudiced" commissions.

3. Limiting the Jury in Antitrust

The creation of the Federal Trade Commission (FTC) emerged out of a similar desire to substitute consistent commission findings for varying and prejudiced juries. The Sherman Antitrust Bill of 1890 had taken the common law rule forbidding restraints of trade and added penal and criminal sanctions to it, just as the early railroad statues did with common law rules about reasonable railroad rates. The Sherman Antitrust Act had originally defined *all* restraints of trade as illegal, but many lawyers thought this blanket restriction was too strong and not in line with the older common law standard against only unreasonable restraints of trade.[65] A subsequent bill attempted to mandate an explicit reasonableness standard, but opponents noted the vagueness problems such a standard could create when coupled with criminal penalties, particularly for large businesses. A lawyer associated with a corporate legal group testified that previous court cases said that any reasonableness "standard must be as variable and uncertain as the views of different juries." He cited court opinions against unconstrained reasonableness standards for railway rates, such as Justice David Brewer's, to argue that "the criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable."[66] A Senate minority committee report opposing the bill reiterated the issues: "What one court or jury might deem unreasonable, another court or jury might deem reasonable. A court or jury in Ohio might find a given agreement or combination reasonable, while a court and jury in Wisconsin might find the same agreement and combination unreasonable."[67]

The Supreme Court's ruling in the *Standard Oil* antitrust case in 1911 read a "rule of reason" standard into the antitrust law, which reignited the debate on vague standards.[68] Justice John Marshall Harlan in his dissent cited the Senate minority report about different juries coming to varying conclusions to argue that the ruling now subjected businessmen to penalties without invoking any obvious rule.[69] In an antitrust case argued soon after the decision, the defendants pleaded that "the Supreme Court have interpolated the word 'unreasonable' into the statute, and hence no man is advised by the statute whether any act contemplated by him is unreasonable or not; and that, as he cannot know, neither can any twelve men who are called upon to determine the quality of his acts, and that one jury might take one view and another jury a different view of the same conduct." The district court judge had to agree about the inconstancy but argued that the Supreme Court decisions had made it a reality.[70] Courts now struggled to deal with criminal prosecutions against individuals based on the "reasonableness" standard. In 1913 Justice Oliver Wendell Holmes upheld these vague standards in a criminal trial by arguing that "the law is full of instances where a man's fate depends on his estimating rightly—that is, as the jury subsequently estimates it—some matter of degree."[71]

An important impetus behind the FTC was to create a rule-like consistency to what was meant by unreasonable restraints of trade. The FTC would substitute for local juries, who could not indulge in the consistent viewings of the same types of cases, or who harbored prejudices against large corporations. As with the

[61]"The Commerce Court and Commerce Commission," *New York Times*, January 23, 1913, p. 10. This power was expanded in cases such as the Supreme Court's famous holding in *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1, 48-49 (1937), which allowed the commission to impose damages without a jury.

[62]For other discussions of the derivation of this standard of review from jury trials, see Merrill, "Article III, Agency Adjudication"; Louis L. Jaffe, "Judicial Review: Question of Fact," *Harvard Law Review* 69, no. 6 (April 1956): 1021; John Dickinson, *Administrative Justice and the Supremacy of Law* (Cambridge, MA: Harvard University Press, 1927), 154–55. For later development of these evidence standards for commissions, see Ernst, *Tocqueville's Nightmare*; Joanna Grissinger, *The Unwieldy American State: Administrative Politics Since the New Deal* (Cambridge, UK: Cambridge University Press, 2012), 20–31.

[63]*Ex Parte Young*, 209 U.S. 123, 124–26, 164–65 (1908). Earlier, in 1892, Justice Brewer had ruled that a jury was required in such determinations. "If the validity of such a law in its application to a particular company depends upon a question of fact as to its effect upon the earnings, may not the court properly leave that question to the jury?" Brewer agreed that it must. *Chicago & G.T. Ry. Co. v. Wellman*, 143 U.S. 339 (1892). Yet later, in *Chicago, Milwaukee, St. Paul Railway Co. v. Tompkins*, 176 U.S. 167 (1900) (see citation in *Ex Parte Young*, 209 U.S. 123, 164), Justice Brewer changed his mind and ruled that such cases were too complicated for judges, let alone juries. He said that as a circuit judge in the case *Smyth v. Ames*, 169 US. 466, he "undertook the work of examining the testimony, making computations, and finding the facts. It was very laborious, and took several weeks. It was a work which really ought to have been done by a master." Brewer not only reversed the case but remanded it with the instruction to refer to some master "to report fully the facts, and to proceed upon such report as equity shall require" (ibid., 179–80). See brief discussion of jury issues in these cases in John Harrison, "Ex Parte Young," *Stanford Law Review* 60, no. 4 (2008): 944.

[64]John Dickinson, "Judicial Control of Official Discretion," *American Political Science Review* 22, no. 2 (1928): 275–300, 291.

[65]For Senator John Sherman's concerns about the difficulty of defining what was an unlawful or unreasonable restraint of trade under the proposed act, see *Congressional Record,* 51st Congress, 1st Sess., 1890, 21, 2458–60. There is a continuing debate on whether the common law attacked only "unreasonable" or all restraints of trade; see Laura Philips Sawyer, *American Fair Trade: Proprietary Capitalism, Corporatism, and the 'New Competition,' 1890–1940* (Cambridge, UK: Cambridge University Press, 2018).

[66]Senate Subcommittee of the Committee of the Judiciary, *Hearings on Amendment to Sherman Antitrust Law* (Washington, DC: Government Printing Office, 1908), 43–55.

[67]Cited in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 97 (1911). See debate on the common law background to the bill and case in Martin J. Sklar, *The Corporate Reconstruction of American Capitalism, 1890–1916: The Market, the Law, and Politics* (Cambridge, UK: Cambridge University Press, 1988), 203–85.

[68]See discussion of rule of reason ruling in Nelson Gaskill, *Regulation of Competition* (New York: Harpers, 1936), 15–16.

[69]*Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 97 (1911).

[70]*United States v. Patterson*, 201 F. 697, 707 (1912).

[71]*Nash v. United States*, 229 U.S. 373 (1913). Yet Holmes, a stalwart believer in the rule of leniency in criminal cases, struck down one indictment under the antitrust laws as excessively vague and tried to distinguish the Nash case. This ruling was handed down just three days after the House of Representatives approved the Federal Trade Commission Act. *International Harvester Co. v. Kentucky*, 234 U.S. 216 (1914) (J. Holmes); Marc Winerman, "The Origins of the FTC: Concentration, Control, and Competition," *Antitrust Law Journal* 71 (2003): 59.

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ICC, this would help create consistency for business. As Woodrow Wilson said in explaining the need for the commission: "Nothing hampers business like uncertainty … the business men of the country desire something more than that the menace of legal process in these matters be made explicit and intelligible."[72] And, as Wilson explained to one senator reluctant to endorse a commission, he looked at "business opinion" and they "desire nothing so much as a trade commission" for the certainty it can give.[73] Victor Morawetz, a noted corporate lawyer, came out in support of the commission in order to the end the "uncertainty" of varying court and jury decisions.[74]

Advocates of the FTC said it would create consistency by determining facts and mixed questions that were once decided by juries and by building up stable standards. Senator Francis Newlands, the foremost proponent of the trade commission bill in the Senate, argued that the commission would stop the constant hearings "before grand juries and petit juries and submitting all these questions to the varying influences, passions, and prejudicies of the hour. I believe that in this way a complete system of administrative law can be built up much more securely than by the eccentric action of grand juries and trial juries. I believe that it is not always necessary to administer the law with aid of grand and trial juries."[75] Some opponents held that the FTC's power to substitute for juries was precisely the problem. Senator William Borah said that under the act, those who "violate the law[,] they are not given a right of trial by jury" since its provisions "affirmatively deny them the right of a hearing by a jury."[76] When the American Bar Association recommended that all antitrust decisions be transferred to the new FTC, the *New York Times* attacked the idea, as part of the paper's decade-long campaign against the substitution of commissions for jury trials, saying "there is no hardship in sending business men to a jury to find out what common law is."[77]

Many, both inside and outside Washington, recognized that the FTC was part of a broad-based attack on juries. As Senator Thomas Walsh said in the Senate Chamber soon after the passage of the act: "Every man in this body knows that for many years there has been a quiet agitation going on for the curtailment of abolition of the right to trial by jury. Magazine and newspaper writers have exhausted the vocabulary of scorn and contempt in describing the alleged ignorance of the unlettered and uneducated juryman."[78] The *New York Times* noted that with the ICC and FTC in charge of much of the business world, "We seem to have put a dozen men [commissioners] in positions to decide questions which used to be settled by juries, grand and petite."[79] Legal experts also noticed the gradual substitution of commissions for juries. An article in the *Harvard Law Review* in 1921 noted that on questions of "mixed law and fact," the federal government was giving "the findings of administrative bodies the respect paid to those of a jury."[80] An article in the *Michigan Law Review* from 1924 noted that administrative agencies' decisions had garnered even greater deference: "Within the past forty or fifty years there has been an increased tendency on the part of Congress to delegate fact-finding functions to administrative bodies," and courts have given "findings greater weight than to the facts found by a jury."[81] When John Dickinson, the foremost interpreter of administrative law in this period, discussed the nature of new regulatory commissions, he said there were only two procedural differences between them and courts. They were "in the first place, not bound by the common law rules of evidence [which themselves were created so as not to bias juries], and in the second place, parties to proceedings before them do not have the benefit of a jury trial."[82]

The power of these new administrative commissions over factual issues inspired pleas by legal reformers to expand them into an ever-greater number of areas. In a 1924 article in the *University of Pennsylvania Law Review*, Professor Francis Bohlen admired legislatures who "create administrative boards and commissions whose duty, like that of a jury in a negligence case, is to gain information and experience and to create standards applicable to specific situations in accordance with the general principles." These commissions, thankfully, also lacked the jury's "natural prejudice in favor of a poor man injured by a rich man, and particularly by a corporation which is always assumed to have unlimited resources." He argued that the usual determination of "mixed questions of law and fact," even in ordinary negligence or tort trials, "may be properly termed 'administrative,'" and should be taken away from juries as well.[83] To many of these legal reformers, the commissions were just the first step in displacing prejudiced and inconstant juries across broad swaths of the American legal system.

[72]Woodrow Wilson, "Address to a Joint Session of Congress on Trusts and Monopolies," January 20, 1914, *American Presidency Project*, http://www.presidency.ucsb.edu/ws/index.php?pid=65374.

[73]Woodrow Wilson to Senator John Sharp Williams, January 27, 1914, series 4, 1105, Woodrow Wilson Papers.

[74]"Wants Trade Board to Guide Business," *New York Times*, February 15, 1914, p. XX6. See Winerman, "Origins of the FTC," 53–54. Some pro-regulation advocates thought the current standard was too vague for even juries themselves to convict anyone. Louis Brandeis said the problem with antitrust lawsuits was that "the jury will not convict" and that the "jury will not convict unless there is in the legal violation some moral taint." House Committee on Interstate and Foreign Commerce, *Hearings on the Interstate Trade Commission* (Washington, DC: Government Printing Office, 1914), 91.

[75]*Congressional Record,* 63rd Congress, 2nd Sess., 1914, 51,12031. For complaints about grand jury powers in the debate on the bill, see Gerard Henderson, *Federal Trade Commission: A Study of Administrative Law and Procedure* (New Haven, CT: Yale University Press, 1924), 23.

[76]*Congressional Record,* 63rd Congress, 2nd Sess., 1914, 51,14370.

[77]"Courts and Commissions," *New York Times,* August 30, 1920, p. 8. See consistently similar complaints from the *New York Times* editorial page, "The New Freedom of Trade," August 3, 1914, p. 10; "The Common Law of Business," *New York Times*, November 10, 1925, p. 24. The Supreme Court limited the FTC's ability to accumulate such a body of rulings based on mixed questions of law and fact, since it argued that most decisions about reasonableness and "unfair methods of competition" were questions of law and not of fact, thus upsetting the hopes of the commission's advocates. See *FTC v. Gratz*, 253 U.S. 421 (1920).

[78]*Congressional Record,* 63rd Congress, 2nd Sess., 1914, 51, 2226.

[79]"The Trade Commission," *New York Times*, February 24, 1915, p. 8.

[80]E. F. Albertsworth, "Judicial Review of Administrative Action by the Federal Supreme Court," *Harvard Law Review* 35, no. 2 (1921): 151.

[81]Gregory Hankin, "Conclusiveness of Federal Trade Commission's Findings as to Facts," *Michigan Law Review* 23, no. 3 (1925): 233. See also Charles Needham, "The Federal Trade Commission," *Columbia Law Review* 16, no. 3 (1916): 185, 188.

[82]Dickinson, *Administrative Justice*, 35. On the rules of evidence as outgrowth of jury trials, which administrative agencies therefore didn't need, see Bernard Schwartz, *An Introduction to American Administrative Law* (London: Isaac Pitman, 1958), 86–88. On later recognition that application of Seventh Amendment would "probably necessitate abandonment of the administrative process," see "Application of Constitutional Guarantees of Jury Trial to the Administrative Process," *Harvard Law Review* 56, no. 2 (1942): 284.

[83]Francis H. Bohlen, "Mixed Questions of Law and Fact," *University of Pennsylvania Law Review* (1924): 118–19. The suspicion of juries continued in the progressive reform movement for generations. Jerome Frank argued that "'jury made law' is, par excellence, capricious and arbitrary," in Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* (Princeton, NJ: Princeton University Press, 1949). Erwin Griswold claimed that "The jury trial, at best, is the apotheosis of the amateur. Why should anyone think that twelve persons brought in from the street … should have any special capacity for deciding controversies between persons?" Quoted in John B. Ashby, "Juror Selection and the Sixth Amendment Right to an Impartial Jury," *Creighton Law Review* 11 (1977): 1138; See also, Hans Zeisel, "The Debate over the Civil Jury in the Historical Perspective," *University of Chicago Legal Forum* (1990): 26.

https://doi.org/10.1017/S0898588X22000190 Published online by Cambridge University Press

4. The Novice Commissions

The earliest promoters of regulatory commissions argued that they would be an improvement over juries, but they did not want to dispense with the advantages of juries entirely. The most salient aspect of these commissions was that they had multiple members, which brought a diversity of viewpoints similar to that of juries. Yet the commissions would add the values of constancy in office through long and overlapping terms and of focus in examining one field. They would also be "unprejudiced," which earlier proponents had noted in contrasting them to existing juries, in that they would not have preconceived notions before entering the work. The goal therefore was not to acquire experts, at least in the modern, more academic, conception of the term, but to appoint several different types of commissioners who could accumulate experience on the job. In a sense, the commission would be a place to develop a new font of knowledge and a training ground for future specialists, especially in areas like business regulation and antitrust, where experts were rare or nonexistent.

The commissions' earliest proponents described the advantages of amateur commissions. Shelby Cullom, who as a U.S. Senator would later introduce the bill creating the ICC, was speaker of the Illinois House when that state's railroad commission bill was introduced, and he helped to ensure its passage. As governor of the state soon after, he told the legislature that the commissioners' "work can be done only by men who can give it their whole time, and who will become students of the great subject of transportation."[84] Cullom, like similar political advocates of commissions, only wanted "students" of the subject. Judge Thomas Cooley argued that commissioners should be "enlightened by the special facts and uncontrolled by iron rules. In railroad questions we are, as yet, only in the morning twilight, no expert fully masters them in all their bearings, the results are often unexpected and confusing, and the highest wisdom of one year proves to be folly in the next."[85] As even Charles Francis Adams, who later became an expert railroad commissioner, noted, when the first commissions were created, "The country did not contain any trained body of men competent to do the work. They had got to be found and then educated."[86]

The nonexpert nature of many of these commissions is demonstrated by the fact that in the early years many of them were *elected*. At the California Constitutional Convention of 1878, which was called in order to regulate railroads and which endorsed the first elective commission in the nation, many attendees argued that a commission would help train average people for the job. One claimed that they just needed "three determined, honest men" without earlier preconceptions "to go into the field and learn the exigencies of the occasion." By contrast, without a commission, "we must take the judgment of twelve men who ordinarily know nothing about these matters, instead of the judgment of the Commissioners, who have investigated the whole subject, and whose decisions are based on actual information." Another said that "a man who gives his attention to it [the commission] ought to acquire the necessary knowledge in one year."[87] By 1891, of the seventeen state railroad commissions with the power to regulate railroad actions, five were directly elected, two were chosen by legislatures, and two more were composed of other state officers.[88]

State regulatory commissions were prominent political plums and often led to higher office. Huey Long began his political career by winning a seat on the elective Louisiana Railroad Commission and later became chairman of the state Public Service Commission, from which position he handed out favors before being elected governor.[89] Oscar Colquitt was a Texas state senator before he won an election to the Texas Railroad Commission, from which position he then ran for and became governor. A future Texas governor, Pat Neff, became a railroad commissioner after leaving gubernatorial office. Texas Railroad Commissioner Ernest Thompson ran twice for governor while still sitting on the commission and touting his record there.[90]

While outside or apolitical expertise was not a focus, an important goal in forming such commissions was to acquire the benefits of multimember juries, but to give them the consistency of personnel that would allow them to develop rules over time. This explains the most innovative aspect of many of the commissions, their "independent" nature, meaning either that the commissioners were elected independent of the executive or that the commissioners could only be removed by the executive for cause. It also explains their extended and usually overlapping terms: six years in the case of the ICC. Representative John D. Long noted the importance of allowing long terms for the ICC and said it was to allow the commissions themselves to train their members. He reminded his colleagues of the railroad commission in his home state of Massachusetts and said that "it is to be remembered that the board there has been made up of men from the ordinary walks of life, so that the success has been more in the system than in the men who work it…. Mr. [Charles Francis] Adams, now a distinguished railroad authority, was nothing of the sort when he went upon that board."[91]

Promoters of the commissions believed in the statement of railroad attorney, and later federal railroad official, Walker Hines: "Men become good commissioners by being commissioners." In other words, the only appropriate training for the commission came on the job itself.[92] Economist Frank Dixon, in a 1905 article on railroad regulations, likewise said: "It must be apparent to anyone that a commissioner with a two-year term is retired at just the time that he is entering upon his period of usefulness. He becomes valuable to the state in the intricate problems of his office only after a long apprenticeship."[93] One advocate at the New York Constitutional Convention noted that just as they recognized legislators needed training, "so it has been with these commissioners. There is no doubt a period of time when anybody going upon a commission is simply a learner, simply a student."[94]

The commissions' creators did not expect to attract specialists, but they did want multimember boards to ensure a diversity of

[84]Shelby Cullom, *Fifty Years of Public Service* (Chicago: A.C. McClurg, 1911), 311.

[85]Quoted in speech by Rep. James Laird, *Congressional Record,* 48th Congress, 2nd Sess., 1884, 16, Appendix 197.

[86]Charles Francis Adams, *Railroads: Their Origin and* Problems (New York: G.P. Putnam's Sons, 1878), 133.

[87]*Debates and Proceedings of the Constitutional Convention of the State of California* (Sacramento, CA: J.D. Young, 1880), 538, 550–51, 612.

[88]Frederick C. Clark, "State Railroad Commissions and How They May Be Made Effective," *Publications of the American Economic Association* 6, no. 6 (November 1891): 11–110, table I.

[89]T. Harry Williams, *Huey Long* (New York: Vintage, 1981).

[90]See Childs, *The Texas Railroad Commission*.

[91]*Congressional Record,* 48th Congress, 2nd Sess., 1885, 16, 44. See also 18 *Congressional Record,* 49th Congress., 2nd Sess., 1887, 18, 784.

[92]Quoted in Clarence Miller, "The Interstate Commerce Commission: The First Fifty Years, 1887–1937," *George Washington Law Review* 5 (March 1937): 586.

[93]Frank Haigh Dixon, "Recent Railroad Commission Legislation," *Political Science Quarterly* (December 1905): 612–32.

[94]*Revised Record of the Constitutional Convention of the State of New York,* vol. I (Albany, NY: J.B. Lyon, 1916), 2245–46.

https://doi.org/10.1017/S0898588X22000190 Published online by Cambridge University Press

backgrounds similar to that of juries. One survey of the regulatory commissions in the late nineteenth century noted that only one had any legal qualifications for the people chosen as commissioners, and that was to ensure diversity of experience. Georgia demanded that of their three commissioners, one be a lawyer, one a general man of business, and only one had to have any experience in railroading.[95] The first draft version of the ICC itself said that of the three commissioners, one should have legal experience and one should have railroad experience, and future commission laws demanded similar diversity of background.[96] Many commission advocates noted the need for multiple but amateur thinkers on a subject. At the 1915 New York Constitutional Convention, one advocate for a commission on conservation gave an extended explanation on the necessity for multimember commissions: "It is not an administrative office, which can be satisfied with one head; it must take into consideration lands, timber, forests, rainfall, fish, minerals…. it will be readily seen that it must have the judgment of several men, if the best results are to be attained." He argued that a positive outcome "does not depend upon expert talent; it depends upon the intelligence and wisdom of a body of men competent to sit in judgment and crystallize opinion into action. Such experts as are needed may be employed from time to time, but the commission should not be made up of specialists. In a word, they should be men trained in general affairs, for the success of such an undertaking largely depends upon the judgment of men uninfluenced by the pride of professional training."[97]

Few commentators about the new regulatory commissions, at either the state or federal level, discussed their "expert" nature. For instance, in the 1,000-page book on *The Law of Railroad Rate Regulation* by Harvard Law professors Joseph Beale and Bruce Wyman, there is not one mention of the "expertise" of commissions, or the existence of "expert" commissioners, despite frequent mentions of "expert testimony" by witnesses before courts and of "expert railway management."[98] At the Virginia Constitutional Convention of 1901, which set up a new corporate regulatory commission that included railroads under its ambit, advocates claimed the commission needed average men and did not discuss their desire for experts. One typical proponent of commission said the question of fixing railroad rates "is a practical question; it is a business question. It is a question that any good merchant, manufacturer, banker, or shipper of any sort is better able to deal with, so far as the experience of his business is concerned" than some specialist would be.[99] As Gerard Henderson, the author of a noted 1924 treatise on the FTC argued, "the science of administration owes its being to the fact that most government affairs are run by men of average capabilities, and that it is necessary to supply such men with a routine and ready-made technique."[100]

A compilation of all ICC commissioners from 1887 to 1935, created for this article using existing commission histories, public announcements of appointments, and obituaries, shows that outside and apolitical expertise was not important for the job. One lawyer looking back over this period noted that "although the appointment to the Commission of men inexperienced in the operation of railroads has been criticized, it will generally be conceded by most people familiar with the situation that this lack of experience has not been a real handicap to the appointees in the performance of their duties."[101] The following analysis evaluates whether each ICC commissioner was a lawyer, a politician, or an academic, and if they had any previous experience in railroads.[102] Lawyers dominated the commission. Of forty-three commissioners in this era, a large majority, thirty, were lawyers, who usually operated across numerous fields of business, and seven were also judges. Only seven commissioners came from academia, and many of those were not specialists in railroads or in regulation. This compilation defines expertise in the broadest possible sense, as anyone who either worked for railroads or had written on railroad issues. Yet even by this definition, just about half or twenty-two of the commissioners, had any experience with railroads or railroad regulation before being appointed to the commission. Fourteen of those commissioners' most important railroad experience involved serving in federal or state government railroad agencies or commissions, supporting the contention that the job of these commissions was to build up knowledge, as opposed to bring it into government. Many of the rest of the commissioners with railroad experience were just former railroad employees, from brakemen to vice presidents, with no expertise separating them from the hundreds of thousands of other Americans who worked for the railroads in this period. There also seemed to be no attempt to keep the ICC separated from politics. Fifteen commissioners had previously served either in elective office, usually as a U.S. congressman or state

[95]Clark, "State Railroad Commissions," table I. See also S. E. Moffett, "The Railroad Commission of California: A Study in Irresponsible Government," *The Annals of the American Academy of Political and Social Science* 6 (November 1895): 109–17, which describes the party platforms on which different commissioners ran.

[96]*Debate on Interstate Commerce*, 34. See Radio Act, 44 Stat. 169, 1163, February 23, 1927.

[97]*Record of the Constitutional Convention of the State of New York*, 1338.

[98]Joseph Henry Beale and Bruce Wyman, *The Law of Railroad Rate Regulation* (Boston: Nagel, 1906), 421, 455, 459, 511, 788. John Dickinson remained suspicious of later attempts in the New Deal to base administrative authority on "experts." George L. Haskins, "John Dickinson, 1894–1952," *University of Pennsylvania Law Review* 101 (October 1952): 7.

[99]*State of Virginia Constitutional Convention*, 2149. See also *Record of the Constitutional Convention of the State of New York*, vol. II (Albany, NY: J. B. Lyon, 1915), 2150.

[100]Gerard Henderson, *The Federal Trade Commission: A Study in Administrative Law and Procedure* (New Haven, CT: Yale University Press, 1924), 328. Also quoted in Gaskill, *Regulation of Competition*, 75. See earlier argument by Frank Goodnow that commissions needed "expertness" but that "expertness comes largely from long-practice," which was why "reasonable permanence of tenure is absolutely necessary"—which is the only use of the word "expert" in his book on administrative policy: Frank Goodnow, *Politics and Administration: A Study in Government* (New York: Macmillan, 1900), 87.

[101]Miller, "The Interstate Commerce Commission," 580–700.

[102]"Federal Regulatory Commission Appointments, 1887–1935," a spreadsheet prepared for this article. I discussed each commissioner's background in four areas. For the ICC and for the other commissions discussed below, I have counted as a lawyer anyone who practiced law. I have counted as a politician anyone who held elective office or held a position in the Republican or Democratic Party organizations, such as state or national party committees. (I have excluded, however, from the count of politicians any lawyers who were elected to a purely legal post, such as district attorney or attorney general, since such were ubiquitous for prominent lawyers in this period.) For academics, I counted anyone who had taught in an institution of higher education or had received a graduate degree besides a legal degree. The question of expertise, in this case around railroads and regulation, I admit, is the hardest to divine. I have included anyone who had worked directly in the industry to be regulated or who wrote articles or books on the topic that I could discover. I admit this would encompass a much broader spectrum of people than those today we would consider "experts," since it would include many with only workaday knowledge of any industry they labored in. By this definition, Judge Thomas Cooley, discussed below, had expertise in railroads due to his briefly managing a railroad receivership and some previous written work on the subject. While this database will doubtless underestimate commissioner experience in each of these four areas due to existing sources not including commissioners' full background, it is plausible that if such information was not obvious in sources, the commissioner's experience in those areas was minimal.

https://doi.org/10.1017/S0898588X22000190 Published online by Cambridge University Press

senator, or as an employee of the Democratic or Republican Party organizations. (One could count sixteen political commissioners if one included the unhappy soul, Claude Porter, who lost eight separate political elections before being appointed to the ICC).[103]

Many researchers touting the commission's expertise have perhaps been misled by the fact that the first chairman of the ICC, Judge Thomas Cooley, was a noted lawyer and scholar who had written about railroad issues. But Cooley had written far more about other subjects than railroads and had devoted relatively little of his career to the subject. When the *New York Times* editorialized about Cooley's selection, they first noted Cooley's "eminence as a constitutional lawyer" and said it was "probably this consideration which led the President to place his name as the head of the list." The *Times* cited Cooley's receivership of the defunct Wabash railroad, which had only lasted a few months, as an afterthought.[104]

In fact, Senator Shelby Cullom demanded President Cleveland appoint Cooley only after President Cleveland "had to yield to party pressure" and appoint William Morrison of Illinois, an ex-congressman, to a commission position. Cullom complained to the president that "Colonel Morrison knows nothing about the subject whatever," and that Cleveland was just "appoint[ing] broken down politicians who have been defeated at home, as a sort of salve for the sores caused by their defeat."[105] A Democratic politician had indeed just written to Cleveland that he "cannot too strongly express that the appointment of Co. Morrison" was necessary, since it "will do more than any other to bridge a chasm which must be bridged if the Democracy is to carry the next presidential election."[106] Cleveland also tried to appoint a New York politician, who was also best man at his wedding, W. S. Bissell, but Bissell declined. Cleveland would later appoint Bissell as his postmaster general, the most political part of the president's cabinet.[107] When former Democratic New York State Senator Augustus Schoonmaker accepted the position in Bissell's place, Schoonmaker told Cleveland he was surprised because "I know not widely railway issues," but he imagined that "character (as it ought) seemed to have had telling weight in your selections."[108] The public understood the political nature of these appointments. The *New York Times* said nominee Aldace Walker, a Vermont lawyer and politician was "Senator [George] Edmund's man," and represented the "Northeast."[109]

The single qualification most consistently cited for any ICC commissioner in public announcements was not his experience with law or policy or railroads, but the region of the country from which he came. In the earliest press reports of appointments to the ICC, most referenced President Grover Cleveland's goal to "give representation to the different sections" of the country.[110] Although the goal of balanced regional representation had obvious political ramifications, congressional proponents of the commission noted that it would allow each commissioner to "consult in his own neighborhood" and "consult with local state commission[s]" in their area.[111] Presidents and members of Congress always discussed the necessity of a commission politically balanced between the Northeast, South, Midwest, and West, and they tended to appoint subsequent ICC commissioners from the same states as the departing one.[112] The same held true for subsequent commissions, which helps explain the need for multimember boards. As one advocate for a five-member Federal Power Commission (FPC) said, "it is almost impossible to represent the various sections of the country that are interested if there are only three commissioners."[113] Although factors like political and sectional balance limited the expertise of such commissioners, they ensured a variety of diverse backgrounds.

The second great Progressive Era regulatory commission, the Federal Trade Commission (FTC) did not intend to attract, and in practice did not attract, experts in antitrust, which in any case were limited in this period. As at the ICC, the FTC's goal was to allow unbiased observers to gather facts and develop consistent standards. Woodrow Wilson in his campaign had famously railed against government by "a smug lot of experts" sitting in Washington.[114] Many historians assume that the FTC was meant to be an expert commission and thus also assume that Wilson reneged on his ideals. In fact, during his campaign, Wilson had argued that "we may have to have special tribunals, special processes" to deal with antitrust, and he continually referred to the FTC as just such a "tribunal."[115] Representative J. Harry Covington, the commission's foremost proponent in the House, argued that decisions of the commission would be made not from expertise but from "the ordinary good sense which the group of men composing the Federal trade commission will have."[116] When Representative Martin Madden wondered on the floor of the House why the FTC "would not be able to get any better experts under the commission plan than under the other," Covington responded that such preexisting expertise was beside the point. He said that "just as the Interstate Commerce Commission has created its trained experts to get the facts regarding railway operations in the country, you would develop a set of experts by the constant special work" in this field.[117] Covington said he wanted merely to procure "highly efficient services of men of large capacity"—capacity being the ability to grow into knowledge, not to have already acquired it. Representative Madden said, "I am willing to admit you can train men to become specialists," to which Covington replied, "That is all I intended."[118] The House committee's report on the final bill said it would create consistency "through the action of an administrative body of practical men" who would apply the "rule enacted by Congress to particular business situations."[119]

[103]If one keeps the analysis to before 1920, there are the same tendencies, except with more lawyers and politicians. Of twenty-seven commissioners appointed to 1920, twenty-one were lawyers, five were academics, eleven were politicians, and thirteen had railroad experience. See "Federal Regulatory Commission Appointments, 1887–1935."

[104]"The Interstate Commerce Commission," *New York Times*, March 23, 1887, p. 4.

[105]Cullom, *Fifty Years of Public Service*, 228–29.

[106]Daniel McMillan to President Grover Cleveland, March 3, 1887, reel 110, Grover Cleveland Papers, Library of Congress.

[107]W. S. Bissell to President Cleveland, March 21, 1887, reel 110, Grover Cleveland Papers, Library of Congress. For complaints about number of people who turned down the position, see William Endicott to Jacob Rogers, April 2, 1887, reel 111, Grover Cleveland Papers, Library of Congress.

[108]Schoonmaker to President Cleveland, March 23, 1887, reel 110, Grover Cleveland Papers, Library of Congress.

[109]"The Railway Commission," *New York Times*, March 24, 1887, p. 1.

[110]Ibid.

[111]*Congressional Record,* 48th Congress, 2nd Sess., 1885, 16, 858.

[112]"The Railway Commission," 1. See "Federal Regulatory Commission Appointments, 1887–1935."

[113]House Committee on Interstate and Foreign Commerce, *Hearing on the Federal Power Commission* (Washington, DC: Government Printing Office, 1930), 31.

[114]Woodrow Wilson, *The New Freedom: A Call for the Emancipation of the Generous Energies of a People* (New York: Doubleday, Page, 1913), 60.

[115]Winerman, "Origins of the FTC," 46. See further discussion of Wilson's distrust of experts, expressed in both public and private, in ibid., 34, 39–40, 46, 90–91.

[116]*Congressional Record,* 63rd Congress, 2nd Sess., 1914, 51, 14919, 14925.

[117]*Congressional Record,* 63rd Congress, 2nd Sess., 1914, 51, 8845.

[118]*Congressional Record,* 63rd Congress, 2nd Sess., 1914, 51, 8841.

[119]*Congressional Record,* 63rd Congress, 2nd Sess., 1914, 51, 12031.

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The FTC featured similar appointments as the ICC. After the first round of FTC nominees, the *New York Times*'s noted that "it is no sure disqualification that they are not men of national repute, and that they have no accomplishments to their credit," not to mention little to noexperience in antitrust.[120] Only two of the first commissioners were lawyers, for an agency explicitly dealing with legal issues. One commissioner, Edward Hurley, was an elementary school dropout from Illinois.[121] Yet Illinois Senator Hamilton Lewis had earlier written the chief White House political official, Joseph Tumulty, about the "understanding between us respecting Mr. Hurley" since "you know how little Illinois has gotten … and we have both waited upon the theory that her losses would be retired by *my* getting the member of the Trade Commission."[122]

When President Wilson's staff compiled backgrounds on his appointees to the FTC, besides mentioning their political support, they focused on the benefits of expansive and not specialized knowledge. The staff kept mentioning the appointees' "wide, varied and successful business career" (for Hurley) or their "wide, varied and successful business experience" (for William Parry, a newspaper editor).[123] When Parry died, Wilson wrote that he wanted "a man of rather varied business experience" rather than a specialist.[124] Eventually, he appointed another newspaper editor, W. B. Colver, who one politician notedhad only had success "in a modest way as a lawyer" but who had been "a powerful worker in the movement to give Cleveland as a city to the Democracy."[125] Overall, the FTC had a just slightly higher proportion of lawyers than the ICC, with nineteen lawyers out of the twenty-five members appointed from 1914 to 1935. Only six members had any particular expertise in antitrust or had written anything about antitrust law and practice, and three of those were appointed after 1933. Only James Landis, also appointed in 1933, had an academic background. Like the ICC, the FTC wasn't divorced from politics, and no one expected it to be. Senator Benjamin Tillman objected to the formation of the FTC by saying that "we have too many commissions now, composed largely of so-called 'lame ducks,' both Democrats and Republicans, who have been defeated at the polls."[126] And indeed, ten of the earliest members of the FTC were former politicians. If one included Wilson's two newspaper editor appointments, in an era when such positions were highly political, there would be twelve politicians, or almost half of all appointments.[127]

If reformers' goal had been to bring "apolitical experts" into government, the commission form for the ICC and FTC would have been a very peculiar way to accomplish that end. Since all commissioners were appointed or reappointed by the president and confirmed by Congress, each was subject to political machinations.[128] Mandates that such commissions ensure bipartisan and cross-state representation also hampered the search for pure or apolitical experts. If the true goal of these commissions had been apolitical expertise, it would have been better accomplished through another reform emerging at this same time, the civil service system. Under this system, objective tests for particular jobs and hiring untouched by congressional whims became the new norm. Generally, when Congress wanted to create room for apolitical "experts," as they often did in this period, they did not make them subject to congressional approval, but instead put them in typical line and staff offices in the bureaucracy.

An examination of government agencies in the typical civil service bureaucracy shows that these were more likely to rely on academic or otherwise qualified experts than the commissions. The scientific departments at the Department of Agriculture in the late nineteenth and early twentieth centuries are the preeminent examples of expert government in this era.[129] Thus when Congress created the Bureau of Animal Industry in 1884 to collect information and "prepare such rules and regulation" as necessary for the elimination of animal disease, they desired someone who already knew about animal disease issues. They created the bureau as an inferior office without a Senate-approved head under the Agricultural Department. Its first chief was Daniel E. Salmon, a doctor of veterinary medicine who had studied at Cornell and in Paris. He headed the department for twenty-one years. Likewise, from 1882 to 1912 the chief chemist and head of the Bureau of Chemistry was Harvey Wiley, who had received a medical degree and then studied chemistry at Harvard and in Germany before he taught the subject in academia.[130] Other scientific agencies acquired similar experts. The head of the Division of Forestry in the Interior Department from 1886 to 1898 was Bernard Fernow, a noted academic working on forest issues, who had studied at the University of Konigsberg and the Royal Prussian Academy of Forests. Fernow passed the position to Gifford Pinchot, who had studied at the French National School of Forestry and then taught forestry in the United States before leading the bureau from 1898 until 1912.[131] Such scientific or civil service appointments were the norm in many parts of the federal government in the Progressive Era, but not in the independent commissions that were the creation of the same period.[132]

[120]"The Trade Commission," 8.

[121]Marc Winerman notes that "Nor were Wilson's initial selections the best complements of Commissioners" (Winerman, "Origins of the FTC," 94).

[122]Senator Lewis to Tumulty, November 20, 1914, series 4, 1105B, Woodrow Wilson Papers, Library of Congress. Emphasis added.

[123]Memorandum on Edward Hurley, c. 1914, Memorandum on William Parry, c. 1914, series 4, 1105B, Woodrow Wilson Papers, Library of Congress.

[124]Woodrow Wilson to Vance McCormick, May 4, 1917, series 4, 1105B, Woodrow Wilson Papers, Library of Congress.

[125]Herbert Quick to Woodrow Wilson, February 8, 1917, series 4, 1105B, Woodrow Wilson Papers, Library of Congress.

[126]*Congressional Record*, 63rd Congress, 2nd Sess., 1914, 51, 11097.

[127]I understand that experience in "antitrust" is more difficult to discover than other issues, so I looked for those who had either filled a particular position in a state or federal agency focusing on the issue or had written on antitrust issues. See "Federal Regulatory Commission Appointments, 1887–1935" for details.

[128]See discussion about political support for FTC commissioner William Humphrey in Humphrey to Franklin Roosevelt, July 19, 1933, box 1, William E. Humphrey Papers, Library of Congress. See also commissioners' continued involvement in political work in, e.g., Jouett Shouse to Victor Murdock, December 20, 1917, Victor Murdock Papers, Library of Congress.

[129]Carpenter, *Forging Bureaucratic Autonomy*.

[130]Leonard White, *The Republican Era: A Study in Administrative History, 1869–1901* (New York: Macmillan, 1958), 244–45.

[131]Arthur W. MacMahon and John D. Millett, *Federal Administrators: A Biographical Approach to the Problem of Departmental Management* (New York: Columbia University Press, 1939), 348–49. For the general high level of such bureau appointments, see ibid., 318–76. For other high-level and long-tenured scientific appointments in the Interior Department in this period, including individuals such as Frederick Haynes Newell and W. J. McGee, see Hays, *Conservation and the Gospel of Efficiency*, 7, 102–103.

[132]The one potential exception to the lack of subject-matter expertise of such commissions in the Progressive Era is the Federal Reserve Board. As a board that largely administered the new Federal Reserve Banks, it perhaps should not be placed in the tradition of "regulatory" bodies, whose goal was to supervise preexisting industries. It did, however, from its inception, tend to be filled with members who had banking experience, although it exhibited the same lack of academic expertise as other commissions. Of the twenty-one board members from 1913 to 1935, only five were lawyers, four were academics and three were politicians, yet fifteen had previously worked in the banking industry, and three had done extensive research or written on banking. Of course, this tradition of banking regulators being particularly attached to their industry continues up to the present. The biographies of every Reserve Board member have been accumulated in a Federal Reserve

https://doi.org/10.1017/S0898588X22000190 Published online by Cambridge University Press

5. The Changing Position of the Commissions

While most researchers argue that the growth of government expertise was tied to the growth of commission regulation in the Progressive Era, the increase in commission expertise emerged only after the end of that era, often dated to around 1920. The newest regulatory commissions of the late 1920s and early 1930s, those staffed by Herbert Hoover or Franklin Roosevelt, were more likely to justify their powers as emerging from expertise and tended to include more academics and outside experts. The Federal Radio Commission, created in 1927 (in 1934 it became the Federal Communications Commission), relied to a greater extent than previous commissions on people with knowledge of the new technology of radio. At first, President Calvin Coolidge told the press that appointees "should have some general knowledge of radio and broadcasting," hardly a call for experts, but a step above previous standards. Yet the traditional balancing issues incumbent on commission appointments hampered Coolidge as well. The *New York Times* noted in a headline that the president's appointment "Task is Harder Because Five Zones and the Political Parties Must be Represented."[133] In reality, Secretary of Commerce (and former engineer) Herbert Hoover selected most of the first commissioners, and he and later Franklin Roosevelt made sure that most of them had subject-matter expertise. Of the seventeen members appointed up to 1935, eleven had experience in radio or electronics, and sixwere academics. Only five were lawyers and four were former politicians.[134]

Likewise, the FPC, created in 1930 under President Herbert Hoover to supervise waterpower sites, also included many subject-matter experts. Of its eight commissioners to 1935, only two were lawyers and two were politicians, while six had expertise in utilities (although none came from academia). Probably Franklin Roosevelt's most significant and long-lasting regulatory commission, the Securities and Exchange Commission (SEC), formed in 1934, was the most expert of them all right from its inception. The SEC's congressional creators, unlike earlier ones, had demanded "experts chosen and appointed by the President" with "special knowledge of market operations."[135] Of its six members appointed in its first two years, three were lawyers, and only one had any political background. Yet two were former academics, and all six had significant experience in securities and finance.[136] But even here the early promoters thought that experience on the commission was important for building up new knowledge. SEC Chair James Landis said that men with varied backgrounds would "stand a better chance of reaching right answers then men bred to a single discipline and a single tradition," but that on the commission they might "develop through experience the desired expertness" in the field to be regulated.[137]

The constitutional justification of these commissions' powers changed as their members did. Originally, courts did not mention these commissioners' expertise when describing their authority. The most generally used term to describe the commissions in court was "experience." In supporting a ruling by the ICC in 1907, the Supreme Court said the commission was entitled to "the strength due to the judgments of a tribunal appointed by law and informed by experience." Deference was also based, as it would be for a jury, on the fact that it evaluated "the witnesses before it and has been able to judge them and their manner of testifying."[138] The Supreme Court for a long time did not discuss the "expert" nature of these commissions. In 1931 Chief Justice Charles Evan Hughes included a vague use of the term when he defended a deferral to the Federal Radio Commission's findings of fact in a licensing case. He argued that "the Congress established the Commission as its instrumentality to provide continuous and expert supervision and to exercise the administrative judgment essential in applying legislative standards to a host of instances."[139] (Just a few years earlier, Hughes had argued that the country should try and "get rid of jury trials as much as possible," and he had long celebrated the need for more commissions.)[140]

It was not until 1935 that the Court made an explicit decision based on the nature of commission expertise. Justice George Sutherland, in *Humphrey's Executor v. United States,* for the first time upheld the independent nature of the FTC and therefore of Congress's restrictions on the president's power to remove officers from all commissions, by waxing at length on the expert nature of the commission. He claimed that the FTC was an "independent nonpartisan body of experts" who had to "exercise the trained judgment of a body of experts," and that this demanded freedom from political control.[141] Ironically, the case was precipitated by President Roosevelt's removal of William Humphrey, who was a retired and ultra-political member of Congress and who had objected to his removal by asking Roosevelt to talk to "Senator Dill, who is more responsible for my being in this position and more interested personally and politically in my retaining it" than anyone.[142] Yet Sutherland's justification of the commission's apolitical expertise undergirded later Supreme Court decisions to uphold the increasing breadth and extent of commission powers.[143]

Thus the expert commission, as we understand it, which forms the basic legal and political underpinnings of the administrative state today, did not arise with the earliest commissions in

online database. See Board of Governors of the Federal Reserve System, "Board of Governors Members, 1914–Present," https://www.federalreserve.gov/aboutthefed/bios/board/boardmembership.htm. See "Federal Regulatory Commission Appointments, 1887–1935" for analysis.

[133]"900 Seek Places on Radio Board: Task Is Harder Because Five Zones and the Political Parties Must Be Represented," *New York Times*, February 26, 1927.

[134]See "Federal Regulatory Commission Appointments, 1887–1935." For radio commissioners' expertise as well as their attention to gathering information from the public, see David A. Moss and Jonathan B. L. Decker, "Capturing History: The Case of the Federal Radio Commission in 1927," in *Preventing Regulatory Capture: Special Interest Influence and How to Limit It*, ed. Daniel Carpenter and David A. Moss (Cambridge, UK: Cambridge University Press, 2014), 176–207.

[135]*Congressional Record,* 73rd Congress, 2nd Sess., 1934, 78, 7946–47.

[136]See "Federal Regulatory Commission Appointments, 1887–1935."

[137]Landis also noted that "fifty years ago we hardly sought to breed experts in these newer fields" and they weren't available. James Landis, "Fact, Fancy, and Reform in Administrative Law," University of Wyoming Speech, February 7, 1941, box 149, James Landis Papers, Library of Congress.

[138]*Illinois Central R. Co. v. ICC*, 454–45 (1907). See verbatim language about "appointed by law and informed by experience," in the Pennsylvania Supreme Court's decision in *Ben Avon Borough v. Ohio Valley Water Company*, 103 A. 744, 750 (Pa. 1918).

[139]*FRC v. Nelson Brothers Bond and Mortgage Company*, 289 U.S. 266, 276 (1933).

[140]Thomas, *Missing American Jury*, 101.

[141]*Humphrey's Executor v. United States*, 295 U.S. 602 (1935). Some analyses of the New Deal's belief in expertise in fact quote extensively about the still common need for agencies to acquire "experience." See Reuel Schiller, "The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law," *Michigan Law Review* 106 (December 2007): 402, 433, 435–36.

[142]William Humphrey to Franklin D. Roosevelt, July 19, 1933, box 1, William E. Humphrey Papers, Library of Congress. Humphrey was also making political recommendations and having discussions with congress members right up to the point of his removal. Humphrey to Senator Elison Smith, August 16, 1933, box 1, William E. Humphrey Papers, Library of Congress.

[143]*Gray v. Powell*, 314 U.S. 413 (1943) (J. Reed) ("it is the Court's duty to leave the [Interstate Commerce] Commission judgment undisturbed," since the question at hand "calls for the expert experienced judgment of those familiar with the industry," although not both "expert" and "experienced"). See also *Chevron v. NRDC*, 467 U.S. 837, 865 (1984).

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the Progressive Era. That era created commissions that could gather facts and apply them to vague standards over extended periods of time, and thus gradually acquire the experience denied to transient fact-finders such as juries. These commissions gradually displaced juries in their realms of focus, but they relied on varied commissioners with diverse experiences to do so, rather than professionally trained experts in the modern sense. Only during the Great Depression and the New Deal did the era of regulatory expert arrive, long after the commission form of government had established itself as an essential part of the American political system.

Supplementary material. To view supplementary material for this article, please visit https://doi.org/10.1017/S0898588X22000190.

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