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Peter Irons, *The New Deal Lawyers*

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BOOK REVIEWS

The New Deal Lawyers, by Peter Irons. Princeton: Princeton University Press, 1982. Pp. 300.

Almost all lawyers will want to read this book. For the oldest among us, the titanic battles for and against the New Deal were formative legal experiences. Some of these battles proved inconclusive, such as those over the legitimacy of various governmental economic activities and over the meaning and scope of the welfare state. These battles continue, waged by people who are now rather exhausted. Fresher experiences, revolving around the civil rights movement and struggles for civil liberties and economic rights during the Vietnam era, captured the imagination of many lawyers who are now in middle age (alas). By turning the New Deal against itself, these lawyers tried to raise issues submerged during the New Deal and the Cold War. They used the legal foundations laid during the New Deal to attack the bureaucratic paternalism and ossification that are part of its legacy.¹ The old fogey in me wants to add that circumstances have deprived young lawyers and law students of the compelling and formative experiences of their elders. This sounds a good reason to trace

1. See P. IRONS, *THE NEW DEAL LAWYERS*, xi-xii (1982) (quoted in text accompanying note 53, *infra*); *id.* at 293-94 (Blacks, largely ignored by the New Deal and chafing under its paternalistic policies, used New Deal cases as foundation for NAACP litigation strategy); *id.* at 295 (quoted in text accompanying note 55, *infra*); *id.* at 296 (discussed in note 55, *infra*).

Although many New Deal institutions proved ineffective, their functions became part of our contemporary "value-mix:" economic stimulation and support, and, beginning in 1946, the maintenance of the economic system. The market was never again trusted as the sole determinant of economic activity, and big business, big labor, and big agriculture were joined by big government. E. LEWIS, *AMERICAN POLITICS IN A BUREAUCRATIC AGE*, 61-66 (1977). See C. PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES*, 1937-47, 265 (1948) (on the New Deal): "Breadth is a good thing in a political movement, but the appearance of stability it gives is false if the attachments are to a personality rather than to a set of principles, and if a substantial part of the following is composed of opportunists"

This system was further elaborated during Lyndon Johnson's Great Society, and a rather high-handed bureaucratic incompetence again became manifest. See A. WILDAVSKY, *SPEAKING TRUTH TO POWER: THE ART AND CRAFT OF POLICY ANALYSIS* 4 (1979): "All who have lived through the exalted promises and disappointed hopes fed by the social problems of the sixties, to come to our times, are seared by that experience." This experience has fostered the scholarship of the seventies—about what went wrong. *Id.* This is one of the many things Irons' book is about.

one's professional "roots" back at least as far as the New Deal, and at least until new commitments come along. If things get much worse economically, these new commitments may come quickly; in a "new" New Deal, we will be keen to know what went wrong with the old one and with the Great Society. Professor Irons has some, probably many, of the answers.

The theme of Irons' book is how, after many missteps, the reality of a national economic system came to be recognized in the law.² This recognition required the filling of an intellectual vacuum by a few dedicated politicians, reformers, and craftsmen—lawyers all. Neglected, but not ignored by Irons is the symbolic aspect of this process—government cares about your suffering and will try to do something about it—that is arguably the New Deal's most enduring contribution to our political life.³ No book covers all angles, however, and Irons' purpose is to show how particular lawyers (warts and all) tried to accelerate constitutional development by fighting Hamiltonians with their own weapons.⁴ This struggle is neglected in much of con-

2. See P. IRONS, *supra* note 1, at 287, (citing the opinion of Hughes, J., in *West Coast Hotel v. Parrish*, 300 U.S. 386 (1937), as announcing a "turning-point in constitutional history)."

3. See, e.g., D. FUSFELD, *THE ECONOMIC THOUGHT OF FRANKLIN D. ROOSEVELT AND THE ORIGINS OF THE NEW DEAL* 243 (1956) (quoting F.D.R.'s speech to Commonwealth Club of San Francisco, Sept. 23, 1932): Government should "assist the development of an economic declaration of rights, an economic constitutional order." The freedom of action of individual businesses should be limited; government should "apply restraint" to "protect the public interest." This was to be a marked departure from past influences of "private law upon the public and public law. [T]he doctrines of limited government, judicial review and laissez faire are devices of private lawyers used in the protection of private rights. Rights, not public policy, are the rhetoric . . ." B. TWISS, *LAWYERS AND THE CONSTITUTION* 152 (1942) (citing *Slaughter House Cases*, *E.C. Knight*, and *Hammer v. Dagenhart*). See A. MELONE, *LAWYERS, PUBLIC POLICY AND INTERESTS GROUP POLITICS* 62 (1977). Twiss' private rights models maintains a contemporary vitality far greater than that of the cases he cites: See, e.g., *Industrial Union Dept.* (quoted in note 32, *infra*); B. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (1980). It was not changed all that much by, e.g., F.D.R.'s urgings. These had—and were probably intended to have—their primary effects as exercises in political symbolism, as part of the "new politics" of welfare and patronage in the political economy. See M. EDELMAN, *THE SYMBOLIC USES OF POLITICS* (1964); E. LEWIS, *supra* note 1, at 90.

4. See brief for the United States, *United States v. Butler*, 297 U.S. 1 (1936), at 169-72, (authored and argued by Alger Hiss) (quoted by P. IRONS, *supra* note 1, at 189):

Adoption of the Madisonian theory "would mean the destruction of many of our most familiar and significant governmental policies and activities. The people have long been accustomed to rely on the benefits" provided through governmental expenditures. "These governmental activities have become so interwoven into our commercial, social, and economic life that

temporary exegesis: "With its primary focus on constitutional doctrine as expressed in the authoritative pronouncements of the Supreme Court, legal history largely ignores the lacunae created by cases in which the legal process falters."⁵ Yet these "missing" cases are often the keys to understanding the "political machinations" that cause a test case to emerge from a litigation strategy (or the lack thereof).⁶

Irons' constitutional law is not an arid conceptualism but the heat of battle. The book has an epic quality: great sufferings are movingly described,⁷ and the main actors display a hubris and craftiness as well as a nobility. Quick character and biographical sketches catch the essence of these actors (and a couple of actresses) on the run without interrupting a fast-paced narrative.⁸ Extensive and diverse materials, laboriously acquired because not readily available elsewhere, have been so skillfully woven into the text that the plot continues to thicken to the very end.⁹ Few academics write better than does Irons. He

to strike them down now would result in catastrophic distortions. [T]he welfare clause should be construed in the Hamiltonian sense to include anything conducive to the national welfare . . . [a determination that] must have been left primarily to the judgment of Congress"

Hiss adopted this ("Brandeis brief") position because of the exigencies of the situation and because of a law school training which stressed the necessity for the use of federal regulatory power. P. IRONS *supra* note 1, at 187-88. (In *Butler*, the Court held key aspects of the AAA unconstitutional: *see id.* at 181-98.)

Speaking to Louisiana farmers in 1935, Secretary of Agriculture Wallace urged them to abandon their natural Jeffersonianism and to embrace the Hamiltonian weapons of the AAA. This would enable farmers to defeat those Hamiltonians who control government and finance and who force farmers to "pay through the nose" while selling in open markets and buying in controlled ones. *Id.* at 181. *See* E. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY* 8 (1966); P. IRONS, *supra* note 1. A Hamiltonian populism was thus no obvious contradiction in terms for New Dealers.

5. *Id.* at 75. *See* note 48, *infra*.

6. P. IRONS, *supra* note 1, at 75, 82 (discussing decision to ask for the dismissal of *United States v. Belcher*, 294 U.S. 736 (1935), a decision that promoted "sick chickens" to the status of a test case for the NRA—*Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)). *See* note 22, *infra*; notes 48-52 and accompanying text, *infra*.

7. *See, e.g.*, P. IRONS, *supra* note 1, at 156-80 (sufferings of cotton plantation sharecroppers, and the ways in which Alger Hiss, etc. tried to help them).

8. *See, e.g., id.* at 27-28 (Gen. Hugh Johnson, head of the NRA); *id.* at 120-21 (Jerome Frank as General Counsel of the AAA—a sketch which does much to explain the personality of this author of *LAW AND THE MODERN MIND* (1930)). Irons interviewed many of the New Deal lawyers, some of whom criticized and corrected his drafts. *Id.* at xiii. The insights into the "Court-packing" episode gleaned from Attorney General Cummings' diaries are also particularly noteworthy.

9. Irons is right to assert that the drama of untested young lawyers defending the New Deal against hostile judges and skilled corporate counsel "itself justifies a recreation. . . ." *Id.* at 4.

performs another rare service for the reader by stating his biases clearly before defending them brilliantly.¹⁰

I.

"Boys with their hair ablaze" was George Peek's description of that "plague of young lawyers [who] settled on Washington . . . and found no end of things to be busy about. I never found out why they came, what they did, or why they left."¹¹ Irons finds out: they were "Legal Politicians in the NRA, Legal Reformers in the AAA, and Legal Craftsmen in the NLRB"¹² The bulk of the book describes the comings and goings of these agencies and their lawyers. They came quickly and out of a deep commitment to public service. When Justice Brandeis, the idol of many New Deal lawyers, advised them to go "back to the states . . . where they must do their work," the most colorful of their number—Tommy Corcoran—responded: "[T]hey won't go back. The only chance of using these brains is in the federal government right now."¹³

It was now or never, even if the early New Deal was too corporatist¹⁴ for the taste of many of its lawyers. Irons finds that an

10. See, e.g., *id.* at xi-xii (quoted in text accompanying note 53, *infra*); *id.* at 295 (quoted in text accompanying note 55, *infra*).

11. *Id.* at 2, 10 (quoting Peek). Peek was the Administrator of the AAA who opposed the appointment of Jerome Frank and procured Frank's dismissal after many bitter conflicts. *Id.* at 118-19, 122-23, 128-32. Peek retained private counsel in the AAA as a "precaution" against the "left-wing lawyers" in Frank's office, members of a "Harvard cabal" insensitive to farm problems. *Id.* at 123. Many supposedly radical New Deal Lawyers were investigated by the F.B.I. and attracted the attentions of congressional red-hunters. *Id.* at 2.

12. *Id.* at 5-6 (National Recovery Act, Agricultural Adjustment Administration, and National Labor Relations Board, respectively). The "suggestive labels" of Politicians, Reformers, and Craftsmen denote groups of like-minded lawyers recruited by superiors for the pursuit of divergent approaches to defending the New Deal. *Id.* As the civil rights movement illustrates, politics, reform and craft are all essential to achieving new legal aims.

13. *Id.* at 104-05. (Corcoran prefacing his remark with—"Mr. Brandeis, I've known you for a long time; don't mind if I'm impertinent.") See E. HAWLEY, *supra* note 4, at 291 (quoting David Coyle): "The big battle is coming on, and them that is there will have the fun."

14. Central to the New Deal, especially its early stages, were unresolved conflicts between "the economic planners and the neo-Brandeisians" E. HAWLEY, *supra* note 4, at viii. This was a struggle between devotees of Theodore Roosevelt's New Nationalism, a corporatist planning to protect the underprivileged against inevitable increases in the concentration of economic power, and advocates of Woodrow Wilson's New Freedom, the aggressive enforcement of competition along lines of the 1914 Clayton and Federal Trade Commission Acts that Brandeis helped to draft. D.

NRA which was not "theirs" became the cornerstone of the New Deal in ways illustrating Gabriel Kolko's notions of a "political capitalism."¹⁵ This is a fairly incendiary conclusion, but it is supported adequately by Irons and in some of the opinions of others.¹⁶ Action on the NRA was delayed, and compromises were then achieved in a matter of hours by putting the contending factors in a locked room.¹⁷ Compromises were cobbled together in an awkward bill that forced its legal

FUSFELD, *supra* note 3, at 209-20; E. HAWLEY, *supra* note 4, at 7-14; W. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL: 1932-40 34 (1963). This was a liberalism living off ideas put together at the turn of the century. C. PRITCHETT, *supra* note 1, at 265.

By training and by personal and political inclination, many New Deal lawyers stood somewhere in between these amorphous yet warring camps, and these lawyers were sometimes able to moderate the swing toward corporatism in the early New Deal. These ideological skirmishes are traced effectively by P. IRONS, *supra* note 1, at 20-21, *passim*. *E.g.*, Gen. Johnson's experiences with the War Industries Board (WIB) shaped his corporatist view of the NRA and led him to later invoke Mussolini's "shining name." *Id.* at 27. "If the WIB represented corporatism in khaki, the NRA under Johnson functioned largely as the WIB in mufti." *Id.* at 28. Rex Tugwell was the only expert on agriculture within the "brains trust," and the others thus deferred to his advocacy of comprehensive planning for agriculture. George Peek had the ear of the President, however. Peek gave the farm program an NRA-like flavor of corporate dominance that grated on Brandeisians like Felix Frankfurter. *Id.* at 113-14, 147. The Wagner Act, creating the NLRB, signalled the end of this corporatist First New Deal and the emergence of a more populist Second New Deal. *Id.* at 231.

15. *Id.* at 18 (citing G. KOLKO, MAIN CURRENTS IN MODERN AMERICAN HISTORY 100-56 (1976)). The NRA represented the kind of "political regulation and compulsion" of business that has alternated cyclically with a "primary dependence on voluntary efforts" since late in the 19th Century. *Id.* (quoting G. KOLKO at 107). Basically "opportunistic and more than willing to abandon partisan attachment in the pursuit of interests," big business sought refuge in the New Deal from Hoover's surprisingly vigorous antitrust policies. *Id.* See text accompanying note 28, *infra*.

16. See, *e.g.*, A. EKIRCH, IDEOLOGIES AND UTOPIAS: THE IMPACT OF THE NEW DEAL ON AMERICAN THOUGHT 36-37, 54 (1969); W. LEUCHTENBURG, *supra* note 14, at 57-58; E. LEWIS, *supra* note 1, at 57 (quoted in note 37, *infra*); B. MITCHELL, DEPRESSION DECADE 228 (1947). See also, E. HAWLEY, *supra* note 4, at 14:

The dilemma of the New Deal reform movement lay in the political necessity of . . . creating organizations and controls that could check deflationary forces and provide a measure of order and security while at the same time preserving democratic values, providing the necessary incentives, and making the proper concessions to competitive symbols.

Coherent and consistent New Deal policies could hardly be expected, but the result can only be characterized as "economic confusion." *Politically*, it was a "fairly respectable job" of satisfying conflicting demands, however. *Id.* at 14-16. See *id.* at 492 (quoted in note 60, *infra*). Hawley then moves on seemingly to contradict Irons' and Kolko's "political capitalism" approach: "Ideologically, the New Deal was tampering with the most revered dogmas of the business creed; and psychologically it was striking at the foundations of business prestige and class security." *Id.* at 114.

17. P. IRONS, *supra* note 1, at 22.

defenders to rely on the *Blaisdell* emergency doctrine,¹⁸ and to play down the breadth of powers delegated by Congress—the issue that proved the NRA's Achilles' heel.¹⁹ Absorbed in skirmishes with an "imperialistic" Justice Department (itself keen to avoid a "Balkanization" of government legal services), NRA staff lawyers gave little thought to an overall battleplan for implementing and then defending their statute-designed-by-committee. They concentrated on prosecuting the small-time chiseller instead,²⁰ and results were not to their liking: "A federal bench dominated by middle-aged, small town, conservative Republicans was more than likely to sympathize with small businessmen who claimed that NRA codes dictated by their large competitors forced them to choose between violation and bankruptcy."²¹

18. *Home Building and Loan Assn. v. Blaisdell*, 290 U.S. 398, 426 (1934) (upholding a Minn. mortgage moratorium by statute): "While emergency does not create power, emergency may furnish the occasion for the exercise of power." See, P. IRONS, *supra* note 1, at 38, 53, 101; *id.* at 26 (quoting Sen. Wagner, 77(5) CONG. REC. 5154-56 (1933)): The emergency doctrine developed by the Supreme Court during World War I applies to the NRA because "the economic emergency . . . enlarges the category of businesses which are affected with a public interest."

19. *Id.* at 26. See *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Arguing for the Schechters, Frederick Wood found the NRA to be a "delegation run wild" that would lead to a planned economy, nationalizations, and some kind of socialism. P. IRONS, *supra* note 1, at 99.

20. *Id.* at 10-12, 37-38, 41, 45; *id.* at 3 (quoted in note 49, *infra*).

With 4,000 trade associations in different industries to be organized under NRA codes, first come, first served would not work. Johnson tried the risky strategy of securing agreement in the ten largest industries first; NRA lawyers, pitted against the cream of the corporate bar, gave up too much too quickly in allowing industry leaders to dictate such code terms as those permitting price fixing. *Id.* at 31-33. One thousand and three (1,003) codes generated some 43,641 complaints. Only 1% of these reached litigation, and a fair number dropped through the cracks of bureaucratic practice. Only two of the 19 NRA cases decided on constitutional grounds involved even middle-sized businesses. *Id.* at 54-55.

All of this is a fairly damning critique of the NRA (see also note 15 and text accompanying it, *supra*), but Irons could have balanced up his assessments along lines suggested by others. The NRA was a "holding action . . . that for a season did provide a psychological stimulant and help check the deflationary spiral, prevent the further erosion of labor standards, eliminate child labor, and implement the share-the-work idea." E. HAWLEY, *supra* note 4, at 132. See *id.* at 114 (quoted in note 16, *supra*). Most economists have censured the NRA too severely; increases in industrial concentration and damages to small businesses have been exaggerated. But a reluctance to use punitive power or undertake an extensive national planning meant that private interests overwhelmed public ones in the NRA. W. LEUCHTENBURG, *supra* note 14 at 69-70. The NRA legislation was the kind of pluralistic compromise that achieves a little of the best, and a fair amount more of the worst of all possible worlds. See *id.* at 57-58.

21. P. IRONS, *supra* note 1, at 55-56. See note 20, *supra*.

While noting a bureaucratic paralysis, Irons wisely avoids the trap of concluding that the *Schechter* deathknell for the NRA was thought a blessing in disguise by the President.²² Roosevelt felt stung politically and may still have been a true believer then, but many New Deal lawyers had their doubts. This was particularly true of those lawyers who had to defend the AAA, conceptually similar to the NRA, under arguments similar to the losing ones in *Schechter*.²³ Kept as far as possible from the levers of power by bureaucratic politicians and politicized bureaucrats, staff lawyers in the NRA and AAA (and those in the Justice Department) were reluctant to go to court in any case.

In contrast, lawyers were aggressively in the NLRB game from the very beginning. They established a standard of legal craftsmanship that is in no small measure responsible for the enduring quality of the later New Deal programs. The Wagner Act was carefully drafted by the Senator's legislative assistant, Leon Keyserling, with help from such luminaries as Milton Handler, William Gorham Rice, and Charles Wyzanski.²⁴ They "cleverly lit a fuse under . . . substantive due process by finding, on behalf of Congress, that the 'inequality of bargaining power' between employers and workers deprived the latter of 'actual liberty of contract,' and that this deprivation 'substantially burdens and affects the flow of commerce.'"²⁵ The

22. P. IRONS, *supra* note 1, at 74, 86, 231. See W. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347, 356 n.49, 357, 382; note 6, *supra*. See also E. HAWLEY, *supra* note 4, at 129 (after *Schechter*, businessmen "thanked God for the Supreme Court, but at the same time they deluged the White House with appeals to save them from industrial chaos"); W. LEUCHTENBURG, *supra* note 14, at 146 (quoting Walter Lippman's assessment of the aftermath of *Schechter*) ("Pollyanna is silenced and Cassandra is doing all the talking").

23. P. IRONS, *supra* note 1, at 111, 114-16, 182-85.

The AAA reflected incompatible approaches to "swollen production and shrunken prices" similar to those used by the NRA, approaches based on a similarly hasty compromise of conflicting interests. Both crop restriction and production stimulation programs were enacted under a declared state of emergency, with a broad delegation to the Secretary of Agriculture to choose between programs. *Id.* at 112-114.

Comparing *Butler* to *Schechter*, the main difference of emphasis was that "AAA lawyers, spiritual and political heirs of the Jeffersonian tradition in their personal views, . . . [defended] their statute wrapped in Hamilton's mantle." *Id.* at 181. See *supra* note 4.

24. P. IRONS, *supra* note 1, at 213, 231.

25. *Id.* at 230. Irons sets the scene well: Union membership had declined from a peak of 4 million in 1920 to less than half that in 1933. The "complacent conservatism of labor's leadership contributed to this decline, but more important were the aggressive open-shop movement of employers and the 'American Plan' under which company unions displaced AFL unions." *Id.* at 203. See *id.* at 205. NRA labor provisos failed (*id.* at 203-4); and Roosevelt was moved to support the Wagner Act by the "social

Wagner Act passed Congress in an almost-pristine form because many thought it unconstitutional. Charles Fahy, general counsel of the NLRB, thought otherwise and quickly devised a craftsmanlike battleplan.²⁶

At this point, Irons' main story collides with one of the most fascinating chapters in our legal history—Roosevelt's "Court-packing" plan and the Court's "switch in time." Irons gives these events the best description and analysis I have read, going a good deal beyond Leuchtenburg's²⁷ in describing context and consequences. The most implacable opponents the New Deal and its lawyers faced were the "Four Horsemen of Reaction:" Justices Butler, Van Devanter, McReynolds, and Sutherland, who sat at the end of nearly "a century of economic rapacity and big-business domination of the Supreme Court."²⁸ After they decided *Schechter*, Roosevelt found us "relegated to the horse-and-buggy definition of interstate commerce." *Time* saw this remark as a trial balloon for a constitutional amendment to bridle the Horsemen,²⁹ but Roosevelt bided his time until after the 1936 elec-

upheaval' resulting from the growing conviction of many workers, that they must now take matters into their own hands." *Id.* at 214 (quoting Irving Bernstein's masterful and moving *THE TURBULENT YEARS* 218 (1970)). *See id.* at 23.

26. *Id.* at 231, 234, 240-48. Fahy saw lawyering (an increasingly-indispensible bit of jargon) "fundamentally as a craft. Social policy was the province of politicians, jurisprudential theory that of judges and law professors." *Id.* at 234.

27. *Leuchtenburg, supra* note 22. *See supra* note 8.

28. P. IRONS, *supra* note 1, at 47. "Occasionally liberal on issues of criminal law and race (consistent with their anti-government animus), this bloc rarely divided on issues of federalism and economic regulation . . ." *Id.* at 13. A Kentucky newspaper described their Court as "nine old back-number owls . . . who sit on the leafless, fruitless limbs of a dead old tree." *Leuchtenburg* note 22, at 390. *See* C. PRITCHETT, *supra* note 1, at 2 (quoted in note 32, *infra*). Unrepentently in dissent after the "switch in time," Justice McReynolds was seen by a reporter to be "poking his pencil angrily at the crowd as he shouted his opinion, without reading it, and his speech was a good deal different from the written one." P. IRONS, *supra* note 1, at 288 (quoting W. LEUCHTENBURG, *supra* note 14, at 236).

29. *Id.* at 106 (quoting FDR's press conference of May 31, 1935). Sen. Norris (presumably quoting James M. Beck) denounced the Court as a "continuous constitutional convention." *Leuchtenburg, supra* note 22, at 371 (quoting Norris). Even a conservative like William Howard Taft could argue, in 1906, that "if five lawyers can negate the will of 100,000,000 men, then the art of government is reduced to the selection of those five lawyers. A. MASON, *THE SUPREME COURT FROM TAFT TO BURGER* 75 (1979) (quoting Taft). The tragedy of this constitutional crisis is that it probably arose by accident: if F.D.R. had been able to make an "average" number of Supreme Court appointments, the crisis might have been averted. *See* Dahl, *The Supreme Court's Role in National Policy-Making*, in *AMERICAN COURT SYSTEMS: READINGS IN JUDICIAL PROCESS AND BEHAVIOR* 616, 616-18 (S. Goldman and A. Sarat, eds. 1978); A. MASON at 41. Another factor was Stone, J's *Butler* dissent, which focuses on the composition of the Court rather than on the institution itself, and which expresses painful awareness

tions while canvassing options in secret from a few close advisors. Bad advice given in secret led Roosevelt to base his Court-packing plan on two demonstrably false premises: that age could be equated with judicial incompetence—a premise that wounded Hughes and Brandeis—and that the Court was clogged by a case backlog.³⁰ Adverse public and congressional reaction to F.D.R.'s plan was overtaken by the "switch in time," however. In *West Coast Hotel*, Justice Hughes "barely looked back at *Schechter*" while recognizing the reality of our national economic life.³¹ Many New Deal lawyers then left government as quickly as they came; the mopping-up was left to others, once this great and apparently permanent victory was won. Irons does remind us that "*Schechter* shows signs of rising from the grave,"³² however.

of the potential for disaster inherent in imposing political and economic views on the nation by "judicial fiat." This, like a few other dissents, "can provide the rallying point behind which political forces coalesce to produce a constitutional crisis." P. IRONS, *supra* note 1, at 196-97. See *Leuchtenburg*, *supra* note 22, at 371.

30. P. IRONS, *supra* note 1, at 272-76. See E. HAWLEY, *supra* note 4, at 158; *Leuchtenburg*, *supra* note 22, at 359-60. Irons goes on to argue (at 276-77, emphasis supplied) that:

Had Frankfurter and lawyers in the Justice Department and other agencies been consulted, the process might have been slower but less politically damaging. On the other hand, the assault on the sacrosanct Court produced *exactly the result that Frankfurter intended* with his first constitutional amendment proposal: . . . *West Coast Hotel* . . . and . . . *Jones and Laughlin*

This must be a slip of the pen; if Irons intends to posit a cause and effect relation between the Court-packing plan and the switch in time, he has not supported his argument adequately. In any event, he later (*id.* at 277) argues that it was the 1936 election returns, not the Court-packing plan, that caused the switch in time.

31. *Id.* at 287. See *supra* note 2 and accompanying text *supra* note 6. Justice Black viewed the 1937 "revolution" as the virtual surrender of the Justices' powers as arbiters of the federal system. See *Hood v. DuMond*, 336 U.S. 525, 562 (1949); *Morgan v. Virginia*, 328 U.S. 33, 387 (1946); *Southern Pacific v. Arizona*, 325 U.S. 761, 789 (1945) (dissenting opinion); A. MASON, *supra* note 29, at 180. See also *United States v. Morgan*, 307 U.S. 183, 191 (1938) (Stone, J.): Where judicial review of administrative action is prescribed by statute, "[c]ourt and agency are the means adopted to attain the prescribed end [Each is] to be encouraged or aided by the other in the attainment of the common aim." As soon as the Roosevelt Court had a marginal liberal majority, it began to champion equalitarian causes that lacked support elsewhere in national or state politics. G. SCHUBERT, *JUDICIAL POLICY MAKING* 204 (rev. ed. 1974). While there were instances of an "immoderate exaltation" of agency authority and "undue deprecation" of judicial authority, the Court expanded its authority in entirely new directions. C. PRITCHETT, *supra* note 1, at 197.

32. P. IRONS, *supra* note 1, at 297. See *id.* (quoting *Industrial Union Dept. v. American Petroleum Institute*, 448 U.S. 607, 686-87 (1980) (Rhenquist, J., concurring) ("a number of observers have suggested that this Court should once more take up its burden of ensuring that Congress does not unnecessarily delegate important choices of social policy to politically unresponsive administrators"); A. MASON, *supra* note 29, at 309 (quoting Yale Kamisar) ("I have the feeling I'm seeing an old movie played

II.

This is the story Irons tells, in a summary too brief to give a feeling for its richness. The story is also a vehicle for exploring the actions of individuals as causes and effects of social change. Much has been written about the relation between law and social change; some studies are interesting, but the process continues to elude our overall understanding, and the role of individuals tends to get lost in a mass of statistics. It is currently fashionable to explain the relation between change and the individual through a psychobiography, which often focuses on the individual adjusting to change so as to reduce his "cognitive dissonance."³³ In comparison, Irons accords his subjects the dignity they deserve and their due measure of free will. Faced with

backward"); C. PRITCHETT, *supra* note 1, at 168-69; *id.* at 177 ("judicial supervision, phoenix-like, dies only to rise again"); B. SIEGAN, *supra* note 3. So, tragedy may be replayed as farce. It may be that judicial deference to Congress is roughly coextensive with an agreement with congressional aims. *See also* C. PRITCHETT, at 2 (finding Charles P. Curtis, Jr.'s explanation "as good as any"): the Fourt Horsemen (*see supra* note 28 and accompanying text) grew up on Frederick Lewis Turner's frontier, emerging with great careers, fortunes, or both. These self-made men found it impossible to see why public power should be used for community purposes. Can the same be said for Burger Court Justices from the "frontiers" of Sun Belt and Snow Belt?

33. *I.e.*, the individual's re-evaluations of attitudes—or cynical manipulations of arguments to fool others—in an attempt to make perceptions consistent with the behavior required by changed circumstances. *See, e.g.*, L. FESTINGER, *CONFLICT, DECISION, AND DISSONANCE* (1964). On psychobiography generally, *see* D. STANNARD, *SHRINKING HISTORY* (1982). *See also, e.g.*, F. BRODIE, *RICHARD NIXON: THE SHAPING OF HIS CHARACTER* (1981); E. ERIKSON, *GANDHI'S TRUTH: ON THE ORIGINS OF MILITANT NON-VIOLENCE* (1969); E. ERIKSON, *YOUNG MAN LUTHER* (1958).

Fleix Frankfurter has proved the lawyer most attractive to psychobiographers. *See* Danzig, *How Questions Begot Answers in Felix Frankfurter's First Flag Salute Case*, 1977 SUP. CT. REV. 257 (1978); N. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* (1981). Reviewing the latter, Bishop (*Robed Rivalry*, NEW REPUBLIC, June 27, 1981, 34, at 37) remarks:

One does not have to pore over the works of Erik Erikson [*see supra*] and Karen Horney to know that Frankfurter found it necessary to create a flattering self-image. Most people do, and live up to it with varying degrees of success. Nor does it take a doctorate in psychology to realize that among the causes of Frankfurter's vanity and his hypersensitivity to criticism was the fact that he . . . thought he had . . . to compensate for being short (5'4") and for not being, by right of birth, a member of the exalted circles in which he moved. To understand this is merely . . . a piece of folk wisdom.

Compared to Hirsch, Irons handles Frankfurter sensitively and sensibly. *See, e.g.*, P. IRONS, *supra* note 1, at 8: "Eternally combative, Frankfurter epitomized the inherent duality of the New Deal lawyers; preaching to his students the ideal of the lawyer as servant to policymakers, he irrepressibly intruded himself into the whole gamut of policy debates within the New Deal." This may have been a rational response then,

harsh economic realities, with the dead weight of precedent and other self-satisfied attitudes of the *ancien regime*, and with rapid yet incomplete changes in politics and in political and legal thought, most of Irons' New Deal lawyers behaved admirably. They developed a professionalism and an ideology of public service we can still envy today, testing their idealism from within the confining nature of lawyers' roles³⁴ and in ways that no amount of psychobiography can capture.

From *Dred Scott*³⁵ in 1857 to the "switch in time" in 1937, judicial review was used, sporadically but as the need arose, to keep the State (and the States of the states) underdeveloped. Intricate and arduous lawmaking processes lacked the overall coordination necessary to formulate coherent policies or to strengthen the State. Federalism may have kept us together until the Civil War, but it also permitted sectional and big business interests to veto the nascent pushes toward equality and a broadened participation that led to the evolution of social democracy (under a stronger State) in other countries.³⁶ In-

and we can scoff now only with the benefit of a 20/20 hindsight on an often-brilliant career. See also *infra* note 34 and accompanying text.

With regard to the relation between law and change at the group or national level, theoretical wisdom is frequently contradicted by careful studies of particular situations: See, e.g., Bullock, *The Office for Civil Rights and Implementation of Desegregation Programs in the Public Schools*, 2 POLICY STUD. 597 (1980).

34. A few examples will illustrate Irons' arguments here. It "is a measure of the pull of professionalism that [Charles] Wyzanski, denounced by the Wagner Act's chief draftsman, Leon J. Keyserling, as a saboteur before its passage, made a 'tour de force' in its defense." P. IRONS, *supra* note 1, at 286. AAA lawyers, "spiritual and political heirs of the Jeffersonian tradition in their personal views" (*id.* at 181), often quarrelled with bureaucrats and other lawyers while struggling to reconcile their social consciences with the constraints on their ability to make policy, and with the Hamiltonian means they were forced to adopt. *Id.* at 147, 180. See *id.* at 120, 147 (quoted in *infra* note 39); *id.* at 189 (quoted in *supra* note 4). Alger Hiss (*id.* at 180, interviewed by Irons in 1979) took his responsibilities very seriously in the face of the "feudalism" and "semi-slavery" of cotton sharecropping, only to learn that "you cannot change the basic economic structure of a society that doesn't want to change, just by edicts from the center." (If this sounds trite now, it was far from trite then, during the Great Society, and for some members of the Reagan Administration.) On contemporary guerrilla wars against the status quo, see, e.g., Kramer, *Antitrust Today: The Baxterization of the Sherman and Clayton Acts*, 1981 WIS. L. REV. 1287. The problems faced were (and still are) extremely difficult to resolve: see E. HAWLEY, *supra* note 4, at 14 (quoted in *supra* note 16).

35. *Dred Scott v. Sandford*, 60 U.S. 393 (1857) (deciding that no freed slave could have federal citizenship—now overruled by the 14th Amendment—and offering the politically-disastrous *dictum* that the Missouri Compromise was unconstitutional).

36. G. BARRACLOUGH, *AN INTRODUCTION TO CONTEMPORARY HISTORY* 146 (1981); Claude, *The Western Tradition of Human Rights in a Comparative Perspective* 14 COMP. JUD. REV. 3, 38-39 (1977) (citing Barrington Moore, Jr.'s discussion of politics in the South); Giraud, *Judicial Review and Comparative Politics*, 6 HASTINGS, CONST. L. Q.

heriting this system,³⁷ New Deal lawyers saw the need for action by a stronger State and for greater measures of economic justice. All that stood in their way were the gatekeepers to legal reform: the Four Horsemen, the three-fourths of district court judges, and the two-thirds of appellate court judges appointed by FDR's three Republican predecessors, and a Justice Department thought to be filled with do-nothing politicians and failed lawyers—ancient bureaucratic types with no particular interest in the New Deal.³⁸

But how, precisely, were needed reforms to be brought about? The lawyers were pulled in many directions by liberal ideas that had been floating around since before the Great War, and by a combination of the heretical approaches and the sterile conceptualism and formalism that characterized legal education in their elite schools.³⁹ The

1137, 1138-39, 1159-63 (1979); Murphy, *Liberalism and Political Society*, 26 AM. J. JURIS. 125, 129 (1981). See Vogel, *Why Businessmen Distrust Their State*, 8 BRIT. J. POL. SCI. 45, 53-54 (1978). Groups and individuals must strike a balance between the costs of having their preferences overridden and the costs of discussion and stalemate. Heymann, *The Problem of Coordination*, 86 HARV. L. REV. 797, 864 (1973). The U.S. Constitution overwhelmingly prefers to incur the latter set of costs.

37. *I.e.*,

a cluster of policies that tended to define the economic realm in contradictory and confusing ways. Laissez faire individualism and regulation for expansion seem at first . . . seriously contradictory . . . In practice, however, the contradiction was submerged and obscured by the conversion of regulatory agencies to legitimated representatives of private sector interest.

E. LEWIS, *supra* note 1, at 57. See *supra* note 15 and accompanying text.

38. P. IRONS, *supra* note 1, at 3, 12; *id.* at 228 (quoting Thomas Emerson's assessment of the Justice Department). See *supra* notes 21, 28 and accompanying text.

39. C. PRITCHETT, *supra* note 1, at 264-65 (liberalism was living off ideas put together at the turn of the century, and many New Deal legal formulations were thought to be a return to Holmes' ideas); A. EKIRCH, *supra* note 16, at 23 (liberals were dissatisfied with the "business civilization" of the 1920's and its "crassness and lack of culture," but differed widely in prescriptions). As Walter Lippman noted (*id.*), "the opportunities to make money were so ample that it was a waste of time to think about politics." In "the areas encompassed by [Jerome] Frank's omnivorous interests—literature, science, and politics—the 1920's was a decade of ferment and clash between intellectual rigidity and experimentalism." P. IRONS, *supra* note 1, at 120. Frank spent much time quarrelling and "trying to reconcile his reformist sympathies with the demands of his constrained legal role." *Id.* at 147. See *supra* note 14.

Columbia and Yale Law Schools had their legal realists, while some professors at Harvard emphasized the "emerging mandarinism of the regulatory state." P. IRONS, *supra* note 1, at 7. While these academics biased students toward reform and regulation, their teachings found powerful antidotes in the case-study strait jacket and in property, contracts, and procedure courses. *Id.* at 6, 9. The net effect was "a veneration of progressive liberalism over a foundation of doctrinal orthodoxy and apolitical pro-

trauma of the Depression gave rise to an "ideology of recovery"⁴⁰—we had to recover *somehow*—within which many factions were allowed to contend. It seems that consensus was to be achieved through a "learning by doing," John Dewey's pragmatism much admired by Irons' lawyers *and* by many of the New Deal administrators who took it as a directive to dispense with lawyers and legal restraints.⁴¹ The hope, expressed by Thurmond Arnold, was that "fanatical alignments between opposing political principles may disappear and a competent, practical opportunistic governing class may rise to power."⁴² The reality was much bureaucratic infighting; someone who disagreed with you became an "ideological apostate," and estrangement began with what Irons terms "the kind of cocktail party carping that is soon magnified into unrestrained billingsgate."⁴³

Weakened by internal dissent and a floundering about, legal defenders of the New Deal allowed their strategies to be derailed

fessionalism." *Id.* at 9. Things have not changed all that much, according to some: see Klare, *The Law School Curriculum in the 1980's*, 32 J. LEGAL EDUC. 336, 339 (1982). The message sent by many law schools is that lawyers should view the world moderately, espousing a moderate conservatism or a liberal reformism in which the New Deal marks the outer boundary of wisdom in politics. *Id.*

40. This Chapter subheading, P. IRONS, *supra* note 1, at 17, is a good choice. The Depression had the effect of loosening men's minds. *E.g.*, in "the plains states breadlines marched under grain elevators heaped high with wheat." W. LEUCHTENBURG, *supra* note 14, at 22. The "traditional relations of government and business were called into question, and solutions that previously would have been rejected as dangerously socialistic were given a sympathetic hearing" at almost all levels. A. EKIRCH, *supra* note 16 at 36. The traditional consolations of religion and science were no longer considered satisfactory or realistic (*id.* at 37). Many rival images of the good life came to notice and a few to power—sometimes briefly. See, E. HAWLEY, *supra* note 4, at 154 (quoted in *supra* note 16.)

41. W. LEUCHTENBURG, *supra* note 14, at 340. The liberals of the 1930's admired intellectual activity that led directly to getting things done; a Progressive sentimentality disappeared in the face of tough-minded, hard-boiled attitudes. *Id.* at 338, 340-41. New Dealers frequently had little patience with legal restraints. *E.g.*, Harry Hopkins wrote to the National Youth Administration Advisory Committee: "We have a lawyer who will declare anything you want done legal." *Id.* at 340. Since "the advice of economists had so often been wrong, the New Dealers distrusted the claims of orthodox theory . . . that government interference with the 'laws' of the economy was blasphemous." *Id.* at 344. Little thought was given to the fact that the courts would not agree with these attitudes. See P. IRONS, *supra* note 1, at 206.

42. T. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 270-71 (1935) (quoted by W. LEUCHTENBURG, *supra* note 14 at 339-40). See, E. LEWIS, *supra* note 1, at 89 (civil service seen to possess an enlightened disinterest, above clubhouse and court house politics).

43. P. IRONS, *supra* note 1, at 148 (specifically referring to relations between Frankfurter and Frank). See *Id.* at 147; *supra* note 14 and text accompanying notes 20, 23.

at first and then merely sidetracked by the "baddies," appropriately represented in Irons' book by the Liberty League.⁴⁴ Politics got rough for government lawyers, as Irons notes:

During the New Deal period, small businessmen and congressional antitrusters pressured the NRA to shift its enforcement emphasis from gas-station owners to corporate giants; cotton plantation owners and their congressional allies brought down the AAA lawyers; and NLRB lawyers squirmed uncomfortably in the midst of battles between AFL conservatives and CIO militants.⁴⁵

Gradually insulated from these kinds of imbroglios by FDR's "new politics" of a welfare and political economy patronage,⁴⁶ the lawyers who remained had a problem in legal politics to deal with. Irons skillfully characterizes it as a partisanship which clearly colors constitutionalism.⁴⁷

The means of dealing with this problem—the litigation strategies Irons modestly claims as the focus for his book⁴⁸—initially made little

44. This "anti-New Deal coalition of industrial leaders and lawyers" (P. IRONS, *supra* note 1, at 81), was bankrolled by the duPonts, Alfred Sloan of General Motors, and Ernest Weir. *Id.* at 81, 244, 248 ("baddies" characterization mine). See *supra* note 15 and accompanying text. Another leading opponent was the lawyer and Democrat, John Davis. P. IRONS, *supra* note 1, at 266. The most common objection was that New Deal academics "favored saving by spending, killing the pigs and plowing up the wheat." A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 375 (1956) (quoting Charles Burlingham). Left-wing critics were not lacking either: the New Deal "is merely a remodeling of the White House into a new Hull House. And the Brains Trust are nothing but settlement workers who want the big bad bankers and the good little workers to play together in peace." A. EKIRCH, *supra* note 16, at 181 (quoting Benjamin Stolberg and Warren J. Vinton).

45. P. IRONS, *supra* note 1, at 14.

46. E. LEWIS, *supra* note 1, at 89-90.

47. P. IRONS, *supra* note 1, at 56. See text accompanying notes 21, 38, *supra*. *E.g.*, 71% of Republican judges held the NRA unconstitutional and 80% of Democratic judges found it constitutional. P. IRONS, *supra* note 1, at 56. One case (discussed in *id.* at 66) is remarkable for its time and remains so today (see note 3, *supra*): *Amazon Petroleum Corp. v. R.R. Comm'n of Texas*, 5 F. Supp. 633 (E.D. Tex. 1934). Upholding production limitations on "hot oil," Judge Bryant cited "the spirit of the times making for collectivism against individualism" and the consequent "march of statute law, which stands with us for public opinion and within constitutional limits determines the public policy of the state . . ." *Id.* at 637-39.

48. P. IRONS, *supra* note 1, at ix. Although the book is about much more than litigation strategies (see, e.g., text accompanying *supra* notes 7-8, 27), it is designed to complement the rare studies of this topic—R. KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1976) (NAACP strategies), and B. TWISS, *supra* note 3 (corporate strategies). Irons also fills

more than a dent in judicial partisanship. NRA lawyers "fumbled about while they searched for a coherent enforcement strategy, and exhibited indecision"⁴⁹ The failings of AAA lawyers are attributed to a poorly-drafted statute, bad judgment by Jerome Frank, and an antipathy toward litigation that obviously made it difficult to formulate a strategy.⁵⁰ But the efforts of NRA and AAA lawyers were retroactively vindicated by the NLRB lawyers, who learned much from the errors and overconfident passivity of lawyers in other agencies,⁵¹ and who benefitted from the political punch of the Second (or later) New Deal.⁵²

III.

So, there is a happy climax to the story, at least for New Deal lawyers, but Irons goes on to give us a darker denouement—the "limits of legal liberalism." Irons' view is a

mixture of admiration and skepticism that leads me to acknowledge the skill and idealism of the New Deal lawyers,

the gaps in J. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976) (social history). P. IRONS at ix. The importance of a litigation strategy is illustrated by the subsequent planning for civil rights/civil liberties battles, and by an old saw: a skillful advocate can only rarely rescue a shaky case, and it is hard to lose an otherwise sound case through dismal oral advocacy. The case is often won or lost at the litigation planning stage. *Id.* at 94. At the brief-writing stage, the most difficult problem "is that of balancing deference to precedent with an aggressive attempt to lead the court to discard encrusted doctrine." New Deal lawyers had "to push the Supreme Court to a recognition that the deeper forces of history and social change compell a newer and wider vision of the Constitution" *Id.* at 191.

49. *Id.* at 240. Irons quotes a marvelous April, 1934 memo from the NRA Assistant General Counsel, Blackwell Smith (*id.* at 39): "Objective: Results; Methods in General: Machiavellian—the end justifies the means (almost)." A combination of "threat and persuasion" and "tricks" was designed to "bring to swift justice locally well-known chisellers" *See id.* at 74; *supra* notes 18-21 and accompanying text.

50. P. IRONS, *supra* note 1, at 133, 155, 240. *See supra* notes 4 and 23 and accompanying text. Frank deserved some of the blame because his distaste for politics was displayed just when crucial litigation decisions were made and when White House support was needed. Also, he hired corporate lawyers almost exclusively, delayed in hiring litigators, and failed to comprehend longstanding divisions within the agriculture industry. *Id.* at 155. But the AAA later tried to develop "a plausible theory that linked economic reality with jurisprudential doctrine." *Id.* at 151.

51. *Id.* at 240, 289, 293. *See supra* note 26. Fahy's brilliant NLRB litigation strategy is too complex to detail here: *See id.* at 241-43.

52. Bolstered by the 1936 Democratic landslide and angered by the failure of big business to support earlier programs, FDR marked the second New Deal with the "little NRA" and "seven little TVAs" legislation. Recovery was sought under a more classical model of the market, which prohibited certain behavior rather than telling business what to do. W. LEUCHTENBURG, *supra* note 14, at 163, 251. *See P. IRONS, supra* note 1, at 290.

and the worth of their work in establishing a foundation for basic economic protection and federally protected civil rights, and yet to admit the inherent limitations of the government lawyer's role as a servant of bureaucratic rigidity and political repression in those periods . . . when dissent poses a threat to power.⁵³

The New Deal as a "lawyer's deal" brought them "direct access" to the "newest and most critical levers of power . . ." ⁵⁴ They responded by creating a legal liberalism that

depended for its implementation on the administrative-legal process as a system of institutionalized conflict resolution between contending interest groups. [L]egal liberalism nonetheless abhorred unstructured and potentially divisive movements that sought to redress grievances and to achieve autonomous power outside the framework of the administrative apparatus of the regulatory state.⁵⁵

Such powerful techniques for absorbing political militance and strengthening the State are fairly "safe" when counterbalanced by the forces of a status quo opposed to attempts at redistribution and to create such new centers of power as the NLRB. But if these same techniques are used to reinforce the status quo, they can become powerful tools of repression. This is especially so when (as now apparently) government lawyers lack the idealism and social conscience of their New Deal predecessors; they simply bend in the face of whatever institutional and political winds are currently blowing. The remedy lies not in wishful thinking about less government, but in elaborating and inculcating a fresh ideology of public service among lawyers. Whatever happened to the client-that-is-all-of-us that many

53. *Id.* at xi-xii. ("The Limits of Legal Liberalism" is the title of Irons' concluding chapter, *id.* at 290).

54. *Id.* at x (quoting Jerold Auerbach's *UNEQUAL JUSTICE*).

55. *Id.* at 295.

Legal liberalism is a largely unarticulated ideology, and like its close cousin, legal realism, it encompasses a disputatious family. *Id.* at 296. *See supra* note 1. *See also*, Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 62 *MINN. L. REV.* 265 (1978); White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 *VA. L. REV.* 279 (1973).

Irons adroitly demonstrates how central these principles have become to the thinking of the legal establishment in a discussion of *ADMINISTRATIVE LAW: CASES AND MATERIALS* 5, 136-38 (L. Jaffe and N. Nathanson, eds. 1976). Jaffe, a New Deal lawyer, is Byrne Professor of Administrative Law at Harvard.) P. IRONS, *supra* note 1, at 296, 331n.12.

New Deal lawyers tried to represent creatively? Dissolved in legal fictions about "the public interest," we await recovery and rediscovery.⁵⁶ Law schools and the Bar give much lip service, but few other resources to the task of developing public service orientations.⁵⁷ Such orientations are fragile at best; Irons observes that, the major battles won, New Deal lawyers quickly "left for the rewards of private practice, uniquely qualified by their New Deal experience to guide corporate clients through the regulatory maze they helped to construct."⁵⁸ Still, this is a far cry from the crass cynicism of today: "Federal law practice has become a form of taxpayer-subsidized graduate education, with the benefits reaped by corporate clients."⁵⁹ Telling us of our roots, Irons offers stimuli and sources for developing new public service orientations that will perhaps revolve around the quality of life and the power to control one's destiny.⁶⁰

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56. Such as they are, these are some of my ruminations while reading Irons.

57. See Klare, *supra* note 39, at 348-40, *passim*. "Public sector lawyers" comprise only 14% of the profession, and only 6% of the ABA's leadership. The leadership's specializations and clientele predispose it toward the protection of powerful business interests, predispositions reflected in the ABA's stands on various public policy questions. A. MELONE, *supra* note 3, at 66, 83. See *id.*, *passim*.

58. P. IRONS, *supra* note 1, at 290. The New Deal gave rise to the "insider" firm (of which Tommy Corcoran's is the prototype) with a stock in trade of easy access to senior bureaucrats and politicians. *Id.* at 298.

59. *Id.* at 299.

60. See Horowitz, *Economic Equality as a Social Goal*, in 5 POL. STUD. REV. ANN. 256, 261, *passim* (I. Horowitz, ed. 1981). See also text accompanying *supra* note 55. E. HAWLEY, *supra* note 4 at 492, adds: "Current policy, it seems, like that of the New Deal era, is still a maze of conflicting cross-currents, and so long as the intellectual heritage remains and conflicting goals persist, it seems doubtful that any set of simple and consistent policies can be drawn up and implemented." See E. LEWIS, *supra* note 1, at 61-66 (discussed in *supra* note 1); *id.* at 57 (quoted in *supra* note 37). Hawley writes of antitrust policies in 1966, but his argument seems applicable generally. A public service ideology would have to specify what it is we want from government, and many of the best legal and other means of getting it. This has never been done fully and was last done imperfectly during the New Deal. Our current malaise offers strong evidence of the need for a grand policy reformulation under thoughtful and forceful political leadership.