

Nihilism with a Happy Ending? The Interstate Commerce Commission and the Emergence of the Post-Enlightenment Paradigm

Mark F. Kightlinger*

This Article examines early Supreme Court opinions about the Interstate Commerce Commission (ICC)—the first federal administrative agency—in an effort to identify the intellectual roots of the modern administrative state. The Article argues that the Court’s effort to explain and justify the function of the newborn ICC shows the traces of a post-Enlightenment crisis in the field of moral philosophy—i.e., the growing conviction that it is no longer possible for reasonable people to agree on what constitutes a true, objective, universally valid standard of reasonable or just conduct. From this essentially nihilistic starting point, the Court helped to fashion a new post-Enlightenment paradigm under which the function of an administrative bureaucracy such as the ICC is to impose order on a market consisting of individuals pursuing their non-rational interests and preferences in the absence of an objective, shared moral framework. The Court thus gave its imprimatur to what has become our way of understanding who and what we are, namely, individuals who require bureaucratic supervision and bureaucratically imposed order as we pursue our non-rational wants and needs in market-based interactions with other individuals. Our need for some kind of order is the sole rationale for this bureaucratically imposed order because, by hypothesis, there no longer exists a true, objective, universally valid standard against which any such order can be measured. This Article’s account of the post-Enlightenment paradigm, its genesis, and its implications builds on the work of philosopher and social theorist Alasdair MacIntyre as well as on two

* James and Mary Lassiter Associate Professor of Law, University of Kentucky College of Law; J.D., Yale Law School, 1988; Ph.D., Yale University, 1991; B.A./M.A., Cambridge University, 1983/1995; B.A., Williams College, 1981; Partner, Covington & Burling 1999-2004.

recent publications by the author examining the intellectual framework underlying U.S. and European Internet privacy regulation.

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I. INTRODUCTION

Government by administrative agency has become ubiquitous. The White House website lists 136 federal agencies and commissions¹ that operate in parallel to the 15 cabinet-level departments of the executive branch.² These federal agencies run the gamut from the Advisory Council on Historic Preservation through the Small Business Administration to the Women's History Commission. The first independent federal regulatory agency,³ the Interstate Commerce Commission ("ICC"), was established in 1887,⁴ meaning that the administrative government of the United States is largely a creation of the last 120 years. If, two decades after Appomattox, one had told a Civil War veteran that his great grandchildren would live in a world where an army of bureaucrats do most of the work of the federal government, his response probably would have reflected disbelief, if not blank incomprehension.⁵ The world that has come to seem normal to us would probably have been unimaginable to him. Even if he had witnessed the birth of the ICC in 1887, it would have required prophetic powers to predict that from this single stream the river of the modern administrative state would flow.

For those of us who are troubled about how we have come to be the subjects of administrative government, the hypothetical Civil War veteran presents an important puzzle. How in the relatively short space of 120 years—less than two modern lifetimes—did we evolve from a

1. Federal Agencies and Commissions, <http://www.whitehouse.gov/government/independent-agencies.html> (last visited July 29, 2008).

2. The executive departments are Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Homeland Security, Housing and Urban Development, Interior, Justice, Labor, State, Transportation, Treasury, and Veterans Affairs. See President Bush's Cabinet, <http://www.whitehouse.gov/government/cabinet.html> (last visited July 29, 2008).

3. Jay S. Bybee, *Agency Expertise, ALJ Independence, and Administrative Courts: The Recent Changes in Louisiana's Administrative Procedure Act*, 59 LA. L. REV. 431, 437 (1999). For a review of the history of U.S. administrative law prior to the establishment of the ICC, see Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256 (2006), and Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801-1829*, 116 YALE L.J. 1636 (2007).

4. See Interstate Commerce Act, ch. 104, § 11, 24 Stat. 379, 383 (1887) [hereinafter ICA]. The ICC was replaced in 1995 by the Surface Transportation Board. See SURFACE TRANSPORTATION BOARD, 1996/1997 ANNUAL REPORT 1 (1998), available at <http://www.stb.dot.gov/stb/docs/ActivityReport1996-1997.pdf>.

5. The number of civilian officials in the federal government jumped from roughly 95,000—a large percentage of whom were postal workers—in 1881 to nearly 500,000 by 1925. See James Q. Wilson, *The Rise of the Bureaucratic State*, 41 PUBLIC INTEREST 77, 77 (1975).

world in which a national government dominated by an army of administrative officials was unimaginable to a world in which such a government is a premise of our daily lives, a world in which readers of an article such as this might wonder why or how one could seriously question the value of administrative government? To put the problem somewhat differently, how have we come to see ourselves as proper and even inevitable subjects for administrative oversight, as regulated and supervised beings? In two recent articles, I argued that this understanding of ourselves reflects what I refer to as the “post-Enlightenment paradigm.” I suggested that the post-Enlightenment paradigm influences and perhaps dictates the way that we explain and justify our behavior and the structure of our social world.⁶ As discussed in Part II of this Article, at the root of the paradigm is a fundamentally nihilistic understanding of our modern situation, a conviction that it is no longer possible to articulate a true, universally valid, objective moral theory according to which we can and should live. Starting from nihilistic premises, we have learned to understand ourselves primarily as individuals pursuing our subjective interests and preferences through agreements with other individuals in markets.⁷ In order to function, the markets require the supervision of expert, impersonal bureaucratic administrators.⁸ Thus, administrative bureaucracies have become a crucial component of our account of who we are and how we obtain what we need and want. Because we understand ourselves through the framework of the post-Enlightenment paradigm, we find it easy and normal to cede control over our lives to administrative bureaucracies and we find it difficult to imagine ourselves in a fundamentally different way—for example, as members of a self-directed community pursuing a shared vision of the good life.⁹ Thus, one might say that the difference between the hypothetical Civil War veteran and us is that he did not comprehend the world through the post-Enlightenment paradigm while we do. To that extent, he inhabited a different world from ours.

If there is merit to the contention that we now explain and justify our behavior and the structure of our social world through the framework of the post-Enlightenment paradigm, then the next question is how the paradigm came to play this crucial role. This Article investigates one of

6. See Mark F. Kightlinger, *The Gathering Twilight? Information Privacy on the Internet in the Post-Enlightenment Era*, 24 J. MARSHALL J. COMPUTER & INFO. L. 353 (2006) [hereinafter Kightlinger, *Gathering Twilight*]; Mark F. Kightlinger, *Twilight of the Idols? EU Internet Privacy and the Post-Enlightenment Paradigm*, 14 COLUM. J. EUR. L. 1 (2007) [hereinafter Kightlinger, *Twilight of the Idols*].

7. See *infra* notes 43-51 and accompanying text.

8. See *infra* notes 56-67 and accompanying text.

9. See *infra* notes 16-21 and accompanying text.

the sources of the paradigm in a very specific body of thought, namely early Supreme Court opinions concerning the ICC. Although Congress created the ICC, the Court was stuck with the task of hearing appeals related to ICC decisions and, in that context, providing the official, legally binding explanation of what the ICC was, how it was supposed to operate, and how it fit into our scheme of life. To accomplish this task, the Court inevitably had to provide us with an account of that scheme of life and of the newborn ICC's role in it. As the Court wrestled with these issues, it appeared to adopt a fundamentally nihilistic standpoint from which the post-Enlightenment paradigm gradually emerged.¹⁰ The paradigm, in turn, provided the implicit structure for the Court's discussions of the ICC.¹¹ Thus, the Court ratified the paradigm and incorporated it into our legal system.

The argument of this Article proceeds in four stages. Part II outlines the post-Enlightenment paradigm. Although the discussion draws freely on my earlier accounts of the paradigm, the focus here shifts to the nihilistic implications of the philosophical debate from which the paradigm emerged and the importance of nihilism as a kind of justification for the key elements of the paradigm. Part III provides an overview of the Interstate Commerce Act ("ICA" or "Act"). Although in 1908 Justice Holmes could breezily refer to the "well-known provisions" of the ICA,¹² it seems likely that those provisions are much less well-known today; hence, the need for a short summary. Part IV examines the emergence and significance of the post-Enlightenment paradigm in the Supreme Court's efforts to explain and justify the role of the ICC in our scheme of life.

II. THE POST-ENLIGHTENMENT PARADIGM

My account of the genesis of the post-Enlightenment paradigm for explaining and justifying human behavior relies heavily on the writings of philosopher and social theorist Alasdair MacIntyre.¹³ The post-

10. See *infra* notes 318-333 and accompanying text.

11. See *infra* Part IV.B (examining the Court's treatment of the ICC).

12. See *Harriman v. I.C.C.*, 211 U.S. 407, 418 (1908).

13. Key texts include ALASDAIR MACINTYRE, *AFTER VIRTUE* (2d ed. 1984) [hereinafter MACINTYRE, *AFTER VIRTUE*]; ALASDAIR MACINTYRE, *WHOSE JUSTICE, WHICH RATIONALITY* (1988) [hereinafter MACINTYRE, *WHOSE JUSTICE*]; ALASDAIR MACINTYRE, *THREE RIVAL VERSIONS OF MORAL ENQUIRY* (1990) [hereinafter MACINTYRE, *THREE RIVAL VERSIONS*]; ALASDAIR MACINTYRE, *FIRST PRINCIPLES, FINAL ENDS AND CONTEMPORARY PHILOSOPHICAL ISSUES* (1990). More recently, MacIntyre has begun to spell out the details of an alternative approach to moral philosophy rooted in the Aristotelian tradition. See, e.g., ALASDAIR MACINTYRE, *DEPENDENT RATIONAL ANIMALS* (1999) [hereinafter MACINTYRE, *DEPENDENT*]. MacIntyre does not refer to the post-Enlightenment worldview that he describes as a "paradigm" in Thomas Kuhn's sense of

Enlightenment paradigm¹⁴ emerged from the failure of philosophers and other intellectuals to resolve certain fundamental problems that were bequeathed to us by the Enlightenment critique of earlier moral theories. The paradigm emerged in three historical stages.¹⁵ In the first stage, extending from roughly the time of Plato and Aristotle through Thomas Aquinas and into the Renaissance, there was a high degree of consensus among thinking persons around a three-part teleological framework for explaining and justifying human conduct.¹⁶ The three parts of the framework were: “an account of human beings as they happen to be here and now, an account of the end or *telos* of human life, i.e., the human good, and an account of the precepts mandating certain virtues and forbidding certain vices that enable human beings to make the transition”¹⁷ from what they happen to be here and now to what they could be if they achieved their potential. Thinkers operating within this teleological framework viewed ethics as the science with which we can study and understand our lives as they are and at the same time inquire into, and receive guidance on, our ends as human beings and how to attain those ends.¹⁸ Within the teleological framework, my *telos* or good as a human being is something I share in key respects with other human beings. It defines me as human and distinguishes me from other non-human beings. Because human beings are defined to a considerable extent by what we share, the teleological tradition viewed the process of embodying human excellence in our lives as a shared, communal or social effort.¹⁹ According to the tradition, “we embody in our lives a series of interconnected roles and relationships, each with associated precepts about virtues and vices, in and through which we develop our characters and work to realize the human *telos*.”²⁰ This account of human beings as essentially social and engaged in a joint effort to achieve the good also points toward a political ideal that we have in

the term, but MacIntyre’s account of the hold that that worldview has on our way of explaining and justifying human action strongly supports the use of that term in Kuhn’s sense. For MacIntyre’s favorable view of Kuhn’s general approach, see MACINTYRE, *THREE RIVAL VERSIONS*, *supra* at 17, 50, 118, 122.

14. I have borrowed the term “paradigm” from Thomas Kuhn. See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 43-51, 174-191 (2d ed. 1970); see also THOMAS S. KUHN, *Second Thoughts on Paradigms*, in *THE ESSENTIAL TENSION* 293, 297, 318-319 (1977). For an examination of Kuhn’s use of the term, see Kightlinger, *Gathering Twilight*, *supra* note 6, at 355 n.9.

15. For a more detailed account of the emergence of the paradigm, see Kightlinger, *Gathering Twilight*, *supra* note 6, at 355-363.

16. *Id.* at 356-357.

17. Kightlinger, *Twilight of the Idols*, *supra* note 6, at 5.

18. *Id.*

19. See Kightlinger, *Gathering Twilight*, *supra* note 6, at 357.

20. Kightlinger, *Twilight of the Idols*, *supra* note 6, at 5.

common as human beings, i.e., that of a “community united in a shared vision of the good for man (as prior to and independent of any summing of individual interests).”²¹

The second stage of the intellectual history that results in the post-Enlightenment paradigm is the Enlightenment itself.²² The story begins with acute criticisms of teleological explanation from various quarters, including Reformation theologians, philosophers, and the emerging community of natural scientists who sought to explain all change in the world through efficient causes rather than final or teleological causes.²³ These criticisms undermined the theoretical foundation for a key element of the three-part teleological framework in ethical philosophy, i.e., the notion of a shared human *telos* or good. What survived was a two-part account of human conduct consisting of a description of who we are here and now and various lists of precepts enjoining us to act or not act in specified ways. The challenge bequeathed to Enlightenment thinkers and their successors was and is to provide a persuasive, rational account of how these two elements—unreconstructed human nature and moral precepts—relate to one another, thus providing a rationally compelling basis for the moral precepts.²⁴ According to MacIntyre, all efforts to meet this challenge have failed, including the efforts of such powerful thinkers as Denis Diderot, David Hume, Immanuel Kant, Adam Smith, Jeremy Bentham, and John Stuart Mill.²⁵

[T]he great Enlightenment theorists had themselves disagreed both morally and philosophically. Their heirs have, through brilliant and sophisticated feats of argumentation, made it evident that if these disagreements are not interminable, they are such at least that after two hundred years no prospect of termination is in sight. Succeeding generations of Kantians, utilitarians, natural rights’ theorists, and contractarians show no sign of genuine convergence.²⁶

Enlightenment thinkers and their successors have failed for the simple reason that it is not possible to identify a rational connection between “a set of moral injunctions on the one hand and a conception of human nature on the other which had been expressly designed to be discrepant

21. MACINTYRE, *AFTER VIRTUE*, *supra* note 13, at 236.

22. For a brief synopsis of the premises of Enlightenment thought, see ARTHUR O. LOVEJOY, *THE GREAT CHAIN OF BEING* 288-289 (Harvard U. Press 1964). For a classic, critical examination of Enlightenment thought, see ERNST CASSIRER, *THE PHILOSOPHY OF THE ENLIGHTENMENT* (Fritz C.A. Koelln & James P. Pettegrove trans., 1951).

23. Kightlinger, *Gathering Twilight*, *supra* note 6, at 357-358 and n.17.

24. MACINTYRE, *AFTER VIRTUE*, *supra* note 13, at 52, 55-56.

25. *Id.* at 40-50 (discussing Diderot, Hume, Kant, and Smith) and 62-64 (discussing Bentham and Mill).

26. ALASDAIR MACINTYRE, *Some Enlightenment Projects Reconsidered*, in *ETHICS AND POLITICS* 172, 181-182 (2006).

with each other.”²⁷ Since the purpose of moral injunctions is “to correct, improve and educate . . . human nature, they are clearly not going to be such as could be deduced from true statements about human nature or justified in some other way by appealing to its characteristics.”²⁸

The continuing failure of Enlightenment and post-Enlightenment thought to provide a rationally persuasive basis for moral injunctions leads to the third stage of the story: the emergence of the post-Enlightenment paradigm. At the core of the new paradigm is the premise that there is a fundamental disjunction or discontinuity between the realm of fact and the realm of value, between the “is” and the “ought.”²⁹ This premise emerges from the awareness of repeated failures to bridge the seemingly unbridgeable gap between descriptions of how human beings are here and now and statements about how they ought to be or what they ought to do.³⁰ Over time, “the ‘is’ comes to be seen as the realm of ‘fact,’ which is objectively available for study by the natural and social sciences, while the ‘ought’ comes to be seen as the realm of ‘value,’ which is private, subjective and not open to rational dispute.”³¹ MacIntyre terms this modern philosophical outlook “emotivism,” i.e., “the doctrine that all evaluative judgments and more specifically all moral judgments are *nothing but* expressions of preference, expressions of attitude or feeling, insofar as they are moral or evaluative in character.”³²

From what has been said so far, it should be clear that emotivism represents not the triumph but the ultimate failure of the Enlightenment project to provide a rationally compelling basis for moral precepts and moral theory. As MacIntyre observes, “what emotivism asserts is in central part that there are and can be *no* valid rational justification[s] for any claims that objective and impersonal moral standards exist and hence that there are no such standards.”³³ Allan Bloom summed up the implications of the failure of the Enlightenment project in characteristically colorful language:

Values are not discovered by reason, and it is fruitless to seek them, to find the truth or the good life. . . . This alleged fact was announced by Nietzsche just over a century ago when he said, “God is dead.” Good and evil now for the first time appeared as values, of which there have been a thousand and one, none rationally or objectively

27. MACINTYRE, *AFTER VIRTUE*, *supra* note 13, at 55.

28. *Id.*

29. Kightlinger, *Gathering Twilight*, *supra* note 6, at 359.

30. *Id.*

31. Kightlinger, *Twilight of the Idols*, *supra* note 6, at 6.

32. MACINTYRE, *AFTER VIRTUE*, *supra* note 13, at 11-12.

33. *Id.* at 19.

preferable to any other. The salutary illusion about the existence of good and evil has been definitively dispelled. For Nietzsche this was an unparalleled catastrophe; it meant the decomposition of culture and the loss of human aspiration. . . . In short, Nietzsche with the utmost gravity told modern man that he was free-falling into the abyss of nihilism.³⁴

As Stanley Rosen observed, “Nietzsche defines nihilism as the situation which obtains when ‘everything is permitted.’”³⁵ However, if everything is permitted, then nothing has intrinsic value, and this leads Nietzsche to emphasize the dark side of nihilism—“the radical repudiation of value, meaning, and desirability.”³⁶ For MacIntyre, Nietzsche was a central figure in the collapse of the Enlightenment project and the rise of post-Enlightenment thought: “For it was Nietzsche’s historic achievement to understand more clearly than any other philosopher . . . not only that what purported to be appeals to objectivity were in fact expressions of subjective will, but also the nature of the problems that this posed for moral philosophy.”³⁷

Although the triumph of emotivism, and therefore of “anything goes” nihilism, was an “unparalleled catastrophe,” the nihilist premises of our modern talk about “values” seem not to bother most Americans.³⁸ As used by the emotivist, words such as “values”

seem[] substantial and respectable. They appear to justify one’s tastes and deeds, and human beings need to have such justification, no matter what they may say. We have to have reasons for what we do. . . .

34. ALLAN BLOOM, *CLOSING OF THE AMERICAN MIND* 143 (1987). For Nietzsche’s announcement of God’s demise, see FRIEDRICH NIETZSCHE, *THUS SPOKE ZARATHUSTRA*, in *THE PORTABLE NIETZSCHE* 103, 124 (Walter Kaufmann ed. & trans., 1968).

35. STANLEY ROSEN, *NIHILISM: A PHILOSOPHICAL ESSAY* xiii (1969). For the quotation from Nietzsche, see FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALS* 150 (Walter Kaufman trans., 1969).

36. FRIEDRICH NIETZSCHE, *THE WILL TO POWER* 8 (Walter Kaufmann & R.J. Hollingdale trans., 1967). For a brief exposition of Nietzsche’s complex views on nihilism, see HERBERT SCHNÄDELBACH, *PHILOSOPHY IN GERMANY 1831-1933*, 166-168 (Eric Matthews trans., 1984). For more detailed discussions of the place of nihilism in Nietzsche’s thought, see WALTER KAUFMANN, *NIETZSCHE: PHILOSOPHER, PSYCHOLOGIST, ANTICHRIST* 97-118 (4th ed. 1974) and KARL JASPERS, *NIETZSCHE: AN INTRODUCTION TO UNDERSTANDING OF HIS PHILOSOPHICAL ACTIVITY* 242-247 (Charles F. Wallraff & Frederick J. Schmitz trans., 1965).

37. MACINTYRE, *AFTER VIRTUE*, *supra* note 13, at 113.

38. For an examination of what Bloom takes to be American ignorance of our spiritual situation, see BLOOM, *supra* note 34, at 227-240.

However, these words are not reasons, nor were they intended to be reasons. . . . By some miracle these very terms became our justification: nihilism as moralism.³⁹

As Bloom seems to suggest, when someone criticizes my conduct or moral commitments, I may respond that my conduct and commitments reflect my values. My values are beyond further challenge because they cannot be measured against any rational, objective standard. Since my values are beyond challenge, any criticism of them is inappropriate. In this way, as Bloom suggested, the language of “values,” which was designed to signal the absence of justification, becomes itself a form of justification. In MacIntyre’s view, “to a large degree people now think, talk and act *as if* emotivism were true, no matter what their avowed theoretical standpoint may be. Emotivism has become embodied in our culture.”⁴⁰ As emotivism became the common and familiar framework for expressing moral and ethical claims and arguments, the nihilistic implication of emotivism ceased to seem threatening. In Bloom’s words, in our post-Enlightenment world, we have “nihilism without the abyss.”⁴¹ Or, as he remarked in another context, “[w]e have here the peculiarly American way of digesting Continental despair. It is nihilism with a happy ending.”⁴²

The post-Enlightenment paradigm for explaining and justifying human action took shape in a world where emotivism was emerging as the most persuasive account of moral life.⁴³ Thus, in important respects, the post-Enlightenment paradigm *is* nihilism’s happy ending, although the extent to which the ending is happy is open for debate. The post-Enlightenment paradigm consists of three elements—the individual, the market, and the administrative bureaucracy—that have become deeply intertwined with the emotivist position.⁴⁴ After Enlightenment thinkers dismissed the old teleological notion of a shared account of the human *telos* and a shared vision of the good, it became increasingly apparent that all accounts of “the” human *telos* were in fact simply accounts of the ends or objectives, the interests and preferences, of particular individuals.⁴⁵ According to MacIntyre,

39. *Id.* at 238-239.

40. MACINTYRE, *AFTER VIRTUE*, *supra* note 13, at 22.

41. BLOOM, *supra* note 34, at 155.

42. *Id.* at 147.

43. For MacIntyre’s account of the emergence of emotivism at Cambridge University circa 1900, see MACINTYRE, *AFTER VIRTUE*, *supra* note 13, at 14-18.

44. Kightlinger, *Twilight of the Idols*, *supra* note 6, at 6-8.

45. Kightlinger, *Gathering Twilight*, *supra* note 6, at 359-61.

[t]ake away the notion of essential nature, take away the corresponding notion of what is good and best for members of a specific kind who share such a nature, and the Aristotelian scheme of the self which is to achieve good . . . necessarily collapses. There remains only the individual self with its pleasures and pains.⁴⁶

In a world where emotivism remains the only persuasive moral theory, it is the individual who does the emoting, the individual who expresses attitudes, preferences, and feelings, the individual who becomes a “kind of sovereign in . . . [a] private realm of value.”⁴⁷

The invention or discovery of the individual⁴⁸ as the basic constituent of moral life demanded a new account of human community or society.⁴⁹ In place of a shared, communal quest for the human good to be realized in and through human relationships, we come to see “society as nothing more than an arena in which individuals seek to secure what is useful or agreeable to them.”⁵⁰ As I wrote in an earlier article, “[t]he model for such a society is the market, which is the second essential element of the post-Enlightenment paradigm. We learn to see our social interactions as a form of market behavior in which we each pursue our individual values and the market distributes whatever we want to each of us for a price.”⁵¹ In the market, each individual strives to attain his or her preferences, which allegedly can be summed up in the seemingly scientific concept of the individual’s utility.⁵² The individual competes, bargains, and enters into contracts with other individuals who pursue their preferences.⁵³ Human society and interaction come to be seen as consensual or contractual.⁵⁴ Community is thus negotiated as a transaction in a market.

The difficulty facing any account of human society as a realm of individuals competing and engaging in consensual transactions based on their own values, interests, and preferences is that such a society appears to face a permanent threat of conflict and chaos.⁵⁵ At the beginning of

46. MACINTYRE, THREE RIVAL VERSIONS, *supra* note 13, at 138.

47. Kightlinger, *Gathering Twilight*, *supra* note 6, at 360.

48. MACINTYRE, AFTER VIRTUE, *supra* note 13, at 60. See ALASDAIR MACINTYRE, *Practical Rationalities as Forms of Social Structure*, in THE MACINTYRE READER 120, 129 (Kelvin Knight ed., Polity Press 1998).

49. See Kightlinger, *Gathering Twilight*, *supra* note 6, at 361-62.

50. MACINTYRE, AFTER VIRTUE, *supra* note 13, at 236.

51. Kightlinger, *Twilight of the Idols*, *supra* note 6, at 6 (footnote omitted).

52. MacIntyre argues that the notion of utility as a summing of individual desires is a “moral fiction” because “the objects of natural and educated human desire are irreducibly heterogeneous.” MACINTYRE, AFTER VIRTUE, *supra* note 13, at 70.

53. See Kightlinger, *Gathering Twilight*, *supra* note 6, at 361.

54. See *id.*

55. See Kightlinger, *Twilight of the Idols*, *supra* note 6, at 6.

the modern era, Thomas Hobbes captured this threat in his memorable claim that the unrestricted pursuit of individual interests will lead to a “war . . . of every man, against every man.”⁵⁶ Accordingly, the essential third element of the post-Enlightenment paradigm is an institution designed specifically to maintain order by preventing the outbreak of conflict and chaos.⁵⁷ This institution is the bureaucracy. MacIntyre’s account of bureaucracy and its significance in the modern era is heavily indebted to Max Weber.⁵⁸ According to Anthony Giddens, in the pure form of bureaucracy

[t]he activities of the administrative staff are carried out on a regular basis, and thus constitute well-defined official “duties.” The spheres of competence of the officials are clearly demarcated, and levels of authority are delimited in the form of a hierarchy of offices. The rules governing conduct of the staff, their authority and responsibilities, are recorded in written form. Recruitment is based upon demonstration of specialised competence via competitive examinations or the possession of diplomas or degrees giving evidence of appropriate qualifications. Office property is not owned by the official, and a separation is maintained between the official and the office, such that under no conditions is the office “owned” by its incumbent.⁵⁹

In our era, one finds bureaucratic organization in both private businesses and public administrations.⁶⁰ As Weber wrote, “[t]he development of modern forms of organization in all fields is nothing less than identical with the development and continual spread of bureaucratic administration.”⁶¹

Bureaucratic institutions are well-suited to provide the order that otherwise threatens to disintegrate in a world that consists of individuals pursuing subjective values, interests, and preferences. This is because the characteristic function of bureaucracy is objective, impersonal application of rules backed by the threat of force.⁶² In Weber’s words,

[b]ureaucratization offers above all the optimum possibility for carrying through the principle of specializing administrative

56. THOMAS HOBBS, *LEVIATHAN* 64 (Dent 1965) (1651).

57. See Kightlinger, *Twilight of the Idols*, *supra* note 6, at 6-7.

58. See MACINTYRE, *AFTER VIRTUE*, *supra* note 13, at 74-5, 86, 109.

59. ANTHONY GIDDENS, *CAPITALISM AND MODERN SOCIAL THEORY* 158 (Cambridge Univ. Press 1971). For a classic exegesis of Weber’s theory of bureaucracy, see TALCOTT PARSONS, *THE STRUCTURE OF SOCIAL ACTION* 506 (2d ed., Free Press 1949).

60. See Kightlinger, *Twilight of the Idols*, *supra* note 6, at 7.

61. MAX WEBER, *ECONOMY AND SOCIETY* 223 (Guenther Roth & Claus Wittich eds., Bedminster Press 1968). For a summary of Weber’s account of the role of bureaucratic organization in a modern capitalist economy, see GIDDENS, *supra* note 59, at 158-60.

62. See Kightlinger, *Twilight of the Idols*, *supra* note 6, at 6-7.

functions according to purely objective considerations. . . .
“Objective” discharge of business primarily means a discharge of
business according to calculable rules and “without regard for
persons.”⁶³

As Reinhard Bendix observed, for Weber, bureaucratic “organizations operate more efficiently than alternative systems of administration[,] and . . . they increase their efficiency to the extent that they ‘depersonalize’ the execution of official tasks.”⁶⁴ Thus, through disinterested application of rules to individuals and markets (backed by the threat of force to deter non-compliance), the bureaucrat combats the disorder that might ensue in the absence of bureaucratic supervision.

Professor White has written that “[t]he art of administration is the direction, coordination, and control of many persons to achieve some purpose. . . .”⁶⁵ In the emotivist post-Enlightenment world, however, one cannot hope to demonstrate that the administrative agency’s purpose reflects an objectively true, universally valid, rationally persuasive standard of conduct based on a shared vision of the good, because such a standard does not exist.⁶⁶ For the bureaucracy, the proper measure of success is “effectiveness”⁶⁷ in organizing and ordering individual behavior according to the purposes that the bureaucracy pursues, whatever those purposes may be. Where the bureaucracy is effective, order is maintained, and effective maintenance of order may be the bureaucracy’s one indisputable goal. From the standpoint of the individual and his or her values and preferences, the actions and underlying purposes of the bureaucracy may seem irrational and wrong. Indeed, it would be an extraordinary coincidence if every individual concurred with every decision of every bureaucracy all the time. In the emotivist world, however, when the individual disagrees with the bureaucracy, the individual cannot point to an objective standard against which the bureaucracy’s decisions should be measured. The individual can say only that the bureaucracy has acted in a manner that is inconsistent with the individual’s values. And if challenged, the bureaucracy cannot respond by citing an overarching objective moral standard, because there is no such standard. The bureaucracy will simply override conflicting individual value systems by whatever means necessary, including the use of force. Because bureaucracy can maintain

63. MAX WEBER, *supra* note 61, at 975 (emphasis excluded).

64. REINHARD BENDIX, MAX WEBER AN INTELLECTUAL PORTRAIT 427 (Anchor Books 1962).

65. LEONARD D. WHITE, INTRODUCTION TO THE STUDY OF PUBLIC ADMINISTRATION 2 (4th ed. 1955) (emphasis excluded).

66. See Kightlinger, *Twilight of the Idols*, *supra* note 6, at 6.

67. MACINTYRE, AFTER VIRTUE, *supra* note 13, at 75.

an impersonal order in a world where values lack a rationally persuasive basis, it is an institution tailor-made for the era of post-Enlightenment nihilism.⁶⁸ In this sense, bureaucracy makes possible nihilism's happy ending.

A reader might object that I have misrepresented Weber and the Weberian understanding of bureaucracy by suggesting that it has roots in a nihilistic account of moral theory. On the contrary, it is well-established that Weber was steeped in Nietzsche's ideas and that Weber agreed in many respects with Nietzsche's analysis of values.⁶⁹ Weber noted "[t]he impossibility of 'scientifically' pleading for practical and interested stands—except in discussing the means for a firmly given and presupposed end. . . ."⁷⁰ According to Weber, "'[s]cientific' pleading is meaningless in principle because the various value spheres of the world stand in irreconcilable conflict with each other. The elder Mill . . . was on this point right when he said: If one proceeds from pure experience, one arrives at polytheism."⁷¹ A couple of sentences later, Weber cites Nietzsche on the irreconcilability of values in different spheres.⁷² In MacIntyre's words, for Weber "[q]uestions of ends are questions of values, and on values reason is silent; conflict between rival values cannot be rationally settled. Instead one must simply choose—between parties, classes, nations, causes, ideals."⁷³ Weber thus qualifies as "an emotivist and his portrait of a bureaucratic authority is an emotivist portrait."⁷⁴ He is, in other words, a post-Enlightenment, post-Nietzschean nihilist.

Not surprisingly, because MacIntyre is a philosopher and not a legal scholar, his treatment of Weber's account of bureaucracy is heavy on philosophical roots and light on legal implications.⁷⁵ To add legal and historical heft to my earlier articles discussing the post-Enlightenment paradigm, I incorporated elements of Robert Rabin's detailed

68. See Kightlinger, *Gathering Twilight*, *supra* note 6, at 361-62.

69. MACINTYRE, *AFTER VIRTUE*, *supra* note 13, at 26. See DONALD G. MACRAE, MAX WEBER 25, 55-59 (1974) (arguing Nietzsche corroborated Weber's position rather than influencing it); see also RAYMOND ARON, 2 MAIN CURRENTS IN SOCIOLOGICAL THOUGHT 248 (Richard Howard & Helen Weaver trans., 1967) (Nietzsche as "major influence" on Weber).

70. MAX WEBER, *Science as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 129, 147 (H.H. Gerth & C. Wright Mills eds. & trans., 1946).

71. *Id.*

72. See *id.* at 148.

73. MACINTYRE, *AFTER VIRTUE*, *supra* note 13, at 26.

74. *Id.*

75. One field of legal scholarship to which MacIntyre has contributed extensively is natural law. See, e.g., ALASDAIR MACINTYRE, *Natural Law as Subversive: The Case of Aquinas*, in ETHICS AND POLITICS 41 (2006); ALASDAIR MACINTYRE, *Aquinas and the Extent of Moral Disagreement*, in ETHICS AND POLITICS 64 (2006).

investigation of the regulatory models underlying most U.S. government agencies.⁷⁶ Among the several models that Rabin identifies, the policing and market-corrective models are relevant here. In Rabin's view, the policing model "was premised on an autonomous market-controlled economy. But adherents to this view were willing to concede that the market systematically generated certain 'excessively competitive' practices such as the manufacture of products that seriously endangered health and safety or the setting of rates that were particularly discriminatory."⁷⁷ Under the policing model, administrative bureaucracies monitor the behavior of market participants, deter excessively competitive behavior, and thereby allow otherwise autonomous markets to stabilize themselves.⁷⁸ By contrast, the market-corrective model denies that markets have the capacity to stabilize themselves even if excessively competitive behavior is deterred.⁷⁹ As a result, the market-corrective regulatory model reflects a "commitment to permanent market stabilization activity by the federal government."⁸⁰ Market-corrective regulation typically has included "price-fixing, information-sharing and market-allocating schemes. . . ."⁸¹ Economic planning is an important objective of administrative agencies under a market-corrective scheme because, as Professor Gifford observed, "planning and supervision of growth are logical outcomes of price and entry regulation."⁸²

Rabin's discussion of regulatory models raises an important question: why do individuals allow, let alone require, administrative bureaucrats to police or plan market activity? One answer, already foreshadowed by Hobbes, is that individuals pursuing their values, interests, and preferences fear chaos and desire order.⁸³ Bureaucrats promise order.⁸⁴ But this answer begs the question: why bureaucratic order? According to MacIntyre, "the major justification advanced for the intervention of government in society is the contention that government has resources of competence which most citizens do not possess."⁸⁵ As

76. See Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1191-94 (1986). For a more detailed summary and discussion of Rabin's argument, see Kightlinger, *Gathering Twilight*, *supra* note 6, at 377-83.

77. Rabin, *supra* note 76, at 1192.

78. See Kightlinger, *Gathering Twilight*, *supra* note 6, at 377, 380.

79. See *id.* at 380 (quoting Rabin, *supra* note 76, at 1192) (internal quotations omitted).

80. Rabin, *supra* note 76, at 1192.

81. *Id.*

82. Daniel J. Gifford, *The New Deal Regulatory Model: A History of Criticisms and Refinements*, 68 MINN. L. REV. 299, 303 (1983).

83. See *supra* notes 55-56 and accompanying text.

84. See *supra* notes 57-68 and accompanying text.

85. MACINTYRE, *AFTER VIRTUE*, *supra* note 13, at 85.

Professor Gifford has noted, “under the conventional wisdom, administrators were said to possess expertise developed from their experience in regulating as well as from their ability to draw on their staff of technicians.”⁸⁶ Weber too emphasized the bureaucrat’s specialized training, experience, and expertise as well as neutrality.⁸⁷ MacIntyre draws out the deep connection between the appeal to bureaucratic competence or expertise and the emotivist underpinnings of Weber’s account of administrative bureaucracy. According to MacIntyre, the manager’s “expertise . . . has two sides to it: there is the aspiration to value neutrality and the claim to manipulative power.”⁸⁸ The bureaucratic expert aspires to be value neutral in that the expert seeks to deal only with facts about the world and human behavior, not with choices between the irrational values or value systems of the individuals and organizations administered by the bureaucracy.⁸⁹ The bureaucracy claims manipulative power because its function is to create order by compelling individuals and organizations to do that which they might not otherwise do if they followed their own values, interests, and preferences.⁹⁰ Indeed, under the post-Enlightenment paradigm, the bureaucracy’s claim to wield manipulative power *is* the rational basis for bureaucratic administration. As MacIntyre observes, “on Weber’s view no type of authority can appeal to rational criteria to vindicate itself except that type of bureaucratic authority which appeals precisely to its own *effectiveness*. And what this appeal reveals is that bureaucratic authority is nothing other than successful power.”⁹¹ Thus, under the post-Enlightenment paradigm, the bureaucrat is seen as a neutral expert with superior capacity to impose order; therefore, the emotivist individual permits and ultimately requires the bureaucracy to act as the supervisor that polices and/or corrects the market and thereby maintains order.⁹²

86. Gifford, *supra* note 82, at 306.

87. *See supra* note 63 and accompanying text.

88. MACINTYRE, *AFTER VIRTUE*, *supra* note 13, at 86.

89. *See id.* at 84-86.

90. *See supra* notes 57-68 and accompanying text.

91. MACINTYRE, *AFTER VIRTUE*, *supra* note 13, at 26 (emphasis in original).

92. It is beyond the scope of this article to discuss the merits of the appeal to competence or expertise as a justification for allowing bureaucrats to supervise the economy. MacIntyre has raised serious philosophical questions about whether the type of managerial expertise claimed for the bureaucrat is even possible. MACINTYRE, *AFTER VIRTUE*, *supra* note 13, at 88-108. He refers to the belief in such expertise as the “fetishism . . . of bureaucratic skills.” *Id.* at 107. In two classic articles, Professor Jaffe expressed doubts about arguments for regulation based on bureaucratic expertise. *See* Louis L. Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105 (1954); Louis L. Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183 (1973). For discussions of the legal literature on this issue, *see*

In a world consisting primarily of individuals, markets, and bureaucracies, policy debate and disagreement tend to oscillate between two recognizable and predictable positions.⁹³ As MacIntyre has written,

the contending parties agree . . . that there are only two alternative modes of social life open to us, one in which the free and arbitrary choices of individuals are sovereign and one in which the bureaucracy is sovereign, precisely so that it may limit the free and arbitrary choices of individuals.⁹⁴

This analysis led MacIntyre to conclude that “the society in which we live is one in which bureaucracy and individualism are partners as well as antagonists.”⁹⁵ We live in a “culture of bureaucratic individualism” where there is a symbiotic relationship between the individual and the bureaucracy.⁹⁶ Each of these elements is understood to function in relation to the other and to the market within which each is presumed to act.⁹⁷

In my earlier work, I showed that the U.S. and EU approaches to Internet privacy law, although superficially quite different, in fact represent points on the spectrum of bureaucratic individualism, with the U.S. approach placing greater emphasis on individual freedom and the EU approach on bureaucratic supervision.⁹⁸ Taken together, however, the two approaches

appear to define our principal options. If . . . the post-Enlightenment paradigm is our normal and ordinary way of explaining and justifying human action, then it is not surprising that the options presented by the paradigm—individual or bureaucracy—might appear to be the primary, if not the only options available to us.⁹⁹

Internet privacy is undoubtedly one of the newest fields of law and policy in which the post-Enlightenment paradigm has shown its influence. This Article examines the other end of the historical continuum. By focusing on the Supreme Court’s ruminations on the ICC

Gifford, *supra* note 82, at 312-19 and James O. Freedman, *Expertise and the Administrative Process*, 28 ADMIN. L. REV. 363, 367-75 (1976). For a history of the rise of the expert as an influential figure in the United States, see RICHARD HOFSTADTER, ANTI-INTELLECTUALISM IN AMERICAN LIFE 197-229 (1963).

93. See Kightlinger, *Gathering Twilight*, *supra* note 6, at 362.

94. MACINTYRE, AFTER VIRTUE, *supra* note 13, at 35.

95. *Id.*

96. *Id.* at 71.

97. For a discussion of the symbiotic relationship between individual and bureaucracy in the field of privacy law, see Kightlinger, *Twilight of the Idols*, *supra* note 6, at 47-54.

98. *Id.* at 54-58.

99. *Id.* at 59.

during the agency's first 20 years, this Article seeks to unearth some of the roots of the process by which the two options presented by the post-Enlightenment paradigm—individual freedom or bureaucracy—became our primary options, and thus our way of understanding the choices presented to us by our situation in the world. Accordingly, Part III provides a short introduction to the ICC via a synopsis of the ICA and then Part IV examines the emergence of the post-Enlightenment paradigm in the Court's effort to come to grips with the ICC and its function in our social scheme.

III. THE INTERSTATE COMMERCE ACT

In 1887, four years after Nietzsche announced the death of God, Congress adopted the ICA.¹⁰⁰ Congress did not frame the ICA as a response to the succession problem in celestial government, but rather as a solution to more mundane problems involving the U.S. government's relationship to the growing railroad industry.¹⁰¹ In the Supreme Court's first substantial case under the ICA, the Court summarized the long-established common law principles governing common carriers¹⁰² such as railroads. The common law

demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service; . . . though the weight of authority in this country was in favor of an equality of charge to all persons for similar services.¹⁰³

In addition, as the Court recognized, “[i]n several of the States acts had been passed with the design of securing the public against unreasonable

100. See *supra* note 4.

101. See *infra* notes 104-106.

102. A common carrier is “a carrier that is required by law to transport passengers or freight, without refusal, if the approved fare or charge is paid.” BLACK’S LAW DICTIONARY 205 (7th ed. 1999).

103. *ICC v. Baltimore & O.R. Co.*, 145 U.S. 263, 275-76 (1892). See *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 436 (1907) (summarizing common law rules governing common carriers). Standard histories of the ICA/ICC include GABRIEL KOLKO, *RAILROADS AND REGULATION, 1877-1916* (1965); ARI & OLIVE HOOGENBOOM, *A HISTORY OF THE ICC* (1976); ISAIAH L. SHARFMAN, *THE INTERSTATE COMMERCE COMMISSION (1931-1937)*; Robert W. Harbeson, *Railroads and Regulation, 1877-1916, Conspiracy or Public Interest?*, 27 J. ECON. HIST. 230 (1967); Albro Martin, *The Troubled Subject of Railroad Regulation in the Gilded Age—A Reappraisal*, 61 J. AM. HIST. 339 (1974); Bruce Wyman, *The Rise of the Interstate Commerce Commission*, 24 YALE L.J. 529 (1915); and Henry C. Adams, *A Decade of Federal Railway Regulation*, 81 ATLANTIC MONTHLY 433 (1898).

and unjust discriminations. . . .”¹⁰⁴ For various reasons, however, these laws failed to appease the hunger for regulation of railroads:

the inefficacy of these laws beyond the lines of the State, the impossibility of securing concerted action between the legislatures toward the regulation of traffic between the several States, and the evils which grew up under a policy of unrestricted competition, suggested the necessity of legislation by Congress under its constitutional power to regulate commerce among the several States.¹⁰⁵

In the Court’s view, the “evils” that Congress sought to address

took the shape of inequality of charges made, or of facilities furnished, and were usually dictated by or tolerated for the promotion of the interests of the officers of the corporation or of the corporation itself, or for the benefit of some favored persons at the expense of others, or of some particular locality or community, or of some local trade or commercial connection, or for the destruction or crippling of some rival or hostile line.¹⁰⁶

How the Court or Congress knew these evils were evil (and not just very upsetting for the injured parties), the Court does not explain.

Congress’s response to these evils was the ICA,¹⁰⁷ which applied to all railroads engaged in interstate commerce.¹⁰⁸ The Act prohibited “unjust discrimination,” which arises if a railroad:

shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a

104. *Baltimore & O.R. Co.*, 145 U.S. at 276.

105. *Id.* The Court neglects to mention a point that probably would have been obvious to anyone watching the development of railroad law in 1892, namely that the “inefficacy” of state laws regulating railroads “beyond the lines of the state” resulted from a decision of the Court itself under the Commerce Clause. *See Wabash, St. L. & P. Ry. Co. v. Illinois*, 118 U.S. 557, 577 (1886). Thus, the Court influenced the creation of the ICC by blocking alternative approaches at the state level. *See HOOGENBOOM, supra* note 103, at 8 (noting the significance of the *Wabash* case in the move toward federal regulation of railroads); SHARFMAN, *THE INTERSTATE COMMERCE COMMISSION, supra* note 103, at 20 n.16. *But cf. KOLKO, supra* note 103, at 33 (Congress had begun work on railroad legislation before the *Wabash* case was handed down).

106. *Baltimore & O.R. Co.*, 145 U.S. at 276.

107. Interstate Commerce Act, ch. 104, § 11, 24 Stat. 379 (1887). For accounts of the adoption of the ICA, *see* JAMES W. ELY, JR., *RAILROADS AND AMERICAN LAW 90-93* (2001); KOLKO, *supra* note 103, at 30-44; and HOOGENBOOM, *supra* note 103, at 8-21.

108. ICA § 1.

like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. . . .¹⁰⁹

Congress did not specify what the phrase “transportation . . . under substantially similar circumstances and conditions” meant. The problem of interpreting the phrase, and thus of defining the scope of the prohibition on “unjust discrimination,” was left by default to the ICC and the courts.

In addition to banning unjust discrimination, the ICA prohibited railroads from providing “any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever. . . .”¹¹⁰ Complimenting this prohibition on undue preferences or advantages was a ban on imposing “any undue or unreasonable prejudice or disadvantage in any respect whatsoever.”¹¹¹ The use of the phrase “undue or unreasonable” to identify the types of advantages and disadvantages that were prohibited suggests that some advantages and disadvantages might not be undue or unreasonable. The ICA provided no guidance, however, on how the ICC was to distinguish the undue and unreasonable—i.e., wrongful—from the due and reasonable—i.e., not wrongful. Decisions about which conduct was wrongful and why were thus left by default to the ICC in the first instance and to the courts on review.

The ICA contained two other significant prohibitions. The first, known as the “long and short haul clause,”¹¹² provided

[t]hat it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance. . . .¹¹³

Essentially, the long and short haul clause meant that on a railroad running from point A to point C through point B, the carrier could not charge a fare for traffic between A and B that was equal to or higher than

109. *Id.* § 2.

110. *Id.* § 3.

111. *Id.*

112. *See, e.g.*, ICC v. Baltimore & O.R. Co., 145 U.S. 263, 284 (1892).

113. ICA § 4.

the fare between A and C. Again, however, the prohibition applied only if transportation occurred “under substantially similar circumstances and conditions,” and the ICA failed to specify what this meant.

The final significant prohibition in the ICA addressed what had become known as pooling.¹¹⁴ In the words of Professor Hall,

[t]here was fierce competition on the trunk lines (lines connecting western agricultural regions, midwestern trade centers, and eastern manufacturing and port cities) at the same time that extensive monopolies existed in localities served by branch and feeder lines. The railroads attempted to deal with these problems through pooling arrangements, which were private agreements among carriers to serve particular areas and to charge fixed prices.¹¹⁵

The ICA flatly prohibited this practice:

[i]t shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof. . . .¹¹⁶

Unlike the provisions already mentioned, the prohibition on pooling contained no phrases such as “substantially similar” or “undue and unreasonable” that might invite litigation and, not surprisingly, very little litigation about pooling reached the Supreme Court.¹¹⁷

In addition to the provisions of the ICA prohibiting specified forms of conduct, the ICA also contained a very early version of what has come to be known as a “filed rate provision.”¹¹⁸ Under the ICA,

[e]very common carrier subject to the provisions of this act shall file with the Commission . . . copies of its schedules of rates, fares, and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said Commission of all changes made in the same.¹¹⁹

114. *Id.* § 5.

115. KERMIT L. HALL, *THE MAGIC MIRROR* 205 (1989).

116. ICA § 5.

117. *See, e.g.*, *U.S. v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 315-16 (1897) (discussing the relationship between the ICA’s prohibition on pooling and the Sherman Act’s prohibition on agreements in restraint of trade).

118. *See MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 224 (1994) (discussing the “filed rate provisions” of the Communications Act of 1934).

119. ICA § 6.

The ICA required carriers to “print and keep for public inspection schedules showing the rates and fares and charges for the transportation of passengers and property. . . .”¹²⁰ The ICA made it illegal for a carrier

to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force.¹²¹

Carriers were not permitted to increase listed rates, fares, and charges “except after ten days’ public notice,”¹²² although they were permitted to reduce rates, fares, and charges by immediately posting notice and modifying the relevant schedules.¹²³ The net result of these requirements was that railroad carriers had to publish and file with the ICC all fares and rates related to interstate traffic and the carriers had to adhere to those fares and rates until they had given appropriate notice of the intent to alter them. Disputes about interpretation of the filed-rate provisions seldom reached the Supreme Court in the first two decades after the adoption of the ICA.¹²⁴

From the standpoint of this Article, the ICA’s most important innovation was the creation of the ICC. In the words of the Act, “a Commission is hereby created and established to be known as the Inter-State Commerce Commission, which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate.”¹²⁵ From a constitutional perspective, this meant that the commissioners were treated as principal officers of the United States.¹²⁶ The commissioners were to be appointed for staggered six-year terms.¹²⁷ Although the President and Senate were to participate in the appointment of ICC commissioners, the ICA included several provisions that preserve the commissioners’ independence. First,

120. *Id.*

121. *Id.* The ICA specified certain categories of tickets and ticket holders that were exempt from the prohibition on deviating from the published rate. Thus, for example, a railroad carrier could charge reduced rates to governments, charities, “ministers of religion,” or “officers and employees” of the company. *Id.* § 22.

122. *Id.* § 6.

123. *Id.*

124. For a rare example of such a dispute, *see* *New York, New Haven & Hartford R.R. Co. v. ICC*, 200 U.S. 361, 391 (1905).

125. ICA § 11.

126. The Appointments Clause distinguishes between officers and inferior officers of the United States. *See* U.S. CONST. art. II, § 2, cl. 2. It has become customary to refer to the former as “principal” officers. *See, e.g., Morrison v. Olson*, 487 U.S. 654, 671 (1988).

127. ICA § 11.

the ICA stated that “any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.”¹²⁸ Approximately 50 years later, the Supreme Court held that similar language imposed a “for cause” limitation on the President’s power to fire an agency head.¹²⁹ Second, the ICA mandated that “[n]ot more than three of the Commissioners shall be appointed from the same political party.”¹³⁰ This suggests a congressional desire to avoid partisan control of the ICC. Similarly, the provision for staggered six-year terms signaled a desire to ensure that control of the White House would not automatically lead to control of the ICC, since each President’s appointees to the ICC might serve deep into, or even beyond, the term of his or her successor. Thus, the ICC was expected to act independently of party and President.

The ICC also was expected to be independent in at least one other respect. Under the ICA, “[n]o person in the employ of or holding any official relation to any common carrier subject to the provisions of this act, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office.”¹³¹ One obvious goal of such a provision was to ensure that the ICC enjoyed a degree of independence from the industry it was established to supervise. This provision might also have tended to discourage people with substantial management experience in the railroad industry from serving on the ICC, since one would expect such people to retain a financial interest in their former employers. Thus, the first five commissioners of the ICC appointed by President Cleveland were former public officials, not railroad managers: Thomas M. Cooley, a former law professor and justice of the Michigan Supreme Court; William R. Morrison, a former congressman; Augustus Schoonmaker, former attorney general and civil service commissioner for New York; Aldace F. Walker, a state senator who had written the Vermont Railroad Commission Act; and Walter Bragg, who had presided over the Alabama railroad commission.¹³² To ensure that commissioners would enjoy financial independence during their terms of service, the ICA set their annual salaries at \$7,500,¹³³ which was more than federal judges (other than members of the Supreme Court) earned in 1887.¹³⁴

128. *Id.*

129. *See* *Humphrey’s Ex’r v. U.S.*, 295 U.S. 602, 626 (1935).

130. ICA § 11.

131. *Id.*

132. HOOGENBOOM, *supra* note 103, at 19-20. For an argument that the first Commissioners were pro-railroad in their orientation, *see* KOLKO, *supra* note 103, at 46-49.

133. ICA § 18.

134. HOOGENBOOM, *supra* note 103, at 20.

The ICC's powers under the ICA fell into two categories. First, the ICC could receive complaints and adjudicate cases concerning alleged violations of the ICA brought by interested parties or the ICC itself.¹³⁵ After a hearing and a finding that a rail carrier had violated the ICA, the ICC was required to issue a "notice" or "order"¹³⁶ directing the carrier to (1) cease and desist from violating the ICA and/or (2) make appropriate reparations to any injured parties.¹³⁷ The ICC also was required to petition the federal courts in the event that a rail carrier decided to "violate or refuse or neglect to obey any lawful order or requirement of the Commission. . . ."¹³⁸ If after an appropriate hearing the court found that a "lawful order or requirement of said Commission drawn in question has been violated or disobeyed,"¹³⁹ the court could use its equity power to enforce the ICC's order.¹⁴⁰ It is worth noting that the ICA repeatedly refers to judicial enforcement of a "lawful order or requirement," thus empowering the courts to determine which ICC orders were lawful and which were not.¹⁴¹

The ICC's second major area of power and responsibility under the ICA might be termed general oversight of the rail industry:

the Commission . . . shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created. . . .¹⁴²

The ICC's authority to obtain "full and complete information" included the power—with the "aid of any court of the United States"—to require testimony by individuals and production of documents.¹⁴³ Supplementing the ICC's general authority to inquire into the activities

135. See ICA § 13 (establishing right to petition commission regarding violations of ICA and imposing duty on ICC to investigate complaints); *id.* § 14 (requiring ICC to issue written reports on investigations and make recommendations to carriers concerning "reparations" to injured parties).

136. Section 15 of the ICA requires the ICC to send a cease-and-desist "notice," but section 16 gives the ICC authority to appeal to the federal courts to enforce "any lawful order or requirement," a phrase that apparently covers a notice issued under section 15. The Supreme Court typically used the term "order" to refer to an ICC cease-and-desist notice. See, e.g., *ICC v. Cincinnati, N.O. & T. P. Ry. Co.*, 162 U.S. 184, 186 (1896).

137. ICA § 15.

138. *Id.* § 16.

139. *Id.*

140. *Id.*

141. See *S. Pac. Co. v. ICC*, 200 U.S. 536, 551 (1906).

142. ICA § 12.

143. *Id.*

of rail carriers, the ICA empowered the ICC “to require annual reports from all common carriers subject to the provisions of [the ICA], . . . and to require from such carriers specific answers to all questions upon which the Commission may need information.”¹⁴⁴ The ICA also authorized the ICC to require that carriers adopt “as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.”¹⁴⁵ Thus, the ICA subjected interstate rail carriers to unprecedented federal administrative oversight and anticipated that carriers might be required to change their internal practices, i.e., their bookkeeping, to facilitate such oversight.

The ICA gave the ICC one additional responsibility—preparation of an annual report to Congress.¹⁴⁶ The ICA provided little guidance concerning the content of the annual report: the ICC was expected to provide “such information and data collected . . . as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary.”¹⁴⁷ Based on this provision, it appears that Congress expected the ICC to become increasingly well-informed about the field of interstate commerce and to assume the role of advisor to Congress regarding commerce regulation. Thus, over time, the ICC would help to set the policies that it then would be tasked with administering, policies based on information about the rail industry that the ICC itself had gathered.

Congress revised the ICA and/or modified the ICC’s authority several times during the first two decades of the agency’s existence,¹⁴⁸ and one of those modifications nicely illustrates the role of the ICC in the policymaking cycle. The 1893 Safety Appliance Act¹⁴⁹ (“SAA”) essentially gave rail carriers five years to install power braking equipment on locomotives and automatic coupling equipment on all rail

144. *Id.* § 20.

145. *Id.*

146. ICA § 21. The ICA actually required the ICC to “make a report to the Secretary of the Interior.” *Id.* The Secretary then had the duty to transmit the report to Congress. There is nothing in the ICA to suggest that the Secretary was to have any role in preparing the report or otherwise overseeing the substantive activities of the ICC. *Cf. id.* § 18 (giving the Secretary a role in setting the compensation of ICC employees, establishing offices for the ICC, and handling expense vouchers for commissioners and ICC employees).

147. *Id.* § 21.

148. *See, e.g.*, Act of August 7, 1888, ch. 772, 25 Stat. 382 (1888); Act of March 2, 1889, ch. 382, 25 Stat. 855 (1889); Act of Feb. 10, 1891, ch. 128, 26 Stat. 743 (1891); Elkins Act, ch. 708, 32 Stat. 847 (1903); Hepburn Act, ch. 3591, 34 Stat. 584 (1906).

149. Safety Appliance Act, ch. 196, 27 Stat. 531 (1893).

cars.¹⁵⁰ Congress took these steps in significant part because of a campaign orchestrated by the ICC, which organized a conference as early as 1889 to focus attention on rail safety.¹⁵¹ As the Supreme Court noted, President Harrison actively participated in the debate about rail safety, calling on Congress during his State of the Union messages in 1889, 1890, and 1891 to adopt legislation on braking and coupling.¹⁵²

And he reiterated his recommendation in succeeding messages, saying in that for 1892: “Statistics furnished by the Interstate Commerce Commission show that during the year ending June 30, 1891, there were forty-seven different styles of car couplers reported to be in use, and that during the same period there was 2,660 employees killed and 26,140 injured. Nearly 16 per cent of the deaths occurred in the coupling and uncoupling of cars, and over 36 per cent of the injuries had the same origin.”¹⁵³

When Congress adopted the SAA in 1893, it mandated changes in braking and coupling technologies and expanded the authority of the ICC in the field of railroad safety.¹⁵⁴ Thus, by pressing Congress to make railways safer, the ICC helped to trigger Congressional action that resulted in an expansion of ICC power.

Discussing the ICC’s role in the adoption of the SAA, Ari and Olive Hoogenboom criticized the ICC because “it passively and typically—as ensuing years would show—decided that it was ‘not prepared to recommend a national law prescribing appliances,’ but submitted the whole question to ‘the wisdom of Congress.’ The ICC . . . wanted Congress to act but would not tell it what to enact.”¹⁵⁵ The Hoogenbooms failed to give the ICC sufficient credit, perhaps because they saw in the ICC’s early actions on rail safety a harbinger of future failings,¹⁵⁶ rather than an honest effort to act responsibly under unprecedented conditions. Here a brand new, *sui generis* federal agency began almost immediately after its creation to extend the scope of its

150. *Id.* § 1 (mandating power braking equipment), § 2 (mandating automatic couplers).

151. HOOGENBOOM, *supra* note 103, at 33.

152. *Johnson v. S. Pac. Co.*, 196 U.S. 1, 19 (1904).

153. *Id.* at 19-20.

154. *See* ch. 196, 27 Stat. at 531. The SAA (1) gave the ICC a significant role in setting standards that “drawbars,” an element of braking technology, would have to meet in order to comply with federal law; (2) imposed on the ICC a duty to alert district attorneys to violations of the SAA; and (3) authorized the ICC to extend the deadline for compliance with the SAA. *Id.* §§ 5, 6 & 7.

155. HOOGENBOOM, *supra* note 103, at 33-34.

156. The opening line of the Hoogenbooms’ history reads: “Nearly everyone agrees that the Interstate Commerce Commission has failed.” *Id.* at ix. Thus, the history that they recount is one of failure and early ICC actions are interpreted as foreshadowing failures to come.

policymaking authority by initiating an investigation into rail safety and feeding significant new information to the White House and Congress for use in the policy debate. As a result, the agency apparently got what it wanted, i.e., legislation on rail safety, while obtaining new authority over the industry it was tasked to regulate. If this was passivity, it was passivity of a productive sort.¹⁵⁷ The ICC also played an important role in the lobbying process that led to the adoption of the 1906 Hepburn Act,¹⁵⁸ which gave the ICC new authority to set maximum reasonable rates for rail freight in certain circumstances.¹⁵⁹

IV. THE ICC AND THE POST-ENLIGHTENMENT PARADIGM

This Part of the Article shows that the Supreme Court, in reviewing the ICC's implementation of the ICA during the period from 1887 to roughly 1910, began to articulate the elements of the post-Enlightenment paradigm and incorporated those elements into the framework of the ICA. Specifically, the Court treated the people and entities regulated by the ICA as individuals pursuing their interests in competitive markets or in one large competitive market.¹⁶⁰ The ICC emerged in the Court's writings as the neutral, expert administrative agency tasked initially with policing unreasonable rates in the market and then later with correcting the market by setting reasonable rates.¹⁶¹ The Court never suggested, however, that the ICC had a special insight into the nature of reasonable (or unreasonable) conduct by railroads or anyone else. On the contrary, the Court appeared to acknowledge that a railroad's conduct would be deemed reasonable or not simply because the ICC, or the ICC and the Court, said it was.¹⁶² There is, in other words, no objective standard of reasonableness to apply. In Nietzsche's nihilistic phrase, all is permitted—except that which the ICC prohibits. Thus, an ICC-imposed order provided the bulwark against potential chaos while a fiction was maintained that the ICC operated under a standard of reasonableness in an era when there were no rationally persuasive standards.

157. For more documentation of the ICC's role in pushing for adoption of safety legislation, see SHARFMAN, 1 INTERSTATE COMMERCE COMMISSION, *supra* note 103, at 246 n.4.

158. For the ICC's role in passing the Hepburn Act, see HOOGENBOOM, *supra* note 103, at 46-52 and SHARFMAN, 1 INTERSTATE COMMERCE COMMISSION, *supra* note 103, at 40 n.39 (indicating that the ICC proposed legislation for Congress to consider).

159. Hepburn Act, ch. 3591, § 4, 34 Stat. 584, 589 (1906). For a discussion of the Supreme Court's response to the Hepburn Act, see *infra* notes 307-308, 311-330 and accompanying text.

160. See *infra* Part IV.A.

161. See *infra* Part IV.B.

162. See *infra* Part IV.B.2.

A. *Individuals & Markets*

This Part of the Article begins with a brief summary of the historical background to the period in which the ICC was established. It focuses on the relative novelty of the notion of the individual, which MacIntyre has described as a “cultural artifact of the seventeenth and eighteenth centuries,”¹⁶³ and the origins of the notion of the market economy. Next, there is a discussion of how the Supreme Court took up, used, and endorsed ideas about the individual and the market in attempting to explain, delimit, and justify the role of the ICC. The very recent origins of the individual and the market disappear from view in the Court’s opinions, which thus rupture the link with a more traditional past while lending the new post-Enlightenment paradigm a misleading aura of timelessness and inevitability.¹⁶⁴

1. The Historical Background—Roots of the 19th Century in a Different Form of Life

Demonstrating that the Supreme Court tended to regard the participants in the economic life of railroads as individuals trading in markets may seem like a bizarre enterprise. What else were the participants if not individuals? Is it not obvious that we are all individuals and that we all trade in markets? Should we not expect the Court to reflect this obvious “insight” in its writings about the ICA and the ICC? In order to address these questions, it is useful to examine briefly a different, more traditional way of understanding who and what we are. As discussed in Part II, the older, teleological account of human nature and moral life held that we are essentially social beings expressing our moral lives in and through our social roles.¹⁶⁵ Thus, for example, as a law professor I am a teacher of students, an academic colleague, a member of the scholarly community, and an employee of my university. Moreover, within my family, I am a son, brother, and uncle, while within my community I am a householder and neighbor. Each of these aspects of who I am is partially defined by certain precepts about virtues and vices, precepts about the type of conduct that is proper or improper for a person who is a professor, uncle, neighbor and so forth. Such precepts are implicit in the judgments that we make every day when we say that a person is a good colleague or a bad neighbor, a great teacher or a mediocre scholar. It is important to notice that all of the roles I have mentioned are relational. I am a teacher in relation to students. I am a

163. MACINTYRE, THREE RIVAL VERSIONS, *supra* note 13, at 190.

164. *See infra* notes 264-266 and accompanying text.

165. *See supra* notes 20-21 and accompanying text.

scholar in relation to academic colleagues at my school and elsewhere. I am a son in relation to my mother and deceased father. According to the old teleological paradigm, in each of these relationships, I am what I am (teacher, scholar, son, etc.) as a member of a pair or a group.¹⁶⁶ When I interact with other members of a pair or a group of which I am a member, I view them not as individuals with whom I trade in a market while pursuing my individual interests and preferences, but as fellow participants in a joint effort to achieve shared goods and a “shared vision of the good life”¹⁶⁷ that we might capture in a phrase such as a well-respected law school, a happy family, or a good neighborhood.

This account of the person as a member of a social nexus inhabiting various social positions contrasts markedly with the self-understanding of the modern individual in a market society. The modern individual sees himself or herself as free of any essential roles or relationships and free of any traditional account of *the* human good or end that might trump his or her private interests.¹⁶⁸ According to MacIntyre, “in acquiring sovereignty in its own realm[, the modern self] lost its traditional boundaries provided by a social identity and a view of human life as ordered to a given end.”¹⁶⁹ This “self which has no necessary social content and no necessary social identity can then be anything, can assume any role or take any point of view, because it *is* in and for itself nothing.”¹⁷⁰ As MacIntyre said in another context, this is a self “whose distinctive identity consists in key part in the ability to escape social identification, by always being able to abstract him or herself from any role whatsoever; it is the individual who is potentially many things, but actually in and for him or herself nothing.”¹⁷¹ The market is, as it were, the natural habitat for this individual who is nothing in himself or herself, but who chooses roles and interests, and then having so chosen, sets out to obtain or achieve what he or she wants by trading with other individuals.¹⁷² Thus, while my relations with other people in groups and communities define who and what I am under the older, teleological paradigm, my relationships with others as an individual are simply

166. Hegel, a relatively late representative of this tradition, argued that the family bond is based on love and that because one’s family is essential to who one is, “one is in it not as an independent person but as a member.” GEORG WILHELM FRIEDRICH HEGEL, *HEGEL’S PHILOSOPHY OF RIGHT* 110 (T. M. Knox trans., Oxford University Press 1967) (1821). For a much older account of the family in which participants are treated as members, not individuals, see ARISTOTLE, *POLITICS* 18-29 (Ernest Barker trans., Clarendon Press 1952).

167. See *supra* note 21 and accompanying text.

168. Kightlinger, *Gathering Twilight*, *supra* note 6, at 360-361.

169. MACINTYRE, *AFTER VIRTUE*, *supra* note 13, at 34.

170. *Id.* at 32.

171. MACINTYRE, *Practical Rationalities*, *supra* note 48, at 135.

172. Kightlinger, *Gathering Twilight*, *supra* note 6, at 360-361.

contractual or consensual means to attaining my individual ends in the post-Enlightenment framework.

As stated thus far, this contrast between two different accounts of our natures and lives as human beings—the traditional teleological account and the account that predominates under the post-Enlightenment paradigm—is entirely theoretical. It has, however, important “real world” analogues in our recent history that help to clarify why the ICC’s tendency to focus on the individual trading in the market is important. As economist and philosopher Karl Polanyi showed in his work *The Great Transformation*, something like the traditional, teleological account of human nature and moral life predominated at most times and places throughout human history until recently. Summarizing the evidence, Polanyi wrote:

[t]he outstanding discovery of recent historical and anthropological research is that man’s economy, as a rule, is submerged in his social relationship. He does not act so as to safeguard his individual interest in the possession of material goods; he acts so as to safeguard his social standing, his social claims, his social assets. He values material goods only in so far as they serve this end. Neither the process of production nor that of distribution is linked to specific economic interests attached to the possession of goods; but every single step in that process is geared to a number of social interests which eventually ensure that the required step be taken. These interests will be very different in a small hunting or fishing community from those in a vast despotic society, but in either case the economic system will be run on noneconomic motives.¹⁷³

Contrary to Adam Smith’s “paradigm of the bartering savage,”¹⁷⁴ Polanyi contends that

[t]he individualistic savage collecting food and hunting on his own or for his family has never existed. Indeed, the practice of catering for the needs of one’s household becomes a feature of economic life only on a more advanced level of agriculture; however, even then it has nothing in common either with the motive of gain or with the institution of markets. Its pattern is the closed group. Whether the very different entities of the family or the settlement or the manner formed the self-sufficient unit, the principle was invariably the same,

173. KARL POLANYI, *THE GREAT TRANSFORMATION* 46 (1944). For summaries of the same point by anthropologists, see GODFREY LIENHARDT, *SOCIAL ANTHROPOLOGY* 85-86 (2d ed. 1966) and MARSHALL SAHLINS, *STONE AGE ECONOMICS* 185-191 (1972).

174. POLANYI, *supra* note 173, at 44.

namely, that of producing and storing for the satisfaction of the wants of the members of the group.¹⁷⁵

Thus, throughout most of human history, the person lived his or her life and saw himself or herself not as an individual pursuing individual interests and preferences in a market with others, but as a member of an ongoing social group playing various roles within the group for the ultimate benefit of the group.

What Polanyi refers to as the “great transformation,” i.e., the emergence of the market and with it the modern individual from traditional communal life,¹⁷⁶ occurred in roughly a century beginning in 1776, a date that is important not because of the American Revolution but because it marks the publication of Adam Smith’s *Wealth of Nations*.¹⁷⁷ According to Polanyi, Smith’s analysis placed heavy emphasis on

man’s ‘propensity to barter, truck and exchange one thing for another.’ This phrase was later to yield the concept of the Economic Man. In retrospect it can be said that no misreading of the past ever proved more prophetic of the future. For while up to Adam Smith’s time that propensity had hardly shown up on a considerable scale in the life of any observed community, and had remained, at best, a subordinate feature of economic life, a hundred years later an industrial system was in full swing over the major part of the planet which, practically and theoretically, implied that the human race was swayed in all its economic activities, if not also in its political, intellectual, and spiritual pursuits, by that one particular propensity.¹⁷⁸

Taking Polanyi’s timeline literally, one hundred years after the publication of Smith’s *magnum opus*, we find ourselves in 1876, just under ten years before the adoption of the ICA and the establishment of the ICC. Only if we recognize that the ICC enters history near the end of a process of radical social transformation leading to the emergence of the modern individual trading in the market, can we appreciate the full significance of the assumption that the world the ICC administers consists primarily of individuals pursuing their interests in a market.

175. *Id.* at 53.

176. MACINTYRE, AFTER VIRTUE, *supra* note 13, at 239.

177. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (R.H. Campbell et al. eds., Clarendon Press 1976) (1776).

178. POLANYI, *supra* note 173, at 43-44.

Polanyi's work focused primarily on the development of a market economy in Europe, particularly in England,¹⁷⁹ and he went so far as to suggest that the market economy in the United States may have emerged with the adoption of the U.S. Constitution.¹⁸⁰ Richard Hofstadter provided a more nuanced account of the development of the market in the United States, discussing the persistence of what he called the "agrarian myth" of the yeoman farmer in American political life.¹⁸¹ The agrarian myth emphasized the "noncommercial, nonpecuniary, self-sufficient aspect of American farm life."¹⁸² In Hofstadter's view, however,

[b]etween 1815 and 1860 the character of American agriculture was transformed. The independent yeoman, outside of exceptional or isolated areas, almost disappeared before the relentless advance of commercial agriculture. The rise of native industry created a home market for agriculture, while at the same time demands arose abroad, at first for American cotton and then for American foodstuffs. A network of turnpikes, canals, and railroads linked the planter and the advancing Western farmer to these new markets, while the Eastern farmer, spurred by Western competition, began to cultivate more thoroughly the nearby urban outlets for his products.¹⁸³

According to Hofstadter, this gradual shift from the self-sufficient, locally oriented yeoman farmer of the agrarian myth to the market-oriented commercial farmer occurred at different speeds in different parts of the country, but "in so far as this process was unfinished in 1860, the demands of the Civil War brought it to completion."¹⁸⁴ In this respect, then, Hofstadter's timeline is similar to Polanyi's. In the hundred years before 1876, agrarian life had evolved from something like an integrated, self-sufficient community that Aristotle might have recognized into a marketplace in which individuals pursued their preferences and interests in the style of Adam Smith's Economic Man.¹⁸⁵ As already noted,

179. See, e.g., *id.* at 30 (commenting on the development of "market society" in England, Germany, Italy, and Austria).

180. *Id.* at 225-226. For further comments by Polanyi on developments in the United States, see for example, *id.* at 217, 234, 249.

181. RICHARD HOFSTADTER, *THE AGE OF REFORM* 24 (1955). Hofstadter noted that "[b]y 'myth,' . . . I do not mean an idea that is simply false, but rather one that so effectively embodies men's values that it profoundly influences their way of perceiving reality and hence their behavior. In this sense myths may have varying degrees of fiction or reality." *Id.* at 24 n.1.

182. *Id.* at 23.

183. *Id.* at 38.

184. *Id.* at 39.

185. Morton Horwitz has provided a very interesting description of some of the legal changes that both reflected and facilitated this transformation. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860*, 31-140, 160-253 (1977).

Congress created the ICC in 1887 at the end of this transformation to oversee the operation of interstate railroads, the lynchpin of the transportation system without which a national and international market for farm crops and other products could not have arisen.¹⁸⁶

2. Individuals in the Supreme Court's Interpretation of the ICA

The word "individual" does not appear in the ICA. The stars among the ICA's *dramatis personae* are common carriers and "persons" who pay common carriers for services rendered,¹⁸⁷ receive potentially unlawful preferences or advantages,¹⁸⁸ and suffer injuries when common carriers misbehave.¹⁸⁹ "Persons" also may complain to the ICC about their treatment by carriers.¹⁹⁰ Other characters with smaller roles in the ICA include firms, corporations, and associations, as well as "mercantile, agricultural, or manufacturing societ[ies],"¹⁹¹ and "any body politic or municipal organization,"¹⁹² all of whom also may complain to the ICC about "anything done or omitted to be done by any common carrier subject to the provisions of this act in contravention of the provisions thereof. . . ."¹⁹³ The final ICA character that should be noted is the "passenger." Passengers are mentioned frequently in the Act, but typically in the phrase "passengers or [or "and"] property"¹⁹⁴ or "passengers and freight."¹⁹⁵ Thus, although a passenger clearly is a person, the ICA effectively treats passengers as equivalent to property or freight, i.e., as items to be shipped from Point A to Point B. Although the ICA does not identify shippers, railroad companies, or passengers as individuals in the sense described in Part IV.A.1, the Supreme Court tended to treat them as individuals bound to a market. With little or no argument, the Court thus provided legal recognition at the highest level for the results of Polanyi's "great transformation" and introduced two key elements of the post-Enlightenment paradigm into the interpretation of the ICA.

Evidence that the Supreme Court viewed persons regulated by the ICA as individuals appeared in one of the first major ICC cases to reach the Court. In the 1892 *Baltimore & Ohio* case,¹⁹⁶ the Pittsburgh,

186. See *supra* note 4 and accompanying text.

187. ICA, ch. 104, §§ 2, 6, 24 Stat. 379, 383 (1887).

188. *Id.* § 3.

189. *Id.* § 8.

190. *Id.* § 9.

191. *Id.* § 13.

192. *Id.*

193. *Id.*

194. *Id.* §§ 1, 2, 3, 4, 6.

195. *Id.* § 6.

196. ICC v. Baltimore & Ohio R.R. Co., 145 U.S. 263 (1892).

Cincinnati & St. Louis Railway Company had challenged the Baltimore & Ohio's practice of selling "party rate" tickets under which a group of ten or more people traveling together on a single ticket paid a fare of two cents per mile rather than the usual fare of three cents per mile for a single-person ticket.¹⁹⁷ The ICC declared that such party tickets violated the ICA as a form of "unjust discrimination."¹⁹⁸ The Court disagreed. The Court relied on an analogy between discriminatory passenger fares and discriminatory rates for freight, an analogy that revealed the Court's fundamental assumptions about the world that the ICA regulated.

If . . . a railway makes to the public generally a certain rate of freight, and to a particular individual residing in the same town a reduced rate for the same class of goods, this may operate as an undue preference, since it enables the favored party to sell his goods at a lower price than his competitors, and may even enable him to obtain a complete monopoly of that business. Even if the same reduced rate be allowed to every one doing the same amount of business, such discrimination may, if carried too far, operate unjustly upon the smaller dealers engaged in the same business, and enable the larger ones to drive them out of the market.¹⁹⁹

The Court constructed this analogy around two basic elements: (1) the individual who pursues his or her own interests at the expense of other individuals and (2) the market within which individuals trade. Against this backdrop, the Court interpreted the ICA as limiting individual pursuit of individual preferences in the freight market. Because the *Baltimore & Ohio* case itself involved passenger fares rather than freight rates, the Court admitted that its reflections on the behavior of individuals trading in the freight market were based not on the facts of the case, but on what it took to be "an established principle of the business."²⁰⁰ The Court thereby disclosed its assumption that "the business" revolved around two elements of the post-Enlightenment paradigm, i.e., the individual pursuing personal preferences and the market. By disclosing this paradigmatic assumption, the Court implicitly endorsed the view that the individual and the market are central to the interpretation of the ICA.

For reasons that also appear to reflect the significance of the post-Enlightenment paradigm in the Supreme Court's interpretation of the ICA, the Court was willing to permit greater discrimination among fares

197. *Id.* at 264.

198. *Id.* at 265.

199. *Id.* at 280.

200. *Id.*

in the passenger market than among rates for freight. A lower fare for a group ticket

does not operate to the prejudice of the single passenger, who cannot be said to be injured by the fact that another is able in a particular instance to travel at a less rate than he. . . . [It] was not the design of the [ICA] to stifle competition, nor is there any legal injustice in one person procuring a particular service cheaper than another.²⁰¹

The Court's reasoning on this point is not particularly lucid. The Court seems to be suggesting that under the ICA, Shipper A has a right to ship her apples at the same rate that Shipper B pays to ship his apples over the same line to the same destination. But Passenger A does not have a right to ship herself at the same fare that Passenger B pays to ship himself. This may be because apples are fungible commodities with a market price that is affected by discriminatory shipping costs, which therefore are prohibited by the ICA's ban on unjust discrimination. By contrast, each person is assumed to be an individual, not a fungible commodity. Because each individual is unique, charging different fares over the same line to the same destination for Individual A and Individual B does not entail treating like things differently, but rather treating different things, i.e., different individuals, differently. Treating different, non-fungible things differently is not unjust or discriminatory. Thus, as one would expect under the post-Enlightenment paradigm, the passenger enters the market for railroad services as an individual, trades as an individual, and may be subjected to individualized treatment by railroads, even though nothing in the ICA required the Court or the ICC to treat the passenger as an individual.

As the Court's language in the *Baltimore & Ohio* case suggests, in the early years after the establishment of the ICC, the Court tended to treat shippers, i.e., people or companies who used rail services to move goods, as individuals. Thus, the Court stated in 1897 that the ICC

is charged with the duty of seeing that there is no violation of the long and short haul clause; that there is no discrimination between individual shippers, and that nothing is done, by rebate or any other device, to give preference to one as against another; that no undue preferences are given to one place or places or individual or class of individuals. . . .²⁰²

The Court shifted without comment from writing about "individual shippers" to writing about shippers as individuals. A similar shift

201. *Id.* at 280-81.

202. *ICC v. Cincinnati, N.O. & T.P Ry. Co.*, 167 U.S. 479, 506 (1897).

occurred in a 1906 case concerning the ICA's requirement that railroads publish and adhere to shipping rates. The Court wrote:

Without a statutory requirement as to publication of rates and the imposition of a duty to adhere to the rates as published, individual action of the shippers, as between themselves and in their dealings with the carrier, would have full play, and thereby every shipper would have the opportunity to procure such concessions as might result from favoritism or other causes. Interpreting the prohibitions of the statute as it is contended they should be, it would follow that every individual would be bound by the published tariff, and the carrier alone would be free to disregard it.²⁰³

Here again is the shift from "individual action" by shippers to shippers as individuals. We also see the paradigmatic presumption that individuals trade with one another in the market in order to achieve their individual interests without regard to the interests of third parties. Similarly, in 1907, the Court wrote of "discrimination as against an individual, or a discrimination or preference in favor of or against an individual or a specific commodity or commodities or localities," and then a few sentences later made it clear that the "individuals" it had in mind were "manufacturers and shippers."²⁰⁴ Again, the Court's off-hand references to individuals and markets reflected the post-Enlightenment paradigm and implicitly gave it the Court's imprimatur by weaving the market-oriented individual who pursues personal interests into the fabric of the ICA.

A somewhat less obvious but equally important indication of the role of the individual in the Supreme Court's thinking about shippers and users of rail services may be the repeated invocation of the notion that the ICA grants shippers "equal rights." For example, in 1897, the Court wrote that the ICA's ban on discrimination (§ 2) "was designed to compel every carrier to give equal rights to all shippers over its own road. . . ."²⁰⁵ In the same year, the Court announced that the ICC's responsibility was to ensure "in all things that equality of right, which is the great purpose of the interstate commerce act, shall be secured to all shippers."²⁰⁶ Again, in 1897 the Court stated "the purpose of the second section [of the ICA] is to enforce equality between shippers over the same line. . . ."²⁰⁷ Writing in 1906, the Court stated that "the great purpose of the act to regulate commerce, whilst seeking to prevent unjust

203. *New York, New Haven & Hartford R.R. Co. v. ICC*, 200 U.S. 361, 395 (1906).

204. *Cincinnati, Hamilton & Dayton Ry. Co. v. ICC*, 206 U.S. 142, 157 (1907).

205. *Wight v. U.S.*, 167 U.S. 512, 517 (1897).

206. *Cincinnati, N.O. & T.P Ry. Co.*, 167 U.S. at 506-07.

207. *ICC v. Alabama Midland Ry. Co.*, 168 U.S. 144, 166 (1897).

and unreasonable rates, was to secure equality of rates as to all, and to destroy favoritism. . . .”²⁰⁸ In 1908, the Court referred to “the central and controlling purpose of the law, which is to require all shippers to be treated alike, and but one rate to be charged for similar carriage of freight. . . .”²⁰⁹ I believe this drumbeat of references to equal rights and equal treatment is another reflection of the central role of the individual in the post-Enlightenment paradigm. The equality of all individuals was an element of the Enlightenment creed articulated by John Locke,²¹⁰ among others.²¹¹ Discussing liberal political theory that traces its roots to Locke, MacIntyre wrote “any inequality in the treatment of individuals *qua* individuals requires justification. Justice is *prima facie* egalitarian.”²¹² From the major premise that all shippers are individuals and the minor premise that all individuals are or should be equal, it is a short syllogistic step to the conclusion that all shippers should be treated equally. In this respect, the rhetoric of equal treatment for shippers and other users of rail services in the Court’s early ICC cases flowed from the same Enlightenment sources that led to the individualism of the post-Enlightenment paradigm.²¹³

Even if one concedes that there is an important strand of individualist rhetoric in the early ICC cases, the suggestion that the Supreme Court implicitly adopted the post-Enlightenment paradigm of individuals trading in markets seems to run afoul of another important line of argument in these same cases. I refer to the passages in which the Court contrasts individuals and corporations. For example, the Court

208. *New York, New Haven & Hartford R.R. Co.*, 200 U.S. at 391.

209. *Armour Packing Co. v. United States*, 209 U.S. 56, 80 (1908). For another invocation of this principle of equality or equal treatment, see *Texas & P. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 441 (1907).

210. See MACINTYRE, AFTER VIRTUE, *supra* note 13, at 250 (identifying Locke as an important ancestor of modern individualist moral theories).

211. The radical egalitarianism of Enlightenment thought becomes apparent in Professor Lovejoy’s summary:

in nearly all the provinces of thought in the Enlightenment the ruling assumption was that Reason . . . is the same in all men and equally possessed by all; that this common reason should be the guide of life; and therefore that universal and equal intelligibility, universal acceptability, and even universal familiarity, to all normal members of the human species, regardless of differences of time, place, race, and individual propensities and endowments, constitute the decisive criterion of validity or of worth in all matters of vital human concernment. . . .

LOVEJOY, *supra* note 22, at 288-89. Perhaps the most famous statement of Enlightenment egalitarianism occurs in the opening phrases of the Declaration of Independence: “[w]e hold these truths to be self-evident, that all men are created equal. . . .” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

212. See MACINTYRE, WHOSE JUSTICE, *supra* note 13, at 344.

213. For a discussion of the origins of post-Enlightenment individualism, see *supra* notes 22-47 and accompanying text.

wrote “[t]he presumption of honest intent and right conduct attends the action of carriers as well as it does the action of other corporations or individuals in their transactions in life.”²¹⁴ In a later case, the Court observed that “the law should have regard to the rights of all, and to those of corporations no less than to those of individuals. . . .”²¹⁵ The Court’s distinction between individual and corporation is important because, as the Court noted in 1909, “the great majority of business transactions in modern times are conducted through these bodies [i.e., corporations], and . . . interstate commerce is almost entirely in their hands. . . .”²¹⁶ In particular, as the Court recognized, “[i]t may be doubted whether there are any individual carriers engaged in interstate commerce,”²¹⁷ as opposed to carriers “of a corporate character.”²¹⁸ If all railroad companies were corporations, then it follows that transactions in the market between passengers or shippers and railroad companies were transactions between an individual, and something that was not an individual. To the extent that the Court recognized the existence and significance in the market of an entity that was not an individual, the Court appeared to be relying on a framework that was different from the post-Enlightenment paradigm.

A thorough discussion of the Supreme Court’s treatment of corporations in the 19th and early 20th centuries is beyond the scope of this Article.²¹⁹ It is worth noting, however, that the Court seemed to be of at least two minds about the best way to understand railroad corporations. First, the Court sometimes treated such corporations as the tools or instruments of individuals in the market. In 1899, the Court upheld against a Commerce Clause challenge an Ohio law requiring all railroad companies operating in the state to stop at least three times per day (excluding Sundays) in any town of 3,000 or more inhabitants through which the railroad company ran at least three trains per day.²²⁰ According to the Court, “[a]ny other view of the relations between the state and the corporation created by it would mean that the directors of the corporation could manage its affairs solely with reference to the interests of the stockholders, and without taking into consideration the

214. *ICC v. Chicago, Great W. Ry. Co.*, 209 U.S. 108, 119 (1908).

215. *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 495 (1909).

216. *Id.*

217. *Id.* at 496-97.

218. *Id.* at 496.

219. For brief accounts of the history of corporate law during the relevant period, see ADOLPH A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE HISTORY* 11-17, 119-40 (1967); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 511-25 (2d. ed. 1985); and HALL, *supra* note 115, at 96-99 (discussing antebellum corporate law), 197-99 (discussing state regulation of railroads and other corporations).

220. *Lake Shore & M.S. Ry. Co. v. Ohio*, 173 U.S. 285 (1899).

interests of the general public.”²²¹ Clearly the Court believed that in the absence of legislation to the contrary, directors (who were individuals) would likely manage corporations to achieve the interests of stockholders (who we may presume were individuals or corporations run by individuals). In other words, absent regulation, a corporation is no more than a means to the ends of interested individuals operating in the market, a view of the corporate form that is entirely consistent with the post-Enlightenment paradigm.

Viewed as a means, the corporate form may give one set of individuals significant power in the market when dealing with other individuals. As the Supreme Court observed in 1873,

[t]he carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higggle or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases, he has no alternative but to do this, or abandon his business.²²²

In an 1897 case, the Court remarked that “as to a majority of those living along its line, each railroad is a monopoly.”²²³ In light of these comments, it is clear that the railroad corporation was not only a means but a powerful means to achieve the ends of its owners. And it would not be surprising if individuals chose to use the corporate form to achieve their market interests precisely because of the significant market power associated with incorporation. As Polanyi recognized, in a market system, individuals who seek to achieve individual interests will try to control the market by adopting a corporate form.²²⁴ By emphasizing the disproportionate power that incorporation may give to individuals in the railroad market, the Court provided further indirect evidence that the post-Enlightenment paradigm helped to shape its understanding of the world in which the ICC operated.

In addition to treating the corporation as a means to the individual’s ends, the Supreme Court sometimes seemed disposed to treat corporations as tantamount to individuals, thereby placing corporations directly into one of the post-Enlightenment paradigm’s basic categories. Given the rapid growth in the number of railroad corporations in the second quarter of the nineteenth century,²²⁵ and the “great boom in

221. *Id.* at 302.

222. *N.Y. Cent. R. Co. v. Lockwood*, 84 U.S. 357, 379 (1873).

223. *U.S. v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 335 (1897).

224. *See* POLANYI, *supra* note 173, at 148.

225. *See* HORWITZ, *supra* note 185, at 137.

railroads during the two decades before the Civil War,”²²⁶ it is not surprising that the Court announced this view of corporation-as-individual in an early railroad case. As the Court said, “for acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business, and of their employment, the corporation is responsible, as an individual is responsible under similar circumstances.”²²⁷ Over fifty years later, the Court extended this analogy, holding that railroad corporations may be made criminally liable for their agents’ violations of the ICA as amended by the Elkins Act.²²⁸ As the Court observed,

[i]t is a part of the public history of the times that statutes against rebates could not be effectually enforced so long as individuals only were subject to punishment for violation of the law, when the giving of rebates or concessions inured to the benefit of the corporations of which the individuals were but the instruments.²²⁹

Thus, the decision to impose criminal liability on corporations as principals for the acts of their agents was in effect a decision to treat corporations as tantamount to individuals. Viewed as individuals, railroads and other business corporations fit squarely into the post-Enlightenment paradigm.

Assuming I am correct that the Supreme Court read the notion of the individual into the ICA,²³⁰ and treated the corporation as an instrument of the individual or as an individual in itself, it is useful at this point to note some important implications of the Court’s approach. The individual, whether it be a shipper, a passenger, or a railroad, plays a very specific role in the Court’s analyses. The individual functions as a bearer of interests. For example, the individual’s interests might involve growing and storing wheat for shipment to specified destinations within a particular timeframe at a particular price. As discussed in the next Part, the individual will pursue those interests in a market by interacting with other individuals. Depending on the prices and services available in the market, the individual might store the wheat longer, ship more or less of it, or ship it to different destinations and at different times. The interests themselves—*e.g.*, growing wheat, storing wheat, shipping wheat, carrying wheat by rail, receiving wheat, consuming wheat—are surds.

226. *See id.* at 69.

227. *Philadelphia, Wilmington & Baltimore R.R. Co. v. Quigley*, 62 U.S. 202, 210 (1858).

228. *N.Y. Cent. & Hudson River R.R. Co.*, 212 U.S. 481, 494-95 (1909).

229. *Id.* at 495.

230. I do not wish to take a position in this Article on whether the Supreme Court’s reading of the ICA did or did not accurately capture the intent of Congress. Rather, my goal is simply to examine the emergence of the post-Enlightenment paradigm in the Court’s interpretation of the ICA and the ICA’s relationship to our social scheme.

They are givens lying solely within the purview of the sovereign individual who simply has those particular interests and not others.²³¹ The individual's interests reflect the individual's preferences and values, and those lie beyond rational debate, as does the degree of the individual's commitment to pursuing particular interests or preferences at the expense of others. Because the individual is a bearer of interests, values, and preferences, and because interests, values, and preferences lie beyond rational debate, any system founded upon the individual must contend with the difficulties arising from such a non-rational foundation. As discussed in Part II, for the individual whose conduct is not subject to rational, objective standards, Nietzsche concluded that all is permitted. This suggests that in reading the individual into the ICA, the Supreme Court read the problem of nihilism into the ICC's post-Enlightenment agenda.

3. Markets in the Supreme Court's Interpretation of the ICA

As discussed in Part II, under the post-Enlightenment paradigm, the market is the arena in which individuals interact and pursue their self-defined interests and preferences. This is true whether the individuals are natural persons or corporations. In cases dealing with the ICA, the Supreme Court occasionally mentioned "markets" or "the market," sometimes referring to the competitive environment for railroad services and other times referring to competition among shippers who used railroad services.²³² However, the Court's occasional use of these terms did not begin to exhaust the role of the market as an analytical tool in the Court's thinking about the ICA. In the 1892 *Baltimore & Ohio* case, the Court offered a glimpse of its background assumptions about the world that the ICA governs. According to the Court, the ICA

was not designed . . . to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction did not operate as an unjust discrimination

231. See Kightlinger, *Gathering Twilight*, *supra* note 6, at 368 (discussing the criterionless character of individual values and interests).

232. See, e.g., *ICC v. Baltimore & O.R. Co.*, 145 U.S. 263, 280 (1892) (rate discrimination by railroads may allow some dealers to drive others out of the market); *Louisville & N.R. Co. v. Behlmer*, 175 U.S. 648, 662 (1900) (Memphis is one of many markets with which Charleston does business); *New York, New Haven & Hartford R.R. Co. v. ICC*, 200 U.S. 361, 392-93 (1905) (carrier that also deals in products carried could control and monopolize shipments to a particular market); *ICC v. Chicago, Great W. Ry. Co.*, 209 U.S. 108, 121 (1908) (whether rate materially affects markets is factor in determining whether railroad granted an undue or unreasonable preference); *S. Ry. Co. v. St. Louis Hay & Grain Co.*, 214 U.S. 297, 300 (1909) (noting that carriers may not discriminate between markets in granting preference of stopping commodity in transit).

against other persons traveling over the road. In other words, it was not intended to ignore the principle that one can sell at wholesale cheaper than at retail. It is not all discriminations or preferences that fall within the inhibition of the statute, only such as are unjust or unreasonable.²³³

Thus, in attempting to interpret the ICA, the Court recognized and effectively ratified a specific social context that the Act, according to the Court, left undisturbed, i.e., a competitive market for rail services in which railroads pursue their interests in bargains with shippers and passengers who are also pursuing their own interests.²³⁴ In this market, the Court believed, it was “customary” for carriers to grant lower prices to certain classes of passengers in the hope, one presumes, of gaining a competitive advantage.

In addition to treating the competitive market as a background assumption of the ICA, in at least three cases interpreting key provisions of the Act, the Supreme Court concluded over the ICC’s opposition that market competition justified discriminatory or preferential practices by railroads.²³⁵ The Court’s general position on this subject is nicely, if somewhat colorfully, summed up as follows:

Competition, free and unrestricted, is the general rule which governs all the ordinary business pursuits and transactions of life. Evils, as well as benefits, result therefrom. In the fierce heat of competition, the stronger competitor may crush out the weaker; fluctuations in prices may be caused that result in wreck and disaster; yet, balancing the benefits as against the evils, the law of competition remains as a controlling element in the business world. That free and unrestricted competition in the matter of railroad charges may be productive of evils does not militate against the fact that such is the law now governing the subject.²³⁶

The Court acknowledged and endorsed this “law of competition” despite the ICA’s silence about the role, if any, of a competitive market in determining what conduct by a railroad was or was not lawful. By invoking market-based arguments to interpret the ICA, the Court articulated another key element of the post-Enlightenment paradigm and incorporated it into the ICA’s system of railroad regulation.

233. *Baltimore & O. R. Co.*, 145 U.S. at 276.

234. For a skeptical discussion of whether the railroad industry was in fact competitive during this period, see Harbeson, *supra* note 103, at 231-32.

235. See *infra* notes 237-259 and accompanying text.

236. *U.S. v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 337 (1897) (quoting *U.S. v. Trans-Missouri Freight Ass’n*, 58 F. 58, 94 (1893) (Shiras, J., dissenting), *rev’d*, 166 U.S. 290 (1897)).

The Court first relied on market competition as a background assumption in the 1896 *Texas & Pacific* case²³⁷ interpreting ICA § 2, which, as discussed above, prohibits charging different rates (higher or lower) for “like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.”²³⁸ The case arose because the Texas & Pacific Railway charged a lower rate to transship imported goods originating in England under so-called “through bills of lading” from New Orleans to San Francisco than the company charged to ship like goods manufactured domestically from New Orleans to San Francisco.²³⁹ The company claimed that it had charged the lower rate to transport English-origin goods because otherwise those goods would have traveled directly from Liverpool to San Francisco by ship via Cape Horn, or by ship and rail via Panama, instead of offloading in New Orleans for shipment by rail.²⁴⁰

The primary issue before the Court in *Texas & Pacific* was whether the circumstances and conditions for transporting domestic goods from New Orleans to San Francisco were substantially similar to the circumstances and conditions for transporting imported goods; more specifically, the Court considered whether competition for the transportation of imported goods rendered the circumstances and conditions legally dissimilar.²⁴¹ Prior to the court case, the ICC had held that the two kinds of traffic were substantially similar, and that the ICA did not allow it to consider the market competition cited by the railroad.²⁴² The Court rejected the ICC’s interpretation of the ICA, holding

that among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, competition that affects rates should be considered, and in deciding whether rates and charges made at a low rate to secure foreign freights, which would otherwise go by other competitive routes, are or are not undue and unjust, the fair interests of the carrier companies, and the welfare of the community which is to receive and consume the commodities, are to be considered. . . .²⁴³

237. *Texas & P. Ry. Co. v. ICC*, 162 U.S. 197 (1896).

238. ICA, ch. 104, § 2, 24 Stat. 379 (1887). *See supra* note 109 and accompanying text.

239. 162 U.S. at 217-18.

240. *Id.* at 205.

241. *See id.* at 217-218.

242. *See id.* at 217.

243. *Id.* at 233-234.

The Supreme Court provided several arguments for this position, but two are of interest here. First, the Court offered some observations “in advance of an examination of the text of the act.”²⁴⁴ One was that “it could not be readily supposed that congress intended, when regulating such commerce, to interfere with and interrupt, much less destroy, sources of trade and commerce already existing. . . .”²⁴⁵ In other words, the Court presumed that Congress would not have wished to destroy what the Court clearly took to be the existing market for transportation of imported goods from Liverpool to San Francisco by requiring the Texas & Pacific to charge rates that would render the company’s services uncompetitive. The Court thus presumed the existence of a market, bestowed legal significance on that market, and made it a central component of the ICA’s regulatory scheme—all “in advance” of examining the ICA.

The Supreme Court’s second argument for holding that market competition may render circumstances and conditions legally dissimilar was that the English courts had reached the same conclusion when interpreting their railroad laws.²⁴⁶ According to the Court, ICA §§ 2 and 3 were modeled on English legislation.²⁴⁷ After reviewing the English case law, the Court concluded:

The English cases establish the rule that, in passing upon the question of undue or unreasonable preference or disadvantage, it is not only legitimate, but proper, to take into consideration, besides the mere differences in charges, various elements, such as the convenience of the public, the fair interests of the carrier, the relative quantities or volume of the traffic involved, the relative cost of the services and profit to the company, *and the situation and circumstances of the respective customers with reference to each other, as competitive or otherwise.*²⁴⁸

As discussed above, Karl Polanyi argued that England was the first home of the “great transformation” that resulted in the creation of a market society from earlier, traditional roots.²⁴⁹ Thus, it is particularly fitting that the Court would rely on English case law to read into the ICA the presuppositions of the market society that had blossomed first in England and then found fertile new soil in the United States during the 19th

244. *Id.* at 211.

245. *Id.*

246. *See id.* at 222.

247. *See id.*

248. *Id.* at 232 (quoting *ICC v. Baltimore & O.R. Co.*, 43 Fed. 37, 53 (1890)) (emphasis added).

249. *See* POLANYI, *supra* note 173, at 46 and accompanying text.

century.²⁵⁰ By importing the notion of the market economy from its country of origin, the Court absorbed a key element of the post-Enlightenment paradigm into its account of our social scheme and the rules governing that scheme.

The Supreme Court made similar use of arguments based on market competition in two other early cases interpreting the ICA. In *Alabama Midland*,²⁵¹ the question was whether, under the ICA's long and short haul clause,²⁵² a railroad could charge less to haul goods from Point A to the "long haul" Point C than it charged to haul the same goods over the same line to the intervening "short haul" Point B if there were competition for traffic (by river) to Point C, but not for traffic to Point B.²⁵³ The Court answered the question in the affirmative.²⁵⁴ Again, nothing in the text of the long and short haul clause required the Court to reach this conclusion. To justify relying on the market as a background assumption, the Court cited not only the *Texas & Pacific* case, but also, again, English case law, even though the English courts had focused on what circumstances constitute an "undue or unreasonable preference or advantage,"²⁵⁵ and not on what conditions or circumstances might justify charging more for a long than a short haul.²⁵⁶ The Court's reliance on English cases that were of questionable relevance shows the lengths to which the Court was prepared to go to justify treating the competitive market as a premise of its interpretation of the ICA.²⁵⁷

The third important case showing the influence of the market premise on the Supreme Court's interpretation of the ICA, i.e., the

250. For a summary of this economic history, see Part IV.A.1.

251. *ICC v. Alabama Midland Ry. Co.*, 168 U.S. 144 (1897). For an illuminating discussion of the background to the *Alabama Midland* case, see Harbeson, *supra* note 103, at 237-240.

252. ICA, ch. 104, § 4, 24 Stat. 379 (1887). See *supra* notes 112-113 and accompanying text.

253. See 168 U.S. at 163.

254. See *id.* at 166.

255. *Id.* at 164.

256. See *id.*

257. For a more extreme case, see *ICC v. Louisville & Nashville R.R. Co.*, 190 U.S. 273, 281 (1903) (railroad may lawfully charge for carrying freight from Point A to an intervening short-haul Point B the shipping price from Point A to the competitive long-haul Point C plus the shipping price from Point C back to Point B).

*Louisville & Nashville*²⁵⁸ case, was a complex variation on the long and short haul scenario. There the Court declared that

[w]hat was decided in the previous cases was that under the 4th section of the act substantial competition which materially affected transportation and rates might, under the statute, be competent to produce dissimilarity of circumstances and conditions, to be taken into consideration by the carrier in charging a greater sum for a lesser than for a longer haul. The meaning of the law was not decided to be that one kind of competition could be considered and not another kind, but that all competition, provided it possessed the attributes of producing a substantial and material effect upon traffic and rate making, was proper under the statute to be taken into consideration.²⁵⁹

Thus, the Court left no doubt about the significance of competition in the market for rail services as a premise for interpreting the ICA. Show us actual evidence of competition affecting your rates, the Court seemed to say, and we will bless that competition as a legitimate basis for charging different rates under the ICA.

In two of the three cases just discussed, Justice Harlan dissented.²⁶⁰ If in dissent he rejected the Court's presumption that the presence of a competitive market was legally relevant to the interpretation of the ICA, then it would follow that he had rejected one of the key elements of the post-Enlightenment paradigm. This in turn would mean, a fortiori, that his interpretation of the ICA did not reflect, let alone endorse, the paradigm. It would then follow that the paradigm was, at best, only one possible model or account of society that found traction within the Court, but not the sole, unquestioned model or account. In fact, Justice Harlan's dissents tend to reinforce the paradigmatic importance of the market. He clearly rejects the Court's conclusions, as one would anticipate in a dissenting opinion. But his arguments suggest that he disagrees with the Court not over whether there is a market for railroad services or for goods shipped over railroads, but over how to define the scope of the

258. See *Louisville & N.R. Co. v. Behlmer*, 175 U.S. 648, 662-663 (1900). The issue in *Louisville & Nashville* was not whether competition for freight running from Point A to long-haul Point C would justify a lower rate between A and C than between A and the intervening short-haul Point B. Rather, the issue was whether competition between traffic running from Point A to Point C and traffic running from Point D to Point C might justify charging a lower rate between A and C than between A and intervening Point B. See *id.* at 654. The idea was that the relatively low cost of traffic between Points D and C might drive out trade between Points A and C, unless the railroad could charge fares that were low enough to make traffic from A to C competitive. See *id.*

259. *Id.* at 670-671.

260. See *ICC v. Alabama Midland Ry. Co.*, 168 U.S. 144, 176 (1897); see *Texas & P. Ry. Co. v. ICC*, 162 U.S. 197, 239 (1896).

market that is legally relevant under the ICA. For example, in the *Texas & Pacific* case, Justice Harlan wrote:

I concur entirely with the commission when it further declared: "One paramount purpose of the act to regulate commerce, manifest in all its provisions, is to give to all dealers and shippers the same rates for similar services rendered by the carrier in transporting similar freight over its line. Now, it is apparent from the evidence in this case that many American manufacturers, dealers, and localities, in almost every line of manufacture and business, are the competitors of foreign manufacturers, dealers, and localities for supplying the wants of American consumers at interior places in the United States, and that under domestic bills of lading they seek to require from American carriers like service as their foreign competitors in order to place their manufactured goods, property, and merchandise with interior consumers. The act to regulate commerce secures them this right."²⁶¹

Justice Harlan then asked: "[a]re all the interests represented by those who handle, manufacture, and deal in American goods and merchandise that go into the markets of this country to be subordinated to the necessities or greed of railroad corporations?"²⁶² By posing this rhetorical question, Justice Harlan apparently meant to draw attention to the fact that there arguably were two markets involved in the case: a market for railroad services and a market for goods shipped by railroad. If this interpretation of Justice Harlan's point is correct, then the ICA, according to Harlan and the ICC, was intended to ensure that discrimination in the market for railroad services did not skew competition in the market for goods shipped. By requiring railroad companies to charge the same rates for like goods shipped from Point A to Point B regardless of the origin of the goods, the ICA (according to Harlan and the ICC) aimed to neutralize the impact of agreements between individuals in the market for railroad services on competition between individuals in the market for goods. Thus, one presumes, goods shipped on a railroad subject to the ICC should sell or not sell according to their merits and not according to whether the producer/shipper had negotiated a special deal with the railroad.

Justice Harlan made a similar, albeit less explicit, argument in the *Alabama Midland* case. Rejecting the Supreme Court's view that the long and short haul clause permitted railroads to take into account competition at the long-haul destination when setting rates, he wrote:

261. *Texas & P. Ry. Co.*, 162 U.S. at 239.

262. *Id.* at 252.

The judgment in this case, if I do not misapprehend its scope and effect, proceeds upon the ground that railroad companies, when competitors for interstate business at certain points, may, in order to secure traffic for and at those points, establish rates that will enable them to accomplish that result, although such rates may discriminate against intermediate points. Under such an interpretation of the statutes in question, they may well be regarded as recognizing the authority of competing railroad companies engaged in interstate commerce—when their interests will be subserved thereby—to build up favored centers of population at the expense of the business of the country at large.²⁶³

As in the *Texas & Pacific* case, Justice Harlan juxtaposes the market for railroad services with another market, here termed “the business of the country at large.” Although his argument is somewhat cryptic, he appears to mean that if railroad companies may charge lower rates to competitive long-haul destinations than to intermediate short-haul destinations, the former will grow and flourish at the expense of the latter because the latter will not be able to compete in the market for goods shipped by rail. In other words, higher rail shipping rates will distort the market for goods moving to and from intermediate destinations. Justice Harlan again implies that the goal of the ICA was to neutralize or at least limit the distorting impact of agreements in the market for rail services on the market for goods shipped by rail—“the business of the country at large.” As in the *Texas & Pacific* case, however, Justice Harlan expresses no doubt about the underlying premise that there is a market for goods shipped by rail and the corollary that a key aim of the ICA was to preserve the competitive operation of that market. If majority and dissent agreed that one or more markets exist and that preserving competitive markets was an aim of the ICA, then a key element of the post-Enlightenment paradigm, i.e., the market, clearly had become an integral and seemingly unquestioned component of the entire Court’s thinking about rail regulation under the ICA.

It is important to draw attention to a detail that easily might be overlooked in the preceding examination of the Supreme Court’s uses of the notions of the individual and the market: the Court’s failure to recognize that these notions were not timeless Platonic forms written into the nature of things, but that they actually emerged and achieved their modern significance only in roughly the hundred years before 1887.²⁶⁴ In the Court’s ICC jurisprudence, the notions of the individual and the market have no history. The individual and the market simply are.

263. *Id.* at 176-177.

264. For a summary of this history, see *supra* Part IV.A.1.

Because these notions and their real-world correlates had no history, the Court was not forced to acknowledge that there might have been a time when they did not exist in their modern form, a time when the “real world” consisted not of individuals trading in markets, but of members of families, communities and other groups trying to achieve shared visions of a good human life.²⁶⁵ The latter was the world that Aristotle described and that existed, according to Polanyi, at most times and places in human history until the late 18th century.²⁶⁶ Because the Court did not acknowledge the history of the paradigm of individuals trading in markets, the Court also could avoid considering the possibility of an alternative paradigm that might have merited discussion when interpreting the ICA. In the absence of any recognized alternative, the post-Enlightenment paradigm emerged without discussion as *the* paradigm—the normal, natural, timeless, and seemingly inevitable premise of any account of human life.

It may be useful at this point to deal with an objection to the argument thus far presented. In this discussion of the role of the market in the Supreme Court’s ICA jurisprudence, have I not simply rediscovered something that has become almost a cliché in discussions of the Court covering the period from roughly 1860 through 1920, namely the Court’s supposed laissez-faire bias? Isn’t this just another example of, in Justice Holmes’s famous phrase from the *Lochner* dissent, the Court’s seeking to “enact Mr. Herbert Spencer’s Social Statics?”²⁶⁷ The answer to these questions is “yes and no.” Yes, when the Court recognized the existence of markets for rail services and goods shipped by rail and declared that competition in such markets may justify fare differentials under the ICA,²⁶⁸ the Court adopted an approach reminiscent of its occasional laissez-faire interpretations of the 14th Amendment.²⁶⁹ But no, it would be a mistake to dismiss the Court’s work on the ICA as the statutory equivalent of the now widely rejected laissez-faire

265. See *supra* notes 173-185 and accompanying text.

266. See *id.*

267. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). For a discussion of Spencer’s *Social Statics*, see RICHARD HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* 40 (1983) (“*Social Statics* . . . was an attempt to strengthen laissez faire with the imperatives of biology.”).

268. See *supra* IV.A.3 (discussing the role of markets in the Court’s interpretation of the ICA).

269. For balanced discussions of the role of laissez-faire thinking in judicial decisions between 1860 and 1920, see Melvin I. Urofsky, *State Courts and Protective Legislation During the Progressive Era: A Reevaluation*, 72 J. AM. HIST. 63 (1985). See also Hall, *supra* note 115, at 221-225, 238-246. Hall finds that “in most instances” courts were not hostile to legislation limiting the operation of markets. *Id.* at 226.

constitutionalism.²⁷⁰ Rather, I would suggest, the Court's work on the ICA as well as its work on the 14th amendment reflected the emergence of the post-Enlightenment paradigm as an increasingly widely shared framework for understanding the modern world and our place in it.²⁷¹

As I already have noted, the majority and the dissent in the Supreme Court's key ICA cases shared the premise of a market economy and differed only on how broadly to define the relevant market when interpreting the ICA. Moreover, despite the Court's disagreement with the ICC over the outcomes of the cases discussed above, the Court apparently shared the market premise with the ICC itself. The evidence for this assertion is unequivocal. The first chairman of the ICC, Thomas M. Cooley, was, in the words of Professor Hall, "one of the nation's most influential writers of legal treatises that advocated laissez-faire."²⁷² This suggests that President Cleveland, who appointed Cooley, must have had some sympathy for the outlook that Cooley was known to hold regarding regulation of the market. And, lest someone argues that Cooley was an outlier on the ICC, it should be recalled that Justice Harlan quoted the opinion of the ICC majority in his *Texas & Pacific* dissent,²⁷³ expressing his agreement that the ICC should be allowed to restrict the role of the market for rail services and thereby preserve the market for goods transported by rail. There was, in short, little disagreement by the 1890s about the existence and legal significance of markets or the market, but there was disagreement about when it was appropriate to restrict the particular market for rail services so that a broader market for goods shipped by rail might thrive.²⁷⁴ If strict adherents to the doctrine of laissez faire favor simply leaving markets alone, then none of the key participants in the development of ICA jurisprudence could be called strict adherents because they all recognized that markets and the market were central, but they also accepted without

270. For instance, Michael Benedict has observed that "[n]othing can so damn a decision as to compare it to *Lochner* and its ilk." Michael L. Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293, 295 (1985).

271. It is beyond the scope of this Article to defend this suggestion, but I believe it merits further investigation.

272. HALL, *supra* note 115, at 205. Cooley's best-known book, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATE OF THE AMERICAN UNION, which was published immediately after the Civil War, went through more than a dozen editions. *Id.* at 222. For a discussion of Cooley's role on the ICC, see HOOGENBOOM, *supra* note 103, at 19-31. For a broader reassessment of Cooley's work, see Alan Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration*, 53 J. AM. HIST. 751 (1967).

273. See *supra* note 261 and accompanying text.

274. For a discussion of this disagreement, see *supra* notes 261-263.

discussion that the ICA imposed restrictions on the market.²⁷⁵ Disagreements arose over the extent to which the ICA incorporated the market and, conversely of course, the extent to which the ICA limited the market. As discussed in Part IV.B, the Court hammered out its understanding of the ICC's role on the anvil of these disagreements, and thereby incorporated into a larger interpretative framework the key elements of the post-Enlightenment paradigm, i.e., the individual, the market, and the administrative bureaucracy.

Before turning to the discussion of administrative bureaucracy, it is useful to recall again why such a bureaucracy is thought necessary in a world that consists of individuals trading in markets. As discussed at the conclusion of Part IV.A.2, the individual that the Supreme Court read into the ICA is a bearer of interests and preferences who pursues those interests and preferences through bargains with other individuals. The venue for those bargains is the market. When two individuals agree to exchange one thing of value, *e.g.*, money, for another thing of value, *e.g.*, transportation services via railroad, the exchange will reflect the interests and preferences of the individuals. Just as the interests and preferences are surds without rational basis, so the agreed exchange that reflects those interests and preferences will have no rational basis. It simply is the agreement these two individuals reached at this time with respect to this subject matter. The agreement reflects their personal values. The market as an institution may provide an orderly space within which individuals can achieve their preferences by, for example, comparing various levels of service at various prices. However, the only limit the market places on the "all is permitted" realm of individual values, interests, and preferences is that the individual must find someone else who is willing to supply what the individual wants for a price the individual is prepared to pay. What the individual wants and what the individual is prepared to pay are sovereign choices of the individual and not subject to further rational debate.²⁷⁶ Thus, one might characterize the market as a state of ordered nihilism—a manifestation of the "happy ending" of nihilism to which Bloom ironically points.²⁷⁷

As should be clear from the cases discussed above, however, the ending for which two individuals bargain in the market is often not particularly happy for everyone. Shippers of widgets made in the United Kingdom may get a better deal on rail freight from New Orleans to the

275. I am aware of no argument in any Supreme Court opinion on the ICA during the period from 1887 to 1912 supporting a pure laissez-faire interpretation of the Act.

276. Contract law clearly reflects this view: "[a]s a general rule the courts do not review the adequacy of the consideration." JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 178 (5th ed. 2003).

277. See BLOOM, *supra* note 34 at 147, and accompanying text.

West Coast than shippers of identical widgets manufactured in the United States. A sweetheart deal between shipper and railroad covering transportation of goods to a competitive long-haul destination may harm shippers and buyers operating from an intervening non-competitive short-haul destination. Entire communities might be ruined economically by a railroad that, for whatever reason, is not prepared to provide them with service at a competitive price. In general, very aggressive dealing by large or skillful players—shippers as well as railroads—may destroy other players.²⁷⁸ The “losers” in these scenarios may find that their values, interests, and preferences are simply ignored or overridden by other individuals in the market. Instability and the potential for chaos always lurk in the wings, as the market leaves some individual interests or preferences unsatisfied or worse, sowing fear among market participants who therefore demand some form of oversight from outside the market itself. As discussed in the following Part, under the ICA the function of the ICC was to keep instability and the possibility of market collapse at bay.

B. Administrative Bureaucracy in the Supreme Court’s Interpretation of the ICA

As indicated in the preceding Part, no one involved in the debate over how to interpret the ICA could properly be called an advocate of pure laissez faire because no one denied that the ICA regulated the market for railroad services.²⁷⁹ Similarly, to my knowledge, no one denied that the ICC had been created to oversee that market, so debate about the role of the ICC inevitably took the form of a disagreement about the extent of ICC power in what everyone conceded was a regulated market. Debate over the ICC was, in other words, a very early example of the broader political debate in the “culture of bureaucratic individualism” over the extent to which the bureaucracy would limit the individual’s sovereign choices in the market.²⁸⁰

Every Supreme Court decision in a case under the ICA explicitly or implicitly delineates, or comments on, the role and function of the ICC, because the ICA established the ICC to interpret and enforce the Act,²⁸¹ and the ICA cases that reached the Court almost always were appeals from ICC decisions. To keep the discussion of the ICC to a manageable

278. For a list of the “evils” perpetrated in and by the market on some consumers of rail services before Congress adopted the ICA, see *supra* note 106 and accompanying text.

279. See *supra* notes 274-275 and accompanying text.

280. See *supra* notes 94-96 and accompanying text.

281. See *supra* notes 125-141 and accompanying text.

length, this Part focuses on cases dealing with three topics. Part IV.B.1 examines the key cases defining the ICC's authority—or lack of authority—to set rates for railroad freight. Part IV.B.2 discusses the absence of standards underlying ICC decision-making, and the significance of the Court's apparent acknowledgement of that absence. Part IV.B.3 examines the often invisible process by which the ICC bureaucracy extended its power over individuals operating in the market for railroad services. As the argument will show, in the post-Enlightenment era, with almost no fanfare, bureaucratic power intervenes to maintain the order that otherwise might dissolve in a market where emotivist individuals pursue their interests and preferences.

1. The ICC & Rate-Setting

From the outset, the ICC had assumed that it possessed the authority to set a reasonable rate for freight in cases in which it found that rates set by railroads were unreasonable, and accordingly the agency had attempted to set rates in many early cases.²⁸² The question whether the ICC actually possessed such rate-setting authority first came before the Supreme Court in the 1896 *Social Circle* case.²⁸³ Although the Court reversed the ICC and found that the rate set by the railroad was reasonable,²⁸⁴ it nevertheless commented in dictum on whether the ICC could set rates in a case in which the railroad's rates were not reasonable. The Court stated:

We do not find any provision of the act that expressly, or by necessary implication, confers such a power. It is argued on behalf of the commission that the power to pass upon the reasonableness of existing rates implies a right to prescribe rates. This is not necessarily so. 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. If the commission, instead of withholding judgment in such a matter until an issue shall be made and the facts found, itself fixes a rate, that rate is prejudged by the commission to be reasonable.²⁸⁵

Having concluded that rate-setting was not consistent with the ICC's role as adjudicator of facts in disputed cases, the Court borrowed language from an early (1890) lower court opinion interpreting the ICA to explain the alternative to ICC rate-setting authority:

282. See SHARFMAN, 1 INTERSTATE COMMERCE COMMISSION, *supra* note 103, at 25-26.

283. *Cincinnati, N.O. & T. P. Ry. Co. v. ICC*, 162 U.S. 184 (1896).

284. See *id.* at 195-196.

285. *Id.* at 196-197.

Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law,—free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits.²⁸⁶

The Court thus saw two options—either railroads set rates via the market in light of their own interests or the ICC sets rates. It should be noted that even in this early case, the two options identified by the Court were precisely the two options offered by the post-Enlightenment paradigm: either individual choice determines the market price or the administrative bureaucracy determines the market price and restricts individual choice. According to the Court, Congress had adopted the former option in the ICA, leaving railroads to set prices, make deals, and generally pursue their interests and preferences as individuals in the market within what we saw in Part IV.A.3 are the very broad, market-oriented limits set by the ICA.

Despite the Supreme Court's clear statement in the *Social Circle* case denying the ICC rate-setting authority, the Court addressed the issue again in considerably more detail in the 1897 *Maximum Freight Rate* case.²⁸⁷ In contrast to the *Social Circle* case, where the Court had identified two alternatives, this time the Court found that

[t]here were three obvious and dissimilar courses open for consideration. Congress might itself prescribe the rates, or it might commit to some subordinate tribunal this duty, or it might leave with the companies the right to fix rates, subject to regulations and restrictions, as well as to that rule which is as old as the existence of common carriers, to wit, that rates must be reasonable.²⁸⁸

The Court immediately rejected the first option, commenting that “[t]here is nothing in the act fixing rates. Congress did not attempt to exercise that power, and, if we examine the legislative and public history of the day, it is apparent that there was no serious thought of doing so.”²⁸⁹ It is noteworthy that the Court never seriously questioned

286. *Id.* at 197 (quoting *ICC v. Baltimore & Ohio R.R. Co.*, 43 Fed. 37, 50-51 (1890), *aff'd*, 145 U.S. 263 (1892)).

287. *See Cincinnati, N.O. & T.P. Ry. Co.*, 167 U.S. 479.

288. *Id.* at 494.

289. *Id.*

whether in principle Congress had the power to set rates or could assign that power to the ICC.²⁹⁰ It thus became an unargued premise of all future discussion that a properly authorized federal administrative agency could supersede the rate-setting power of the individual/corporation in the market. In this way with no fanfare or discussion, the Court implicitly accepted bureaucratic individualism—i.e., the symbiotic relationship between individual and bureaucracy in the market—as a possibility with which we henceforth would have to live.²⁹¹

Having concluded that Congress did not set rates and presumed that an agency with proper authority could set rates, the only question was whether the ICC actually had rate-setting authority.²⁹² Here the Supreme Court reached the same conclusion that it had reached before:

The question debated is whether [Congress] vested in the commission the power and the duty to fix rates, and the fact that this is a debatable question, and has been most strenuously and earnestly debated, is very persuasive that it did not. The grant of such a power is never to be implied. The power itself is so vast and comprehensive, so largely affecting the rights of carrier and shipper, as well as indirectly all commercial transactions, the language by which the power is given had been so often used, and was so familiar to the legislative mind, and is capable of such definite and exact statement, that no just rule of construction would tolerate a grant of such power by mere implication.²⁹³

Translating this passage into the language of the post-Enlightenment paradigm, one might say that it is a premise of our social scheme that individuals/corporations set the prices for goods and/or services through bargains that they make with one another in the market. The Court announced that, in the absence of clear statutory language to the contrary, it would presume that Congress intended to endorse this market premise of our social scheme—despite the lack of evidence that Congress intended such an endorsement. By choosing the proper language, however, Congress could empower the third component of the paradigm, the administrative bureaucracy, to set prices and thereby override the power of the individual/corporation in the market. To underline the point, the Court provided an exhaustive discussion of existing state laws governing railroad rates, indicating which formulae

290. *See id.* at 505 (“The words and phrases efficacious to make such a delegation of power are well understood, and have been frequently used. . .”).

291. *See supra* notes 93-97 and accompanying text (discussing bureaucratic individualism).

292. *See* 167 U.S. at 494.

293. *Id.* at 494-495.

legislatures used when empowering state administrative agencies to take over rate-setting.²⁹⁴

Justice Harlan dissented in the *Maximum Freight Rate* case without filing an opinion,²⁹⁵ and some scholars examining the ICC have decried the outcome of the case. The Hoogenbooms, for example, describe the *Maximum Freight Rate* result as one of several “disastrous defeats,” and observe that “the ICC lost to the courts its fundamental power to fix rates.”²⁹⁶ Rabin observes that “since the Commission was otherwise limited to issuing retroactive, nonpunitive cease and desist orders, its determinations had virtually no impact without the authority to declare an appropriate charge for the future.”²⁹⁷ According to Rabin, the *Maximum Freight Rate* case was evidence of the Court’s “strong and hostile” response to the ICC, and this supports his conclusion that the Court “seriously mistrust[ed] the administrative capacity to adjudge rates fairly.”²⁹⁸ Along the same lines, Skowronek argues that “[t]he commission was, in effect, held to be exclusively a ward of the Court rather than an arm of the legislature, and like a court, it could only pass on the reasonableness of a past action.”²⁹⁹ In contrast to this critical literature, Kolko has commented that “the Court was correct in questioning . . . whether the Commission ever had the ability to determine a rate in the first place,”³⁰⁰ and Nelson apparently concurs.³⁰¹ Discussing the *Maximum Freight Rate* case among others, Ely also rejects the conclusions of those who “have accused the Supreme Court of emasculating the commission.”³⁰² He adds: “[t]his line of decisions unquestionably reflected the Court’s favorable disposition toward private economic ordering and skepticism about business regulations. The basic problems with the act, however, were the responsibility of Congress.”³⁰³

This long-running scholarly debate over the ICC’s early rate-setting authority and the merits of the Supreme Court’s reasoning in the

294. See *id.* at 495-500.

295. *Id.* at 512.

296. HOOGENBOOM, *supra* note 103, at 35. In fact, of course, the ICC “lost” the power to the railroads, which had had the power from the outset.

297. Rabin, *supra* note 76, at 1214.

298. *Id.* at 1215.

299. STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE 157 (1982). See SHARFMAN, 1 INTERSTATE COMMERCE COMMISSION, *supra* note 103, at 27 (noting the “inability of the Commission, under the Supreme Court’s interpretation of its authority, to carry out the primary purposes of the Act”).

300. KOLKO, *supra* note 103, at 82.

301. See WILLIAM E. NELSON, THE ROOTS OF AMERICAN BUREAUCRACY, 1830-1900, at 131 (1982) (noting that “the courts did not do violence to the legislative history” through their interpretation of the ICA).

302. ELY, *supra* note 107, at 95.

303. *Id.*

Maximum Freight Rate case is, of course, interesting from a historical perspective and was once fraught with economic significance for all concerned.³⁰⁴ However, the debate tends to distract attention from the unchallenged consensus about the fundamental terms of the debate as framed by the Court—either the ICC has rate-setting power in certain circumstances or the railroads retain power to set rates via the market. And these terms reflect the basic structure of the post-Enlightenment paradigm: bureaucracy supervising—to a greater or lesser extent—individuals who act on their interests and preferences in markets. Indeed, one might speculate that the intractability of the long-running debate about the ICC's claimed rate-setting power may have reinforced in all participants the belief that there really were and are no alternatives to individual/corporate rate-setting via the market and rate-setting by an administrative bureaucracy. The possibility of an alternative world without a bureaucracy, a market, or individuals pursuing their non-rational preferences, a world of the sort modernity had begun to eclipse only a few decades earlier,³⁰⁵ did not receive serious consideration by the Court.³⁰⁶ In the absence of any apparent alternative, the post-Enlightenment paradigm came by default to define the terms of the debate. And not surprisingly, when Congress revised the ICA in the 1906 Hepburn Act, Congress simply shifted from one paradigmatic alternative to the other, i.e., away from individual/corporate rate-setting in the market and toward ICC power to set maximum rates in cases where existing rates were found to be unreasonable.³⁰⁷ The Supreme Court approved the ICC's use of this new authority without significant comment,³⁰⁸ and thus reinforced the post-Enlightenment paradigm as the unspoken premise and framework for policy debates about the railroad industry.

2. ICC Authority & Expertise: Power Without Standards

This Part argues that when one examines the Supreme Court's infrequent comments on the nature of and justification for ICC authority,

304. If the ICC could set a maximum rate for freight, then the ICC could limit the profitability of shipping along particular lines and potentially limit the profitability of the railroad as a whole. All other things being equal, every dollar that the railroad could not extract in shipping charges on goods because of ICC-imposed limits, the shipper could pocket after selling those goods. Thus, the key players had a significant financial stake in the debate.

305. See *supra* Part IV.A.1.

306. I am aware of no discussion by the Court of an alternative model to what I have termed the post-Enlightenment paradigm.

307. Hepburn Act, ch. 3591, § 4, 34 Stat. 584, 589 (1906).

308. See *ICC v. Chi., Rock Island & Pac. Ry. Co.*, 218 U.S. 88 (1910) (enforcing an ICC order setting maximum rates under authority of Hepburn Act).

one finds clear traces of the nihilism that gave rise to the post-Enlightenment paradigm. Thus, not surprisingly, the Court's comments on ICC authority also tend to reflect the paradigm's rationales for granting administrative bureaucracy power over the market and thereby endorse the paradigm as the framework for discussions about administrative government. To understand the Court's view of the nature of and justification for ICC authority, it is useful to classify the ICC under Professor Rabin's typology of regulatory models.³⁰⁹ From Rabin's perspective, it seems clear that the ICC was a policing agency and not a market-corrective agency between its inception in 1887 and the passage of the Hepburn Act in 1906. The ICC could police excessively competitive behavior in the market, such as unreasonable rates and violations of the long and short haul provision, but the ICC could not intervene more directly to correct market outcomes by setting rates.³¹⁰ Thus, as expected under the policing model, in the early years, ICC intervention tended to support the autonomy of the market by deterring excessively competitive behavior that might otherwise lead to market breakdown. After the adoption of the Hepburn Act, the ICC assumed increasing authority to set rates and alter market outcomes, and thus the ICC began to evolve from a policing to a market-corrective agency.³¹¹ As the ICC evolved, power in the market necessarily shifted from individual/corporation to administrative bureaucracy. Under both of Rabin's models, however, it is clear that the ICC operated within the nexus of individual-market-bureaucracy defined by the post-Enlightenment paradigm.

During the period when the ICC was a policing agency, the Supreme Court adopted a very restrictive view of the scope of ICC authority. According to the Court, "[t]he power given [to the ICC] is the power to execute and enforce, not to legislate. The power given is partly judicial, partly executive and administrative, but not legislative."³¹² The ICC could declare past or current rates unreasonable and past or current conduct unjust, but the ICC could not prescribe future rates or conduct.³¹³ Moreover, the Court treated the ICC as what administrative lawyers

309. For a discussion of Rabin's models, *see supra* notes 76-82 and accompanying text.

310. *See supra* Part IV.B.1 (discussing the evolution of ICC rate-setting authority).

311. *See supra* notes 307-308 and accompanying text.

312. *ICC v. Cincinnati, New Orleans & Tex. Pac. Ry. Co.*, 167 U.S. 479, 501 (1897). For a discussion of the ways courts have used the distinction between legislative and administrative judicial acts, *see* LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 170-73 (1965).

313. *See supra* Part IV.B.1 (discussing the evolution of ICC rate-setting authority).

would later call an “adjunct” to the judiciary.³¹⁴ The ICC was a “body not authorized to make a final judgment, but to investigate and make orders which may or may not be finally embodied in judgments or decrees of the court.”³¹⁵ Because the courts reserved the authority to review ICC decisions *de novo*,³¹⁶ Rabin concluded that the ICC “might police the market, but only so long as the final authority remained in the courts.”³¹⁷

Despite treating the ICC as formally an adjunct of the judiciary, the Supreme Court in practice deferred, or required deference, to the agency in certain circumstances, and it is in the rationale for deference that one finds indications of the nihilism that generated the post-Enlightenment paradigm. What is the evidence for this somewhat surprising claim? The Court held that the ICC, not the federal courts, had primary jurisdiction over all questions of fact.³¹⁸ This is important because among the so-called “questions of fact” over which the ICC had primary jurisdiction were whether rates charged by a railroad were reasonable and whether discrimination between individual shippers by a railroad was due or undue.³¹⁹ Thus, the Court treated what would appear to be questions of value, e.g., whether rates were unreasonable or discrimination was undue or unjust, as questions of fact. According to the Court, the alternative to recognizing the ICC’s primary jurisdiction over such questions would be disorder and a lack of uniformity in the market for railroad services:

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

314. See ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 122-23 (2d ed. 2001).

315. *ICC v. Baird*, 194 U.S. 25, 43 (1904).

316. See *ICC v. Cincinnati, N.O. & T. P. Ry. Co.*, 162 U.S. 184, 196 (1896) (ICC’s findings are *prima facie* evidence but, “in a trial in the court, [neither party] is to be restricted to the evidence that was before the commission”). For a discussion of this issue, see Rabin, *supra* note 76, at 1212-13.

317. Rabin, *supra* note 76, at 1215.

318. See *ICC v. Clyde Steamship Co.*, 181 U.S. 29, 32-33 (1901) (“[W]here the Commission by reason of its erroneous construction of the statute had . . . declined to adequately find the facts, it [is] the duty of the courts . . . not to proceed to an original investigation of the facts which should have been passed upon by the Commission, but to correct the error of law committed by that body, and, after doing so, to remand the case to the Commission so as to afford it the opportunity of examining the evidence and finding the facts as required by law.”); *Tex. & Pac. Ry. Co. v. ICC*, 162 U.S. 197, 238 (1896) (“[D]efendant was entitled to have its defense considered, in the first instance, at least, by the commission, upon a full consideration of all the circumstances and conditions upon which a legitimate order could be founded.”).

319. See *Tex. & Pac. Ry. Co.*, 162 U.S. at 238.

as to reasonableness by the various courts called upon to consider the subject as an original question.³²⁰

In the Court's view, therefore, the question whether a rate is reasonable is one on which individuals, including individuals who serve as federal judges and ICC commissioners, may differ. Because smart, well-informed people may differ, the rationale for recognizing primary jurisdiction in the ICC was not and presumably could not be that the ICC has special insight into the correct answers to questions about what conduct is unreasonable, unjust, or undue. Rather, the Court recognized primary ICC jurisdiction over these "factual" questions simply because the ICC as a single, unified federal agency possessed a unique power to impose on the market a uniform, consistent standard concerning what rates are unreasonable and what discrimination is unjust or undue. The Court actively discouraged lower courts from attempting to make findings about unreasonable or unjust conduct when reviewing ICC determinations: where the ICC failed to consider particular facts bearing on the reasonableness of a railroad's conduct because of an erroneous interpretation of the ICA, a reviewing court generally was expected to correct the error of law and then remand to the ICC for a new "factual" determination about the reasonableness of the railroad's conduct.³²¹ One may presume that the Court's rationale for requiring remand to the ICC mirrored its rationale for recognizing primary jurisdiction in the ICC—i.e., the need for a single, uniform standard of reasonable conduct to be imposed on the entire market by the unique federal agency with the power to adopt such a standard.

The Supreme Court is, of course, also a unique federal agency³²² that can impose its views of the law on the entire market, or, indeed, the entire country. Particularly in the early years, the Court did overrule ICC findings that railroads had engaged in unreasonable conduct if the ICC findings were based on an error of law. In the *Social Circle* case, for example, the Court overruled the ICC because the agency refused to allow a railroad to take into account market competition when setting "reasonable" rates.³²³ In effect, the Court required the ICC to adopt the market as a standard of reasonable conduct for railroads under the ICA,³²⁴ meaning that the ICC had to accept as reasonable any bargain that two individuals (here a railroad and a shipper) struck in a competitive market based on their individual preferences. But to say that

320. *Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 440 (1907).

321. *See Clyde Steamship Co.*, 181 U.S. at 32-33.

322. U.S. CONST. art. III, § 1.

323. *Tex. & Pac. Ry. Co.*, 162 U.S. at 195-96.

324. For an elaboration of this point, *see supra* Part IV.A.3.

individual preferences in the market set the standard for individual conduct is the same as saying there is no standard. From the factual statement “A and B did X in the market,” the Court infers the value judgment “X is reasonable.” This supposed inference simply transforms a description of individual conduct into a value judgment affirming the same conduct, bridging by fiat the gap between fact and value that most post-Enlightenment moral philosophers would find to be unbridgeable.³²⁵

The Supreme Court’s approach to ICC jurisdiction and the problem of reasonableness appears to reflect the same nihilistic doubts about moral philosophy that gave rise to the post-Enlightenment paradigm.³²⁶ We no longer believe we are capable, after the collapse of traditional and Enlightenment moral theories, of arriving at a true, objective answer to such questions as whether particular actions are reasonable or unreasonable, just or unjust.³²⁷ In a world where emotivism is the starting point for moral debate, judges and others inevitably will disagree about such private value judgments. To avoid the disorder and chaos that might arise from such disagreement, we need an administrative body such as the ICC with authority to establish standards and thereby impose uniformity and order. The order is neither right nor wrong. It simply is *the* order. That is its primary, if not its sole, justification, but that is sufficient given the alternative, i.e., disorder. We label the order that the ICC imposes on the market “reasonable,” but the order is reasonable only because the ICC says it is and not because it satisfies a non-existent, true and objective standard of reasonableness. As the *Social Circle* case illustrates, the alternative is to label the market outcome itself “reasonable” simply because it is the market outcome.³²⁸ Thus, the value-laden term “reasonable” functions at least in part as a fiction that justifies the ICC-imposed order and/or the market-imposed order. Of course, as long as the ICC followed the policing model, its ability to impose order was limited. It could determine *ex post* what rates were unreasonable but not impose *ex ante* rates it deemed reasonable, and it had to rely on the judiciary to bless and enforce its decisions.

After passage of the Hepburn Act converted the ICC into the first federal market-corrective agency, the Supreme Court announced a more deferential attitude toward ICC power in the 1910 *Illinois Central* case:³²⁹

325. See *supra* notes 29-32 and accompanying text.

326. See *supra* notes 29-43 and accompanying text (discussing the nihilist roots of the paradigm).

327. See *supra* notes 29-43 and accompanying text.

328. See *supra* notes 323-325 and accompanying text.

329. *ICC v. Ill. Cent. R.R. Co.*, 215 U.S. 452 (1910).

in determining whether an order of the [C]ommission shall be suspended or set aside, we must consider, [(a)] all relevant questions of constitutional power or right; [(b)] all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and, [(c)] . . . whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. . . . [S]uch perennial powers [of judicial review] lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised.³³⁰

In the same year, the Court showed a similarly deferential attitude in rejecting a challenge to an ICC decision concerning the reasonableness of railroad conduct. “Such decision, we have said with tiresome repetition, is peculiarly the province of the Commission to make, and that its findings are fortified by presumptions of truth, ‘due to the judgments of a tribunal appointed by law and informed by experience.’”³³¹ Thus, courts should not second-guess the wisdom of ICC policy because it is the job of the ICC, not the courts, to determine what policy is wise, just as it is the ICC’s job to determine what conduct is reasonable. In general, courts should endorse the ICC’s decisions because the ICC made them, and not because those decisions were correct. Indeed, the Court’s position makes sense only if one believes that the ICC sometimes will make decisions that a judge would consider incorrect and that there is no overarching standard against which to decide who is correct in such a situation, the judge or the ICC. If an overarching standard existed and could be applied by the courts, there would be no justification for deferring to the ICC. As Professor Wilson argued, the ICC’s challenge was “to make binding choices without any clear standards for choice.”³³² Indeed, as already noted, the mere fact that only the ICC could make market-wide binding choices became the rationale for granting the ICC power over the market. The ICC alone could exercise the kind of effective, unified power that would bring order

330. *Id.* at 470 (citation omitted); see also Rabin, *supra* note 76, at 1233-34 (discussing the significance of the deferential approach announced in *Illinois Central*).

331. *ICC v. Chi., Rock Island & Pac. Ry. Co.*, 218 U.S. 88, 110 (1910) (quoting *Ill. Cent. R.R. Co. v. ICC*, 206 U.S. 441, 454 (1907)).

332. Wilson, *supra* note 5, at 95.

to the national market, and, as MacIntyre observed, the appeal to effectiveness as a justification “reveals that bureaucratic authority is nothing other than successful power.”³³³

One argument that begins to emerge only gradually in the Supreme Court’s early opinions on the ICA is that the ICC deserves deference not simply because of its unique status and unified structure, but also because of its competence or expertise in the field of railroad regulation. As discussed above, under the post-Enlightenment paradigm, claims about agency expertise or competence become the standard justification for increasing administrative management of society.³³⁴ Although the evidence here is relatively slender, it appears that the Court moved gradually toward a theory of agency competence as a rationale for ICC supervision of the rail industry. In a case from 1900 that focused on whether competition in a particular market justified a railroad’s pricing decisions, the Court stated that “the law attributes prima facie effect to the findings of fact made by the Commission, and that body, from the nature of its organization and the duties imposed upon it by the statute, is peculiarly competent to pass upon questions of fact of the character here arising.”³³⁵ The Court did not specify the ICC’s peculiar competence or identify what it was about the “nature of its organization” that might place certain questions within its purview. In a 1907 case, the Court went further, describing the ICC as

a tribunal appointed by law and informed by experience. And in any special case of conflicting evidence a probative force must be attributed to the findings of the Commission, which, in addition to ‘knowledge of conditions, of environment and of transportation relations,’ has had the witnesses before it and has been able to judge of them and their manner of testifying.³³⁶

Thus, by 1907, the Court believed the agency had developed broad competence in the field of rail transportation, and this competence gave the agency the expertise to evaluate conflicting testimony in contested cases.

Finally, and perhaps not coincidentally, in one of the earliest cases under the Hepburn Act, the Court seemed to take another step toward the position that the ICC’s special competence or expertise justifies the authority the ICC exercises over the market, including the newly granted authority to set rates under certain circumstances. According to the Court,

333. MACINTYRE, AFTER VIRTUE, *supra* note 13, at 26.

334. *See supra* notes 63, 85-86 and accompanying text.

335. Louisville & Nashville R.R. Co. v. Behlmer, 175 U.S. 648, 675 (1900).

336. Ill. Cent. R.R. Co. v. ICC, 206 U.S. 441, 454-55 (1907) (citation omitted).

[f]rom whatever standpoint the powers of the Interstate Commerce Commission may be viewed, they touch many interests, they may have great consequences. They are expected to be exercised in the coldest neutrality. The Commission was instituted to prevent discrimination between persons and places. It would indeed be an abuse of its powers to exercise them so as to cause either. And the training that is required, the comprehensive knowledge which is possessed, guards or tends to guard against the accidental abuse of its powers, or, if such abuse occur, to correct it.³³⁷

Without using the term “bureaucracy,” the Court here implies that the ICC exemplifies then-emerging notions of the ideal bureaucracy,³³⁸ staffed with people who are impersonally neutral, trained, and who possess “comprehensive knowledge” of the relevant field. According to the Court, these characteristics enable the bureaucracy to make decisions without discrimination or favoritism—a conclusion that mirrors Weber’s.³³⁹ It is probably not a coincidence that at the same time the Court accepted the ICC’s new authority to make “legislative”³⁴⁰ decisions setting reasonable future rates under the Hepburn Act, the Court also came close to arguing that the agency’s special competence justified the broad grant of authority. Greater authority presumably requires more robust justification. But the Court did not, and presumably could not, suggest that the ICC’s greater competence gave the agency unique or authoritative insight into what conduct was wise, reasonable, undue, or unjust. As the Court previously had recognized,³⁴¹ on such questions reasonable people are likely to disagree, and the Court had therefore decided that to avoid disunity the ICC’s determination ordinarily will prevail.³⁴² Thus, as applied to an agency’s “value” judgments about unreasonable, unjust, or undue conduct in the market, the theory of agency competence functions at least in part as a kind of fiction to rationalize the power over the market that we must vest in a single, unified administrative agency if we are to avoid social disorder. For those given to epigrams, one might say the agency does not have power because it is competent; it is competent because it has power.

I have argued that the Supreme Court implicitly adopted the premise that the ICC had no special insight into what sorts of conduct were reasonable or unreasonable, due or undue, just or unjust, and, as a

337. ICC v. Chi., Rock Island & Pac. Ry., 218 U.S. 88, 102 (1910).

338. See *supra* notes 58-67 and accompanying text.

339. See *supra* notes 63-64 and accompanying text.

340. See *supra* note 312 and accompanying text.

341. See *supra* note 320 and accompanying text.

342. One must add the qualifier “ordinarily” because the Court reserved the authority to overrule ICC determinations that were based on errors of law. See *supra* note 321 and accompanying text.

corollary, that intelligent people such as ICC commissioners and federal judges inevitably would disagree on such matters. If my reading is correct, then the Court's approach seems to reflect the same doubts—albeit in a considerably milder form—about the existence of rationally persuasive, objective, universal moral standards that led Nietzsche to announce God's death and led others to propound emotivism as a default moral theory. In other words, there appears to be a strong nihilistic undercurrent to the Court's account of the nature of and justification for ICC authority. Of course, an emotivist/nihilist view of the ICC would be entirely consistent with the emotivist/nihilist account of individuals trading in the market that the Court appears to have found in the ICA.³⁴³ Indeed, if one adopts an emotivist view of individuals in the market, it would be difficult to explain how those individuals can be transformed into non-emotivist, non-nihilist officials when they are recruited into administrative service at the ICC. It would also be hard to explain how we can equip the ICC (or the Supreme Court) with a non-nihilistic, rationally persuasive, objective, universally valid moral theory to impose on individuals in the market when we apparently cannot equip the individuals themselves with the same theory. With emotivism and nihilism, if one is in for a penny, one is in for a pound. This suggests again that the Court's invocations of competence to justify ICC actions actually serve as a cover for what ultimately is an exercise of power by the ICC that is not and cannot be grounded in a rationally persuasive, objective moral argument or theory. Bureaucratic power holds in check the disorderly tendencies of emotivist individuals pursuing their preferences in the market, thereby allowing the market to function without dissolving into chaos.³⁴⁴ Thus, by saving individuals from themselves, bureaucratic power underwrites nihilism's happy ending.

3. ICC Investigations and the Rise of the Bureaucratic Corporation

The repeated references to ICC power in Part IV.B.2 may have created the impression that ICC agents fanned out across the United States in the 1890s and pointed guns at railroad managers. In fact, as this Part argues, ICC authority over railroads grew through a much more subtle process of bureaucratization and bureaucratic oversight at the agency and within the railroads themselves. An examination of early Supreme Court cases interpreting the ICA reveals almost no notice—aside from the Court's remarks in 1910 about the ICC's "coldest

343. See *supra* Parts IV.A.2, IV.A.3.

344. See *supra* notes 62-64 and accompanying text.

neutrality”—of the fact that the agency was a rapidly expanding bureaucracy.³⁴⁵ The ICC was not, of course, the first federal entity to assume a bureaucratic form. Professor Crenson has argued that the bureaucratization of the federal government began during Andrew Jackson’s presidency.³⁴⁶ The civil service reform movement, which sought to eliminate Jacksonian “spoilsmen” and increase the professionalism of the federal bureaucracy through merit-based hiring and promotion, open competitive examinations, and job tenure, came to a climax with the adoption of the 1883 Pendleton Civil Service Reform Act.³⁴⁷ At the ICC itself, within a year of the agency’s creation there were two auditors and 25 clerks supporting the five commissioners.³⁴⁸ By 1899, the ICC’s technical staff had burgeoned to 119 clerks, agents, auditors, and statisticians.³⁴⁹ In 1906, the Hepburn Act expanded the Commission itself to seven members.³⁵⁰ As the ICC’s responsibilities grew, so did its staff—to 330 in 1907 and 527 in 1909.³⁵¹ Yet all of these developments remained invisible in the opinions of the Supreme Court, which continued to review the ICC’s work in much the same way it would review the work of a lower court, the staff of which might consist of one or two clerks and a secretary.

In addition to assisting the ICC with complaints about railroad misbehavior, what was this growing army of bureaucrats doing? One clue can be found in an article by Henry C. Adams, who ran the ICC’s Statistical Department from soon after the agency’s creation until 1911.³⁵² According to Adams, the ICC’s most important accomplishment during its first decade was to push the railroad industry itself toward uniformity of administration:

Never in the history of American railways has there been such a marked movement toward uniformity in administration as during the last ten years [from 1887 to 1897]. It is not claimed that this has been accomplished by the commission against the wish of the railways,—

345. *See Chi., Rock Island & Pac. Ry. Co.*, 218 U.S. at 102 (referring to ICC’s exercise of its powers in “coldest neutrality”).

346. MATTHEW A. CRENSON, *THE FEDERAL MACHINE: BEGINNINGS OF BUREAUCRACY IN JACKSONIAN AMERICA* 4 (1975).

347. *See* Pendleton Civil Service Reform Act, ch. 27, 22 Stat. 403 (1883). For a description of the political struggles that led to the adoption of the Pendleton Act, *see* ARI HOOGENBOOM, *OUTLAWING THE SPOILS* 238-252 (1961).

348. 2 ICC ANN. REP. 174 (1888).

349. 14 ICC ANN. REP. 91-93 (1901).

350. Hepburn Act, ch. 3591, § 8, 34 Stat. 584, 595 (1906).

351. HOOGENBOOM, *supra* note 103, at 53.

352. Adams was a nationally recognized economist and statistician as well as the first Johns Hopkins Ph.D. For further information about Adams, *see* S. Lawrence Bigelow et al., *Henry Carter Adams*, 30 J. POL. ECON. 201, 206 (1922) and HOOGENBOOM, *supra* note 103, at 31.

indeed, the formal steps have not infrequently been taken upon the orders of railway managers; but no one who knows the situation can for a moment believe that they, of their own motion, would have interested themselves in establishing uniformity of administration to the extent that it has been established.³⁵³

How did uniformity of administration within the railroad industry arise? Not surprisingly, Adams suggested that the ICC's interaction—both formal and informal—with the railroad industry during contested cases promoted administrative uniformity.³⁵⁴ In addition, he argued that administrative uniformity resulted from “[t]he development [within the ICC] of a division of statistics and accounts which, so far as information is concerned, would place the commission on the same footing as the [railroad] management itself.”³⁵⁵ Information gathered by this specialized division of the ICC bureaucracy would provide “the groundwork upon which the successful control of railways in the United States rests.”³⁵⁶

According to Adams, preparation for ICC control began with a push for “the development of a uniform system of accounts for the railways themselves.”³⁵⁷ The ICC's goal was to ensure that each railroad had one accounting system and that all railroads used the same system. As Adams observed, “if there be but one system of accounts for all corporations subject to the jurisdiction of the commission, it is necessary only to master the principles, rules, and classifications of one system in order to gain a mastery of all.”³⁵⁸ In other words, uniformity among railroads would facilitate mastery by the ICC's administrative bureaucracy. According to Adams, the first step toward uniformity was the development of a “common form for annual report” that railroads could file with all state commissions as well as with the ICC.³⁵⁹ The second step was to establish a uniform method of classifying expenses across the railroad industry.³⁶⁰ From there, the ICC pressed for

353. Adams, *supra* note 103, at 437.

354. *Id.* Kolko pointed out that the ICC dealt informally with the vast majority—nearly 90 percent—of the 9000 complaints filed during its first 18 years. See KOLKO, *supra* note 103, at 153. Harbeson defends the ICC's informal approach on the ground that it saved time and money. See Harbeson, *supra* note 103, at 236-237. Neither Kolko nor Harbeson notes the effect that this extensive informal dialogue between regulator and regulated may have had over time on the administrative structures and actions of the both.

355. Adams, *supra* note 103, at 440.

356. *Id.*

357. *Id.*; see also ICA, ch. 104, § 20, 24 Stat. 379, 383 (1887) (ICC authorized to mandate uniform accounts).

358. Adams, *supra* note 103, at 440.

359. *Id.*

360. *Id.*

uniformity in “the compilation of train-mileage, the classification of railway employees, the rules for arriving at daily wages, and the adjustment of a balance sheet.”³⁶¹

Adams neglected to discuss another likely stimulus toward administrative uniformity, i.e., the requirement that each railroad file its rates and fares with the ICC and then abide by those filed rates and fares unless and until it published and filed a revision.³⁶² For such a system to work, a railroad would have to plan a detailed fare schedule in advance. Large-scale planning for an interstate railroad required personnel and organization.³⁶³ Thus, like the ICC’s information-gathering system, the filed-rate system may have encouraged railroads to organize, or reorganize, both their methods of accounting and the underlying management and planning of rail services, thereby increasing operational uniformity throughout the industry and enabling the ICC to exercise power over the industry. As the railroad industry rendered itself increasingly transparent to the federal administrative bureaucracy, it apparently oriented itself simultaneously to the needs of bureaucratic oversight and control. In the language of the post-Enlightenment paradigm, one could say that the individual, i.e., the railroad corporation, rendered itself amenable to bureaucratic supervision by quite literally learning to account for itself to the ICC bureaucracy. The railroad gradually transformed itself into the individual-as-supervised-by-bureaucracy.

As Henry C. Adams noted, the ICC’s push for administrative uniformity met with a receptive audience in the railroad industry itself.³⁶⁴ Professor Nelson has argued that “[t]he size of a few of the major railroads—the Baltimore & Ohio, the Erie, the New York Central, and the Pennsylvania—made routinization of decisionmaking unavoidable. . . .”³⁶⁵ As a consequence, from the 1850s onward, “railroads found it necessary through ‘a judicious subdivision of labor’ and ‘a proper division of responsibilities’ to create complex bureaucracies, each segment of which was responsible for a different aspect of railroad management.”³⁶⁶ According to Nelson,

361. *Id.* at 441.

362. *See supra* notes 118-124 and accompanying text.

363. *See infra* notes 364-369 and accompanying text (discussing the relationship between the growth of railroads and the development of bureaucratic management).

364. *See supra* note 353 and accompanying text.

365. NELSON, *supra* note 301, at 101-102.

366. *Id.* at 102 (citations omitted). For a description of the complex management structure of a large railroad circa 1885, *see* Charles E. Perkins, *Administering a Great Railroad System*, in *THE RAILROADS, THE NATION’S FIRST BIG BUSINESS* 118 (Alfred D. Chandler ed., 1981).

these bureaucratized structures were far different from the management patterns of small, early railroads, in which, as in nearly all other antebellum businesses, the chief executive of the company could 'give its business his personal attention, and . . . be almost constantly upon the line engaged in the direction of its details.' . . .³⁶⁷

The early and rapid bureaucratizing of railroad corporations meant that when the ICC came into existence in 1887, it found itself facing an increasingly bureaucratic industry. Professor Chandler has studied the pioneering role of railroads in the development of the modern business organizational structure.³⁶⁸ He noted the increasing bureaucratization of railroad management by the early 20th century, when "the process of ratemaking was being shared with the Interstate Commerce Commission, which handled the negotiations between sets of shippers and the railroad."³⁶⁹ With the passage of the Hepburn Act, ICC bureaucrats gradually took over from railroad bureaucracies the key function of setting rates for rail services.³⁷⁰ Thus, as the ICC itself bureaucratized and then began to evolve into a market-corrective agency, its dealings with the railroad industry were increasingly bureaucracy to bureaucracy and supervisor to supervised. In the language of the post-Enlightenment paradigm, one could say that the administrative bureaucracy found itself overseeing a market consisting of corporate individuals who were bureaucratizing and, one would therefore presume, increasingly open to bureaucratic oversight. In the culture of bureaucratic individualism, therefore, the bureaucracy manages and controls the (corporate) individual from within and without, thus quietly avoiding any overt threat or use of force.

The administrative impact of the ICC's information-gathering and rate-filing processes on the railroad industry typically is overlooked in legal discussions concerning the ICC.³⁷¹ After the Court held in one early case that a grand jury investigating alleged violations of the ICA could not force a witness to testify about some of his actions as a grain shipper because of the danger of self-incrimination,³⁷² Congress passed an act granting broad immunity from prosecution for testimony before the ICC.³⁷³ In the inevitable follow-up case, the Court held that a witness

367. NELSON, *supra* note 301, at 103 (citation omitted).

368. ALFRED D. CHANDLER, JR., *THE VISIBLE HAND* 81-187 (1977).

369. *Id.* at 186.

370. *See supra* notes 307-308 and accompanying text (discussing the significance of the Hepburn Act).

371. I have seen no discussion of these topics in my review of the legal literature for this article.

372. *Counselman v. Hitchcock*, 142 U.S. 547, 586 (1892).

373. *See Compulsory Testimony Act*, ch. 83, 27 Stat. 443, 443-44 (1893).

could be forced to testify under this newly granted immunity.³⁷⁴ The Court later held that the ICC could not use its subpoena power to force E.H. Harriman and other railroad tycoons to reveal personal financial information.³⁷⁵ However, as long as the ICC did not violate the privacy of railroad owners, the Court did not interfere with ICC efforts to obtain information. As the Court stated in 1894, “[i]t was clearly competent for congress . . . to invest the commission with authority to require the attendance and testimony of witnesses, and the production of books, papers, tariffs, contracts, agreements, and documents relating to any matter legally committed to that body for investigation.”³⁷⁶ Matters legally committed to the Commission included “the management of the business of carriers subject to the provisions of the act, and . . . the whole subject of interstate commerce as conducted by such carriers. . . .”³⁷⁷ Because ICC information and rate-filing requirements did not generate cases for the courts, the transformative effects of those requirements on the operation of railroads remained largely invisible in judicial writings on the ICC during the agency’s first 25 years. Yet if Adams was correct, this invisible transformation of railroad operations facilitated expansion of ICC power over the railroads. No doubt the relative invisibility of the process itself may have facilitated expansion of ICC power. Power imposed at gunpoint inevitably attracts attention and typically elicits a response. Power gradually imposed from the point of a bureaucrat’s pen attracts little notice, and thus order can be maintained in the market as if by magic.

The Supreme Court’s decision to protect Mr. Harriman’s financial dealings from the impact of an ICC subpoena serves as a reminder that, aside from corporations, there was another type of individual in the market interacting with railroads and, on occasion, with the ICC. This was the natural person who, as stockholder/owner, might exercise some control over the railroad’s corporate bureaucracy and who, as shipper or passenger, would find himself or herself buying services from the railroad’s corporate bureaucracy in the market. Indeed, as shipper or passenger, the individual person had little choice but to deal with a large railroad bureaucracy in the market if he or she wished to transport people or things over land because there was no significant alternative to railroads for overland shipping. Before the ICA, an increasingly bureaucratic railroad management determined when and where the trains

374. See *Brown v. Walker*, 161 U.S. 591, 610 (1896). For a discussion of the early evolution of the ICC’s subpoena power, see SHARFMAN, 1 INTERSTATE COMMERCE COMMISSION, *supra* note 103, at 23 n.19.

375. See *Harriman v. ICC*, 211 U.S. 407, 417 (1908).

376. *ICC v. Brimson*, 154 U.S. 447, 473 (1894).

377. *Id.*

ran and how much transportation would cost, presumably in light of the perceived interests of the railroad.³⁷⁸ One would also presume that shippers negotiated with railroads in the hope of striking a deal that furthered the shippers' interests. With the adoption of the filed-rate system,³⁷⁹ the ICA prohibited the railroad from negotiating special rates with individual customers.³⁸⁰ Thus, the individual faced a railroad bureaucracy offering a legally controlled take-it-or-leave-it proposition. With passage of the Hepburn Act, the ICC assumed responsibility for setting rates in certain circumstances, so the individual could take comfort—or not—in the fact that the railroad bureaucracy with whom he or she dealt often had no actual control over the rate that the individual would have to pay. In general, as bureaucratic authority increased first in the railroads and then at the ICC, the officials and bureaucrats who exercised power over railroad rates became increasingly remote from the individuals who had to foot the bill for railroad services.

As one would expect in the nascent culture of bureaucratic individualism, this expansion of bureaucratic power was explained and justified as a form of protection for the individual. As discussed above, the Supreme Court repeatedly asserted that the ICA's main purpose was to ensure that individuals and localities were treated equally and were not subject to unjust or undue discrimination by railroads.³⁸¹ Since the ICA established the ICC to accomplish this purpose, the Court's argument implies that we ensure equal, non-discriminatory treatment of individuals by empowering administrative bureaucracies to make more and more of the key decisions. The bureaucracy thus emerged as the solution to the individual's transportation problems and, as the line of development from the original ICA to the Safety Appliance Act to the Hepburn Act and beyond suggests, we learned to solve each new problem that the individual encountered in the field of transportation by enhancing the power of the ICC over transportation of the individual.³⁸² In this way among others, bureaucracy became part of the fabric of the individual's life—a supposedly necessary condition for equal, non-discriminatory, coldly neutral treatment in the national transportation system. At the same time and for the same reasons, the individual came to be

378. For a discussion of the development of bureaucratic management in the railroad industry, see *supra* notes 364-370 and accompanying text.

379. See *supra* notes 118-124 and accompanying text.

380. See *Texas & Pac. Ry. Co. v. Mugg & Dryden*, 202 U.S. 242, 245 (1906) (“[W]hatever may be the rate agreed upon, the carrier’s lien on the goods is, by force of the act of Congress, for the amount fixed by the published schedule of rates and charges.”) (quoting *Southern Ry. Co. v. Harrison*, 119 Ala. 539, 558 (1898)).

381. See *supra* notes 106, 205-211 and accompanying text.

382. For a summary of the ICC’s growing regulatory ambition, see *Wilson, supra* note 5, at 98.

understood as intrinsically dependent on the administrative bureaucracy for such equal, non-discriminatory treatment. Without the bureaucracy, the individual risked becoming the victim of other individuals, including powerful corporations, in a railroad market that otherwise might dissolve into a Hobbesian war of all against all,³⁸³ with the strong dominating the weak and the strong ultimately suffering domination by the stronger.³⁸⁴ Apparently, only the power of the administrative agency could combat market disorder and protect us from Hobbes's dark vision of a world of individuals run amok. As a consumer in the national transportation market, each person was invited to see himself or herself as the individual-as-supervised-and-protected-by-bureaucracy. Thus, the individual awakened in the world of the post-Enlightenment paradigm unavoidably bound to and dependent on markets supervised by bureaucracies.

It is important to recall finally what the order imposed on individuals in the market under the post-Enlightenment paradigm is not. It is not and does not pretend to be a rationally persuasive moral order or an objective, true, right order to which individuals—natural and corporate—would assent under appropriate conditions. In the post-Enlightenment era, it is assumed that there is no rationally persuasive, objective, true, right order to which individuals will assent. It is precisely because of this assumption that we require a competent neutral bureaucracy to impose the order that we must have to survive in our market-based society. The relative invisibility of bureaucratic power combined with fictions about bureaucratic competence and the “reasonableness” of the standards imposed by bureaucratic power may help us to forget that it is in fact power that bureaucracies like the ICC exercise when imposing order on markets. We survive in a Nietzschean world where all is permitted in theory because the bureaucracy tells us what is in fact permitted and what is in fact prohibited. Without the generally invisible hand of bureaucratic power, it seems the outcome of our nihilism would be chaos. If, therefore, nihilism has a happy ending, bureaucratic power may be the reason. This shows again the key role of bureaucracy in the post-Enlightenment paradigm, which grew out of an essentially nihilistic set of premises about the impossibility of a rationally persuasive moral theory after the Enlightenment. By articulating and reinforcing the post-Enlightenment paradigm, the Supreme Court's early ICC cases helped to establish the central role of

383. See *supra* note 56 and accompanying text.

384. For examples of the Supreme Court's use of war metaphors and imagery to describe the railroad market, see *U.S. v. Joint-Traffic Ass'n*, 171 U.S. 505, 564, 569 (1898).

bureaucratic power in the then-emerging culture of bureaucratic individualism.

V. CONCLUSION

In the years between 1887 and 1910, the Supreme Court faced the challenge of interpreting the ICA and articulating the function of the new ICC within our society. As this Article has shown, in responding to that challenge, the Court drew on and gave shape to what I have called the post-Enlightenment paradigm. Thus, the Court treated the people and entities that the ICA regulated as individuals pursuing non-rational individual interests and preferences in the market for railroad services. The Court came to view the ICC as an administrative bureaucracy charged with combating the inevitable tendency toward disorder in that market. In the early years, the ICC policed the market, identifying and discouraging overly aggressive behavior by individuals. After the adoption of the Hepburn Act, the ICC assumed an increasingly market-corrective role—imposing order by setting the prices that individuals could charge in the market. Underlying this paradigmatic understanding of the relationship between railroads, railroad users, and the ICC was the Court's apparent conviction that there is no objective, true, universally valid, rationally persuasive standard of conduct available to courts or individuals. In particular, reasonable people, whether individuals or courts, will not agree on what constitutes unreasonable or unjust conduct. From this essentially nihilistic premise, it follows that individuals pursuing their non-rational interests and preferences will interact in a manner that breeds disorder unless an entity such as an administrative bureaucracy imposes order on them.

Of course, the order that the bureaucracy imposes does not and cannot reflect an objective, true, universally valid standard of conduct, because, by hypothesis, such a standard does not exist. Thus, the sole "rational" justification for any order the bureaucracy imposes is that it will be preferable to the alternative, which is disorder. Although in theory anything goes, in practice the ICC and other administrative bureaucracies tell us what goes and what does not go. By ensuring order that otherwise would not exist, bureaucracy provides nihilism's happy ending. However, the price is a social structure consisting of individuals, markets and bureaucracies in which the application of power ultimately has no justification beyond our need for someone to maintain order.

Although this Article is the continuation of my earlier work on more recent manifestations of the post-Enlightenment paradigm, its conclusions are, nevertheless, preliminary in many respects. First, the Article does not purport to provide a comprehensive account of how the

post-Enlightenment paradigm insinuated itself into our way of understanding our modern social scheme. Rather, it focuses on the emergence of the paradigm in the Supreme Court's efforts to explain and justify ICC supervision of consumers and providers of railroad services. Much more could be said about how and why other institutions gradually adopted the paradigm as a way of explaining and justifying personal conduct and social arrangements. Second, the Article does not examine the narrower question of how the paradigm shaped the Court's approach to administrative law in the years after 1910. I expect to take up that issue in a future article. My goal will be to show how we went from a world in which the paradigm was novel to a world in which the paradigm was normal and alternatives to the paradigm were almost unimaginable—the world that I believe we inhabit today.

A third issue that this Article does not examine is the precise role or status of the judiciary in the post-Enlightenment paradigm itself. The judiciary plays an important role in my discussion, yet the paradigm does not recognize the role or significance of the judiciary. Nelson has suggested one possible solution to this problem, arguing that after the Civil War, the federal judiciary itself increasingly adopted a formalistic/bureaucratic outlook on legal issues.³⁸⁵ Thus, in a sense, supervision by the judiciary evolved into a form of bureaucratic supervision. Whatever one makes of Nelson's argument, it is clear that a more detailed examination of the function of courts under the paradigm would be useful. At the same time, it is important not to overstate the role of the courts in the saga of the ICC.

The Supreme Court clearly blunted some of the ICC's early initiatives and delayed implementation of some of the ICC's policy decisions. The Court's opinions denying the ICC rate-setting authority provide a good example. Yet by implicitly relying on the paradigm to explain and justify the function of the ICC, the Court provided a rationale for enhancing the power of the administrative bureaucracy and limiting the role of the judiciary in the administrative state. Indeed, the Court itself seemed to endorse such a limited role for the judiciary in the *Illinois Central* case.³⁸⁶ In general, the Court renounced the authority to second-guess ICC policy decisions and sent the message that lower courts ordinarily should not attempt to override ICC decisions about what conduct was unreasonable or undue. And if *Vermont Yankee*³⁸⁷ and

385. NELSON, *supra* note 301, at 133-148.

386. *See supra* note 330 and accompanying text.

387. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

*Chevron*³⁸⁸ are any guide, it appears that the Court continues to renounce any significant role as an arbiter of agency policy.

A final issue that I do not address in this Article and that I expect to take up in future writings is the fundamental question whether the nihilistic understanding of our moral situation that underlies the post-Enlightenment paradigm is accurate. Here I do not simply point to the interesting theoretical paradox that if the hardcore nihilist denies the possibility of truth, then he or she cannot assert that nihilism is true. Rather, I hope to address the more practical issue of whether it is still possible to articulate an objectively true and valid, rationally persuasive ethical framework within which a community can pursue a shared vision of the good life. And following Alasdair MacIntyre, I expect to do this from an Aristotelian, teleological standpoint.³⁸⁹ I want to consider whether it is still possible to imagine a world without individuals, markets and bureaucracies and whether such a world might truly be better than the world we have constructed for ourselves since 1887. I want to consider, in other words, whether there might be a happier ending than the one that administrative bureaucracies have seen fit to provide for us.

388. *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984).

389. MacIntyre has spent much of the last twenty years attempting to revive the old Aristotelian/Thomist approach to moral theory. See, e.g., ALASDAIR MACINTYRE, *Plain Persons and Moral Philosophy: Rules, Virtues and Goods*, in *THE MACINTYRE READER* 136 (Kelvin Knight ed., 1998). For my very preliminary comments on this issue, see Kightlinger, *Twilight of the Idols*, *supra* note 6, at 60-61.