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The Anti-New Deal Progressive: Roscoe Pound's Alternative Administrative State

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Abstract: Recent scholarship has linked the rise of the Progressive movement in America to the creation of an "administrative state"—a form of government where legislative, executive, and judicial powers are delegated into the hands of administrative agencies which compose a "headless fourth branch of government." This form of government was largely constructed during the New Deal period. The influential legal theorist Roscoe Pound provides the paradoxical example of a Progressive who balked at the New Deal. While many commentators have concluded that Pound's opposition to the New Deal was based on a departure from his earlier Progressive thought, his opposition was in fact based on a consistent Progressive philosophy. Pound therefore provided a vision of an alternative administrative state, which would achieve the ends of the Progressive vision but without the means of the administrative state.

Recent scholarship in American political thought has established an almost causal link between the political theory of American progressivism and the creation of an "administrative state," where political authority is centralized and delegated into the hands of a "headless fourth branch of government," namely, national administrative agencies with rulemaking, adjudicatory, and enforcement powers.[1] This administrative state was largely constructed during the New Deal period (1932–1952), which witnessed the creation of a large number of such agencies.

The American administrative state continues to be a source of contention among academics and political officials alike. American administrative agencies have suffered from a crisis of legitimacy since their widespread

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[1]See, for instance, Ronald J. Pestritto, "The Progressive Origins of the Administrative State: Wilson, Goodnow, and Landis," *Social Philosophy and Policy* 24 (2007): 16–54; Pestritto, *Woodrow Wilson and the Roots of Modern Liberalism* (Lanham, MD: Rowman and Littlefield, 2005); John Marini, "Progressivism, Modern Political Science, and the Transformation of American Constitutionalism," in *The Progressive Revolution in Politics and Political Science*, ed. John Marini and Ken Masugi (Lanham, MD: Rowman and Littlefield, 2005).

establishment in the Progressive Era (1890–1920).[2] Moreover, the clamor against the perceived excesses of American bureaucracy has reached a fever unseen since the New Deal itself. Few governments can long survive when such a large portion of their offices and authority are openly questioned by citizens. The need for reconciling modern administrative power and American constitutionalism is as acute as ever. Yet few alternatives to the administrative state are offered by its opponents.

For this reason, the thought of Roscoe Pound (1870–1964) is highly relevant and ought to be of interest to political scientists. Roscoe Pound was a highly influential Progressive legal theorist who founded the sociological jurisprudence and legal realism movements in a series of influential articles published from 1900–1915.[3] He therefore stood as one of the intellectual founders of progressivism in legal thought, symbolized by his twenty-year reign as dean of Harvard Law School. Yet despite his progressivism, Pound criticized the New Deal harshly for expanding administrative power. He thus provides an example of a Progressive who opposed both the New Deal and the creation of the administrative state. Further, in his opposition to the New Deal Pound provided a vision of an alternative administrative state, one which has never been seriously considered in America but which arises from within the Progressive ranks. Pound thus helps us confront two pressing questions: is Pound's reputation as a "fallen founder" of progressivism accurate, and can Pound be a source of inspiration for those seeking a feasible alternative to the administrative state? Furthermore, is Pound's alternative administrative state consistent with his progressivism?[4] This article argues that Pound was a consistent Progressive legal thinker whose alternative administrative state

[2]See James O. Freedman, *Crisis and Legitimacy: The Administrative Process and American Government* (Cambridge: Cambridge University Press, 1978).

[3]See Roscoe Pound, "The Need of a Sociological Jurisprudence," *Green Bag* 19 (1907), 607–15; Pound, "Mechanical Jurisprudence," *Columbia Law Review* 8 (1908): 605–23; Pound, "Liberty of Contract," *Yale Law Journal* 18 (1909): 454–87; Pound, "The Scope and Purpose of Sociological Jurisprudence," pts. 1–3, *Harvard Law Review* 24 (1911): 591–619; 25 (1911): 140–68; 25 (1912): 489–516.

[4]If so, Pound would seem to offer guidance for contemporary attempts to institute a neoprogressivism in American political culture, one that attempts to implement an alternative to centralized administration. For examples of neoprogressivism, see Alan Dawley, *Struggles for Justice: Social Responsibility and the Liberal State* (Cambridge, MA: Harvard University Press, 1991); E. J. Dionne, *They Only Look Dead: Why Progressives Will Dominate the Next Political Era* (New York: Simon and Schuster, 1996); Michael McGerr, *A Fierce Discontent: The Rise and Fall of the Progressive Movement in America, 1870–1920* (New York: The Free Press, 2003); Richard Rorty, *Achieving Our Country: Leftist Thought in Twentieth-Century America* (Cambridge, MA: Harvard University Press, 1998); Michael Tomasky, *Left for Dead: The Life, Death, and Possible Resurrection of Progressive Politics in America* (New York: The Free Press, 1996).

deserves serious consideration as a means of restoring the rule of law and constitutional government based on separation of powers.

The New Deal brought the controversy over the administrative state center stage in American politics. Beginning in May 1933, the American Bar Association (ABA) began to voice reservations about the expansion of administrative power during the New Deal.[5] That year, the ABA's Special Committee on Administrative Law advocated transferring the judicial power out of administrative agencies and back into independent tribunals such as the courts.[6] The ABA persisted in its opposition to the administrative state throughout the 1930s, and eventually the controversy came to a head with the introduction of the Walter-Logan Act in 1939.[7] The Walter-Logan Act would have created boards within each agency and department to review administrative action, and would have granted substantial authority to the courts to hear cases involving private citizens and overturn agency rules and regulations.

President Roosevelt understood that the source of the opposition was the bar in general, and Roscoe Pound in particular. In his veto of the Walter-Logan Act, President Roosevelt claimed that while "the more progressive bar associations" accepted the need to "supplement" the judicial branch with "the administrative tribunal … a large part of the legal profession has never reconciled itself to the existence of the administrative tribunal. Many of them prefer the stately ritual of the courts, in which lawyers play all the speaking parts, to the simple procedure of administrative hearings which a client can understand and even participate in."[8] The more progressive lawyers understood the need for the administrative process, but many other members of the legal profession, FDR noted, still longed for the elimination of administrative tribunals.

Roosevelt was certainly *not* referring to James Landis, former chairman of the Securities and Exchange Commission and dean of Harvard Law School. Landis had only two years prior published a series of lectures that represented the most optimistic view of the potential of newly created bureaucratic agencies.[9] Rather, he was likely referring to Roscoe Pound, who preceded Landis as dean at Harvard, and his followers in the legal academy. Pound was the author of the ABA's report of 1938, which warned of the rise of "administrative absolutism" and called for a radical

[5]Walter Gellhorn, "The Administrative Procedure Act: The Beginnings," *Virginia Law Review* 72, no. 2 (1986): 219.

[6]Ibid.

[7]Ibid., 224. The Walter-Logan Act was introduced by Francis E. Walter (D-PA) in the House, and William Logan (D-KY) in the Senate.

[8]Franklin Delano Roosevelt, "Veto of a Bill Regulating Administrative Agencies," 8 December 1940, available online via The American Presidency Project at http://www.presidency.ucsb.edu/ws/index.php?pid=15914.

[9]James Landis, *The Administrative Process* (New Haven: Yale University Press, 1938).

reassessment of the New Deal and its effect on the rule of law.[10] The very act that gave rise to Roosevelt's veto and message about the legal profession, the Walter-Logan Act, was in some respects inspired by Pound's report. Pound therefore represented a sharp contrast to Landis's vision of an autonomous administrative bureaucracy with expansive discretion and few external checks on its decisions.

That a fierce disagreement between James Landis and Roscoe Pound on the future of the administrative process would emerge is surprising. After all, both Landis and Pound were sincere Progressives who were critical of legal formalism and of eighteenth-century natural law jurisprudence with its emphasis on individualism and freedom of contract, and who believed in an expanded role for a new, positive state. In fact, Pound himself was the leader of the movement in the legal academy seeking to usher in a new conception of the role of law and the state in the early part of the twentieth century. Yet by 1938 Pound stood at the center of the frontline in opposition to the New Deal.

These facts have led most historians to conclude that Pound was simply an inconsistent thinker who shrank from the very results he had worked so hard to bring about decades earlier. Thus, the consensus among scholars is that Pound was influential but incoherent, rather than a source of guidance on the question of law and administration. In his influential work *The Transformation of American Law,* Morton Horwitz argues that in authoring the ABA report "Pound had made an abrupt about-face on the uses of administrative justice."[11] His "earlier complex understanding of the limits of formalism was replaced by simplistic pieties about the rule of law," Horwitz concludes.[12] David Wigdor, Pound's biographer, argues that while his earlier work reveals him to be a legal thinker of the highest order, by 1938 "Pound became increasingly vituperative, and the fantastic accusations that he hurled so effortlessly demonstrated his loss of proportion."[13] Michael Willrich is even more explicit in his assessment that there are two Roscoe Pounds. Willrich calls Pound "the best legal mind of his progressive generation," and credits him with launching "sociological jurisprudence." Yet, "just when those years of collective work were finally bearing fruit, in the New Deal and the Supreme Court's 'Constitutional Revolution of 1937,' the *former* progressive [emphasis added] makes a stunning reversal and

[10]The term "administrative absolutism" is pervasive in the "Pound report" (Roscoe Pound, "Report of the Special Committee on Administrative Law," *Annual Report of the American Bar Association*, no. 63 [1938]: 331–62).

[11]Morton Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992), 219.

[12]Horwitz, *Transformation of American Law,* 220.

[13]David Wigdor, *Roscoe Pound: Philosopher of Law* (Westport, CT: Greenwood Press, 1974), 263.

denounces the whole enterprise—*his* whole enterprise—as a dangerously relativistic, absolutist, un-American nightmare."[14]

In the same vein, legal historian John Fabian Witt admits that "there had always been a conservative streak running through Pound's thinking on administration and the common law," but nevertheless claims that "the arc of [Pound's] thinking" involved "transforming himself from sociological prophet of a rising administrative state to bitter critic of the New Deal and its associated institutions."[15] By the middle of the 1930s, Witt contends, "Pound's conservative streak had turned deeply reactionary."[16] For Witt and others, Pound is to be remembered as an inconsistent thinker, who changed his views from "prophet" to "critic" of the administrative state. In doing so, he bequeathed to us a half-hearted administrative state by helping to shift *some* (but certainly not all) aspects of public policy from centralized administrative bodies to lawyers and the tort system.[17]

Even in his own day Pound was vilified as an apostate from his earlier progressivism. In one of the authoritative books on Pound's thought, N. E. H. Hull observes that by the mid-1930s Pound "was lionized in the law journals by members of the bar as a new conservative,"[18] an assessment with which Hull appears to agree,[19] although many of his contemporaries noted that he retained many of his Progressive impulses.[20] In the end, Hull's assessment

[14]Michael Willrich, *City of Courts: Socializing Justice in Progressive-Era Chicago* (Cambridge: Cambridge University Press, 2003), 315.

[15]John Fabian Witt, *Patriots and Cosmopolitans: Hidden Histories of American Law* (Cambridge, MA: Harvard University Press, 2007), 228, 214.

[16]Witt, *Patriots and Cosmopolitans*, 231.

[17]Witt's primary contention is that Pound's work was "to ensure that the new social policy functions of the mid-twentieth-century state would be channeled into existing institutions … limiting the spread of the administrative state and expanding into the common-law field known as the law of torts" (*Patriots and Cosmopolitans*, 214). One of the more curious aspects of Witt's argument is the claim that Pound was influenced by "a powerful conformity and a deep urge to please" (ibid., 230). Thus, Pound tacked rightward in order to conform to those around him. This is curious because the direction of Pound's reputation from 1930 (when he was dean of Harvard Law School) to 1960 can only be described in terms of steep *decline*; the more anti-New Deal Pound became, the more his influence and standing as an intellectual diminished.

[18]N. E. H. Hull, *Roscoe Pound and Karl Llewellyn: Searching for an American Jurisprudence* (Chicago: University of Chicago Press, 1997), 250.

[19]See the title of chapter 6 of *Roscoe Pound and Karl Llewellyn*, titled in part "Pound Moves to the Right," as well as the preceding chapter which generally maintains that Pound changed his position constantly "over the course of intellectual [*sic*] career" (Hull, *Roscoe Pound and Karl Llewellyn*, 252). For Hull's argument that Pound was inconsistent, see especially 312–17.

[20]See Hull, *Roscoe Pound and Karl Llewellyn*, 250: regarding George R. Farnum, writing about then-Dean Pound in the *Boston University Law Review*, "Farnum conceded the progressive strains of Pound's thought, but these were less important

is that Pound was simply inconsistent, and that he had repudiated his earlier progressivism by 1930: "You just could not tell where Pound stood in the maelstrom of ideologies" during the New Deal period, but "Pound's retreat from leadership of the reform party in jurisprudence began quietly in November 1931" and by 1933 "Pound had slipped his liberal moorings to sail a new course."[21] Although Hull does recognize that Pound "opposed giving too much authority and discretion to administrative agencies even before World War I," she seems to conclude that Pound's resistance to the New Deal was of a different kind altogether.[22] And the Pound of the 1940s and afterwards "had turned about, rejecting sociological jurisprudence." He "had discovered a new faith."[23]

However, a careful reading of Pound's writings reveals that the traditional account is oversimplistic and even downright misleading. Roscoe Pound's writings reveal a remarkable consistency, in that he was always willing to accept "executive justice" or "administrative justice" as a temporary evil, but had a consistent vision of the future of the administrative process that was fundamentally at odds with the vision of Landis, Roosevelt, and many of his Progressive interlocutors.

More important than the question of Pound's consistency, however, is the question of the ongoing relevance of Pound's argument to today's administrative state. Pound's aim, which he pursued consistently throughout his career, was to update the judicial process to absorb the responsibilities that in his day were being handed to administrative agencies. This is why he accepted executive or administrative justice only as a temporary measure. In short, Pound consistently believed that administrative justice was a necessary but

than the conservative ones. … Farnum did not admire Pound for Pound's real achievement, his dogged progressive pragmatism."

[21]Hull, *Roscoe Pound and Karl Llewellyn*, 251, 254. In essence, Hull's argument is that Pound was inconsistent (Hull argues that in one of Pound's essays "the many Pounds floated on the surface … like the flotsam of a shipwreck after a storm" [ibid., 283]), and that he moved away from his earlier progressivism, but also never fully embraced a natural law conservatism tied to the ideas of the Founding. Hull admits that Pound, even in his later career, thought "systems of ideas" based on natural law were "rooted in a now-gone vision of an individualistic frontier society," but also argues that Pound repudiated progressivism after 1930, and that his later criticism of the New Deal represents "a far cry from the Pound of the 1900s, who noted with approval the subordination of the claims of powerful individuals to the needs of the community" (ibid., 252, 259). What I hope to show in this article, to repeat, is that the Pound of the 1900s and the Pound of the 1930s are essentially consistent, and that we can learn from both Pounds. Hull does note that Pound himself "did not admit his backsliding" (ibid., 283).

[22]Ibid., 257.

[23]Ibid., 315.

temporary evil, and that if the rule of law were to be preserved, the judicial branch must assume the role assumed by administrative agencies in his day.

This leads us to a very different evaluation of Pound's legacy from what is typically offered by legal historians. Most legal historians link Pound's attack on the New Deal with the passage of the 1946 Administrative Procedure Act (APA).[24] The APA standardized administrative procedures, established the scope of judicial review of agencies, and is still today the primary source of administrative law. However, what Pound had in mind, at least in his earlier career, was profoundly different from the proposal advanced in the minority report of the Attorney General's Committee on Administrative Procedure, released in 1941 and generally credited as the inspiration for the APA.

Whereas the prevailing account of Pound's influence on the development of the administrative process credits him with laying the groundwork for more robust judicial review, beginning with the APA and culminating in the "adversarial legalism" that currently characterizes administrative law,[25] Pound's vision for the future of the administrative state was never seriously considered as a political proposal, to America's great detriment. This article argues that legal historians mistake Pound's legacy for the administrative state. Pound was critical of the New Deal not because he abandoned his Progressive ideas. He was skeptical of the New Deal administrative state *because of* his devotion to progressivism. Pound denounced the rise of administrative justice during the very period in which he also criticized natural law jurisprudence and launched sociological jurisprudence. Therefore Pound did not believe that progressivism inevitably resulted in the kind of administrative state created during the New Deal period. This is the argument of parts I and II. After briefly describing Pound's Progressive philosophy, which was evident in his advocacy of sociological jurisprudence, the article will defend Pound's consistency by demonstrating that Pound's infamous ABA report was merely a restatement of reservations Pound had long held about the administrative state. Furthermore, Pound's alternative administrative state is both plausible and capable of having political resonance in light of the profound disappointment with the way the administrative state currently functions.

Part I: Pound's Progressivism: Natural Law vs. Sociological Jurisprudence

Roscoe Pound's progressivism was a combination of two core elements: a critique of natural law, and an embrace of pragmatism, or in his terms,

[24]See, for instance, Hull's assessment: "The Administrative Procedure Act of 1946 did more or less exactly what Pound had wanted eight years earlier" in the ABA report of 1938 (*Roscoe Pound and Karl Llewellyn*, 258).

[25]Robert Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge, MA: Harvard University Press, 2003).

"sociological jurisprudence."[26] These elements, however, produced a very different public program from the one advanced by his Progressive colleagues. Before proceeding to discuss his alternative program in parts II and III, let us first examine Pound's Progressive thought.

Pound understood the dominant natural law tradition that informed American law and jurisprudence in the late eighteenth and early nineteenth centuries. Periodically, he even credited the idea of natural law for many advances in the field of law. Pound characterized the "formative era of American law" as the period between the American Revolution and the Civil War, and that period "was heavily burdened by the formalism of the strict law."[27] While it was not a monolithic movement, and there was disagreement over how much of the English common law should be adopted and how much that law should be overhauled to meet new conditions, "the lawyers and judges and teachers of the formative era found their creating and organizing idea in the theory of natural law."[28]

In Pound's view, natural law derived from reason was the best tool that the early Americans could have used to reform the English law without losing its essential spirit of liberty. Natural law allowed Americans to accept part of traditional law, and thus not begin purely from scratch but to test all of traditional law by reason: "The old materials were to be tested by the ideal and were to be reshaped to conform to it or, if this was not possible, to be rejected. … Thus it happened presently that a new authority was set up thereby—a philosophical authority of the 'nature of things' or the 'nature of man.' Once more the legal order was the revelation of a god. The new juristic god was called 'reason,' and was represented as hostile to authority. But his hostility extended only to the authority of gods other than himself."[29] Thus, natural law based on reason replaced revelation based on theology as the foundation of the legal order in early America. There was still a need to base the legal system on inviolable first principles, even if they were to be derived from an alternative source.[30]

[26]The emphasis on pragmatism in Roscoe Pound's legal thought is described by Terry di Filippo, "Pragmatism, Interest Theory and Legal Philosophy: The Relation of James and Dewey to Roscoe Pound," *Transactions of the Charles S. Peirce Society* 24, no. 4 (1988): 487–508. Di Filippo argues that "Pound's own work consisted in large part of the extension to legal theory of the philosophic principles advanced by William James and John Dewey" (ibid., 487).

[27]Pound, *The Formative Era of American Law* (Boston: Little, Brown, 1938), 6.

[28]Ibid., 12.

[29]Pound, *Interpretations of Legal History* (Cambridge, MA: Harvard University Press, 1946), 5–6.

[30]It is worth noting that Pound's interpretation of legal history closely follows Auguste Comte's famous description of the development of scientific inquiry through theological to metaphysical to positive stages. See Auguste Comte, *Cours de*

In a characteristically Progressive line of reasoning, Pound admitted that this theory of natural law had its use in the period during which it was applied. It was useful as a way to derive law from a first principle which could not be traditional authority, since authority had been overthrown by the Enlightenment. "In studying the formative era of American law we are concerned immediately with the eighteenth-century natural law which became embodied for us in the Declaration of Independence and is behind our bills of rights." However, this does not mean that natural law is suited for every period. Its use, rather, is contingent upon its time and place. Pound continued,

> While legal systems were freely absorbing materials from without, as in the development of equity and the taking over of the law merchant in English law, the theory of natural law served well. But when the absorption was complete for the time being and stability required a pause to assimilate fully what had been taken up during the period of growth and called for internal ordering and harmonizing and systematizing rather than for creation, it ceased to satisfy. A reconciliation in terms of stability rather than in terms of change was demanded and this reconciliation was effected through history.[31]

By history, Pound means that law was explained not in terms of deduction from natural law principles, but in terms of "principles of growth."[32] Even as late as 1958, after his supposed conversion to conservatism, Pound wrote that

> what led to abandonment of the juristic theory of natural rights was its extreme abstract individualism. … As a theory of inherent moral qualities of persons it was based on deduction from an ideal of the abstract isolated individual. As a theory of rights based upon a social compact, it thought of natural rights as the rights of the individuals who had made the compact and had thereby set up the social and political order to secure them. In either view the end of the law is to maintain and protect individual interests.[33]

Pound was an adherent of the historical school, but he also acknowledged that the era of the historical school of legal history and interpretation had come to a close.[34] But given his view of the use of natural law as historically

Philosophie Positive, chap. 1, in *Auguste Comte and Positivism: The Essential Readings*, ed. Gertrud Lenzer (New York: Harper and Row, 1975), 71–101.

[31]Pound, *Interpretations*, 6.

[32]Ibid., 9.

[33]Pound, *The Ideal Element in Law* (1958; reprint, Indianapolis: Liberty Fund, 2002), 196.

[34]"We may well believe, then, that an epoch in juristic thought has come to an end, and that the time is ripe to appraise its work … and to consider wherein its way of

contingent, it should come as no surprise that Pound did not think the end of the era of the historical school meant a return to natural law. In the end, Pound emphatically rejected the natural law tradition as inappropriate for contemporary circumstances.[35]

Pound was vague about his vision for the future of jurisprudence. He clearly rejected the natural law thinking of the eighteenth century, but also argued that the historical approach of the nineteenth century has run its course. He explained that "three ideals and resulting canons of value for the recognition, delimitation, and securing of interests have obtained in juristic thought. One looks at all things from the standpoint of the individual human personality."[36] This view asserts that "the highest end is individual freedom." The second view "looks at all things from the standpoint of organized society." In this second canon, "the significant values are collective values. … The highest end is the nation or state." The third view "regards the first two as transcended in the conception of civilization and the values of civilized life." Thus in the third canon there is no opposition between the individual and the collective. Rather, "Morals, law, and the state get their significance as making for civilization," which transcends the opposition between the individual and society. "The highest end is civilization."[37] After laying out these three different conceptions of juridical thought, Pound concluded that "the natural law is not tied to the individualist ideal for all time. Today the second and the third are contesting."[38] Law is evolving away from the purely individualist and purely collectivist approaches, toward a concept of civilization that transcends these two approaches. The influence of G. W. F. Hegel on Pound's analysis of the tripartite evolution of American law is clear. A new synthesis transcending natural law individualism and collectivism is about to emerge.

What Pound suggested, then, is that a new natural law is emerging, but one that is tied to the progressive goal of civilization.[39] In fact, Pound preferred not to call this new approach "natural law," as that term obscures the difference between the new approach and the eighteenth-century approach. While

unifying stability and change, with which men were content for a century, is no longer of service" (Pound, *Interpretations*, 12).

[35]As Paul F. Murphy has written, "Pound found the then influential natural rights dogma … distasteful" (Murphy, "Holmes, Brandeis, and Pound: Sociological Jurisprudence as a Response to Economic Laissez-Faire," in *Liberty, Property, and Government: Constitutional Interpretation Before the New Deal*, ed. Ellen Frankel Paul and Howard Dickman [Albany: State University of New York Press, 1989], 57).

[36]Pound, *Formative Era*, 18.

[37]Ibid., 19.

[38]Ibid.

[39]See Philip Selznick, "Sociology and Natural Law," *Natural Law Forum* 84 (1961): 84–108.

Pound credited the achievements of the eighteenth-century natural law approach,[40] he added, "I am not holding a brief for the old natural law. I should not for a moment urge jurists to return to the mode of thought of the eighteenth century."[41] In the final analysis one wonders what Pound's new jurisprudence would look like in practice. It is clearly not the same as the old natural law, and it is primarily intended to update the law to apply to new circumstances. He explained that it will "furnish a critique of old received ideals and give a basis for formulating new ones, and … yield a reasoned canon of values and a technique of applying it. I should prefer to call it philosophical jurisprudence."[42] Pound's view of "philosophical jurisprudence" that will liberalize the legal order and supply new ideals seems to be a judicial application of the philosophy of historical unfolding for the sake of achieving civilization, that third way between individualism and collectivism.[43]

Pound added that natural law provides judges with a convenient pretense for using sociological jurisprudence to reshape the law. He wrote that "equity and natural law are yet bolder fictions [than procedural fictions] allowing a more sweeping creative activity" by judges.[44] "Natural law," he continued, "the great agency of juristic development of law, is a fiction of a superior body of legal principles" that can be used to "correct and supplement" positive law.[45] Pound's vision for the use of natural law in the service of progressive ends was part of his alternative proposal, which we will examine in subsequent parts of this article.

Pound's ultimate conclusion was that the future of legal thought will consist in something that resembles natural law but (1) does not rest on ideas that are considered permanently true, and (2) focuses mostly on the practical effect of law on social problems rather than justice between individuals. We will now turn our focus to this second element.

[40]He wrote, "However much the last generation may have railed at the theory of natural law, no achievements of any of its theories are at all comparable" (*Formative Era*, 21).

[41]Ibid., 29.

[42]Ibid.

[43]In October 1921, in the preface to a book titled *Introduction to the Philosophy of Law*, Pound wrote: "Philosophy has been a powerful instrument in the legal armory and the times are ripe for restoring it to its old place therein. … It is possible to look at those problems [of legal science] philosophically without treating them in terms of the eighteenth-century natural law or the nineteenth-century metaphysical jurisprudence which stand for philosophy in the general understanding of lawyers" (Pound, *Introduction to the Philosophy of Law* [New Haven: Yale University Press, 1922], 10–11).

[44]Pound, *Interpretations*, 132.

[45]Ibid., 133.

Pound's Pragmatism

The difficulty with the natural law approach of the past, shaped as it was by individualism, was not simply that it was ill suited for modern, complex society, economy, and government. It carried the further problem of creating a rigid and overly logical jurisprudence—a "jurisprudence of conceptions," in Pound's terms.[46] Elsewhere he called it "mechanical jurisprudence," meaning that it simply applied general principles inflexibly to circumstances, rather than allowing circumstances to shape the principles employed to reach a result.[47] The rigidity of mechanical jurisprudence, Pound argued, must give way to a system of law that subjugates "principles and doctrines to the human conditions they are to govern." Such a system would place "the human factor in the central place and relegate logic to its true position as an instrument" for the human beings it is to serve.[48]

The difficulty of a jurisprudence of conceptions was that it made law too abstract and logical, in Pound's view. In a speech delivered in Wisconsin, published in 1924, Pound argued that "we talk a great deal about the individual, but what did we mean in the last century by the individual? … It was a theoretical individual up there in a vacuum."[49] This was a result of our conception of the rule of law: "Abstract justice of abstract rules as applied to abstract men was our whole concern."[50] Thankfully in Pound's view, this was changing in every field of inquiry, but the field of law was behind the times. He continued, "We don't treat rheumatism any more. We treat John Doe and Richard Roe, who are afflicted with rheumatic symptoms. … Today we do not treat the heart, the liver, or the lungs. We deal with John Doe and Richard Roe, whose heart or liver or lungs or kidneys do not function as they should."[51] This type of jurisprudence, although it was justified as equal justice under the law, allowed many social problems to persist and was ultimately destructive of the individual itself. Pound argued that "our individualism of the last century was a theoretical individualism only."[52] Summarizing his argument in 1908, Pound bluntly declared, "Conceptions are fixed. The premises are no longer to be examined. Principles cease to have importance. The law becomes a body of rules. This is the condition against which sociologists now protest, and protest rightly."[53]

[46]Ibid., 119.
[47]Pound, "Mechanical Jurisprudence," *Columbia Law Review* 8 (1908): 605–23.
[48]Ibid., 609.
[49]Pound, "The Growth of Administrative Justice," *Wisconsin Law Review* 11 (1924): 331.
[50]Ibid.
[51]Ibid.
[52]Ibid., 332.
[53]Pound, "Mechanical Jurisprudence," 612.

In response to the "theoretical individualism" of the last century, Pound searched for an actual individualism, in which the law would be applied in a way that was advantageous to actual rather than abstract individuals. Since individuals no longer live in a vacuum, relatively uninfluenced by social forces, the law must adapt by integrating social facts and consequences into legal reasoning. Pound explained, "We are searching for a judicial or administrative individualization."[54] Pound's solution was what he called "sociological jurisprudence." From 1907 to 1912, Pound published a series of articles articulating his criticism of mechanical jurisprudence and his proposal for sociological jurisprudence.[55] These articles were an indictment of the judicial approach of the nineteenth century and a vision for judicial behavior in the twentieth century.

Pound's primary argument for sociological jurisprudence was that courts should turn away from the mechanical approach of applying universal and rigid principles to particular circumstance, and towards deciding particular cases on the basis of their social, economic, and political effects. This need is caused by the fact that law and politics are unable to keep up with the vast changes in scientific progress (which produced social and economic change) and our knowledge of the world. Pound writes, "current disrespect for law is not, in intention at least, disrespect for justice." Rather, "the fault must be laid largely to the law and to the manner in which law is being taught and expounded," and law is not being updated to reach practical social benefits.[56] As he argued in 1908, "We have, then, the same task in jurisprudence that has been achieved in philosophy, in the natural sciences and in politics. We have to rid ourselves of this sort of legality and to attain a pragmatic, a sociological legal science."[57]

Pound prescribes the solution: "With the rise and growth of political, economic, and sociological science, the time is now ripe for a new tendency, and that tendency, which I have ventured heretofore to style the sociological tendency, is already well-marked in Continental Europe."[58] "We must reinvestigate the theories of justice, of law, of rights," he declares.[59] "We must seek the basis of our doctrines, not in Blackstone's wisdom of our ancestors … but in a scientific apprehension of the relations of law to society and of the needs and interests and opinions of society to-day."[60] This means that "the modern teacher of law should be a student of sociology, economics, politics as well" as law.[61] The law must be updated to follow scientific and sociological insights rather than the mere application of principles to cases, regardless of circumstance.

[54]Pound, "The Growth of Administrative Justice," 332.
[55]See note 3 above.
[56]Pound, "The Need of a Sociological Jurisprudence," 607, 608.
[57]Pound, "Mechanical Jurisprudence," 609.
[58]Pound, "The Need of a Sociological Jurisprudence," 609.
[59]Ibid., 610.
[60]Ibid., 610–11.
[61]Ibid., 611.

Pound's advocacy of sociological jurisprudence and critique of natural law are fundamentally progressive in nature. As N. E. H. Hull explains, "Sociological jurisprudence was progressive; it had faith in experts, in the power of well-trained, well-meaning intellect to sort out and realign the world."[62] The turn to sociological jurisprudence would revolutionize law by making it a force for social reform rather than the application of legal principles to particular cases. Pound argued that "law is a means, not an end," and when the social consensus behind the law changes, law must shift to correspond to such changes.[63] Our law has not done so, and therefore "while jurists in America are repeating individualist formulas of justice, sociologists are speaking rather of … defining justice as the satisfaction of everyone's wants so far as they are not outweighed by others' wants."[64] The new sociological jurisprudence will make the law a means, a means to an effective social implementation of the new theory of justice, rather than an end in itself which must govern individual cases. As Pound reasserted in the 1920s, "the legal order is a process of adjustment of overlapping claims and compromising conflicting demands or desires in the endeavour here and now to give effect to as much as we can. In other words, our social engineering will be the more effective the more clearly we recognize what we are doing and why."[65] Pound's sociological jurisprudence was an attempt to use sociology in carrying out the law that will amount to social engineering.

Pound's progressivism and pragmatism are based on his critique of the role of natural law in the American legal tradition. His treatment of natural law reveals both his appreciation for its accomplishments and his rejection of its basic presuppositions about the universality of principle in the area of law. His critique of the jurisprudence of conceptions and endorsement of sociological jurisprudence make him the forefather of legal realism.[66] All of this would have consequences for Pound's alternative understanding of the role of courts and jurists, as we will observe subsequently. What is noteworthy for now is that Pound's legal philosophy is representative of mainstream Progressive views applied to the realm of law and jurisprudence.

Part II: Pound's Consistency: The "Recrudescence of Executive Justice"

Having established Pound's deep commitment to leading Progressive ideals, in this part and the next I will explore the intriguing possibility that Pound's progressivism led him to oppose, rather than support, the administrative

[62]Hull, *Roscoe Pound and Karl Llewellyn*, 278.
[63]Pound, "The Need of a Sociological Jurisprudence," 612.
[64]Ibid.
[65]Pound, *Interpretations*, 158.
[66]In fact, Pound in 1931 wrote about "the call for a realist jurisprudence" in an article by that title, in *Harvard Law Review* 44 (1931): 697–711.

state that was being constructed in his day and that was expanded under FDR. Pound warned about the recrudescence of executive justice that was taking place in America in the first decade of the twentieth century, long before the "about-face" that contemporary historians claim Pound made in the 1930s. An examination of his infamous ABA report of 1938 reveals that many of the arguments in that report are identical to arguments that Pound made decades earlier. This will demonstrate that the 1938 report was not an about-face, and that Pound's thinking and warnings were consistent. This will prompt the question raised in the third part of this article, namely, that of Pound's alternative to the administrative state.

The Recrudescence of Executive Justice

Perhaps the most pressing problem to which Pound dedicated his study was the difficulty—intrinsic to law itself—of shaping law to serve both the purpose of setting forth universal or general rules and the need to secure justice in particular and individual cases. Pound's approach to this problem was critical to his famous attack on "executive justice." In 1922 he opened a series of published lectures on legal history by introducing what in his view was an intractable problem:

> how to reconcile the idea of a fixed body of law, affording no scope for individual willfulness, with the idea of change and growth and making of new law. … For, put more concretely, the problem of compromise between the need of stability and the need of change becomes in one aspect a problem of adjustment between rule and discretion, between administering justice according to settled rule, or at most by rigid deduction from narrowly fixed premises, and administration of justice according to the more or less trained intuition of experienced magistrates. In one way or another almost all of the vexed questions of the science of law prove to be phases of this same problem.[67]

The central problem to which Pound addressed himself throughout his writings was how law can be not only "justice according to settled rule" but also compatible with the discretion magistrates need to do justice in particulars. In basic terms, Pound was referring to the tension between using universal and inflexible rules to decide particular cases and reliance on the wise use of a prudent magistrate's discretion.

Pound accepted that the traditional American approach to law was formalistic and devoted to the rule of law, almost to a fault. We were obsessed with following the precept of Montesquieu and Locke that no person should be trusted with holding any combination of legislative, executive, or judicial power. In America, as a result, "nothing is so characteristic of American

[67]Pound, *Interpretations*, 1. See also "Report of the Special Committee on Administrative Law," 357.

public law of the nineteenth century as the completeness with which executive action is tied down by legal liability and judicial review."[68] In particular, "an effective apparatus of judicial control over administration by mandamus, prohibition, certiorari, and statutory substitutes" was achieved in the nineteenth century by the implementation of common-law doctrines.[69] Executive action in America prior to the twentieth century was excessively restrained by judicial control.

But this approach led to "judicial interference with administration. Law paralyzing administration was an every-day spectacle. Almost every important measure of police or administration encountered an injunction."[70] Ill-advised judicial control of administration rendered government ineffective and inefficient, and in the twentieth century "the paralysis of administration produced by our American exaggeration of the common law doctrine of supremacy of law has brought about a reaction."[71] A "bad adjustment between courts and administration" was "a legacy from the contests between the common law courts and the crown in seventeenth-century England," contests which produced these ill effects on our side of the Atlantic.[72] These ill effects led to a swing toward the opposite extreme, namely, the rise of the administrative state.

Because of these developments, as early as 1907 Pound was writing that "the recrudescence of executive justice is gaining strength continually and is yet far from its end." "Where, a generation ago, we were agreed to be proud of our peculiar doctrine of judicial power over unconstitutional legislation, that doctrine has become the subject of constant and even violent attack. … We have actually traveled a long way from the notions of a generation ago as to the relation of courts and administration."[73] Even "the judiciary has begun to fall in line," Pound stated, and "powers which fifty years ago would have been held purely judicial and jealously guarded from executive exercise are now decided to be administrative only and are cheerfully conceded to boards and commissions."[74] It is important to reiterate that these were Pound's thoughts in both 1907 and 1938. Therefore, Pound's thinking on the threat of executive justice was the same twenty-nine years prior to authoring the ABA annual report that has earned him infamy as an opponent of the New Deal, and one year after writing his groundbreaking article on sociological jurisprudence. Pound was concerned about the problem of executive justice even at the height of his contributions to Progressive legal thought.

[68]Pound, "Executive Justice," *American Law Register* 55, no. 3 (1907): 139.

[69]Pound, "Report of the Special Committee on Administrative Law," 352.

[70]Pound, *The Organization of Courts* (Philadelphia: Law Association of Philadelphia, 1913), 2.

[71]Pound, "Executive Justice," 137, 139.

[72]Pound, "Report of the Special Committee on Administrative Law," 351–52.

[73]Pound, *Organization of Courts*, 3.

[74]Pound, "Executive Justice," 137, 139.

Surveying the rise of the administrative state, Pound explained that in "the cases prior to 1880" the practice of courts was to "hold all matters involving a hearing and a determination, whereby the liberty, property or fortune of the citizen may be affected, to be judicial and not capable of exercise by executive functionaries." Later, however, courts began to simply "require an appeal or a possibility of judicial review," but to otherwise leave the exercise of such powers to administrative agencies that combined legislative and executive powers in a way that threatened constitutionalism. Finally, however, the courts began "to cast off even that remnant of judicial control" and "to hold every sort of power that does not involve directly an adjudication of a controversy between citizen and citizen … to be administrative in character and a legitimate matter for executive boards and committees."[75] Pound therefore laid out three possible paradigms: either (1) "matters involving a hearing and a determination" affecting liberty and property are wholly judicial, or (2) they are administrative but subject to judicial review, or (3) they are entirely administrative and exempt from judicial review. To illustrate the prevalence of the first paradigm, courts of equity held jurisdiction to settle disputes over water rights in the nineteenth century. Private suits would be brought to these courts for resolution. This power over environmental considerations was understood to be judicial in nature. Similarly, Pound noted elsewhere, "at the time when grade crossings became a real problem in this country, one of the great states of the Union committed the regulation of such crossings to a court of equity."[76] "Those were the days when if there was a controversy over water rights it was determined not by a state board of engineers, but by a court of equity. Those days are over."[77] By contrast, Pound observed, "to-day the courts are agreed that the power is not judicial" and they uphold laws giving the authority to govern how water is appropriated to executive boards.[78] And the courts are no longer assuming the power to review the decisions of these boards. By 1907, Pound observed, "a statute may confer wide and summary powers of dealing with property to a board of health without providing for any appeal."[79] Thus, in a number of areas, in the nineteenth century, courts assumed the power to settle particular controversies, but by the early twentieth century these duties were gradually being assumed by administrative boards and commissions.

These developments, Pound believed, indicated the rise, or recurrence, of a theory of executive justice. Executive justice characterizes the "attempt to adjust the relations of individuals with each other and with the State summarily, according to notions of an executive officer for the time being as to what

[75]Ibid., 140.
[76]Pound, "The Growth of Administrative Justice," 327.
[77]Ibid.
[78]Pound, "Executive Justice," 141.
[79]Ibid., 144.

the public interest and a square deal demand, unencumbered by many rules."[80] This rise of executive or administrative justice, Pound wrote in 1924, "is perhaps the conspicuous feature of our American law."[81] Thus, well before the New Deal Pound was concerned about the rise of executive justice and the decline of judicial power. Duties long understood to be judicial in character were being transferred over to administrative boards.

Pound likened the rise of executive justice to the contest between the common law and the king in England in the sixteenth and seventeenth centuries. He found "an instructive parallel … in the history of our legal system. In the middle of the sixteenth century" in Great Britain, "lawyers began to complain that the common law was being set aside and that scarcely any business of importance came to the king's courts of law."[82] For centuries, law was developed slowly and organically in the common law courts, but an explosion of law began to occur that was developed outside of the common law courts, in summary courts of an executive nature, such as the King's Council and the Star Chamber. Pound argued that this was "a movement from judicial justice administered in courts to executive justice administered in administrative tribunals or by administrative officers. In other words, it was a reaction from justice according to law to justice without law, and in this respect again the present movement away from the common law courts is parallel."[83] As powers were transferred from common law courts to the king's courts of law, the result was a movement from justice according to law to justice without law. The same thing was happening in early twentieth-century America, Pound believed. The rise of the administrative state meant that justice would be dispensed without law, but merely in accordance with the arbitrary decrees of administrative agencies.

He admitted that one of the reasons for the turn to executive justice was the need for expertise,[84] but Pound insisted that the bar was to blame for these developments. Because lawyers and judges refused to adopt sociological

[80]Ibid., 145.

[81]Pound, "The Growth of Administrative Justice," 325.

[82]Pound, *Organization of Courts*, 4.

[83]Ibid., 5. In 1924 Pound would similarly write, "we are entering upon a period of legal development that has many of the possibilities of that more classic period in the seventeenth century when Lord Coke laid down the doctrine of which I spoke a moment ago. For not merely in England, where perhaps it has gone farther, but in this country, to a lesser extent in Canada, and throughout the English-speaking world, one of the striking phenomena in the large administration of justice, is the growth, the progress, of administrative justice. And this administrative justice, at least in its crude beginnings, appears to have much in it of the oriental; to have very much in it of a reversion to a primitive justice without law" (Pound, "The Growth of Administrative Justice," 324–25).

[84]A claim that has been well established in the scholarly literature. See, e.g., G. Edward White, *The Constitution and the New Deal* (Cambridge, MA: Harvard

jurisprudence that could be applied to remedy existing social ills, the only recourse was to vest these powers in administrative experts. Pound argued that "we must attribute the popularity of executive justice chiefly, if not wholly, to defects in our present legal system."[85] "The only way to check the onward march of executive justice is to improve the output of judicial justice till the adjustment of human relations by our courts is brought into thorough accord with the moral sense of the public at large."[86] If the courts had not been so stubborn in their refusal to adopt sociological jurisprudence, the recrudescence of executive justice may not have occurred.

Therefore, Pound was optimistic that the rise of executive justice was merely a phase that would eventually subside as the legal academy updated its notion of jurisprudence to correspond with present necessities. He stated, "Executive justice is an evil. It has always been and it always will be crude and as variable as the personalities of officials."[87] However, it is a necessary evil to provide for the individualization of the law until the law can catch up with new circumstances. Therefore, Pound argued, "it is worth while to ask whether, instead of being alarming phenomena, indicating a decay in our spirit of liberty, the rise of administrative justice, the primacy of the executives … are anything more than natural results of the evolution that we have been going through with economically and socially."[88] This led him to believe, at least in 1907, that the current shift in the direction of administrative justice was merely "one of those reversions to justice without law which are perennial in legal history."[89]

But the lawyers needed to be spurred on to do this important work, and Pound understood his task to be to provide the inspiration: "If we are to be spared a return to oriental justice, if we are to preserve the common law doctrine of supremacy of law, the profession and the courts must take up

University Press, 2000), 99–100; Jerry L. Mashaw, *Greed, Chaos, and Governance: Using Public Choice to Improve Public Law* (New Haven: Yale University Press, 1997), 131–57.

[85]Pound, "Executive Justice," 145.

[86]Ibid., 146.

[87]Ibid., 145–46.

[88]Pound, "The Growth of Administrative Justice," 330. In making this argument Pound was following the analysis of thinkers such as Albion Small and Richard Ely, who argued that the complexity of modern government was an inevitable outcome of the socioeconomic upheaval of the Progressive Era. See Richard Ely, *Studies in the Evolution of Industrial Society* (New York: Macmillan, 1903); Albion Small, "Private Business is a Public Trust," *American Journal of Sociology* 1 (1895): 276–89; Small, "The State and Semi-Public Corporations," *American Journal of Sociology* 1 (1896): 398–410.

[89]Pound, "Executive Justice," 144. Once again, in his description of the movement from judicial justice to executive justice to sociological jurisprudence, the influence of Hegelianism on Pound is apparent.

vigorously and fearlessly the problem of to-day—how to *administer* the law to meet the demands of the world that is."[90] Just as great lawyers and jurists in the past reshaped the law in the face of executive justice, adapting legal developments to fit into a coherent system of law, Pound was confident that his generation would achieve the same: "If … we meet the movement away from law by a modernizing of the legal and judicial machinery … we may be confident that now, as in Tudor and Stuart England, the law will prevail."[91] In short, Pound's solution to the problems of judicial justice was *reform*, not *rejection* of common law and judicial resolution. He sought to update the administration of justice by the courts to *preserve*, not to get rid of, common law. John Fabian Witt therefore errs when he claims that Pound believed "American constitutionalism had wrongly favored common law institutions where more efficient administrative management was required."[92] Witt argues that Pound intended to throw out the common law rather than reform it. On the contrary, Pound's hope was that American legal education could be improved to aid the process of integrating administrative power into traditional common law institutions.[93] Pound declared emphatically in 1905 that "the remedy" for the rise of administrative agencies "is in our law schools," and he attempted to implement that remedy as dean at Harvard Law School.[94]

Pound's concern about executive justice and his advocacy of a return to judicial justice reflect a different conception of the administrative state, one that was prevalent but not predominant in the progressive legal academy. Pound's conception was based on the German concept of the *Rechtstaat*, which denoted a government bound by fixed rules.[95] Both the *Rechtstaat* and the New Deal conception of the administrative state were consistent with progressive ideals; but whereas Pound was optimistic that the rule of law could be preserved in 1908, he saw that his conception of the administrative state was in decline by the 1930s.

[90]Ibid., 146.

[91]Pound, *Organization of Courts*, 7.

[92]Witt, *Patriots and Cosmopolitans*, 223.

[93]See Robert B. Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (1983; repr., Union, NJ: Lawbook Exchange, 2001), 131–71; William C. Chase, *The American Law School and the Rise of Administrative Government* (Madison: University of Wisconsin Press, 1982), 106–35.

[94]Roscoe Pound, "Do We Need a Philosophy of Law?," *Columbia Law Review* 5 (1905): 352.

[95]This conception of the administrative state was shared by Ernst Freund, another influential progressive legal theorist, as Daniel R. Ernst has insightfully explained. See Ernst, "Ernst Freund, Felix Frankfurter, and the American *Rechtstaat*: A Transatlantic Shipwreck," *Studies in American Political Development* 23 (2009): 171–88. On Freund, see also Chase, *The American Law School and the Rise of Administrative Government*.

Pound's ABA Report of 1938

Pound was the author of the American Bar Association's "Report of the Special Committee on Administrative Law" in 1938, and chair of the committee of the same name. The tone of the report surprised many of Pound's colleagues in the legal community.[96] On the whole, however, they should not have been surprised, for the language Pound used in the report was nearly identical to that of his earlier academic work. Only those colleagues who had ignored Pound's warnings over the past 20 years about the "recrudescence of administrative justice" could have been surprised at his warnings in the ABA report.

In part 3, the main section of the report, Pound argued that it is up to the bar to check the rise of administrative justice that is reaching its pinnacle in the New Deal: "the attitude of courts and of the profession toward administrative agencies and tribunals and the balance between the judicial and the administrative are of fundamental importance in the expanding administrative jurisdiction of today."[97] He focused his audience on the clear issue of the day—the expanding nature of administrative jurisdiction and its encroachment on judicial power, which was upsetting the tense balance between the two. He stated that "administrative bureaus and agencies are constantly pressing upon legislatures for increased jurisdiction, and for exemption from [judicial] review, and in the nature of the case encroach continually on the domain of judicial justice."[98] Thus there was a direct confrontation between administrative agencies and justice through the judicial system, and "except as the bar takes upon itself to act, there is nothing to check the tendency of administrative bureaus to extend the scope of their operations indefinitely even to the extent of supplanting our traditional judicial regime by an administrative regime."[99] In basic terms, "the pressure for administrative absolutism goes on and the profession must be vigilant to resist it."[100] Pound thus opened the main body of the report by saying that nothing short of regime change

[96]Two prominent legal scholars responded in print to Pound's report, both expressing shock at its tone. See Kenneth Culp Davis, "Dean Pound and Administrative Law," *Columbia Law Review* 42 (January 1942): 89–103. Davis wrote that Pound's "sweeping strictures on administrative agencies have been widely influential" (89). See also Louis Jaffe, review of Roscoe Pound, *Administrative Law: Its Growth, Procedure, and Significance* (Pittsburgh: University of Pittsburgh Press, 1942), in *Columbia Law Review* 42 (November 1942): 1382–85. Jaffe opened his review of Pound's book by noting that "the depth of controversy is attested by the violence and the distortion which it generates. … Not the least offender, both by reason of intellectual eminence and the extent of his transgression, is Dean Pound" (1382).

[97]Pound, "Report of the Special Committee on Administrative Law," 338–39.

[98]Ibid., 339.

[99]Ibid.

[100]Ibid., 346.

was occurring in the New Deal. A judicial regime was being supplanted by an administrative regime, and the bar was the last remaining line of defense.

But how should the bar go about defending the traditional judicial regime? What should be its objective? Pound answered that "the profession must insist upon … such an adjustment of administrative jurisdiction and practices and determinations to the general law, and of the doctrines of the general law to the exigencies of effective administration, as will preserve the guaranteed rights of individuals and yet permit of effective securing of public and social interests."[101] The relationship, in other words, must be reciprocal. Not only must the law adjust to the exigencies of administration, but administrative jurisdiction and practices must adjust to the general law. Administration must bend to the dictates of law, but law must adapt to the need for legislation that secures the social interest of the community. A general law, outside of administration, must be developed to constrain the exercise of administrative power.

Pound therefore departed from the proposed definition of administrative law: "It is urged that 'law is whatever is done officially.' Hence administrative law would be the actual course of the administrative process, whatever it is."[102] This positivistic definition of administrative law, as whatever rules and actions agencies produce, is at odds with the true definition of law, "the body of authoritative grounds of and guides to decision."[103] This, the proper understanding of law, means that administrative power must be governed by authoritative grounds and guides that are not defined by administrative agencies but developed by courts. The grounds and guides would not, in Pound's view, be derived from natural law, of course, but from sociological or philosophic jurisprudence.

The problem, however, is that "administrative absolutism" is on the rise, and poses a threat to our tradition of the rule of law. With the creation of administrative agencies, and the argument that scientific expertise and efficiency should be the objectives of our institutions, judicial checks on government action are being eroded. The kind of balance that the bar ought to preserve is undermined by administrative absolutism. Pound wrote that "the idea of checks and balances is inseparable from a well ordered society in the English-speaking world. It is a mistake to think it an obsolete idea of the seventeenth and eighteenth centuries." Yet "administrative absolutism, very much urged at present, rejects this idea of balance."[104] In the American tradition, he repeated, "administration is under and a part of the legal order." It is checked by the legal order. In a striking passage, Pound claimed that the administrative absolutism is like "the proposition recently

[101]Ibid., 342.
[102]Ibid., 339.
[103]Ibid., 340.
[104]Ibid., 342.

maintained by the jurists of Soviet Russia that in the socialist state there is no law but only one rule of law, that there are no laws—only administrative ordinances and orders."[105] In turning to administrative absolutism, Pound concluded, the New Deal was taking America in the direction of Russia.

In an argument that would sound familiar to any reader of Pound's earlier work, he noted that "the reasons" for the rise of administrative absolutism "are historical, growing out of a bad adjustment between courts and administration which was a legacy from the contests between common law courts and the crown in seventeenth-century England."[106] Pound thus repeated his oft-stated argument that the rise of bureaucracy in America was like the contest between the common law courts and the crown in England. He also repeated his argument that "in the nineteenth century we had carried to the extreme a system of judicial interference with administration. Something very much like a paralysis of administration by judicial order" was taking place during that time.[107] Therefore, Pound argued in the report, the causes of our current crisis of administrative absolutism point the way to the solution. What is needed, Pound explained, is "to achieve a better adjustment between administration and judicially enforced law."[108] This can be achieved by reforming the judiciary away from the evils that produced judicial interference with administration and the turn to administrative justice.

As is fairly clear by now, nothing in these remarks is inconsistent with the warnings Pound gave as early as 1907 about the rise of executive justice and the need for courts and lawyers to respond appropriately. All of the same elements are present in the Pound of 1907 and the Pound of 1938: the argument and warning about executive justice, the argument that the courts are responsible for the rise of administrative justice because of their outdated jurisprudence, and the faith that the best response is to update the administration of justice. The ABA report, therefore, does not reflect an "about-face" so much as a logical development of ideas Pound had held for decades. Thus it was *because of*, not in spite of, Pound's progressivism that he objected so strenuously to the New Deal. The crucial thing to note, therefore, is that the Pound of 1938 is entirely consistent with the Pound of 1907.[109]

[105]Pound, "Report of the Special Committee on Administrative Law," 343.
[106]Ibid., 352.
[107]Ibid., 353.
[108]Ibid.
[109]Those who maintain that Pound was an inconsistent figure are correct in a certain sense; but they misplace when his break with progressivism occurred. By 1949 Pound appears to have developed much greater suspicion of progressivism than at any other point in his life. See, in particular, Pound's "The Rise of the Service State and Its Consequences," reprinted in *The Welfare State and the National Welfare*, ed. Sheldon Glueck (Cambridge, MA: Addison-Wesley, 1952), 211–34. The later Pound was still concerned about the perils of the administrative process, but he combined his critique

In both cases, Pound's objection to the administrative state was not that it was vested with too wide a scope of authority, but rather how that authority was to be exercised in practice.

Establishing Pound's consistent progressivism provokes the far more interesting question: if the Pound of 1907 and the Pound of 1938 are consistent, how did a consistent progressive reconcile his progressive philosophy with his opposition to bureaucratic justice? The answer lies in Pound's alternative administrative state.

Part III: Pound's Alternative: Progressivism without the Administrative State?

Roscoe Pound's alternative to the administrative state would achieve the aims of progressivism in theory but would not resemble the administrative state with its bureaucratic, executive justice. In other words, Pound's alternative to the New Deal was not the Administrative Procedure Act of 1946 (APA), contrary to the claims of some legal historians. Rather, it was far more radical, involving several elements, including a reorganization and specialization of the judiciary, the adoption of a sociological jurisprudence, and a separation of the administrative and judicial functions.

The Administrative Procedure Act: Pound's Alternative?

To get a sense of what Pound's alternative administrative state would look like, we should first contrast it with the APA. Scholars have argued that the APA was an outgrowth of Pound's work, and that he thus carries some responsibility for the creation of the APA.[110] This conclusion renders Pound relevant for understanding the development of the administrative state in the 1940s, but it overlooks what was truly radical and innovative in Pound's thinking. Pound acquiesced in the creation and perpetuation of administrative agencies in 1938 as a second-best alternative, but the earlier Pound was dedicated to building a theory of an "alternative administrative state."

of administrative absolutism with a critique of the expansive scope of government in his later writings. By 1949, but not by 1938, Pound was becoming more critical of the administrative state on grounds that were foreign to progressivism. His later work involved a reintroduction of the idea of limits on government authority and a critique of the new idea of rights combined with a defense of the Founders' concept of rights.

[110]In particular, this is the thesis of G. Edward White, *The Constitution and the New Deal*, 116–27.

Pound's ABA report does call for many of the policies that were central to the APA. Most broadly, Pound did not accept the faith in administrative expertise that characterized so many of his Progressive allies and was particularly prominent in the writings of Progressives such as Frank Goodnow and James Landis. In the ABA report Pound argued that independent regulatory agencies were likely to be politicized rather than impartial. "The postulate of a scientific body of experts pursuing objective scientific inquiries," Pound wrote, "is as far as possible from what the facts are or are likely to be in a polity where the administrative bodies are not protected in tenure by the Constitution as are the courts, and … are subjected to centralized executive control."[111] Courts with lifetime tenure, in Pound's view, would be *more* independent and insulated from political pressures than regulatory agencies controlled by the president.

Furthermore, Pound disputed the widely held notion that agencies would be superior policymaking organizations owing to their expertise. "In many fields of administration there is no particular expertness," he claimed.[112] The assumption that all administration must be undertaken by experts overlooks the fact that much (or even most) of administration is handled perfectly well by inexpert judges who nevertheless impose the rule of law on otherwise arbitrary government activity. In the end, Pound thought it impossible to have a purely expert model of regulation and administration: "the professed ideal of an independent commission of experts above politics and reaching scientific results by scientific means, has no correspondence with reality."[113] Controlled by the executive and subject to political pressure, the only means of protecting the people from a politicized administration is "the check of legal limitations enforced by an independent tribunal."[114]

More specifically, in the ABA report Pound advanced three general proposals reflected in the APA: arguments for rulemaking, for public notice of rulemaking, and for judicial review of administrative action. In the proposed legislation accompanying the report, Pound explained that the bill called for "the issuance and publication of rules and regulations implementing the statutes administered by governmental agencies."[115] This stood in sharp contrast to the accepted administrative practice of the time, which was to make policy through ad hoc adjudications rather than through general rulemaking.[116] If agencies would issue rules and regulations rather than using ad

[111]Pound, "Report of the Special Committee on Administrative Law," 344.
[112]Ibid., 345.
[113]Ibid., 359.
[114]Ibid.
[115]Ibid., 334.
[116]As many legal scholars have noted, the typical agency practice up to the 1960s was to treat every case as unique, and use specific adjudication to deal with each particular case. During the 1960s, a "flight to rulemaking" took place where agencies began to use rules to achieve policy goals. See, for instance, Antonin Scalia,

hoc adjudications, Pound reasoned, agencies would have to follow generalized rules, a key component of the rule of law.

These rules, furthermore, would be accompanied by notice to interested and affected parties, allowing the public to know the rules in advance and to check agency abuse. "As to the objection that adequate argument is not assured," Pound wrote, "it ought to be possible to provide for notice of the application to the public authorities interested and to interested individuals."[117] If agencies proceed by making general rules, with comment to the public, rather than through ad hoc determinations, and their actions are checked by judicial review,[118] the victory of administrative absolutism may be checked. In general, then, the practical recommendations of the Pound report focused primarily on procedural checks on agencies enforced by the courts, which is also very much in line with what eventually emerged in the APA.

It is thus understandable that many scholars assess Pound's influence on the development of the administrative state purely in terms of the APA and the development of judicial review of agency action. Seen through this lens, Pound won out over the position in favor of unbridled administrative discretion held by other Progressives such as Landis and Goodnow. However, despite these similarities between the Pound report and the APA, there is good reason to believe that Pound thought these proposals did not go far enough. Rather, he was willing to countenance administrative justice because he did not think it was feasible to eliminate it. In a revealing passage in the ABA report, Pound "recognized that administration will inevitably play a large and very likely for some time to come increasing role in American government."[119] Pound wrote this, of course, immediately after the Supreme Court's famous decisions striking at the core of the New Deal, and FDR's subsequent response.

The thesis that Pound was not satisfied with the APA is demonstrated by Pound's writings after its passage. In an essay published in 1953, Pound noted that "the attitude of the courts toward quasi-judicial functions of administrative agencies has been changing in England and has definitely changed in America" seven years after passage of the APA. However, he concluded, the "danger of legitimating administrative absolutism" remains because the APA signals "a relaxation" but not "an abandonment of judicial

"*Vermont Yankee*: The APA, the D.C. Circuit, and the Supreme Court," *Supreme Court Review*, no. 1978 (1978): 376.

[117]Pound, "Report of the Special Committee on Administrative Law," 336.

[118]"Judicial review in England and in the United States has had a marked effect in compelling the development of a technique of determination consonant with due process of law… commissions can be held to this balance only by legal checks judicially enforced" (ibid., 351).

[119]Ibid., 342.

scrutiny."[120] In other words, the APA's "relaxation" of judicial oversight is preferable to complete "abandonment of judicial scrutiny," but this does not mean that Pound thought the danger of administrative absolutism had subsided. The APA was preferable to nothing, as it retained some semblance of judicial scrutiny of administrative action, but this was not the solution to administrative absolutism Pound had in mind.

The problem was that, even in 1953, well after the passage of the APA, Pound believed that the administrative state was irreconcilable with the core elements of Anglo-American law. He argued that while it is "doubtful whether we could at this late state of our legal development succeed in setting up a division of jurisdiction between the ordinary and the administrative courts," we might still check the "privileges of the existence and extent to which an administrative agency is the judge run counter to the whole course of development of Anglo-American law."[121] Pound was not suggesting something like the APA, which ensured that courts would be able to review acts of administrative agencies. Rather, even years after the passage of the APA, Pound argued that administrative agencies *cannot* perform the judicial function in any system of Anglo-American law. The APA did nothing to remedy this more fundamental problem.

Why was the APA, with its preservation of judicial review of administrative action, insufficient? Pound's response was that, although "there is an element of discretion in the judicial process and a function of adjudication in the administrative process," "the two processes are characteristically distinct. The one deals with each case as one of a type and seeks to determine it by a rule for cases of that type," while the other "tends to treat cases as unique and make *ad hoc* determinations."[122] Although agencies might perform a quasi-judicial function, they are established to decide cases based on procedures and principles that are fundamentally different from those of courts.[123] Preserving the administrative process, with the possibility for review by courts, does not resolve the issue. Decisions are still made in the first instance by the administrative process in which every case is dealt with on an ad hoc basis.

Therefore, because the administrative and judicial processes are irreconcilable, simply to transfer the judicial process to administrative agencies under

[120]Pound, "The Rule of Law and the Modern Social Welfare State," *Vanderbilt Law Review* 7 (1953): 5.

[121]Ibid., 12.

[122]Ibid., 30.

[123]The distinction is given clear expression by Robert S. Lorch, *Democratic Process and Administrative Law* (Detroit: Wayne State University Press, 1980), 26–34. Lorch argues that administrative agencies decide cases with a forward-looking approach rather than one based on precedent; can initiate action and seek out cases unlike a court; and are designed to decide cases with a view to the public interest rather than the justice of the particular parties in any given case.

the superintendence of the courts will not solve the dilemma. As Martin Shapiro has written, "The Administrative Procedure Act (APA) of 1946 is … the formal creation for the United States of administrative law in the European sense. For that act acknowledges that we have administrative courts presided over by a separate set of judges (then called hearing officers, now administrative law judges), using a distinct set of procedures to try cases under laws that subordinate private to public interests."[124] In other words, the APA *entrenched*, rather than overturned, the creation of an alternative process that allowed for the adjudication of particular cases, according to very different rules and principles. The power to decide these particular cases was traditionally held by the courts in American law. Thus the APA did not reverse, in Pound's view, the trend away from judicial justice (justice according to law) to executive justice (justice without law).

The yet-unsolved problem, in Pound's view, was "how a kind of administrative justice can be developed within the Anglo-American legal system."[125] The APA had not devised an adequate solution to this question. But Pound had been proposing an alternative to the administrative state for some time. The alternative was a consistent theme of his earlier declamations against executive justice even in 1907. Thus, while he would accept the APA as better than nothing, Pound did not think it was an ideal solution. Sixty years later many legal scholars would agree with Pound.[126] An examination of Pound's alternative reveals something far different than the APA.

The Reorganization of Courts

A precondition of any attempt to construct the alternative administrative state, in Pound's view, was complete reform of the judicial branch. To deal with modern circumstances, modern courts would have to be developed. Pound thought that much of the reform would be organizational. In a paper written in 1909 that was incorporated into an earlier ABA report on preventing delay and cost in litigation, Pound argued that "the whole judicial power of the state … should be vested in one great court, of which all tribunals should be branches, departments or divisions. The business as well as the judicial administration of this court should be thoroughly organized so as to prevent not merely waste of judicial power, but all needless clerical work,

[124]Martin Shapiro, "On Predicting the Future of Administrative Law," *Regulation* 6, no. 3 (1982): 20.

[125]Pound, "The Rule of Law and the Modern Social Welfare State," 18.

[126]See, e.g., Theodore Lowi, *The End of Liberalism* (New York: W. W. Norton, 1969); *The Personal President: Power Invested, Promise Unfulfilled* (Ithaca, NY: Cornell University Press, 1985).

duplication of papers and records, and the like, thus obviating expense to litigants and cost to the public."[127]

The focus would be threefold: on organization of personnel, that of judicial business, and that of administrative business. In a consolidated judicial system, we could have "specialized judges rather than specialized courts."[128] The organization of judicial business would remedy a similar problem, by preventing judges from hearing myriad cases involving myriad subjects simultaneously. Administrative organization would allow courts to have control of clerical officers, rather than choosing such personnel through election as was typical in Pound's day. If all of these changes would be implemented, "the court becomes not merely a machine for deciding cases formally presented, but a bureau of justice."[129] This bureau of justice would be the means by which the bench and bar would finally be updated to deal adequately with modern circumstances. Expert judges would be available for the resolution of particular cases, in accordance with traditional judicial processes but with a foundation in sociological jurisprudence. Progressive goals would be realized through this bureau of justice rather than the decisions of administrative experts.

The key point here is that Pound's proposals, as of the 1900s and 1910s, were not to increase judicial review of administrative agencies, but to reorganize the judicial branch to *replace* administrative agencies as we know them today. Pound argued that his proposals to reorganize the judicial branch "would enable the judicial department to do adequately the work which, in desperation of efficient legal disposition, we have been committing more and more to administrative boards and commissions, which are contrary to the genius of our institutions and often, at best, are mere experiments."[130] Administrative agencies would still exist, of course, but the administrative process would be replaced by an updated judicial process.

The Separation of Administrative and Judicial Functions

Given the aforementioned criticism of the administrative process in the ABA report, and Pound's proposals for the reorganization of the judicial branch, assessing Pound's influence wholly in light of the APA misses Pound's *true* genius. Pound's solution was to recommend not greater judicial review of administrative agencies, but a restoration of the tradition of courts as administrators by updating the judicial branch to meet the demands of modern government.

[127]Quoted in Pound, *Organization of Courts*, 15.
[128]Ibid.
[129]Ibid., 20.
[130]Ibid., 21–22.

The ultimate question, according to Pound, was whether certain powers were to be conferred on courts or agencies. The answer to this question would determine whether America would continue to be a nation based on the rule of law, or whether administrative absolutism would win the day. The APA vested substantial adjudicative powers in administrative agencies, and gave courts the power to review administrative action. Thus the APA's answer to the question was to vest judicial power in agencies, under judicial supervision.

An alternative answer to this question is to vest the power of adjudication in the courts themselves. This was Pound's answer. In his writings in the 1950s, after the passage of the APA, Pound's dissatisfaction with the APA is evident. Pound noted in 1953 that in Continental Europe, "whether the civil or the administrative courts have jurisdiction depends on whether the state or public authority has acted in its public or in a private function." By contrast, in Anglo-American law there is no theory of the unlimited state. Thus, "with us the question would arise whether this was to be an executive or administrative, or legislative, or a judicial tribunal." Further, "it would have to be a strong and independent tribunal in order to uphold the guarantees of our American bills of rights."[131] In other words, the key question is whether the exercise of public authority is by an administrative or a judicial tribunal. Central to Anglo-American practice is that such determinations are made by an independent tribunal, one which employs a process that will protect individual rights. The administrative tribunal does not provide these protections. "Are we prepared to relegate American bills of rights to administrative discretion?" Pound asked.[132] Opting for the administrative tribunal rather than the judicial tribunal turns the American legal system on its head.

Thus, Pound was not satisfied by stronger judicial review of administrative agencies, such as was provided for in the APA. The ultimate problem was the erosion of the judicial power and the replacement of judicial authority with administrative justice. Any attempt at solution would be illusory unless it sought to preserve judicial justice, or justice according to law. In a 1951 book titled *Justice According to Law* Pound continued to condemn "high-handed and one-sided administrative action," which the APA was insufficient to prevent.[133]

[131]Pound, "The Rule of Law and the Modern Social Welfare State," 21.

[132]Ibid.

[133]Pound, *Justice According to Law* (New Haven: Yale University Press, 1951), 83. In his later book, *Jurisprudence*, published in 1959, Pound continued to rail against the rise of unchecked administrative power in America, but did not mention the Administrative Procedure Act. Hull explains this fact as an oversight. See Hull, *Roscoe Pound and Karl Llewellyn*, 328. This is possible, but it is also possible that Pound simply believed the APA did not alleviate the fundamental problem.

The key reason that the APA was insufficient to prevent one-sided administrative action was that it was premised on the permanent transfer of judicial power to administrative agencies. Pound was emphatic that the power of adjudication was essentially a judicial power. In 1958 he wrote that judicial inability to apply the law in a flexible manner "in the nineteenth century has contributed to a multiplication of administrative agencies and tribunals and a transfer to them of matters formerly of judicial cognizance."[134] The transfer of judicial power to agencies, Pound believed in 1958, would inevitably lead to discretionary justice or justice without law. The solution must be to restore the judicial power to courts, and accept that judges will have some flexibility to apply the law in a creative, philosophic or sociological manner. Pound argued that "there are many situations … where the course of judicial action is left to be determined wholly by the judge's individual sense of what is right and just."[135] While there are "obvious" objections to this way of thinking about judicial power, there is inevitably "a point beyond which rule and mechanical application are impotent. The tendency today is to extend rather than to restrict its scope. We must find how to make it tolerable."[136] The way to make discretion in applying rules to particular cases tolerable, Pound concluded, was to ensure that this discretion was exercised judicially rather than administratively: "the history of Anglo-American equity shows this may be [made tolerable] by developing through experience principles of exercise of discretion and recognizing that because there is no rule in the strict sense it does not follow that a tribunal must have unlimited power of doing what it chooses."[137] In other words, Pound's suggestion was that courts, once reorganized, could exercise discretion through something like the common law equity power to achieve the same results as administrative agencies, but without the absolutism and combination of functions characteristic of the administrative state. In England, equity was a power exercised outside of the common law and the courts, but it was eventually incorporated into the judicial system. Pound believed that the same process could occur with the powers of administrative agencies.

Pound ultimately accepted the inevitability of the existence of administrative agencies. As he emphatically admitted, "administrative agencies of promoting the general welfare have come to be a necessity and have come to stay."[138] However, the inevitability of administrative agencies did not require the demise of the rule of law administered by courts. It is not worthwhile to question "state performance of many services which it can perform

[134]Pound, *The Ideal Element in Law*, 86.
[135]Ibid.
[136]Ibid., 86–87.
[137]Ibid., 87.
[138]Ibid., 357.

without upsetting the American legal-political order."[139] Some public services can be performed by the government, even by administrative agencies, "without substituting administrative discipline for legal liability *made effective by legal proceedings in the courts*."[140] In other words, administrative agencies themselves were not the problem, in Pound's view. Rather, the problem was the substitution of administrative justice for legal proceedings in courts. Transferring judicial power back into the judicial system and out of the hands of administrative agencies would not do away with administrative agencies, or progressive policy aims, but it would preserve the rule of law. Thus, in the words of one legal scholar, an alternative to the administrative state "would be for it to follow the pattern of the executive tribunals of three centuries ago. The justice dispensed by the great federal agencies must become truly judicialized and administered by bodies possessing solely judicial authority. Such bodies will, in time, follow the example of Chancery and develop into courts."[141] The precedents and determinations made by administrative agencies could be developed into a set of legal doctrines applied by courts in a common law fashion.

It is thus clear from examining Pound's writings, both before and after the passage of the APA, that his vision for reforming the administrative state was not identical to the solution devised by the APA. In fact, in Pound's view the passage of the APA may have been worse than the disease. For rather than putting authority back into the hands of the courts, that act essentially created (or, more precisely, perpetuated) a competition between courts and agencies for the authority that was vested in the administrative state. This is why Pound's criticism of administrative absolutism was just as scathing after the passage of the APA as it was before.

Conclusion

Roscoe Pound's historical reputation has suffered, unjustifiably, as a result of his unwillingness to embrace the New Deal's conception of the administrative state. As a result, our understanding of Progressivism's legal theory is skewed. Progressivism was not a monolithic movement, and not all Progressives believed that the way to implement the new theory of the state was to create the modern administrative state that we have today. This insight is important for today's progressives grappling with the task of preserving an active central government without accepting the pitfalls of centralized administration.

[139]Ibid.

[140]Ibid., 358 (emphasis added).

[141]Bernard Schwartz, "The Administrative Agency in Historical Perspective," *Indiana Law Journal* 36, no. 3 (1961): 278.

The struggle over the legitimacy of and control over the administrative state is one of the most important stories in American politics over the last 100 years. The rise of bureaucracy and the question of its place in the American constitutional order has provoked numerous academic and political controversies. The administrative state suffers from a century-long crisis of legitimacy, and this crisis shows no sign of abatement.[142]

Unfortunately, one of the most creative thinkers about the administrative state has largely been neglected owing to an ongoing myth of his conversion from progressive legal mind to conservative reactionary. Contrary to prevailing accounts, Roscoe Pound was a consistent thinker and he has much to contribute to America's ongoing debate about the legitimacy of the administrative state. He presents the instructive example of an anti-New Deal Progressive thinker who was consistent in his thinking. Pound's alternative administrative state would preserve the ends of a more positive and active central government, in accordance with progressive theory. However, by transferring judicial power back into courts and out of administrative agencies, Pound's alternative would seek the achievement of progressive ends through a government structure in greater accordance with the separation of powers and the rule of law. By rediscovering Roscoe Pound's consistent thought, the groundwork can perhaps be laid for a serious consideration of the alternatives to administrative justice.

[142]The ongoing cycle of crisis and legitimacy is the central starting point for Freedman, *Crisis and Legitimacy.*