



2009

Ernst Freund, Felix Frankfurter and the American Rechtsstaat: A Transatlantic Shipwreck, 1894-1932


Daniel R. Ernst

Georgetown University Law Center, ernst@law.georgetown.edu

This paper can be downloaded free of charge from:
<https://scholarship.law.georgetown.edu/facpub/18>

"Ernst Freund, Felix Frankfurter and the American Rechtsstaat: A Transatlantic Shipwreck, 1894-1932." *Studies in American Political Development* 23 (October 2009): 171-88.

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.
Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>

 Part of the [Administrative Law Commons](#), and the [Banking and Finance Law Commons](#)

GEORGETOWN LAW

Faculty Publications



October 2009

Ernst Freund, Felix Frankfurter and the American Rechtsstaat: A Transatlantic Shipwreck, 1894-1932

23 Stud. Am. Pol. Dev. 171-88 (2009)

Daniel R. Ernst

Professor of Law

Georgetown University Law Center

ernst@law.georgetown.edu

This paper can be downloaded without charge from:
Scholarly Commons: <http://scholarship.law.georgetown.edu/facpub/18/>

Posted with permission of the author

As the Emergency Economic Stabilization Act made its way through Congress in the fall of 2008, one repeatedly voiced complaint was the enormous, judicially unreviewable discretion it vested in Treasury Secretary Henry Paulson as he acquired up to \$700 billion of assets and securities on the government's behalf. "We're essentially creating a King Henry here who is going to be able to buy any type of financial instrument he wants from any financial institution anywhere in the world," complained Congressman John Culberson, a Republican from Texas. His Democratic colleague from Virginia, Robert Scott, objected that Congress "should not give unlimited discretion to buy assets at prices obviously higher than fair value to an administration frequently accused of cronyism and favoritism."¹ Yet when two conservative groups denounced the newly enacted law for violating a constitutional ban on the delegation of legislative power, prominent law professors simply shrugged. The bailout "certainly tests the outer limits of Congressional delegation authority," Laurence H. Tribe allowed, but the law was hardly unprecedented. Many other vague delegations had survived judicial review.²

Professor Tribe had a great deal of history on his side. From the Interstate Commerce Act of 1887 through the New Deal, legislation creating federal agencies usually endowed officials with broad delegations of power to act in the public interest. By 1951 such delegations were so commonplace that the law professor Kenneth C. Davis could compile a long list, including grants of the power to set "just and reasonable rates," to remove "unreasonable obstructions" to navigation, to end "unfair methods of competition," and to regulate broadcasters in accordance with "public convenience, interest, or necessity."³ For American reformers, "modern government" required discretion for administrators; to insist that administrators proceed in a rule-bound fashion was to call for "a laissez-faire role for government."⁴ When, in 1944, the Austrian

emigre Friedrich A. Hayek warned that only governments bound “by rules fixed and announced beforehand” could deliver their peoples from the “road to serfdom,” even New Dealers who were starting to worry where unbridled discretion might lead could not see how to embrace Hayek’s version of the “Rule of Law” without renouncing the whole of the American reform tradition.⁵

In fact, Hayek was anticipated by one of the principal early theorists of the American administrative state. Ernst Freund’s great treatise, The Police Power (1904), became the American progressive’s counter to any conservative who invoked an older tradition of “constitutional limitations” on American statebuilding.⁶ Like the “transatlantic” reformers Daniel T. Rodgers studied in his magisterial Atlantic Crossings (1998), Freund believed that Europe’s city planning, social insurance, rural cooperatives and other attempts “to limit the social costs of aggressive market capitalism” were presumptively appropriate models for the United States.⁷ He felt the same way about European approaches to implementing those programs. Above all, he expected to see the United States, like other modernizing countries, follow Germany in establishing a Rechtsstaat, that is, a polity in which the legitimate activities of the state and the “the sphere of freedom” of the citizenry were “exactly define[d] and inviolably secure[d].”⁸ Despite Freund’s best efforts, however, the Rechtsstaat was one European import that never established itself on American shores.

The shipwrecking of the Rechtsstaat may be observed in a quarrel between Freund and another leading scholar of administrative law in the United States in the early twentieth century, Felix Frankfurter. The two had a great deal in common. Both had lived in Europe before taking up residence in the United States. Freund was born in the United States to German parents in 1864, educated in Germany, and emigrated in 1884, settling in New York City.⁹ Frankfurter was

born in Austria eighteen years after Freund and emigrated with his family to New York's lower east side in 1894, the year Freund left the city to join the faculty of the University of Chicago. Both actively participated in the reform movements of the Progressive Era. Jane Addams eulogized Freund as "the finest exponent in all Chicago of the conviction that as our sense of justice widens it must be applied to new areas of human relationships or it will become stifled and corrupt." Frankfurter labored tirelessly on behalf of the National Consumers League and progressive industrial unions, such as Sidney Hillman's Amalgamated Clothing Workers of America. Both protested the deportation of suspected radicals in the Palmer Raids of 1919.¹⁰ Both rejected the widely held dogma, most authoritatively pronounced by A. V. Dicey, that equated the Rule of Law with the freedom to challenge any administrators' deprivation of a private right in a proceeding conducted in "the ordinary legal manner before the ordinary Courts of the land."¹¹ Each hailed the other as a great scholar of administrative law. Frankfurter dedicated his casebook on the subject to "Ernst Freund, Pioneer in Scholarship." Freund repaid the compliment in his review of the book by placing Frankfurter "at the forefront of the field of administrative law in this country."¹²

For all that, the two disagreed fundamentally about administrative law. Their disagreement took definite shape in the years 1921 and 1932 as the two shared responsibility for the leading foundation-supported research program in their field, the Commonwealth Fund's Committee on Administrative Law and Practice. As the senior and better published of the two, Freund prepared a comprehensive agenda and expected Frankfurter to recruit lawyers from among the recent graduates of his administrative law seminar to carry it out. Frankfurter had his own ideas, however; ultimately, each man directed his own phase of the program as he saw fit.

Freund conducted a “statutory survey” of administration in the federal government, New York, and Germany; Frankfurter oversaw a series of “intensive studies” of individual agencies. The culmination of Freund’s survey was the virtually unreadable Administrative Power over Persons and Property (1928). Although the summa of more than three decades of Freund’s teaching and writing, the book’s influence was negligible, especially on the younger generation of legal academics who dominated the field after World War II. The monographs of Frankfurter’s students cast a much longer shadow. As a work of scholarship, the most impressive was I. L. Sharfman’s massive investigation of the Interstate Commerce Commission, published in the 1930s, but an earlier study of the Federal Trade Commission by Gerard C. Henderson influenced more American lawyers. Decades after its publication in 1924, law students still learned its object lessons about how administration could go wrong and what lawyers could do about it from a lengthy extract in Henry Hart and Albert Sack’s Legal Process.¹³

No single factor explains why Freund lost and Frankfurter won. Freund’s taxonomic approach to legal scholarship obscured his meaning and limited his readership. Henderson’s vivisection of a faltering federal agency was much more engaging reading. Personal temperament and institutional location also mattered. Freund’s charm could engender great affection in his students, but, as he acknowledged, he lacked Frankfurter’s capacity to inspire and cultivate disciples. He occupied a somewhat marginal place at the University of Chicago’s law school after a curriculum he proposed was rejected in 1904. Frankfurter, in contrast, regularly culled the best students from Harvard’s large LL.B. classes and its smaller pool of graduate law students.¹⁴

More important than any of these factors was a difference of opinion on the merits of

administrative discretion. Freund hoped to bring the Rechtsstaat to America. Nineteenth-century German liberals had developed the concept to constrain the discretion of revanchist, aristocratic bureaucrats, but Freund found it no less serviceable in an American polity dominated by political machines. For Freund, administrative discretion was an evil, tolerable only until experience under open-ended standards suggested the content of a certain rule. Frankfurter's outlook was quite different. He had been a government lawyer in the presidential administrations of Theodore Roosevelt and William Howard Taft, when the need for trained administrators was, as he put it, "becoming a more accepted commonplace of statecraft."¹⁵ He thought that the governance of the modern societies required more subtle adjustments of social interests than any rule could anticipate. If Freund thought the first job of administrative law was the constraint of administrative discretion, Frankfurter thought it was the freeing of administrators from the oversight of common-law courts. From his vantage point, Freund's Rechtsstaat left too little to the professional judgment of administrators.

1

The Commonwealth Fund was founded in October 1918 by the widow of Stephen V. Harkness, John D. Rockefeller's silent partner, with an endowment of \$10 million. Its president was Edward Harkness, Stephen's only surviving son; the other members of the Board of Directors were Edward's law partner and fellow Yale man, Samuel H. Fisher; the president of a trust company, who served as treasurer; and George Welwood Murray, John D. Rockefeller's favorite lawyer and a member of the New York City law firm Milbank, Tweed.¹⁶ In 1919 Max Farrand, a

5

historian at Yale University, became General Director. He oversaw the Fund's portfolio of scholarly research, including the administrative law project, until his departure in 1927 to run the Huntington Library.¹⁷

The Commonwealth Fund's first grants supported research on child welfare, public health, and medicine, but in 1920 the Board of Directors authorized the annual expenditure of up to \$50,000 on legal research and organized a committee to oversee the program. At its first meeting the Legal Research Committee approved Farrand's proposal for a study of administrative agencies. These had multiplied in the preceding two decades. Even before the war, a moribund Interstate Commerce Commission had been revived and new agencies, such as Food and Drug Administration and the Federal Trade Commission, created. Growth on the state level was even more dramatic, in the guise of public utility commissions, workers' compensation schemes, and tax equalization boards. The United States' entry into the Great War brought the nationalization of the railroads and merchant marine, a burgeoning of the Bureau of Internal Revenue, and the creation of agencies of war insurance and finance.¹⁸ By 1920, even Charles Evans Hughes, who had fought for a public utilities commission while governor of New York, wondered "in view of the precedents now established whether constitutional government as heretofore maintained in this republic could survive another great war even victoriously waged."¹⁹

In what one historian has termed the "unusual political turmoil, economic disruption and social disorder" following the Armistice, many reformers came forward with proposals to build upon, rather than dismantle, the wartime state. Some found their way to the Board of Directors of the Commonwealth Fund; in early 1919 Samuel Fisher wrote to Farrand of "the many people in town," all "talking reconstruction."²⁰ Perhaps at the suggestion of Murray, an alumnus and

booster of Columbia's law school, Farrand consulted its dean, Harlan Fiske Stone, for possible topics for legal research. With two experts on his faculty--Thomas Reed Powell and Thomas Parkinson--Stone suggested administrative law.²¹ Farrand may also have consulted Roscoe Pound, who had recently written on the place of administration in a polity dominated by common-law courts.²²

In any event, Stone's and Pound's ideas prominently appeared in the proposal for a Legal Research Committee that Farrand submitted to the Board of Directors in June 1920. In 1916 Stone had warned that "the entire legal system is in the process of undergoing re-examination in the supposed interest of reform" and argued that university-based scholars ought to take the lead. In 1920 Farrand quoted Stone in arguing to the Commonwealth Fund's directors that professors, rather than practitioners or judges, were the proper people to conduct "scientific" investigations of the law.²³ To convey the urgency of the moment, Farrand employed a theme that Pound had sounded earlier that summer.²⁴ In "the critical period of American legal history" following the Revolutionary War, Farrand explained, the English common law was in danger of being replaced with "all sorts of crude projects." Just in time, however, James Kent, Joseph Story, and other treatise writers did "what no one else could": they stated the common law in a form that judges could easily understand and use in their decisions. In 1920 law teachers had a "somewhat similar" job. Once again, the common law was confusing, uncertain and unpopular. Once again, it lagged behind "rapidly changing economic and industrial conditions." And, once again, "we must rely upon legal scholars, especially in the Law School, to do the constructive work necessary."²⁵

But just what constructive juristic work were the law professors to undertake? A few

years later the American Law Institute would be created to “restate” the various branches of the common law in an attempt to preserve the place of common-law courts in the American polity. The proposal had captured the imagination of the great corporation lawyer Elihu Root, who opened the Carnegie Corporation’s coffers for the project, in the hope that a revived common law could hold its ground against the advances of administrative agencies with their “great and dangerous opportunities for oppression and wrong.” Root believed that “these agencies of regulation must themselves be regulated” and looked to common-law courts to do the job.²⁶ This was the orthodox position within the American legal profession. At least since the publication of Dicey’s Law of the Constitution in 1885, Anglo-American lawyers had viewed the common law not just as one legal system among many but the apotheosis of liberty. With Dicey, they equated the Rule of Law with a guarantee that matters of private right be finally determined by common-law judges sitting in courts with general jurisdiction rather than “specialist judges” in administrative courts.²⁷

From the start, it seems, the Commonwealth Fund took a more cosmopolitan approach. In words borrowed from Stone, Farrand told its Board of Directors that the study of American legal institution ought to be conducted “in comparison with other legal systems.”²⁸ Sometime between July 1920, when the Board voted to create a Legal Research Committee, and July 1921, when that body finally convened and approved “an inquiry into administrative practices affecting private right,” Farrand had settled on Ernst Freund to chair the project and elicited a research agenda from him. Not surprisingly, judicial review of administrative decisions figured in Freund’s plans; he had been teaching that subject since 1904, and his casebook, published in 1911, covered it at length.²⁹ But Freund recognized that law could arise outside the courts. He

proposed that the statutes of Congress and a few state legislatures be studied to “segregate, systematize, and analyze” the provisions that held administrators in check and that “actual administrative practices” be investigated to make clear the informal norms and routines that protected private interests. English legislation and practices were surely relevant, Freund allowed, but so were the experiences of France and Germany—a controversial claim for American lawyers, because it muddied Dicey’s distinction between the Anglo-American Rule of Law and the Continental droit administratif.³⁰

A more parochial oversight committee might have balked, but the Commonwealth Fund’s Legal Research Committee included some of the most thoughtful and wide-ranging jurists of the day. Three law deans signed up: Stone, Pound, and the University of Chicago’s James Parker Hall, who chaired the committee. Benjamin Cardozo of the New York Court of Appeals also served, as did the patrician New York City lawyers C.C. Burlingham and John G. Milburn.³¹ Cardozo, at least, felt that the law deans held “the balance of power.” The Legal Research Committee did insist that the committee overseeing the administrative law project include a practicing lawyer, but the one obtained, Walter Fisher, was himself a leading civic reformer and had worked with Freund in the campaign for a municipal charter for Chicago.³²

The Legal Research Committee approved Freund’s preliminary program for research and even swallowed Farrand’s recommendation that Felix Frankfurter be recruited to the project. For a brief interval it seemed that the Board of Directors might balk at the Harvard law professor, who had acquired a reputation as a dangerous radical by harshly criticizing the trial of the labor organizer Tom Mooney and the mass deportations following the Palmer Raids of 1919-20. George Welwood Murray, for one, had his doubts, “not because [Frankfurter’s] point of view is

apt to differ from mine, but because he seems so ill-balanced in any point of view.” But Farrand was persistent and persuasive: the Commonwealth Fund’s project “would be liable to serious criticism” should it omit so well-known an expert, and other members of the administrative law and legal research committees could be counted on to veto “any radical conclusions” he might advance. Besides, Farrand argued, “it would be safer to have Frankfurter on the committee than it would be to have him criticize it from the outside.” In the end, Murray acquiesced and assured Farrand that he would object only “in a very glaring case.”³³

From July through October 1921 Freund developed his proposal for a project on administrative law and practice while Farrand assembled a committee to execute it. For a time, Thomas Reed Powell seemed a likely recruit. Like Freund, he was a student of the Columbia University political scientist Frank J. Goodnow as well as a lawyer. Powell had inherited his teacher’s courses when Goodnow left to become president of the Johns Hopkins University and had produced mind-numbingly precise articles on the review of administrative decisions by writs of mandamus and certiorari. By 1921, however, he had already reinvented himself as a brilliant and acerbic scholar of constitutional law and no longer regarded administrative law “con-amore.” After a brief dalliance, he bowed out.³⁴ Powell’s colleague Thomas Parkinson did attend an organizational meeting, but Frankfurter, repelled by his “annoying ignorance of the field and corresponding dogmatism, shallowness and bluff,” refused to serve with him, and he was not considered further.³⁵

Although Goodnow would ultimately join Freund, Frankfurter, and Walter Fisher on the letterhead of the Commonwealth Fund’s “Administrative Law and Practices Project,” in fact only Freund and Frankfurter vied for leadership of the enterprise. From late 1921 through the spring

of 1922, their contest would be quite sharp, as Frankfurter refused to sign onto the research agenda that Freund, as the senior scholar, assumed he should set. Once Farrand settled the matter by permitting each professor to direct his own program of research, the conflict was usually dormant, but it flared up at crucial moments, most notably in the summer of 1926, when Freund presented the Commonwealth Fund with a manuscript embodying over thirty years of thought on administrative law.

2

We do not know exactly what Roscoe Pound wrote to provoke Ernst Freund in October 1913, but apparently it included a slighting reference to “administrative law people.” “I can assure you that there are mighty few of us and of a very different type from what you imagine,” Freund protested in reply. “Administrative Law stands not for administrative power but for control of administrative power, and if I favor delegation [of legislative power to administrators] it is only because I believe that control of delegated power is more capable of development than control of legislation.” Evidently when Pound read the words “administrative law,” he focused on the word “administrative” and associated it with unbridled discretion; Freund focused on the word “law” and associated it with the constraint of “arbitrary power.”³⁶

The novelty of the term for Anglo-American lawyers may have contributed to Pound’s mistake. As the law professor Jerry Mashaw has shown, the United States did have administrative law avant la lettre in the guise of the common law of officers. That body of law, however, existed in a different jurisprudential universe, described by Morton Horwitz, Elizabeth

Mensch, and Joseph Singer, in which rights and their correlative duties defined most relations, and the state itself was conceived of one rights bearer among many. In such a universe, the existence of actual loss without a legal remedy--damnum absque injuria--was a troubling anomaly.³⁷

The Progressive Era brought a new way of thinking about societies, economies, and politics. In place of “the autonomous economic man, the autonomous possessor of property rights, the autonomous man of character,” writes the historian Daniel Rodgers, the progressives offered the “consciously contrived,” harmonious society.³⁸ They insisted on seeing individuals as born into and living within going concerns: social classes, ethnic groups, skilled crafts, society as a whole. The new “social” or “sociological” approach had broad implications for law, explored in Pound’s brilliant critiques of the constitutional law of the Supreme Court, the construction of “socialized” juvenile and municipal courts, and the law professor John Welsey Hohfeld’s system of jural relations. In Hohfeld’s system a common-law rule that created an area of damnum absque injuria was no anomaly but a conscious choice of a legal regime, which he called the jural relation of “privilege-no right.”³⁹ Within this realm, which lay between “plain illegality” and plain “liberty,” Freund argued, administrators, acting under the police power, could lawfully restrain private acts that were “legitimate but attended with peril or liable to abuse.”⁴⁰

Administrative law was “the system of legal principles which settle the conflicting claims of executive or administrative authority on the one side, and of individual or private right on the other.”⁴¹

Freund grounded his definition of administrative law in the German ideal of the Rechtsstaat, a state bound by fixed and certain rules that demarcated spheres of legitimate state

action and of individual liberty. “In order to secure with certainty and predictability a sphere in which the citizen could act free from the interference of the state,” writes the historian Kenneth Ledford, “Rechtsstaat doctrine sought to replace both unwritten customary law and arbitrary bureaucratic law with a system of law that was general and autonomous, public and positive, aiming at generality in legislation and uniformity in adjudication”⁴² The ideal was given an institutional dimension in the mid-nineteenth century by Rudolph von Gneist, a Prussian jurist and statesman who taught at the University of Berlin. Turning to English constitutional history for inspiration, he found in the eighteenth-century justice of the peace a model civil servant—a member of the gentry, to be sure, but one “purged of . . . selfish class interests” by his voluntary and uncompensated governance of the locale for the good of the nation.⁴³ From the English case Gneist developed a proposal for an independent administrative judiciary consisting of mixed bodies of administrators and judges drawn from the ordinary law courts. Between 1872 and 1883—that is, while Freund was studying law in Germany--Prussia established administrative courts more or less along the lines Gneist proposed. They soon established their independence from the bureaucracy in a series of notable cases. As Ledford has argued, they “brought into being a meaningful rule of law in Germany,” albeit one of a procedural nature that was vulnerable to “the strongly formalist notions of German positivist legal theory.”⁴⁴

Freund must have heard Gneist lecture while studying at the University of Berlin, but he did not write about administrative law until 1893, after he had taught the subject himself and began studying with the political scientist Frank J. Goodnow at Columbia University.⁴⁵ At that point Gneist loomed large for Freund, because Goodnow had attended Gneist’s lectures and acknowledged a great debt to the master in his Comparative Administrative Law (1893). Soon

Freund was praising Gneist's history of the English constitution, deploring the American doctrine of sovereign immunity for putting officials "beyond the pale of those principles which constitute what the Germans call the Rechtsstaat," and applauding Prussia's administrative courts, which he identified as Gneist's creation and "the most ingenious solution of the problem how to combine bureaucracy and self-government."⁴⁶

For Freund—as for Frenchman Alexis de Tocqueville and the Englishman James Bryce--the most fundamental and distinctive phase of the American state was its dearth of centralized national bureaucracies.⁴⁷ Freund captured the difference between Europe and America in a distinction between "bureaucratic government" and "self-government." Bureaucratic government prevailed in Europe, where the chief executive was "the head of an army of officials who derive their function and duties directly or indirectly from him, whose hierarchical organization culminates in his person, who have received a special training, who serve the state for life, and whose interests are therefore to a large extent identified with those of the government, and somewhat dissociated from those of the people." "Self-government" prevailed in the United States. "Not only are the people the source of governmental power," Freund wrote, "but they exercise that power themselves" by selecting laymen to govern them and only briefly entrusting them with power, so that they never lose "their contact with the people." Because public offices were not joined in a hierarchy of authority and control, some other means of keeping them in check had to be found. Writing in 1893, Freund thought that those means were specific statutory delegations to officials, coupled with review of their actions in courts of general jurisdiction. He was convinced that most executive functions were so minutely regulated that they had become ministerial acts. "We may truly speak of a government by law and not by men,"

Freund maintained, for the “officer has no one to look to for instruction and guidance, except the letter of the statute.”⁴⁸

That is, in theory the officer did not. Freund feared that in practice America’s administrators took their lead from political bosses. The Jacksonian principle of rotation in office might have been intended to replace aristocratic government with rule by the people, but it had become “an instrument for partisan purposes.” “Professional office-seekers” had become “a separate class of the community, just like the bureaucracy in Europe,” Freund complained, “only without the same training and expertise.”⁴⁹

German jurists developed the idea of the Rechtsstaat to keep a royal government from playing favorites; in the United States Freund invoked it to constrain “the shady and corrupt aspects” of patronage politics.⁵⁰ Where questions of fact and law in matters of private right were involved, he looked to the judiciary to keep administrators within the bounds of the law. On one score he favored the American system of review by courts of general jurisdiction over the German administrative courts: the latter, he observed, were “not entirely independent,” because they mixed administrators with ordinary judges. On balance, though, Freund believed that the German system better protected private rights: its procedures were simpler, and it gave disputants the option of appealing upward through a bureaucratic hierarchy as well as into the administrative courts. His preference grew stronger in the early twentieth century as American courts started to defer to the findings of fact of administrative agencies rather than decide factual questions de novo.⁵¹

In 1894 Freund still hoped for “an infusion of bureaucratic or professional elements” into the American system of self-government. Until that happy day, he looked to legislatures to

“narrow as much as possible the sphere of discretionary action” by fixing “precisely and completely” how and when administrators should act. “Compliance with these conditions will place all individuals upon a basis of equality, and the administration is bound by fixed rules which are controllable and enforceable by the courts.” The Rechtsstaat would come to America, Freund predicted, in the guise of detailed delegations of legislative power that converted unreviewable discretion into ministerial acts.⁵²

He could hardly have been more wrong. For some years he took comfort from New York’s passage of the Raines Liquor Law in 1896. Under earlier law, the decision to award or revoke a liquor license to persons of “good moral character” had been committed to the discretion of local officials. Although New York’s judges had professed to see “little to fear from an abuse” of this discretion, Freund was convinced that machine politicians had used it to reward friends and punish enemies and that a statute was needed to “take liquor licenses out of politics.” The Raines Law substituted rule for discretion by detailing the factors left unspecified in the old, open-ended standard. Henceforth, the applicant who made an adequate showing of compliance with these requirements received the requisite certificate as a matter of course.⁵³

Freund would invoke the Raines Law in all of his major writings on administrative law. He soon realized, however, that whatever it heralded for licensing, it was not typical of delegations of legislative power to independent commissions, a trend that included the revival of the moribund Interstate Commerce Commission, the creation of state public utility commissions, and the passage of the Federal Trade Commission Act in 1914.⁵⁴ If, as Freund insisted, “the progress of law should be away from discretion toward definite rule,” if “all discretion in administration . . . is an anomaly and the modern tendency is to reduce it to a minimum,” had

America turned its back on history?⁵⁵

Freund persuaded himself that it had not and that in fact “the gradual and rather unconscious drift” of American public policy was “toward the displacement of discretion” in administrative power over private rights.⁵⁶ First, he believed that legislation could provide administrators with clearer principles if legislators would draw upon legal and social expertise. In Europe, Freund noted, important legislation was almost always drafted by the ministries. “It is prepared by high officials, trained and experienced jurists and economists, who work under the guidance and advice of practical administrators with all the official information of a centralized bureaucracy at their command.” In the United States, statutes had long been the product of “a large political body possessing no particular qualifications,” yet Freund saw many signs that an era of “intelligent legislation based upon expert advice” had at last arrived. He could point to his own service as Illinois’s delegate to the National Conference of Commissioners on Uniform States Laws, the enactment of his bills on illegitimacy and divorce, the creation of legislative reference bureaus in Illinois and Wisconsin, and the American Bar Association’s establishment of a special committee on legislative drafting.⁵⁷ Although his suggestion that graduate study in law be devoted to “discovering definite and demonstrable working principles of legislation” had found few takers, Harvard had seemingly endorsed his call for law professors to frame legislation by awarding him the James Barr Ames Prize for his treatise Standards of American Legislation (1917).⁵⁸

Freund also looked to the agencies themselves to develop principles in matters of private right and even of expediency. In a lecture first delivered in 1914, Freund denied that recent delegations of legislative powers to administrative agencies amounted to “a shifting from judicial

rule to administrative discretion.” In fact, the change was “from discretion to rule and not vice versa.” Fixed rules had not prevailed under the old system of judicial enforcement of regulatory statutes because legislation had left vague standards of “reasonableness, safety and adequacy” to the considerable discretion of the jury, “the least responsible of all the factors of government.” In criminal proceedings, jurors sympathized with the accused, because one did not “lightly send a person to prison.” In civil cases, “liberally inclined” juries favored plaintiffs, especially in suits against corporations. In contrast, an administrative agency was responsible to “the force of circumstances” and “surrounded by procedural guaranties and other inherent checks.” Much more so than legislators and jurors, administrators were obliged to defend their decisions. For this reason, they tended to respect precedent and expert opinion and to “evolve principle out of constantly recurrent action.”⁵⁹

When, in 1914, Freund predicted that American administration would transform itself into the Rechtsstaat, he had to concede that the history of discretionary administrative power in the United States to that point had been “rather discouraging.” “The next ten or twenty years,” he thought, would be decisive.”⁶⁰ One can imagine, then, his excitement six years later when the Commonwealth Fund suddenly materialized with funds for a study of “administrative law and practice” in the United States. Freund still believed that “unstandardized power” over private rights was “undesirable per se” and “hardly conformable to the ‘Rule of Law’”; now he would have the chance to see whether the Rechtsstaat had in fact come to America by writing a twentieth-century American counterpart to Gneist’s great study of local government in eighteenth-century England.⁶¹ The prospect must have dazzled Freund, but Felix Frankfurter would find it far less alluring.

Freund met Frankfurter for the first time in October 1921 and was impressed by the Harvard professor's command of administrative law. "I found him keenly alive to the importance of the work, fully familiar with every problem I touched upon, and generally admirable in his attitude," Freund reported to Farrand. The Harvard law professor was also "eager to help," albeit "mainly through assistants."⁶² Despite Frankfurter's suggestion that only the national government be studied, Freund proceeded with his original plans and prepared a lengthy prospectus that projected studies of Massachusetts, New York, Wisconsin, and the city of Chicago, as well as the federal government. The main object of the inquiry, as Freund saw it, was "to ascertain whether private interests are adequately safeguarded under delegated administrative action." To this end, investigators would take up six principal problems: "(1) the legitimate province of delegated legislation or rule making power; (2) the legitimate sphere and extent of administrative discretion; (3) the problem of separating incompatible functions; (4) what constitutes due process, in an equitable, not merely constitutional sense, in administrative procedure; (5) a clear theory of judicial relief; and (6) simplification of remedies."⁶³

Freund explained the need for "a reasonably complete survey" of several jurisdictions in straightforward terms. "In that way alone is it possible to get a view of the growth and extent of administrative power, and the legislative practice in regulating or not regulating it," he explained to Farrand. "Upon the basis of a few selected subjects you cannot form a general judgment."⁶⁴ Left unsaid were his methodological assumptions. In Germany Freund had been taught to see the material world as the manifestation of the spirit of an age, which would be revealed if studied

“systematically.” To study “law as a system,” he had written in 1904, was to see it as “a body of reasoned principles,” of rules “consciously founded in principle” and of principles embodying a “common purpose.”⁶⁵ Thus, Freund, in the philosopher Morris Cohen’s judgment, “always sought to find a genuinely rational pattern” in the law he studied. For administrative law, the pattern he hoped to discern was a tendency to do away with discretion.⁶⁶ Only a comprehensive study could reveal whether Americans had embraced the Rechtsstaat.

Felix Frankfurter had his own notion of Wissenschaftlichkeit. “Much of research,” he wrote to Freund, after reading his prospectus, “is a painful process of proving what you already know, or at least feel.” Yes, the “objective demonstration of a scientific study” was called for, but studies of a handful of agencies would suffice, at least initially. “The generalizations, the philosophizing, the ultimate answers” would emerge in due course. Frankfurter also questioned Freund’s formulation of the object of the inquiry as “whether private interests are adequately safeguarded.” Would it not be more accurate to ask whether administrative law afforded “substantive justice both to public and private interests”? he asked. “After all, we can’t consider whether private interests are safeguarded without equally considering the public interests that are asserted against them.” The younger scholar concluded deferentially. “The field needs your leadership, for no one has so deeply and comprehensively made the field his own. To whatever extent I can—if you think me of use—I should deem it a real privilege to work with you.”⁶⁷

Frankfurter shared his views with Farrand, who found them to be line with Stone’s complaint that Freund ought to get “sufficiently down to a concrete practical job” of proposing specific reforms. Farrand told Freund that he would have to confine himself to “a very limited field so that we can be sure of concrete results.” Whatever the value of Freund’s agenda for “the

student of the subject,” the Chicago professor still had to “convince the Directors of the Commonwealth Fund that their expenditures have not been misused.”⁶⁸ Farrand proposed that the interested parties confer after the annual meeting of the Association of American Law Schools in Chicago in late December 1921. Farrand, Freund, Frankfurter, and several other scholars of administrative law met on three successive days. When the meeting broke up on January 1, Freund’s unified research project had been discarded. Instead, Freund was to prepare his own survey of statutes that created administrative power over private rights in the United States, New York, England, and Germany. Frankfurter was to oversee a series of “intensive” studies, mostly of federal agencies.⁶⁹

These turned out to be elaborations of papers written by Frankfurter’s students.⁷⁰ In the wake of the Chicago meeting, he pushed for a larger share of the Commonwealth Fund’s largess at Freund’s expense and went out of his way to puncture Freund’s claim that rule was replacing discretion in administrative law. “I wonder if you weren’t struck by the recurrence by Freund to several instances that seemed to him very interesting, the existence of which he didn’t want ‘lost,’ but which, under questioning (like the N.Y. liquor license cases) turned out to be merely instances, and frankly admitted to be such by him,” he wrote to Farrand. A “comprehensive” volume was too great a task to expect “even from Freund in two or three years.” Although such a treatise would be valuable, much like Freund’s Standards of American Legislation, its effect “on professional opinion and on the stimulation of research in general” would be “very slight.” Freund thought “in terms of German philosophic Grundrisse,” Frankfurter complained, when what was needed were “the necessary factual demonstrations out of which the general problems and the unifying elements will emerge.” As he later put it, administrative law had to be studied

“functionally, and not analytically.” Whatever typology Freund came up with would be idiosyncratic and no more deserving of the Commonwealth Fund’s endorsement than anyone else’s “pet schemes.”⁷¹

Frankfurter’s opposition at Chicago had left Freund shaken. Not only had the younger man insisted on “the paramount importance of the intensive studies” and dismissed “the present value of anything like a comprehensive survey,” Freund recorded in a note to himself, Frankfurter had rejected as “mere examples” the evidence upon which Freund had based his entire understanding of the field. Freund considered Frankfurter’s own notion of empirical research inadequate. “It may be that a mass of statistical and factual material will result in scientific demonstration of the merits or demerits of administrative practices and of the legislation underlying them, but it may also be that the material will be inadequate to support ‘scientific’ generalizations, or that even the fullest material may prove in its nature incapable of yielding demonstration.”⁷²

In the following years, Freund and Frankfurter proceeded on separate tracks, to the satisfaction of at least Roscoe Pound, who assured Farrand that it was “distinctly a good thing that Freund is approaching administrative law from one side and Frankfurter from another.”⁷³ Frankfurter paired present or former students with various topics: Eleanor Bontecou with federal rule-making, John Cheadle with the U.S. Customs Service, William McCurdy with the U.S. Post Office, Edwin Patterson with state insurance commissioners, I. L. Sharfman with the Interstate Commerce Commission, William Van Vleck with immigration. Bontecou, Cheadle and McCurdy never completed their manuscripts; the others proceeded at a glacial pace. Patterson’s book, already well underway when the administrative law project was organized in 1921, did not

appear until 1927. Van Vleck published his study in 1932.⁷⁴ Sharfman's aspirations for his ICC study proved so burdensome that he suffered a nervous breakdown, after which the Commonwealth Fund decided to publish the work piecemeal. The first volume appeared in 1931; the last, in 1937.⁷⁵

The book that made good on Frankfurter's claims for the intensive study of administrative law was Gerard Carl Henderson's Federal Trade Commission (1924). Henderson had graduated from the Harvard Law School in 1916 after serving as president of the Law Review and writing a prize-winning and subsequently published essay. He was the rare top graduate who went into government service, as a lawyer at the Federal Trade Commission, the War Shipping Board, and the War Finance Corporation. Along the way he wrote for the New Republic, economic journals, and law reviews; ghostwrote portions of the report of Woodrow Wilson's Second Industrial Conference; and remained close to Frankfurter, who convinced his law school colleagues to hire him, only to see the appointment vetoed by the Harvard Corporation.⁷⁶

The offer to write a study of the Federal Trade Commission reached Henderson while in private practice in New York City in July 1922. He plunged in and, with his sterling legal pedigree and former service at the commission, gained access to its files, lawyers, and economists. In September 1923 he sent a draft to Frankfurter that thrilled his mentor. "I knew that if we got Henderson to do the Trade Commission we'd get an outstanding piece of work," Frankfurter enthused to Farrand. "But he has exceeded even my expectations—he has dug out unexpectedly rich material from the records of the Commission, which bears on our main problem, namely, the nature of administrative procedure and the dependability of its process in accomplishing the ends for which it was established, and at the same time protecting individual

interests affected by its action.”⁷⁷

A work that better confirmed what Frankfurter already “knew, or at least felt,” about the Federal Trade Commission could scarcely have been written. By 1922 that flower of progressive reform, while not yet blasted by the chairmanship of William Humphrey, had wilted considerably. The federal courts trusted neither its findings of fact nor its conclusions of law, because they appeared in lifeless, formulaic opinions rather than compelling narratives.⁷⁸ Even before examining the commission’s files, Henderson had reached “one tentative, but fairly well defined conclusion—viz., that the practice of the Commission in failing to file and publish written opinions, including dissenting opinions, if any, is fundamentally vicious, and impairs considerably the value of the work that the Commission has done from a juristic standpoint.” Although he later claimed to have had “not the slightest idea” what he would conclude, his original, “tentative” conclusion would become the book’s principal finding. According to Henderson, the problem with the Federal Trade Commission was not Congress’s vague delegation of executive power or the substance of its policies but its failure to display the legal and economic reasons that led it to strike the balance of social interests as it did.⁷⁹

The book was exactly the kind of narrowly focused, concrete, and reformist work that Stone and Farrand had envisioned for the Commonwealth Fund’s administrative law project. Walter Fisher, the practitioner on the administrative committee, asked that a copy be sent to the assistant secretary of agriculture responsible for administering the Packers and Stockyards Act (under which he frequently litigated). Every federal judge was sent a copy, as were leading Wall Street lawyers and scholars of administrative law from New Haven to Calcutta.⁸⁰ FTC Chairman Hutson Thompson grouched about the book but nonetheless revised the commission’s rules to

meet its criticisms. Roscoe Pound called it “a great contribution”; Stone offered Henderson a job at Columbia on “handsome terms.” Former commissioner George Rublee, among other reviewers, joined Henderson in blaming the agency’s decline upon “its failure to convince the courts that it has exercised an expert judgment in making its decisions.”⁸¹

Frankfurter seized upon Henderson’s success to renew his argument that “intensive studies” were far preferable to studies “unnourished by the realities of ‘law in action’”—seemingly a reference to Freund’s still uncompleted statutory survey. “Judicial review” and “discretion” could not be studied in isolation, he told Farrand; they must be studied “organically,” in light of “the specific interests entrusted to a particular administrative organ,” as well as its history, structure and “enveloping environment.” “Only such a physiological study of Federal Trade Commission administrative law and practice in action as Mr. Henderson has attempted could have possibly disclosed the processes, the practices, the influential factors which make Federal Trade Commission rulings,” Frankfurter crowed.⁸²

While the Commonwealth Fund basked in the praise lavished on Henderson’s book, Freund soldiered on with his statutory survey, plagued by illness and staggered by the enormity of the task.⁸³ At last the massive manuscript of Administrative Powers over Persons and Property arrived at the Commonwealth Fund in the summer of 1926, in two parts. The first, “analytical” part, Freund explained, gave “what the Germans call a system of administrative law.” It was a painstaking, elaborate taxonomy of the forms and methods of administrative power over private rights, as revealed in the legislation of New York, the United States, England and Germany. The second, “descriptive” part grounded the first in specific legislation under sixteen headings: public utilities, shipping, banking, insurance, trade, labor, the professions, religion, education, political

action, safety, health, morals, personal status, land use, and revenue. Freund conceded that the second part was “somewhat repellent in form” and “a laborious piece of work which few persons will care to read through,” but he insisted it was necessary to “lend weight and support to the exposition” of the first part.⁸⁴ The style was well, if delicately, characterized by an English scholar. “The author’s Teutonic education produced an inexhaustible industry, a remarkable capacity for inventive classification, and a power of subtle and penetrating analysis,” William Robson wrote, but “one sometimes wished Freund had attempted to formulate some body of conclusions at the end of his fine-spun web of conceptual exposition.”⁸⁵

Farrand did not hide his dismay with a work that was so unlikely to prompt reform—or even to be read cover-to-cover by anyone.⁸⁶ He turned to Pound for help. The Harvard law dean reported that although the manuscript contained “a great deal of good material,” it was “so written as to make the reading of it indescribably tedious. I thought for a while that possibly bad eyes had something to do with my difficulty in reading it, but I find I can read other things quite as technical and still keep awake, while the labor of working out exactly what Freund means thoroughly, phrase by phrase, sentence by sentence, and paragraph by paragraph, puts me to sleep.”⁸⁷

Attempts to persuade Freund to make the book “readable or attractive” proved unsuccessful. “My experience with Freund,” Farrand complained, “has been that he is so sensitive that when I offer anything that might be interpreted as a criticism, he closes up his shell and you might as well pour water on an oyster for all the effect it has.” Pound, who had had similarly unsatisfying exchanges, urged Farrand to publish the book notwithstanding its flaws. “A man of Freund’s calibre has some rights,” Pound advised, “and one of them is to put things as

he wants them. We ought to be glad to have so monumental a work on almost any terms.”⁸⁸

Frankfurter agreed. Although the book would “not commend itself even to the ‘learned members’ of the teaching or the legal profession,” it would serve as “a rather recondite source for the few specialists who are ready to quarry into it.” Putting the best face on the situation, Farrand told the Commonwealth Fund’s Board of Directors that although Freund’s monograph was “not as interesting reading as the Henderson study of the Federal Trade Commission,” it was “a perfectly impartial analysis of an unbelievable amount of detail” and would “reflect credit on the author and upon those who have sponsored it.”⁸⁹

Unacknowledged in these assessments, shrouded in Freund’s many qualifications and concessions, was the message of the book: Americans had embraced the Rechtsstaat. Freund distinguished between two devices administrators used to resolve private rights: “the advance checks” of licenses, permits, or certificates and the “corrective intervention” of administrative orders or directives. He was most confident of the “trend toward the reduction of discretion in the grant of licensing powers.” With a mental glance over his shoulder at Frankfurter, he insisted that his conclusion was “not based on so unique an instance as the New York Raines Liquor Tax Law of 1896 with its absolute elimination of all discretion.” Even the Transportation Act of 1920, which seemingly endowed the Interstate Commerce Commission with “the widest type of discretion” when deciding whether to grant certificates of convenience and necessity, also required hearings. It thereby set in motion a process of official justification that would “inevitably tend to check and reduce discretion.”⁹⁰

The case of administrative orders was more doubtful. The Federal Trade Commission Act was the most prominent example of a grant of discretion “as a means of finally evolving a

definite rule.” The decision to leave “the indeterminate concept of unfair competition” to the commission to define through an accumulating body of precedents was “an admissible, if novel, method of dealing with practices which appear detrimental to the public when it is difficult to formulate with clearness either the evil or the remedy.” The setting of rates for regulated industries was harder to account for. “The whole course of rate legislation and action under it has been an effort to discover some principle of rate control.” Regulators, it was apparently assumed, would ultimately hit upon the true principle, which they could then apply with only the same “margin of discretion” that judges exercised in resolving questions of fact. Such a “‘trial-and-error’ method” was acceptable; so even was a delegation that passed the buck for propounding a standard “not fit to be set up as an avowed policy,” such as the de facto cartelization of public utilities in a state that constitutionally banned monopolies. Rate-setting, Freund strongly implied, was none of those things; administrators acted solely out of “expediency”; their discretion was “not displaceable by rule.” It was “a legislative makeshift to appease the demand for public control,” a “claim on the part of the state to be recognized as a quasi-partner with paramount powers unattended by obligation or liability,” and “in a sense a negation of law.”⁹¹

No economic issue was of greater concern to Frankfurter and other legal progressives in the 1920s than the regulation of public utilities.⁹² If, as Freund conceded, it was an exception to the general “tendency toward standardization” he discerned in the American statute book, it cast doubt on his claim that Americans had rejected the delegation of discretionary political power to administrative officials because of their “instinctive perception that it is essentially a negation of the rule of law in administration.”⁹³ More likely he was projecting onto American legislators his

own disapproval of regulation that gave the state primary control over businesses but saddled their owners with “all risk and responsibility.”⁹⁴

Freund had an answer: a systematic study of administration ought to survey the entire statute book and not just the legislation that created the most controversial agencies. His survey revealed that American legislation used the license-granting power more than the order-issuing power and that “licenses tend to become ministerial acts.” Still, Freund could not quite dismiss the possibility that he had only discovered what he had wanted to find. “In ascertaining tendencies it is not easy to divest the mind of bias or prejudice,” he confessed. “Evidence of a development that seems desirable easily appears persuasive or convincing.”⁹⁵ Could it be that the obscurity of Freund’s Administrative Powers was not simply the product of scholarly caution and a “Teutonic” style but also the author’s doubts over whether he had in fact documented the existence of an American Rechtsstaat?⁹⁶

Certainly the few legal scholars who undertook a careful reading of the book were unconvinced. Northwestern University’s great law dean John Henry Wigmore had met an earlier statement of Freund’s theories with the objection that “the bestowal of administrative discretion, as contrasted with the limitation of power by a meticulous chain-work of inflexible detailed rules, is the best hope for governmental efficiency.”⁹⁷ Frankfurter’s students took up the cry in their reviews of Administrative Powers. Freund’s focus on private right to the exclusion of public policy and the social interest was “one-sided,” Edwin Patterson complained. “A Martian reading this book would wonder why one group of humans (‘officials’) were taking so much trouble to trouble another group of humans (‘private individuals’).” Freund’s fear of discretion was the product of his “fundamentally conservative point of view”; if discretion was always an evil,

Patterson demanded, what “becomes of Mr. Justice Holmes’ ‘intuitions too subtle for any articulate major premise’?”⁹⁸ John Dickinson took issue with Freund’s claim that discretion as other than a prelude to a rule was an “anomaly.” Freund evidently believed that only legislatures should exercise the “political” function of discretion and that in time rules could be developed for all matters properly the subject of regulation by an administrative agency, Dickinson observed. These a priori assumptions were at least dubious and probably wrong. In any event, by failing to question them Freund had failed to demonstrate “the proper limits of administrative discretion.”⁹⁹

If Freund required further evidence that his star had fallen and Frankfurter’s was ascendant he need only consider the Commonwealth Fund’s actions in March 1927. After reluctantly authorizing the publication of Administrative Powers, the Legal Research Committee enthusiastically invited Frankfurter to write the readable, synthetic account it had hoped for from Freund.¹⁰⁰ The Harvard law professor declined the challenge, but a few years later he delivered a set of lectures, published as The Public and Its Government (1930), that called for government not by rule-bound officials but by expert administrators free to act as their scientific “temper of mind” led them. “We have greatly widened the field of administrative discretion,” Frankfurter declared. If doing so has “opened the doors to arbitrariness,” the remedy was not a bright-line rule but a professional civil service, fair procedures, and public scrutiny, and the criticism of “an informed and spirited bar.” He would restate his views in the preface to his casebook on administrative law, published, with a coauthor, in 1932.¹⁰¹

In his review of Frankfurter’s casebook for the November 1932 issue of the Harvard Law Review, Freund acknowledged that his attempt to transplant the Rechtsstaat in American soil had failed. “The reviewer’s own ideas about administrative law were undoubtedly influenced by

Goodnow, who in his turn was influenced by continental jurists and treatises,” Freund wrote, “but the process of transmission brought eliminations and substitutions; and now the presentation of an entirely new plan appears to break the old tradition completely.” The concession was all the more poignant for being posthumous: Freund had died of a heart attack on October 20. He was spared seeing the New Deal’s vast expansion of administrative discretion or the Nazis’ perversion of the Rechtsstaat tradition.¹⁰²

4

To inaugurate a lectureship in honor of Ernst Freund in 1953, the Powers-That-Be at the University of Chicago Law School turned to Felix Frankfurter. The Supreme Court justice prefaced his talk with praise for Freund as “a courtly man ‘of the old school’” and a pioneer in the fields of administrative law and legislation. Perhaps some in the audience suspected that the two men had once been at loggerheads: how else would Frankfurter have known that Freund was “a man of strong convictions,” whose “passion was behind his judgment and not in front of it”? Still, Frankfurter’s presence that evening, “as an act of pious gratitude to a great teacher of the law,” probably created the impression that he and Freund had agreed on the fundamental tenets of administrative law. If so, Frankfurter would have eclipsed Freund by embracing him.¹⁰³

In 1953 such a feat would have been easily accomplished because Freund had fallen from the canon of scholarship on administrative law. Frankfurter had reproduced a passage from Administrative Powers in his 1932 casebook, but probably for its depiction of the Court of Customs Appeals as an American equivalent of a continental administrative court and not for

Freund's claim that customs law had evolved "more by specific statutory definition than by the enlargement of administrative discretion."¹⁰⁴ For a time, an occasional New Dealer would bring up Freund's work only to dismiss it. In 1936, for example, the political scientist Charles Hyneman declared it "high time to question whether [Freund's] hope of ultimate detailed statutory regulation is not largely vain and illusory." A few years later, the law professor Ralph Fuchs scoffed that Freund had no "other basis than a conceptual one" for his bias against discretion.¹⁰⁵ Even these references ended after 1938, when New Dealers acquired a more tempting target in Roscoe Pound and his fulminations against "administrative absolutism."¹⁰⁶ Neither James Landis, Walter Gellhorn, nor Jerome Frank mentioned Freund in their books on administrative law. In his 1940 casebook, Gellhorn did refer readers to Freund for help with a knotty procedural point, but he omitted him from an introductory discussion of theorists of administrative law.¹⁰⁷ In his postwar treatise, Kenneth C. Davis mentioned Freund and Goodnow as authors of "early works in the field" that were "of little usefulness on current problems."¹⁰⁸ No wonder, then, that when reformers called for specific delegations of legislative power, heightened judicial review, and mandatory rule-making in the late 1960s, as the law professor Richard Stewart remarked, they "either failed to recognize or failed to acknowledge that Professor Freund long ago anticipated all of their arguments."¹⁰⁹ In The End of Liberalism (1969), for example, Theodore J. Lowi invoked not Freund's Administrative Powers but Hayek's "superb essay" on the Rule of Law in The Road to Serfdom (1944).¹¹⁰

Freund's ideas had fallen from view because they appealed to a particular group of political actors at a particular moment, the urban middle class in its first flush of enthusiasm for nonpartisan government. Chicago was a vibrant center of progressivism; in no American city

were professionals, university professors, and other reformers better organized or more ambitious. Between 1892 and 1919, they formed scores of civic clubs, “good government” leagues, parks and planning associations, settlement houses, social service agencies, child welfare societies, suffrage organizations, “social hygiene” societies, protective leagues for immigrants and African Americans, criminal justice institutes, education committees, and associations for public health, labor legislation, and social insurance.¹¹¹ Freund’s contributions to this reform community were remarkably extensive. One historian dubbed him “the major legal expert of Chicago reform”; another, “an unsung giant of progressivism.”¹¹² Freund worked for the extension of civil service and the adoption of the short ballot; he drafted a new charter for Chicago in 1904 and the home rule provision in the failed Illinois constitution of 1920. He was a founder and officer of the Immigrants’ Protective League and wrote statute establishing it as a public commission. He reviewed every bill submitted for the approval of the Committee on Social Legislation, a lobbying consortium created by a number of reform groups. As a member of the Illinois Association for Labor Legislation he drafted an employers’ liability bill and a Sunday labor law; he joined labor reformers in defending a ten-hours law for women; he lectured on social legislation to the School of Civics and Philanthropy and the University of Chicago’s School of Social Service Administration, which he helped organized. As Illinois’s representative to the National Conference of Commissioners on Uniform State Laws he drafted many bills on domestic relations and shepherded them through the Illinois legislature.¹¹³ Liberalizing the law of illegitimacy was a special interest; Jane Addams likened his devotion to “what the Quakers called a ‘concern.’” Child welfare workers leaned on him heavily. Even after leaving Chicago for the Children’s Bureau in Washington, Grace Abbott, for example, anxiously sought Freund’s

approval of regulations under the federal child labor law.¹¹⁴

Freund became, in the judgment of a settlement house worker, “one of the most useful men in Chicago,” because he shared the basic political premises of progressive reform.¹¹⁵ From his continental legal education, he derived much the same notion of a naturally harmonious society that his fellow Chicagoans more commonly found in religion. He shared his mentor Goodnow’s distinction between politics and administration, which was a foundational belief among progressive reformers. Like Freund and Goodnow, they believed that legislators ought to determine “the variable element of policy, the constant readjustment of political life and of government to changing economic and social conditions.”¹¹⁶ Clear rules preserved legislative expressions of social harmony by keeping potentially faithless administrators from compromising with political bosses or developing “a bond of sympathy” with vested interests.¹¹⁷ Without “precise terms of regulation,” Woodrow Wilson fretted in 1908, commission government amounted to a turn “from law to personal power.”¹¹⁸

Although, as the historian Samuel Haber observed, “progressive reformers had optimism in great store,” by the early 1920s their supply was very nearly depleted. The strikes, riots, and other conflicts after the Armistice were devastating challenges to their vision of a naturally harmonious society; in the new decade, political bosses reasserted their dominance of politics and put the “improved machinery of state” to their own uses.¹¹⁹ Public utilities and other corporations that originally resisted regulatory commissions embraced them as an alternative to “strike bills” introduced by party politicians “for the purpose of holding up corporations” and as a forum for informal negotiations in which they generally had the better of administrators.¹²⁰ Finally, reformers’ own experiences with public agencies showed just how poorly their model of

a “rational, monocratic system of firmly arranged levels of hierarchical authority flowing from superior to inferior roles” described the loose-jointed, heterogeneous, and conflict-ridden reality, in which authority was as much a function of officials’ “qualifications and skills” as their locations on an organizational chart.¹²¹

Felix Frankfurter proved to be a more reliable guide to the new American state. From 1906 to 1911, he brought lawsuits under the Interstate Commerce Act as an assistant to United States Attorney Henry Stimson; when Stimson became Secretary of War Frankfurter accompanied him as his special counsel and the Law Officer of the Bureau of Insular Affairs. Frankfurter joined Harvard’s law faculty in 1914 but was back in Washington for the war, installing proteges in bureau after bureau. “Mr. Wilson has charge of foreign policy and Felix seems to sponsor the rest of the government,” marveled Harold Laski.¹²² In short, Frankfurter thrived in a federal bureaucracy that little resembled the orderly visions of the political scientists.

Frankfurter acknowledged that open-ended delegations to administrators could lead to “abuses of caprice and oppression,” but he countered that abstract and universal thinking produced its own injustices. The regulation of public utilities needed to be “flexible enough to meet the flexibilities of life,” he told his students; the regulation of securities required broad “standards of fair-dealing,” as no “legislative net” could cover the whole field.¹²³ If Freund would tether bureaucrats to legislative resolutions of social conflict, Frankfurter would free them to exercise their “practical judgment in the adjustment of clashing economic and social interests,” which they were to arrive at after performing “the quiet, detached, laborious task of disentangling facts from fiction, of extracting reliable information from interested parties, of agreeing on what is proof and what surmise.” This was no mechanical process; it required “the imponderable

qualities of imagination, judgment and discrimination.” Ultimately, it depended upon the professionalism of administrators and of the experts who advised them.¹²⁴

Many political actors discovered that delegation to administrators better served their interests than did detailed legislation. Legislators often employed it to avoid the resolution of politically divisive details. Depending on who controlled the relevant agency, reformers or business interests sometimes calculated that they could obtain a more favorable regulatory regime than the legislature would have produced. Middle-level administrators could acquire something like prerogative power, and professionals could influence policymaking more pervasively.¹²⁵ Lawyers especially stood to benefit, to Freund’s dismay and Frankfurter’s delight. Freund thought that the relentless study of judicial opinions ruined lawyers as legislators and administrators. He believed, with Edmund Burke, that “legislators ought to do what lawyers cannot.”¹²⁶ Frankfurter believed almost the reverse. The government lawyer was “inevitably thrown into the heart of the policy-making process and of necessity has an important, and often a controlling, voice in the major issues of his department or agency,” he maintained. “By tradition and training,” the lawyer is “the expert in affairs.”¹²⁷

Such views were of course congenial to Frankfurter’s protégés who worked in New Deal and wartime Washington and created the modern regulatory law practice during the Truman administration. James Landis, the second chairman of the Securities and Exchange Commission, argued that modern regulation required not “generalizations and principles” but the “practical judgment” of “men bred to the facts.”¹²⁸ The legal historian Willard Hurst, who left an academic post to write labor standards clauses into overseas procurement contracts during World War II, called lawyers the experts “whose skill it is to make social use of the experts in all other fields.”

He ranked them as “law makers” of equal stature with legislatures, courts, constitutional conventions, and executive officials.¹²⁹ In a widely noted set of lectures published in 1952, Charles Horsky, a New Dealer at a leading Washington law firm, set out a complementary view of private practitioners as a sine qua non of effective governance.¹³⁰ Scholarly and popular attacks on command-and-control regulation did ultimately produce more specific delegations in the environmental legislation of the 1970s. Even then, however, most reformers assumed that administration was a pluralist process of interest-group politics and attempted to make agencies more representative “mini-legislatures.”¹³¹

In his great mid-twentieth-century synthesis of America legal history, Willard Hurst paused to give his own assessment of Freund. “Sympathetic with the growth of the administrative process, but also distrustful of the delegation of broad policy decisions,” Freund “predicted in 1928 that legislatures would take back the leadership of policy as they gained experience in new fields of regulation.” Although experience had not borne Freund out, Hurst still found a valuable message in his work, that legislators should not surrender policymaking to administrators but should use “the contributions of the executive” in formulating public policy and writing legislation.¹³² Administrative discretion was neither the inevitable concomitant of modern governance nor the first, fatal step on “the road to serfdom”; it could coexist with directives to administrators to advance specific, legislatively expressed concerns. That one can attack administrative discretion and remain within the broad boundaries of the American reform tradition is a useful lesson for today’s critics of financial bailouts and other combinations of public and private power.

1. Congressional Record, 110th Congress, 2d Sess., 2008, H10364, H10779.
2. Robert A. Levy, "Is the Bailout Constitutional?" Legal Times, October 20, 2008; John Schwartz, "Some Ask If Bailout Is Unconstitutional," New York Times, January 15, 2009; see also George F. Will, "Bailing Out of the Constitution," Washington Post, March 29, 2009.
3. Kenneth Culp Davis, Administrative Law (St. Paul, MN: West Publishing Co., 1951), 45.
4. Louis L. Jaffe, "The Illusion of the Ideal Administration," Harvard Law Review 86 (1973): 1186, 1185.
5. Friedrich A. Hayek, The Road to Serfdom (Chicago, IL: University of Chicago Press, 1944), 80; Theodore Rosenof, "Freedom, Planning, and Totalitarianism: The Reception of F. A. Hayek's Road to Serfdom," Canadian Review of American Studies 5 (1974): 149-65.
6. Ernst Freund, The Police Power: Public Policy and Constitutional Rights (Chicago, IL: Callahan, 1904); see Daniel T. Rodgers, Contested Truths: Keywords in American Politics since Independence (New York: Basic Books, 1987), 151.
7. Daniel T. Rodgers, Atlantic Crossings: Social Politics in a Progressive Age (Cambridge, MA: Belknap Press, 1998), 2.
8. Friedrich Julius Stahl, Die Philosophie des Rechts, 3d ed. (1856), 2:88.
9. Paul D. Carrington, "Ernst Freund," American National Biography 8 (1999): 470-72.
 Freund received his J.U.D. degree from the University of Heidelberg in 1884. Later that year he enrolled as a non-graduate in the Columbia Law School, according to records in the Office of the Registrar at Columbia University. Jillian Cuellar to Daniel R. Ernst, October 30, 2008; Columbia University Alumni Register, 1754-1931 (New York:

- Columbia University Press, 1932), 297, 1092.
10. Jane Addams, "The Friend and Guide of Social Workers," in University of Chicago, A Vesper Service Devoted to the Memory of Ernst Freund, 1864-1932 (n.p., n.d.), 44, box 58, John Henry Wigmore Papers, Northwestern University Library, Evanston, IL; Michael E. Parrish, Felix Frankfurter and His Times: The Reform Years (New York: Free Press, 1982), 72-75, 81-128; William M. Wiecek, "The Legal Foundations of Domestic Anticommunism: The Background of Dennis v. United States," Supreme Court Review 2001: 390-91.
 11. Albert Venn Dicey, Introduction to the Study of the Law of the Constitution, 8th ed. (1885; London: Macmillan, 1902), 182-83.
 12. Felix Frankfurter and J. Forrester Davison, Cases and Other Materials on Administrative Law (Chicago, IL: Commerce Clearing House, 1932), v; Ernst Freund, review of Frankfurter and Davison, Cases and Other Materials on Administrative Law, Harvard Law Review 46 (1932): 167-68.
 13. I[saiah] L[eo] Sharfman, The Interstate Commerce Commission: A Study in Administrative Law and Procedure (New York: Commonwealth Fund, 1931-37); Gerard C. Henderson, The Federal Trade Commission: A Study in Administrative Law and Procedure (New Haven, CT: Yale University Press, 1924); Henry M. Hart and Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law, ed. William N. Eskridge, Jr., and Philip P. Frickey (Westbury, NY: Foundation Press, 1994), 1098-1106.
 14. [Edwin Brown Firmage,] "Ernst Freund--Pioneer of Administrative Law," University of

- Chicago Law Review 29 (1962): 763-69; William C. Chase, The American Law School and the Rise of Administrative Government (Madison, WI: University of Wisconsin Press, 1982), 46-59, 71-75, 94-97.
15. Parrish, Felix Frankfurter and His Times, 27-61; Felix Frankfurter to Morris L. Cohen, May 17, 1914, reel 27, Felix Frankfurter Papers, Manuscripts Division, Library of Congress (FF Papers).
 16. “Commonwealth Fund,” New York Times, July 17, 1921, 72; Commonwealth Fund, Second Annual Report of the General Director for the Year 1919-20; “Samuel Herbert Fisher,” in Charles Hitchcock Sherrill, comp., Yale College Class of ‘89 Quindecennial (New York, 1904), 90; “Lion Award Made to George Murray,” New York Times, December 5, 1937, 61; Henry H. Klein, Dynastic America and Those Who Own It (New York, 1921), 62-63, 139.
 17. Samuel H. Fisher to Max Farrand, September 2, 1919, box 9, Max Farrand Papers, Huntington Library, San Marino, CA. Barry G. Smith to Farrand, April 6, 1925, box 3, *ibid.*
 18. Robert E. Cushman, The Independent Regulatory Commissions (New York: Oxford University Press, 1941), 105-15; 177-213, 228-40; Morton Keller, Regulating a New Economy: Public Policy and Economic Change, 1900-1933 (Cambridge, MA: Harvard University Press, 1990), 50-51, 55-65; Morton Keller, Regulating a New Society: Public Policy and Social Change, 1900-1933 (Cambridge, MA: Harvard University Press, 1994), 200-02; Ajay K. Mehrotra, “Lawyers, Guns, and Public Monies: The U.S. Treasury, World War One, and the Administration of the Fiscal State,” *Law and History Review*

- (2010).
19. “Hughes Sees Need for New Freedom,” New York Times, June 22, 1920, 11.
 20. Michael E. Parrish, Anxious Decades: America in Prosperity and Depression, 1920-1941 (New York: W.W. Norton, 1992), 7; Samuel Herbert Fisher to Farrand, January 22, 1919, box 5, Farrand Papers.
 21. Stone later spoke to Farrand of “his original proposition” and “our main purpose” in creating the administrative law project. “Administrative Practices: Conferences with Dean Stone,” December 7, 1921, box 2, series 23, Commonwealth Fund Papers, Rockefeller Archives Center, Sleepy Hollow, NY (hereafter CF Papers; all boxes in series 23); Harlan Fiske Stone to Farrand, February 5, 1925, box 6, *ibid.* On Stone’s faculty, see Julius Goebel, Jr., A History of the School of Law, Columbia University (New York: Columbia University Press, 1955), 241-42, 255-58.
 22. On Pound’s views of administrative law in this period, see Michael Willrich, City of Courts: Socializing Justice in Progressive Era Chicago (New York: Cambridge University Press, 2003), 111-12, and John Fabian Witt, Patriots and Cosmopolitans: Hidden Histories of American Law (Cambridge, MA: Harvard University Press, 2007), 226-28.
 23. Farrand omitted Stone’s warning that if reform was not the result of “scientific scholarship,” it would be the product of “the politician and the agitator.” Columbia University, Annual Reports of the President and Treasurer to the Trustees with Accompanying Documents for the Year Ending June 30, 1916 (New York, 1916), 59-60; “Legal Research: Presented to the Directors at a Meeting on 6-26-20,” box 3, CF Papers.
 24. Roscoe Pound, “The Pioneers and the Common Law,” West Virginia Law Quarterly 27

- (1920): 1-19 (address delivered July 1920). Pound's most fulsome paean to antebellum jurists was The Formative Era of American Law (Boston, MA: Little, Brown, 1938).
25. "Legal Research."
 26. Elihu Root, "Public Service by the Bar," in Addresses on Citizenship and Government (Cambridge, MA: Harvard University Press, 1916), 535; N.E.H. Hull, "Restatement and Reform: A New Perspective on the Origins of the American Law Institute," Law and History Review 8 (1990): 75; G. Edward White, The Constitution and the New Deal (Cambridge, MA: Harvard University Press, 2000), 167-97.
 27. Morton J. Horwitz, The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy (New York: Oxford University Press, 1992), 225-28.
 28. "Legal Research."
 29. Freund to Frank J. Goodnow, November 11, 1903, box 6, Frank Johnson Goodnow Papers, Special Collections, Milton S. Eisenhower Library, Johns Hopkins University, Baltimore, MD; Ernst Freund, Cases on Administrative Law (St. Paul, MN: West Publishing Co., 1911). See Chase, American Law School and the Rise of Administrative Government, 72-73.
 30. "Preliminary Memorandum Concerting the Plan for an Inquiry into Administrative Practices Affecting Private Rights," box 2, CF Papers; "Meeting of the Legal Research Committee at the Bar Association, Monday, July 11, 1921, at 10 o'clock," box 3, *ibid.*
 31. Evidently Pound served with misgivings. "I don't like this business--but don't dare get out of it," he explained to Felix Frankfurter. "God knows what they'll do if some of us don't keep in." Handwritten note on Farrand to Frankfurter, August 31, 1921, reel 81, FF

Papers.

32. Benjamin Cardozo in Handbook of the American Association of Law Schools and Proceedings of the Nineteenth Annual Meeting, Held at Chicago, Illinois, December 29-31, 1921, 119, quoted in Hull, "Restatement and Reform," 73. Fisher was also a former U.S. Secretary of the Interior and a partner in a major Chicago law firm. "Meeting of the Legal Research Committee"; Robert S. LaForte, "Walter Lowrie Fisher," American National Biography (New York: Oxford University Press, 1999), 8: 21-23; Maureen A. Flanagan, Charter Reform in Chicago (Carbondale, IL: Southern Illinois University Press, 1987), 45; Oscar Kraines, The World and Ideas of Ernst Freund: The Search for General Principles of Legislation and Administrative Law (University, AL: University of Alabama Press, 1964), 4, 130-32.
33. George Welwood Murray to Farrand, August 26, 1921, box 1, CF Papers; Farrand to Murray, August 23, 1921, *ibid.* Murray considered intervening when Sharfman criticized a railroad reorganization in which he had a part, but Learned Hand, appointed to the Legal Research Committee in 1930, talked him out of it. Murray to Hand, February 14, 1935, box 125, Hand to Murray, February 18, 1935, box 58, Learned Hand Papers, Harvard Law School Library, Cambridge, MA.
34. Thomas Reed Powell, "Administrative Exercise of the Police Power," Harvard Law Review 24 (1911): 268-289, 333-46, 441-59; Powell to Freund, n.d., box 2, Ernst Freund Papers, Special Collections Research Center, University of Chicago Library, Chicago, IL (EF Papers); Powell to Frankfurter, March 20, 1922, reel 81, FF Papers.
35. Felix Frankfurter, "Memo of Conference at Chicago, Dec. 31, 1921 and January 1, 1922,"

- n.d., reel 81, FF Papers; Frankfurter to Farrand, January 4, 1922, box 2, CF Papers.
36. Pound to Freund, October 21, 1913, reel 6, Roscoe Pound Papers, Harvard Law School Library, Cambridge, MA; Freund, Cases on Administrative Law, 1.
 37. Jerry L. Mashaw, "Recovering American Administrative Law: Federalist Foundations, 1787-1801," Yale Law Journal 115 (2006): 1256-2006; Mashaw, "Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801-1829," *ibid.*, 116 (2007): 100-205; Mashaw, "Administration and 'The Democracy': Administrative Law from Jackson to Lincoln, 1829-1861," *ibid.*, 117 (2008): 1568-1693.
 38. Daniel T. Rodgers, "In Search of Progressivism," Reviews in American History 10 (1982): 124-25.
 39. On Pound and "socialized" courts, see Willrich, City of Courts. For Hohfeld and the reconceptualization of classical legal thought, see Horwitz, Transformation of American Law, 1870-1960, 9-31, 151-56; Elizabeth Mensch, "The History of Mainstream Legal Thought," in The Politics of Law: A Progressive Critique, 3d ed. (New York: Pantheon, 1998), 23-53; Joseph William Singer, "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld," Wisconsin Law Review 1982: 975-1059.
 40. Ernst Freund, Administrative Powers over Persons and Property: A Comparative Survey (Chicago, IL: University of Chicago Press, 1928), 27, 28; see also Freund, Police Power, 6.
 41. Freund, Cases on Administrative Law, 1.
 42. Kenneth F. Ledford, From General Estate to Special Interest: German Lawyers 1878-1933 (New York: Cambridge University Press, 1996), 7-8. I am indebted to Professor

- Ledford for his scholarship and advice on the Rechtsstaat in Germany.
43. Eric Hahn, "Rudolf Gneist and the Prussian Rechtsstaat, 1862-78," Journal of Modern History 49 (1977): D1363-64, D1366.
 44. Kenneth F. Ledford, "Formalizing the Rule of Law in Prussia: The Supreme Administrative Law Court, 1876-1914," Central European History 37 (2004): 203-24. See also Martina Künnecke, Tradition and Change in Administrative Law: An Anglo-American Comparison (Berlin: Springer, 2007), 24-25.
 45. I found little on Freund's legal education in his papers at the University of Chicago. Published accounts have him studying law at the University of Berlin and Heidelberg University. Association of American Law School, Handbook and Proceedings of the Thirty-First Annual Meeting, 1931: 163. He once explained that by moving from one university to another German law students could "study Roman law with Jhering, Constitutional law with Gneist, and the History of the American Constitution with Von Holst," but he did not say that he had studied with any of them. Ernst Freund, "The Study of Law in Germany," The Counsellor 1 (1891): 133-34. Freund's other early articles took up Norman influence on English law, the Roman law of contract, the German Civil Code, New York's recording act, historical jurisprudence, and a leading English case on the law of conspiracy: "The Effect of the Norman Conquest on English Law," Columbia Law Times 1 (1888): 232-62; "Contract and Consideration in Roman Law," *ibid.*, 2 (1889): 167-78; "The Proposed German Civil Code," American Law Review 24 (1890): 237-54; "Record and Notice under the Revised Statutes," Columbia Law Times 3 (1890): 223-30; "Historical Jurisprudence in Germany," Political Science Quarterly 5 (1890): 468-86; "A

Recent Case on the Law of Conspiracy,” The Counsellor 1 (1891): 220-29. Only after lecturing on Administrative Law and Municipal Corporations at Columbia in 1892-93 did he publish his first article on administrative law, “Private Claims against the State,” Political Science Quarterly 8 (1893): 625-52. See Charles E. Merriam, “Ernst Freund,” Dictionary of American Biography, supp. 1-2 (New York: Charles Scribner’s Sons, 1958), 323; Ernst Freund, Jurisprudence and Legislation (St. Louis, 1904), 1.

Freund repeatedly credited Goodnow as the source of his ideas about administrative law. Kraines, World and Ideas of Ernst Freund, 4; Reminiscences of Joseph Warren Madden (1957), 40, Oral History Research Office, Columbia University Library, New York, NY. Goodnow thanked “Doctor Ernst Freund of the New York Bar” for his comments on the manuscript of Comparative Administrative Law: An Analysis of the Administrative Systems, National and Local, of the United States, England, France and Germany (New York: G.P. Putnam's Sons, 1893), vi.

46. Arthur W. Macmahon, “Frank J. Goodnow,” Dictionary of American Biography, supp. 1-2 (New York: Charles Scribner’s Sons, 1958), 250; Goodnow, Comparative Administrative Law, vi; Ernst Freund, “The Law of the Administration in America,” Political Science Quarterly 9 (1894): 405; see also Ernst Freund, “Historical Survey,” in The Growth of American Administrative Law (St. Louis, MO: Thomas Law Book Co., 1923), 40.
47. Alexis de Tocqueville, Democracy in America, ed. J. P. Mayer (New York: Anchor Books, 1969), 262-63; James Bryce, The American Commonwealth (1889; New York: Macmillan, 1891), 1:15.

48. Freund, "Law of Administration in America," 406-09.
49. *Ibid.*, 421.
50. Hahn, "Gneist and the Prussian Rechtsstaat," D1366; Freund, "Historical Survey," 9-10; Ernst Freund, "The Substitution of Rule for Discretion in Public Law," American Political Science Review 9 (1915): 670.
51. Freund, "Discussion," Proceedings of the American Political Science Association 6 (1909): 60. At the same meeting Goodnow voiced his exasperation with Dicey's American disciples on this score. "We can do no better than endeavor to beat it into the heads of the legal profession that notwithstanding our boasted protection of private rights in this country, those rights are as a matter of fact much less protected against administrative action than they are under the system of administrative courts in vogue upon the continent of Europe." *Ibid.*, 64.
52. Freund, "Law of Administration in America," 419, 425.
53. Act of April 30, 1892, 1892 N.Y. Laws, ch. 401, §18; *People v. Grant*, 126 N.Y. 473, 27 N.E. 964 (1891); Act of March 23, 1896, 1896 N.Y. Laws, ch. 112, §§17, 23, 24; see Freund, Administrative Powers 492-93, 502.
54. Freund, "Historical Survey," 23; see also Freund, Police Power, 196, 677; Freund, Cases on Administrative Law 70; Freund, "Substitution of Rule for Discretion," 670; Ernst Freund, "An Inquiry into Administrative Law and Practice: Memorandum Preliminary to a Survey of Statutory Administrative Powers to Determine Private Rights" (confidential proof, [1923]), 55; Ernst Freund, "Licensing," Encyclopedia of the Social Sciences (New York: Macmillan, 1933): 9: 447.

55. Freund, "Substitution of Rule for Discretion," 666; Ernst Freund, "The Substitution of Rule for Discretion in Public Law," International Journal of Ethics 25 (1914): 100-01.
56. Freund, "Historical Survey," 23.
57. Ernst Freund, "The Problem of Intelligent Legislation," Proceedings of the American Political Science Association 4 (1907): 70-71, 79; see Maurice T. Van Hecke, "Ernst Freund as a Teacher of Legislation," University of Chicago Law Review 1 (1933): 92-94; Arthur H. Kent, "The Work of Ernst Freund in the Field of Legislation," *ibid.*, 94-96.
58. Ernst Freund, "The Correlation of Work for Higher Degrees in Graduate Schools and Law Schools," Illinois Law Review 11 (1916): 307; Ernst Freund, Standards of American Legislation (Chicago, IL: University of Chicago Press, 1917). If Freund reflected on the irony that the prize's namesake had helped quash his plans for a German-style curriculum at the University of Chicago Law School, he gave no indication in his letter of acceptance. Freund to Pound, December 21, 1918, reel 6, Pound Papers; see Frank L. Ellsworth, Law on the Midway: The Founding of the University of Chicago Law School (Chicago, IL: University of Chicago Law School, 1977), 54-73.
59. Freund, "Substitution of Rule for Discretion" (1914), 100; Freund, "Substitution of Rule for Discretion" (1915), 666-67, 669, 671, 675.
60. Freund, "Substitution of Rule for Discretion" (1915), 669, 670, 675-76.
61. Freund, "Historical Survey," 22-23; Freund, "Substitution of Rule for Discretion" (1914), 102.
62. Freund to Farrand, November 1, 1921, box 2, CF Papers.
63. [Ernst Freund,] "Suggestions of a Working Plan for the Proposed Inquiry into Administrative Law and Practice under the Auspices of the Commonwealth Fund," 5-6,

- n.d., box 2, CF Papers.
64. Freund to Farrand, December 5, 1921, box 2, CF Papers.
 65. Freund, Jurisprudence and Legislation, 1, 2.
 66. Morris R. Cohen, "A Critical Sketch of Legal Philosophy in America," in Law: A Century of Progress, 1835-1935 (New York: New York University Press, 1937), 2: 316-17; Freund, "Suggestions of a Working Plan," 13.
 67. Frankfurter to Freund, December 10, 1921, reel 82, FF Papers.
 68. Farrand to Frankfurter, December 14, 22, 1921, reel 81, FF Papers; Farrand to Freund, December 7, 1921, box 2, CF Papers.
 69. "Administrative Practices: On Friday, December 30, 1921," n.d., box 2, CF Papers; Freund to James Parker Hall, January 4, 1922, *ibid.*; "The Three Days Conference Developed the Following," n.d., box 5, EF Papers.
 70. Felix Frankfurter, "Memo of Conference at Chicago, Dec. 31, 1921 and January 1st, 1922," n.d., reel 81, FF Papers; Freund to Farrand and Frankfurter, n.d., *ibid.* ("Memorandum regarding meeting at New Haven, May 11/22, and conferences in Baltimore and Washington May 13, 15 and 16").
 71. Frankfurter to Farrand, January 4, 1922, box 2, CF Papers; Frankfurter to Farrand, February 14, 1924, reel 82, FF Papers.
 72. Freund, "Comment on Frankfurter's Letter of Jan. 4," n.d., box 5, EF Papers.
 73. Freund to Frankfurter, May 19, July 5, 1922, reel 81, FF Papers; Pound to Farrand, December 27, 1922, box 3, CF Papers.
 74. Edwin Wilhite Patterson, The Insurance Commissioner in the United States: A Study in Administrative Law and Practice (Cambridge, MA: Harvard University Press, 1927);

- William C. Van Vleck, The Administrative Control of Aliens: A Study in Administrative Law and Procedure (New York: Commonwealth Fund, 1927). Bontecou's failure to complete her study after the Commonwealth Fund invested over \$16,000 in it apparently poisoned the Fund's relations with Frankfurter after 1930. Barry C. Smith, "Report to the Legal Research Committee," May 2, 1931, Smith to Hand, May 20, 1932, box 125, Hand Papers.
75. I.L. Sharfman to Frankfurter, April 8, 1930, reel 82, FF Papers; Max Lowenthal to Frankfurter, April 13, 1930, Barry C. Smith, "Interview with Mr. I. L. Sharfman," April 24, 1930, box 6, CF Papers.
76. "Gerard C. Henderson, Lawyer, Dies at 36," New York Times, September 1, 1927, 23; Gerard Carl Henderson, The Position of Foreign Corporations in American Constitutional Law: A Contribution to the History and Theory of Juristic Persons in Anglo-American Law (Cambridge, MA: Harvard University Press, 1918); Federal Trade Commission, Minutes, January 6, 1917, online at <http://www.ftc.gov/os/minutes/jan-mar1917.pdf>, visited November 1, 2008; Gerard C. Henderson to Frankfurter, n.d., reel 40, FF Papers; Parrish, Frankfurter, 108, 120; Merlo Pusey, Eugene Meyer (New York: Knopf, 1974), 142, 178.
77. Henderson to Frankfurter, September 15, 1923, reel 40, FF Papers; Frankfurter to Farrand, October 4, 1923, box 6, CF Papers.
78. G. Cullom Davis, "The Transformation of the Federal Trade Commission, 1914-1929," Mississippi Valley Historical Review 49 (1962): 437-55; Pendleton Herring, Public Administration and the Public Interest (New York: Russell & Russell, 1936), 108-38.

79. Henderson to Frankfurter, September 7, 1922, reel 40, FF Papers; Henderson to Farrand, February 27, 1924, box 6, CF Papers.
80. Walter L. Fisher to Ernst Freund, March 13, 1924, Helen M. Deane to Farrand, November 11, 1925, Frankfurter to Farrand, April 29, 1924, Farrand to Deane, March 12, 1925, Freund to Farrand, October 27, 1924, box 6, CF Papers.
81. Henderson to Farrand, March 6, 1924, May 12, 1925, Pound to Farrand, March 13, 1924, Frankfurter to Farrand, April 19, 1923, box 6, CF Papers; George Rublee, review of Henderson, The Federal Trade Commission, Harvard Law Review 38 (1924): 269.
82. Frankfurter to Farrand, January 25, 1924, box 6, CF Papers. Frankfurter would similarly aggrandize on behalf of the “physiological study of administrative law in action,” even as he bowed to “the pioneer scholarship of Frank J. Goodnow and Ernst Freund,” in his introduction to Patterson’s Insurance Commissioner in the United States, xiii, xvii, and “The Task of Administrative Justice,” University of Pennsylvania Law Review 75 (1927): 614-21.
83. Freund, “Administrative Law and Practice Report for 1924-25,” reel 81, FF Papers; Freund to Frankfurter, March 12, 1923, box 5, EF Papers.
84. Freund to Frankfurter, March 7, 1927, box 7, CF Papers; Freund to Farrand, May 1, 1925, box 2, CF Papers.
85. William A. Robson, Law Quarterly Review 49 (1933): 177.
86. Farrand, “Outline of Points to Take Up with Regard to Freund’s Statutory Survey,” n.d., box 7, CF Papers.
87. Pound to Farrand, November 24, 1926, box 3, CF Papers.
88. Farrand to Frankfurter, February 24, 1927, Pound to Farrand, March 1, 24, 1927, box 7,

CF Papers.

89. Frankfurter to Freund, March 9, 1927, box 7, CF Papers; Farrand to Samuel H. Fisher, April 1927, box 1, CF Papers.
90. Freund, Administrative Powers, 59-60, 580-82.
91. Ibid., 98-99, 101, 29.
92. Keller, Regulating a New Economy, 62-65; Felix Frankfurter, The Public and Its Government (New Haven, CT: Yale University Press, 1930), 81-122.
93. Freund, Administrative Powers, 102, 582-83.
94. Such was the case, Freund had argued, with rate-setting by the ICC since 1910. Freund, “Historical Survey,” 37, reprinted, in relevant part, as Ernst Freund, “Commission Powers and Public Utilities,” American Bar Association Journal 9 (1923): 288; see also Freund to Robert S. Lovett, n.d., box 2, EF Papers; Robert S. Lovett, The Railroad Problem: Comments on Certain Methods Suggested for Solving It (New York, 1919), 29. More generally, Freund warned that discretion tempted “the consumer, the passenger, the shipper, the wage earner, the ‘small man’ in general” to use regulation as “a weapon to gain economic advantage.” Freund, “Historical Survey,” 31; Freund, “Commission Powers and Public Utilities,” 286.
95. Freund, Administrative Powers, 59, 581.
96. Farrand, “Outline of Points.”
97. John H. Wigmore, “The Dangers of Administrative Discretion,” Illinois Law Review 19 (1925): 441.
98. Edwin W. Patterson, review of Freund, Administrative Powers over Persons and Property, Columbia Law Review 29 (1929): 104, 105, quoting *Lochner v. New York*, 198

- U.S. 45, 74 (1905) (Holmes, J., dissenting).
99. John Dickinson, review of Freund, Administrative Powers over Persons and Property, American Political Science Review 22 (1928): 985.
 100. Farrand to Pound, March 26, 1927, box 3, CF Papers.
 101. Frankfurter, Public and Its Government, 151, 158, 159; Frankfurter and Davison, Administrative Law, vii-viii.
 102. Freund, review of Frankfurter and Davison, 170; “Prof. E. Freund, U. of C. Authority on Law, Is Dead: Stricken by Heart Attack while Asleep,” Chicago Daily Tribune, October 21, 1932, 9.
 103. Felix Frankfurter, “Some Observations on Supreme Court Litigation and Legal Education,” University of Chicago Law School, February 11, 1953, reel 134, FF Papers.
 104. Frankfurter and Davison, Administrative Law, 869-73, reprinting Freund, Administrative Powers, 555-60. In his administrative law seminar in 1925, Frankfurter had emphasized the emergence of an administrative court in Freund’s discussion of customs in “Historical Survey.” “Administrative Law Notes (Landis, 1925),” 300, box 153, Thomas G. Corcoran Papers, Manuscripts Division, Library of Congress.
 105. Charles S. Hyneman, “Administrative Adjudication: An Analysis II,” Political Science Quarterly 51 (1936): 519; Ralph F. Fuchs, “Concepts and Policies in Anglo-American Administrative Law Theory,” Yale Law Journal 47 (1938): 546-47 n. 32.
 106. See George B. Shepherd, “Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics,” Northwestern University Law Review 90 (1996): 1590-93.
 107. James M. Landis, The Administrative Process (New Haven, CT: Yale University Press,

- 1938); Walter Gellhorn, Federal Administrative Proceedings (Baltimore, MD: Johns Hopkins Press, 1941); Jerome Frank, If Men Were Angels: Some Aspects of Government in a Democracy (New York: Harper & Bros., 1942); Walter Gellhorn, Administrative Law: Cases and Comments (Chicago, IL: Foundation Press, 1940), 1-33, 808 n.*.
- Neither E. Blythe Stason, who sympathized with Freund’s “conservatism,” nor Frankfurter’s protégé Milton Katz, who presumably did not, referred to Freund in their casebooks. E. Blythe Stason, The Law of Administrative Tribunals (Chicago, IL: Callahan, 1937); Milton Katz, Cases and Materials on Administrative Law (St. Paul, MN: West Publishing Co., 1947); see E. Blythe Stason, review of Freund, Administrative Powers, Michigan Law Review 27 (1929): 845-46.
108. Davis, Administrative Law, 38.
109. Richard B. Stewart, “The Reformation of American Administrative Law,” Harvard Law Review 88 (1975): 1694 n. 118. See Reuel E. Schiller, “Rulemaking’s Promise: Administrative Law and Legal Culture in the 1960s and 1970s,” Administrative Law Review 53 (2001): 1139-88.
110. Theodore J. Lowi, The End of Liberalism: Ideology, Policy, and the Crisis of Public Authority (New York: W.W. Norton, 1969), 298 n. 7.
111. Steven J. Diner, A City and Its Universities: Public Policy in Chicago, 1892-1919 (Chapel Hill, NC: University of North Carolina Press, 1980), 191-94.
112. Diner, City and Its Universities, 43-44; Thomas R. Pegram, Partisans and Progressives: Private Interest and Public Policy in Illinois, 1870-1922 (Urbana, IL: University of Illinois Press, 1992), 20.

113. Diner, City and Its Universities, 130-31, 138-39, 142, 147, 156, 158, 165; Pegram, Partisans and Progressives, 75, 82, 97, 117; Kent, "Work of Ernst Freund," 95-96.
114. Addams, "Friend and Guide of Social Workers," 43; Freund to Grace Abbott, May 22, 1917, Abbott to Freund, May 26, 1917, box 1, EF Papers.
115. Van Hecke, "Teacher of Legislation," 92.
116. Samuel Haber, Efficiency and Uplift: Scientific Management in the Progressive Era, 1890-1920 (Chicago, IL: University of Chicago Press, 1964), 101-03; Pegram, Partisans and Progressives, 13-14.
117. Freund, "Substitution of Rule for Discretion" (1915), 671; Freund, Administrative Powers, 584.
118. Woodrow Wilson, "Law or Personal Power," The Public Papers of Woodrow Wilson, ed. Ray Stannard Baker and William E. Dodd (New York: Harper Bros., 1925-27), 2:25, 28, quoted in Michael Les Benedict, "Law and Regulation in the Gilded Age and Progressive Era," in Law as Culture and Culture as Law: Essays in Honor of John Phillip Reid, ed. Hendrik Hartog and William E. Nelson (Madison, WI: Madison House, 2000), 258-59, 260.
119. Haber, Efficiency and Uplift, 104; Pegram, Partisans and Progressives, 181, 186.
120. Revised Record of the Constitutional Convention of the State of New York, April Sixth to September Tenth, 1915 (Albany, NY, 1916), 3: 3101-02; "Find Service Boards Haven't Easy Tasks," New York Times, December 17, 1911, 14; see Robert F. Wesser, Charles Evans Hughes: Politics and Reform in New York, 1905-1910 (Ithaca, NY: Cornell University Press, 1967), 159; Bruce W. Dearstyne, "Regulation in the Progressive

- Era: The New York Public Service Commission,” New York History 58 (1977): 331-47.
121. Martin J. Schiesl, The Politics of Efficiency: Municipal Administration and Reform in America, 1800-1920 (Berkeley, CA: University of California Press, 1977), 190-91. On the federal bureaucracy, see Daniel P. Carpenter, The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862-1928 (Princeton, NJ: Princeton University Press, 2001).
122. Harold Laski to Oliver Wendell Holmes, Jr., September 5, 1917, quoted in Parrish, Frankfurter and His Times, 82.
123. Felix Frankfurter, review of The Growth of American Administrative Law, Harvard Law Review 37 (1924): 640-41; Frankfurter, “Gentlemen, we shall consider in this course,” September 28, 1914, 4, part 3, reel 21, Felix Frankfurter Papers, Harvard Law School Library, Cambridge, MA; Student notes of Frankfurter’s seminar on administrative law, 49, box 153, Corcoran Papers.
124. Frankfurter, Public and Its Government, 49, 153; Report of President’s Committee on Civil Service Improvement (Washington, DC: Government Printing Office, 1941), 31. For Frankfurter’s authorship of this portion of the PCCSI’s report, see Frankfurter to Frank Murphy, December 10, 1940, part 3, reel 2, FF Papers, HLS. As Scott James pointed out to me, Freund’s view embodied elements of Richard Stewart’s “transmission belt” model of administrative law, and Frankfurter’s even more closely resembled the “expertise” model that Stewart saw as the dominant approach during the New Deal. Stewart, “Reformation,” 1675-78.
125. Louis L. Jaffe, Judicial Control of Administrative Action (Boston, Mass.: Little, Brown,

- 1965), 33-40; James Willard Hurst, The Growth of American Law: The Law Makers (Boston, MA: Little, Brown, 1950), 399-400; Brian Balogh “Reorganizing the Organizational Synthesis: Federal Professional Relations in Modern America,” Studies in American Political Development 5 (1991): 147-70.
126. Edmund Burke, “Letter to the Sheriffs of Bristol,” in Freund, Standards, iii; see *ibid.*, 312; Van Hecke, “Teacher of Legislation,” 93. On American lawyers’ hostility to statutes, see Benedict, “Law and Regulation,” 246-49.
127. Report of the PCCSI, 31; Frankfurter, “The Law and the Law Schools,” American Bar Association Journal 1 (1915): 540.
128. Landis, Administrative Process, 33. For Landis’s quarrel with Goodnow’s intellectual heirs, see Donald R. Brand, “The President as Chief Administrator: James Landis and the Brownlow Report,” Political Science Quarterly 123 (2008): 69-93.
129. Willard Hurst, “Legal History: A Research Program,” Wisconsin Law Review 1942: 323; Hurst, Growth of American Law, 249-375; see Daniel R. Ernst, “The Ideal and the Actual in the State: Willard Hurst at the Board of Economic Warfare,” in Total War and the Law: The American Home Front in World War II, ed. Daniel R. Ernst and Victor Jew (Westport, CT: Praeger, 2002), 149-83.
130. Charles A. Horsky, The Washington Lawyer (Boston, MA: Little, Brown, 1952).
131. Richard J. Lazarus, The Making of Environmental Law (Chicago, IL: University of Chicago Press, 2004), 69-73; Stewart, “Reformation,” 1711-60.
132. Hurst, Growth of American Law, 411.