The problem of control in the weak state

Domination in the United States, 1880–1920

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How does a decentralized, fundamentally weak state achieve a measure of control over societal changes without losing its essential character? That is the question that government, academic, and business leaders in the United States faced in the closing decades of the nineteenth century. Before about 1880, most Americans in positions of influence were deeply committed to weak governments, divided sovereignty, and individual self-determination. The federalist structure of autonomous local, state, and national governments, patronage party politics, and a strong court system upholding individual rights contributed to and reinforced this commitment. But in the 1880s and 1890s influential Americans awoke to constant civil unrest and growing inequality in a society transformed by urbanization and industrialization, and began to realize the necessity of controlling the direction and consequences of change. In those years, and continuing at least to 1920, such Americans undertook the task of rethinking democracy. As a consequence of this crisis, the United States embarked upon an unprecedented and still continuing period of state building. This process, as Stephen Skowronek has shown, resulted in a "national administration" that remains wedded not only to the ideals, but also to the institutions of the weak state.¹

Our purpose here is to analyze the American effort to legitimize an interventionist strategy of political control within the ideological and institutional strictures of the weak state. Although we do not discuss them in detail, the paper is set against the backdrop of the series of crises, economic changes, and social movements that occurred in the United States between the 1860s and 1920.² Out of the perception, as well as the fact, that such fundamental changes were occurring came the impetus to remake the democratic state. It is the ideological and institutional remaking of the democratic state that is the topic of our analysis.

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To this end we divide the following discussion into three major sections: we focus on (1) the principles, (2) the accompanying institutions, and (3) the theoretical implications of weak state domination strategies. After a brief summary of the weak state thesis in American studies, we examine, in the first major section, the intellectual rethinking of democracy and the development of a set of core justifications for social control. These justifications turn out to be continuations of the ideology of the weak state, with subtle but highly significant differences emerging in the post-1880 period. Understanding the legitimizing principles espoused by a broad range of American thinkers enables us, in the second major section, first to analyze the attempts to institutionalize this social control ideology through law, and second to focus in particular on the emergent model of substantively rational administrative justice, which we believe characterizes the American welfare state. In the last section we address the theoretical implications of our findings. Specifically, we argue that Weber's typology of domination should be extended to incorporate the American case more adequately. Our theoretical point is that, while Weber's scheme remains applicable to the broad range of historical societies, his framework for the analysis of contemporary domination is too loosely meshed to catch the significant, but often subtle differences among modern societies.

American exceptionalism

A long tradition in studies on American society centers on the notion that the United States has diverged in important ways from orthodox European patterns of nation-building. While this theme has been used by a variety of scholars to voice diverse concerns, there is some consensus that the source of American uniqueness is in the lack of indigenous feudal institutions. Tocqueville's observations of American society in the 1830s present this thesis in its most influential form. He argued skillfully that the absence of an aristocracy helps explain the emergence of a "township" model of diffuse authority relations rather than a European model of state-centered politics. But Tocqueville was far from the first to note this causal relationship. As Bailyn and Wills have shown, the American state-builders themselves took conscious advantage of their lack of aristocratic fetters to debate the parameters of the new government (as recorded, for example, in The Federalist Papers), and ultimately to institutionalize their vision of a unique state in the Constitution.
These recent interpretations tend to concur that the exceptional nature of the American state was evident at the outset, was in large part made possible by the timing of settlement and independence, and became a deep-seated aspect of the American mentalité. Beyond this point, however, an interesting disagreement arises. To some writers, the American state is exceptional because it is primitive. Hartz argues that America was a "fragment" of Europe, which avoided the strains of European revolution and nation-building by resting on "three hundred years of bourgeois immobility." \(^5\) Huntington develops Hartz's fragmentation thesis further in his comparative analyses of political modernization. He argues that the United States avoided the need for a strong state because, on the one hand, it lacked an aristocracy that would otherwise have provided a focal point for class dissensus, and on the other because it maintained an abiding belief in "fundamental" natural law, which was itself characteristic of Tudor rule. Thus while unified sovereignty was established as a new principle of authority in the sixteenth century on the Continent and in the seventeenth century in England, the "antique" liberal state in America maintained a diffusion of authority throughout the polity.\(^6\)

To other writers, however, the application of antique notions to modern conditions resulted in a qualitatively new and wholly original conception of authority. Bailyn traces the ideological roots of federalism back to the colonists' obsession with power and sovereignty: "'Power' to them meant the dominion of some men over others, the human control of human life: ultimately force, compulsion." Their suspicion of centralized power led them to rethink the European notion of indivisible sovereignty and the corresponding institutions of European states. The emergent conception of divisible sovereignty was not a retreat from authority, but a rationale for new institutional practices: "[P]remised on the assumption that the ultimate sovereignty - ultimate yet still real and effective - rested with the people, [it became] not only conceivable but in certain circumstances salutary to divide and distribute the attributes of government sovereignty among different levels of institutions." This reconceptualization, to Bailyn, prepared the way "for a new departure in the organization of power."\(^7\)

Similarly, Schwartz describes how the almost paranoid suspicion of centralized power characteristic of the American Whig tradition resulted in a distinctive model of political leadership that informed the framing of the Constitution.\(^8\) While American whiggery was borrowed relatively late from English politics, it was nonetheless a conservative,
resorationist ideology, which combined the imagery of the Enlighten-
ment, the Puritan Commonwealth, and Saxon democracy in an attack
on sovereignty. The ideal whig leader, exemplified by Washington, was
the antithesis of both the European statesman and the Weberian
charismatic leader: he avoided power, supported existing traditions,
and was revered more for his temperate virtue than for any personal
genius.

While the weak state thesis of American exceptionalism has been
generally accepted and convincingly applied to the pre-Civil War era, it
is less often and only awkwardly applied to subsequent developments.
It is precisely in this period, however – when a predominantly rural
society and genuinely federated polity gave way to rapid industrializing
and urbanizing trends, when ubiquitous civil unrest and comprehensive
reform movements generated pressures for the protections of a welfare
state – that the structural limits of the weak state became most
apparent, and hence that the weak state thesis itself should be most
thoroughly specified. While the thesis is generally accepted as valid for
the post-Civil War era, difficulties arise over how it should be con-
ceptualized, particularly for the period after 1880 when the United
States obviously began the process of state-building that continues
today.

The conventional approach has been to renew the argument that
equates exceptionalism with primitivism. Badie and Birnbaum, for
example, find that “the American state remains backward when com-
pared with its French or German counterpart.” They explain this differ-
ence in terms of a weak bureaucracy, the “relatively low level of state
autonomy and institutionalization,” and the large political role played
by “the business community and the market.” 9 Loosely defining the
weak state by some of its institutional attributes, they fall back upon an
explanation derived from Huntington and Lowi that “the state in
America remains an ‘incomplete conquest,’ ” an anachronism from an
earlier era. 10 Like Huntington and Lowi, Badie and Birnbaum argue
that the fully developed state is the European state, while the American
state is an example of arrested development, a negative case rather
than an independent alternative to state-building. Similar conclusions
have traditionally been offered in the comparative literature on welfare
state development: The United States, it appears, was a “laggard” in the
development of social insurance and other public benefit programs. 11

Perhaps the best recent application of the weak state thesis to modern
American state-building is Stephen Skowronek’s fine study, *Building a New American State*. Skowronek concludes that “American exceptionalism has not been transcended by twentieth-century state-building; it has only taken a new form.” The new form he sees is the rise of a national administrative state, but unlike the strong, centralized bureaucracies of the European state, American administration is diffuse in purpose, relatively decentralized in structure, and operationally weak—characteristics that result, according to Skowronek, in “a hapless confusion.” Although his analysis is more insightful than most previous studies of state-building in the United States, and more attuned to the originality of American state-building strategies, Skowronek’s study remains an analysis of institutions rather than an attempt to join an institutional analysis with an examination of the principles of legitimation that justify and shape institutions. While the linkage between institutions and mentalities is a central issue in the research on pre-Civil War exceptionalism, it is less apparent in discussions of postbellum development strategies. This omission is probably a result of the dominance of the “primitivist” interpretation of the weak state: according to this linear imagery of state-building, the American suspicion of power must ultimately and straightforwardly give way before the demands of modernity. But if, as Skowronek argues, contemporary American political institutions bear the mark of their exceptional origin, it follows that American anti-sovereign ideology was not buried by the new regime, but rather subtly transformed to legitimate the new structure of authority.

We argue in the remainder of this article that the linkage between ideologies and institutions is crucial to our understanding of America’s distinctive approach to state-building. At this point, however, we must emphasize that we are *not* making a directly causal argument to the effect that ideas cause action or that great thinkers cause fundamental institutional changes. Were we to make a causal argument in the following sections, which we do not, we would argue that pre-existing institutions, which structure class alignments and status group membership, establish conditions upon which self-interested people act. But as Weber pointed out, although not properly seen as causal agents, ideas nonetheless suggest and justify the directions that self-interested actors take. It is, therefore, essential that the sociological, particularly the structural, implications of ideas be examined seriously, as an addition to and not as a substitute for a causal analysis of social change. Previous analyses of American state-building have looked at interests, at institutions, at civil unrest, but not at the sociological implications of
the ideas that went into justifying institutional change. This is the task we attempt in the remainder of this paper.

**Changes in American ideas about ethics and social control**

In this section we argue that Progressive American thinkers responded to a perceived crisis of political authority by articulating an original and widely influential ideology of social control that implied a subtle, but decisive shift in the nature of political domination in America. The endemic conflict between reform demands and the traditionally limited authority of the state called forth a new set of principles legitimizing an interventionist state, a new rationale enjoining obedience to law, and – as we describe in the next section – a general transfer of authority from judiciary and legislature to executive and administrative agencies. The foundation of this new ideology, and of the emergent Progressive strategy of institutional reform, was laid by American intellectuals who struggled to rethink the fundamental principles of obedience and ethical obligation. We show that arguments for obligation and obedience to law were no longer rooted in an innate human nature, but came to rest instead on principles of social responsibility. American thinkers encouraged this shift, as Janowitz has shown in a somewhat different connection,\(^{13}\) by combining ethics and social control in a way that minimized coercion, including that from political power, and maximized self-regulation in organized social contexts.

We do not attempt to capture all aspects of the complex intellectual response to the social and economic problems of the post-Civil War United States. We aim toward a narrow analysis rather than a broad intellectual history, and therefore restrict our focus here to (1) the structural conditions favorable to the emergence of a normative conception of social control, (2) the content of the new ideology of control, with special attention to the links that were forged between ethics and social roles, and between roles and social organization, and (3) the widespread acceptance of the organizational response to social control.

Four characteristics of the American intellectual community are important to understanding this process of redefinition. First, the period between 1880 and 1920 saw great changes in American education:\(^{14}\) many major universities, especially state schools, were founded, older schools rapidly increased in size, and perhaps most important, the modern university took shape during this time. The division of the
university into academic departments, of the curriculum into majors, and of higher education into undergraduate and graduate schools all became institutionalized features of modern higher education. This institutionalization process in turn created a sense of competition among intellectuals and helped fuel the process of academic professionalization.\textsuperscript{15} Second, despite the expansion of universities, the size of the intellectual community was by today's standards small, even intimate: its members knew one another, and from their common experience they established a climate of opinion in which they rarely argued about primary assumptions.\textsuperscript{16} This convergence is important because much of this community played an unusually active role in political change: as Skowronek writes, "The agenda for building a new American state was defined by an intellectual vanguard of university-trained professionals. They articulated the limitations of the state of courts and parties and championed specific bureaucratic alternatives that promised functional responses to new environmental demands."\textsuperscript{17}

Third, most of the leading intellectuals of the period had some academic training in Europe, usually in German universities, and all knew about and were often critical of major trends in European thought.\textsuperscript{18} Herbert Spencer in particular received a thorough drubbing from American intellectuals, even though they accepted and worked with ideas of evolutionary change. In addition, American writers generally criticized European socialist, Marxian, and Hegelian ideas.\textsuperscript{19} But this "Spencer-smashing," as Lester Ward called it,\textsuperscript{20} as well as the criticisms directed at other European thinkers, aimed less at dismissing than at critically appropriating those few central ideas that sat well with the experience of American intellectuals. Fourth, while they actively positioned their ideas in relation to European thinkers, Americans were more concerned with establishing a sound theory of practice than with founding or following a tradition of scholarship.\textsuperscript{21} They questioned the assumptions of science, they looked for certitude in knowledge, and in the main they wrestled very well with these philosophic issues, arriving at similar epistemological positions well in advance of European thinkers. But they were not devoted to scholarship and scholastic traditions, as for instance Weber was.\textsuperscript{22} In the worship of science they were evangelists, while European intellectuals were churchmen. These Americans proclaimed their break from tradition, claimed to represent a new vision of science, and called throughout their writings for new believers. Americans abandoned while Europeans built academic theologies.
Despite their claims to originality, what these Americans broke from is not always clear. Many said they parted from the Spencerian notion of abstract, transcendental evolutionary laws, others from German Staatstheorie, and still others from British utilitarianism. In their early writings William James and Lester Ward were most insistent on their rejection of Spencer. But James and many others also split from existing schools of American thought. In *The Principles of Psychology*, James listed a few such schools along with their American and European proponents — the “Automaton-theory,” the “Mind-stuff theory,” the “Material-monad theory,” the “Soul-theory.” But neither James nor any of his contemporaries criticized any specific theory for long; he even loosened his grip on Spencer when Spencer’s star began to fade.

These Americans railed more against theory in general than against any theory in particular. So virulent was the criticism and so diffuse was the target that White labels the movement an intellectual “revolt against formalism.” However characterized, the act of abandoning an intellectual past in which cause and effect could be neatly explained was nearly universal among American intellectuals. To James, for example, all deterministic theories were “monisms,” in contrast with his own perspective of “pluralism.” Veblen attacked “hedonistic” economic theory. Similarly, Charles H. Cooley divided up the theories he opposed in four groups — “mere individualism,” “double causation,” “primitive individualism,” and the “social faculty view” — and without naming names dismissed them all in five pages in the first chapter of *Human Nature and the Social Order*. The rhetorical device of grouping loosely-named theories and quickly discounting their relevance is so commonplace that it bespeaks a widespread agreement among intellectuals of the period that their work involved a sharp discontinuity with past thinking.

What these American intellectuals moved toward is a good deal clearer than what they left behind. Two major themes predominate. The first and most important of these was the reflexiveness of human reality. According to this view, both human ethics and human knowledge, including scientific knowledge, are based on intersubjective agreements forged in social relationships, and hence are interdependent. The second theme was the sociological consequence of the first: If reality is based upon the active force of human intelligence and results from interdependencies, then social control is best achieved reflexively, by educating and appealing to individuals’ subjective understandings of their social worlds.
The reflexivity of norms

The first theme, the reflexivity of reality, had many variants. Oliver Wendell Holmes Jr., in 1881, certainly offered a version in his analysis of the development of laws, as did Charles Peirce in the 1870s and 1880s in his highly influential interpretation of evolution as a process of chance. But perhaps the most important early examples are in the writings of William James and Lester Ward, both of whom argued that individuals made reality according to their prior but constantly remade conceptions of it.

James criticized Spencer’s notion of human psychology when he wrote that “the knower is not simply a mirror floating with no foot-hold anywhere, and passively reflecting an order that he comes upon and finds simply existing. The knower is an actor, and coefficient of the truth on one side, whilst on the other he registers the truth which he helps create. Mental interests, hypotheses, postulates, so far as they are bases for human action – action which to a great extent transforms the world – help to make the truth which they declare.” James would develop this point throughout the rest of his life, first making it a premise of human thought in The Principles of Psychology, and then using it as the epistemological foundation of his widely read philosophical works. In one of the most important of these later works, Pragmatism, A New Name for Some Old Ways of Thinking, James stated, “‘truth’ in our ideas and beliefs means the same thing that it means in science. It means … nothing but this, that ideas (which themselves are but parts of our experience) become true just in so far as they help us get into satisfactory relation with other parts of our experience….”

Working at the same time as James, Lester Ward independently addressed the social nature of human reality. Ward stressed society much more than did James, and argued for a teleological view of human action. By their ability to use their intellect, he suggested, individuals can foresee the consequences of their actions, and hence can select from among alternative courses of action those of greatest benefit to themselves and to society in general. Using this idea to call for a methodology of social reform, Ward, in The Psychic Factors of Civilization, advocated the adoption of “sociocracy,” government run by experts trained in sociology.

From these beginnings, the idea of reflexivity became a hallmark of early American social science. Its premise, “the turning back of the
experience of the individual upon himself,"" served as the foundation for a sociological view of the self, for a sociological view of human knowledge, and for an intellectual rationale for social reform.

The same premise led to a sociological reworking of ethics and social control. Every social theorist of the period participated in this task, and all reached the same conclusion, that ethical conduct was relative to and had its origins in social groups. With this conclusion, American intellectuals made an important contribution to the legitimation of reform in a weak democratic state: they moved the justification for the ethical conduct of individuals from a transcendental source (e.g., natural law or God or some innate patterns of behavior) to an experiential grounding in reflexive society. They pinned the correctness of ethics upon the workings of social groups and upon the social well-being of its members. "A separate individual," said Cooley, "is an abstraction unknown to experience, and so likewise is society when regarded as something apart from individuals." Morality, Cooley argued, could not be divided "into the social and the non-social." Rather "man's physical outfit ... is all social in the large sense, is all a part of the common human life." Dewey expanded this thesis in a book entitled Ethics. "The very habits of individual moral initiative, or personal criticism of the existent order, and of private projection of a better order, to which moral individualists point as proofs of the purely 'inner' nature of morality, are themselves effects of a variable and complex social order."

But William Graham Sumner said it best in his highly influential book, Folkways. He wrote that the rules of human conduct are social, and that they are "real" and "true" facts only in the most restricted sense, only insofar as they shape and nurture the life of humans in social groups. Sumner concluded that "rights can never be 'natural' or 'God-given,' or absolute in any sense. The morality of a group at a time is the sum of the taboos and prescriptions in the folkways by which right conduct is defined. Therefore morals can never be intuitive. They are historical, institutional, and empirical." This is the same conclusion that Holmes had reached in 1881 about the nature of law: Laws are historical, institutional, and true only insofar as they bear on human life as it is actually lived: "The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong." This conclusion, as we will later show, had far-reaching consequences for building the legal framework for control within the parameters of federalism.
The social science view of ethics was widely held by educated, forward-looking people of the period,\textsuperscript{47} and with it came the conviction that human conduct could not be justified in terms of standards external to human groups. Instead the inner justifications for obedience had to rest on social factors. Both American philosophy and American social science took as a key problem the task of providing intra-group standards for individual conduct. In this regard American intellectuals defined a set of principles of domination for American society, principles that acknowledged and built upon social control in the absence of a strong state.

From the beginning, American writers rejected the formalist solutions that Weber, for one, had observed in Europe.\textsuperscript{48} "Formalism," wrote Cooley, is "an evil that suppresses individuality and stupefies or misdirects the energies of human nature."\textsuperscript{49} Rules of conduct should not be imposed upon individuals, but rather should arise from within the social community. The same theme is repeated again and again: Laws arise out of folkways and mores.\textsuperscript{50} Systems of social control reflect the societies in which they are found.\textsuperscript{51} Laws define social standards, rights define social obligations, and both laws and rights are social creations.\textsuperscript{52} The principle of obedience cannot be formal and lawlike, but rather must conform to the reflexiveness of human nature, must build on genuine human feelings, and must draw upon the consciousness of social groups.\textsuperscript{53} At the base of this theme was the recurring idea that the principle of obedience was organizational in context and substantive in nature.\textsuperscript{54}

We can best establish the historical linkage of the new group-centered vision of ethics – what Haskell calls "theories of interdependency"\textsuperscript{55} – to the emergent principles of weak-state social control by describing, first, the logical connection drawn by these thinkers between control and social organization; and second, the widespread acceptance of that connection even beyond the intellectual community. The theoretical linkages were best drawn by Dewey and Mead. Dewey accepted the ideas that human action is interdependent and that obedience must be grounded in social responsibility. He reasoned that individuality and genuine freedom grew out of social organization, which is itself a reflexive creation of human beings. Social control is that which emotionally pulls individuals into social groups and holds them there. That inner tug is "responsibility." Society, wrote Dewey, "wants men and
women who habitually form their purposes after consideration of the social consequences of their execution... Apprehensiveness of susceptibility to the rights of others... is the essence of responsibility, which in turn is the sole ultimate guarantee of social order.”

Dewey believed that responsibility is built organizationally upon a network of rights and obligations. Rights are always “social in origin and intent,” and always apply to a “defined activity; to one carried on, that is, under certain conditions. This limitation constitutes the obligatory phases of every right.” By this reasoning Dewey supplied a positive form of Holmes’s notion of tort law. Said Dewey, the individual “has a right to use the public roads, but he is obliged to turn a certain way. He has a right to use his property but he is obliged to pay taxes, to pay debts, not to harm others in its use, and so on.”

Mead carried the logic of this position even farther and in a more sociological direction. Social control was to Mead a central, pressing intellectual problem that required historical as well as sociological solutions. He understood that American approaches to social control differed from European ones, a consequence resulting from the different structures and ideas within which each society created its social reality. Europeans offered more structuralist, absolutist, and positive solutions to social control than did Americans. Theirs was a hierarchical solution. By contrast, said Mead, early American philosophy “was warm with the inner life of the self.” When Europeans developed technological and evolutionary interpretations of social reality, Americans were loath to give up this inner life and accused European thinkers of being too deterministic. American thinkers and activists clung to “a self that could interpret nature and history by identifying itself with their processes.” The pragmatism of James and Dewey, and by implication of Mead himself, carried forward this idea of the self and in so doing recreated what Mead thought was “the important characteristic of American life, the freedom...to work out immediate politics and business with no reverential sense of a pre-existing social order within which they must take their place and whose values they must preserve. We refer to this as individualism, perhaps uncouth, but unafraid.”

Like Dewey, Mead saw that the American answer to the problem of social control lay in making the processes of action the goals and substance of individual human concern. But unlike Dewey, Mead drew out the sociological implications of this conclusion by conceptualizing the healthy self as the bearer both of individual identity and collectively
shared norms. In a lengthy, complicated article, “The Genesis of the Self and Social Control,” Mead describes the conditions under which the self enacts control:

The human societies in which we are interested are societies of selves. The human individual is a self only insofar as he takes the attitude of another toward himself. Insofar as this attitude is that of a number of others, and insofar as he can assume the organized attitudes of a number that are cooperating in a common activity, he takes the attitudes of the group toward himself, and in taking this or these attitudes he is defining the object of the group, that which defines and controls the response. Social control, then, will depend upon the degree to which the individual does assume the attitudes of those in the group who are involved with him in his social activities.62

Thus Mead argued that individualism and social control could both be accommodated within American society: social control is internalized to become self control when individuals take on the attitudes of others as occupants of roles in organized action settings. By conceptualizing individuals as selves, selves and others as role occupants, and groups as organizations of roles, Mead was able to merge role theory with principles of social control, and treat both as processes of social organization.

The general notion that appropriate organization is the key to self- and social control provided a foundation for the American embrace, from the 1890s on, of organizational technologies. All the social sciences, in one form or another, developed some conception or focused on some aspect of organization. American political scientists were originally drawn to German Staatstheorie, with its conception of indivisible, absolute sovereignty. But by the turn of the century they began to reject this approach because of “their inability to apply the German idea of the state to the American political tradition.” Joining with the Pragmatist thinkers of the time, they abandoned abstract, deductive theory and studied instead the organizational processes of government: “They pursued political parties, congressional committees, or economic interests through the maze of political decision making and found actualities more vital, not to mention more pertinent to every-day politics, than abstractions.”63

Even more than political scientists, early American sociologists took up the idea of organization as a banner. Organization and disorganization were concepts as important in American sociology as class and class conflict were in European Marxist and Socialist circles, and for
similar reasons. Organization and class, in their respective literatures, were the building blocks of complex societies. Organizations in American sociology ranged from play groups and communities to government and industrial administrations, and ideally they all possessed the same two purposes, as locations in which social goals could be accomplished and the individual selves could be realized.54

The affinity for the organizational message, however, went far beyond academic circles, and became a core element in the extensive organizational movements of the period. These movements are often identified with Taylor’s writings on scientific management, but in fact the movements preceded Taylor’s fame and are certainly much broader than his concentration on time and motion studies of efficiency in factories.65 In reference to state building, organizational movements in three spheres stand out. First, one of the most important organizational movements, in an era filled with them,66 was the public administration movement, which began at the municipal level and quickly spread to national and state governments.67 A second important organizational movement in the public arena led to administrative reforms in education, criminal and juvenile justice, mental health, and charities.68 Both movements were built on a firm distinction between administration and the substantive task at hand, and in both movements the administrative side was quickly professionalized, with career civil servants, social workers, teachers, psychologists, district attorneys, and parole officers becoming permanent employees subject, in theory, to their particular codes of professional ethics. The third important movement, so well described by Chandler,69 was the widespread trend among businessmen to adopt explicit organizational structures within their firms. The administrative side of business also professionalized, producing what Chandler calls “the visible hand,” middle management in corporations.

Thus regardless of the motives ascribed to specific reformers and whatever the goals of specific movements, the characteristic feature of the Progressive transformation was the search for new technologies of administrative control. In each of these three spheres in 1880 there was little or no explicit, self-conscious organization, but by 1920 each was fully and explicitly organized, and subsequent changes in these areas were rationalizations of the structures developed in these four crucial decades. In this period, organization was not merely a formal apparatus, and certainly not only a means to accomplish an envisioned end; instead organization in the lexicon of American life became a goal in itself, a method developed to ensure fairness and to preserve what is
valued in human life. In the revision that occurred in American thought at the turn of the century, the act of organization was intrinsically an ethical act, vital to human nature and to society.

A brief contrast with what was occurring in Europe and a summary in Weberian terms will add theoretical clarity to the discussion to this point. As Huntington has shown, in Great Britain, as well as Continental Europe, political institutions and influential political thinking took a very different direction than it took in the United States. In Victorian England, the Parliament strengthened its control over the state apparatus, developed an administrative bureaucracy to govern a far-flung empire, and centralized the legal structure around the Austinian definition that equated law with the command of the sovereign. Building on the imperial bureaucracy and on a centralized legal system based upon the Napoleonic Code, the French state was both ideologically and administratively centralized. Prussia began to develop a model bureaucracy in the early nineteenth century. Bismarck's reforms in the 1860s and 1870s combined this model with a legitimizing ideology of Staatstheorie to construct the administrative institutions of a unified German state. Thus in one form or another, all across Europe, centralizing political institutions were in place and were being further developed. Moreover, although many differences existed among European nations, advanced political thinking in each location emphasized the legitimacy of authority concentrated in key political figures, figures who symbolized the nation-state itself. In the United States, during the same period of time, however, political figures, such as Presidents Hayes, Harrison, Garfield, Cleveland, even including Teddy Roosevelt, were mere politicians; the political structure remained resolutely decentralized; and political ideology reemphasized anti-centralist, anti-sovereign themes.

In Weberian terms, then, to American intellectuals and organizers of all types, the principles of legal domination did not originate in formal, hierarchically ordered, or even law-like rules. These principles did not stem from politics, from a legal system, or from any other apparatus of a strong state. Instead legitimate principles of domination, what Americans increasingly called "social control," arose from the "natural" processes of society, which included the market. These processes produce the social roles within which the self is nurtured and to which each individual is responsible. These principles, says Janowitz, focus on "the capacity of a social organization to regulate itself."
Authority was “socialized” as it was subsumed within and became a function of organizations. Socialized authority required that within organizations individuals should fulfill the obligations of their roles. Such roles implied both a status position and a function to the group as a whole. Role, status, and function are constant, essential elements both to the workings of social groups and to the self-realization of the individual. Together they represent the concrete form of the “generalized other” by which reflexive consciousness is applied to conduct in pursuit of collective goals. By offering these principles of social organization as legitimate principles of domination, American thinkers thus were able to articulate a reformist strategy of control without resort to the formal, centralist legal principles that served as the foundation of state-building in Europe. William James’s imagery precisely captured the American view when he wrote, in *A Pluralistic Universe*, that to him reality was “more like a federal republic than like an empire or a kingdom.”

The socialization of duty in American law

The social control ideology just described was not implemented straightforwardly in a national program of institution-building. The socialization of authority was constrained by some of the very forces that called it forth: the inertia of courts, the strength of parties, and the expansive power of capital. To all of these it held the specter of uncontrolled bureaucratic growth. Yet we argue that the new ideology was more than just a gloss on cynical attempts to maintain the status quo. The limits of existing institutional structures had been reached, and reform was on its way. The concept of reflexive ethics and the imagery of organizational control provided a meeting-ground on which the limits of institutional change could be negotiated on a case-by-case basis.

In this section we focus on law as the institutional arena within which these limits were most clearly and decisively set. We show, first, that in the period 1880–1920 law absorbed much of the Progressive emphasis on organizational membership and reflexive duty, but the institutional response was neither direct nor complete. The United States was a weak state with strong law, and even the subtle shift of mind implied by the new ideology would have required abandonment of certain notions of personal rights – particularly rights over property – that had long informed juristic theory, legal education, and court structure. Second,
we argue that the reform impulse was bifurcated: influential jurists who sought to make the common law responsive to a changing society developed a compelling ideology of judicial activism that echoed contemporary trends in social theory. At the practical level, however, ordinary courts were obdurate, and the new group-centered conception of social order became institutionalized within peripheral legal bodies, particularly public regulatory and administrative agencies. Third, we show that within these agencies—specialized and safely decoupled from ordinary common-law tribunals—a substantively-oriented model of justice has emerged that offers a model of legitimation for political authority in society as a whole.

The institutional background to this process can be outlined briefly. As in other modernizing states, the extension of executive power in the United States was met with demands for a system of rules that would regulate the administrative process, limit executive discretion, and provide for citizen redress—in short, for a body of administrative law. The growth of administrative justice in the United States was isomorphic with the development of administrative authority itself. In parallel with our discussion of welfare-state institutions generally, it is apparent that the United States was not simply late, relative to Europe, in developing a rationalized system of administrative justice, but rather developed a style of administrative law that was distinct from contemporary European models. The fragmentation and decentralization of executive authority constrained the growth of administrative justice as it did the consolidation of state power. The United States could not, on the one hand, have followed the Continental pattern of establishing a single, hierarchized administrative law system with its own professional staff and a specialized jurisprudence, because to do so would have violated the doctrine of separation of powers and threatened the integrity of the common law. Nor could the United States follow the British pattern and allow common-law rules administered by ordinary courts to inform administrative practice. While the United States nominally follows the British doctrine that administrative acts are subordinated to the common law, American courts tend to lack important powers—especially powers to issue writs and hear appeals—used by British courts to control agency discretion and provide citizen redress.

In the United States, rules governing administrative discretion were not imposed by any centralized authority. Rather they emerged piecemeal, within autonomous functional agencies established to carry out specific
reforms. Diverse codification processes have been noted, for example, in railway and public utility commissions, the Interstate Commerce Commission, workmen's compensation commissions, collective bargaining agreements, and welfare appeals procedures. Typically these agencies sought neither to develop their own body of case law, nor to borrow from common-law precedent. Attempts in the early twentieth century to formalize administrative jurisprudence were largely ignored by practitioners. Conservative enemies of reform also opposed attempts to codify administrative procedure, until in 1933 the American Bar Association supported legislation that would bring the burgeoning New Deal agencies under the purview of the courts. Finally in 1946 Congress passed the Administrative Procedure Act that, to the disappointment of conservatives, generally limited judicial review and strengthened agency autonomy. The APA brought some rationality to procedures at the federal level, especially in industrial regulation. But it left untouched not only state and local agency discretion, but also federally-funded programs under local administration—most notably, social welfare.

Some would argue that the APA has created a droit administratif within a limited arena, and that in the residual mass of agency tribunals no administrative law as such exists. We suggest on the contrary that this residual category contains an implicit model of social control, based on substantively rational principles, which characterizes administrative justice in the United States. In the remainder of this section, we describe how the ideological rationale for such a model was developed in response to judicial conservatism, and outline the features of that model as they have become institutionalized in agency practice.

The Holmesian critique of formalism

To legal scholars of the late nineteenth century, the evolution of Anglo-American law was reckoned by the growth of an autonomous body of formal precepts. Beginning in thirteenth-century England, the growth of formalism kept pace with the expansion of the market economy. Traditional standards of liability based on kinship status were gradually replaced with abstract concepts—such as contract, negligence, and fault—which could link autonomous individual actors with the proximate consequences of their acts. Formalism and individualism reached their peak in American law between 1776 and 1850. The lack of an indigenous aristocratic tradition allowed the common law to
respond to the rising influence of business and the ambitions of the legal profession for an autonomous, scientific domain. The result was a body of doctrine that de-emphasized the remaining substantive and instrumental goals of the common law in favor of formalistic rules and a nonintervenive economic policy.83

This rise of formalism had two important consequences, both exemplified in the developing law of master and servant. First, the imagery of free, “objective” contract became the controlling metaphor for legal decision, just as the free market had come to characterize social relations in general.84 The employment relation in particular came to be seen as a free contract between equals.85 A second and related consequence was the institutionalization of the doctrine of “no liability without fault.” Where the employee is seen as party to a contract, the employer’s traditional obligations for the welfare of his employees are void. Out of this logic grew a set of common law doctrines that tended almost to eliminate industrial liability for injuries occurring to workers.86

In the latter half of the nineteenth century, just as formalism reached its zenith, it began to crumble from below. For the protection of employers, courts expanded the negligence doctrine to the point where fault had to be shown even in cases of direct personal injury,87 yet the inherent subjectivity of the fault standard led to inconsistent rulings. Further uncertainties arose from changes in industry, the legal profession, and the political environment. New machines introduced novel means of injury, and led to an enormous increase in industrial accidents. The development of the contingent fee system encouraged attorneys to file tort suits against employers on behalf of indigent workers.88 At the same time labor and consumer groups began to clamor for protection from oppressive doctrines. Judges busily contradicted one another’s rulings, and quickly made a hodgepodge of tort law.89 Eventually tort liability was to be systematized by legislative action; but in the meantime Oliver Wendell Holmes Jr. made a major attempt to salvage a common law of obligation.

Holmes’s jurisprudential writings may be seen as an attempt to reformulate the nature of liability, and thereby to provide the foundation for a “comprehensive arrangement of the law” into a “philosophical system.”90 The key element in his reconstruction of the common law was a theory of obligation that depended neither on subjective fault nor formal, absolute liability, but rather on a relativist conception of duty
drawn from actual social conditions. Holmes argued that subjective fault ultimately defied proof, and therefore could not generate systematic rules. On the other hand, an absolute liability standard that held an actor liable regardless of intent could generate serviceable rules, but tended to discourage individual initiative: “According to this view... under the common law a man acts at his peril.”

Holmes’s thought was informed by his association with Charles Peirce, William James, and other members of the Harvard “Metaphysical Club” between 1870 and 1874. Holmes’s pragmatism lay first in his rejection of any subjectivist or transcendental elements in law, and second in his insistence that law is a dynamic science that could serve as an instrument for the achievement of social ends. The proper object of law, he insisted, was not to instill individual morality, but to publicize social duties – “to give a man a fair chance to avoid doing the harm before he is held responsible for it.” In clear parallel to Peirce’s epistemology, Holmes suggested that the standards of the “reasonable and prudent man” would contribute to the cumulation of objective rules that would, over the long run, increase the predictability of the law.

Holmes focused on negligence as the “comprehensive principle of tort law,” and in doing so cut obligation off from its traditional moorings and tied it instead to social interdependencies. Whereas, historically, liability had been generalized from the relations of “persons in particular situations of fact” such as vendor and purchaser or master and servant, Holmes suggested that these were just special cases of a general set of potential duties “of all the world to all the world,” and that all public and private obligations could be located somewhere between isolated individuals and uniform societies.

The revolutionary implication of this line of reasoning is that any specific relation may imply a duty if public sentiment requires one to be imposed. Where a duty is implied, objective standards to distinguish negligent from non-negligent performance, and to determine the most socially advantageous distribution of losses, may be developed through the insight of the “prudent man” as distilled in case law. Holmes recognized, for example, that doctrinaire opposition to industrial accident insurance only brought the courts into conflict with public sentiment, and avoided the key legal issue of how the cost of injuries should be allocated to the greatest “social advantage.” He argued further that courts should consider a broad range of information when deciding
policy issues, particularly the findings of scientific experts: "For the rational study of the law the black-letter man may be the man of the present," he wrote, "but the man of the future is the man of statistics and the master of economics."97

But there were conservative aspects to Holmes's thought as well, most conspicuously in his approach to tort liability, which echoed the pragmatic emphasis on self-regulation. Holmes was attempting to resuscitate the common law, not to question the economic assumptions of capitalism or to transform the courts into laboratories for social engineering; thus he generally favored a maximum of personal freedom and a minimum of personal liability.98 While he suggested that liability was general, he stopped short of declaring it absolute. Instead he declared the fault standard to be the "limiting principle of tort liability."99 Holmes's reasoning in such matters was clearly pragmatic: "A man need not, it is true, do this or that act," he wrote, "but he must act somehow. Further, the public generally profits by individual activity. As action cannot be avoided, and tends to the public good, there is obviously no policy in throwing the hazard of what is at once desirable and inevitable upon the actor."100 Holmes criticized contemporary English case law, which, as part of a general trend toward state-administered distributive justice, threatened to reintroduce absolute liability in tort cases.101 Instead he bowed to the manifest power of Gilded Age industrialists: by justifying the retention of fault Holmes was able simultaneously to generalize the concept of liability and limit its application to private enterprise.

Holmes's particular conservatism is more specifically manifest in his view of the proper role of juries. Throughout the nineteenth century, unpredictable juries threatened the integrity of emergent tort doctrines and provoked judicial rules that limited their interpretive responsibility.102 Holmes prescribed instead that juries be assigned an overt policy-making role: as representatives of the collective prudent man, the jury sets standards in situations where the court is "not itself possessed of sufficient practical experience to lay down the rule intelligently." But ideally, as cases with identical or similar fact-situations repeat themselves, the range of gray areas in the law will narrow and the role of the jury will diminish. Over time, "the sphere in which [the judge] is able to rule without taking their opinion at all should be continually growing."103 This model is a direct deduction from the pragmatic view of social change: the jury, as representative of an inchoate public, articulates vague but concrete judgments based on experience.
The Holmesian judge, like the Peirceian scientist and the Meadian reformer, approaches experience inductively, and uses a collectively-shared method to abstract, articulate, and organize a web of definitive precepts. Just as scientific theory grows, common-law doctrines accrete around experience, always approaching but never achieving perfect predictive accuracy.

In summary, Holmes proposed a subtle yet important realignment of American jurisprudence that, like contemporary social theory, sought to reconcile the demands of the welfare state with the constraints of laissez-faire democracy. On the one hand, he criticized the utility of formal natural-law maxims and subjective standards of responsibility, and suggested instead that law was — and should be — a dynamic and responsive instrument for adjusting the strains of social life. On the other hand, by proposing that law is a science that may be viewed as a "philosophically continuous series," and particularly by supporting severe limitations on liability based on hardheaded, objective standards of fault, Holmes defended the integrity of the common law system and lent intellectual respectability to the manifest conservative tendencies of the courts.

If Holmesian jurisprudence had been absorbed by the institutional court system, the foundation would have been laid for the development of a reform-minded administrative law within the common law. But there was never much practical likelihood of that occurring. The structural fragmentation of state court systems, the vast increase in printed case reports after 1880, and the continued reticence of the federal judiciary assured continued uncertainty. The dominant strategy of rationalization, promulgated at influential law schools such as Langdell's Harvard, was to reject the vast majority of inconsistent and "incorrect" decisions in favor of a hallowed few aged, usually English, "correct" decisions. The "orthodox Establishment," as Gilmore has written, "rejected, ignored, or perhaps simply misunderstood many aspects of Holmes's complex thought." By translating a socialized conception of duty into legal terms, however, Holmes offered a compelling ideological rationale for reform of another sort.

*The era of legislative reform*

After 1900, in response to the broad-based pressure of Progressive reformers, state legislatures assumed the burden of creating and main-
taining the substantive law that had traditionally been borne by the courts. It is plain that support for reform legislation was fueled by resentment of conservative courts and their bondage to reactionary legal dogma. As one contemporary wrote:

The people are not interested in precedent. They have lost their primitive reverence for it. They are interested in justice, and a dogmatic adjudication that "this is the law as settled by precedent" will not tend to counteract a fast developing prejudice to judges as a class of public servants and to courts as institutions.

The progressive legislator, by contrast, was seen as unfettered by the "Spencerian dogma of 'equal freedom'" and by the constraints of natural law:

He puts restrictions upon the ownership of property, provides for its seizure and destruction, denies to those not qualified the exercise of professions and callings, limits the freedom of contract, interferes in multitudes of ways with the management of private businesses, all in supreme disregard of natural rights, whenever he conceives that social demands require it.

The "social legislation" of the Progressive era controverted existing legal doctrine in three ways. First, such laws emphasized substantive goals at the expense of legal formalism. Particular reforms were aimed toward apparently disparate goals in such areas as child health and welfare, labor, business regulation, and resource conservation. Beyond this, however, the articulated common goal of most such legislation was distributive justice, i.e., the apportionment of losses in a fashion that accords with public policy. Legislators were not, as many jurists noted with chagrin, overly concerned with the niceties of procedure or the integrity of the common law.

Second, by bringing substantive policy goals to the forefront, much of this legislation de-emphasized formal, individualistic standards of liability, and instead brought back a strict liability standard. Workmen's compensation acts were an outstanding example of the return to strict liability, but it was liability with a Holmesian twist: the laws did not throw the burden of workers' injuries back upon the employer, but rather enacted a form of "social insurance" that spread the losses among all insured parties (and ultimately to the public) and rendered the issue of negligence moot. Thus, by legislative fiat, employers' traditional common-law defenses against negligence were voided in all but egregious cases of misconduct. It appears moreover that such legisla-
tive initiatives and the spread of insurance have influenced the courts to retreat from the no-liability-without-fault standard, not only in cases of employer negligence, but also in other areas of tort where the interests of society are affected: "In the legal sense, ‘fault’ has come to mean no more than a departure from the conduct required of a man by society for the protection of others, and it is the public and social interest which determine what is required."

Third, by focusing on persons in identifiable social relationships – employees, consumers, children, women – the social legislation of the time signified a shift away from the individualist, contract imagery of the nineteenth century and toward an older imagery of ascriptive status. The historical significance of this shift was clear to contemporary legal thinkers:

If Sir Henry Maine’s interpretation of legal and political history is sound, from “status to contract,” all of this means we are traveling backward, for legislation is putting disabilities upon employers and employees, as well as upon common carriers and others engaged in public employments, which are not imposed upon the rest of the community.

But status, like liability, was intended to have a different meaning: it did not create disabilities, but rather “conditions of self-realization." It did not imply “protection” for “incapable” persons, but rather “guidance” for otherwise capable persons who are “unlikely to provide as well for their own interest as can the community.” Ultimately, the reemergence of status as a criterion of legal action was linked to a more comprehensive ideal of a state whose legitimate role was the adjustment of group interests for the achievement of collective goals. Thus the organizational imagery of American social science found its way into the ideology of legislative reform. Among legal thinkers of the time, “a vision of society as a constellation of interdependent groups displaced a competing vision, held by the original proponents of legal science, of society as an aggregate of autonomous individuals.”

Progressive legislators thus usurped much of the traditional lawmaking functions of the courts, and overrode some of the most cherished doctrines of nineteenth-century common law. Holmesian jurisprudence was, in effect institutionally bifurcated: legislatures acted as the engine of legal development, and the courts provided its brake. Holmes himself was unsympathetic to most social legislation, but sanguine about its impact on the legal system. By no means all of the legal system viewed these developments with equanimity, however.
Roscoe Pound was one of the more sympathetic critics of legislative reform. Like Holmes, Pound was influenced by contact with the nonlegal intellectual community, in this case American sociologists, and he sought to reconcile substantive reform and procedural stability within the boundaries of a "sociological jurisprudence." But Pound's thought also developed away from Holmes, and pointed the way (albeit inadvertently) toward the disengaged academic jurisprudence of the New Deal and after.

Pound sought to bring reform under the common law umbrella in three ways. First, he argued that substantive justice and procedural formality were dialectically related aspects of legal change. Where responsibility for substantive and formal law were institutionally segregated, willful legislatures created intangible "duties which morally are of great moment but legally defy enforcement" – thus they achieve neither their immediate goals nor any "general advance" in law. Second, Pound proposed that jurisprudence be based on a theory of "social interests," which was a more systematic version of Holmes's duties of "all the world to all the world." Social interests were defined as legitimate claims of individuals and groups "of which social engineering in a civilized society must ... take account" – in brief, the building blocks of an emergent welfare state. Pound also recognized that a jurisprudence based on "social interests" must pivot on status imagery rather than contract law, and must eliminate fault as a criterion of liability. Third, Pound called for a reorganization of courts so that they could take back major responsibility not only for lawmaking, but also for enforcement and research on the impact of judicial decisions.

Like Holmes, however, Pound had little impact on the legal community. Legislative reform continued unabated, and Pound continued to deplore the trend toward administrative or "executive" justice. He wrote in 1914 that

Workmen's compensation legislation is threatening to take a great mass of tort litigation out of the domain of law and confine it to administration. Even in criminal causes, which we think of as par excellence the domain of the common law, juvenile courts, probation commissions and other attempts to individualize the treatment of offenders, and the endeavors of the medical profession to take questions of expert opinion out of the forum and commit them to a sort of medical referee, bid fair to introduce an administrative element into punitive justice which is wholly alien to our inherited ideas.

Pound's ideas provide a convenient summary for our discussion of the
crisis of American legal formalism. He observed, we believe correctly, that the proliferation of independent administrative and regulatory agencies resulted from claims for substantive justice that the courts were ill equipped to meet. These agencies formed the nuclei of the contemporary American system of social welfare and industrial regulation. Our analysis suggests that that system's distinctive structural characteristics — i.e., its piecemeal growth and lack of integration relative to earlier and later European systems — owe as much to the institutional history of American law as they do to the ambitions of professional elites and reform movements or the diffidence of politicians.

Pound also observed that the model of justice that prevailed in these agencies was quite different from that in common law courts. The courts have, of course, been affected by the trend toward substantive justice, but in peripheral ways. In some cases, “social justice” ideals have been appended to courts through specialized administrative sub-units, such as probation and parole agencies, where their influence on routine decision-making may be minimal; in others, courts have become protectors of minority rights. In neither case have legal institutions become the voice of community sentiment in a manner envisioned by Holmes and Pound. Rather agencies and commissions, speaking for circumscribed social groups, have become the carriers of a new tradition of substantive law. We turn now to describe some salient characteristics of an emergent model of administrative justice.

The substantive rationalization of administrative justice

Holmes and Pound were both concerned that the institutional segregation of legal form and substance would result, on the one hand, in the ethical exhaustion of the common law, and on the other in the irrational growth of administrative discretion. We suggest on the contrary that it is possible to outline a general model of administrative justice that reflects both the structural constraints of a weak state and the organizational ideology developed by American intellectuals at the turn of the century. Such a model consists of four common tendencies, which we discuss in turn: (1) the dominance of substantive goals in the development of procedural rules; (2) the substitution of organizational imagery for political or adversarial imagery; (3) the renewed salience of status; and (4) the development of diagnostic procedures for adjudication.

Rules and substantive goals: Several commentators have observed that
the substantive orientation of administrative agencies precludes fine observance of precedent and due process: "The very spirit of admin-
istration is the accomplishment of things. This may and no doubt does result in the sacrifice of rights." Informality seems to be generic to admin-
istrative proceedings, even under such strict regimes as the federal Administrative Procedures Act and the French Conceil d'Etat.

But informality is not synonymous with irrationality. Despite their relative informality, American administrative agencies do generate system-
atic rules. Because of the broad dispersion of governmental authority, however, these rules tend to be elaborated in parochial contexts along substantively rational lines. Two principles inform the rule-making process. First, rules are developed to protect agency policy. Policy goals rather than abstract norms of justice serve as the ultimate referent of legality. In a federal regulatory agency, Kagan found that "Any decision in accordance with [agency] policy ... was legally right, and any decision at variance with that policy was wrong." Second, rules are developed to protect agency boundaries from attacks by legislatures, courts, and constituent publics. A vulnerable agency may eschew combative enforcement strategies in favor of diffuse efforts to negotiate, conciliate, and contain conflict, which are difficult to contain by due process rules. Thus an antidiscrimination commission studied by Jowell sought to persuade rather than to prosecute: its effective goals were "neither administration nor enforcement as such, but education and conciliation."

Organizational imagery: The shift to organizational imagery is a logical response to problems of policy attainment and boundary maintenance for two reasons. First, as we discussed above, much progressive-era social legislation was predicated on the growth of an increasingly complex society in which large industrial organizations appeared to be the dominant force. The goal of the resulting regulatory agencies, charity boards, and licensing commissions was, in the most general sense, to mediate and rationalize organizational relationships and to assure a proper fit between individuals and the organizations in which they were participants, all without appeal to transcendent law or com-
mands of a sovereign. A second and more practical reason is that the most powerful actors in most agencies' domains are organizations: their interests and their vocabularies constrain the growth of procedural rules.

These influences are most clearly seen in industrial regulation, where
agencies are most often at a power disadvantage relative to their constituents. For example, the Federal Trade Commission preferred not to prosecute corporations, but rather to mediate among firms and achieve adjustments of trade practices that would be both lawful and “beneficial to business.”\textsuperscript{142} Likewise, the Interstate Commerce Commission justified its regulatory activities in terms of their beneficial effects on the transportation industry as a whole: “Constructive coordination is to be preferred to ‘destructive competition.’”\textsuperscript{143} Organizational imagery characterizes social welfare administration as well, however. For example, the juvenile court exemplified the trend toward “individualized justice” contained in Progressive social legislation; but in fact its major role was to coordinate the flow of children to appropriate social service agencies.\textsuperscript{144} Social welfare laws generally devote less attention to procedural rules than to specifying appropriate referrals for various categories of clients.\textsuperscript{145} Thus, just as Pound suggested that “social interests” overrode both individual and political interests, so the organizational imagery of administrative law overrides politics in the interest of society as a whole, and organizational boundaries redefine citizenship.\textsuperscript{146}

\textit{Status}: We saw above that in much social legislation, status characteristics defined the jurisdiction of an agency, and thus the individual’s liability to agency power. Institutionalized status distinctions structure not only an agency’s domain of action, but its appropriate output and penultimate goals. Regulation, according to one author, requires classification and typification: “Any classification is permissible which has a reasonable relation to some permitted end of governmental action ... and is based on some characteristic or duty of the classified.”\textsuperscript{147} Administrative classifications are not drawn from legal typifications – while the former confer identities, the latter describe actions. Instead they come from two different sources.

First, agencies rationalize sets of status typifications that are salient to their purposes, and which are applied to maintain proper role relationships among persons and organizations subject to administrative power: between employer and employee, producer and consumer, parent and child. When agency decisions are challenged, the overriding legal issue is not criminal guilt, performance of a contractual obligation, or commission of a tortious act; but rather condition, identity, and status. The ICC, through its licensing power, determines whether a railroad may exist as a legitimate corporate entity. The juvenile court was established not to judge children in the punitive sense, but to determine
their status as dependent or delinquent. Public welfare agencies determine applicants' benefits in terms of their qualitative state of eligibility.\textsuperscript{148}

Second, agencies may draw upon exogeneously-defined status classifications, especially those maintained by professionals. Professionals give voice to the public in terms anticipated by Holmes and Pound: "The popular will cannot be expressed by Congress, because the popular will does not discover a method. A result is wanted – better service and rates, freedom from discrimination and tyranny. No general body can reach that result: it takes an expert economist to formulate a rule."\textsuperscript{149} In such cases, the reflected prestige of science legitimizes the typification practices of the agency: psychologists certify the schizophrenic, physicians certify the battered, blind, and disabled, and economists distinguish a cartel from a trade association. The infusion of professional rules into administrative disputes interweaves a layer of institutional autonomy between citizen and state. It deflects the rationalization process further from formal legality, and impels it toward a substantive "scientific rationality."\textsuperscript{150}

\textit{Diagnosis:} Finally, diagnosis provides the method by which conflicts over status are resolved.\textsuperscript{151} As the medical metaphor suggests, diagnostic procedures differ from adversarial procedures in that they are grounded in expert judgement, they place few boundaries on the search for meaningful evidence, and they require broad discretion in order to construct an etiology and formulate an effective plan of "treatment." Diagnosis involves the attribution of a moral identity, based on retrospective etiological accounts and using professionally maintained repertoires of diagnostic typifications.

Of course, extralegal typifications influence the civil and criminal legal systems as well, most often through such peripheral actors as police, public defenders, and probation officers.\textsuperscript{152} Our point here, however, is that in administrative settings diagnostic typifications provide the core technology of the decision-making process.\textsuperscript{153} This is most obvious in the social welfare field. In juvenile proceedings, probation officers actively negotiate meaningful accounts of juvenile misbehavior in terms of a medical model of deviance. Because welfare appeals are usually concerned with the qualitative issue of client eligibility rather than benefit levels or behavior, appeals proceedings are "inquisitional" rather than adversarial.\textsuperscript{154} Referees are unconcerned with precedent, caseworkers' judgements are nearly as unassailable as a "dentist's inter-
pretation of a tooth X-ray," and referees are exposed to "irrelevant" and "prejudicial" information.\textsuperscript{155} Diagnostic procedures are also apparent in industrial regulation, however. The FTC, for example, was explicitly empowered to identify corporations whose actions formed a pattern "against good morals," such as "bad faith, fraud or oppression."\textsuperscript{156} The ICC was intended not to police, but to diagnose and to plan: "If the railroads are 'sick' we listen eagerly to what [ICC] Commissioner Eastman may have to say upon the subject.... The ills of the industry have become ... [his] bailiwick."\textsuperscript{157} In other research, Boston housing inspectors made judgments about whether code violations were due to landlord negligence or acts of destructive tenants. The discretionary judgment of investigators is so well recognized that only warnings were issued on first violations; subsequent punitive sanctions were based on retrospective assessments of "good faith."\textsuperscript{158}

In this section, we have outlined the broad contours of an administrative model of jurisprudence. It is assumed that, in any given administrative setting, the rationalization process will proceed according to a logic that is in some sense unique and derivative of the agency's substantive focus. Organizational imagery will vary in terms of the institutional domain over which the agency has jurisdiction; salient status and role distinctions depend upon available professional taxonomies; and diagnostic procedures may be designed to make fine distinctions in some settings, and relatively gross ones in others. We expect that overall American administrative tribunals diverge along these lines from those in Europe, and in new states that follow European patterns of development.\textsuperscript{159} Moreover we hypothesize that agencies in the United States vary systematically among themselves, depending on how they are linked vertically and horizontally to other agencies. For example, agencies with tight vertical linkages – such as the SEC, which must prosecute cases in ordinary courts, and other agencies whose decisions may be appealed – are probably more constrained by formal common law rules. Agencies that are horizontally linked – e.g., through federal or state codes of administrative procedure – are likewise prone to relatively greater formalization. Finally, social welfare agencies probably exemplify these trends more than industrial regulatory commissions – in part because of their relatively poor linkages, in part because of the persistent notion that welfare is a gratuity rather than an adjudicable right,\textsuperscript{160} and in part because their clients tend to be poor individuals rather than corporations.

Yet administrative justice as a whole represents a distinct type of law,\textsuperscript{161}
one that is different from legal-rational authority on the one hand, and
from "kadi-justice," which both Weber and Pound saw as the likely
alternative to degenerative formalism on the other. Further it is
apparent that the distinctive characteristics of administrative justice are
nascent in the jurisprudence of Holmes and Pound: both sought a
general theory of obligation that would systematically incorporate dis-
tributive principles in the common law; both criticized formalism and
endorsed the infusion of substantive goals; and neither was successful
in making the common law an agent of reform. Administrative justice
represents the substantively-oriented rationalization of the reform
impulse outside the common law system. In our concluding discussion,
we suggest some more general implications of these findings for a
theory of domination.

Conclusion: The principles of domination in American society

We have shown that between, roughly, 1880 and 1920, American
thinkers had worked out and had begun to institutionalize a solution to
the problem of achieving control over an increasingly complex capital-
istic society. These thinkers continued to reject the solutions Euro-
peans had worked out in the preceding century, solutions that in
various ways laid the foundation for the development of strong
states. Most American intellectuals believed that order could be
achieved without powerful leaders and without coercive institutions.
They built their theories of order on the assumption that the mecha-
nisms of control were in society itself and outside the realm of direct
governmental action. These theories advocated organization, because it
was only through organization that individuals could know their duties
and could apply proper constraint upon their own actions. At its base,
order in a weak state came to rest literally upon "self" regulation, but
such regulation was only possible if organizational roles and status
obligations were clarified, so that sanctions could be routinely and
fairly applied to individuals who violated their social responsibilities.

One of the prominent ways that Americans institutionalized this system
of social control was to establish formal means to apply these sanc-
tions. Courts and law changed under the influence of these new ideas
about social control, but initially did not supply the reformers with a
systematic way to apply the needed sanctions. Therefore legislators
acted, often at the urging of well-organized citizens, to create admin-
istrative agencies to adjudicate and sanction violators. In theory, these
agencies were to be extensions of the citizenry rather than tools of the politicians, and their task was to be administrative in nature rather than law making and law enforcing: they were to maintain the “natural” social order of society. The family, the child, the community, the market, the consumer – these were the objects of agency concern. Agency experts, of ten academics, studied, subdivided, classified, and developed the organizational meaning of each object. Under the impetus of such scrutiny the goal of administrative law has been, in Weber’s terms, the rationalization of substance.

Among the long-term consequences of this institutionalization process has been, of course, the bureaucratization, if not always the strengthening, of the state. All spheres of government have now been altered by this reorientation – from the chief executive, who is now styled as a manager of the organization of government, to the U.S. system of justice, which has now incorporated the laws of social responsibility among its foremost tenets. And administrative law has become the law of the land: in 1976, appeals of Social Security Administration decisions alone accounted for more cases than the entire federal judiciary.¹⁶⁵

These principles of domination embodied in the American notion of social control provided the foundation for a system of rule quite different from that outlined by Weber for Europe in Economy and Society.¹⁶⁶ Weber argued consistently that the historical tide of legal development ran toward increasing formalization. At the same time, he remarked on a number of factors that could introduce ethical and policy considerations into the law and weaken its formal integrity.¹⁶⁷ Many of these factors – including party politics, lay demands for substantive justice, and the power ambitions of the legal profession itself – are salient in the American case. Moreover Weber observed profound structural differences between Continental and Anglo-American legal systems. He found that the latter “presents a picture of an administration of justice which in the most fundamental formal features of both substantive law and procedure differs from the structure of Continental law as much as is possible within a secular system of justice.” One of the most striking differences, thought Weber, is that “even what is on the face of it so fundamental a concept of Continental law as dominium still does not exist in Anglo-American law.”¹⁶⁸ But these observations appear mainly as qualifications to his larger developmental argument. “Inevitably,” he wrote, “the notion must expand that the law is a rational technical apparatus, which is continually transformable in the light of
expediential considerations and devoid of all sacredness of content.”\(^{169}\) We argue, in effect, that Weber did not take his own qualifications seriously enough. When juxtaposed with his typology of domination, Weber’s observations about English and American law are quite important, and imply the possibility that the two societies pursued different courses of political development than the one Weber found in continental Europe.

Dominium (i.e., the state of achieving supremacy), after all, is the central idea underlying Weber’s concept of Herrschaft, the “authoritarian power of command.”\(^{170}\) It is this idea that Weber traces historically in his typology of domination. For Weber, bureaucracy and legal rational domination, being based on hierarchical principles and formal rules, embodied in a highly rationalized form the notion of Herrschaft – literally, the master’s hand. That the concepts of Herrschaft and dominium do not have standing in Anglo-American law and even that the terms themselves have “no satisfactory English equivalent”\(^{171}\) suggest that the institutionalization of power and obedience in American society may differ substantially from that in continental Europe.\(^{172}\)

This perception of difference raises the question: Is it possible to re-conceptualize Weber’s typology of domination so that it is useful in the analysis of the state-building process in the United States? Although this question is certainly too complex to answer fully in this context, our findings in this article suggest how the American case might be fruitfully included within Weber’s typology of domination. Weber formulated his concepts of legality and formal rationalization as contrasts for those of patriarchalism, feudal honor, and charisma, all of which were deeply rooted in the rationality of substance. Moreover, this basic contrast applies equally to the American case: Relative to the premodern societies Weber examined, domination in the United States falls clearly on the side of laws and formal systematization. Our belief is, however, that while Weber’s scheme remains applicable to this larger scale, his framework for the analysis of contemporary domination is too loosely meshed to catch the significant, but often subtle differences among modern societies.

These limitations in Weber’s sociology of domination are particularly evident in his overly formalized characterization of bureaucratic organization.\(^{173}\) Weber’s understanding of modern organization was based on his knowledge of bureaucracies in Europe, and particularly in Germany. He correctly stressed two aspects of such organizations.\(^{174}\)
First, he saw bureaucracy as a modern solution to the perennial problem of how rulers organized their staffs to produce systematic obedience. Bureaucracy, then, is a type of staff arrangement in which the state owns and controls the means of administration, and in which staff members could not easily separate from the state by proclaiming themselves an independent source of power. We agree with this aspect of Weber’s concept of bureaucracy and do not seek to revise it further for the American case. But we find the second aspect, the principles of domination internal to bureaucratic organization, more problematic. Weber characterized these principles in strictly formal terms: “The reduction of modern office management to rules is deeply embedded in this very nature.” These rules, Weber wrote, are “general rules, which are more or less stable, more or less exhaustive, and which can be learned.”175 The obedience of bureaucrats is equally formal, and comes from rational discipline.176 “The content of discipline is nothing but the consistently rationalized, methodically prepared and exact execution of the received order, in which all personal criticism is unconditionally suspended and the actor is inswervingly and exclusively set for carrying out the command…. Discipline in general, like its most rational offspring, bureaucracy, is impersonal.”177

This formal, contentless style of domination rests upon the prior assumption of hierarchy, with an undisputed sovereign at the head. The justification for disciplinary authority inheres in the hierarchy itself. Yet as we have suggested, hierarchy is the precise feature that the American polity has chronically lacked, indeed has sought to avoid. Therefore how is domination possible in the United States? We have shown here that American social and legal thinkers did not accept the European characterization of organizations and nation building, and attempted to replace these formal qualities of bureaucracy with substantive ones: rules were not justified by hierarchy, but by the immanent contours of the process of social life; obedience arose not from discipline, but from persuasion. The evidence suggests that in the United States social and legal thinkers moved early and decisively toward a substantively rational characterization of organization and of the legal means to maintain order in organizations. They repeatedly stressed the non-formal, substantive features of American ethics, of American laws, and ultimately of American understandings of the rules by which they are governed.

It is our conclusion that a fruitful way to understand the orienting principle of domination underlying administrative law in American soci-
ety is to view it as a variant of legal domination that emphasizes the rationalization of substantive policy rather than procedure. With this variant, domination fixes upon the individual’s subjective understanding of the world and calls upon each individual to obey his or her conscience. Obedience is self-control, and what one obeys is one’s understanding of his or her moral duty. In Mead’s words, obedience in the United States is “warm with the inner life of the self.” The organizational movements in Progressive America recast the self’s moral duty from that of an autonomous individual to that of a social being, and thus shifted the basis of morality from absolute conviction to reflexiveness. With this revision, domination in American society became increasingly articulated by means of organizational metaphors. Obedience was to live up to one’s social responsibility, and one’s social responsibility could be determined by conceptualizing one’s relationship with others in a systematic way, in terms of one’s organizational fit.

Through administrative law, among other devices, this form of obedience was made more calculable and more predictable by categorizing relationships and fixing the responsibilities of roles with respect to their parts in the operation of the whole. Rationalization, hence, proceeded on the substantive logic provided by the prudent man who conceptualized his responsibility in terms of what Mead called the generalized other. Out of this concern for calculability came classifications and specifications of duties. This calculability systematized “the knowledge of means-ends relations and of the consequences as well as the results of value analysis,” and came to be “dependent upon science.” As Holmes and Mead foresaw, science supplied the substantive knowledge of and ultimately the means to settle disputes over one’s location and duties in organization wholes.

Scientific expertise is in tension with but nonetheless supports the need of individuals for self-realization, what Schluchter calls “enlightenment.” In modern thinking self-realization and self-regulation are synonymous, and as the basis of social control form a type of domination that is antagonistic to the formalized system of legal domination that Weber wrote about: a system predicated on self-regulation does not acknowledge the legitimacy of the master’s hand, however nearby it may be; there is no Herrschaft, no legitimate external source of command. In principle, command had to be internalized, had to be present in the form of duties that one is morally obliged to fulfill. Scientific knowledge transmitted through education might contribute to the information about people’s place in society that they need in order to
live a moral life. But in the end, substantively rational legal domination, as conceptualized so often in American life, came to rest on the presumption that order arises from selves in society, never from decisions made by elites, scientific, political, or otherwise. As Mashaw has put it so nicely, in the United States "administration, at least bureaucratic rationality" should be equated with the "liberal ideal," because "the impersonality of rules [is] a safeguard against domination, a means for maintaining the social preconditions of individual moral agency."\(^{181}\)

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Notes


17. Skowronek, 286.


19. There were of course American intellectuals who supported these ideas, but the more general posture was in opposition rather than agreement with these European traditions. White, *Social Thought in America*, is particularly good on this point, but also see Sylvia D. Fries’s discussion of the turnabout in political science, “Staatstheorie and the New American Science of Politics,” *Journal of the History of Ideas* 34 (1973), 391–404, and Hamilton Cravens’s similar discussion for sociology, “The Abandonment of Evolutionary Social Theory in America: The Impact of Academic Professionalization Upon American Sociological Theory,” *Midcontinent American Studies Journal* 12 (1971), 5–20.


22. A similar discussion is offered on a more general basis by Hofstadter, *Anti-Intellectualism in American Life*.

23. The best discussion of this ambiguous and bewildering break with the past is Haskell, *Emergence of a Professional Social Science*. At one point (41), he notes that “Since today we are accustomed to [a] shortage of independent variables and have firsthand experience of no other perspective, we may say that, prior to the intense interdependence of the late nineteenth century, men lived in a universe of human affairs that had a superabundance of independent variables. Their world was unpredictable but richly explicable, compared to our own, for it was full of independent comings and goings whose explanation lay in the autonomous will of the mover and nowhere else.”

25. Haskell, 10.
29. White, Social Thought in America.
33. Haskell (Emergence) has labelled this theme "interdependence." We agree with Haskell's use of this term and its centrality to the intellectual changes of the time. We prefer the term "reflexiveness," taken directly from the epistemological discussions carried on by James, Principles of Psychology, Mead, Selected Writings, and particularly John Dewey, "The Reflex Arc Concept in Psychology," Psychological Review 3 (1896), 357–70, because it captures both the notion of interdependence and its epistemological grounding.
36. James, Pragmatism, a New Name for Some Old Ways of Thinking (New York: Longmans, Green, 1907), 58 (his emphasis).


47. Wiebe, *Search for Order*.


54. Morris Janowitz ("Sociological Theory and Social Control," 84) also reaches this conclusion: "In formal terms, one can think of social organization, the subject matter of sociology, as the patterns of influence in a population of social groups. Social control, therefore, is not to be conceived as being the same as social organization; it is instead a perspective which focuses on the capacity of a social organization to regulate itself; and this capacity generally implies a set of goals rather than a single goal. Social control is a perspective which, while committed to rigorous hypothesis testing, requires the explication of a value position."

55. Haskell, *Emergence*.

56. Dewey and Tufts, *Ethics*, 436; Dewey’s emphasis.

57. Dewey and Tufts, 440; Dewey’s emphasis.


59. Dewey and Tufts, 440.

60. In developing Mead’s perspective, we use only those writings that Mead published during his lifetime in *Selected Writings*. Posthumous works, largely prepared by students from class notes, also validate the points we make below. See, in particular, Mead, *Mind, Self, and Society*, and *Movements of Thought in the Nineteenth Century* (Chicago: University of Chicago Press, 1936).


84. Horwitz, 262–263.


87. Gregory, “Trespass to Negligence.”


97. Holmes, “Path of the Law,” 467, 469.

102. White, *Tort Law in America*, 58.
107. White, *Tort Law in America*, 60.
115. Prosser, 21; see also Bohlen, 453; Friedmann, 248; Gregory, 383–384.
116. E. James, 774. In Dicey’s more succinct terms, under the English Workmen’s Compensation Act of 1897 (after which the American acts were partially modeled), “The rights of workmen in regard to compensation for accidents have become a matter not of contract, but of status,” A. V. Dicey, *Law and Public Opinion in England* (London: MacMillan, 1905), 283. See also Dicey’s (236) comments on the status implications of the 1870 and 1881 Landlord and Tenant Acts.
117. E. James, 774; our emphasis.
118. Dicey, 261.
120. They did this not only by passing more laws, but by increasing the specificity of statutory prescriptions to reduce the latitude of judicial interpretation. See Grant Gilmore, “Legal Realism: Its Causes and Cures,” *Yale Law Journal* 79 (1961), 1045.


127. Pound, "Social Problems and the Courts," *American Journal of Sociology* 18 (1912), 331–341. Pound's emphasis on enforcement was a characteristic extension of the sociological perspective. To Holmes's famous aphorism that "The life of the law ... has been experience" (*Common Law*, 5), Pound countered that "The life of the law is in its enforcement" ("Limits of Effective Legal Action," 167).


134. In this regard our analysis differs somewhat from those of Skowronek, Orloff and Skocpol, and Skocpol and Ikenberry, as well as many strictly historical analyses. These interpretations tend to trace the actual course of nation-building to the conflicting interests of the actors involved. Although we would not disagree with this view, we would add to it an institutional and cultural analysis of the context within which ideal and material interests of actors came into conflict with each other.


145. Furthermore, the United States emphasizes procedure more in regulatory acts than in social welfare, while Britain has tended to do the reverse. See Schwartz and Wade, *Legal Control of Government*, 113–114.

146. An example will clarify this conclusion: Welfare law has to do with the relation of the recipient to organizations that give welfare and give services to welfare people. The recipients of welfare agencies are defined not in terms of their status as citizens, but rather in terms of their inclusion within the organizational purview of the welfare agency. Hence most citizens cannot receive welfare, but some non-citizens (e.g., Vietnamese refugees) are eligible for government benefits.


163. Huntington, “Political Modernization.”

164. E.g., Israel, *Building an Organizational Society*. 

166. For a more in-depth analysis and sympathetic revision of Weber's sociology of domination, see Gary G. Hamilton, "Patriarchalism in Imperial China and Western Europe: A Revision of Weber's Sociology of Domination," *Theory and Society* 13 (1984), 393–425. That treatment, as well as the present one, suggests that Weber's typology is Eurocentric and in need of revision to be fully useful in comparative analysis.


172. See, e.g., Schwartz, "George Washington and the Whig Conception of Heroic Leadership."

173. As Wolfgang Schluchter has written, in theoretical terms, Weber's discussion of modern law and modern domination does not retain the balance between formal and substantive factors that characterized his treatment of premodern societies. Instead, in his treatment of modern domination, "Weber tends to identify legality with formal rationalization ... so that substantive rationalization appears not as a component of the guiding principle of legality but as its counter principle. Substantive rationalization means the intrusion of ethical imperatives, utilitarian pragmatism or political maxims into the autonomy of the legal and administrative apparatus, which functions as a 'rational machine' and thereby provides to the citizens 'a relative maximum of freedom, and greatly increases for them the possibilities of predicting the legal consequences of their actions.' Substantive rationalization appears to disable this machine," Schluchter, *The Rise of Western Rationalism: Max Weber's Developmental History* (Berkeley: University of California Press, 1981), 108. In line with Schluchter's thesis, we argue here that Americans have attempted to develop a state machine based on substantive rationalization.


177. Weber, 1149.


179. Schluchter, 59.

180. Ibid.