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## THE ADAPTATION OF ADMINISTRATIVE LAW AND PROCEDURE TO CONSTITUTIONAL THEORIES AND PRINCIPLES*


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I

Frank J. Goodnow, one of the founders and the first president of the American Political Science Association, predicted many years ago that the era of constitutional controversies, when most of the great national legal and political issues in the United States centered around the interpretation of the provisions of the Constitution, would gradually be replaced by an era when the foremost issues of the time would be concerned with the scope, efficacy, and significance of administrative law and procedure. Issues of constitutional construction, however, have a tendency to persist in the operation of the American federal system of government. And the effort to reorganize the federal judicial system in 1937 aroused a new interest in constitutional history, principles, and theories. But it is true, nevertheless, that one of the matters of major importance today in the internal affairs of government is concerned with the development of administrative practices and techniques, as well as with the adaptation of administrative legislation and adjudication to constitutional theories and principles.

For many years, administrative law and procedure grew in Anglo-Saxon countries without any special consideration being given to its development. Albert V. Dicey's insistence that there was no such thing as the French *droit administratif* in England seemed to satisfy the lawyers and publicists, and it was taken for granted in Anglo-American countries that there were no real issues or legal

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problems involved in the administrative process differing from the ordinary features of the application of the common law ideas of the administration of justice and of the supremacy of the law. The pioneer work of Goodnow, Ernst Freund, and others made only slight impressions on the legal profession, but gradually prepared the way for a new type of instruction and the consideration of problems in public administration and in public law.

When lawyers and judges a few decades ago became aware of the scope and significance of the work of administrative agencies, with the development of what appeared to be a fourth branch of the government, criticisms and invective were directed against the so-called "new despotism" or "bureaucracy triumphant." The criticisms of Lord Hewart and others in England led to a parliamentary investigation and to an authoritative repudiation of most of the objections which were raised. Parliament retains its supremacy and delegates powers freely to administrators under such conditions and subject to such safeguards as are deemed expedient. In the United States, James M. Beck and Chief Justice Hughes were foremost among those who raised similar objections to administrative justice. But in this country, by virtue of the fact that the Chief Justice and the Associate Justices, who, with a few exceptions, followed the leadership of the Chief Justice, exercise judicial, executive, and legislative powers, as the occasion seems in their opinion to require, the objections to the legislative efforts to delegate powers have become for the time being a part of the fundamental law. Thus the judicial enlargements and extensions of the separation of powers doctrine, combined recently with a new concept of fair play extracted from the due process of law clauses, will be a part of our public law until the federal Constitution is amended or until another bench of judges deletes these new doctrines from the constitutional gloss.

The attack upon administrative law and procedure as it has developed in the United States has recently become more vigorous and assertive and has resulted in a series of proposals to limit and to control administrative action. With the prevalence of common law ideas of the supremacy of the law, and with the extensive and in many respects quite effective review of legislative and executive acts to make sure that they conform with juridical notions of the meaning of the Constitution, some of these proposals involve a radical departure from the prevailing ideas and practices in the

administration of public affairs in a country in which the government has a popular basis and sanction. It is appropriate, therefore, to examine the relations of the current tendencies and practices in the growth of administrative justice to constitutional theories and principles. Let us turn, first, to the theory of the separation of powers as it applies to and affects administrative justice, and to the transformation of the significance of this theory by the process of judicial interpretation.

We have only recently begun to give special consideration to, and to evaluate, the process of interpretation or the ways and means whereby groups and interests seek to warp the language and meaning of a written constitution to accomplish their desired ends. The eighteenth-century political philosophy, from which the written charter as a basis for a governmental structure evolved, attributed a certainty and efficacy in the adoption of such charters for the purpose of the establishment of good and stable governments which the experience of a century and a half has demonstrated to be in many respects illusory. But from the American experience with written charters, which has been more fortunate than that of many other countries, has come an attitude or point of view in interpreting these charters which has led to both confusion and misrepresentation. Those with certain political or economic predilections who have sought to attain what in their opinion were deemed to be desirable political objectives have as a rule followed in the footsteps of Chief Justice Marshall, who, when using language that was far from definite and specific to read into the federal Constitution the doctrines of federalism and nationalism, insisted that it was the will of the law and the Constitution only which he was expounding and applying. Thus was begun and gradually fostered the notion that has been relied upon in support of a variety of causes, namely, that for the judges the words of the Constitution have one, and only one, meaning; or, to use the customary phrase, "the Constitution speaks with the same voice now as when it came from the hands of its framers."

The process of interpretation, however, is by no means so obvious and simple as it is frequently made to appear. It is apparent, as the exponents of realism or functionalism in jurisprudence have repeatedly pointed out, that the method of procedure whereby judges determine whether the facts of a particular case fall within the rule, principle, or standard deemed pertinent to the case,

involves a mental process in which the words are mere symbols for intricate and complex modes of thought. Language is, therefore, not merely the instrument by which we think, but it directs our thinking into certain paths. Taking the words as symbols, the judge whose duty it is to apply them must re-expand or recreate the thought that they were intended to, or really do, convey. Viewing the procedure of legislatures in the making of laws and of courts in their interpretation, with the differences of personality and community interest as well as the differences caused by the lapse of time and change of environment, it is obvious that words are far from fixed things. A word, in the language of Justice Holmes, is "indeed not a crystal transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." It is the fluidity of words and of their adaptability as circumstances require to the varying interests and desires of the interpreters that has accounted for the glosses which have grown upon certain doctrines or phrases included in the federal fundamental law.

Though many of the provisions of the Constitution have been molded or expanded by means of interpretation, a few principles or phrases such as the separation of powers, due process of law, and interstate commerce have been especially susceptible of change by judicial construction to carry out the purposes or objectives of dominant modes of thinking during different periods of American history.

II

It is a truism to state that the American constitutional system rests upon the fundamental doctrine of the separation of the three powers of government. But much depends upon the peculiar content which is read into that doctrine and the time, place, and circumstances under which the departments of government appropriately concerned interpret and apply the doctrine. Much of the discussion and comment relating to the separation of powers takes it for granted that the theory, as incorporated in state and federal constitutions, was substantially the same theory as is now interpreted and applied by the courts. And it is also assumed that judicial review of legislation, as understood and applied today, was combined with this theory to set up an effective system of checks and balances to restrict majority rule in favor of the interests of minorities and, in particular, to safeguard personal and property

rights. But it is plain that the original American theory of the separation of powers is quite different from modern concepts presumed to emanate therefrom. And the doctrine of judicial review of legislation as formulated in the late eighteenth and early nineteenth centuries was in few respects comparable to modern ideas and practices now prevailing with respect to the application of this doctrine.

Though Montesquieu's theory of the separation of governmental powers was included as a feature of early state and federal constitutions, it is well known that the theory at this time had little practical effect on the operation of the state governments. For nearly a century, legislative, executive, and judicial powers were freely and persistently mingled. Legislatures acted as courts of final resort, and in many respects exercised a partial supremacy over the other departments. Powers of every description were delegated freely to executives, and at times to courts, with only a few cases of refusal by the judges to enforce the legislative mandate, primarily to protect their own privileges and powers. Only occasional attempts were made to classify powers according to their intrinsic nature. During this century, with a few exceptions, the theory of the separation of powers meant that powers not expressly vested by the Constitution in either of the departments might, regardless of their nature, be assumed by the legislature or delegated to other agencies as the legislature might see fit. Justice Story stated the prevailing view regarding the separation theory during the early decades of American history in the dictum that "when we speak of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand the maxim in a limited sense . . . i.e., the true meaning is that the whole power of one of these departments should not be exercised by the same hands, which possess the whole power of either of the other departments." With only a few exceptions, the makers and interpreters of our first constitutions apparently had notions in mind approximating the prevailing French idea of a separation of functions rather than a separation of powers as currently understood.

It was not until the period preceding and following the Civil War that state justices, seeking grounds to check the growing tendencies toward the popular control over political and economic affairs, turned to the theory of the separation of powers, as well

as to the due process of law clauses as convenient phrases to check the exercise of legislative and executive powers deemed unwise. And a review of state and federal judicial decisions indicates that the sanctification of the doctrine of the separation of powers as a constitutional principle to foster and maintain the policy of governmental *laissez-faire* is largely the product of American constitutional interpretation during the latter part of the nineteenth century. Justice Holmes at one time defined the constitutional concept of the police power as a convenient device to accomplish ends in the way of interferences with personal and property rights which would otherwise be inhibited by constitutional limitations. In a similar manner, justices who considered legislative and administrative action objectionable from the standpoint of their own political and economic views found the separation of powers an appropriate device to place obstructions in the way of the incipient efforts to bring under control some of the unjust and destructive tactics of an industrial régime which were beyond effective control by the ordinary legal processes.

Thus when the states undertook, by way of legislative and administrative action, to establish effective health and sanitary laws, to foster irrigation projects, to regulate public utilities, and to improve the social and economic conditions of the people, many of the beneficent measures enacted by the legislatures were held void as violating the principle of the separation of powers. Excessive ideas of independence and of superiority on the part of the judges which had occasionally been expressed in earlier decades with little effect on public administration were now more frequently embodied in judicial opinions with respect to the regulation of social and economic affairs, with an attitude of assertiveness bordering sometimes on the verge of arrogance. But the increasing necessity for public control along these lines and changing judicial attitudes gradually brought about a reversal of the earlier decisions and the approval by state judicial tribunals of grants of legislative, executive, and judicial powers to administrative agencies. To maintain a semblance of consistency, the terms "quasi-legislative" and "quasi-judicial" were frequently used. The constitutions, in accordance with the theory of the separation of powers, did not permit the delegation by the legislature of legislative and judicial powers to administrative tribunals, but no such prohibition applied to the grants of quasi-legislative or quasi-judi-

cial powers. A *modus operandi* had been discovered to approve action which appeared to the judges desirable and to condemn similar action when it was considered undesirable. Thus the separation of powers doctrine supplemented the pliancy of due process of law to extend judicial control over legislative and administrative acts. The separation of powers doctrine, however, was not made a vital part of federal public law until several decades later with the epoch-making decisions in the Panama Refining Company Case and the Schechter Poultry Corporation Case.

In analyzing the efforts to establish definitive relations among the three departments of government, it is customary to ignore the fact that although the federal Constitution declares that this Constitution and the laws and treaties enacted in pursuance thereof shall be the supreme law of the land, it does not declare, as John Taylor of Caroline and others in our early history as a nation demonstrated, that it is the lawyers' interpretation only of that law that is supreme. Moreover, though the Massachusetts constitution provided that there was set up in that commonwealth a government of laws and not of men—a phrase frequently recurred to—this did not mean that it was lawyers' law only that was to prevail in the government of that state. Lawyers at this time, it is well known, were in none too good repute among those who regarded themselves, as clergy and laymen, to have full authority to make and, if necessary, to interpret laws. Woodrow Wilson recognized this fact when he spoke of the federal Constitution as the vehicle of the life of the nation and not a mere "lawyers' document."

It is important to realize also that the claim of the judiciary that it is the exclusive province of the judges to construe and interpret the constitutional limits on the coördinate departments of government is an assumption or postulate concerning which there was considerable doubt and uncertainty for almost a century after 1787. There were occasional expressions of opinion by the Federalists similar to that of Chancellor Kent in Dash v. Van Kleeck that it is "the sense of the American people that the right to interpret the law does and ought to belong exclusively to courts of justice." But Alexander Hamilton, along with many other Federalists, despite his eloquent plea favoring the authority of the courts to review legislative acts as a means to preserve and protect the federal Constitution, conceded that the legislative department

had the right to place its own interpretation on the Constitution similar to the current practice in England. And James Madison, who is generally referred to as the ablest exponent of the doctrine of the separation of powers at the time of the formation of the Constitution, emphatically expressed the opinion in the First Congress, which is frequently forgotten or ignored, that Congress had an equal authority with the courts to place a final and conclusive interpretation upon the Constitution, at least so far as its own powers and those of the Executive are concerned. When judicial review of legislative and administrative acts is being extended to new and unaccustomed fields, and it is being urged that further extensions be made, it is well to keep in mind that judicial review itself, so far as legislative acts are concerned, was made a part of our fundamental law through the process of judicial interpretation.

There is no definite or express requirement in the Constitution that one department be accorded greater authority than another in the interpretation of the fundamental law. It was in accord with this hypothesis that Presidents Jefferson, Jackson, and Lincoln refused to regard themselves as bound by interpretations placed upon the Constitution by the Supreme Court. The doctrine of judicial supremacy, so far as constitutional construction is concerned, advanced chiefly by the Federalists after the policies of the party had been repudiated by the nation, by frequent assertion and repetition was gradually accepted by all parties. But judicial supremacy as historically understood and applied did not, except to a few extremists, go so far as to give sanction to the notion of a virtual monopoly of interpretation and application of the law by judges. It is the transformation, by means of the separation of powers theory and other constitutional phrases, of notions of judicial supremacy into concepts of legal and judicial monopoly in the interpretation and application of the law that is the most significant feature of recent discussions on administrative justice.

Many of the current comments and observations regarding the weaknesses of administrative justice, which take such a legal and judicial monopoly for granted, are predicated on an assumption which, if clearly stated at the beginning, would clarify the discussion of the issues involved. Foremost among the assumptions in the literature on administrative tribunals is the claim that if finality of decision on the facts and, to a limited extent, on the law

is granted to administrative agencies, a form of administrative absolutism has thereby been set up. But finality of decision in countries where democratic principles and practices prevail, except for the determination of issues by the people through constitutional amendments, must be placed in some public authority. Recognizing the ultimate authority of the people to override by constitutional amendments existing agencies and methods of procedure, there may be established a form of finality of decision on the law and the facts in the courts and hence the establishment of a type of "judicial absolutism," or such authority may be accorded to executive and administrative agencies in what may be termed "administrative absolutism," or the final decision, as is the practice in countries where legislative supremacy prevails, may be placed in the legislature with the acceptance of a type of "legislative absolutism."

The real issue at stake is the one argued at length in the famous Judiciary debate of 1802 in Congress, whether a governmental mechanism should be provided in such form that the people could rule by such agencies as they might wish to establish, or whether the written charter serving as a foundation for the government should be so interpreted and expanded in meaning as to set up a delicately balanced system with the judges as final arbiters. Those who have desired to place checks upon the authority which the people may exercise in the affairs of government have favored judicial review of legislation to place a barrier against legislative arbitrariness or absolutism. And in the same manner forces are now operating to place checks upon what is regarded as administrative finality or absolutism. But it should not be overlooked that in replacing these types of absolutism we are setting up another form of absolutism. One may justly and reasonably prefer a judicial despotism to a legislative or administrative despotism. And there are many of this way of thinking who laud the aristocracy of the robe, or the supremacy of judges, which has been established in the United States. As a matter of fact, however, phrases such as "administrative absolutism," "administrative despotism," or "wonderland of bureaucracy," are used primarily to prejudice the minds of the people against administrative methods and procedure, and at the same time to conceal the real motive, namely, the assurance of a type of legal and judicial finality with respect to all of the fundamental matters relative to life,

liberty, and property. Strong and well-organized interests are determined to sustain and extend this kind of finality because they fear, and propose to check as far as possible, popular control over political affairs. Having attained a large measure of control over legislation, their primary objective at this time is to limit the scope and to canalize the proceedings of executive and administrative officers.

Attorneys for such interests and members of the bar who frequently consider administrative justice primarily from the standpoint of the increase of business for the members of the legal profession insist that the atmosphere of inquiry before boards and commissions, as well as before all officers who render quasi-judicial determinations, should be contentious, as it is before a court, with a full hearing and counsel employed on both sides. But is the adversary, contentious, or "cockfight" method of securing justice—as the common law trial procedure has been called—the only method that may reasonably and advantageously be employed by public officials in carrying out the discretionary or quasi-judicial functions which modern governments are expected to perform? Are there not fields in which the adjustment of a particular type of public and private relations may more appropriately be made by informal or arbitral procedure, with the administrator serving in the rôle of arbitrator? A cursory examination of legal history brings out the fact that arbitration and conciliation are among the oldest, and have always been the most rational and effective, methods of adjusting many types of civil disputes.

"Courts are not the only agency of the government that must be assumed to have the capacity to govern," asserted Justice Stone in his dissent in the Agricultural Adjustment Act Case; and he objected to an "interpretation of our great charter of government which proceeds on any assumption that the responsibility for the preservation of our institutions is the exclusive concern of any of the three branches of government." It is, however, apparent in the recent tendencies to limit and to circumscribe the activities of administrative tribunals that there is a lack of anything like legal or judicial self-restraint. The supervisory function exercised by the courts over administrative agencies is based upon concepts, principles, and standards which are often notoriously vague and are susceptible of a great variety of interpretations. It is assumed that judges are the only ones who know what is fairness and reasonable-

ness in official action, and who appreciate what are the requirements of the operation of the rule of law. Judges may act upon vague standards and principles or upon mere general concepts of fair play in controlling administrative action, but administrators must be confined and controlled by definite and well-known standards prescribed in advance. Courts may or may not make findings of fact and conclusions of law, and may or may not state the reasons for their decisions. Such a privilege, however, is to be denied to all administrative agencies rendering quasi-judicial decisions. Extensive rule-making or legislative authority is conceded as belonging to the courts, or is granted by statute, and the rules formulated by judges are regarded as having legal effect whether or not private rights are adversely affected. Of all public officers, judges are the only ones who are to be accorded the privilege of exercising an uncontrolled discretion. No such dominance of one department of government over the others was envisaged in the adoption of written constitutions containing a separation of powers doctrine.

III

Because of the presumed threat to the monopoly as to the application and interpretation of the law which many lawyers and judges think is rightfully theirs, a widespread and energetically directed attack is being made on the present trends and tendencies in administrative justice. In dealing with certain phases of this attack manifested in judicial decisions, in the actions taken by a majority of the members of some bar associations, and in an increasing amount of literature on the subject, I wish to make it clear that I realize that there are many members of the bench and bar who do not agree with the current objections to administrative law and procedure. It is with the prevailing sentiment of the profession that the ensuing comments and observations are primarily concerned. Though certain members of the legal profession have frequently viewed with grave concern the establishment of new administrative agencies, the pressure for the creation of such agencies whereby special technical skill may be developed and applied through the delegation of administrative and judicial powers to executive and administrative officers has been so great that many new tribunals have been authorized in recent legislation. In the words of Dean Landis of the Harvard Law School, "the adminis-

trative process is, in essence, our generation's answer to the inadequacy of the judicial and the legislative processes."

Many members of the bar, however, became alarmed at the establishment of new federal administrative tribunals with broad powers of determination both of the law and the facts in order to meet the emergency conditions created by the economic depression of 1929–33. To analyze and report on the legal effects of the creation of these and similar administrative tribunals, the American Bar Association appointed a Special Committee on Administrative Law. In its first reports, the Committee called attention to the failure to provide for judicial review of executive or administrative acts in certain provisions of the National Industrial Recovery Act and of the Agricultural Adjustment Act. The greatest danger, in the opinion of the Committee, was manifested in the provision of the Economy Act of 1933 dealing with veterans' benefits which declared "administrative decisions to be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision." Vigorous opposition was expressed regarding the tendency in this and other acts to combine the judicial with legislative or executive powers, and it was declared that decisions of the settlement of controversies of a judicial character must be brought back into the judicial system. To accomplish this result, it was maintained, first, that judicial or quasi-judicial functions of administrative agencies should be segregated and placed in an independent tribunal having the safeguards of judicial independence and irresponsibility, and, second, that the decisions of administrative officers should be subject to judicial review, not only on the law, but also on the facts. The active interest manifested in the attainment of these objectives by the American Bar Association led to similar movements in the states and encouraged allied organizations to join in protests against recent legislation creating new commissions or extending the jurisdiction of those engaged in the administrative services of the gvernment.

Thus the movement to curb administrative officers and boards, which received encouragement and sanction by the decisions of the Supreme Court of the United States in such cases as Ohio Valley Water Company v. Ben Avon Borough, Crowell v. Benson, St. Joseph Stock Yards Company v. United States, Jones v. Securities and Exchange Commission, and Morgan v. United States, as well

as in similar decisions by state supreme courts, limiting the authority of administrative agencies with respect to conclusive findings of fact and requiring changes of procedure in making such findings, is being fostered almost with the fervor of a crusade. Lawyers are being advised to become aware of, and to join in checking, the tendency manifested by administrative bureaus and commissions to seek constantly from the legislature increased jurisdiction with, so far as possible, exemption from judicial review. This tendency is condemned as an unwarranted encroachment on the domain of judicial justice, though no objections are raised to a similar tendency on the part of the courts to increase their jurisdiction by judicial legislation.

But the most amazing phase of the current attacks on administrative law is the attempt to restore judicial review of administrative findings and decisions to large areas in which, from long experience with state and federal tribunals, the courts have accorded a practical finality to decisions of such tribunals. A spirit of distrust of executive and administrative officials such as that indicated in the comment of Chief Justice Hughes that "an unscrupulous administrator might be tempted to say 'let me find the facts for the people of my country and I care little who lays down the general principles' " is used as the background and justification for the contention that the courts must in practically all cases examine and form an independent judgment on the law and the facts. Thus the finality of fact-finding of some important administrative officers and tribunals, which has become the most significant and in many respects the most constructive phase of the development of American administrative law during the past half-century, is to be stricken down in favor of the rule that there must be either a trial *de novo* or a thoroughgoing examination of the law and the facts in the review of practically all administrative decisions.

The main objective of many individuals and groups which are convinced that the nation is headed in the wrong direction in the organization and procedure of its administrative agencies is to take steps by judicial and legislative methods to implement, as it is called, the present method of administrative rule-making, to divorce the judicial functions now exercised by these agencies from the legislative and executive functions which they perform, and to provide for a broader and more effective type of judicial review of administrative action.

The most significant proposal to accomplish the above ends which may not be thoroughly and systematically accomplished through the process of judicial interpretation is embodied in the measure sponsored by the American Bar Association. The Committee on Administrative Law of this Association, which formerly advocated the enactment of an administrative court measure, later prepared and sponsored a bill of its own and, with the approval of the Association, arranged to have the bill introduced in Congress. By the Logan-Walter bill, which was passed by the Senate and recommended for passage by the Judiciary Committee of the House of Representatives during the first session of the Seventy-sixth Congress, the Supreme Court is authorized to prescribe uniform rules of practice and procedure for the quasi-judicial proceedings of federal administrative officers, bureaus, and commissions. The Court of Appeals of the District of Columbia is constituted a super-administrative agency with the power of veto over administrative rules and regulations. For all rule-making affecting property or civil rights, there is a mandatory requirement of notice and public hearings.

An important provision of the bill makes it mandatory for any federal officer or agency which renders quasi-judicial decisions to establish an intra-departmental board. To such board, presided over by a lawyer, anyone feeling aggrieved by a decision or failure to act on the part of any employee or agency may appeal. In such appeal there must be a formal hearing, with a written record of testimony, opportunity to examine and cross-examine witnesses, and it is necessary to prepare written findings of fact. And finally there must be a written opinion or order which may form a basis for subsequent hearing and decision by the head of the administrative agency, or for the courts if the decision eventually becomes a matter in issue before a judicial tribunal authorized to review such administrative decisions. The Circuit Courts of Appeal are granted the authority to review a final decision or order of any federal administrative agency or intra-departmental board, and may reconsider and set aside the findings of fact of the agency or board as well as give a judgment on all issues of law. These judgments shall be final unless reversed by the Supreme Court. The Interstate Commerce Commission and probably the Federal Trade Commission are to be exempted from the proposed rigid procedural requirements, which indicates that current criticisms

are directed chiefly against the procedure of recently established federal administrative agencies. The recommendation for the establishment of intra-departmental boards to be presided over by a lawyer for the hearing of administrative appeals, with review both of rule-making and administrative decisions by the courts, in addition to all of the existing types of the review of administrative action which are to remain in effect, is made, although it is conceded that the plan will increase appeals both within the department and before the reviewing courts, and it is also conceded that multiple appeals are an unfortunate feature of American legal procedure which ought to be avoided. Sponsors of the bill have announced that at the earliest opportunity they propose to take the necessary steps to secure for these intra-departmental boards an independent status within the departments as nearly as possible after the model of the constitutional courts.

It is admitted by the advocates of this bill that the separation of powers doctrine in itself is not a secure and efficacious basis to require such a segregation of judicial from legislative and executive functions. Hence the Supreme Court of the United States is commended for appealing to what seems to be the underlying implications and the natural corollaries, not only of this doctrine but also of the common law ideas of fair play presumed to be embodied in the phrase "due process of law," in order to find more effective limits for administrative action.

These essential implications and corollaries are declared to be:

(*a*) No man should be permitted to be judge in his own case, that is to say, the combination of judge and prosecutor and, *a fortiori*, the combination of judge, prosecutor, and legislator should be avoided so far as possible;

(*b*) All officers who participate in judicial or quasi-judicial action should enjoy a tenure of office and assurance of compensation as free as possible of control by the executive and legislative branches;

(*c*) The final control and review of judicial decisions, by whomever rendered, should be lodged in the judicial branch of the government, that is to say, the constitutional courts; and to the extent that this is not permissible (e.g., on certain questions of fact) review should be lodged in one or more independent tribunals resembling the constitutional courts as closely as possible.

In so far as these implications and corollaries may not be fully and effectively required by the separation of powers theory, the opponents of the powers now exercised by administrative tribunals and of the procedure customarily followed by them approve the

decisions of the Supreme Court to the effect that arbitrary delegations of power constitute a denial of rights safeguarded by the due process clauses of the Fifth and Fourteenth Amendments. In fact, there are some who contend that the varying and uncertain meanings attached to the separation of powers theory make the due process clause a much more appropriate means of confining administrative tribunals within the channels which will meet with judicial approval. And the limitations thus prescribed by judicial decisions are to be greatly augmented by proposed legislative enactments designed to carry into effect the spirit and implications of the constitutional mandates.

The primary assumption of those who insist that there must be no interference with judicial review of the broadest kind, both of the law and of the facts as found by administrative agencies, is that such review is necessary to retain and render effective the common law protection and safeguards for the preservation of personal and property rights. In the first place, these so-called "safeguards" of the common law were not a part of the common law as it developed in England, and they do not now stand in the way of effective delegations of power to administrative officers in England. And in the second place, these "safeguards," so far as they have become a part of American law, are recent discoveries which the courts have made and have declared to be a part of the American common law presumably embodied in constitutional phraseology in order to place barriers in the way of the successful administration of public measures supported by insistent popular demands.

The reading of these newly discovered common law ideas of fair play into the Constitution by Chief Justice Hughes in the Morgan Cases, and extracting them from the separation of powers theory and the due process of law clause, is similar in many respects to Justice Field's successful effort to read into the fundamental law the Declaration of Independence and Adam Smith's economic doctrine of *laissez-faire*. No one has given a satisfactory definition or exposition of the separation of powers theory or of the term "due process of law." The method adopted by the courts of definition by judicial inclusion and exclusion leaves much to be desired. Furthermore, in the consideration of the efforts to formulate a common law mold for the action of all federal administrative officers, boards, and commissions in the United States, it should

be noted that it has been authoritatively held by the Supreme Court that there is under our constitutional system no such thing as a federal common law. The federal Constitution at no place expressly sanctions the underlying principles and corollaries of the common law, and when Federalist judges attempted to engraft the common law upon the Constitution, the movement was resisted by the leaders of the Democratic-Republican party and the Republican doctrine was eventually approved by the Supreme Court. No greater revolution in constitutional construction could be conceived than to enlarge the scope of federal powers or to prescribe the limitations applicable thereto in accordance with the doctrines, principles, and concepts of the common law.

Despite the insecure constitutional basis and the somewhat devious methods of procedure adopted to accomplish the desired ends, something in the nature of a common law "straight jacket" is being constructed into which administrative action must fit to conform to the standards of legality, whereas most of the administrative agencies to which these standards are to be applied relate to conditions which were unknown to the common law. Moreover, many of the statutes providing for administrative procedure were designed to provide remedies in fields in which the customary legal methods had failed to render effective, expeditious, and inexpensive justice. Regardless of this fact, the employment of counsel and the assurance of formal judicial procedure according to common law standards are demanded by the opponents of administrative justice. Thus the simple, direct, and expeditious handling of affairs by administrative officers is held up to scorn, no matter how much more advantageously individual and social values may thereby be protected and preserved.

The claim is made by those who wish to separate the judicial from the legislative and executive functions of administrators and to assure full judicial review for all phases of administrative action that no reactionary position is assumed and that the ill-adjustment between law and administration which prevailed during the latter part of the nineteenth century is not to be restored. All that is demanded, so it is maintained, is the safeguarding of individual interests, the preservation of the check and balance ideas involved in the common law doctrine of the supremacy of law, and the requirement that a form of judicial finality or supremacy be enforced as a phase of the constitutional separation or distribution

of powers. But it is not so much the constitutional separation of powers which is to be preserved as it is the judicial gloss which has been superimposed upon that doctrine to give the lawyers and the courts the final word in determining both private and public rights. In answer to the contention that the common law is hostile to administrative action, it is claimed that the main objective of the common law is to prevent the arbitrary and capricious exercise of administrative powers. It is noticeable, however, that all action affecting certain rights and interests is assumed to be arbitrary unless such action is taken by judges, and it is taken for granted that the decisions of judges, regardless of their scope and effect, are necessarily judicial and, therefore, reasonable.

The nature of the supremacy sought is forcefully stated in the contention that in the American system of government administration is under and a part of the legal order and that the political order is not outside of and above the legal order. We have, if this reasoning in its extreme form is correct, not a government of, for, and by the people, but a government of, for, and by the lawyers and the clients they serve, whereas it has been pointed out by lawyers as well as by many others that there are millions of people whose rights and interests are not protected by the legal profession. Law, in this way of thinking, is not a means to an end. It is an end in itself. And not only must all private and public interests be made to conform to this superior legal order, but this order must prevail regardless of its effect on the public welfare or whether it runs counter to repeated and unmistakable expressions of the popular will. Evidently the doctrine of a higher law to which all political action must conform is appearing under a somewhat different guise.

Though no such system was provided for nor is required by any of the express language of the federal Constitution, it is seriously contended, nevertheless, that administrative tribunals must be adjusted in the United States to the American judicial tradition, i.e., to the supremacy of the law. And this supremacy is now interpreted not only to require the dominance of lawyers' law, but also to require a monopoly of the lawyers in the interpretation and application of the law.

The insistence that disputes be settled by lawyers whether or not intricate and technical legal issues are involved may not come within the prohibitions of the anti-trust or anti-monopoly laws.

But the demand that lawyers should have the sole right to settle certain types of disputes, as well as some of the monopolistic tendencies in the practice of the law and in legal education will, I am sure, when the matter is given full consideration and publicity, be inhibited by a public sentiment that will not sanction so large a control of public affairs by any single, select, and closed order—an order containing many unselfish, public-minded, and distinguished citizens who are deeply concerned with the public welfare, but some of whose members appear to be concerned primarily with the preservation of the rights of clients that have ample funds to engage in the slow and tortuous processes of expensive litigation.

There are few who would undertake to deny that the necessities of the present situation require the turning over of a large part of the fact-finding and the preliminary determination of matters of law to administrative officers who must act in a measure, at least, as law-makers, as executives who apply the law, as well as the judges who determine its meaning under the particular circumstances. The fact that administrative tribunals so constituted frequently settle, in an informal, expeditious, and effective manner ninety per cent or more of the controversies that come before them, without any objections or attempts to appeal from their decisions, and that only a small part of the remaining issues go through the course of actual litigation in the courts, indicates that the procedure itself is essentially sound and secures a type of justice and fairness in resolving disputes affecting personal and property rights that cannot be dispensed with. The procedure in many respects is in need of improvement, but to move in the direction of the requirement that all issues involving fact-finding and all those concerning preliminary determinations as to the meaning and application of statutes must go to the courts or to other quasi-judicial tribunals, wherein common law methods of hearing, trial, and judgment are in vogue, is to turn the hands of the clock backward, to reëstablish a status of political, social, and economic *laissez-faire* in which only the favored few can have their rights adjudicated.

IV

The ideal for administrative justice of a body of experts pursuing objective and scientific methods in dealing with the law and the facts with respect to a given set of civic relations is, it is true, frequently not fully realized. But the customary insinuations re-

garding the type of training, qualifications, and ideals of administrators fail to give due credit to the host of men and women who have entered the public service with the best qualifications attainable for the work to be performed, and who at a considerable sacrifice in remuneration are devoting their lives to the carrying out of the objectives declared to be desirable by the representatives of the people. Administrators are often compared unfavorably with the members of the bench because there is no such uniform guarantee of training for their tasks as there is in the case of judges selected from the bar. But what has been the training of judges? Has it not been, as a rule, the protection and the preservation of the private interests of clients? And is this a specially desirable training for officials who are expected to preserve and protect the public interests and public welfare, and who are called upon to use and develop informal, expeditious, and non-contentious procedure characteristic of many phases of administrative action?

One of the common contentions of the critics of our modern administrative mechanism is that administrators lack the necessary independence and objectivity to render decisions affecting the rights of person and property, and that they are too frequently dominated by personal or political motives. There is no way of proving or disproving this contention, but there is good reason to believe that a type of independence and objectivity approximating that of the judges has been attained in the practices and procedures of many administrative officers and agencies. In fact, many administrators are lawyers and have had the same kind of training as judges. Moreover, judges to a certain extent, just as members of administrative boards and commissions, have personal, political, and economic theories and principles which they seek to foster through their judicial decisions. The prevalence of political methods and influences in the trial courts of first instance is one of the discreditable phases of justice as administered by the courts, and there is room for much improvement in the procedure of courts as well as of administrative agencies. It is apparent that most of the objections raised against administrative justice apply to a certain degree to the practices and procedures of courts of justice.

A considerable part of the opposition to the present methods of administrative procedure is directed against the regulation itself, and not merely against the method of enforcement. And there are

many today who give the impression, at least, that they agree with the English Chief Justice who wished to see no administrative ventures in a field where the lawyer's training and precedents gave no guidance. Are we not being subjected to the recrudescence of the old and often discredited *laissez-faire* theory, with certain concessions to administrative agencies which will permit them to function in an ineffective and futile manner? The powers of administrative officers, boards, and commissions, it is maintained, are not to be reduced or interfered with; it is the procedure of such officers only which is to be reformed. But was it not the advantages of direct, non-technical, and expeditious procedure that led to many of the grants of authority to administrative agencies and that justifies as a rule the present powers which they exercise? And is it advisable to require in all cases involving the discretionary action of administrators affecting personal or property rights an elaborate, expensive, and time-consuming technique for the primary purpose of the preparation of a perfect record for the courts when an appeal is sought from administrative decisions?

In the administrative process, rule-making and the usual enforcement proceedings which follow cannot be separated from administrative adjudication without sacrificing in many instances efficiency and the advancement of the public interests sought to be protected by the legislative mandates. And it has been demonstrated in many fields that effective public regulation requires a joinder of all three of the governmental powers. The real choice is between effective regulation by the present type of officers, boards, or commissions or impotent public agencies circumscribed by a rigid application of the separation of powers theory combined with the newly construed restrictions in accordance with a modernized version of due process of law. Efficiency is not the only factor to be considered in evaluating the methods employed and the accomplishments of public administrators. It is necessary and indispensable for the public welfare that individual rights and privileges be protected. On the other hand, the protection of such rights and privileges may not be accorded to the few to the neglect of those of the many without giving encouragement and sanction to oligarchic in preference to democratic principles in the management of public affairs.

With a note of realism and practical insight often lacking in the comments and observations regarding the authority of adminis-

trative officers in the United States, the Committee on Ministers' Powers in England frankly recognized that there were conditions when the ministers or departmental boards should be granted authority to make final and conclusive findings on both the facts and the law. It was the opinion of the Committee that only emergency conditions or extraordinary circumstances warranted the denial of any appeal to the courts. For it is one of the sacred traditions of Anglo-Saxon political philosophy and practice that so far as possible the way should be left open for the citizen to litigate if he feels that his rights have been interfered with and he can afford to take the necessary steps to secure a legal determination of his claims.

With respect to most of the controversies involving administrative action, the Committee believed that the practice which now prevails in England should be continued, namely, that the findings of fact of administrative officers should be final and conclusive and that there should be judicial review only on questions of law. In exceptional cases, the Committee deemed advisable an appeal on the facts to a special tribunal within the department. The Committee thought that the tendency to exclude the courts from a review of legal issues arising in the exercise of authority by the departments and boards had gone too far, and that a more careful consideration should be given to measures which preclude or seriously interfere with judicial review. In the judgment of the Committee, it is advisable to separate as far as is possible and practicable the judicial functions within the departments from those that are not judicial in order to avoid the impression that officers enforcing the law become judges in their own causes. These recommendations, to which few exceptions could be taken by those who favor the administrative process as it has developed in the United States, are quite different from the proposals to cast all administrative agencies into a uniform mold, to demand judicial review of the facts and of the law, and to extend judicial review of administrative action to new phases of administrative legislation and adjudication. It is significant also to note that none of the important changes recommended by the Committee relative to administrative procedure has been enacted into law.

With a different approach to the problems involved, much of the discussion in the United States relative to the powers and procedures of administrative agencies, noted Justice Stone, "is reminis-

cent of the distrust of equity displayed by the common law judges led by Coke, and of their resistance to its expansion. We still get reverberations of these early fulminations in renewed alarms at our growing administrative bureaucracy and the new despotism of boards and commissions. So far as these nostalgic yearnings for an era that has passed would encourage us to stay the tide of needed reform, they are destined to share the fate of the obstacles which Coke and his colleagues sought to place in the way of extension of the beneficent sway of equity." Despite these "nostalgic yearnings," as predicted by Elihu Root almost a quarter-century ago, we shall go on, and we shall expand administrative agencies whether we approve them theoretically or not. Such agencies furnish a form of protection to personal and individual rights and place obstacles in the way of wrongdoing which under our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts. And the contention attributed to James Madison and renewed by Root in the address in which the above statement was made that the "governors shall be governed" and that the "regulators shall be regulated" is well on the way toward accomplishment. For the claim that administrative officers, boards, and commissions exercising quasi-legislative and quasi-judicial functions are in an irresponsible position is in fact not true. All of these official agencies are subject to a triple check by the legislature, which may reduce their appropriations or may amend the act granting them powers, by the executive through new appointees, and by the courts, for judicial review, though sometimes limited by the legislature in its grant of administrative authority, remains in most instances as a check upon extreme forms of unfairness in procedure or of arbitrariness in action.

These limitations and restrictions upon administrative action have, with few exceptions, brought about such reasonable safeguards for the rights of persons and property that there is no urgent need for the drastic methods proposed to reform administrative procedure by state and federal legislative action. I do not wish to be understood to favor unfairness or arbitrary action on the part of administrators; for I know that administrators, like judges, are at times inclined to err, and that checks and safeguards against unfair administrative as well as unwise judicial action are not only desirable but also indispensable. I question merely whether for

certain phases of governmental action the only desirable, appropriate, and effective check is the judicial check. In the instances where greater safeguards should be established, the legislative and executive departments have ample authority to provide the necessary remedies without turning over to the courts the control of such a large part of public administration.

V

Criticisms of administrative practices and procedure in the United States have been made as a rule without thorough investigation and consideration of the intricate and complex facts and conditions which appertain to this type of official action. No organization has undertaken the kind of survey and analysis, such as that which was made by the Committee on Ministers' Powers in England, which would furnish the basis for more intelligent and scientific conclusions than have been thus far formed on some of the controversial issues involved. The efforts to improve the present method of disposing of the controverted cases of automobile accidents illustrates the necessity of a careful investigation of broad and general factors of public policy as well as the effect of a change of administrative or legal procedure. A large part, and in some instances more than half, of the time of judicial tribunals is devoted to the trial of automobile accident cases. Partial, and perhaps inconclusive, studies have indicated that approximately as much money is expended in the trial of accident cases as is finally paid in judgments to those who have sustained injuries. And there are many who when injured cannot afford the delay or the expense of a court trial, and who must accept compromises with either no compensation or quite inadequate awards. There is good ground, therefore, for the contention that the present slow, cumbersome, and costly procedure before courts for the settlement of automobile accident cases should be revamped, if not entirely replaced by the settlement of these cases by special commissions established for this purpose. Much more intensive and extensive factual studies are needed to determine the most appropriate and efficient type of procedure in such cases so far as the protection of individual rights and the preservation of related public interests are concerned.

The usual method adopted by critics of administrative law in the United States is to gather varied and scattered types of evi-

dence and opinion to support predetermined postulates or conclusions, and then to try to fit all of the various and divergent administrative agencies into a preconceived mold. This is apparently what has been attempted in the preparation of the Logan-Walter bill. Though this bill has been approved by a number of state and local bar associations, it is significant that the National Lawyers' Guild, following the recommendations of a Special Committee, disapproved the bill, thereby advising the members of the Guild to oppose its enactment. The Committee, in its analysis of the bill, objected to the tendency throughout the measure to cast all administration into a uniform mold. The plan of permitting appeals to intra-departmental boards with the formal hearings required, along with the extension of judicial review of administrative findings and decisions, it is believed by the Committee, would paralyze the functions of government. And special objections were raised to the attempt by means of the bill to place such a large part of the supervisory functions of the executive in the hands of the judiciary. Thus certain members of the legal profession are joining with experts in the field of administration and with scholars versed in the principles and practices of public law to secure a more thorough study and analysis of the administrative process before such an extreme form of common law and legislative straight-jacket is superimposed upon all of the important federal administrative agencies.

But this bill is merely one of the concrete proposals which are being presented to Congress and to the legislatures of the states to remedy what are regarded as the chief defects of administrative tribunals. The American Bar Association's Special Committee on State Administrative Agencies and Tribunals has prepared some tentative conclusions and recommendations which are in a few respects more favorable to the present practices and procedure of such tribunals than the rigid requirements that are proposed to be applied to federal agencies. State and local bar associations have also formed committees to investigate and report upon the present powers and procedure of the officers exercising administrative authority in the state administration. Most of the measures suggested by these committees, and which are being submitted to the legislatures of the states, to remedy the alleged defects of these agencies have a singular likeness to the proposal before Congress, just as the decisions of the state courts are following the unfavor-

able attitude toward such tribunals manifested in some of the recent decisions of the federal Supreme Court. Regardless of the action which may be taken on these measures, the fundamental issues relating to administrative justice will remain to be determined. What are the most apparent and the most serious weaknesses of different types of administrative agencies? To what extent are these weaknesses to be attributed to unwise and ineffective methods of organization, and to what extent to inadequate and improperly trained personnel? To what extent, and along what lines, is it desirable to restrict or to extend the jurisdiction and the activities of administrative officers and agencies? And finally what are the most appropriate and effective adjustments which may be made in the establishment of the relations between the administrative agencies and the courts? Before satisfactory answers may be given to these and other pertinent questions, much data must be gathered and evaluated by individuals, by private organizations, and by public officers who have had experience with the practical problems and difficulties in the administrative phases of government.

No one could forecast what would be the results and conclusions of such investigations. It is significant, however, that the Committee on Ministers' Powers with respect to English practices, where much more extensive delegations of power and broader and more frequent grants of quasi-judicial authority to administrative officers with comparatively little judicial review, have been made than in the United States, after a thorough inquiry, concluded that "we see nothing to justify any lowering of the country's high opinion of its Civil Service or any reflection on its sense of justice, or any ground for a belief that our constitutional machinery is developing in directions which are fundamentally wrong." Fortunately, much preliminary work has been done to form scientific and authoritative analyses of the administrative process as developed by the Interstate Commerce Commission, by the Federal Trade Commission, and by workmen's compensation commissions or industrial accident boards. And some significant studies are now in progress by official and private committees or groups.

Internal reforms in administrative methods are in some instances much needed. Such reforms however, will not be accomplished by the imposition of general restrictions and rigid formulas which all agencies must follow, but rather by a careful investigation of existing practices, with exploration of available effective techniques

and experimentation with new modes of official action. Until the method of investigation and evaluation is more extensively employed, judgments on one of the most intricate and far-reaching of governmental problems will be likely to be based on preconceived notions and influenced to an undue degree by the views of those representing special interests. Assuming that the research and scholarly work of political scientists may not be entirely detached, objective, and scientific, there are issues involved in the development of administrative justice which are so significant for the future welfare of society and are so closely related to the primary purposes and aims of this Association that more definite steps may well be considered by the members of the Association than have heretofore been taken to interpret and evaluate the current ideas and tendencies in this relatively new field of governmental theory and practice.

In the early years, when political science was becoming a separate and independent field among the social sciences, public law, a subject at this time accorded little attention in the curricula of law schools, was for many of the members of the new organization one of the major lines of interest. Gradually the scope of work coming within the ambit of the American Political Science Association has been broadened and enriched by the exploration, analysis, and interpretation of other phases of political ideas and phenomena, with the result that political science may truly be regarded as no longer under the bondage of the lawyers. On the other hand, public law has now become one of the important subjects of instruction in law school curricula, and with this trend has come a decline of the importance of this field of instruction in departments of political science. In fact, the pendulum has swung so far in the opposite direction that there are some who maintain that the only deserving place for public law courses in which the case method of instruction is used is in the law schools. In my opinion, such views are incompatible with the best interests of legal instruction both in the law schools and in departments of political science. Public law always has been and continues to be primarily public in its nature, significance, and implications. It belongs, therefore, as much to the field of the political and social sciences as it does to the field of the law, and political and social scientists as well as lawyers may well coöperate in the consideration and evaluation of the vital problems involved in its development. If modern govern-

ments may be organized to function effectively in a society basically democratic, does it not seem imperative that more time and energy should be devoted, not only to the creation of an administrative mechanism to cope with modern social and political problems, but also to the determination of ways and means to maintain more adequately the public interests and welfare, as well as to preserve within reasonable bounds individual rights and privileges?

VI

Frank J. Goodnow's prediction regarding the consideration of the desirability, efficiency, and appropriate techniques of administrative procedure in dealing with many of the economic and social problems of the present day has come true, to a certain extent at least; but this consideration is involved in and conditioned by an issue of greater significance—the adaptation of such procedure to constitutional theories and principles. Once more by the turn in tide of judicial interpretation one of the foremost political controversies centers around the meaning and application of the federal Constitution. Those who fall back upon the Constitution to sanction the views which in their opinion accord with desirable public policy admit that many federal statutes have been enacted during the past century or more that have involved delegations of legislative and judicial power to administrative officials, and that such delegations, prior to 1935, were all declared valid by the Supreme Court. And it is taken for granted that, with respect to combinations of legislative and executive power, a rigid application of the separation of powers doctrine is neither possible nor desirable. But by a different kind of reasoning this doctrine, with only few exceptions virtually ignored in both constitutional theory and political practice until the last two decades, has been held to be a rigid and inflexible guide to prohibit the mingling of judicial with legislative or executive powers and to enlarge the privileges and prerogatives of the courts regardless of inevitable encroachments on the domain of the other departments. The doctrine of separation of powers, we are told, now requires a meticulous and mechanical classification and separation of functions, and it is insisted that there is nothing to do but to provide for this separation or to amend the Constitution by changing the pertinent constitutional principle. But is it the Constitution that demands such a requirement, or is it what Justice Holmes called the personal and individual

predilections of the interpreters which are first read into the general phrases of the document and withdrawn therefrom to make it appear that it is the voice of the Constitution only that speaks? Thus the process of interpretation again comes to the forefront as a means of construing limits to governmental action not prescribed by the written fundamental law.

Chief Justice Winslow of the state of Wisconsin spoke many years ago of the difficulties involved in adapting an eighteenth-century constitution to a twentieth-century society. The greatest difficulties encountered in this adaptation, however, are not with the written instruments which were drafted in the eighteenth century, but with the interpretations or glosses which have been injected into or superimposed upon the phrases of the written document. The Supreme Court of the United States has begun to brush aside some of these additions to or modifications of the Constitution by interpretation, and has indicated the advisability of changing other phases of the constitutional gloss. One of the most significant of the steps taken in this direction is the gradual disposal of Chief Justice Marshall's dictum in McCulloch v. Maryland, which was enlarged by interpretation into a broad doctrine preventing reciprocal taxation of any kind of the instrumentalities of one governmental unit in the federal system by another unit. No such prohibition was expressly provided by the federal Constitution, and the entire doctrine of "implied prohibitions," as it is called, is an extensive superstructure built upon a theory of federal relationships which was found impracticable, and was repudiated, after a short trial, by the federal systems of Canada and Australia. There is no good or defensible ground for the prohibition as applicable to modern society. The overruling of the doctrine of Swift v. Tyson relating to the recognition by the federal courts of general principles of commercial law and the superstructure erected thereupon was another step to bring constitutional interpretation back to the language of the document itself, as well as to the intent of those who drafted and adopted the instrument.

Justice Black has indicated in some recent dissents that an imposing array of precedents relating to the interpretation of the commerce clause are not based upon the written phrases and requirements of the Constitution, but rather emanate from assumptions, suppositions, and ideas of governmental policy which have been read into the terse phrases of this clause and have tended to

transfer large areas of authority to the Supreme Court which were by definite grant conferred upon Congress.

Fortunately for the development of an effective system of administrative law and procedure not unduly restricted by the so-called theories and traditions of the common law, it is necessary only to prevail upon the judges to interpret the separation of powers theory according to the rational requirements of the Constitution and of its construction for more than a century, and to delete from the due process of law doctrines some of the current additions and interpolations. Recent decisions of the Supreme Court indicate a trend in this direction. Though unwise legislative restrictions on administrative law and procedure, such as are embodied in recent bills, may temporarily interfere with the normal evolution of efficient types of political mechanism to cope with the complexities of modern life, through the method of trial and error they can and will be changed without undue delay. But when these restrictions are declared to be a part of the written fundamental law, barriers are placed in the way of reasonable adaptations of governmental agencies to meet new conditions which produce in effect a form of political paralysis. Such paralysis can be prevented only by appropriate and necessary constitutional amendments, or by the ways and means which have more frequently been adopted to meet similar situations, namely, the process of judicial interpretation.

No doubt steps will be taken to revise by judicial interpretation the phases of the constitutional gloss designed both in the state and federal governments to place unwise and indefensible restrictions upon the administrative process. Administrative law and procedure may then readily be adapted to constitutional theories and principles, and governments may function more adequately and more efficiently in the performance of the public duties and responsibilities required for a twentieth-century society. With greater freedom of action and less need for adherence to formal and cumbersome legal procedure, we may look forward to marked improvements in the organization of administrative agencies, to the selection of a better qualified personnel to perform the work committed to these agencies, and to the enlargement of the field in which they may be designated by the legislative and executive departments to carry out the public social and economic objectives which are now considered indispensable.