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SOME IMPLICATIONS OF RECENT LEGISLATION*

Roscoe Pound**

Forty years ago a speaker on such an occasion, when he was called on to speak of American institutions, at once struck a note of resounding eulogy. As the last step in a long course of evolution of free institutions, ours were the best that man had known. We could look upon them with just pride as the culmination of enlightened progress of a free people. Thirty years ago the note had changed. A speaker on such an occasion felt bound to aggressive criticism of some details, while glorifying the principles of our institutions. He felt bound to single out certain of the details for vigorous attack and then to follow with an exposition of some single specific remedy, to be put in force at once at the next session of the legislature—very likely with the detailed draft of the necessary bill added in an appendix. This bill was guaranteed to set everything right by its intrinsic force and wisdom. Twenty years ago the note had changed once more. The speaker who conformed to the fashion of that time felt bound to utter a high and solemn note of warning. Our institutions were not only sound in principle, as we had always believed them to be, their details, in which those principles were realized, were precious possessions committed to our care to be zealously preserved from every form of question, from every project which threatened alteration or abrogation. They were beset with dangers. Heretical teachers, newcomers imbued with wrong ideas derived from the institutions of other lands, and agitators at home were undermining them. Alien ideas were being propagated. Un-American ideas were being taught and writings were in circulation from which they were acquiring a wide currency. If these doctrines, subversive of Ameri-

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can ideals, American political principles and American institutions were suffered to be disseminated, if they were not thoroughly stamped out, the destruction of our institutions would carry down with them all civilization in a general wreck.

Today something of all this may still be heard at times according to the occasion. But we have for the most part ceased to be alarmed about our institutions or to care what may happen to them. The dominant fashionable note just now is one of change. Everything has changed. All that we had learned in five generations of political and economic and legal experience has become obsolete. The inventive skill, the resourcefulness in business device on which we had prided ourselves, has ceased to be significant. If we are still to adhere to democracy, we must preserve democracy by building all our institutions anew. The very nature of our people, if not indeed of all mankind, has changed. What had been deemed virtues are but discarded Victorian inhibitions. What had been thought individual rights are but outmoded claims which can no longer be admitted. What had been regarded as constitutional guarantees are at most pious exhortations. They had often been misused by reactionary judges who took seriously what were mere verbal formulas, not to be accorded a fictitious weight because they happened to be announced in the text of the Constitution or to have been supposedly settled by a long course of judicial decision. Mere words, wherever they may be found, are not to be allowed to stand in the way of administrative leadership toward new goals.

Perhaps this fashion may in time prove to have been as transient as were its forerunners. But I am not here to urge return to any of those fashions of the past. Nor am I here to spread the gospel of some new fashion. I am not here to urge a return to the economic ideas of the last century nor to call for repeal of the laws which have been put upon our statute books in the past forty years. I am not presenting some ambitious plan to remedy all the abuses of our political and economic life by a great act of legislation to be introduced in the appropriate legislative body tomorrow. I am not here obeying a call to prophesy or to warn. But much less am I inclined to admit that in the present decade in the twinkling of an eye we were all changed; that there was overnight a complete breach of historical continuity; that all need of constitutional guarantees and checks and balances suddenly ceased and an era of enlightened administrative omnicompetence supervened out of a clear sky. What I shall essay is a more humble role of diagnostician. I shall
ask what are the implications, or perhaps better, what are the pre-suppositions, of recent legislation, state and federal, which reflects in action the fashionable mode of thought of the moment as to economic, political and legal institutions.

Certain ideas had been developed in our polity through experience developed by reason and reason tested by experience. One of the chief of these ideas was the idea of balance. No doubt this is a hard idea to keep in mind in an age of rush and hurry and manifold distractions. Any one other than a skilled juggler finds it difficult to keep two balls in the air continuously at the same time. On the same principle it is difficult to keep in mind more than one idea at a time. Yet to understand our government one must do this. Indeed, this idea of balance is inseparable from a well ordered society. At least in the English-speaking world we must have a balance between stability and change, between the general security and the individual life, between society and the individual, between regimented co-operation and free individual initiative and activity, between nation and state, between state and neighborhood, between legislative and executive and judiciary. It was the need of such balances, in the bad political and economic conditions following the Revolution, which compelled the drawing up and adoption of the Constitution. It is the achievement of these balances which has made it possible to govern a whole continent by one political organization for a century and a half, marked by expansion in area and in population beyond what the framers could have conceived, by internal conflict and civil war, and by profound changes both in the make-up of the population and in social and economic conditions.

It is a mistake to think of balance as an obsolete idea of the eighteenth century. It is a mistake to think it something belonging only to a past era of small, simple things. The bigger, the more complex a society, the more and more complex the relations of groups and associations calling for a weighing and valuing of their claims, the more complicated becomes the task of adjusting their conflicting and overlapping interests and clashing activities. Hence men are driven to an omniscient state, to a superman leader, to an administrative absolutism unless they can maintain a system of balance. Otherwise there is an anarchy of struggling interests in which the offhand adjustments for the time being take the form of giving in to the more ruthless or more insistent or more unreasonable.

It is no more possible to cure all the ills which are incident to
the conduct of business in a big country, in an age of big things, in a complex social and economic order, by a regime of complete administrative regulation than by one of complete legislation, covering all the details of conduct with detailed rules, or by one of complete absence of regulation and unrestrained private individual initiative.

Another idea which had held a chief place in the polity of English-speaking peoples was that one will was not to be subjected arbitrarily to the will of another. More specifically the idea was that no one was to be subject to arbitrary action of those who wielded the power of politically organized society. As the great preacher of the Pilgrims put it, we were to be with one another, not over one another. This was the idea behind our bills of rights and behind the doctrine our legal historians have been calling "the supremacy of the law"; a doctrine once thought to be the birthright of the American but now sneered at frequently by young lawyers newly appointed to give counsel to administrative bureaus and imbued with the idea of the supremacy of the bureau.

Still another idea which had governed our polity was distribution rather than centralization of the powers of government. This was an application of the idea of balance. It was an idea of parceling out of authority among coordinate agencies of government, defining the limits of the power conferred upon each distributee, and keeping each within those limits by rules of law judicially declared and administered. In the last century we thought of this distribution of powers as something involved in the very idea of freedom. Today it is scouted as something belonging to the slow going days of the past and is disappearing before a tendency to give bureaus and boards and commissions all the powers of government without limitation or reservation.

All of these ideas run back to a fundamental idea of freedom or liberty, an idea which has not merely ceased to be entertained in advanced and self-styled liberal circles but has become distinctively unfashionable if not wholly repudiated. Cicero said we were slaves of the law in order that we might be free. Today we are to be the slaves of administrative officials in order that we may preserve democracy by committing demos to the rule of unchecked or merely self-checked discretion. The giving up of what had been the basic ideas of our polity and of the fundamental idea on which they rested, if indeed we mean consciously and seriously to give them up, is so radical a departure as to justify the new faith in
the gospel of change. The shifting from an idea of a free people to one of a people divided into two classes, one of tribute payers and one of pensioners of a regime of bureaus controlled ultimately and absolutely by one exalted ruler, quite justifies those who hold that a new era is at hand and that the break with our past is complete and irrevocable.

Undoubtedly, in common with the rest of the world, we in the United States carried the idea of liberty and its corollaries much too far in the latter part of the last century and in the immediate past. The conception of leaving every one free to do as he liked with no more restraint than was essential to enable other men to do as they liked, so far as these two could be reconciled by a universal law, was excellently adapted to the pioneer conditions of our formative era. Carried to an extreme, as the one thing to be regarded in an urban industrial society it obviously left interests of the first moment unprovided for or inadequately provided for. So, too, we carried too far the idea of checks upon the exercise of governmental authority and overworked the machinery of judicial review of governmental action with reference to constitutional limitations. When I came to the bar in 1890 almost every item of executive or administrative action as a matter of course encountered an injunction. But a reaction had begun a decade before. About 1880 there are signs of a shifting of the judicial view as to what is exclusively judicial, and at the end of that decade the setting up of the Interstate Commerce Commission marks the beginning of a rise of administrative justice which has gone on by leaps and bounds in the twentieth century, and especially in the current decade. This reaction was inevitable. But Spencer tells us that action and reaction are equal and in opposite directions; and that general philosophical proposition has been demonstrated abundantly in the present connection. As we were going much too far in one direction fifty years ago, we feel bound to go too far to the same extent in the opposite direction today.

From the idea that all things will inevitably work themselves out by experience and that planning and creative lawmakers are futile, an idea generally received in the latter part of the nineteenth century, we have been going to the other extreme of an idea that nothing will work out by experience but that all things must of necessity be planned by legal or political or economic or social super-experts and cannot with safety be left to any but a governmental process of trial and error. From an idea of the in-
dividual as a self-sufficient economic unit, we have been swinging to the opposite extreme of an idea of the complete interdependence of individuals, to be promoted by dependence upon the national government. The old doctrine of the king as father of his country, has been newly interpreted. The government is thought of as an anxious mother directing the nurse to go upstairs and see what Tommy is doing and tell him not to do it. From an extreme of jealousy of administration and hampering of it by judicial scrutiny and tying up of every important administrative act by injunction, we have been going to a no less extreme confidence in administrative agencies. Almost every activity has been put under the control of some one of them, and that control tends constantly to increase, to be relieved of legal limitations, and to be freed from effective judicial review. Along with this there has sprung up a growing belief in administration as something above and beyond law, as something good in itself to be cultivated for its own sake; a type of doctrine which I have been calling administrative absolutism.

Behind this doctrine of administrative absolutism is Karl Marx's doctrine of the disappearance of law. As Marx saw it, law will disappear with the abolition of private property. The legal ordering of society results from the division of society into classes, that is, into those who exploit and those who are exploited. It is no more than a device of those who exploit to keep those whom they exploit in subjection. Hence when classes disappear in a communist organization of society, law, too, will come to an end. "Communism" says a Russian exponent of this doctrine . . . "means the triumph of socialism over law, for law will wholly disappear with the abolition of classes and their opposing interests." The conditions that have made for the development of law in social relations are created by capitalism.

In the Constitution, liberty and property are coupled in one guarantee, the guarantee of due process of law; and behind that guarantee is law—the Constitution as the supreme law of the land. The Marxian doctrine which rejects law rejects it because it secures liberty and property, neither of which belong in the communist polity. The rejection of liberty by the exponents of administrative absolutism is avowed. The rejection of property goes with it in

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1 Marx, Critique of the Gotha Program (Engl. transl. 1933) 81.
2 Stucka, State and Law Encyclopaedia 1593 (in Russian, not translated); Pashukanis, Allgemeine Rechtslehre und Marxismus (transl. from Russian, 1939) introd. and c. 4. See Gsovski, The Soviet Concept of Law (1939) 7 Fordham L. Rev. 1.
effect, whether avowed or not. In the words of a German publicist, an exponent of extreme ideas of authority (words adopted by a Russian exponent of the communist polity as it stood before the recent shift toward the right) in the ideal state there is to be no law and but one rule of law, namely, that there are no laws but only administrative ordinances and orders.\(^3\)

At bottom, then, administrative absolutism involves taking away the legal security of liberty and property. But while it is taking its time to reach the goal toward which it moves, certain other implications or presuppositions require consideration. One upon which its adherents lay much stress is the assumption of administrative expertness. The business man, the industrialist, the judge are all blunderers. They are to be subjected to enlightened guidance of an expert, either a board or bureau of experts or an expert employed by a board or bureau. Thus the conduct of enterprises will conform to an enlightened public interest as revealed to the expert by the nature of his office. For it is to be noted that the expertness is a purely ex officio expertness. The administrative official or agent is not appointed because he is an expert. He is an expert because he has been appointed to be one. We are told continually that we must look at the problems of administration realistically and that the failure of courts to take a realistic view is the justification of putting administrative determinations beyond the reach of judicial review. But if we look at the realities of administration and adjudication, there is not, there has never been, there is not likely to be any such uniform guarantee of the training of administrative officials and their agents and subordinates for their tasks as there is in the case of judges taken from the bar.\(^4\) At the battle of Balaclava, Lord Cardigan held that he was qualified to command a brigade of cavalry in battle because, although he had only a barrack yard experience, he held, in the days when commissions were purchasable, the Queen’s commission as a general. The famous charge of the Light Brigade was not the only mistake of an ex officio expert on that occasion.


Again, administrative absolutism presumes that administrative boards and commissions and agencies can be trusted to determine rights without the checks which obtain in the judicial process. It presumes that fair, objective, reasoned administrative determinations are assured by the administrative hunch or expertness, without any of the checks which operate to assure fairness and objectivity and reason in judicial decision. It is assumed that the courts, with all the checks of law, of training of the judges, of public records of what is done, of review of the action of the single judge by a bench of judges, and of professional and academic scrutiny and criticism of what they do, cannot be expected to and are inherently unable to reach objective results. For a leading exponent of administrative absolutism, who now holds a high administrative office, with \textit{jus vitae necisque} over private enterprise, is likewise in the science of law an exponent of a doctrine of psychological determinism. He has urged, in effect, that the items of the judicial process are shaped decisively by the psychological determinants of the individual judge. These determinants are largely undiscoverable and hence judicial action is only in appearance and in pretense uniform and predictable.\footnote{Frank, \textit{Law and the Modern Mind} (1930) 111, 149; Frank, \textit{Are Judges Human?} (1931) 80 U. of Pa. L. Rev. 17, 233. See Pashukanis, \textit{ubi supra}, 62; Dobrin, \textit{ubi supra}, 415.} Such a theory of law in the hands of an official empowered to apply law of his own making in his own way speaks for itself. But it is another presupposition of administrative absolutism that a reasonable adjustment of relations and regulation of conduct may be attained by putting the guiding and regulating agency in the position of a party to controversial situations, like the man who intervenes in a brawl, not to stop the fight but to go in and take part in it on the side of one of the combatants. Many examples might be cited.\footnote{One need not make invicious specifications. Legislation or proposed legislation enabling or requiring administrative bureaus or boards or commissions to intervene as parties is common enough.}

When lawyers show themselves skeptical as to the possibilities of administrative absolutism under our polity, they are commonly told that they are seeking to exclude all discretion from the process of determining rights and adjusting relations and regulating conduct, and are seeking return to an old idea of governing all things by rigid rules, mechanically applied, which was given up long ago. But everything depends upon what is meant by "discretion." The lawyer thinks of a discretion held by law to the

\footnote{One need not make invicious specifications. Legislation or proposed legislation enabling or requiring administrative bureaus or boards or commissions to intervene as parties is common enough.}
limits of the rule which commits some judicial action to the judge's personal sense of what is right. He thinks of what he calls a judicial, as distinguished from a personal discretion—a discretion governed by principles. He thinks of a discretion subject to be reviewed in case of abuse, and so held in check by knowledge that if a genuine judgment is not exercised in a reasonable way the action under the guise of discretion will be set aside.

Let me be understood. I am not attacking administration. I am seeking to understand the implications and presuppositions of the administrative absolutism toward which so much of recent legislation is tending. Administration must play a large part in any polity under the social and economic conditions of today. It would be idle to argue for any such restrictions of the administrative process as prevailed with us in the last half of the nineteenth century. The demands of an expanding law of public utilities, the requirements of modern social legislation, which called for speedy and sure enforcement and especially for inspection and supervision, and the need of guidance of enterprise before and at the crisis of choice of paths or devices, instead of requiring a guess as to the legally permissible course and judging of the correctness of the guess after the event—all these things brought about a rapid and in some connections extreme development of administrative agencies. They helped to produce the chaotic condition of boards and tribunals and agencies with different powers, subject to different modes of review, relieved of review in varying degree; some with almost judicial traditions, at the other extreme some with no traditions and growing disinclination to hear both sides if possible to avoid it; some with powers of legislation, administration, and adjudication so far as it is possible to confer them and get by the courts; some with power and practice of acting as an investigating and accusing body, of advocacy at the hearings before themselves, with adjudication upon their own accusations, and of executing their own decrees—in short, the welter from which many scholars, under the influence of ideas imported from Europe, seek escape through administrative absolutism. But no such drastic departure from our constitutional institutions is needed to bring about what

1"Because the matter is left in the discretion of the Court, it does not mean that the Court is free to do exactly what it chooses, to indulge in sympathies or to invent some new equitable doctrine between the parties. It means that discretion is to be exercised upon judicial grounds in accordance with the principles that have been recognized in this Court." Langton, J., in Greenwood v. Greenwood, [1937] Probate 157, 164.
administrative agencies were needed to achieve. Our judicial organization was set up for pioneer communities in which little or no administration was needed. Our legal procedure, inherited from eighteenth-century England, and adapted to the rural, agricultural America of our formative era, was not at once equal to the task of applying our traditional doctrine of the supremacy of the law to rapidly multiplying new administrative agencies. Not a little friction and waste resulted while administrative agencies were finding themselves and the courts were struggling to apply constitutional and legal limitations under an inadequate organization and procedure.

But, we shall be told, why not take a realistic view? These administrative agencies are with us, they are busy at work on every side. They have far more control over actual human relations and actual conduct of enterprises than the courts. They are tending to be the paramount agency of social control in our polity just as they are emphatically the paramount agency in Continental Europe. Why not acknowledge this and give up kicking against the pricks? To the lawyer the reasons for standing out against the tide of administrative absolutism are to be found not only in the presuppositions of the regime but in certain characteristics which, as he reads the reports of cases in which courts in every part of the English-speaking world have been called on to review administrative action, seem to be universal.

One of these characteristics is a bureaucratic disregard of the maxim "hear the other side." Even when the statute setting up an administrative agency expressly requires a hearing it has happened frequently that the bureau or commission has acted without any hearing of interested parties and without any real findings of fact. This tendency has appeared in England and in Australia as well as with us. Again, there has been both with us and in England a marked tendency to decide on the basis of matters not before the administrative tribunal; to act on evidence not produced, or on

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secret reports of inspectors or examiners with no guarantee of a complete or impartial inspection or examination. There has even been a tendency to act on second-hand statements of general repute, opinion and gossip, sometimes traceable to preparation in advance by one of the parties, without opportunity to the party adversely affected to cross examine the sources of opinion. This sort of thing is especially manifest in connection with a tendency to make determinations on the basis of pre-formed opinions and prejudices. A bureau easily comes to consider the administrative determining function one of acting rather than of deciding. It easily comes to apply to the determining function the methods of the directing function. Administrative agencies are peculiarly subject to political pressure and thus tend to do what "will get by" at the expense of the law. Where they have rulemaking powers, they operate under none of the checks that obtain in the case of legislative lawmaking. There is as like as not no notice to the affected parties till the rule is made. When there is a hearing it is not unlikely to be merely to comply in form with statutory requirements, the rule having been prepared before the hearing instead of growing out of it. It has even happened that a suit involving an administrative rule has gone to the highest court of the land before it was discovered that the rule had no existence. Moreover, administrative rulemaking, as was brought out more than once under administrative enforcement of the National Prohibition Act, has a tendency to the making of arbitrary rules for bureau convenience at the expense of important interests.

But what most troubles the lawyer is the union of rulemaking, investigation, advocacy, and adjudication in one bureau and not infrequently in practice in one person. This is supposed to be required for efficiency. There was much experience of this under prohibition. The zeal to get results at whatever cost was not the least of the features of that regime that brought the administration

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10 Interstate Commerce Com'n v. Louisville & N. R. Co., 227 U. S. 88, 93, 33 S. Ct. 185, 57 L. Ed. 431 (1913).
14 E. g., Doran v. Eisenberg, 30 F. (2d) 503, 504 (C. C. A. 3d, 1929).
of the law into disrepute and disfavor. The same phenomenon may be seen in the parole boards in more than one jurisdiction. The inability of those interested to find out what the rules are or what rules are the basis of action, the large powers confided to the boards and the arbitrary exercise of them have brought on violent prison outbreaks more than once and in more than one jurisdiction.

Another feature of administrative absolutism which troubles the lawyer is the exercise of jurisdiction by deputies. Administrative determination of appeals from the action of administrative subordinates is frequently a one man review, it may even be a review by a secretary of the official with reviewing jurisdiction, or a rubber stamp review of the action of subordinates by those subordinates themselves. Judicial review is review by a bench of judges and there is no such thing as a judge exercising his reviewing authority in any other way than in person.

I have spoken of administrative determinations. But when we turn to administrative guidance, the primary function of administration, we find phenomena which are equally disturbing. One is a tendency to force theories upon those subject to administrative regulation. Those who for the time being shape the policies of administrative bureaus compel indirectly by denial of the facilities of the mails or of interstate commerce a molding of the conduct of enterprises or of business to the patterns fashionable for the moment with the "experts" of the bureau—often doctrinaire theories with no experience behind them. In the same way legislation may impose punitive taxation to enforce a theory upon enterprise where acceptance of it would not be compelled directly. How far this may go is illustrated by the proposal to license all corporations that can be reached under the powers of the federal government. That this would subject every corporation of much consequence to regulation by a national as well as a state master is obvious. That much regulation is indicated for many situations in corporate management is clear enough. But subjection of corporate business to bureau control, under the conditions of today means subjection substantially of all business to such control, since all businesses of much significance transcend state lines. To commit the whole business of the country to the control of a bureau at Washington, in view of the tendency

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17 This is true in Roman law [Dig. i, 21, 5; Dig. ii, 1, 5; Cod. iii, 1, 5], and in the canon law [Decretum, 1, 29, 3; Tellez, Commentaria (1715 ed.) 1, 614] as well as in modern law.
of administrative bureaus to disregard jurisdictional limits,\textsuperscript{18} to seek to extend continually the sphere of their action, and to push their regulatory powers to the limit,\textsuperscript{19} is something that should give us pause. Is there anything in experience of bureaucratic management to indicate that it will prove better than a legally controlled private management? But in a widely held current view as to legislation and administration, experience in our past is an irrelevant consideration.

What needs to be thought of in connection with bureau control of all business and legislative indirect control by punitive taxation is the implication that there is need of remodeling the social order at once and that it is the task of the federal government to carry out this remodeling. If we are sure of this the question still remains whether the details of the task are wisely committed to subordinates in administrative bureaus instead of being formulated directly by legislative lawmaking. For as the legislative setting up of administrative agencies goes on, there is want of any consistent system of regulation. Indeed, the tendency to administrative absolutism leads to such want of system. From that standpoint there is no objection to requiring practices of private business to which government business competition is not subjected. When regulation is simply the application of arbitrary will, without the check of constitutional or legal limitations judicially enforced, the government may demand that business recognize and adhere to what are pronounced fair business practices while it violates them all as it may choose. It may insist, for example, upon a theory of "full disclosure" as applied to private business operations and yet adopt practices in contravention of that theory. It may compete with private business without being subject to legal rules or standards of fair competition. That the presupposition of all this is that private business is something which is to disappear in the administrative remodeling of the social order does not disturb the advocate of administrative absolutism. But are the American people prepared to admit that presupposition? Much could be overlooked in the necessarily crude beginnings of administration in a land where it had been unknown on any large scale. But administrative regulation is now old enough in the United States to know what it is doing and why it is doing it.

The \textit{bête noire} of the proponents of administrative absolutism

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\item \textsuperscript{18} Doran v. Eisenberg, 30 F. (2d) 503 (C. C. A. 3d, 1929).
\item \textsuperscript{19} This is admitted by a leading advocate of unchecked administrative action. Jennings, Courts and Administrative Law (1936) 49 HARV. L. REV. 429, 454.
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is judicial review enforcing the constitutional guarantee of due process of law. There is constant pressure by administrative bureaus upon legislative bodies to tie down review so as to make it practically ineffective or to do away with it altogether. As the latter course is not constitutionally admissible, the plan of the moment is to evade the Constitution by making an apparent concession to it in setting up an administrative appellate tribunal permitting administration to review itself. The purposes of administrative bureaus are too high for judicial consideration according to the narrow standards of the law. The methods of carrying out those purposes must be determined by the purposes themselves and not tied down by such legalistic ideas as hearing both sides, acting upon evidence, or basing determinations on definite findings of fact. Without effective provisions for a record as the basis of review the review by an administrative appellate court cannot achieve the purposes of review as a check upon administrative action. If the tribunal is to be a real court, it will be no more acceptable to the advocates of administrative absolutism than the ordinary courts, and it will merely multiply courts in a time of judicial organization calling for unification and simplification rather than for adding new tribunals. If it is not to be a real court, the whole purpose of review of administrative action is given up.

It is not mere toryism to protest against institutional waste. It is as reprehensible as any form of irreparable waste. To look only at our own country the depprofessionalizing of the professions, on the basis of doctrinaire false democracy, which went on at the beginning of the nineteenth century, was a bit of needless waste which we only began to repair after a hundred years, but which has bad results in the administration of justice today in every large city in the land. The complete decentralization of banking under Andrew Jackson was another bit of waste, which has given us banking crises at regular intervals, while in the rest of the world the banks stand firm under economic depressions. After one hundred years this waste is far from repaired. Schemes for remaking the social order whether consciously planned or unconsciously involved in the drift of administrative absolutism and bureau dictatorship, are likely to do no more than bring about like institutional waste. Economic institutions are not the least important of the institutions of civilized society.

It is a common device of the adherents and proponents of administrative absolutism to set up a straw man, label it with the name
of those who question their doctrine, and proceed vigorously to belabor that straw man. If one challenges administrative justice, administrative lawmaking, administrative investigation, administrative advocacy before itself, and administrative dictation of its theories for the moment, concentrated in one bureau or one man, he is a reactionary. He does not believe in any regulation of the conduct of enterprises. He seeks to return to the regime of laissez faire. He would hamper administration by subjecting it to the legal and judicial straight jacket which was imposed on it fifty years ago. A modern, simple, speedy, inexpensive mode of judicial review of administrative determination and rulemaking, along lines now well understood in the reform of legal procedure which has gone on steadily for the past thirty years, would preserve the substance of the guarantees of the Constitution, and leave administration free to do its real work within constitutional limits. There is nothing reactionary in such a proposition. It is in the line of progress of our administrative law upon American principles.

The implication, the presupposition of administrative absolutism is that of every form of autocracy. Indeed, administrative bureaus and officials rather than courts have been the agents of government by autocrats wherever there has been personal as contrasted with constitutional government. The Roman emperor was set up as a god. Who could presume to match his wisdom against that of a god? The autocratic king of the seventeenth and eighteenth century centralized monarchies ruled by divine right. What were individual rights against right derived from God? The administrative bureau rules by right of postulated omnipotence. It presupposes a lack of competence on the part of the rest of the community to manage their own affairs, or else that there is no such thing as their own affairs. What is individual experience or intelligence or resource to match against the omnipotence of an administrative bureau (and the delegated omnipotence of one of its clerks or inspectors or investigators) chartered to do what it likes in each case looked upon as unique? To complete the regime there is needed only a Führer or Duce or superman head administrator to direct all of these sub-supermen in a common path. The corollary of the proposition that men are not competent to manage the details of their private affairs is that they are not competent to manage public affairs. In the end administrative absolutism must stand upon a political absolutism.