1935

The Growth and Development of Administrative Law

Edward L. Metzler

Follow this and additional works at: https://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
Available at: https://scholarship.law.marquette.edu/mulr/vol19/iss4/1

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized editor of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.
IT HAS been observed that we are living in a changed world, a world of new moral concepts but of outworn legal institutions. It is evident that the American legal system has slowly been adapting itself to meet great changes. The developments of the past few decades have resulted mainly in the establishment of a system of administrative agencies, tribunals, and law. Even in the 19th century administrative law was developing in the United States and today it is in many phases of equal or greater importance than the judicial system developed through the common law. The causes of this new and divergent arm of the law originated in the fundamental changes which occurred throughout the past century in the social and industrial life of this country, changes momentous enough to effect, in some spheres of social and industrial activity, entirely original and unprecedented methods of dealing with the problems presented therein. These causes must be considered in any intelligent study of the problem of administrative law.

THE REASONS FOR THE GROWTH OF ADMINISTRATIVE LAW

Economic and Social

Administrative law seems to have developed from a combination of forces, some pressing on the legal system from without, others from within. From without came the most powerful forces, economic and social; from within came revolt against the impractical technicalities and rigidity of a structure adapted by and for older generations, con-
ditions, and institutions, and which were welded too strongly on the present.

As observed by Aristotle the first of all causes and the principal one is necessity. The development of administrative agencies and of the law which governs them was a necessity—a "social necessity," as one writer has put it, rather than an absolute one. History reveals that:

"The two legal systems that have impressed themselves most deeply upon the world, that of Rome and that of England, have for considerable periods managed to do without administrative intervention with private rights other than in judicial forms."

The necessity, then, was a relative one and was so considered by the people whose demands for regulation of industry brought about the increase in administrative agencies and law.

Controlling demand for regulation does not exist when a nation finds itself in the position that the United States did. If we look back to the continental United States of 1790 we find a territory comprising a gross area of 892,135 square miles. If we view the United States of 1853 we behold a vast expanse of 3,738,395 square miles. Not only was the new nation occupied with this tremendous territorial expansion but the blast furnaces of the Industrial Revolution were still at white heat—natural resources were tremendous—cheap immigrant labor flowed into the country—gigantic factories sprang up—and mass production enormously elevated the standards of living. In such circumstances the country was too busy, too prosperous, in too much of an expanding mood to be greatly concerned with attempts at governmental intervention. Demands for special regulation were made when striking abuses appeared but there was practically no sentiment for governmental control as a general principle. This developed when the abuses of industry became more clearly recognized, when the moving forces of the expanding period began to slow down, and when it often appeared that the abuses might be more harmful than could be compensated for by the benefits. A practical need for control developed. The legal system which could assert this control had not kept pace with the rapidly changing structure of society and was not readily adapted to the complex situation which was presented to it for adjustment.

Professor Sharfman's study of the Interstate Commerce Commission, for example, reveals that judicial enforcement of common law obligation would be unable, in the case of public callings, to control the complex and dynamic relationships of the prevailing industrial era.

1 Borchard, French Administrative Law (1933) 18 Iowa L. Rev. 133.
2 Freund, Administrative Powers Over Persons and Property (1928) p. 578.
In the special occasions where industry had dominated the economic life of people they had insisted on protection from the government. The greatest of these occasions, perhaps, is that which marks the regulation of the railroads. This developed in the early seventies in the revolt of the farmers of the middle west against the high transportation charges and poor treatment by the railroads and their agents. Eastern capitalists were in control and the revolt against their methods is known as the "Granger Movement." It brought about the creation of railroad commissions which at first had no authority to enforce their orders and relied upon the force of public opinion. Gradually these administrative agencies were given increased authority until today they are practical managers of many branches of industry formerly considered entirely of private concern. They extended into other fields also, notably in the regulation of public utilities and of securities.

The federal government began its excursions into the field of regulation very definitely with the creation of the Interstate Commerce Commission in 1887. Following the famous decision in *Wabash R. R. Co. v. Illinois* deciding that a state did not have the power to control intrastate rates on an interstate shipment its powers have expanded until today it is in practical control of railroad management.

Imagination which made possible the expansion of industry also contributed to measures for its control by administrative agencies. In the late years of the nineteenth century there was a complete lack of any work on administrative law in the English language, while in some European countries, in Germany for example, literature on the subject was notably rich. The German immigrants who comprised a comparatively large part of the population of the East North Central and West North Central States were accustomed to this type of legal administration, and it is not surprising that the system of administrative law should find initiative or at least less resistance here than it would in the more traditionally English sections.

It was this industrialization we have mentioned which brought large numbers of immigrants and continual streams of farmers into the cities. The growing factories brought centralization and concentration of population, and resulted in changing American society from one predominantly rural to one predominantly urban. In 1910 forty-five and eight-tenths per cent of the population was urban, in 1920 fifty-one

---


and four-tenths per cent, in 1930 fifty-six and two-tenths per cent. Thus the growth of administrative justice is, as it were, one of the:

"natural results of the evolution that we have been going through economically and socially; an evolution that has changed us, as the last census tells us, from a predominantly rural agricultural society to a predominantly urban industrial society."  

Under such circumstances, then, more and more people were coming into contacts of an increasingly complex character. Could it be strange then that our national life should become more unified, that state boundaries should lose much of their significance, that dormant powers of the federal government should be awakened to new tasks! Nor was it unusual in view of the tendency of these factors to bring society itself toward centralization in all spheres of governmental activity. The structure of the federal system itself was highly centralized. Dr. Freund has observed these characteristics of the American and English systems and finds that:

"In America the growth of administrative power did not encounter the same temperamental opposition that it did in England, but it was checked by the distribution of powers under a federal system. The highly concentrated form of the federal administrative organization was for a long time not used for the exercise of governmental power over individuals (other than the collection of revenue) : it is not until the end of the nineteenth century that Congress began to use its interstate commerce powers for regulative purposes, and it then had recourse in part to administration by commission. In the states the bulk of the legislation was at first administered without general supervision; and it was only by slow degrees that a central state administrative organization was built up. The result is that, while we have probably been less conservative than England in the enactment of regulative legislation, we still have on the whole an administrative control less bureaucratic, because less centralized."  

The power of industry and chiefly the abuse of that power also led to a demand on the part of the public for what might be termed a "socialization" of industry and of the state—a demand which in some of its features has been erroneously denounced by its opponents as the philosophy of socialism. In his analysis of the revival of administrative law Professor Robson has observed that of the causes of its reassertion in England the "underlying explanation is to be found in the vast exten-
sion of state aid municipal activity which has taken place in the last fifty years."

The same situation with perhaps less intensity has occurred in the United States. From 1840 to 1890 our national wealth was increasing faster at least than the expenses of the federal government, and from 1890 to 1913 our national income had increased more rapidly than the total tax burden. But in the twenty years from 1912 to 1932, despite the fact that the total income of governmental divisions had more than tripled, their expenditures had increased in even greater proportion with a consequent increase in the public debt and growing interest payments thereon. We thus have presented a situation where there has been an enormous increase in the per capita wealth and income but, especially of late years, in substantially less proportions to governmental expenditures. State and municipal units are chiefly responsible for this. The per capita expenditures in cities had risen from $3.69 from 1818-21 to $16.90 in 1854-57, to $49.01 in 1903-06 and to $76.34 in 1922. Indicative of the trend is the fact that the greater the concentration of population the greater the governmental cost—the expenses of large cities were relatively higher than those of the smaller divisions.12

The increase in governmental expenses has been ascribed to a number of causes. In the case of the federal government it is unquestionably due chiefly to the costs of war, but there are other causes which are reflected more clearly in state and local expenditures. The most prominent of these have been found to be rising prices, territorial expansion, increase of population and the congestion of large cities, rising standards of living, the fact that public officials are more concerned with budget increases than decreases and the laxness of legislative and administrative methods, but a great portion of this increase may be attributed to the expansion of governmental activities.13

With this increase in governmental undertakings it was only natural that there should have been an accompanying increase in the law which not only facilitated but controlled the functions. And it was natural that variations in the existing legal structure should develop to meet the new and changing situations, for while the application of our constitutional system had previously been concerned chiefly with individual needs it found an increasing necessity to be applied to public needs.

11 ROBSON, JUSTICE AND ADMINISTRATIVE LAW (1928) p. 250.
12 See STATISTICAL ABSTRACT OF THE UNITED STATES (1934) Tables 201, 207, 282.
13 "...the expansion of the activities of modern local governments into the field of social welfare has been mainly responsible for the increase of local public expenditures." LUTZ, PUBLIC FINANCE (1929) 76. "The fact of the matter is, that the modern social structure has become so complex that no government has been able to evade or avoid the duties and responsibilities which this growing complexity has forced upon it." LUTZ, supra at 77.
The development of the common law was characterized by an emphasis on individual and property rights while administrative law lays equal or more stress on the subordination of private interest to the general welfare.\textsuperscript{14}

We have considered some of the principal economic and social reasons for the development of administrative law but before turning to another phase of the study we might summarize by a quotation from a recent study of one of the great federal administrative agencies:

"The vast changes wrought in the social and economic aspects of society during the nineteenth century, due to the introduction of new mechanical forces, the penetrating influence of science, large scale industry and progressive urbanization have reflected themselves in a steady extension of legal control of social and economic interest. State intervention at first expressed itself largely through specific legislative directions depending in most instances for enforcement upon the rigid, cumbersome and inevitably ineffective machinery of the criminal law. More recently legislative regulation of economic and social interests has resorted to administrative instruments in the enforcement of legislative policy. Inevitably, this has greatly widened the field of discretion. It has created, in a sharp form, new aspects of the familiar conflict in the law between rule and discretion."\textsuperscript{15}

\textit{Legal and Procedural}

At best the legal system is not perfect. It is instituted and preserved by men for their common good. The very persons who are most responsible for its shaping often differ widely among themselves as to its proper fundamentals. It is adopted largely to meet the needs of its time and the economic conditions, culture, and traditions of the society of which it is a part. While law is natural and necessary it has certain disadvantages when molded by human agencies for, as it "formulates settled ethical ideas, it can not, in periods of transition, accord with the more advanced conceptions of the present."\textsuperscript{16} In the United States our legal system functioned chiefly when controversies had arisen between individuals rather than as one where the executive arm of government could interfere with individuals "of its own motion prior to and apart from the existence of any controversy between them."\textsuperscript{17} Wholesale delegation was checked by a written Constitution embracing the principle of a separation of powers. As the demand for affirmative action or corrective intervention increased, Congress turned to the executive branch of the government which was capable of more rapid expansion

\begin{footnotesize}
\begin{enumerate}
\item See Goodnow, \textit{Comparative Administrative Law} (1893) 8; Robson, \textit{supra} note 11, at 32, 252; Freund, \textit{Legislative Regulation} (1932) Preface.
\item Henderson, \textit{Federal Trade Commission} (1924) Introduction.
\item Dickinson, \textit{Administrative Justice and the Supremacy of the Law} (1927) 94.
\end{enumerate}
\end{footnotesize}
and was not bound as rigidly by the system as were the other divisions. The executive, too, probably possessed more popular support and less popular control. Consequently a method of administrative regulation in contrast to, but subject to, judicial control appeared.

The courts themselves could perhaps have met the increasing needs to a large extent by vigorous affirmative action, by demanding new powers, revising technical rules by declaratory judgments, by the increased use of injunctive powers, by insisting on large increases in the number of courts, and by demanding huge appropriations and staffs of assistants. That they did not is probably due to the traditional training and reticence of the judiciary based on the theory that the judge may not also be the advocate of the cause, a theory by which some administrative tribunals are not "hampered." And while there has been sporadic criticism, especially of late years, both in and out of the court room, there seems to have been no general concerted attempt to meet the situation by invigorating traditional methods. On the contrary the courts generally assumed a permissive attitude giving the administrative officers and boards a wide latitude to determine conclusively the matters brought before them. As Professor Sharfman has stated in regard to the particular development of an early administrative body:

"Through a self-denying interpretation of their own functions in the prevailing scheme of control—in reliance upon the general purposes and methods of the Interstate Commerce Act rather than upon express legislative provisions—the courts have progressively narrowed the scope of judicial review."20

On the other hand certain administrative agencies grew soundly partially because of their own reticent attitude. The Interstate Commerce Commission, for example, is found to have emphasized substance rather than form, recognized its authority was purely statutory and awaited statutory grants before extending its powers—in fact it had even resolved the statutory ambiguity as to jurisdictional scope against the extension of its authority "to all the operations of water lines engaged in some measure of joint carriage with rail lines."21 It sought

---

18 See Allen, Bureaucracy Triumphant (1931); Beck, Our Wonderland of Bureaucracy (1933); Report of the Committee on Administrative Law, American Bar Association (1934); Edmunds, The Federal Octopus (1932); Hardgrove, Judicial Review of Actions of Administrative Bodies, Wisconsin State Bar Association (1931) vol. 21; McMillan et al., v. Railroad Comm. of Texas et al., 51 F. (2d) 400 (D.C.W.D. Texas 1931); Southern Ry. Co. v. Commonwealth of Virginia, 290 U. S. 190, 78 L. ed. 260 (1933); Central Ohio Lines v. Public Utilities Comm. of Ohio, 123 Ohio St. 221, 174 N.E. 765 (1931).

19 Dickinson, supra note 17, at 49.


21 id. at 177.
legislative enactment rather than resort to administrative construction and emphasized realities rather than mere legalism.\textsuperscript{22}

The advantages of the new system of administering justice under law and in meeting changed and changing conditions are claimed to be numerous. In general it is a more flexible system, adapted to the handling of complex problems of a specialized and technical character without being bound by too many technicalities of procedure and evidence, capable of initiating action where necessary and of doing large volumes of work in an inexpensive manner.\textsuperscript{23}

To the factor of flexibility,\textsuperscript{24} which the courts of law and legislatures lacked, is attributed much of the growth of the administrative system. It is said that:

"The striking recourse to administrative powers in recent federal economic legislation . . . is due to another condition, namely the inability of the legislature to formulate standards sufficient for private guidance. This ability in turn may be due either to the inherent inapplicability of uniform standards to individual cases or to the temporary failure to discover such principles."\textsuperscript{25}

And as regards the extension into the judicial field it is said:

"To entrust an administrative agency with the determination of individual rights and interests, as in connection with the rates to be charged by a public carrier or the freedom to practice a profession, cannot but make those rights more flexible, and more responsive to uncertain factors of discretion, than when they are left to be defined by the more rigid processes of a court applying supposedly permanent rules of law."\textsuperscript{26}

However it should be well for students interested in the ultimate welfare of American jurisprudence to realize that flexibility is not a cure-all. In fact this flexibility may have tended to bring about even more complex situations. In England

"Parliament is still 'taking effective measures for correcting diverse abuses'—abuses which seem more diverse and more difficult of correction than ever before."\textsuperscript{27}

As the picture of American life will indicate, society has been undergoing vast changes. There has been an increasing complexity of social phenomena which the legislatures have found themselves unable

\textsuperscript{22} 2 id. at 176 et seq.
\textsuperscript{23} 1 SHARFMAN, supra note 20, at 478; HENDERSON, supra note 15, at 22, 23; STONE, LAW AND ITS ADMINISTRATION (1924) 191.
\textsuperscript{24} "What is wanted is not a rigid rule at all, but the intelligent and flexible discretion of a responsible directing mind." DICKINSON, supra note 17, at 14.
\textsuperscript{25} FREUND, supra note 2, at 29.
\textsuperscript{26} DICKINSON, supra note 17, at 29.
\textsuperscript{27} SUzman, Administrative Law in England (1933) 18 Iowa L. Rev. 161.
to cope with through traditional methods. Congress, for example, found itself unable to control unfair competition and created the Federal Trade Commission, an administrative body with quasi-judicial powers. The reason assigned for this is typical of other bureaus, for, as was said:

"The forms of unfair and oppressive competition are myriad. By the time Congress has discovered and defined a dozen, a dozen more will be devised and put in operation. A tribunal should be created, with power to mold and adopt the law to each new situation. Since business and economic problems will be encountered as well as questions of law, the power should be lodged with a commission composed of eminent lawyers, economists, business men, and publicists, which would have 'precedents and traditions and a continuous policy.' The organization would be quasi-judicial in character. We want traditions; we want a fixed policy; we want trained experts; we want precedents; we want a body of administrative law built up."^^28

And the Supreme Court of the United States has recognized this complexity by giving wide latitude to administrative determinations. As stated in one case by Chief Justice Hughes:

"To hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert, and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task."^^29

Another reason assigned for the growth of administrative power has been that this method was more adapted to the determination of questions of a specialized and technical character than was the ordinary law court. When administrative tribunals were composed of men who had spent considerable parts of their lives in the study of problems of transportation, communication, taxation, or trade practices they were apparently better qualified to deal with these problems than the judge of an ordinary court, who could not possibly have an intimate knowledge of all the various subjects which might be brought to his attention. The understanding of the judge in such cases could not encompass as readily the broad problems involved, and he lacked the time required to familiarize himself with the facts and law in each particular problem. This factor then has contributed to an increasing administrative power and a lessening judicial power.

---

^^28**Henderson, supra** note 15, at 11.
^^29**Crowell v. Benson**, 285 U. S. 22, 46, 76 L. ed. 598 (1932), upheld the provisions of the Longshoremen's and Harbor Workers' Compensation Act, administered by the United States Employees' Compensation Commission, and which makes the findings of a deputy commissioner, supported by evidence and within the scope of his authority, final.
Administrative law derives additional support from the ability to dispense cheap justice.\textsuperscript{30} This cheap justice was partially attributed to the ability to deal effectively and quickly with "legislative schemes involving a relatively large number of disputes."\textsuperscript{31} While the strength of the common law rested in the preoccupation of the judge with the particular controversy under discussion,\textsuperscript{32} it was weak in providing no special remedy to deal with cases of the same general class as a group. Although some improvements were made, as in consolidation of actions, the judge could not, like the administrator, "deal with whole classes of cases at a stroke and dispose of a thousand instances with but a single wave of the pen."\textsuperscript{33} Dean Van Vleck has shown that administrative adjudications are almost an absolute necessity where large numbers of cases are involved. For example:

"Summary action is a requisite of a procedure by which incoming aliens are examined at the borders. Even under the present immigration regulations the number of aliens admitted during the fiscal year ended June 30, 1930 was 446,214 and the number rejected 8,233. ** The total number of alien inspections is estimated for the fiscal year ended June 30, 1930, as . . . 31,600,000."\textsuperscript{34}

One essential difference between the administrative "process" and the ordinary course is that the former is self-motivated, while the latter waits until the parties ask its intervention.\textsuperscript{35} This inherent power of aggressiveness has assisted the administrative agency to push itself into larger fields. Except in very rare cases a court never proceeds on its own motion but the administrative tribunal may make an investigation unknown to the party or parties concerned and summon him or them to appear before it. It has power to act as complainant, as prosecutor, and as judge—a situation which deserves careful scrutiny. With thereby an almost complete control of the case before it, speed of disposition is much more readily possible—although it is open to question whether this, from a broad viewpoint, is always accomplished.

Another reason for the development of administrative tribunals is found in the fact that they are not bound as strictly by the technical rules of adjective law as are the ordinary courts. They are not bound by common law rules of evidence, parties do not have a jury trial,
controversies are decided not by fixed rules of law, but by the application of governmental policy or discretion.\textsuperscript{36} The justification for this is that the members of the administrative tribunals are experts who are able to evaluate evidence without the formal application of the technical reasons for its rejection or reception. The Supreme Court has affirmed the wisdom of this procedure in the following terms:

"The inquiry of a board of the character of the Interstate Commerce Commission should not be too narrowly constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation and it should not be hampered in making inquiry pertaining to interstate commerce by those narrow rules which prevail in trials at common law where a strict correspondence is required between allegation and proof.\"\textsuperscript{37}

Professor Dickinson has to some extent summarized the reasons for the growth of administrative law which were inherent in the legal system when he wrote:

"The particular advantages which a system of regulation by government thus has over one of regulation by law differ in the different fields of regulation, but the differences are in the matter of emphasis; the respective advantages fall, with greater or less incidence, under one or more of the following heads:

1. Regulation by government opens a way for action to be taken in the public interest to prevent future harm where there would be no assurance that any action would be taken if the initiative were left wholly to interested individuals.

2. It provides for action that will be prompt and preventive, rather than merely remedial, and will be based on technical knowledge which would not be available if it were taken through the ordinary course of law.

\textsuperscript{36} Dickinson, supra note 17, at 35.

\textsuperscript{37} Interstate Commerce Comm. v. Baird, 194 U. S. 25, 48 L. ed. 860 (1904). See also I. C. C. v. Louisville & Nashville R. R. Co., 227 U. S. 88, 57 L. ed. 431 (1912); Spiller v. Atchison, Topeka, & Sante Fe Ry. Co., 233 U. S. 117, 64 L. ed. 810 (1920); U. S. v. Abilene & S. Pac. R. R. Co., 265 U. S. 274, 68 L. ed. 1016 (1924); Western Paper Makers' Chemical Co. v. U. S., 271 U. S. 268, 70 L. ed. 941 (1926); Beaumont, Sour Lake & Western Ry. Co. v. U. S., 282 U. S. 74, 75 L. ed. 221 (1930). See also Stephens, Administrative Tribunals and Rules of Evidence (1933), wherein he points out that "a survey of the Interstate Commerce Commission cases thus discloses but four which directly sanction the relaxation of the rules of evidence by the commission, and of these the most carefully considered one does so upon the theory that the objectionable evidence was not objected to." For a study of the extent to which the courts have permitted the introduction of evidence which would not be admitted in the ordinary courts of law, see Stephens, supra, at 31, 32, 46, 51. For the practice followed by some of the commissions, see Stephens, supra, at 62, 84, showing that there is a general attempt, and in some cases a statutory requirement, to apply rules of evidence but in a liberal manner, substance rather than form being aimed at. The Interstate Commerce Commission in general does not apply the rules of evidence strictly, while the Federal Trade Commission aims to receive only legally competent evidence and to base its findings of fact thereon. See McClintock, supra note 33, at 552.
"3. It ensures that the action taken will have regard for the interests of the general public in a way not possible if it were only the outcome of a controversy between private parties to a law-suit.

"4. It permits the rules for the prevention of socially hurtful conduct to be flexible rules, based on discretion, and thus makes possible the introduction of order in fields not advantageously admitting the application of rules of a rigid and permanent character."

Professor Frankfurter summarized the reasons for the general growth of administrative law when he said:

"Administrative Law is, in effect, a major response of law to the complexities of a power age. It constitutes the processes by which great activities of government—the activities that perhaps touch most people and touch them most intimately—are subdued by the reason appropriate to them. Much of the contemporary energy of law, it is now plain to all, runs into fresh channels. The new intervention of government into the affairs of men cannot be adjusted by the limited, litigious procedure, well enough adapted for ancient common law actions, or through hollowed judicial instrumentalties."

Tendencies Indicating Future Development

The growth of administrative law has been inextricably bound up with the growth of the accompanying tribunals and of the system itself, as it is the "law covering the fields of legal control exercised by law administering agencies other than courts, and the field of control exercised by courts over such agencies." The purpose of this discussion is to indicate very general trends, and no attempt will be made to differentiate at length between specific trends in the interwoven divisions mentioned.

In an address delivered some years ago Dean Pound considered the growth of administrative justice, the primacy of the executive, and the rise of the legal standard, and stated that they were "but phases of a larger development that is heralding a new stage of legal development." This was believed to be a tendency toward individualization; "to deal with the individuals; not the abstract individual but the concrete human being in a society of human beings." There is substantial evidence of this—crime is treated more as a disease, there is better segregation, classification and rehabilitation of the mentally sick as well as better care of the physically ill, different standards are applied to juvenile delinquency than to adult misconduct, and there is a general re-examination of similar fields. This does not necessarily seem to re-

38 Dickinson, supra note 17, at 14.
39 Frankfurter, Introduction to "A Symposium of Administrative Law Based Upon Legal Writings" (1933) 18 Iowa L. Rev. 129.
40 Robson, supra note 11, at 31.
result in an individualization of all administrative fields, however. We have injected abstract standards, for example, into one of the prime examples of the administrative system, the workmen's compensation laws. Thus schedules are provided which determine the amount that shall be paid for the loss of a leg, an arm, an eye, a life, and so on, although conceivably the actual damages may vary tremendously with individuals although doing the same work at the same pay. We might say that in such cases the tendency is to establish a closer relationship between law and economics by making the particular industry bear the burden.

A pronounced tendency is toward an enlargement of the system of corrective intervention which has been the "most recent and the most characteristic development of administrative powers." This naturally means increased administrative powers as is emphasized when we consider the shifting from voluntary to mandatory action which has marked the various state and federal commissions. It also means an increased resort to administrative agencies, and a circumscribing of managerial independence as distinct from freedom in internal organization. It seems inevitable, however, that the more functions which administrative agencies are called upon to exercise the less will be their popular support and the less likely will they be granted new and sweeping powers.

Congress is finding itself unable to keep up with organized demands for regulation and is delegating the powers to administrative bodies. These bodies in turn are finding themselves unable to keep pace with this desire for control. For example, the Interstate Commerce Commission offered the suggestion several years ago that it be given express statutory authority to redelegate specific matters to individual commissioners and employees, with power of review in the Commission. This power was later granted by Congress, with certain limitations. This tendency seems almost a necessity in the present status of the administrative system and undoubtedly a redelegation is constantly carried on in practice although not always in theory.

It has been pointed out that "The rule of review over administrative determinations is the battle ground of current literature in this field of law." As long as the American system of government prevails

---

42 Freund, supra note 9, at 583.
43 Id. at 580.
44 1 Sharfman, supra note 20, at 4.
45 1 Sharfman, supra note 20, at 9.
absolute finality is not possible. In his comprehensive study of this particular phase of administrative law Professor Dickinson has found that:

"Administrative justice exists in defiance of the supremacy of law only in so far as administrative adjudications are final or conclusive, and not subject to correction by a law court. To some undefined extent, however, they are final, and there seems to be a tendency at work to make them increasingly so."

To this we might add the further qualification that the adjudication must be made in conformity with due process. This tendency is evidenced by the trend of legislative enactments towards making such findings of fact by administrative tribunals conclusive except where arbitrary or capricious or contrary to law.

There is some evidence also of a consolidation of administrative functions, and an attempt to allocate them to their proper spheres. For example, it has been pointed out that the inclusion of telephone, telegraph, and cable companies under the jurisdiction of the Interstate Commerce Commission was hardly in consonance with sound policy as they were fundamentally unrelated. The enlargement of the Federal Radio Commission's jurisdiction to include communications of that nature bears out the tendency noted. Professor Freund has stated that the "proper province of administrative power lies in the legislative control of actions recognized as legitimate but attended with peril or liable to abuse. . . ." Gambling, vice, outlawry, it is said, are matters of criminal enforcement; religion, politics, the press, are not appropriate to administrative control; administrative power over education is limited; and while there has been considerable agitation for the extension of control in some of these fields, the tendency is apparently to leave them largely in their present channels.

While administrative powers are being increased it seems that "the gradual and rather unconscious drift is toward displacement of discretion" in the exercise of those powers. The reason for this is indicated by the statement that:

"What we cannot say of administrative power in general we can say of discretionary administrative power over individual rights, namely that it is undesirable per se and should be avoided as far as may be,

48 Maurer, *Due Process and the Supreme Court, A Revaluation* (1934) 22 Geo. L. J. 725.
49 Dickinson, supra note 17, at 37.
51 2 Sharfman, supra note 20, at 186.
52 Freund, supra note 9, at 583.
53 Id. at 23, 437.
for discretion is unstandardized power and to lodge in an official such power over person or property is hardly conformable to the 'Rule of Law'.

and the proof in another extract from a study of the same writer, "... in that field of legislation in which administrative checks have had the longest history and the widest application, the navigation laws, they have become almost entirely ministerial; and long experience in an administrative regime is perhaps the safest criterion as to what is adequate and effective in the way of control."

But there seems to be an increased tendency, perhaps temporary and confined to new administrative agencies, toward political interference or control.

The administrative system is characterized by the primacy of the executive and the majority of the Supreme Court has claimed that the President has an illimitable power to remove all executive officers whom he appoints, at least with the consent of the Senate, and specifically includes the members of the various commissions in that category. While the judiciary is relatively free from control and consequently unpopular when it renders a decision contrary to the ideas of the prevailing present political power, it is nevertheless practically independent. The administrator enjoys no such freedom and,

"An incorrect or even unwise decision, though supported by his superiors in public, may lead behind the scenes to absence of promotion, less responsible work, or even to dismissal from office in a serious instance."

As administrative agencies initiate action upon complaint, in many instances, of the party adversely affected there is

"The danger that the public authority may appear to be placed in the service of one of two adverse or competing economic interests. . . . The difficulty is a very real one in economic legislation. Consider the terms with which legislation operates; fraud, discrimination, monopoly, price control, unreasonable charge, inadequate service; and you will recognize the gradation from common legal certainty to utter indefiniteness. The more indefinite the standard, the greater is obviously the temptation to use the law as a weapon to gain economic advantage, using the public interest as a shield."

55 Id. at 22.
56 Frey, supra note 2, at 581.
59 Rosson, supra note 11, at 48.
60 Frey, supra note 2, at 583; Rosenberry, Administrative Law and the Constitution (1929) 23 Am. Pol. Sci. Rev. 32.
Such danger is apparent for instance in the great competing units of industry—in the automobile, the steel, the coal,—where government asserts a regulation by means of codes. Professor Sharfman has called attention to this tendency toward political interference even in the case of the well established Interstate Commerce Commission. He points out that Presidents have tried to influence a course of action, and states that:

"one cannot but view with concern the recent developments threatening the maintenance of the Commission's independence. Interference by the executive branch of the government is an unmixed evil, however subtle and indirect its manifestation may be."

There has been some pressure for the establishment of a complete system of administrative courts both in England and in the United States. The tendency in this country is to do this in substance but to preserve the form and essence of the present judicial system, especially its control of the administrative activities. The great objection to these separate courts is that they would be composed of specialists who, while viewing the particular aspects of their problems with greater clarity, would, due to the frailities of human nature, lose sight of the relative significance of their work. It is quite possible, however, that such courts might be demanded for different reasons than they now are, i.e., they may be sought to act as buffers between the individual and the government after the fashion of the Conseil d'Etat of France. Definitely there appears to be no necessity for special tribunals or a special administrative law. The ordinary courts have weaknesses but their inherent failings are of less significance. Corrections are possible. There is in fact a tendency to make them easier of access, more speedy, and less hampered by procedural technicalities. On the other hand there is a determined insistence that administrative tribunals reform their procedure, to provide substantial justice by an adherence at least to minimum standards of procedural safeguards. With the increased power of the federal government there has also been a tendency to assert authority over state matters, for example, over intrastate commerce and in the fields of social welfare.

61 See SHARFMAN, supra note 20, at 452, 488; but see ROBSON, supra note 11, at 193.
62 ROBSON, supra note 11, at 315; SUZMAN, supra note 27, at 180.
63 For example, a series of industrial tribunals as an aid to enforcing the National Industrial Recovery Act had been suggested.
64 ALLEN, BUREAUCRACY TRIUMPHANT (1931) 48.
65 Id. at 105.
66 Willis, Delegation of Legislative Powers (1933) 18 Iowa L. Rev. 157.
67 Report of Committee on Administrative Law, American Bar Association (1934); SUZMAN, supra note 27, at 165.
68 1 SHARFMAN, supra note 20, at 5.
69 The most recent example is exemplified by the Economic Security Bill, 74th Congress, 1st Session, H.R. 4120; S.1130.
CONCLUSIONS

The growth of administrative law resulted as the natural accompaniment of the growth of administrative agencies in existence in the recognized governmental functions and of the new agencies set up to meet the needs of a changing society.

The present form of the administrative system is accounted for by the fact that, while there are certain fundamental differences in American and English jurisprudence, our legal institutions were molded in the traditional principles of the common law which were familiar to, and a part of the culture of, the great majority of the colonists who established our system of government. In the United States a written Constitution has prevented the same degree of growth and concentration of powers found in England. This constitution provided for a separation of legislative, executive, and judicial powers. An administrative system had been tried in England under the Tudors with great efficiency from the executive standpoint, but with such great abuse from the popular standpoint that it was virtually abolished.

The prime reason for the development seems to have been in the slowing down of the economic and social forces which were present by reason of tremendous territorial expansion and industrial revolution, and the necessity of meeting conditions which those forces, especially the latter, brought. We changed from a rural to an urban society, we greatly increased our standards of living, we concentrated our population in large cities, we began to be increasingly conscious of the disadvantages of this new life and sought to minimize them by governmental control. The great uprisings of the farmers of the Middle West, the "Granger Movement," started the practical beginnings of the administrative system. Their demands for protection from the domination of the railroads in the control of eastern and foreign capital resulted in the establishment of state railroad commissions. Administrative agencies developed faster in the local and state units because the problems were first apparent there. But as the problems assumed wider significance the administrative system became a part of the larger units of government. The establishment of these new agencies was perhaps made easier by the fact that tremendous numbers of immigrants had been accustomed to an administrative system in the countries of their origin.

As the course of history emphasizes, abnormal conditions are usually marked by concentration of power. We also met the extraordinary problems which were arising by a concentration of power in the executive through the establishment of administrative arms of government. This was especially true of the already highly centralized federal government. The change naturally produced conflict with the established customs of which the legal system is inherently the protector.
The existing legal system could not keep pace with the rapidly growing demands of society due to its outworn methods. Neither in England or in the United States was there a concerted effort by the bench or bar to recognize and eliminate the imperfections of the legal structure. The courts adopted a permissive attitude to the encroachments of administrative tribunals.

The administrative method also had certain inherent characteristics and advantages which made it more adaptable to existing problems than the courts of law. It was able to move more rapidly than the legislature. It was modern. The administrative agency was a flexible body which could take cognizance of changing conditions as they arose, marching almost step by step with the society of which it was a part. Specialists were in charge of particular fields, knowing not only the needs of society but having the power to harmonize these needs and correct abuses by their own motion, proceeding at relatively low cost by the curtailment of technical formalities and by disposing of large numbers of cases as one.

Exact tendencies are most difficult of determination. With the rising standards of education we are obtaining a better understanding of the nature of the problems of society. Due to closer contacts we are of necessity required to surrender certain freedom which we formerly possessed. By common consent our actions are regulated by government but these had become too complex for the method of the established common law. Administrative agencies were created by Congress as a solution but even they have found it necessary to redelegate their powers. Administrative agencies have been obtaining more powers. Their determinations have tended more and more to become final—if they are fairly arrived at there is no need for a complete re-examination by the courts. As these agencies grow older their own weaknesses appear. A better understanding has tended to a consolidation of functions and the creation of more settled procedure. In brief the tendency is for the administrative system to proceed according to the rules of law rather than upon personal discretion.

However, as the administrative agency becomes an increasing factor in determining economic policy it becomes more desirable to shape its decision. The political power has tended to influence these determinations, especially in newer bodies, through its powers of appointment and removal. There is also some tendency to eliminate the checks of power which the ordinary courts possess by the establishment of a system of administrative courts. But the developing insistence on improvement of administrative procedure and a curtailment of its powers will probably prevent an extension that is manifestly unwise or determinations that are clearly personal.
On the whole the evidence is clearly against the theory that a completely administrative system is superior to the fundamental principles of government which exist in our country today. It is true that the administrative system is desirable in some aspects and almost a necessity in others, but it does not follow that it should encompass every field of human endeavor. The United States and England seem to have progressed far more than some of their much ruled brethren. While the impossibility of measuring the multiplicity of factors is obvious, there is grave reason to well consider whether we should sacrifice, in even seemingly minor details, the fundamental principles of our government, substituting therefore the more flexible, less certain justice of our administrative system.