the American Law School & the Rise of Administrative Government

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to the memory of
Louis Morton
from a student

Preface

This book had its genesis some fifteen years ago in my student experience at the Harvard Law School. There was little of the stuff of scholarship in my impressions and sensibilities of that period, but a skepticism about the ways and means of legal education took root in my first year of law school, endured over the years, and now informs—in some ancestral way—the arguments and suggestions of these pages. At the level of argument, this study will argue:

—that American legal scholarship has been heavily influenced by the configuration of its institutional home, the law school;
—that this configuration took shape under dubious circumstances at the beginning of this century and has never been adequate to the task of producing scholars for a modern society;
—that legal scholarship in turn has influenced American government, primarily by its insistence that a judicial model of decision-making has little applicability to the work of administration; and
—that this in turn has weakened the exercise of both administration and the judicial function in modern America.

And at the level of suggestion, it will attempt to suggest:

—that the law school has served us poorly in this century, and that it must be overhauled if it is to serve us better in the future; and
—that since the failures of American government in this century are attributable at least in some respects to the actions of this external agent, those failures have not taken the measure of government's possibilities.

More than skepticism supports these assertions, of course. But the reader probably has gathered from the size of this study that it stops short of being a comprehensive history of

the American law school, of legal scholarship, or of administrative government. The reasons are, on the legal side, that it doesn't need to be comprehensive, and, on the administrative side, that it couldn't be. The principal contributions of legal scholarship to the growth of modern administration have come from the nation's leading law schools, especially the Harvard Law School. In terms of scholarly influence, this small community is American legal education. The study of administrative government, however, has no such unity about it. A single administrative agency or department produces enough materials to keep a researcher occupied most of his lifetime. And beyond that single administrative experience lie hundreds upon hundreds of others, each to some degree unique in its mandate, in its composition and structure, and in the economic, political, and social environments in which it operates.

I realize that when an author forsakes a comprehensive narrative of his subject he also forsakes the means to persuade his readers that his conclusions are ironclad. My hope, however, is that I can persuade readers of this work of the plausibility, if not the certainty, of its angle of vision, and stimulate further inquiry and argument about its concerns.

More people than I could have imagined several years ago have examined various versions of this study, and I have benefitted from their reactions, however communicated, whether they realize it or not. In particular, I wish to thank four persons for their criticism and encouragement along the way: Stephen Botein, Ernest May, Abigail Thernstrom, and Stephan Thernstrom.

Finally, to Frank Freidel there is owing more than just thanks, for his example and support have sustained a student's aspirations and hopes for the academic life in the face of it all.

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Introduction

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At present American legal thought is going through one of its periodic debates on the nature, purpose, and legitimacy of the judicial function. What seems to be emerging is a sense of a "modern" judicial function that is a dramatic departure from previous thinking. Whereas in the "traditional" view the judge's role was relatively passive, a mere adjunct to the efforts of private parties to order their affairs, in the modern view the judge has become an aggressive public "policy planner and manager."[1] The center of gravity of judicial business has shifted increasingly from retrospective questions of private law—whether, for instance, party *A* broke his contract with party *B* last year—to prospective questions of public law and policy—how a legislative purpose of the state may best be effected in the near future.[2]

That our sense of justiciable questions has grown so dramatically is due in part to the problems of late twentieth-century society that other branches of government seem reluctant to address, and in part to the discovery of certain institutional advantages of courts, in comparison with other agencies of government, for dealing with issues of public policy. Courts with their formal and adversary procedures are hardly ideal instruments *in the abstract* for effecting public policy, but they seem articulate, purposeful, and relatively immune to petty political influence in comparison with contemporary administrative agencies, executive departments, and legisla-

1. Abram Chayes, "The Role of the Judge in Public Law Litigation," *Harvard Law Review*, 89 (1976): 1302.

2. Ibid., 1284; for somewhat different statements of the transformation, see Donald L. Horowitz, *The Courts and Social Policy* (Washington: The Brookings Institution, 1977), 4–9; and Owen M. Fiss, "The Supreme Court, 1978 Term–Foreward: The Forms of Justice," *Harvard Law Review*, 93 (1979): 35–36.

tures. Even in terms of representativeness, an appointive, life judiciary fares well in practice, if not in democratic theory, against bureaucracies and legislatures. No one is particularly delighted with this result—our ingrained loyalty to the ideal of representative and responsive government tells us that there ought to be something better—but the result remains: in mundane, day-to-day, practical terms, courts hold up well. And while quite a few observers believe that this insight has been overextended, to the point of judicial usurpation, it seems unlikely that the judge's role in society will ever revert to what it was in an earlier day.[3]

This "modern" assessment of the possibilities of the judicial function did not come about overnight. Indeed, it has been a century in the making. But not until recently has even a rough synthesis been possible, so that only today can we visualize a "traditional" model and a "modern" model standing far apart on such questions as justiciability.[4] The reason, it is believed, that this synthesis could only begin to emerge after decades of piecemeal development is that the traditional model was firmly rooted in the realities of the world of seventy-five years ago. Legal thinking, political realities, and societal needs simply barred until recently the possibility that the judge would operate effectively as a policy planner and manager.[5]

But is this perception correct? One purpose of this study is to suggest that it is not. Rather, the suggestion here is that our "modern" sense of the judicial function was deliberately held up for more than half a century by the very persons who were entrusted by the legal profession and the American people with defining and publicizing new legal developments. These were legal scholars, located in the university law schools.

It is possible, of course, that even had the contribution of turn-of-the-century legal scholars been different, the behavior

3. Chayes, "The Role of the Judge," 1304–16; Fiss, "Forms of Justice," 28–44; Horowitz, *Courts and Social Policy*, 17–19, 255–98.

4. Chayes, "The Role of the Judge," 1285–1304.

5. Ibid., 1285–88.

and performance of judges would not have been. But I believe otherwise. For it should be realized that the full impact of our "modern" sense of the possibilities of the judicial function would not have been felt so much by the regular courts as by the then emerging "administrative process." This term describes the hundreds of agencies, commissions, boards, and bureaus that today oversee and police the details of our existence.

Today, the work of this process is regarded as pretty much separate and distinct from that of the courts. But if legal scholars at the turn of the century had popularized their sense of the judicial function—a sense that was very close in many respects to our "modern" one—it is credible, if not certain, that we would have seen a dramatically altered development of American administrative government in this century. Today, we would speak frequently, if not exclusively, of administrative courts and administrative jurisprudence, and our understanding of both the limits and the possibilities of the public policy function of the judge would be many decades old instead of only just emerging.

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To clarify and elaborate upon these assertions, let us look first of all at the state of administrative government at the beginning of this century. American politics was groping for new methods of governing society, and in a general confusion of purposes at least one stood out clearly. This was to avoid the problems that were involved in the judicial enforcement of regulatory statutes.

In the nineteenth century, the usual method of dispensing the remedial power of government had been for the legislature to express its will in a statute and then trust private parties to enforce it by permitting them to sue for statutorily created rights in courts of law. For example, the legislative purpose that carriers should charge reasonable rates for their services would be effected by permitting shippers who had

paid higher rates to sue for damages. But as one reformer noted, if "the vaunted common law was strong in name," it was "a shambling thing in action."[6] Exorbitant rate structures might continue unabated for months and years after the legislature had acted, while the courts sifted through the claims and counterclaims of witnesses and the motions and appeals of attorneys. Furthermore, a final court decree holding that a rate for a particular service was unlawful under the statute did not determine the legality or illegality of rates for related services. Each instance of alleged wrongdoing had to be litigated through a drawn-out process of trial and appeal.[7]

In a society that increasingly complained about the distresses of an industrial age, such slow and fractional enforcement seemed intolerable. The incapacity of the courts for effective regulation came to be perceived as inherent to some degree in any process that relied on private initiative and adversary procedures to achieve its results. At the same time, it was recognized that this problem was exacerbated by a generation of judges and practitioners who seemed too often learned only in archaic rules of procedure and a jurisprudence better suited to the conditions of a preindustrial society. Their torturous proceedings seemed to lead not infrequently to decisions that elevated an abstract individual liberty above the alleviation of palpable group distress. Society's problems appeared too pressing to wait for the time when the judicial process might be expected to reform itself. It seemed better to seek an alternative method of effecting the legislative will.[8]

The development of the administrative agency as this alternative was initially the result of political happenstance. The administrative process had begun to be perceived as a distinct part of government in the final three decades of the nineteenth century with the creation of state railway rate commis-

6. Charles McCarthy, *The Wisconsin Idea* (New York: Macmillan, 1912), 35. "Common law" here simply means the court system.

7. Ibid., 34–35; Bernard Schwartz, "The Administrative Agency in Historical Perspective," *Indiana Law Journal*, 36 (1961): 267–68.

8. McCarthy, *Wisconsin Idea*, 41, 238–42; Dwight Waldo, *The Administrative State* (New York: Ronald Press, 1948), 79.

sions and, more particularly, the Interstate Commerce Commission. But the debates on regulation in the legislatures of this period reveal an utter conceptual confusion about what was being created and a lack of appreciation for the possible consequences of this confusion. The dominant factors were the need from the politician's standpoint to take some sort of action against a railroad power which the citizenry had come to see as overbearing, and the ever-present necessity of compromising on a bill in order to gain its passage. In terms of how the proposed agencies were to conduct the business of regulating railroads, the debates suggested a variety of functions ranging from specialized transportation courts to purely executive action under the control of one of the established executive departments. Whatever the final form of the bills, it was not assumed in any case that a particularly large addition had been made to the workings of government.[9]

What had resulted for the most part was the creation of semiautonomous boards of officers with an ill-defined mixture of powers. These powers were not used to noticeable effect for the remainder of the century. The state railway commissions and the Interstate Commerce Commission soon were regarded as inconsequential. But in the first decade of the next century these institutions would be invested with an intellectual justification which would perpetuate and multiply their form, and thus turn an apparent nineteenth-century misadventure into one of the twentieth century's great hopes.

By 1910, the method of intervening more directly and quickly than courts against industrial disorder was thought to have been found. This was the utilization of administrative agencies that would act as the legislature's agents against unlawful practices in advance of or to the exclusion of a judicial trial. Reformers, scholars, journalists, and politicians all be-

9. Albro Martin, "The Troubled Subject of Railroad Regulation in the Guilded Age—A Reappraisal," *Journal of American History*, 61 (1974): 339–71; Bernard Schwartz, ed., *The Economic Regulation of Business and Industry: A Legislative History of U.S. Regulatory Agencies* (New York: Chelsea House, 1973), 1:17–584; Robert E. Cushman, *The Independent Regulatory Commissions* (New York: Oxford University Press, 1941), 19–34, 37–68;

came caught up in examining the governmental potential of these previously unremarkable bodies. In contrast to the courts, it was suggested that administrative agencies would be able to monitor continuously the circumstances of industrial life by means of corps of inspectors and periodic investigative hearings. In this way they would know immediately about violations of the legislative will, and they would be empowered to enter orders against them on the spot. This process was to be facilitated by speedy, informal proceedings and by decision-making that emphasized common sense and expert discretion rather than the abstract, precedent-bound logic of the courts. After a time, the agencies' knowledge of the problems under their supervision might become so detailed and comprehensive that they could issue orders prescribing good business practice and thus prevent future violations. The sporadic, contentious, and rule-clogged enforcement of the courts would give way to a continuous and frictionless expertise capable of responding to the new industrial world in its entirety and keeping pace with its ever-changing relationships.[10]

As an agent of the legislature, the administrative agency constitutionally would carry on this work independently of the judicial branch of government. The courts might step in to ensure that an agency was using fair procedures and no more power than the legislature specifically had given it, but, as in the case of the judicial review of legislative action, the substance of the agency's work was not to be inquired into. In conjunction with the legislature, the new industrial order was for the agency to effect.[11]

In actual practice, however, administrative agencies spent much of their time and resources imitating courts. Although

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James E. Anderson, *The Emergence of the Modern Regulatory State* (Washington: Public Affairs Press, 1962), 79.

10. Robert H. Wiebe, *The Search for Order, 1877–1920* (New York: Hill and Wang, 1967), 133–63; Charles Evans Hughes, *Addresses and Papers, 1906–1908* (New York: Putnam, 1908), 93–94, 102–11, 141; McCarthy, *Wisconsin Idea*, 41, 46–47; A. A. Berle, "The Expansion of American Administrative Law," *Harvard Law Review*, 30 (1917): 430–48.

11. Bruce Wyman, *Principles of Administrative Law* (St. Paul: Keefe-Davidson, 1903), 13, 85, 154; Hughes, *Addresses and Papers*, 105–7.

the agencies had large staffs that the courts lacked, staff members seemed preoccupied with the ordinary routines and paperwork that accompany bureaucratization. Direct and immediate intervention against wrongdoing rarely occurred, orders prescribing future good practices rarely were issued, and the agencies usually waited for individuals to bring violations to light by means of complaints. Complaints initiated agency hearings and these were followed by orders granting or denying relief to the complainant. In terms of governmental function, what administrative agencies were doing was adjudicating controversies. In terms of the effective enforcement of regulatory statutes along these lines, the courts could have done no worse since they did the same thing.[12]

That is not to say, however, that there was no basis for a new and separate process of government in the early twentieth century. As we shall see, many administrative tasks were not justiciable. But to the extent that the administrative process merely withdrew issues from the jurisdiction of the courts—an early twentieth-century reaction against supposed judicial conservatism—and, more important, worked to divert justiciable controversies of twentieth-century origin away from the courts, the shift to administrative regulation entailed serious losses relative to judicial regulation. Because adjudication by administrative agencies was thought to be part of a new and different process of government, judicial standards of rational definition in issue-framing and decision-making did not pertain. This, as much as the relative novelty and complexity of the controversies that confronted administrators, accounted for what soon became characteristic of administrative adjudication: its rambling, lengthy hearings and its ambiguous and often irrelevant decision-making. The administrative function often was only the judicial function used unprofessionally.[13]

12. William E. Mosher and Finla G. Crawford, *Public Utility Regulation* (New York: Harper, 1933), 34–39; Schwartz, "Administrative Agency in Historical Perspective," 270–72; Martin Shapiro, *The Supreme Court and Administrative Agencies* (New York: Free Press, 1968), 91–93.

13. John Dickinson, *Administrative Justice and the Supremacy of Law in the United States* (Cambridge: Harvard University Press, 1927), 6–7, and