Who gets to Decide?

Thinking About Administrative Law

In Light of the Basic Principles of Democratic Representation

C.S. Lewis, *Introduction to On the Incarnation, by Athanasius*
(Centenary 1944).

It is a good rule, after reading a new book, never to allow yourself another new one till you have read an old one in between. If that is too much for you, you should at least read one old one to every three new ones. . . . Not, of course, that there is any magic about the past. People were no cleverer then than they are now; they made as many mistakes as we. But not the same mistakes. They will not flatter us in the errors we are already committing; and their own errors, being now open and palpable, will not endanger us. Two heads are better than one, not because either is infallible, but because they are unlikely to go wrong in the same direction. To be sure, the books of the future would be just as good a corrective as the books of the past, but unfortunately we cannot get at them.

Adams, John. *A Defence of the Constitutions of Government of the United States of America*. 1787.

"But not to enlarge on this, let us proceed to the inquiry, what is virtue? It is not that classical virtue which we see personified in the choice of Hercules, and which the ancient philosophers summed up in four words—prudence, justice, temperance, and fortitude. It is not Christian virtue, so much more sublime, which is summarily comprehended in universal benevolence. What is it then? According to Montesquieu, it should seem to be merely a negative quality; the absence only of ambition and avarice; and he thinks that what he thus advances is confirmed by the unanimous testimony of historians. But is it not more conformable to truth and nature, to say that virtue consists in a positive passion for the public good, in the public affections which interest men in the happiness of society more than in their own private advantage? This active, generous quality has been known by the name of public spirit, and is the real principle of republics.

3

Aristotle, Nicomachean Ethics (Book II, Chapter 6):

"Virtue, then, is a state of character concerned with choice, lying in a mean, i.e. the mean relative to us, this being determined by reason, and by that reason by which the person of practical wisdom would determine it. It is a mean between two vices, that which depends on excess and that which depends on defect; and again it is a mean because the vices respectively fall short of or exceed what is right in passions and actions, while virtue both finds and chooses that which is intermediate."

Deficiency		**Virtue (Mean)**		**Excess**
Cowardice	**↔**	**Courage**	**↔**	**Rashness**

4

Federalist No. 47 (Madison):

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

Montesquieu, The Spirit of the Laws, Book XI, Chapter 6 (1748):

"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor."

5

Hamburger, Philip. Is Administrative Law Unlawful? University of Chicago Press, 2014.

"The administrative state is a kind of 'soft despotism,' a velvet-gloved revival of the arbitrary Star Chamber Stuart absolutism that the English quashed in their 1688 revolution and that Americans overthrew in 1776. Prerogative power has crawled back out of its constitutional grave in administrative form, and this imperils American liberty."

6

Title search: Who Gets to Decide?

First appeared as part of the conference materials for the
20th Annual Advanced Texas Administrative Law Seminar session
"Texas Administrative Law and the Constitutional Design"