THE LAW OF THE PLANNED SOCIETY

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In Morristown, New Jersey, five housewives, including an elderly widow, sat in the shovel of a bulldozer for more than an hour to protest the building of an interstate highway through a section of town occupied by historic homes. Mrs. Cooke, the widow, sat in the shovel sobbing softly as police demanded that the women move. "This is such a lovely town," she said, "I do not know what will become of it." After repeated threats of arrest, the women finally gave way and the bulldozer began ripping into a frame house a block from a mansion where Washington spent a winter in 1779. The State Highway Department was unmoved by the protest. A spokesman said: "These women just aren't looking at the big picture. Our route has been approved, and we are going through with it."

In Mt. Vernon, New York, on the same day, it was reported that work on widening a parkway was resumed after the failure of a demonstration by residents. A few days before, dozens of housewives and businessmen, angered that age-old trees were to be torn down for the highway, had stationed themselves at dawn in front of heavy machinery used in building the highway. Police demanded that they leave and workmen started a bulldozer roaring toward the residents, who linked arms and refused to budge. The police pulled the line apart, twisting arms and legs. Men in business suits fell down, women's handbags flew open, and fifteen persons, who had made themselves dead weight on the ground, were finally carried away bodily. Sixteen persons were arrested, including a rabbi, two pregnant women, and the wife of a Westchester County Supervisor. A New York Transit Police Captain, also a resident, was arrested for punching a policeman. Children in tears ran behind screaming mothers held by police-

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men. Governor Rockefeller halted work on the highway but a few days later it was resumed.

These stories are typical of many others. In New York City residents protested the building of an expressway across lower Manhattan. In Long Beach, Long Island, citizens turned out to object to a proposal by Army engineers to build a ten-mile long, 100-foot wide sand dune. Residents claimed that the sand dune, intended as a protection against storms, would cut the communities off from the beach and change their entire character. In California incensed citizens succeeded in postponing a proposed freeway through Golden Gate Park. In Philadelphia mothers and children blockaded a major road which they said had been turned into a speedway. In Massachusetts students and residents of Cambridge stood vigil to save 127 sycamores along the Charles River. In Arizona there is controversy of national proportions over proposed dams which it is said would permanently alter the character and appearance of Grand Canyon. In Northern California some of the finest remaining stands of coastal redwoods are threatened. Most recently local citizens and conservation groups lost a battle to prevent the building of an interstate highway on Chestnut Ridge near Bedford, New York. The federal highway administrator contended that a highway actually improves woodlands; the woods are opened up "to all the people" and construction itself adds to beauty; boulders pushed into streams make eddies for fish, and embankments create lakes, he said. Thousands of people were reported to have protested.

It might seem easy to dismiss these protests as a form of contagion, perhaps inspired by the example of the civil rights movement, and perhaps also by the academic and student demonstrations against American foreign policy. But I think we can see something more here. There is indeed a general trend toward direct political expression and pressure as an alternative to reliance on the regular processes of representative government. But, in addition, the controversies which I have described do not lie in such typically political areas as civil rights, foreign policy, or the draft. Instead, they involve the supposedly non-political, scientific areas of planning. The planning process, theoretically the realm of the detached expert, has been made political by the direct action of citizens.

Some of the reasons for this trend, if it is a trend, can be identified. The activities and decisions of government have a growing impact upon the lives of citizens. As the United States becomes more crowded and more complex, the process of government becomes a vast jigsaw
puzzle in which every move in one area affects many other areas. At the same time, it seems increasingly difficult for the citizen to make effective contact with government. Citizens are rarely informed when the agency makes its decision; their first notice is often the roar of a bulldozer. Even when notice is available many agencies have no regular procedures for hearing citizens’ protests. Nor are agencies easily controlled through elections; most agency officials are appointed rather than elected. Nor does there appear to be much hope of relief from the law and the courts. Many of the demonstrations described above were accompanied by legal action of one sort or another but the courts almost uniformly refuse to interfere. Lawyers who practice before government agencies and students of administrative law are often as baffled as local demonstrators.

It is interesting to note a parallel between the concerns of the ordinary citizen, or the practicing lawyer, and the so-called “New Left.” One of the chief concerns of the “New Left” is the alienation of government from the people, and lack of adequate popular participation in governmental decision making. Organizations like Students for a Democratic Society are allies of the housewives of Morris-town in that they want local people to have some say in the actions of the highway builders. SDS is also like the housewives in that it has figured out no method better than demonstration by which such participation can be brought about.

The word method is crucial. From the years of the New Deal onward, it has become increasingly an article of faith among students of government that American society needs more planning. A large number of books expound the thesis that planning could solve many of our most acute social problems; some, like B. F. Skinner’s Walden Two, see planning as the way to a new Utopia. An equally large number of books, all of them seemingly with the title Planning, Freedom, and Democracy, undertake to show that there is no conflict among the ideals mentioned in their titles. A glow of optimism surrounds this literature. But although the philosophers, political scientists and economists have thought voluminously about planning, lawyers, who are concerned with how to do things, have not thought enough. In consequence, we have much planning, but no adequate means for planning—no adequate law for planning.

Recently there have been signs that the law is about to embark in new directions. In two recent decisions, one concerning a proposed power facility to be built by Consolidated Edison at Storm King Mountain along the Hudson River, and the other dealing with the
protest of the United Church of Christ against the renewal of a television license to a Mississippi company allegedly guilty of racial discrimination, the federal courts have radically broadened citizen participation in governmental decision making and moved toward basic changes in the substantive law of planning. These decisions are the culmination of others which have been little noted. Individually or together, they do not state an underlying theory for the law. But perhaps they point the way.

This article is intended as a preface to the coming development of a system of law for the planned society. It begins by attempting to diagnose some sources of trouble in our present law of planning and allocation—now included within the broad and misnamed category of Administrative Law. Second, the article suggests some of the consequences of the law's present inadequacy. Third, it examines what appear to be new trends in the law. And finally, it makes an effort to show what the law must do to face up to the problems and dilemmas which planning presents. How do we preserve democratic participation in the decision-making process—a process that is no longer effectively controlled by elected legislatures? How can planning encompass adequately the many values of American society and not just a few limited objectives at the expense of others? How can we preserve an unplanned area for individual development and freedom of choice—an area where constitutional protection of pluralism and privacy can still be effective? I do not offer solutions to these problems. I do suggest that facing up to these problems offers our best hope of solving them.

I. Administrative Law: A Mythology for an Ambivalent Nation

A. Backwards Into Planning

One of the major developments of the twentieth century in all industrial countries has been the growth of centralized planning and allocation of resources. This phenomenon has transcended differences in political and economic systems. It is a prime element of socialist societies like the Soviet Union and the countries of Eastern Europe. It has also evolved in democratic countries like Sweden and it existed in the totalitarian dictatorships of Nazi Germany and Fascist Italy. The inherent nature of a complex industrial society forces this development regardless of the theories or wishes of the people concerned.

In the United States the political and economic tradition inherited from the nineteenth century was dead set against planning and allo-
cation—perhaps more strongly than in any other country in the world. This tradition did not, however, enable the United States to resist the inevitable. It merely affected the way in which the inevitable arrived. Perhaps the earliest development was the growth of private allocation and planning in the form of large corporations and trusts in industries like oil and rail transportation. Businessmen were the active forces of collectivism and planning in the United States. In time they forced the hand of government. Governmental regulation, such as the Sherman Act and the Interstate Commerce Act, was designed to place some degree of public control on private systems of planning and allocation. But the United States, consciously or unconsciously, sought to maintain to the greatest extent possible the free enterprise system. To this end private business was, wherever possible, given jobs to do that government might have carried out itself. Hence private entrepreneurs were permitted to fly the nation's air routes, broadcast over the government-owned airways, and control much of the hydroelectric power of the nation's rivers. A compromise has been worked out in which such private enterprise operates public services for profit but in "the public interest."

The substantive and procedural law created to accompany these developments grew up in haphazard fashion with little theory to guide it. When the federal government first undertook regulation in a major way, in the case of the railroads, Congress created the Interstate Commerce Commission to deal with this specific problem. The Commission was endowed with legislative, executive and judicial powers, headed by a group of commissioners supposedly experts in their field. It proved to be the archetype of the administrative agencies to come. As each new problem arose, Congress created a new agency to deal with it or assigned the function to an existing regulatory agency. The nature of the functions, however, kept changing. The job of the ICC was to regulate, that is, to police activities which otherwise remained essentially private. The job of the Securities and Exchange Commission was roughly similar. On the other hand, the Federal Communications Commission, although described as if it were merely regulating traffic on the airways, engages not only in regulation but also in allocation; it licenses private companies to use the scarce and valuable channels of the radio spectrum. Likewise the Civil Aeronautics Board allocates routes for air transportation and the Federal Power Commission allocates natural gas pipeline routes and hydroelectric sites. Still further from the original function of regulation is the growing responsibility of some agencies to engage in planning. Some-
times this is an indirect, or unspoken, consequence of an agency's assigned job; the CAB unavoidably plans the nation's air transportation system. Sometimes an agency's responsibility for planning is made almost explicit; the FPC may approve only hydroelectric projects which are best adapted to a comprehensive plan for a river valley; nothing is said, however, about who makes the plan. Often the same agency combines regulatory duties with allocation and planning powers: the comfortable and traditional ICC was given authority over the trucking industry with power to allocate routes and thus plan for the nation's motor transportation needs. In comparing the ICC's original regulatory role with its new role as arbiter of motor transportation, we see an illustration of how the familiar agency form could be left unchanged while the agency was given new responsibilities which were (although Congress would not acknowledge the fact) radically different from the old.

Every development in the field of planning has taken place in characteristically ad hoc fashion. Usually it was necessary to fight powerful and vocal defenders of unregulated corporate power. Consequently Congress never adopted any general approach to planning; quite the contrary, the very idea was shunned and planning and allocation came disguised as regulation and justified either as machinery to aid the smooth functioning of free enterprise or as an exception to the general rule of laissez faire. Thus it was that the coming of planning was in many ways unsatisfactory to proponents as well as opponents: the true believers in free enterprise saw the development of planning as something dangerously insidious (and so it was) and the advocates of planning saw the new activities of government as half-way measures and inadequate (and so they were). In these circumstances the governmental institutions created to deal with planning and allocation had to be created without a candid acknowledgment of their true function. Congress kept using the model of the ICC no matter what function the agency was supposed to perform.

Just as it employed a single model for agency structure, so Congress used but one formula for describing the agencies' tasks. Each agency had to have an individual legislative mandate from Congress. The mandate could not be too specific, or Congress would be doing the agency's job itself. Nor could it be merely a general assignment of authority because this would violate the constitutional doctrine against the improper delegation of congressional power. The solution adopted was, despite the diversity of the agencies' tasks, similar from agency
to agency. In almost every case the agency was given a specific jurisdiction or task to perform and then directed to exercise its authority "in the public interest," or according to "the public interest, convenience and necessity," or some other formula of the same level of generality. From time to time Congress made its wishes more particular when an individual issue was brought to its attention but basically the agencies were left to develop the meaning of their mandates.

With respect to procedure Congress also used a single approach which was applied to most of the agencies. Agency activity was forced into three categories: adjudication, rule making, and executive or discretionary functions. Adjudication took the model of a modified courtroom trial. Rule making was performed in the comparatively informal manner of a legislative hearing. Executive proceedings required no specific procedures. In the case of each, agency statutes gave a general definition of the persons or interests entitled to participate in agency decision making. Subject to statutes, the courts decided who had a right to seek judicial review of agency action; the courts also worked out, with the guidance of statutes, principles defining the scope of review of agency action. Significantly, the categories of "rule making" and "adjudication" fitted the function of regulation far better than that of allocation and planning. In 1946 Congress passed the Administrative Procedure Act, which attempted to provide a single set of rules to govern proceedings in every type of federal agency.

Thus planning and allocation came to the United States undifferentiated from regulation, and hence unaccompanied by any institutions, laws or effective means to cope with the problems that planning and allocation bring. Because we cannot admit to ourselves how much our economy has changed, we have not been willing or able to fashion a system of law for planning and allocation. Instead, the present system of law has served in large part to perpetuate a mythology which has obscured, rather than aided, the solution of the great problems of an ever more active government.

B. The Central Myth

In delegating power to various administrative agencies, Congress sought to give each agency enough leeway to do its job and yet avoid constitutional objections. Congress early discovered the utility of the "public interest" formula, which was broad and elastic and yet satisfied the Supreme Court. Sometimes Congress attempted to spell out the meaning of "the public interest" by listing a series of policies or
factors to be taken into consideration. Occasionally Congress has laid
down a very specific instruction: television licenses should not be
given to those convicted of violating the antitrust laws. But neither
the listing of factors nor specific admonitions have significantly al-
tered the function of the formula: it operates as a virtually total
transfer of policy-making authority from Congress to the agency. The
formula marks a far-reaching change in the nature of our national
legislature. In many fields, Congress is now more a reviewing agency
than a legislative authority. Even if it meets throughout the year and
conducts its business efficiently there is no longer any possibility that
Congress can address itself, at least as an initial matter, to all of the
fundamental issues of policy that must be decided by a modern gov-
ernment. Congress is forced to limit itself to a few areas of competency
and hand over the remaining task of legislation to others while re-
taining power to investigate, to intervene, and to revise when objec-
tions are made with sufficient force.

Seventy-five years ago, it is possible that "the public interest" had
a different, more definite meaning than it does now. In times domi-
nated by economic pillage, robber barons, and piratical business tac-
tics, "the public interest" could simply mean not yielding to private
interest; perhaps it was reasonably clear what was not in the public
interest. That may have been enough for early forms of regulation.
Some writers have attempted to generalize this idea by arguing that
"the public interest" means the general good rather than good to one
particular interest. But in more recent times such notions of "the
public interest" no longer serve. Very rarely are issues so clearcut that
it is possible to say confidently what is in the general good and what
is only good for one special interest.

As the agencies have sought a meaning for the public interest, they
have come to this: the public interest is served by agency policies
which harmonize as many as possible of the competing interests
present in a given situation. Thus the objective of the CAB is to
work out policies that will be acceptable to the carriers, airline pas-
sengers, cities, and local economic interests. The FCC seeks broadcast
service that will satisfy competing demands for entertainment, news,
culture, religion, and education. The FPC in its capacity as a regu-
lator of the transmission of natural gas tries to consider the imme-
diate versus the long range need for gas, the problems of the coal
industry, and local economic requirements. In all of these cases it is
thought that the public interest requires some recognition of the
claims of each interest that can be identified. Thus the agencies have
evolved a meaning for their charters which makes them both philosopher-kings searching for the good and practical politicians trying to please a multi-voiced rabble.

Such use of the phrase "public interest" leads to the central myth of our present administrative law: the belief that decisions concerning planning and allocation can be, and are, made on an objective basis. When an agency grants a license to build a dam, revokes a television permit, or reduces the airline service to Boston, it claims the authority of an objective "public interest," a standard that apparently can be determined by using scales and measures. As one student of the administrative process, John Griffiths, summed it up in a final exam:

The Progressives and New Dealers were confronted by a society whose size, complexity, and rate of change seemed to preclude effective governmental control of the kinds which they found necessary if the traditional institutions and modes of regulation were the limits of the public's capacity to bring public policy to bear on the issue. Courts were too slow and too encumbered in procedures designed for criminal cases or litigation between private parties over private rights. Legislatures were too busy, and too political to make the refined, "expert" decisions that had to be made. The need was for an arm of government which would be judiciary, executive and legislature all rolled into one efficient and expert machinery for regulation. The trouble at the root of this idea was that its proponents held to a totally fallacious idea of how a decision can be made. They thought there was an "administrative" decision, somewhere in between a judicial and a legislative decision and partaking of both, which could be made by experts—and only by experts. Their belief in the existence of this new kind of decision led them to think that a fourth branch of government could be designed, as against which the checks and balances and other restraints upon the other three would not be relevant. And it led them to ignore the problems which would arise simply because the "administrative" decision does not exist.

The "administrative" decision was conceived of as that right decision which will be clear to an "expert" if, without the help (they would have said, the hindrance) of criteria, standards, rules, etc., he confronts a vast array of raw data.

I would describe the central myth somewhat differently, for I believe that criteria play a crucial role. The myth begins with the assumption that there is an objective reference for the concept of what is best. The process of decision may therefore be carried on in accordance with standards or criteria—that is, within the limits of law.
Courts can review decisions on the basis of these standards. The raw materials of decision are facts: how much will the highway cost if it follows route A or route B; how many people travel between points X and Y; what are the engineering requirements. The decision makers combine expert knowledge and professionalism with judicial bearing. The tools they use for decision are science and reason. At the core of the myth is its cardinal point: decisions are not primarily choices between values. The entire machinery of administrative law serves to deny the role of values in the planning process.

C. *The Ancillary Myths*

The appearance of objective choice is reinforced by the ceremony of adjudicatory procedure. Here the crucial point is that procedure which may be perfectly appropriate for regulatory activities becomes foolish and deceptive when it is adapted to determining what planning would be in the "public interest." The "public interest" is determined in most cases by a process which would appear to an observer to be a "trial" at which a "verdict" is reached on the basis of objective "facts." In the case of a television license, an air service case, or a power site, there are "witnesses," "evidence," a "judge" and opposing lawyers. Yet even in a comparative hearing on a television license the agency is manifestly called upon to make a policy choice that cannot possibly be fixed within objective limits. Trial procedure makes sense for regulatory decisions, such as whether a company has violated the Federal Trade Commission Act. It makes sense when allocation is based upon objective statutory criteria that spell out who is entitled to a particular benefit or privilege. But there cannot be a trial of what kind of television programs Boston should have, or which city should get a regional airport, or what plan is best for a river valley.

In the case of the river valley, the planners must first gather facts, but the decision about where and whether to build a dam is almost purely a value choice. No dam is necessary in any absolute sense; every dam has advantages and offsetting disadvantages, and the choice may be like a vote for inexpensive electricity and against fish, or a vote for free enterprise-expensive electricity and against public power-cheap electricity. In such cases a "trial" is plainly inappropriate. The case of television licenses is less obvious, for here we have a combination of objective choice and value choice. Some criteria of choice, such as staff experience and quality of facilities, are comparatively objective; other criteria, like the desirability of one type of proposed pro-
gramming over another, are value choices. The frustrating nature of television hearing procedures derives from the fact that the procedures may be faithfully followed with respect to some criteria, only to have other (and probably decisive) criteria utterly elude them. It is because every television choice is partly a small bit of ad hoc policy legislation that the trials are so lengthy and so meaningless.

When it is used in areas of policy making, procedure serves primarily to preserve the mythology about how government operates. It prevents us from seeing resource allocation as a process by which some are punished and others rewarded for reasons which have no relation to objective merits but have relation only to government policy. It preserves the appearance of the rule of law, making it seem that the immensely important allocation and planning process is being carried out at all times subject to fair and equitable guiding principles. It preserves the appearance of constitutional division of power. By making planning choices appear to be something judicial—the application of general rules of law to a particular situation—the appearance of the constitutional scheme is retained. Administrative procedure is absurdly miscast for the work of planning and allocation but it preserves our faith in the existence of a governmental system which we know and trust.

The mythology created by substantive and procedural law is completed by a third set of principles—the so-called doctrine of primary jurisdiction. Because of the unsystematic way in which Congress passed statutes dealing with specific situations as they arose, it is not surprising that there has been overlapping and conflict among different congressional policies and different agency jurisdictions. The FPC may approve a dam in an area that has been set aside as a national forest; the FCC may hand out television franchises in such a way as to create a problem of restraint of trade under the antitrust laws. Some of these conflicts are resolved by Congress. But most of them have to be resolved by the courts. Typically, a court is confronted by a dispute between agency jurisdiction (ICC rate setting, in the earliest case) and court jurisdiction under conflicting principles of law (state law, in this same case). Or the conflict is between two federal statutes, one giving power to an agency (the Shipping Board), the other administered through the courts by another agency (the Sherman Act, administered by the Department of Justice). In such cases, the courts generally talk about the importance, or non-importance, of "expertise," and, to a lesser extent, of "uniformity." But this talk both confuses and disguises what is really happening. What
is happening is that the courts in deciding issues of jurisdiction are resolving policy conflicts which Congress created but left unresolved. The courts are deciding which of two conflicting policies shall prevail.

Resolving conflicts is exactly what courts are supposed to do. The troublesome fact is that by giving their decisions the confusing label of primary jurisdiction, the courts make immensely important arbitrations without saying what they are actually doing and without enunciating any standards or giving any reasons. We might like to know why the Shipping Act prevails over the antitrust laws in one case and not another, but we are not told. The doctrine of primary jurisdiction preserves the myth that Congress has enunciated various policies which are consistent with each other or can be made consistent by a process of reason. It once again prevents us from seeing the process of value choosing that takes place outside the legislature in the course of planning. It prevents us from seeing that we have many uncoordinated, possibly incompatible systems of planning and allocation, some of which are seriously in conflict with others. But to acknowledge the conflicts publicly would require admitting how much planning really goes on in our society. Rather than do this, we resolve the conflicts without admitting we are doing so, once more burying the major problems under a reassuring appearance of law.

II. The Price of Illusion

We pay a heavy price for the illusions of administrative law. First, we are forced to struggle with a system of law filled with contradictions and confusion. Second, the underlying problems of planning, being ignored, get worse. These effects are best seen with reference to the public interest standard, adjudication procedure, and the conflict between planning and other ideals in a democratic society.

A. The Inadequacy of the “Public Interest” Standard

The “public interest” standard, in the meaning most agencies have given it—a balancing of competing forces—is not a satisfactory basis for planning. In the first place, it is ad hoc. Every balance is struck individually, and general policy is correspondingly hard to fashion or to follow. More important, the very concept of balancing is in one sense a contradiction of the concept of planning. The effort to balance pulls strongly to the status quo and against anything radical or bold. It obscures the fact that there is a far broader range of choice than that within which the agency habitually operates. For example, the FCC presumably has power to decide that half the television stations
ought to be non-profit educational ventures, assigned to universities and foundations rather than to industrial companies. And the FCC might require even the commercial stations to abandon their entertainment format in favor of detailed news coverage and other forms of public service. Such choices are easily forgotten under a "balancing" theory. A further deficiency of the balancing theory is that it leads to a self-limiting method of ascertaining the facts and issues which make up the public interest. Frequently the agency allows the parties to present their partisan concepts of the facts, issues and the public interest, and lets it go at that. The agency attitude is a passive one, based on the assumption that the self-interest of competing parties will inevitably bring out all of the issues. Thus balancing denies that the agency has an affirmative duty to undertake planning on its own initiative.

The whole concept of "the good" as representing a compromise of interests is thus at variance with planning. Fashioning values and goals out of existing interests prevents any really long range policy making or planning from ever being done. It equates policy making with satisfying the majority or the most powerful interests although the country might benefit more from policies which favor weaker or minority interests, or interests not yet in existence. It tends to place emphasis on those interests which have a commercial or pecuniary value as against intangible interests such as scenery or recreation. The economic need for a dam, which can be presently felt, is likely to carry more weight than considerations that urge that a river be left as it is. In addition, the prevailing notion of the public interest allows large private interests undue power. All too often choice becomes a compromise among powerful private interests in which more general but less immediate interests are neglected. In short, the most fundamental infirmity of the present concept of the public interest as a guide for planning is that it defeats planning by responding only to immediate pressures.

The "public interest" contains more specific contradictions. Most public activities in the planning field are carried out, under our public-private economy, by private business entities. Hence the "public interest" must always be a compromise with these private interests. What does the public interest mean when a private corporation engages in air transportation? Because the airline is a private corporation the public interest must include the corporation's right to make a profit, and its directors' right to make management decisions. This private aspect of the public interest cannot necessarily be harmonized
with the interest of consumers of transportation. The agency itself may be implicated in these contradictions if it has, among its responsibilities, the job of "promoting" the industry it must also regulate. Thus the CAB is by one statutory direction responsible for a sound national airline industry—requiring the agency to assume a management outlook—while at the same time it must look after the public's transportation needs.

These difficulties cause what is probably the most apparent failure of the "public interest" standard: the much lamented fact that few agencies are able to relate their decisions to any standard in a way that helps to explain a given choice. When the FCC selects a particular applicant for a television license or makes rules for chain broadcasting, when the CAB chooses an airline route, or the FPC decides between public and private power, it is very rare to find either an agency opinion or a judicial opinion that shows us why this decision was made instead of another equally available choice. The FCC has attempted to overcome this problem by listing criteria for selecting television licensees, but the criteria appear to work as rationalizations rather than explanations. Most agencies have been unable to make decisions which give even the appearance of consistency, fairness or reason. It does not help to follow the practice of some agencies whereby the commissioners decide a case and then order up an opinion written by a professional opinion-writer whose assignment is to find or invent any reasons he can for the commissioners' decision. The inescapable fact is that the prevailing concept of "the public interest" does not encourage, and may not even permit, a forthright description of the kind of choices which planning decisions actually require.

B. The Failures of Procedure

The unsatisfactory state of substantive administrative law has led some students of the administrative process to look for a solution, or at least a palliative, in procedure. To the lawyer procedure carries its own virtues. It can make certain that all points of view are heard. It can ventilate the decision-making process by exposing it to the light of day and thus make some forms of abuse more difficult. It can force an agency to spell out reasons for a decision which serve both as a check upon the agency process and as a basis for judicial review. It can even counteract, to some degree, the murky atmosphere of institutional decision making where decisions are evolved, rather than made, by a series of officials none of whom bears identifiable responsibility. But while the agencies have kept rule-making proce-
dure reasonably flexible, adjudication procedure has grown constantly more unworkable, leading to proposals for separation of rule making and adjudication within agencies, closer observance of judicial procedures and practices, or the establishment of an "administrative court."

The crux of the problem has already been mentioned: what works for regulation does not and cannot work for allocation and planning. Adjudication procedure is made ridiculous when it is enlisted in an attempt to "prove" planning by evidence. Naturally, almost anything is or may be relevant when the subject is planning. In an FCC, CAB or FPC case, many different criteria are utilized by the agency in reaching a decision. The parties have no way of knowing in advance which criteria will be stressed in a given case and for all that the parties know, new criteria may be introduced. Accordingly, the prudent lawyer must seek to introduce evidence bearing on every imaginable issue that the agency might consider. The lawyer would be rash indeed if he omitted some point, no matter how farfetched, for the agency might later fix upon this as the pivot of its choice. For the same reason the hearing examiner is reluctant to exclude any evidence. It is unlikely that he can be criticized or reversed for admitting evidence, but if he leaves a gap in the record over the objections of a party he invites trouble. Everything conspires to expand the size of the record and virtually no counter-force is at work to limit evidence. This condition seems inevitable if the decision cannot really be placed upon a basis of objective choice. Since it is tacitly recognized that the agency will be making policy as it goes along there can be no limit to the relevance of evidence. It is the limitless and unfenced range of the agency's probable basis of decision that lies at the root of the procedure problem.

A closely related source of trouble is that because agencies are always engaged in policy making, there is necessarily confusion about the line between rule making and adjudication. If the agency determines policy in a rule-making proceeding and this settles the issue at stake in a particular adjudication, the complaint is, of course, that the parties to the case were deprived of the substance of their adjudicatory hearing because the controlling issue has already been decided. If, for example, the agency has previously adopted the policy that no newspaper shall receive a television station, then a subsequent adjudicatory hearing on a newspaper's application will be a rather unsatisfactory affair. On the other hand, if the agency makes policy in the course of adjudicating a particular case, the opposite protest is made. If the agency says in its decision on a newspaper's application
for a television license that beginning with this case no newspaper will receive a license, the inevitable protest is that there was no adequate notice of the agency's new rule. This dilemma is a revealing one. It demonstrates anew that so-called adjudication is actually a combination of policy making and objective choice, and the trouble with agency adjudication procedure is that it is designed to fit a model which does not exist.

Attempts to "prove" planning by evidence lead to another contradiction: the administrative agency's knowledge of facts outside the record. Administrators are "experts"; they decide many similar cases and they presumably come from backgrounds which make them specialists; all of this produces a special knowledge in addition to the record. It also produces a distinct point of view. If we think in terms of the judicial model, the agency is open to serious criticism, for its decisions may be based upon facts outside the record, or opinions settled in advance of the hearing. But is this not exactly what is meant by expertise? Is not "expertise" merely another term for knowledge of facts outside the record plus built-in predispositions? Is not the administrator who is free of such contamination also free of any claim to be an expert? When Congress decided that it wanted an expert tribunal, it is fair to say that Congress also wanted what might be termed a tilted tribunal—one with a particular approach to the subject—a viewpoint on policy and on the facts which go into the formation of policy. Such a tilt was noted in the early days of regulatory agencies like the NLRB, but in that agency the tilt has gradually righted itself. But the tilt is inherent when planning is part of the adjudicatory process. It is policy making which gives the agency its tilt and thereby distorts the purely judicial model.

All of these intractable difficulties combine to explain the best known problem of administrative procedure: the endless time involved. The hearings drag on and on, with almost every conceivable type of evidence admitted, until a vast record has been built up. Sometimes the record will run to thousands of pages. A comparative hearing in a television case might last for one hundred hearing days. In addition, there are all sorts of procedural delays, so that a case may take months or years to reach a conclusion. Despite this overwhelming length, few participants feel that the adjudicatory process is "fair." The agency comes to its decision with built-in biases and a knowledge of facts outside the record, which give the parties the uncomfortable feeling that the decision may have been prejudged. Moreover, it is often felt that the ultimate decision is not based either on the evi-
dence put in the record or even on the reasons given in the agency's opinion. An impression of futility surrounds adjudications, as if the parties were going through an empty ritual which has no appreciable impact on the outcome. This does not imply bad faith or corruption; it simply means that a decision may ultimately be made on political or policy grounds that are unstated.

The tale of procedure ends with judicial review. The courts know that something is wrong, but what are they to do? They can order some more procedure or require an agency to give new or different reasons but how can they review the substance of a planning or allocation decision? Yet review may be imperative, for private rights are often at stake. The intermingling of policy with objective choice is what gives judicial review of agency adjudications its inconsistent and sometimes despairing quality. It should be added that the procedure by which different agency jurisdictions are reconciled or accommodated under the judicial doctrine of primary jurisdiction is a further source of frustration. The application of the doctrine from case to case has been drastically inconsistent, and it has mainly served as the source of great, seemingly endless delay. Parties are dragged through a lengthy agency proceeding in what may turn out to be a futile quest for relief they can only obtain elsewhere. Ultimately, the decision by the tribunal to which the matter has been referred may be based upon criteria which could easily have been utilized by the original tribunal. Once again, the fact that the policy-making aspects of the issue are hidden confounds agency, court and parties alike.

C. The Larger Losses

In some planned societies, there is no written constitution, and no tradition of pluralism. Planning is then easier, for it need not attempt to comply with these exacting ideals. But in a society that wants to have planning and also wants to preserve these ideals, the task is difficult. Many commentators have argued that planning cannot be compatible with our constitutional system: planning cannot be democratic, it cannot be subject to the rule of law, and it cannot proceed under the principle of equality. A different but equally crucial question is whether planning is capable of replacing the system of individual value choices associated with a free society.

The most obvious strain is in the working of the democratic process. As was noted earlier, the growth of administrative agencies testifies that our elected officials are less and less able to keep watch over the government's activities; they can oversee an ever smaller percentage
of a larger and larger quantity of decisions. Hence the delegation to
the agencies. The vital question, then, is to what extent the public
itself can participate in, or even be aware of, the agency decision
process.

The problem of public participation begins with the question of
notice. There is rarely any effective notice of governmental decisions
in which the public, or some segment of the public, might be in-
terested. Every day decisions are made concerning highways, dams,
air safety, navigation, and hundreds of other issues. Few are reported
in even the most complete newspaper. Even if there were adequate
notice, the public usually lacks enough information to evaluate the
kinds of decisions that planners make. The question of which route
is best for a highway or how many daily flights shall occur between
New York and Buffalo is a question which combines facts available
to everyone with detailed technical information which the public does
not have. Lacking the latter information, how can the public have
views that are entitled to be given weight? Beyond this, the public
lacks the means of getting heard. Often the citizen will not be able
to find out who the decision maker is. Even if that information is
available, it is not practical for the citizen to seek personal interviews
with planning officials. Yet individuals have little access to the media
of mass communication which might command the attention of
planners. And they must compete with large organizations which can
amplify their voices. Beyond this, even if the individual were fully
able to communicate his views, he would simply be too busy to express
himself on all of the issues with which he had legitimate concern.
He cannot make effective use of his freedom to speak on every issue
no matter how open are the channels of communication. For all of
these reasons, it is hard for the voter, when he goes to the polls, to
vote in a way that is meaningful with respect to a particular issue of
planning or allocation, and it is even harder for him to get heard
directly.

A more abstract but equally critical problem is presented by the
constitutional ideals of limited government and the rule of law. Our
constitutional plan is based upon fear of concentrated power. Hence
the division of power between nation and states, the doctrine of
enumerated and limited powers, the system of checks and balances,
and the Bill of Rights. But where are these to be found in a planned
society? The existence of a planned economy tends to undermine these
concepts. Can there be effective separation of powers when govern-
ment engages in planning? Since Congress does not really set standards
and the courts do not really review, all power is necessarily concentrated in the planning and allocation agencies. And the agencies are not only free of the separation of powers; they are also free of traditional limitations upon the areas of legitimate governmental concern. In planning and allocation the agency may with some logic take almost any factor (no matter how local or personal) into consideration in making its decision; the enumerated powers of the constitution are turned into a general welfare clause that can readily penetrate into the private lives of citizens. This is especially serious because in planning and allocation the interests of the community are in the forefront of the planner's consciousness, and hence the factors of individual liberty and privacy tend not to be weighed so heavily. Under the balancing theory, the public interest becomes equivalent to the majority interest, and this "outweighs" any "individual" interest in liberty or privacy. Moreover, planning by its very nature is hard to confine within fixed boundaries, and this runs counter to any concept of the rule of law. Planning means discretion. How shall we object to a decision that puts a super-highway through a park? Can there be a "law" against it? Perhaps. But the trend to a rule of discretion is unmistakable.

Discretion can be benevolent, but it can also be oppressive. It is an unfortunate fact that a large portion of the official corruption that mars American political life occurs in those agencies which engage in planning and allocation and therefore have discretion to grant or deny licenses, contracts, franchises, and other favors. In addition, discretion can readily be used unfairly or arbitrarily, so as to discriminate against some groups or individuals. Scandals involving liquor licenses, highway contracts, building codes and farm subsidies show that the discretion that accompanies planning and allocation is an almost unbearable temptation to human nature's less admirable side.

How does planning comport with the third constitutional ideal of equality? The more comprehensive the system of planning, the more it is true that every inequality is the responsibility of government, not a mere fortuity. In the unplanned society, men who are situated differently can only blame the spin of the wheel or the inscrutable will of fate. But the more actively government plans, the more it becomes responsible for the consequences. And while we can tolerate many inequalities that are fashioned by the fates, it is far more difficult to accept inequalities that are the product of some official's deliberately taken decision in Washington. The award of defense
contracts can build up one section of the country and abandon another to decay. A farmer whose poverty is due to a series of droughts may possibly take his condition philosophically; one whose poverty is due to the government's denial of a subsidy may become bitter and rebellious.

Beyond questions of causation, how should "equality" be defined in a society that plans and allocates in the public interest? "Equality" can, perhaps, be defined within a single system of allocation. All applicants for a television license or a farm subsidy should feel that they have been given an equal chance. If only some can be chosen, it is important that the law be so designed as to make sure that the choice was a "fair" one. The less objective the criteria of choice, the more difficult it is to maintain this feeling. A much more profound problem is to define equality between allocation systems. One man farms, another man is an artist, a third drives a taxi and a fourth works in a shipyard. The farmer is subsidized and protected against ruinous competition, the shipyard worker is also subsidized and protected, the taxi driver may or may not get protection against too much competition but is not subsidized, and the artist gets neither help nor protection from the government. Should any standard of "equality" be operative here? Is the artist less useful to the country than the farmer? Is the artist differently situated on some grand scale of relative circumstances? Equality before the law in this sense is a profoundly elusive idea; perhaps there is no justification for such a concept at all. Perhaps in an affluent society the issue is to seek a minimum level of well-being for everyone, beyond which the concept of equality will be of diminishing importance. But as long as poverty is a serious problem, and as long as some agencies tend to be sensitive to a few large private interests, equality will remain a vital issue.

I do not mean by the preceding discussion to suggest that there can ever be any resolution of the great problems of democracy, the rule of law, and equality. My point is to show these issues boiling beneath the surface of our administrative law and likely to surge up dangerously when a nation which expects its government to be responsive, limited, and fair discovers, in a flood of political awareness, that these expectations are becoming less real just as government intrudes more and more into the lives of citizens and hence into their consciousness.

Beyond all questions raised by legal ideals is a further question: can the planning process be trusted to act as a chooser of values? The choice of values is the heart of the planning process. Regulatory law,
no matter how radical, proceeds upon the theory that its function is to be a traffic officer; it takes things as it finds them, and merely attempts to regulate the traffic. Thus the first zoning laws primarily tried to keep the different uses of land from interfering with each other, much as a traffic light keeps two streams of traffic separate. Planning begins when the law asks what should be; it is here that the ability of planning to choose values becomes a crucial issue. The shortcomings of administrative law previously mentioned in this article do not inspire confidence in the ability of a typical agency to act as a value chooser. The balancing theory of the public interest, as previously noted, makes the agency unduly responsive to immediate pressures and private interests. On the other hand, the agency lacks enough democratic participation by the community as a whole to know the community’s wishes. As a substitute for ability to reflect all of the interests in the community, the agency cultivates a form of professionalism in which it attempts to “know what is best” for the community. The trouble is that professionals have their own peculiar narrowness of outlook. Like all experts they are likely to adopt a particular point of view and then to pursue it without rethinking the problem from time to time. The Bureau of Reclamation is a dam-building machine which will keep building dams as long as there is running water in a stream in the United States. At the same time, it lacks a broader outlook which might consider the values that dams destroy. Professionals, in short, can be counted on to do their job but not necessarily to define their job.

The more basic problem of value choosing is whether expertise can ever substitute for individual choices. In an unplanned society we have a multiple sovereignty of private property and every owner engages in value choosing. Planning is based upon the theory that such multiple choosing becomes impractical in a crowded world. Therefore government must make some choices that will govern us all. We are invited to look ahead to a scientific society in which values will be chosen on a rational basis. Unfortunately, science is not yet able to encompass the many different values that human beings choose if left to their own individual idiosyncrasies. As yet, science knows very little about what makes people happy or what adds to the richness and satisfaction of life.

III. The Search for New Solutions

Administrative law is in a state of rapid change. Looking at these changes, it is possible to pick out some which seem highly relevant
to the problems just discussed. They are not only relevant, they are extremely helpful in thinking about how to approach a new law of planning. Of course one cannot pick out isolated decisions and call them a trend. But the law represents a source of new ideas. It can offer a pragmatic approach which helps to point out the direction in which the theory of the law must go.

A. **Broader Definition of Task**

One development has been toward a more inclusive definition of the goals or values which an agency must consider. This is to be carefully distinguished from efforts to fix more definite standards for agency decision making. Such efforts, doomed to failure, seek to narrow an agency's range of choice. A broader definition, in contrast, does not guide the agency to a decision, but attempts to liberate its thinking. It is simply the enlarging of the factors or values which an agency must take into consideration. For example, regulations adopted by the Bureau of Public Roads for the Interstate Highway System provide, 23 C.F.R. § 1.6(c):

> . . . The conservation and development of natural resources, the advancement of economic and social values, and the promotion of desirable land utilization, as well as the existing and potential highway traffic and other pertinent criteria are to be considered when selecting highways to be added to a Federal-aid system or when proposing revisions of a previously approved Federal-aid system.

Probably the most significant development of this type has been the case of *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). Consolidated Edison proposed to build a power facility at Storm King Mountain on the Hudson River at a point of historical and scenic importance. The project was not a use of hydroelectric power from the river, but a "storage battery" intended to pump water into a reservoir using the off-hour capacity of New York City's generators to store up water power for times of peak demand. New high tension wires were required by the proposal. Conservationists and local communities protested the project, arguing that it would damage the river scenery and the beauty of local communities, and that alternative ways could be found to store up power. The Federal Power Commission overruled these objections and approved the proposal. Its reasoning proceeded along traditional lines of economic emphasis and balancing of interests. The Commission found:
The primary benefit which will be realized from the proposed project is its economy and reliability as a source of power to meet Con Edison's peaking and emergency requirements. The undisputed proof shows that the Cornwall project would produce savings in the cost of electricity of over $12 million each year as compared with a modern steam electric plant, the only practical alternative source suggested.

On the basis of this finding the Commission's conclusion was as follows:

We have considered with sympathy the protests, which in substance say there must be another source of power as good or better. The record shows, however, that the Cornwall project has large advantages over any other method of meeting the applicant's need for additional peaking power . . . . Here the impact of the project on the surrounding area is minimal while the need for electricity from this economical and dependable source is great.

We therefore conclude that on balance the issuance of a license appropriately conditioned to avoid unnecessary harm to the landscape or to other public or private interests, for the construction, operation, and maintenance by Con Edison of the Cornwall project, is desirable and justified in the overall public interest and that such license should be granted.

The Court of Appeals, in a landmark decision, returned the case to the Commission for a new hearing. The court told the Commission that:

If the Commission is properly to discharge its duty in this regard, the record on which it bases its determination must be complete. The petitioners and the public at large have a right to demand this completeness. It is our view, and we find, that the Commission has failed to compile a record which is sufficient to support its decision. The Commission has ignored certain relevant factors and failed to make a thorough study of possible alternatives to the Storm King project. While the courts have no authority to concern themselves with the policies of the Commission, it is their duty to see to it that the Commission's decisions receive that careful consideration which the statute contemplates. . . .

This is the essence of the court's holding. But the opinion goes further. The full reach of the decision may be suggested by the following comments.

First. Historically, the chief concern of the Federal Power Commission was the development and promotion of hydroelectric power, and its usual approach was to deal with proposed projects on a case-to-
case basis. Here, for example, the Commission did not attempt a study of the possibilities of the Hudson River Valley as a whole; it focused on the proposal immediately before it. The Court of Appeals, however, instructed the Commission to undertake a broad and comprehensive responsibility for planning. In the words of the court: “Congress gave the Federal Power Commission sweeping authority and a specific planning responsibility.” Under the Second Circuit decision, the Commission is now not entitled to approve this project without first reviewing plans for the entire region to make certain that the project fits into a comprehensive picture of the region’s development.

Second. As already noted, the Federal Power Commission and other federal agencies have usually been willing to sit back and allow interested parties before them to bring forth the considerations, facts, and arguments which might bear on or define the public interest. The Commission, acting somewhat like a court, could then proceed to weigh the “evidence” before it, and decide between the competing claims. The Court of Appeals rejected this passive concept of the FPC’s role. Instead, the court told the Commission that it must undertake an affirmative burden of inquiry:

In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.

Third. The federal regulatory process has suffered not only from a bias toward specific developments like hydroelectric projects, but also from a tendency to weight economic and pecuniary values more heavily than intangible values. The Court of Appeals insisted that the Commission reconsider its scale of values. The Commission was obviously impressed with an annual saving of $12,000,000 promised by Consolidated Edison. But the court said: “We find no indication that the Commission seriously weighed the aesthetic advantages of underground transmission lines against the economic disadvantages.” And the Court concluded:

The Commission’s renewed proceedings must include as a basic concern the preservation of natural beauty and of national historic shrines, keeping in mind that, in our affluent society, the cost of a project is only one of several factors to be considered.

The court did not indicate the weight to be given to beauty but it did place beauty and other intangible interests in a far less disadvan-
tageous position for the future. The court also placed more weight than the Commission on such values as recreation and the survival of fish in the river. These values, which might be termed partly economic and partly recreational, had previously been subordinated to the Commission's concern with electric power.

Fourth. As part of its passive attitude the Federal Power Commission, along with other regulatory agencies, had usually rejected or accepted proposals without seriously exploring alternatives. The Court of Appeals told the Commission to give serious consideration to alternatives and to see whether in view of all the other values at stake some other method of producing electric power might in the long run be preferable:

The Commission neither investigated the use of interconnected power as a possible alternative to the Storm King project, nor required Consolidated Edison to supply such information. . . . The failure of the Commission to inform itself of these alternatives cannot be reconciled with its planning responsibility under the Federal Power Act.

Of course a "checklist" of values cannot be a guarantee of well-considered decision making. The CAB has been given a checklist of values, and its decisions are hardly a model of the planning process. But if we cannot guarantee "right" decisions, we can perhaps insure that more decisions are made by the right processes, and the Second Circuit's opinion suggests one way that this might be done.

B. The Right to Participate in Agency Proceedings

Another development is concerned with the right to participate in agency proceedings. From narrow beginnings, more appropriate to adjudication and regulation than to planning, this right has grown quietly but steadily. Some of the cases directly involve the right to participate, while others involve the right to obtain judicial review. The law centers on the concept of the would-be participant's "interest." "Interest" means something which distinguishes a proposed party from the general public, for agencies and courts share a pervasive fear that proceedings will be inundated by too many participants. The definition of "interest" began with accepted legal categories: an interested party was one whose legal rights might be affected by the outcome, or one who had a substantial economic stake in the outcome.

Gradually the definition expanded. In an FPC proceeding to authorize a natural gas pipeline, the National Coal Association (a trade association of coal producers including some who might lose business
due to the pipeline), the United Mine Workers, and the Railway Labor Executives Association were held to be interested parties on the theory that each might suffer economically through the proposed competition. In a case involving the proposed abandonment of a natural gas pipeline, the City of Pittsburgh was held to be interested because of the possible danger to the future supply of gas for its residents. On the other hand, tenants who would be displaced by an urban renewal project and who claimed they would have no adequate place to live have been denied the right to sue; such persons do, however, have the statutory right to appear at a public advisory hearing. In an unusual case where the Superintendent of Yellowstone National Park undertook a program of slaughtering elk, professional guides who made their living by conducting hunting parties in Yellowstone tried to sue, but lost out on the ground of sovereign immunity. In a still more unusual case citizens of the United States, together with alien residents of the Marshall Islands in the Pacific, attempted to enjoin the testing of atomic weapons in the Marshall Islands, alleging genetic injury to the world’s population and immediate danger to health. They were held to lack standing to sue, having no special interest apart from that of mankind in general.

It is in this context of decisions insisting upon some form of “special” interest that the opinion in Scenic Hudson Preservation Conference v. FPC takes on an additional significance. The FPC’s order approving the facility was challenged by the Scenic Hudson Preservation Conference, an unincorporated association consisting of several non-profit organizations concerned with natural beauty and conservation, and three towns. Their standing was questioned. The court said:

The Federal Power Act seeks to protect noneconomic as well as economic interests.

* * * *

In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservation, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of “aggrieved” parties under § 313(b). We hold that the Federal Power Act gives petitioners a legal right to protect their special interests.

* * * *

We see no justification for the Commission’s fear that our determination will encourage “literally thousands” to intervene and seek review in future proceedings. . . . Our experience with
public actions confirms the view that the expense and vexation of legal proceedings is not lightly undertaken. . . .

. . . [T]he Commission has ample authority reasonably to limit those eligible to intervene or to seek review. . . . Representation of common interests by an organization such as Scenic Hudson serves to limit the number of those who might otherwise apply for intervention and serves to expedite the administrative process.

This case, while it talks about “special interest,” really appears to proceed on a quite different principle: the need to have certain points of view represented. This implied principle was made explicit in a second case of great importance, Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966). The FCC granted a license renewal to a television station in Jackson, Mississippi, despite complaints that the station had engaged in racial discrimination. Court review was sought by United Church of Christ, a national denomination with substantial membership in the station’s prime listening area, and by two individuals who were described as both owners of television sets and civil rights leaders. They claimed standing on the ground (1) that they were denied equal time on their air to answer their critics, (2) that they represented nearly one-half of the station’s potential listening audience, a group who were allegedly discriminated against and ignored, and (3) that they represented the total listening audience with respect to the right of all listeners to hear balanced programming. The Commission denied the petitions to intervene, promising however, that it would consider the issues raised by their complaints. The Commission took the position that members of the listening public do not suffer any injury peculiar to them, and that to give them standing would pose great administrative burdens.

The Court of Appeals for the District of Columbia Circuit reversed, in an opinion that undertook a sweeping reexamination of the doctrine of standing. The court began by observing that concepts of standing have not been static, and standing is not limited to those suffering economic injury. Standing, said the court, is accorded to persons “not for the protection of their private interest but only to vindicate the public interest.” Calling the concept of standing “practical and functional,” the court said it could see no reason to exclude the listening audience. On the contrary, participation by the listening audience “seems essential to insure that the holders of broadcasting licenses be responsive to the needs of the audience. . . .” Moreover, the court continued, the fact that the FCC itself is directed by Congress to protect the public interest is no reason “to preclude the
listening public from assisting in that task.” The court noted that
the FCC’s duties are vast and it cannot monitor every broadcast. And
the Commission has always viewed its regulatory duties “as guided if
not limited by our national tradition that public response is the most
reliable test of ideas and performance in broadcasting as in most areas
of life.” As for the theory that the FCC itself can represent listener
interests, the court said:

When it becomes clear, as it does to us now, that it is no longer
a valid assumption which stands up under the realities of actual
experience, neither we nor the Commission can continue to rely
on it. The gradual expansion and evolution of concepts of stand-
ing in administrative law attests that experience rather than logic
or fixed rules has been accepted as the guide.

The court added that expedients such as permitting the public to
write letters of complaint or appear as witnesses at local hearings
were not sufficient; the beneficial contribution of listeners “must not
be left to the grace of the Commission.”

The court then set forth a theory of representation for the agency’s
“consumers” or constituents. Unless they can be heard, it said, there
may be no one to bring unsatisfactory programming to the FCC’s at-
tention: “Some mechanism must be developed so that the legitimate
interests of listeners can be made a part of the record which the Com-
mission evaluates.” Experience demonstrates, the court said, that
“consumers are generally among the best vindicators of the public
interest.”

In order to safeguard the public interest in broadcasting, there-
fore, we hold that some “audience participation” must be allowed
in license renewal proceedings.

The court then suggested the kind of groups or organizations that
might properly represent the public:

The responsible and representative groups eligible to intervene
cannot here be enumerated or categorized specifically; such com-
munity organizations as civic associations, professional societies,
unions, churches, and educational institutions or associations
might well be helpful to the Commission. These groups are found
in every community; they usually concern themselves with a wide
range of community problems and tend to be representatives of
broad as distinguished from narrow interests, public as distin-
guished from private or commercial interests.

The Commission should be accorded broad discretion in es-

cluding rules for determining which community representatives are to be allowed to participate and how many are reasonably re-
quired to give the Commission the assistance it needs in vindic-
cating the public interest.

Were this decision to be followed with respect to other agencies, it would revolutionize the present law of participation in administrative proceedings. It is too soon to know its effect. But meanwhile there are other straws in the wind.

C. *Advisory Hearings*

A number of agencies have not waited for the law of standing to develop a measure of democratic participation. Either by regulation or statute, they have provided for advisory hearings—hearings that are not binding on the agency, but have the virtue of being open to all—much like a town meeting, held before a particular agency on a particular issue. The Federal Highway Act, 23 U.S.C. § 128(a) (1964), provides as follows:

Any State highway department which submits plans for a Fed-
eral-aid highway project involving the bypassing of, or going through, any city, town, or village, either incorporated or un-
incorporated, shall certify to the Secretary that it has had public hearings, or has afforded the opportunity for such hearings, and has considered the economic effects of such a location. Any State highway department which submits plans for an Interstate System project shall certify to the Secretary that it has had public hear-
ings at a convenient location, or has afforded the opportunity for such hearings, for the purpose of enabling persons in rural areas through or contiguous to whose property the highway will pass to express any objections they may have to the proposed location of such highway.

The hearings contemplated by the Highway Act are not like either the judicial model or the model of the legislative hearing as developed by Congress. There are, on the one hand, no requirements concerning evidence, testimony, cross-examination or the keeping of a record. On the other hand, the agency is not quite as free to disregard the hear-
ings as a legislature is; the highway department must certify that it “has considered” at least the economic objections to a particular lo-
cation. Thus it is that these hearings have a town meeting quality or, in current terms, an element of “participatory democracy.”

Another example of advisory hearings by regulation is the Forest Service’s provision for hearings on wilderness classification. When the Service wishes to promulgate a decision concerning a wilderness area,
officials must first determine if there is any demand for a hearing. If so, a town-meeting type hearing is held at or near the location, before a Department of Agriculture official. At a typical hearing there might be statements by lumbermen, chamber of commerce officials, conservationists, scientists, labor unions, and members of the Forest Service itself. The hearing is part of the total record on the basis of which the agency ultimately makes up its mind.

There are, of course, major differences between an advisory hearing and the type of hearing that must be afforded one who has legal standing. A party with standing may be entitled to notice, to present evidence, to cross-examine other witnesses, to insist that the decision be based on the record made at the hearing, and to judicial review. These are very significant differences. Nevertheless, the advisory hearing deserves notice as a growing phenomenon, obviously designed to meet a growing need or demand.

D. Self-Government

Recently there have been some efforts to institutionalize community participation. In the antipoverty program, the Office of Economic Opportunity has sought “the participation of the poor” in directing community programs. Attempts to institutionalize such participation have taken various forms: community-wide election of representatives, participation of representatives in local programs, regional and national conferences, and conventions. Inevitably, the problems are tremendous: how is the electorate defined, how are leaders nominated and chosen, how does the electorate inform itself on the issues and transmit its opinions? Then there are political questions: to what extent is participation genuinely welcomed, how does such participation dovetail or collide with existing political power, and what happens if the participation becomes too well-organized, too powerful, and too radical? To begin such an experiment with “the poor” has its special difficulties: “the poor” are by definition the group least able, by education, experience, and opportunity, to take part in a new experiment in government. I cannot discuss the OEO experiment here, but it is a significant part of the total picture of efforts toward democratic participation.

E. Direct Action

To the three forms of participation just mentioned we should add a fourth: the type of action described in the introduction to this article. More and more often, it seems, people will not wait for the liberalization of the law of standing or the creation of advisory hear-
ing procedure; they resort to direct action. When a highway was proposed for the old canal towpath bordering the Potomac River, Mr. Justice William O. Douglas led a 189-mile protest hike to call attention to the recreational value of the towpath. The hike succeeded in getting the highway reconsidered. In 1954, when the hike took place, such demonstrations were unusual, even though protest demonstrations have always enjoyed a certain popularity (e.g., the Boston Tea Party). In the short space of a dozen years, demonstrations have become commonplace. Direct action is often combined with political and legislative efforts. When it was proposed to process and dispose of radioactive waste materials in the City of New Britain, a matter within the jurisdiction of the Atomic Energy Commission, townspeople passed ordinances forbidding the waste processing, protested at AEC hearings, engaged in a public relations campaign, and took the matter to court, all almost simultaneously.

One of the best examples of direct action I have seen is the Save the Park Campaign in New Haven. An interstate highway connector was about to be constructed through East Rock Park. Residents launched a campaign that included nearly every imaginable strategy: a citizens' organization, meetings, hearings, newspaper publicity, bumper stickers, Save the Park Days, local ordinances, new state legislation, and court action. At this writing the Park forces seem to have roundly defeated the highway department.

Direct action continues to be a constant newspaper story; it is a rare day when the New York Times does not carry at least one instance. Very recently it was reported that a group in Redwood City, California, was protesting a decision by the city's Board of Port Commissioners to allow the manufacture of napalm in the city to be used in the Vietnam War; objectors declared that "Redwood City will become known as a place where flaming death is manufactured." They were reported to have 2,600 signatures on petitions—enough to force a referendum on the decision of the Board. Thus public concern with planning stretches from old houses to war, and each effort confronts the common problem of control over planning decisions. But although there has been some success in getting results, piecemeal efforts are not likely to create a system of law. And in the end, only a system of law can control the planned society.

IV. AN APPROACH TO A LAW OF PLANNING

In what direction do the developments in administrative law point? Viewed as experiments, they are clues to a law of planning. They suggest that such law may at a minimum do something to cope with the
problems of democratic participation. They also offer some guidelines to the problem of choosing values and the problem of equality. And possibly they hint at steps the law can take to impose a form of limitation upon the whole planning process, leaving an area beyond for the individual. The discussion below considers these suggestions—in a way that must necessarily be tentative.

A. Democratic Participation

Any system of law intended to secure greater public participation in the process of planning and allocation must begin with the problem of notice. Unless there is some way that interested persons can find out about proposals before they are adopted, intervention will usually come too late. The problem of notice is not solved by an obscure reference in the Federal Register. Even the most alert citizen would find himself swamped by the deluge of announcements. And if he did find something he was interested in, he would not know what the particular issues were. There are at least two possible answers to the deluge problem. First, to some extent it is possible to count on specialized organizations—air passengers' associations and historic homes associations, for example—to be the watchdogs of the Federal Register. Many such organizations now exist and do keep watch; more watchdogs will come into being as the need arises. In addition, agencies might give special notice to interested organizations, and to anyone else who made a written request. Agencies might also be required to adopt master plans, and to give notice of these plans, in addition to notice of individual actions. The FPC could be required to formulate and make public its tentative plan for a whole river basin; the CAB could be asked for a regional transportation plan. This would consolidate the number of notices, and at the same time encourage longer-range planning, with the incidental benefit of more time for discussion. To focus debate, a master plan might be offered with alternatives, putting clear-cut choices before the public.

Assuming that the law could cope with the question of notice, the next problem would be the mechanics of participation. The easiest form of participation is by written statements, and this should always be possible. But, generally speaking, hearings of some sort are needed too. The advisory hearing seems a useful device. An advisory hearing before an agency requires certain procedural safeguards if it is to do its job properly. The hearing should be held before disinterested persons who did not initiate the original proposal. Agencies should be compelled to respond to hearings at least to the extent of giving reasons for
decisions. This might force the agency to give thought to adverse views. In addition, there should be some opportunity for public participation or argument in the review of initial decisions made after hearings, so that at the stage of final review, the agency would have before it advocates of alternative positions. Such procedures could make the advisory hearing process an integral part of the decision process. In every case of planning the appropriateness of a hearing and the kind of hearing might be judged according to flexible standards.

While these proposals are essentially pragmatic, they raise questions concerning some rather basic matters of theory. The first theoretical issue goes to the question of democratic structures: the nature of legislatures designed for planning and the nature of their constituencies. Our administrative agencies suggest a concept of a new multi-legislative democracy, in which Congress would perform only certain general functions of arbitration and oversight, and the remainder of its work would be carried out by many different specialized legislatures. This is not necessarily at war with the original constitutional scheme of things. The original scheme contemplated many local legislatures. Because many interests no longer divide along regional lines, these local legislatures can no longer deal with some of the most important public issues. Interests still divide up, however, but the division instead of being regional is functional—and hence our administrative agencies might be thought of as the local, specialized legislatures of today.

If the agencies are to be our new legislatures, we may also speculate about a new type of constituency. This is already with us, as the political scientists point out, in the form of large organized interests: corporations, industry trade associations, labor unions, organizations representing groups like the farmers or automobile owners and interest groups such as the fishermen's or riflemen's associations. And over the years most of the planning and allocating agencies have tended to develop their own constituencies. Some of the constituents have been in effect customers or partners, as the airline industry is to the CAB. Others have been watchdogs and critics as the Sierra Club is to the Forest Service. Such constituents already take a day-to-day interest in the activities of "their" agencies. They have the resources of specialized help to obtain sufficient information fully to understand and evaluate the agency decision, and they have an easier time getting heard because they know who is in charge and they are big enough to force him to pay attention. They invite a concept of democracy based not on locality or geography but rather a democracy of mutual interests. But they raise many questions. Are these or-
ganizations themselves internally democratic? Do they collectively represent all the voices in society, or only the most powerful and articulate? Is a division by mutual interests likely in the long run to be profoundly divisive? Certainly interest groups cannot be the exclusive method of democracy. But if we take as an axiom that wherever planning decisions are made, representation is needed, then there must be a forum for telephone users (to debate digit dialing) and for other categories into which our lives are divided; the form of government must follow the substance.

Should these organizations be given an institutional role in the planning process? Such a role might take several forms. Specialized groups might be afforded direct notice of proposed agency action and be admitted as of right to hearings. The Forest Service has worked out a more structured role for interest groups by setting up advisory councils at which different industry and interest group representatives are invited to join in a council which is used as a sounding board and source of ideas for the agency. These advisory groups do not have formal authority and one difficulty is that the Forest Service chooses the council, which may be more of a "company union" than an independent force. Nevertheless it does provide a regular channel for interest groups which already exist.

A further theoretical issue raised by the problem of democratic participation concerns the concept of free speech in a planned society. Constitutional protection of speech has centered on content—the right to express ideas which others find objectionable. But today a greater problem of free expression is not the content of speech but whether speech can be made audible—whether speech can be effective. To be effective, speech must reach other citizens (this is increasingly a problem of mass communications) and must also reach government. The problem of speech that is most sharply presented by a planned society is getting heard by government.

What are the means for reaching government from the outside? Perhaps the most obvious is through "political influence"—the kind of power that large economic interests, organizations and pressure groups are able to exert. A second route is through the use of television, radio, the newspapers or magazines—a route available only to a few well situated persons or groups. A third route is by legal proceedings before the agencies and the courts. In criticizing administrative law, we should not overlook the fact that one of the underlying functions of legal proceedings against the government is not to "win" in the old-fashioned sense of winning a lawsuit, but to force the gov-
ernment to pay attention to a particular point of view. This is perhaps the primary value of litigation challenging the licensing of atomic waste disposal in New Britain, or the building of a dam in Hell's Canyon. Indeed, the Supreme Court has held that certain forms of litigation must be protected as free speech under the Constitution. But legal proceedings, like political influence and mass communications, are open only to a very few. The problem, then, is to create a channel of communication by which the ordinary citizen can reach his government. It is this that we have been dealing with in discussing the problems of notice, advisory hearings, and constituencies. These methods, or others like them, must strive to create a constitutional right of effective speech in the planned society.

B. Broadening the Values in Planning

The Scenic Hudson case suggests that Congress, while it cannot fix more definite standards for agency decisions, can insist upon broader standards: a more sweeping definition of the agency's task and a wider list of the values that must be considered. Is this a workable remedy for the narrowness of some agencies' vision? Perhaps it would help to think of the delegation of power to any agency in terms of a corporate or an institutional charter, conferring the general government and management of a given area, just as the Corporation of Yale University is given, not an instruction to make rules in "the public interest," but the "government, care, and management" of the University. This should make clear to an agency that its responsibility cannot be satisfied by passive balancing of competing interests, but that it must engage in affirmative planning on its own. The charter of the Forest Service furnishes an example. It states that "[T]he Secretary of Agriculture is authorized and directed to develop and administer the renewable surface resources of national forests. . . ." Such a statutory mandate is, of course, easier to lay down where the subject matter is publicly owned. But could we not also tell the CAB that its responsibility is to administer the public air corridors of the nation and to plan, promote and regulate the national air transportation system? The FPC could be chartered as an agency to care for and manage the nation's hydroelectric resources. Thus the law could establish each agency as a public enterprise like the post office or the TVA—operated in part by private enterprise but with the public agency responsible to the consumers for the ultimate product. Such a delegation would not only remind the agency of the scope of its responsibilities, it would make clear to the public where responsibility
for failure lies. If television programs are objectionable, the public should be able to hold the FCC accountable, and if airline service is unsatisfactory the CAB should be an object of criticism. The public will, of course, continue to blame the private entrepreneurs as well, but the law can help the public to perceive and locate governmental responsibility.

Besides delegating power, Congress might also attempt to set down a checklist of certain basic goals or values that the agency must take into consideration. The charter of the Forest Service, 16 U.S.C. § 531(a) (1964), once again offers a model. The Secretary of Agriculture is told to administer the forest resources for "multiple use." This term is defined as management of forest resources

... so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources; each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.

In the case of each planning agency Congress could take special pains to define those values which might seem outside the immediate scope of the agency's main concern. For example, the FPC could be told to concern itself with scenery, recreation, historic and archaeological values as well as the production of hydroelectric power. Congress might thus seek to guard human values that might otherwise be ignored. Such statements of values are no mere gesture. Experience with the Forest Service demonstrates that if a professional agency is developed and given full responsibility, it is of the nature of bureaucracy that it will take very seriously whatever guides Congress imposes. The Forest Service has its limitations of vision, but it does try to carry out its mandate faithfully. It demonstrates how well an agency can function if its basic responsibility for planning and management (with certain defined goals and values) is made clear to it and to the public.

A broader outlook can also be built into the agency itself by institutionalizing certain values which might otherwise be neglected. Why not a bureau of conservation in the highway department, a depart-
ment of fisheries for the FPC, a division of educational television in the FCC? Such agencies or bureaus could be depended on to do what comes naturally to any bureau: pursue its own raison d'etre as ardently as possible. The device of bureaus to represent interests is already common in government, like the Disarmament Agency which is supposed to counteract the Pentagon. It is no longer a surprising thought that government must take measures to ensure a broad range of values and even to promote its own opposition. As government grows ever stronger, it must underwrite pluralism in ever more explicit terms.

An agency can only support a full spectrum of values if it has some way to identify all of them. This exposes a further duty of the planning agency—not merely to represent all visible values, but to seek out those which are not so readily discovered. Suppose the issue is whether to build a dam. Certain interests are immediately apparent—navigation, consumption of electricity, recreation. But a search might disclose many other interests at stake. What is the impact of a dam on the natural environment—on wildlife and erosion? What is its impact on one region of the United States as against another? On agriculture in the region of the dam and in competing regions? These are questions for research and for science. Often only government will have the resources to carry out such investigations; there may be no articulate representatives of some of these invisible issues (just as our highway builders have had little knowledge of the social effects of the multitudes of automobiles they set rolling). The theorists of planning assume such scientific investigation. It remains for administrative law to find means of making certain that it takes place.

What has been said so far has been concerned with insuring that planning agencies take note of as wide as possible a range of values. Broadening agency charters, institutionalizing and seeking out values, and permitting constituencies to take part in decision making are all devices to increase the likelihood that the less immediate and less vocal values will be heard from. But the reasons why some values are neglected go much deeper than failure to think about them. The underlying problem is our failure to fit them into a budget of our needs.

The hiker who walks the Appalachian Trail in New York State frequently encounters paved highways. At one point the trail requires him to cross an extremely busy four-lane highway where cars and trucks travel at least 60 miles an hour. There is no median strip and because of dips in the road visibility is cut off in both directions.
Why is there no footbridge at this dangerous place? Perhaps it was a failure of planning. The highway builders, intent upon automobile transportation, simply did not think of the need for a footbridge. Maybe they did not even know that the Appalachian Trail must cross the highway. The initial failure may, therefore, have been lack of knowledge. Had the highway department been properly set up for planning it might—either on its own or at the prodding of a hikers’ organization—have been aware of the need for a footbridge. It does not follow from this, however, that the bridge would have been built. Bridges cost money and the highway department must budget its funds to produce the maximum in transportation. Does the highway department have a budget for trails? If there is no footbridge at this point, it is most likely not merely a failure of planning, but also because we have not been willing to pay for this particular value. The plight of the pedestrian everywhere in our country shows the link between identifying values, giving them recognition and paying for them—three closely interrelated aspects of the planning process. Let the pedestrian try to walk along the street in the sidewalkless suburbs, or promenade along a riverbank that has been preempted by railroad yards and highways, or cross a bridge built mainly to carry vehicular traffic, and he will find himself humiliated and harassed, if not in actual danger.

The values which are most frequently neglected by planners are those which cannot be measured in commercial terms and therefore cannot conveniently be budgeted. In a society in which government supports and subsidizes so much, it is necessary that the intangible values be supported too. If we want a system of trails for hikers, we must be prepared not only to recognize this in our planning but to provide for it in our budgets. In New York City an organization called the Committee to Beautify the City of New York proposed that all new buildings be required to budget one per cent of their costs for aesthetic purposes. The tiny size of even this proposal shows how inadequate our conception of paying for values has been. If we want vestpocket parks in our cities, it is not only a question of leaving some space open in our planning but also of paying for that space and for its maintenance. Our cities could make good use of the rooftops of the houses for recreational space sadly lacking down below—if we were willing to pay. Along our turnpikes we could have genuinely appealing picnic areas at a distance from the road, spread out enough to offer some privacy and provided with running water, fireplaces and ample lawns. Accidents on highways due to driver fatigue
might well be cut down by such rest spots. If our present “rest areas” are barren oases, gravel strips frighteningly close to rumbling trucks and bare to a harsh sun, it is because we will not pay for more. This is a failure of planning in the most profound sense—a failure to develop methods by which we can recognize the full spectrum of our needs.

C. **Equality and Entitlement**

What place does the ideal of equality have in a planned society? Every act of planning redistributes values, intentionally or not, and much planning is carried on by direct allocation of resources. Maybe the larger questions of equality—between farmer and urban worker, between entrepreneurs and scientists—must be left to the philosophers or to the workings of the political system. But recent developments in administrative law suggest that there are at least two kinds of equality which the law is capable of comprehending. The first, and narrower, is equality within a single allocation system. The second is equality in the sense of a minimum share in the commonwealth. Since I have written on these issues elsewhere, I will be brief here.

The first problem is equality within a single allocation system. The role of government as an allocator of values is common to socialist as well as democratic regimes. As government comes to occupy a central position in the economy, it becomes the dispenser of resources, occupational licenses, educational privileges, contracts and franchises, which are a major source of the status and well-being of individuals. Allocation which meets the needs of planning does not, however, necessarily measure up to any ideal of equality. Planning focuses on the needs of the majority and its ends might well be served by what could be considered unfairness or inequality in a given case. Demands of fairness, on the other hand, exist regardless of whether they serve the interests of the people as a whole. If allocation is subject to a rule of fairness, there can be a basic tension between the planning and allocating functions of government.

Resolution of this tension might be easy if planning and allocation could be separated into a two-step process. But very frequently they are inseparable. When a television licensee is selected, the FCC must make a planning choice (what type of broadcasting will best serve the public interest) and at the same time it must allocate a very substantial asset. Here planning takes place by means of allocation; allocation represents individual acts of policy making. It seems to me that we must make an arbitrary choice of whether the planning or the equality ideal shall prevail when the two conflict. Some re-
soures should be distributed according to principles of objective entitlement, available to all who meet a statutory standard. Such resources would take on the status of protected property rights. Where property is recognized, adjudication and principles of fairness and equality are appropriate. Other resources should be distributed to those who will use them in a manner that will best serve certain policies of the community. Where the private holder is performing an essentially public function, rights of property and equality should not be recognized and the planning rather than the adjudicatory model is appropriate.

The choice of which valuables dispensed by government should be made subject to principles of objective entitlement has largely been made by the law already: they are valuables that are closely identified with the security and independence of individuals. Among the resources dispensed by government which it would seem desirable to treat as property are social security pensions, veterans' benefits, professional and occupational licenses, public assistance, unemployment compensation, public housing, benefits under the Economic Opportunity Act, Medicare, educational benefits and farm subsidies. Planning with respect to such rights can be done on a general basis; the rights themselves should be distributed to all who qualify for a certain status. Governmental decisions concerning such rights should be and are increasingly subject to the requirements of due process of law; such rights should not be denied or revoked without a full adjudicatory hearing.

In contrast, the right to build a dam on a navigable river, to fly an airline route, or to broadcast over a television channel need not, and probably cannot, be distributed in accordance with objective standards. Here the ideal of equality must be abandoned, but the ideal of public service can be strictly enforced. These values should not be treated as property and the law should make every effort to see that they do not become property in the hands of holders. In the case of a television license, for example, there is no reason why the law should permit the license, which is handed out free, to be sold or transferred by the licensee for what is frequently a large sum of money. It should be no more transferable than a government contract. Such rights would still be very valuable and much sought after but they would not quite have their present profoundly corrupting windfall aspect. If the government retained close supervision over the activities of the holders of these valuables, and also accepted the ultimate responsibility for the services performed, this would further
avoid any similarity to private property. If these steps were taken, we might approach the ideal of equality in the area of public service by private entrepreneurs. The approach to equality would be to eliminate the gross inequality of pork barrel windfalls from government allocation. The spectacle of a television licensee receiving a multi-million dollar windfall which he can collect without rendering equivalent service to the public would be eliminated, and with it one of the most pointed public displays of unjustified inequality. If we are to have a public-private state, we must avoid the appearance of princely largess to court favorites.

There remains the second kind of equality: equality in the sense of a minimum guarantee of income, services and well-being. In a planned society, poverty, lack of opportunity and lack of basic services become increasingly intolerable. Every allocation of resources will be weighed critically against these unmet basic needs. Hence a planned society must establish minimum standards for each individual's well-being—needs that will receive first priority in the nation's budget. Education, housing, medical care and an income for necessities surely come within this category. The law should remove them from administrative discretion, establish them as rights, and safeguard them with the protections of due process of law. Once again we approach an area which cannot be discussed in the present article. It must suffice to say that the concept of a guaranteed minimum would go a long way toward integrating the ideal of equality with the ideal of planning.

D. Beyond Planning

Let us assume that planning and allocations can be made more democratic, more pluralistic and more egalitarian. Is that all that we should ask of the law? In a society which is not simply majoritarian, which seeks to protect individuals and minorities as well, the answer must clearly be no. What is there to prevent planning from reaching the most private details of an individual's life—from intruding into an individual's innermost self? Majoritarianism and egalitarianism do not necessarily respect the individual. The "public interest," no matter how democratically arrived at, no matter how broadly conceived, is not by itself an adequate concept of society. The law must draw a line beyond which planning cannot go.

The starting point for such a line must be the Bill of Rights. The Constitution marks out the minimum circumference within which the individual needs to be protected at all costs: speech, conscience,
and privacy. But the safeguards of the Bill of Rights can be effective barriers against planning only if they are given a functional interpretation that is meaningful in today's world. I have already suggested, in an earlier part of this article, a functional interpretation of free speech that would enable it to work effectively in the formation of planning. Here, in searching for a stopping place for planning, a functional approach may best be found in the concept of privacy.

Privacy lies behind a number of provisions of the Bill of Rights: the guarantee of freedom of conscience, the prohibition against quartering soldiers, the right to be free of arbitrary searches and seizures, the guarantee against loss of liberty or property without due process of law. Recently privacy received recognition in its own right by the Supreme Court. The Court held that the Connecticut law prohibiting the giving of birth control advice to married couples was an unconstitutional invasion of privacy. From this starting point the right of privacy should grow—and its growth should be proportional to the need for it. Americans have always enjoyed a large measure of privacy. In earlier times privacy received its chief protection from the institution of private property, the existence of the frontier, and the mere absence of government from many areas of life. As living becomes more crowded, and governmental regulation becomes more pervasive, privacy is constantly more threatened, and must increasingly depend for its survival upon the protection of positive law. The objective of such law should be to keep the amount of privacy constant through changing circumstances and times. Planning must be halted at the line where belief, artistic expression, domestic affairs, education and creativity begin.

It is in meeting the need for an expanding Bill of Rights that the most crucial function of the courts and of judicial review is to be found. Courts cannot say what good planning is; at most they can insist that procedures be followed, parties heard, values mentioned and jurisdictional limits observed. But when planning confronts the Bill of Rights the job of the courts is to see to it that each right is equal to its task. In this sense, the courts may expect an ever higher role and responsibility in the planned society.

The definition of the area beyond planning is the most vital function of the law of the planned society. For it is here that the distinctive quality of America lies. Planning exists in socialist and capitalist societies alike. And public-private ownership is becoming common to both societies as private property merges into public in the United States and emerges from public in the Soviet Union. Even
the democratic form of government will not long serve to distinguish the United States from Russia, for just as democracy is changing its form in the United States, so the Soviet Union is adopting new machinery to make planning more responsive to public demand. The distinctiveness of the United States is found—and has always been found—in its respect for the individual human being.

CONCLUSION

The purpose of this article has been to urge that we forego the illusion that we do not have planning, recognize the great problems that planning brings to an open society, and seek new laws to make the best possible accommodation of planning and liberty. We need a Constitution for the Welfare State.

The major contemporary problems of constitutional law cluster around three categories: the functioning of the democratic system, the distribution of rights and equities in the commonwealth, and the maintenance of a boundary between the community and the individual. This article has concentrated on the first. In seeking a more adequate conception of democracy for today's world, it has taken an essentially conservative position: it attempts to preserve the outlines of the American system rather than to abandon it. There is a large body of opinion which argues that neither democracy nor pluralism is an appropriate ideal for the twentieth century state. But it is still possible that we have not given either democracy or pluralism enough of a chance to show whether they can function in the midst of planning.

The search for a law for the planned society must be carried on in light of knowledge that is largely pessimistic. Almost all the evidence we have argues that when man is in the mass, the faults of human nature are grossly enlarged and the hard-won virtues swept away. Faced with the banality and conformity of a mass society, the individual may find that self-expression and individualization of experience are possible only by a retreat to a radical subjectivity. But it is still open to us to make improvements within our society wherever they are possible. At a minimum, we can clear away some of the pretense and confusion of administrative law.

The issue is all summed up in the supersonic plane. It can travel faster from somewhere to somewhere, but its huge cost will take money from other domestic needs, and its sonic boom menaces those who live in its path. The President—acting in secret, and without submitting the question to Congress or the people—has ordered the plane to be
built, partly, we are told, in order to increase United States prestige. Is the decision to authorize this plane a wise one? Has our system of planning been able to make an adequate choice among alternatives? Is the method of decision consistent with our democratic ideals? Do we know whether most people would really prefer faster transportation if they had experienced the invasion of their lives which comes with it? One night last summer I slept out on the porch of a cottage by a lake. I woke early in the morning and lay watching the fragile silence of pines, mist, and water. Suddenly, from a casually passing plane, came a shattering sonic boom. In that inhuman impact all the hitherto academic shortcomings of administrative law came home to me.