

# Administrative Law in the Next Century\*

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The law, says Cardozo, has its periods of ebb and flow.<sup>1</sup> In administrative law, the flood tides have been upon us for most of the century. There is every reason to believe that this situation will continue in the foreseeable future.

Administrative law, of course, mirrors the society itself; its very existence has been called forth by the societal changes that have occurred during the past two centuries. Its history reflects the changed nature of society and the altered role of government to deal with those changes.

The future of our administrative law during the next century depends upon the future of the American society. Administrative law in a wholly collectivistic system is necessarily a different thing from what it is in a purely atomistic or market system, or in the present-day mixed society.<sup>2</sup> If Orwell's *1984* is to set the pattern for the next century, our administrative law will be entirely different, in institutions and precepts, from the present system. The same would be true, although perhaps to a lesser extent, if the society is to be cast in the mold of Ayn Rand's *The Fountainhead*.

It is difficult enough to try to play the prophet with regard to legal trends without having to foresee what American society will be like in the next century. The present article is based upon the prediction made by C. P. Snow in 1970, carried forward into the next century:

The worry I have met . . . among Americans is a fear of revolution. This is totally unrealistic. . . . The underlying structures—as the young call them—of American society are immensely strong. By structures I mean the institutions that the radicals get cross about. . . . I would be prepared to make a bet, though I shan't be there to collect, that by the year 2000, the essential framework of [the United States] . . . will be remarkably similar to what it is today.<sup>3</sup>

In other words, this paper assumes that there will be no societal upheaval in the United States during its third century. That may be a rash assumption in an era in which the pace of change in human affairs has taken a quantum leap forward.<sup>4</sup> Still, it is the only workable assumption

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\*This article is based upon Schwartz, *Administrative Law: The Third Century*, 29 AD. L. REV. 291 (1977), which has been revised and expanded for this Symposium.

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1. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 126 (1921).

2. Cf. Calabresi, *Torts—The Law of the Mixed Society*, in *AMERICAN LAW: THE THIRD CENTURY* 104-05 (B. Schwartz ed. 1976) (discussing the approach to injury-related issues in a purely collectivistic society).

3. Snow & Snow, *Hope for America*, LOOK, Dec. 1, 1970 at 30, 33.

4. Cf. A. TOYNBEE, *EXPERIENCES* 182 (1969) (discussing the static nature of mankind's development).

for a paper devoted to *legal* trends, even in an area so dependent upon the nature of the society.

### I. ADMINISTRATIVE POWER

Administrative power is as old as the American government itself. The very first session of the first Congress enacted three statutes conferring important administrative powers.<sup>5</sup> Well before the setting up of the Interstate Commerce Commission [ICC] in 1887<sup>6</sup>—the date usually considered the beginning of our administrative law—agencies were established which possessed the rule-making and/or adjudicatory powers that one usually considers to be characteristic of an administrative agency. Modern administrative law, nevertheless, may be said to start with the ICC, the archetype of the modern administrative agency. It has served as the model for a whole host of federal and state agencies that were vested with delegated powers patterned after those conferred upon the first federal regulatory commission.

Conscious use of the law to regulate the society has required the creation of an ever-growing administrative bureaucracy. The ICC has spawned a progeny that has threatened to exhaust the alphabet in the use of initials to characterize the new bodies. Nor has the expansion of administrative power been limited to the ICC-type economic regulation. A trend toward extension into areas of social welfare began with the Social Security Act of 1935.<sup>7</sup> Disability benefits, welfare, aid to dependent children, health care, and a growing list of social services have since come under the guardianship of the administrative process. The increasing concern with environmental matters has also given rise to new agencies with expanded powers. The traditional area of regulation is now dwarfed by the growing fields of social welfare and environmental concern.

Will the trend toward proliferation of administrative agencies continue, or even be intensified, during the coming century? The current disillusionment with government in general and the administrative process in particular may lead some to conclude that a negative answer is appropriate—that the trend toward administrative power has already passed its peak. The most suggestive movement in administrative law today is one that aims to rationalize administrative power. Administrative reform is high on the political agenda; the Carter Administration has made administrative reform a major part of its domestic program.

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5. Act of July 31, 1789, ch. v, 1 Stat. 29 (repealed 1790); Act of Sept. 1, 1789, ch. xi, 1 Stat. 55 (repealed 1792); Act of Sept. 29, 1789, ch. xxiv, 1 Stat. 95 (expired).

6. Act of Feb. 4, 1887, ch. 104, 24 Stat. 379 (codified in scattered sections of 49 U.S.C. (1970 & Supp. V. 1975)).

7. Social Security Act, ch. 531, 49 Stat. 620 (1935) (codified in scattered sections of 42 U.S.C. (1970 & Supp. V. 1975)).

### A. *Delegation of Powers*

During the past half century a prime task of our developing administrative law has been to legitimize the vast delegations of power that have been made to administrative agencies, particularly at the time of the New Deal. The 1935 *Schechter* and *Panama* cases<sup>8</sup> struck down the most important early New Deal measure on the ground that it contained excessive delegations of power because the authority granted under it was not restricted by a defined standard. Today the opinions in those cases seem written from another world. The courts have all but abandoned the view expressed in *Schechter* and *Panama* that laws delegating power must be invalidated unless they contain limiting standards. Wholesale delegations have become the rule in our administrative law. The touchstone has become the "public interest" criterion. As Charles Reich summarized it, "The basic theme [is] simple: economic power . . . must be subjected to the 'public interest' "<sup>9</sup> as defined by the administrator.

The virtual demise of the requirement of meaningful standards to restrict the authority delegated to an administrative body has serious implications. The requirement serves the function of ensuring that fundamental policy decisions will be made, not by irresponsible (in the political sense) bureaucrats, but by the elected representatives of the people. As Judge J. Skelly Wright put it, "At its core, the doctrine is based on the notion that agency action must occur within the context of a rule of law previously formulated by a legislative body."<sup>10</sup> It is the job of the legislature to make the difficult policy choices in a representative system. When the legislature passes this job on to nonelected officials, it contributes substantially to the dilution of democratic responsibility.

As recently as 1963, three dissenting Justices of the United States Supreme Court would have used the doctrine against delegation without defined standards to invalidate the power given to the Secretary of the Interior to allocate water resources among competing states.<sup>11</sup> In 1974, the Court itself stated that "the requirements of *Schechter*" were still hurdles for delegating statutes to overcome<sup>12</sup> and, in 1976, it repeated the rule that a delegation of power must be accompanied by discernible standards.<sup>13</sup> Some of our most distinguished judges, speaking off the bench, have called for revival of meaningful limitations on delegation.<sup>14</sup>

Nevertheless, it is difficult to foresee a stemming of the flood of

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8. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

9. C. REICH, *THE GREENING OF AMERICA* 45 (1970).

10. Wright, *Beyond Discretionary Justice*, 81 *YALE L. J.* 575, 583 (1972).

11. *Arizona v. California*, 373 U.S. 546, 646 (1963) (Harlan, J., Douglas, J., and Stewart, J., dissenting).

12. *National Cable Television Ass'n v. United States*, 415 U.S. 336, 342 (1974).

13. *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 458, 559 (1976).

14. See W. DOUGLAS, *GO EAST YOUNG MAN* 217 (1974); Wright, *supra* note 10, at 582-86.

virtually uncontrolled delegations. The trend is all toward allowing the legislature to delegate power as it chooses, with or without meaningful standards. That trend seems likely to continue, particularly in an age of endemic crises. Although some judges still talk the language of the standards requirement, their words have an increasingly anachronistic ring.

We can also project a continuing expansion of administrative power into areas traditionally occupied by the courts. When the Federal Trade Commission Act was before Congress, Senator Sutherland asserted that the adjudicatory authority Congress proposed to vest in the FTC "is a judicial power and belongs to the courts."<sup>15</sup> Hence, he continued, the Act contained an invalid delegation of judicial power to the proposed commission. Twenty years later, however, as Mr. Justice Sutherland, he had no difficulty upholding the independent status of the FTC, although he recognized that it "was created by Congress as a means of carrying into operation legislative and judicial powers."<sup>16</sup>

The evolution in Sutherland's thinking on delegation of judicial power has paralleled that of his judicial confreres during the present century. Workmen's compensation, at first resisted as contrary to basic conceptions, was soon accepted by courts throughout the country and has virtually replaced the industrial accident case, the typical tort action of a century ago. Indeed, the future of much of tort law may lie in the extension of the principle of compensation to other areas, notably to the field of automobile accidents. Puerto Rico has already established an Automobile Accident Compensation Administration.<sup>17</sup> By the end of the century we may expect similar agencies in the states, particularly as the inadequacies of no-fault insurance become apparent. We may also expect that judicial jurisdiction will give way to administrative jurisdiction in other fields in which the courts have not been able to adjudicate effectively, including family law and probate law, and possibly business law. As the Supreme Court has recently recognized, constitutional guarantees applicable in the courts, such as the right to jury trial in civil cases, do not stand in the way of delegations of adjudicatory authority to administrative agencies.<sup>18</sup>

Yet there is a paradox in this accelerating trend toward administrative justice. As expressions of disillusionment have increasingly been heard about the agencies in operation, the law is finding new worlds for the administrative process to conquer. To speak of public institutions as endowed with life is more than metaphor. The governmental body, like

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15. 3 B. SCHWARTZ, *THE ECONOMIC REGULATION OF BUSINESS AND INDUSTRY 1778* (1973).

16. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 630 (1935).

17. P. R. LAWS ANN. tit. 9, § 2060 (Supp. 1976).

18. *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977).

the animal, has periods of vigor and decline. The vital spark has gone out of the administrative agency. Even undue influence and corruption—cancers of the governmental organ—have appeared. Yet despite all the concern and seeming activity in Washington and elsewhere, there is no effective movement to reduce administrative power. If anything, the opposite trend seems likely to continue.

### B. *Administrative Criminal Law*

Norval Morris has called for an administrative law of crimes as an important need of criminal law during the next century.<sup>19</sup> Not too long ago such a call would have been inconsistent with basic administrative law principles, since there appeared to be a strict line between civil and criminal cases in the delegation of adjudicatory authority to agencies. That line has now become a penumbra. There exists a borderland where at least some criminal jurisdiction may be transferred from courts to agencies in a manner that is consistent with administrative and constitutional law principles.

The development of administrative criminal law is underscored by *Rosenthal v. Hartnett*<sup>20</sup> which upheld New York's legislative scheme to remove most traffic offenses from the courts to administrative agencies. Petitioner in *Rosenthal* had been found guilty of speeding and fined fifteen dollars by a Department of Motor Vehicles hearing officer. This determination was affirmed by the Appeals Board of the Administrative Adjudication Bureau of the City of New York. Petitioner challenged the determination as unconstitutional, focusing his claim narrowly on the quantum-of-proof issue. But the court framed the issue more broadly in terms of the "constitutionality of the substitution in the adjudication of traffic infractions of an administrative agency and administrative procedures for courts of criminal jurisdiction and judicial procedures."<sup>21</sup> On these terms, the court agreed that the legislature might transfer cognizance of traffic infractions to the jurisdiction of an administrative agency. The reason given was the intensely practical one of necessity: the volume of traffic offenses and the congestion in the criminal courts justified the legislature in seeking an administrative solution.

Practical necessity compels the affirmative answer to the question of the validity of such a delegation of criminal jurisdiction to an agency. The operation of most traffic courts serves only to bring both the courts and the law into disrepute. Theoretical objections to the delegation of even minor criminal jurisdiction to an agency have had to yield to the growing inadequacies of traffic courts, particularly in large metropolitan areas.

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19. Morris, *Criminal Law—Some Second Century Problems and Third Century Solutions*, in *AMERICAN LAW: THE THIRD CENTURY* 97 (B. Schwartz ed. 1976).

20. 36 N.Y.2d 269, 326 N.E.2d 811, 367 N.Y.S.2d 247 (1975).

21. *Id.* at 272, 326 N.E.2d at 813, 367 N.Y.S.2d at 249.

The "administrative traffic court" may prove but the first step in agency intrusion into the criminal law. We may expect increasing efforts to transfer other lesser offenses, notably those involving violations of sumptuary laws, from courts to agencies. Thus, the Governor of New York in 1971 called for the transfer of jurisdiction from the courts of "those offenses and other matters that can be effectively handled outside the court system."<sup>22</sup> Administrative "regulation must replace our present futile reliance upon the criminal justice system in such areas."<sup>23</sup> If these recommendations are followed, the administrative agency may soon spawn progeny that will dwarf the present criminal justice system.

This prediction must, however, be qualified by constitutional considerations. In the criminal field, the Bill of Rights places upon the delegation of adjudicatory powers to agencies limits that do not exist with regard to civil cases. The guarantee of trial by jury would alone bar the trial of felony cases by tribunals other than courts. In addition, administrative agencies may not be vested constitutionally with the power to impose imprisonment as a penalty.<sup>24</sup> If criminal jurisdiction is delegated to agencies, punishment must be limited to monetary penalties. Transfer of criminal jurisdiction from courts to agencies means that imprisonment must be eliminated as punishment for the offenses concerned, and the offenses should be reclassified as noncriminal.

In addition, a caveat should be imposed on the current willingness to abandon the traditional reluctance to confer criminal jurisdiction upon agencies. Considerations of practical efficiency in areas such as traffic violations scarcely justify stripping the courts of a major part of their criminal competence. Perhaps conduct such as gambling and prostitution should no longer be considered sufficiently harmful to society to justify rigid prohibition. Nevertheless, while such acts remain offenses, we should hesitate to remove the safeguards of the criminal law from those charged with their commission. What is to be feared is that the present crisis in the criminal courts will exert a kind of pressure which will make what was previously clear seem doubtful, and which could bend even seemingly settled administrative law principles too far.

### C. *Legislative Control*

President Carter has asserted the unconstitutionality of the so-called legislative veto<sup>25</sup>—that is, statutory provisions empowering one or both Houses of Congress to disapprove executive and administrative action by

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22. N.Y. Times, Jan. 7, 1971, at 26, col. 5.

23. N.Y. Times, Oct. 11, 1970, at 80, col. 5 (quoting Mayor Lindsay of New York City urging that housing offenses, gambling, and prostitution be removed from the criminal courts and transferred to administrative agencies).

24. *Wong Wing v. United States*, 163 U.S. 228 (1896).

25. N.Y. Times, June 22, 1978, at 1, col. 1.

resolution not subject to the President's veto power.<sup>26</sup> The President's objection appears unlikely to stem increasing efforts, in which the legislative veto technique plays a prominent part, to secure effective legislative control over administrative action.

The increasing use of the legislative veto is a direct reflection of the growing malaise over uncontrolled administration. In the words of a recent *New York Times* editorial, "Imperial Presidencies and imperious agencies have made the 'legislative veto' increasingly attractive to Congress. . . . It has been only natural for Congress to seek a redress in the balance."<sup>27</sup> The great need in an era of ever-expanding administrative authority, accompanied as it is by an almost reciprocal disillusionment with governmental agencies, is to establish effective safeguards. One response to that need has been the growing interest in more adequate legislative oversight. Apart from such indirect legislative pressures as control over appropriations, power over appointments, and exercise of investigative authority, legislative control over the executive has generally been absent from American administrative law. This lack of effective direct legislative supervision constitutes an important lacuna in the system.

Legislative review of administrative action, through techniques such as the legislative veto, represents a worthwhile attempt to fill this void. The movement to provide for legislative review has been spreading in recent years. According to a 1976 House report, at least 183 legislative veto provisions have been included in federal statutes since 1933;<sup>28</sup> by a more recent estimate, Congress has resorted to the device in 48 measures over the past four years.<sup>29</sup> Use of the legislative veto technique by state legislatures has also grown substantially. In 1955, six states had specific provisions for legislative review of agency rules and regulations.<sup>30</sup> Currently, provisions for some form of legislative review are part of the statute book in at least twenty-eight states.<sup>31</sup> In most of these, review is by

26. See generally Schwartz, *The Legislative Veto and the Constitution—A Reexamination*, 46 GEO. WASH. L. REV. 351 (1978).

27. N.Y. Times, June 26, 1978, at 18, cols. 1-2.

28. H.R. REP. NO. 1014, 94th Cong., 2d Sess. 14 (1976).

29. See note 27 *supra*.

30. See Schwartz, *Legislative Control of Administrative Rules and Regulations: I. The American Experience*, 30 N.Y.U.L. REV. 1031, 1038 (1955).

31. Schwartz, *supra* note 26, at 362-63. See ALASKA STAT. § 24.20.400-460 (1976); COLO. REV. STAT. § 24-4-103 (1973); CONN. GEN. STAT. ANN. § 4-170 (West Supp. 1978); FLA. STAT. ANN. §§ 11.60, 120.545 (West Supp. 1977); GA. CODE ANN. § 3A-104 (Supp. 1977); IDAHO CODE §§ 67-5217 to 5218 (West Supp. 1977); Pub. Act. No. 80-1035, § 7.06, 1977 Ill. Laws 1571 (to be codified at ILL. REV. STAT. ch. 127, § 1007.06); IOWA CODE ANN. § 17A.8 (West Supp. 1978); KAN. STAT. § 77-426 (Supp. 1976); KY. REV. STAT. ANN. § 13.087 (Baldwin Supp. 1977); LA. REV. STAT. ANN. § 49:968 (West Supp. 1977); ME. REV. STAT. tit. 5, § 2504 (Supp. 1977); MD. ANN. CODE art. 40, § 40 (Supp. 1977); MICH. STAT. ANN. § 3.560(145) (1977); MINN. STAT. ANN. § 3.965 (West 1977); MO. ANN. STAT. § 536.037 (Vernon 1978); MONT. REV. CODES ANN. § 82-4203.1 (Supp. 1977); NEB. REV. STAT. § 84-908 (1976); NEV. REV. STAT. §§ 223B.067, .068 (1977); OKLA. STAT. ANN. tit. 75, § 308 (West 1976); OR. REV. STAT. §§ 171.705-713 (1975); Act No. 176, art. I, § 6, 1977 S.C. Acts 392; S.D. COMPILED LAWS ANN. § 1-26-1.2 (1974); TENN. CODE ANN. § 4-535 (Supp. 1977); TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 5(g) (Vernon Supp. 1978); VT. STAT. ANN. tit. 3, § 817 (Supp. 1977); W. VA. CODE §§ 29A-3-11 to 12 (1976); WIS. STAT. ANN. § 13.56 (West Supp. 1978). See also ARIZ. REV. STAT. ANN. § 41.511.05(8) (West Supp. 1978) (legislative review of State Park Board regulations).

legislative committees. In ten states, the legislature itself may exercise the legislative veto.<sup>32</sup> In nine of these states, the annulment may be accomplished by joint or concurrent resolution of both Houses; in Oklahoma, a resolution passed by either House suffices.<sup>33</sup>

At its 1977 annual meeting the National Conference of State Legislatures recommended that its members adopt procedures for reviewing administrative rules and regulations.<sup>34</sup> This recommendation should stimulate the spread of legislative review techniques throughout the country. There is strong sentiment in Congress for setting up an analogous federal system of general review of agency rules. A bill providing for such a system narrowly failed to receive a required two-thirds majority in the Ninety-fourth Congress.<sup>35</sup>

Despite the Carter strictures, the few cases in point uphold the constitutionality of the legislative veto.<sup>36</sup> It would be most unfortunate if specious construction of a constitutional doctrine should bar the use of one of the most promising methods of control of executive and administrative action. Congress is in a unique position to supervise administrative authority,<sup>37</sup> and the legislative veto is a valuable tool in this task. The great need in an era of expanding administrative authority is to establish effective safeguards outside the executive branch. Independent control can, in practice, be exercised only by the legislative and judicial branches. In this country, we have adequately developed control by the courts. Techniques for direct legislative supervision, however, have been neglected. The legislative veto enables American legislatures to assume their rightful place as effective supervisors of delegated powers. This writer predicts that the legislative veto and other legislative review techniques will play an increasingly important part in the administrative law of the next century.

## II. ADMINISTRATIVE PROCEDURE

American administrative law has been based upon Justice Frankfurter's oft-quoted assertion that "the history of liberty has largely been the history of the observance of procedural safeguards."<sup>38</sup> Our system,

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32. Alaska, Connecticut, Idaho, Michigan, Montana, Oklahoma, South Carolina, Tennessee, Texas. See statutes cited at note 31 *supra*.

33. OKLA. STAT. ANN. tit. 75, § 308(d) (West 1976); see other statutes cited at note 31 *supra*. See also GA. CODE ANN. § 3A-104(f) (Supp. 1977) (annulling resolution must be passed by two-thirds vote or be submitted to Governor for signature or veto).

34. Schwartz, *supra* note 26, at 361.

35. *Id.* at 352, 360-61.

36. *McCorkle v. United States*, 559 F.2d 1258 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978); *Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978). See generally Schwartz, *supra* note 26, at 369-73; Schwartz, *Administrative Law Cases During 1977*, 30 AD. L. REV. 167, 169-71 (1978).

37. H.R. REP. NO. 1014, 94th Cong., 2d Sess. 8 (1976).

38. *McNabb v. United States*, 318 U.S. 332, 347 (1943).



more than any other, has emphasized administrative procedure (the procedural requirements imposed upon what Continental jurists term the active administration). The starting point in such emphasis has, of course, been the constitutional demand of due process. "When we speak of *audi alteram partem*—hear the other side—we tap fundamental precepts that are deeply rooted in Anglo-American legal history,"<sup>39</sup> precepts that are now a command, spoken with the voice of due process.<sup>40</sup> But our law has gone far beyond the constitutional minimum. Building upon the due process foundation, the law has constructed an imposing edifice of formal procedure. The consequence has been a virtual judicialization of the agencies; from the establishment of the ICC to the present, the administrative process has been set in the courtroom mold.

Complaints of undue judicialization of administrative procedure have long been heard. As Judge Friendly has noted, "[C]ases before the old-line regulatory agencies have been characterized by enormous records (read by no one), great expense, and giant delays."<sup>41</sup> Perhaps the problem was not as pressing as long as it was confined to the regulatory agencies. "Burdensome though it is, the cost of [formal] procedure is often but a small part of the amount involved in any regulatory case of consequence and can be borne without difficulty by a multi-million dollar corporation of the kind commonly regulated by the big federal agencies. That class of *administrés* can be left to take care of itself."<sup>42</sup>

But formal procedural requirements are no longer limited to cases involving "that class of *administrés*." In a 1975 article Judge Friendly declared that "we have witnessed a greater expansion of procedural due process in the last five years than in the entire period since ratification of the Constitution."<sup>43</sup> What this writer has called the "*Goldberg v. Kelly* revolution"<sup>44</sup> has extended due process requirements from the traditional field of regulatory administration to the burgeoning benefactory role of the welfare state. The law has pressed the newer areas of social welfare into the judicialized mold of the regulatory process.

How far will the trend toward judicialization go? Will procedures that have become a travesty in the courtroom and have been proving ever less effective in the regulatory area continue to be imposed on the expanding administrative apparatus?

#### A. *Right to be Heard*

It is easier to answer these questions today than five years ago, when

39. *In re Andrea B.*, 405 N.Y.S.2d 977, 981 (Fam. Ct. 1978).

40. *Caritativo v. California*, 357 U.S. 549, 558 (1958) (Frankfurter, J., dissenting).

41. Friendly, *Foreword to B. SCHWARTZ & H. WADE, LEGAL CONTROL OF GOVERNMENT: ADMINISTRATIVE LAW IN BRITAIN AND THE UNITED STATES* xvi-xvii (1972).

42. *Id.* at 113. Judge Friendly, however, disputes this statement. *Id.* at xvii.

43. Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1273 (1975).

44. B. SCHWARTZ, *ADMINISTRATIVE LAWS: A CASEBOOK* 369 (1977).

the *Goldberg v. Kelly* revolution was at its height. *Goldberg*<sup>45</sup> and its progeny at first advanced the frontiers of due process so rapidly that it seemed there might be no stopping place.<sup>46</sup> *Goldberg's* holding that there was a right to be heard prior to agency action was extended en masse to all the newer areas of administrative power, including welfare,<sup>47</sup> disability,<sup>48</sup> medicare,<sup>49</sup> unemployment,<sup>50</sup> education,<sup>51</sup> and housing.<sup>52</sup> Due process was held to require a full adversary hearing, governed by the adjudicatory requirements of the federal Administrative Procedure Act. This led Judge Friendly to assert that

over-judicialization in the regulatory agencies in the United States is as nothing compared to what would result if all the safeguards of the Administrative Procedure Act were to be applied to the denial, withdrawal, or curtailment of welfare, medical, and unemployment payments, and other benefits. . . . The United States would be buried under an avalanche of paper, like Professor Fulgence Tapir in Anatole France's *Penquin Island*—if indeed enough reporters to type the records could be found.<sup>53</sup>

The *Goldberg v. Kelly* revolution may, however, have reached its apogee, if not its Thermidor. More recent cases, particularly *Mathews v. Eldridge*,<sup>54</sup> which held that due process did not require an opportunity for an evidentiary hearing prior to the termination of Social Security disability benefits, drastically limit the reach of the due process right.

*Eldridge* shows that the law may leave *Goldberg v. Kelly* to stand virtually alone in vindicating the due process right to a pretermination hearing, at least where monetary benefits are at stake. *Goss v. Lopez*,<sup>55</sup> holding that high school students were denied due process of law in violation of the fourteenth amendment when they were temporarily suspended from their schools, without hearing either prior to suspension

45. In *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Court held that a state that terminates public assistance payments to a particular recipient without affording the opportunity for an evidentiary hearing prior to termination denies the recipient procedural due process in violation of the due process clause of the fourteenth amendment. In *Mathews v. Eldridge*, 424 U.S. 319, 325 n.4, the Court delineated the elements that must be included in a pretermination hearing under *Goldberg* as follows:

(1) "timely and adequate notice detailing the reasons for a proposed termination"; (2) "an effective opportunity [for the recipient] to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally"; (3) retained counsel, if desired; (4) an "impartial" decisionmaker; (5) a decision resting "solely on the legal rules and evidence adduced at the hearing"; (6) a statement of reasons for the decision and the evidence relied on.

46. *Cf. Friendly, supra* note 43, at 1316 (asserting that *Goss v. Lopez* pulled the procedural stops in *Goldberg*, thereby advancing the frontiers of due process without giving any indication of a stopping place).

47. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

48. *Richardson v. Wright*, 405 U.S. 208 (1972).

49. *Martinez v. Richardson*, 472 F.2d 1121 (10th Cir. 1973).

50. *California Human Resources Dep't v. Java*, 402 U.S. 121 (1971).

51. *Goss v. Lopez*, 419 U.S. 565 (1975).

52. *Escalera v. Housing Auth.*, 425 F.2d 853 (2d Cir. 1970).

53. *Friendly, supra* note 41, at xviii.

54. 424 U.S. 319 (1976).

55. 419 U.S. 565 (1975).

or within a reasonable time thereafter, shows that cases not concerning money payments still stand on a different footing.<sup>56</sup> There is a line between the two types of cases in the relative ability to repair the effects of an improper decision. One may question, however, whether the results in *Eldridge* and *Goss* are consistent. The *Eldridge* opinion emphasizes that "the degree of potential deprivation that may be created by a particular decision"<sup>57</sup> is a key factor to be considered in determining whether there is any due process right to a pretermination hearing. If that is the case, who suffers the greater deprivation, the pupil subject to a short suspension or the worker whose government disability payments are ended?

The most recent Supreme Court decision on the matter, *Board of Curators of the University of Missouri v. Horowitz*,<sup>58</sup> further qualifies the *Goss* decision. *Goss* had extended the right to be heard to school discipline cases for which there had previously been thought to be a due process floor. The dissenters in *Goss* protested that the majority ruling brought within the due process guarantee a multitude of discretionary decisions in the educational process, giving as illustrations "[t]he student who is given a failing grade, who is not promoted, who is excluded from certain extracurricular activities, who is assigned to a school reserved for children of less than average ability, or who is placed in the 'vocational' rather than the 'college preparatory' track."<sup>59</sup> This would judicialize the educational process to an extent that would make it unworkable.

*Horowitz* indicates that such extreme fears are unwarranted. In that case, the medical school at a state university had dismissed respondent as a student because of faculty dissatisfaction with her clinical performance. The Court held that educational decisions which turn on academic (as opposed to disciplinary) factors do not necessitate a due process hearing. The decision to dismiss respondent, like the decision of a teacher on the proper grade for a student,<sup>60</sup> turns on expert evaluation of cumulative information and is not readily adapted to the procedural tools of adjudicatory decision-making. *Goss v. Lopez* is thus limited to nonacademic disciplinary proceedings. As such, its hearing requirement does not put most educational determinations (including those noted by the *Goss* dissenters) into an overjudicialized straitjacket.

By way of summary, it may be said that although *Goldberg v. Kelly* will probably continue to be followed, it will be confined to the welfare

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56. In *Goss v. Lopez*, the Court, however, was careful to point out that the type of hearing it required stopped short of a trial-type proceeding and would not include the opportunity to secure counsel, to confront and cross-examine witnesses, or to call witnesses. Rather, the Court required effective notice and informal hearing to allow the student to give his version of the events and thus protect against erroneous action. *Id.* at 583-84.

57. 424 U.S. at 341.

58. 435 U.S. 78 (1978).

59. 419 U.S. at 598.

60. See *Horne v. Cox*, 551 S.W.2d 690 (Tenn. 1977).

termination case. In cases involving other types of public largess, *Mathews v. Eldridge* will set the procedural theme. This does not mean no due process protection, but only that a pretermination hearing is not necessary. The right to a post-termination hearing was reaffirmed in *Eldridge*, in which the Court stressed the claimant's right to an evidentiary hearing on administrative review of the decision terminating his disability benefits.

### B. *Flexible Due Process*

*Goldberg v. Kelly* has also been diluted in another important respect. The Court there indicated that when due process required a hearing, a full evidentiary hearing was demanded. The opinion of Justice Brennan stated that a full judicial-type hearing was not necessary. This disclaimer must not, however, be given too much weight. "After the usual litany that the required hearing 'need not take the form of a judicial or quasi-judicial trial,' Mr. Justice Brennan proceeded to demand almost all the elements of one."<sup>61</sup> In *Mathews v. Eldridge*, the Court itself conceded that, in *Goldberg*, "the Court held that a hearing closely approximating a judicial trial is necessary."<sup>62</sup>

The *Goldberg* requirement of a judicial-type evidentiary hearing may pose a serious dilemma for a system of administrative law that has extended procedural requirements from the traditional regulatory field to the expanding area of social welfare. However fair in theory, fully judicialized procedure may frustrate effective administration in fields such as welfare and social security. This is true not only because of the nature of the cases involved, but also because of their number. When we move from the ICC-type agencies to those administering welfare or social security, we move into an area of mass administrative justice, in which cases are measured not in the thousands but in the millions. "To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities. . . . Moreover, further formalizing the . . . process and escalating its formality and adversary nature may not only make it too costly . . . but also destroy its effectiveness."<sup>63</sup>

In areas of mass administrative justice, such as welfare or social security, formal adjudicatory procedure may have to give way when it can serve only to frustrate effective administration. As the Supreme Court has said about the social security system, "The system's administrative structure and procedures, with essential determinations numbering into the millions, are of a size and extent difficult to comprehend. . . . 'Such a system must be fair—and it must work.'"<sup>64</sup>

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61. Friendly, *supra* note 43, at 1299.

62. 424 U.S. at 333.

63. *Goss v. Lopez*, 419 U.S. 656, 583 (1975).

64. *Richardson v. Perales*, 402 U.S. 389, 399 (1971).

If our administrative law system is to be workable as well as fair, it will have to realize that due process is a flexible concept. The Procrustean notion<sup>65</sup> that when due process demands a hearing it must demand a full-scale judicial-type trial in every case has already started to give way. The Supreme Court itself has declared that “[t]he judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decision-making in all circumstances.”<sup>66</sup> The law must recognize that due process need not necessarily mean traditional adversary process. Administrative procedure must develop as a compromise between what a British judge once called the methods of natural justice and those of courts of justice.<sup>67</sup>

For this to be accomplished the law will have to move beyond the *Eldridge* retreat from *Goldberg v. Kelly*, a retreat that permits agency action without a pretermination hearing. It must also recognize that the still-required post-termination hearing need not necessarily conform to all the requirements of the traditional adjudicatory hearing in every case.

As Judge Friendly has urged, it is only “some kind of hearing”<sup>68</sup> that is required by due process. The type of hearing required may vary with the seriousness of the particular case. Due process requirements should depend upon incremental analysis—that is, gains versus losses for each additional procedure required. Full judicialization may be demanded in cases with the most serious consequences, such as welfare termination or school expulsion. In other cases, due process may demand less. Since there are alternatives less burdensome than fully judicialized hearings, the law should choose the less burdensome alternatives when the incremental gain in the more burdensome procedure would be outweighed by the marginal costs, for example, in time and expense.

*Ingraham v. Wright*<sup>69</sup> illustrates the trend toward the flexible due process conception, which refuses to hold agencies to all the requirements of a full “evidentiary hearing” in every case in which due process demands an opportunity to be heard. *Ingraham* dealt with the question whether imposition of disciplinary corporal punishment in public schools was consonant with the requirements of due process. The Court found that corporal punishment implicated a constitutionally protected liberty interest. It did not, however, conclude that, as in *Goss v. Lopez*,<sup>70</sup> notice and hearing were required by due process prior to imposition of the disciplinary penalty. In this case, said the Court, traditional common-law remedies were fully adequate to afford due process.

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65. Cf. Friendly, *supra* note 41, at xviii-xix (finding “no support for the thought that the due process clause guarantees opportunity for argument in every case.”).

66. *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976).

67. *Local Gov't Bd. v. Arlidge*, [1915] A.C. 120, 138.

68. See generally Friendly, *supra* note 43.

69. 430 U.S. 651 (1977).

70. 419 U.S. 565 (1975).

Some might say that *Ingraham v. Wright* (which held that corporal punishment might be imposed in schools without prior notice and hearing) is inconsistent with *Goss v. Lopez* (which held that a school could not hand down a ten-day suspension without giving the student notice and an informal hearing). According to the Court, there is no such inconsistency. In *Goss*, the school suspension interrupted the student's entitlement to education; the corporal punishment at issue in *Ingraham* had no such result. "Unlike *Goss v. Lopez* . . . , this case does not involve the state-created property interest in public education. The purpose of corporal punishment is to correct a child's behavior without interrupting his education."<sup>71</sup>

More important for our purposes is the fact that the *Ingraham* Court went on to say that "even if the need for advance procedural safeguards were clear, the question would remain whether the incremental benefit could justify the cost."<sup>72</sup> Prior hearing as a universal constitutional requirement in corporal punishment cases would unduly burden school discipline. "At some point the benefit of an additional safeguard to the individual affected . . . and to society in terms of increased assurance that the action is just, may be outweighed by the cost.' . . . We think that point has been reached in this case."<sup>73</sup>

In *Ingraham* the burden that would have been imposed by requiring administrative safeguards of notice and hearing was considered much greater than any benefit to be derived from predisciplinary hearings: "[T]he probable value, if any, of additional . . . procedural safeguards" must be balanced against "the [state] interest, including the function involved and the fiscal and administrative burdens that the additional . . . procedural requirement would entail."<sup>74</sup> In short, the Court followed the incremental approach previously urged.<sup>75</sup>

### C. Rule-Making Procedure

A word should also be said about procedure in rule-making. That subject is almost entirely statutory. Rule-making is the administrative equivalent of the legislative process of passing a statute.<sup>76</sup> Hence, agencies engaged in rule-making are, as a general proposition, no more subject to constitutional procedural requirements than is the legislature engaged in enacting a statute. Unless a statute requires otherwise, a rule will normally not be held invalid because of agency failure to hold a hearing or to follow any other procedures prior to promulgating the rule.

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71. 430 U.S. at 674 n.43.

72. *Id.* at 680.

73. *Id.* at 682.

74. *Id.* at 675.

75. See text accompanying note 68 *supra*.

76. *Kelly v. Zamarello*, 486 P.2d 906, 909 (Alaska 1971).

The Federal Administrative Procedure Act (APA) did, however, impose procedural requirements on rule-making. Under the APA, two types of rule-making, formal and informal,<sup>77</sup> are recognized. Formal rule-making exists when rules must be preceded by a "trial-type" hearing. The APA approach to formal rule-making is a hybrid one that imposes adjudication requirements upon a rule-making proceeding.<sup>78</sup>

The Supreme Court has limited the scope of formal rule-making under the APA. *United States v. Florida East Coast Railway Co.*<sup>79</sup> holds that formal requirements must be followed only when the enabling statute expressly requires the rules to be made "on the record after opportunity for an agency hearing."<sup>80</sup> This virtually makes a talismanic test of the language of section 554(c) of the APA.<sup>81</sup> But the result is desirable. Trial-type procedures with a requirement of basis on the record are out of place in rule-making.<sup>82</sup> It would be most unfortunate for formal rule-making to be extended to cases not covered by the *Florida East Coast* decision.

Informal rule-making under the APA is usually called notice and comment rule-making, since all that is required is notice of proposed rule-making and an opportunity for interested persons to submit comments to the agency concerned. Notice and comment rule-making has been criticized as not providing enough procedural safeguards. Although some courts tried to impose stricter procedures, the Supreme Court has recently aborted this line of cases. In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*,<sup>83</sup> the court of appeals had struck down a rule dealing with the uranium fuel cycle in nuclear power reactors because of inadequacies in the procedures employed in the rule-making proceedings. The agency had complied with the APA notice and comment requirements, but the appellate court held that more should be required in order to facilitate full ventilation of the issues. The Supreme Court reversed on the ground that section 553 of the APA lays down the only procedural requirements for informal rule-making.<sup>84</sup> To require

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77. *Phillips Petroleum Co. v. Federal Power Comm'n*, 475 F.2d 842, 851 (10th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974).

78. *Id.*

79. 410 U.S. 224 (1973).

80. *Id.* at 234.

81. Section 554(c) of the Administrative Procedure Act provides:

(c) The agency shall give all interested parties opportunity for—

(1) The submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

5 U.S.C. § 554(c) (1976).

82. See B. SCHWARTZ, *ADMINISTRATIVE LAW* § 60 (1976).

83. 435 U.S. 519 (1978).

84. Section 553 of the Administrative Procedure Act provides in pertinent part:

(b) General notice of proposed rule making shall be published in the Federal Register,

more, said the Court, would "almost compel" the agency to conduct all rule-making proceedings with the full panoply of procedural devices normally associated only with adjudicatory hearings.<sup>85</sup>

The Supreme Court decision in *Vermont Yankee* means that if agencies are to be required to follow stricter procedures than those imposed by the APA, such requirements will have to be imposed by Congress, not the courts. It is, however, unlikely that the APA will be amended to require more than notice and comment procedures in most rule-making. We are living in a period which has seen a tremendous expansion of rule-making power. Both Congress and the courts have fostered the trend toward rule-making. But that does not mean that rule-making should be moved in a judicialized direction. To do so would defeat the principal advantages of the rule-making process.

#### D. *Administrative Judiciary*

The Supreme Court has referred to the distinction between American law, in which one system of law courts applies both public and private law, and the practice in a Continental country such as France, which administers public law through a system of administrative courts separate from those dealing with private law questions.<sup>86</sup> The French administrative courts are specialized tribunals that review the legality of administra-

unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

- (1) a statement of the time, place, and nature of public rule making proceedings;
- (2) reference to the legal authority under which the rule is proposed; and
- (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

- (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
- (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.
- (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

- (1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
- (2) interpretative rules and statements of policy; or
- (3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 553 (1976).

85. 435 U.S. at 547.

86. *Garner v. Teamsters Local 776*, 346 U.S. 485, 495 (1953).



tive acts. Although proposals have been made for establishment of comparable administrative courts in our system,<sup>87</sup> the French concept of administrative reviewing courts has largely remained foreign to American administrative lawyers.

Since enactment of the federal Administrative Procedure Act, however, the American system has taken another path toward the establishment of an administrative trial judiciary. The APA set up within each agency a corps of independent hearing officers called hearing examiners. These examiners, who were given hearing powers comparable to those of trial judges as well as substantial decision-making powers, were to preside over hearings governed by the APA. Under the APA, examiners may be empowered to issue initial decisions, which become *the* decisions of the agencies concerned unless those decisions are appealed. In virtually all the important federal agencies the power to make such initial decisions was delegated to examiners by the relevant agency rules.

By the APA, "Congress intended to make hearing examiners 'a special class of semi-independent . . . hearing officers.'"<sup>88</sup> The congressional intent was to vest agency hearing officers with the status of quasi-judges, since their functions were comparable to those of trial judges. "On paper at least," Senator McCarran, the Senate sponsor of the APA said, "they are to be very nearly the equivalent of Judges, albeit operating within the federal system of administrative justice."<sup>89</sup> Senator McCarran tried to complete the judicial analogy with a bill designed to have the President appoint the examiners, who were to have tenure during good behavior. This bill, however, never got out of committee. A similar fate met more recent bills that would have enabled Congress to change the title of hearing personnel from "examiner" to "administrative trial judge."

Then, in 1972, the Civil Service Commission promulgated a regulation that made the change. Under the regulation the title of hearing officers appointed under the APA was changed from "hearing examiners" to "administrative law judges."<sup>90</sup> By a simple administrative stroke of the pen the federal agencies were endowed with a full-grown administrative judiciary that was vested with the power to make initial decisions in most adjudicatory proceedings. Now the change has been given statutory imprimatur with a 1978 law confirming the new title.<sup>91</sup>

The evolution of federal hearing officers—from pre-APA agency subordinates to APA hearing examiners and now to judicial status as administrative law judges—will set the pattern for the developing system

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87. We have had some limited experience with specialized review tribunals. See B. SCHWARTZ, *FRENCH ADMINISTRATIVE LAW AND THE COMMON-LAW WORLD* 322 (1954).

88. *Ramspeck v. Trial Examiners Conference*, 345 U.S. 128, 132 (1953).

89. McCarran, *Three Years of the Federal Administrative Procedure Act—A Study in Legislation*, 38 GEO. L.J. 574, 582 (1950).

90. 37 Fed. Reg. 16,787 (1972) (codified in 5 C.F.R. § 930.203a (1978)).

91. Act of Mar. 27, 1978, Pub. L. No. 95-251 § 5108(a), 92 Stat. 183.

of administrative justice. When the APA examiner provisions went into effect, the federal agencies employed 197 examiners. At the beginning of 1978, there were 997 administrative law judges in twenty-three federal agencies; over half (670) were in the Social Security Administration, thereby reflecting the impact of that agency's mass justice upon the administrative process. Only the fiscal squeeze of recent years has prevented the number from rising substantially higher. The Social Security Administration alone projects an administrative law judge corps of well over 1,000 in the next decade.

In the next century, we can predict that there may well be a federal administrative judiciary running into the thousands and administrative law judges in ever-increasing numbers dispensing both regulatory justice and the mass justice of an expanding welfare state. In addition, a similar trend toward hearing officer judicialization may also be expected in the states. Maine<sup>92</sup> and California<sup>93</sup> have adopted the title of administrative law judge and administrative court judge. Other states are also starting to follow the federal model.<sup>94</sup>

#### E. *Broader Perspective*

The next century may thus see an ever-growing federal and state administrative judiciary that will dwarf the traditional judiciary in the courts. From a broader point of view, there may be repetition on a larger scale of the situation in sixteenth and seventeenth century English law. In his Rede lecture, Maitland pointed out that at the end of Queen Mary's reign, "the judges had nothing to do but 'to look about them.'"<sup>95</sup> The inadequacies of the common law and the expense and delay involved in lawsuits had led the bulk of the community to avoid the courts at all costs. The jurisdiction of the judges was being superseded by other tribunals, notably the Star Chamber and Chancery.

The movement away from the common law in Tudor and Stuart times was a movement away from justice administered in law courts to justice administered in what were, for all intents and purposes, administrative tribunals. The ensuing struggle by the common law to reestablish its supremacy has interesting implications for our own day.

When the common lawyers eventually triumphed after the final expulsion of the Stuarts, they did not attempt to turn the legal clock back to pre-Tudor times. Instead, they sought to retain what was desirable in the administrative justice of their day and to fit it into its proper place in the legal order.

92. ME. REV. STAT. tit. 5, § 10051 (Supp. 1978).

93. Members of the California Unemployment Insurance Appeals State Board are, for example, known as administrative law judges.

94. In New York, for example, review board members of the Public Service Commission are as a matter of custom called administrative law judges.

95. F. MAITLAND, ENGLISH LAW AND THE RENAISSANCE 22 (1901).

Although the Star Chamber as such was abolished, the law courts realized that a large part of its work was of permanent value, and therefore much of its law passed into the common law. And the place of Chancery in the legal system was definitely confirmed. Chancery was retained as a separate tribunal, but it was wholly judicialized along common-law lines. The Lord Chancellor, who was originally the chief clerk of the King and dealt out administrative justice in the King's name, became, in time, the head of a true court with an established place in the existing legal order.<sup>96</sup>

The challenge of administrative justice in the sixteenth and seventeenth centuries was met by the elimination of the undesirable elements in such justice and the retention and judicialization of the rest. The arbitrary discretion exercised by the agencies was canalized within legal limits, and where such discretion was, as in the case of Star Chamber, too intimate a part of the tribunal, the tribunal itself was done away with. The common lawyers, who had earlier complained that the justice dispensed by Chancery was so uncontrolled by legal principles that it might just as well have depended on the size of the particular Chancellor's foot, were able to ensure that Chancery became a true court for the application of principles that, though somewhat different from those of the common law, were no less fixed.

The challenge faced by the law in Tudor and Stuart days was well stated by Chief Justice Vanderbilt: "Then, as now, the administration of the common law left much to be desired. Then, as now, what was needed was more administration in the courts of justice and more of the fundamental principles of justice in the . . . tribunals."<sup>97</sup> The courts reformed through an infusion of then-modern concepts of law and administration and the elimination of undesirable elements in the newer justice. The rest was judicialized and fitted into its proper place in the legal order.

The recent rise of the federal administrative judiciary indicates that the administrative law of the next century may follow the pattern of the executive tribunals of three centuries ago. The justice now dispensed by the agencies will become truly judicialized and administered by judges possessing solely judicial authority. Our administrative law will then become as much a part of our ordinary law as has the law of equity, which was originally developed by the Court of Chancery.

### III. JUDICIAL REVIEW

Until recently, the dominant consideration in fashioning the law of judicial review was that of deference to the administrative expert. The

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96. *Mulhearn v. Federal Shipbuilding Co.*, 2 N.J. 356, 366, 66 A.2d 726, 731 (1949).

97. Vanderbilt, *The Place of the Administrative Tribunal in our Legal System*, 24 A.B.A.J. 267, 273 (1938).

result has been a theory of review that limits the extent to which the discretion of the expert may be scrutinized by the nonexpert judge. The basic approach was one stated a generation ago: "We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission."<sup>98</sup>

This judicial attitude has started to change, giving way to articulation of judicial doubts about the desirability of the trend toward narrow review of administrative authority. According to Judge Bazelon, it is no longer enough for the courts regularly to uphold agency action "with a nod in the direction of the 'substantial evidence' test, and a bow to the mysteries of administrative expertise."<sup>99</sup> A more positive judicial role is demanded by the changing character of administration litigation: "[C]ourts are increasingly asked to review administrative litigation that touches on fundamental personal interests in life, health, and liberty. . . . To protect these interests from administrative arbitrariness, it is necessary . . . to insist on strict judicial scrutiny of administrative action."<sup>100</sup>

#### A. *Near Term: Availability of Review*

As far as judicial review is concerned, one must distinguish between short- and long-term trends. In the near term (let us say the next quarter century), there should be an intensification of recent tendencies. This means a further expansion of the availability of review and a broadening of the scope of review.

##### 1. *Standing*

Expansion in the availability of review will be accomplished first of all by a continued broadening of the categories of plaintiffs who possess the standing needed to bring review actions. "The past decade, has seen a dramatic lowering of the barriers imposed by standing requirements to challenges of administrative action."<sup>101</sup> The restricted concept of standing that formerly prevailed has given way to an ever-widening concept that has increasingly opened the courts to challenges against administration action.

The lowering of standing barriers may be expected to continue, since standing is so closely related to the growing movement toward participatory democracy. The legal system, like other institutions, must give the citizen the means of making his impact more directly on the governmental process. In administrative law this means growing recognition of the role of the public in judicial review. As the New York court put it in a case broadening taxpayer standing, "it would be

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98. *Board of Trade v. United States*, 314 U.S. 534, 548 (1942).

99. *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584, 597 (D.C. Cir. 1971).

100. *Id.* at 597-98.

101. *Evans v. Lynn*, 537 F.2d 571, 610 (2d Cir. 1975) (Kaufman, C.J., dissenting).

particularly repellant today, when every encouragement to the individual citizen-taxpayer is to take an active, aggressive interest in his State as well as his local and national government, to continue to exclude him from access to the judicial process . . . , the classical means for effective scrutiny of legislative and executive action."<sup>102</sup>

The next quarter century should see an extension of the state jurisprudence upholding taxpayer standing, exemplified by this New York case, to federal administrative law, which is still dominated by *Frothingham v. Mellon*<sup>103</sup> and its denial of standing to federal taxpayers. In addition, we can expect a liberalization of the present bipartite injury test followed by the Supreme Court, under which a plaintiff seeking review must show (1) that the challenged agency act caused him injury in fact, economic or otherwise, and (2) that the alleged injury was to an interest arguably within the zone of interests protected or regulated by the relevant statute.<sup>104</sup> Justice Brennan has urged that the bipartite injury test is needlessly complex and that all that should be needed for standing is injury in fact.<sup>105</sup> The single "injury in fact" test has been adopted by most state courts,<sup>106</sup> and one can predict that the same test will be adopted by the federal courts in the not too distant future. All that will be required for standing will be that plaintiff allege that he has suffered harm (economic, qualitative, aesthetic, or environmental) as a result of defendant agency's action.

Can we go further and predict that the review action will ultimately be treated as the *actio popularis* of the later Roman law; that is, an action with no restrictions on the standing of those who seek to bring it? A few years ago Judge Friendly expressed doubt about a proposal by the present writer and an English colleague that we follow England in not demanding standing as a prerequisite to judicial review:<sup>107</sup> "One may . . . endorse recent relaxation of the requirement of standing . . . without agreeing to its abolition, even assuming that this was permissible under the constitutional provision limiting the federal judiciary to 'cases' and 'controversies.'" <sup>108</sup> It is probable that the courts will follow the Friendly view. Standing requirements will be further relaxed along the lines already indicated, but a plaintiff will still be required to show some injury

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102. *Boryszewski v. Brydges*, 37 N.Y.2d 361, 364, 334 N.E.2d 579, 581, 372 N.Y.S.2d 623, 626 (1975).

103. 262 U.S. 447 (1923). Here the Court stated that a person asking the Court to hold a federal act unconstitutional "must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Id.* at 488.

104. *Association of Data Processing Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970).

105. *Id.* at 172 (Brennan, J., dissenting).

106. See *New Hampshire Bankers Ass'n v. Nelson*, 113 N.H. 127, 129, 302 A.2d 810, 811 (1973); K. DAVIS, *ADMINISTRATIVE LAW* § 22.00-3 (1971).

107. B. SCHWARTZ & H. WADE, *supra* note 41, at 291.

108. Friendly, *supra* note 41, at xx.

in fact (even if causation is as attenuated as that in the *SCRAP* case)<sup>109</sup>—“some particularized injury that sets him apart from the man on the street.”<sup>110</sup>

## 2. *Due Process*

In other respects, too, the availability of review will continue to be broadened. In 1973 three dissenting Justices referred to a key administrative law question that the Court had always avoided—whether there is a due process right to judicial review.<sup>111</sup> Though the Court did not then, as these dissenters claimed, answer that question *sub silentio*, it may be expected that it will be answered in the affirmative if it is squarely presented in a future case. The Court has already stated that preclusion of review is not lightly to be inferred.<sup>112</sup> Increasing awareness of the importance of review as a safeguard<sup>113</sup> should lead the Court to strike down statutory preclusive provisions if their terms cannot be nullified by judicious interpretation.<sup>114</sup>

## 3. *Sovereign Immunity*

In two other important areas availability of review will be enlarged: sovereign immunity and forms of action. By the turn of the next century, it may be hoped that the last vestiges of sovereign immunity will have disappeared from our public law. The trend toward legislative and judicial elimination of sovereign immunity as a barrier to tort claims against government will make public tort liability part of the law in every American jurisdiction.<sup>115</sup> Hopefully, too, present inadequacies in the Federal Tort Claims Act will be corrected (substituting public liability for that of the individual officer, but providing at the same time for indemnity by the latter when he acts with fraud, corruption, malice, or gross negligence,<sup>116</sup> and providing for absolute public tort liability, at least in cases in which there is comparable liability imposed upon a private tortfeasor).<sup>117</sup> Happily, the lacuna that existed in the law caused by the

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109. *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973).

110. *United States v. Richardson*, 418 U.S. 166, 194 (Powell, J., concurring).

111. *Ortwein v. Schwab*, 410 U.S. 656, 661, 664-65 (1973) (Douglas, J., Brennan, J., & Marshall, J., dissenting).

112. *Barlow v. Collins*, 397 U.S. 159, 166 (1970).

113. Precluding review, in Justice Douglas' phrase, makes a "tyrant" out of every agency officer. *United States v. Wunderlich*, 342 U.S. 98, 101 (1951) (Douglas, J., dissenting).

114. *Cf. Hirschfeld v. Commission on Claims*, 376 A.2d 71 (Conn. 1977) (review available despite strong preclusive provision).

115. For a recent case, see *Jones v. State Highway Comm'n*, 557 S.W.2d 225 (Mo. 1977).

116. *Contra*, *United States v. Gilman*, 347 U.S. 507 (1954).

117. *Contra*, *Laird v. Nelms*, 406 U.S. 797 (1972).

misapplication of sovereign immunity to bar actions seeking specific relief has now been corrected.<sup>118</sup>

#### 4. *Forms of Review Actions*

There will also be liberalizing changes with regard to the forms of review actions. The Supreme Court has resolved conflict among the circuits by holding that the Administrative Procedure Act is not an independent source of review jurisdiction.<sup>119</sup> The decision represents a backward step,<sup>120</sup> and it is to be hoped that the Congress will amend the APA to correct the decision.

It is hoped that in the states the present confusion that surrounds forms of review action will give way to comprehensive provision for an exclusive simplified form of review. Critics have been urging such a uniform system of review by a single, simple form of action for years. Similar criticisms in England have led to a recent amendment in the rules of the English High Court, which now provide for one unified review action called an "application for judicial review" in place of the previous technical procedures for applying for the various kinds of prerogative orders.<sup>121</sup> Is it fanciful to trust that the English reform will have a more immediate effect on what is still, in so many ways, an Anglophile legal system?

#### B. *Near Term: Scope of Review*

The scope of review of administrative action has been profoundly influenced by the activist role assumed by the courts in recent years. American judges, accustomed to having the last word on constitutional issues that affect the very warp and woof of the society, constantly overrule the acts of the political departments in the process. In area after area the courts, led by the Supreme Court, have had to step in to serve as spearheads of social change when the political branches have proved unable or unwilling to act. Judges who have thus performed a virtually legislative function have inevitably felt freer than their predecessors in overruling decisions of the legislature's delegates.

The most significant extension in scope of review in recent years has occurred in California, where courts have developed a rule of broad review in cases involving so-called fundamental rights. The leading case of *Strumsky v. San Diego Employees Retirement Association*<sup>122</sup> states the rule as follows:

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118. Act of Oct. 21, 1976, Pub. L.No. 94-574, 90 Stat. 2721 (codified at 5 U.S.C. §§ 702-703 (1976)).

119. *Califano v. Sanders*, 430 U.S. 99 (1977).

120. For a more detailed treatment of this theme, see Schwartz, *Califano v. Sanders and Administrative Procedure Act Interpretation*, 55 TEXAS L. REV. 1323 (1977).

121. STAT. INST., pt. 111, § 2 (1977).

122. 11 Cal. 3d 28, 520 P.2d 29, 112 Cal. Rptr. 805 (1974).

If the order or decision of the agency substantially affects a fundamental vested right, the trial court, in determining . . . whether there has been an abuse of discretion because the findings are not supported by the evidence, must exercise its independent judgment on the evidence and find an abuse of discretion if the findings are not supported by the weight of the evidence."<sup>123</sup>

This California version of the supposedly discredited *Ben Avon* doctrine<sup>124</sup> is, if anything, broader than *Ben Avon* itself, which was confined to constitutional rights. Under the California rule, a right may be "fundamental" even if it is not a constitutional right—as was true of the right of a police officer's widow to a service-connected death allowance in the *Strumsky* case. The California rule is a direct consequence of the increasing judicial vigilance to protect individual rights and the growing disenchantment with the claims of administrative expertise. The California court has asserted that when an agency decision affects a fundamental right, full review is appropriate because "abrogation of the right is too important to the individual to relegate it to exclusive administrative extinction."<sup>125</sup> The result is a substantial broadening of the scope of review, which may set a pattern for the last quarter of the century.

The California approach may be seen as a logical consequence of the tendency in recent years to permit broad review of agency action affecting personal rights. The preferred status of personal rights in present-day public law has led the Supreme Court to adopt a stricter standard for judging restrictions on them than its standard for judging restrictions on property rights. Thus, when agency action affects such personal rights protected by the Constitution as the right of citizenship,<sup>126</sup> there may be room for broader review.<sup>127</sup> Similarly, the fundamental interests at stake under the first amendment help to explain why independent review of an agency determination of the constitutional fact of obscenity is required.<sup>128</sup>

We may expect the courts in coming years to continue the attempt to assert a more active review role. One way to accomplish this would be to extend the broad review now asserted by the federal courts in personal

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123. *Id.* at 32, 520 P.2d at 31, 112 Cal. Rptr. at 807. For a more recent application of the rule, see Cal. Rptr. 805, 807 (1974). For a more recent application of the rule, see *Anton v. San Antonio Hosp.*, 19 Cal. 3d 802, 567 P.2d 1162, 41 Cal. Rptr. 442 (1977).

124. *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920). In *Ben Avon*, the Court held that when a public service commission is given the legislative power to prescribe future rates chargeable by a utility, due process of law under the fourteenth amendment requires that the state provide a fair opportunity for the utility to present its claim of confiscation to a judicial tribunal for determination upon its own independent judgment as to both law and facts. The Pennsylvania statute in question in *Ben Avon* was declared unconstitutional since it purported to withhold from reviewing courts the power to determine the question of confiscation according to their own independent judgment.

125. *Strumsky v. San Diego Employees Retirement Ass'n*, 11 Cal. 3d 28, 32, 520 P.2d 29, 33, 112 Cal. Rptr. 805, 809 (1974).

126. See *Agosto v. Immigration and Naturalization Serv.*, 436 U.S. 748 (1978).

127. See *Pickering v. Board of Educ.*, 391 U.S. 563, 578 n.2 (1968).

128. See *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 101-02 (1973).



rights cases to other rights, leading ultimately to adoption of something like the California fundamental rights doctrine. Other expansive approaches would extend review power to allow inquiry into the reasonableness of agency penalties or sanctions, which the Supreme Court has held generally to be beyond the reviewing court's proper scope of inquiry.<sup>129</sup> They would also enlarge the scope of review over agency discretion, for example, by extending review beyond abuse of discretion to cases of unwarranted exercise of discretion.<sup>130</sup>

In dealing with the scope of review, one must take particular care to distinguish between what courts say and what they do. We may expect the judges to continue to talk in terms of review limited by the substantial evidence rule, with continued ritual obeisance to the mystique of administrative expertise. Yet that will not stop reviewing courts from doing justice in the particular case. "A general proposition," as Holmes noted, "is simply a string for the facts."<sup>131</sup> When counsel is able to dent the mass of cases confronting the court and convince the judges that the facts show that the agency did not deal fairly with his client, even if the agency findings are, theoretically speaking, supported by substantial evidence, no general theory of limited review will prevent a reversal.

One may predict that growing disenchantment with the administrative process will lead courts to extend the scope of review. The pervasive mistrust of government has not extended to reviewing courts. If anything, people tend to trust judges more than administrators and would approve an extension of review authority.

How effective broader review would be is another matter. In practical terms, it may be impossible for the courts to give anything near the individual attention needed for effective scrutiny in more than a small minority of the mass of review cases before them. More than any theory of limited review, it is the pressure of the judicial calendar, combined with the elephantine bulk of the record in so many review proceedings, that leads to perfunctory affirmance of the vast majority of agency decisions.

### C. *The Longer Term*

History, says William James, is essentially the story of man's attempt

129. *Butz v. Glover Livestock Co.*, 411 U.S. 182 (1973). Cf. *Zink v. Sausalito*, 10 Cal. App. 3d 662, 139 Cal. Rptr. 59 (1977) (*Strumsky* rule of full review, see note 122 *supra*, not applicable to review of penalties imposed by agency).

130. Cf. Revised Model State Administrative Procedure Act § 15(7) (f) (1961), which provides:

(7) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact; but it may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if the substantial rights of the appellant have been prejudiced because the administrative findings, inference, conclusions, or decisions are:

.....  
(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

131. 2 O. HOLMES-F. POLLOCK LETTERS 13 (M. Howe ed. 1961).

“to find the more inclusive order.”<sup>132</sup> In law, the “more inclusive order” is a judicial system which has a monopoly in the dispensation of justice and which gradually embraces within its jurisdiction the tribunals and organs that may once have decided cases outside the judicial process. In early English law, the development occurred when the king’s courts took over the justice formerly dispensed by feudal courts, local courts, and the mass of anomalous jurisdictions that had grown up over the centuries. A similar development took place during the conflict in the seventeenth century between the law courts and executive tribunals that culminated in the absorption of the latter into the judicial system.<sup>133</sup> It has already been indicated that administrative justice during the next century may well follow the pattern of the executive tribunals of three centuries ago, with an administrative judiciary performing the adjudicatory functions of agencies within the framework of the judicial system.

If such a complete judicialization of administrative justice does occur, it will completely alter the situation with regard to judicial review. If administrative justice becomes part of the judicial system, what we now term judicial review will become a branch of appellate review. The reviewing court will act virtually as a hierarchical superior, playing the part not of today’s reviewing court but of a court of appeal.

If that happens most of the judicial review problems discussed will be eliminated. Review of the administrative judiciary will be governed by the same principles that govern appeals in the courts. That, in itself, may create new problems concerning issues such as standing. Under traditional rules of standing, only the parties may appeal from lower courts. Is the same limitation necessarily desirable in an administrative law case, which may have impact far beyond the immediate parties? Perhaps the same considerations that have led to relaxation of rigid standing requirements may justify a broader approach to the question of who will have a right to appeal from the decisions of the administrative judicial system.

Even if the predicted development does take place, it will substitute appellate review for the present system only in the area of administrative justice. Presumably the trend toward full judicialization will not affect the nonadjudicatory functions of agencies, particularly their authority to promulgate rules and regulations. Exercise of rule-making power will still be by agencies subject to judicial review in the present sense. This will not be a minor matter, given the recent judicial trend favoring agency rule-making authority.<sup>134</sup>

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132. W. JAMES, *THE WILL TO BELIEVE* 195-206 (1897), *quoted in* 1 R. POUND, *JURISPRUDENCE* 542-43 (1959).

133. *See* text accompanying notes 95-97 *supra*.

134. *See, e.g.*, *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973); *WBEN, Inc. v. United States*, 396 F.2d 601 (2d Cir. 1968), *cert. denied*, 393 U.S. 914 (1968); *California Citizens Band Ass'n v. United States*, 375 F.2d 43 (9th Cir. 1967).

The predicted administrative judiciary in the next century will, as already indicated, be far more numerous than the traditional judiciary in the courts. Most of the judges in the country will then be members of what will amount to administrative trial courts. If that occurs it may be expected that there will be a strong movement to create administrative appellate courts somewhat along the lines of the French system. The Constitution's article III provision for one Supreme Court and comparable state constitutional provisions may make it impossible to establish a supreme administrative court like the French *Conseil d'Etat*, but there is no constitutional barrier to one or more administrative appellate courts below the Supreme Court.

It is to be hoped that the momentum behind the development of an administrative trial judiciary as part of the judicial system will not lead to a successful demand for administrative appellate courts based upon the claim that only such courts would have the expertise needed to deal with the highly technical and complex issues that arise in administrative law cases. The call for expertise inevitably strikes a responsive chord in the ears of laymen, and no occasion need be made for disparaging the whole race of experts. But those who seize upon expertness as the "be all and end all" of judicial review ignore the lessons of both Anglo-American and French legal history. In addition, the proponents of a system of specialized courts overlook the advantages of review by courts of broad jurisdiction, which can bring to particular cases a wide range of experience, knowledge, and understanding, as well as a proper detachment from narrower interests.

It is the great virtue of the Anglo-American judicial process that it employs judges who are not specialists in any one field of legal endeavor but capable by disposition and training of dealing with all types of cases. The limitations of the expert—inability to see beyond the narrow confines of his own experience, intolerance of the layman, and excessive zeal in carrying out his own policy regardless of the cost to other, broader interests of society—are subjected under our system to the trained scrutiny of the non-expert judge, who, uninfluenced by professional bias, is able to take a view broader than mere promotion of administrative policy in the particular case without regard for the ultimate cost.

One trained in Anglo-American traditions and techniques must conclude that more would be lost than gained by segregating administrative law by means of a separate system of administrative courts. Of course, there are deficiencies as things stand now. But the cure is not a complex structural alteration that would eliminate the review role of the ordinary courts, with the profound constitutional implications of such an alteration.

#### CONCLUSION

"We stand on the threshold of a new era in the history of the long and

fruitful collaboration of administrative agencies and reviewing courts."<sup>135</sup> Administrative law is now at a turning point. Before 1936, the stress was on delegations of power and their reconciliation with constitutional traditions. The *Morgan* cases<sup>136</sup> shifted the emphasis to administrative procedure. For thirty-five years, the procedural pattern was worked out in the regulatory agencies and then extended to the new areas of social welfare. The basic principles were codified in the federal Administrative Procedure Act and its state counterparts.

We now seem to be moving toward a new period whose essential outlines are not yet clear. The situation is complicated by current disillusionment with the administrative process. The goal of cheap and inexpensive justice by experts, one of the chief reasons for setting up agencies, has proved illusory. The administrative process has too often proved even more expensive and time-consuming than the judicial process. Even more important has been the increasing failure of agencies to protect that very public interest they were created to serve. The administrative process, which had once been vigorous in fighting for the public interest, has become an established part of the economic status quo. It has come to terms with those it is ostensibly regulating: the "public interest" is equated more and more with the interest of those being regulated. For the age-old central question of political science, "Quis custodiet ipsos custodes?" ("Who will regulate the regulators?"), our system has given a new answer: those who are regulated themselves.

Whether or not the trends projected in this article will enable our administrative law to cope with this problem is beyond this article's scope. Even so, few authors are as rash as those who venture into print with projections of coming developments. As a newspaper once described the present writer's effort to predict future Supreme Court tendencies, "He would be on much safer ground trying to forecast the winner of the 1958 Kentucky Derby, for which nominations have not even been made as yet."<sup>137</sup> Perhaps all we can say with assurance is to repeat, with Camus, that the wheel turns, history changes."<sup>138</sup> Administrative law will continue to evolve, as it has until the present; all we can hope is that it will continue to meet the changing needs of the society it serves.

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135. *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584, 597 (D.C. Cir. 1971).

136. *United States v. Morgan*, 313 U.S. 409 (1941); *United States v. Morgan*, 307 U.S. 183 (1939); *Morgan v. United States*, 304 U.S. 1 (1938); *Morgan v. United States*, 298 U.S. 468 (1936).

137. *The Court Confuses a Noted Professor*, *Shreveport Times*, July 13, 1957, at 4A, col. 2.

138. A. CAMUS, *RESISTANCE, REBELLION, AND DEATH* 7 (1960).