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Administrative Law and the Burger Court

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ADMINISTRATIVE LAW
AND THE BURGER COURT

Bernard Schwartz*

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**INTRODUCTION**

It is perhaps paradoxical that the one area of public law in which the Warren Court did not make any fundamental contributions is that of administrative law. It is increasingly apparent that a concern for individual rights that does not focus on the rights of the individual within the administrative process is bound to be only partially effective. In our evolving society, the relationship between administrative power and individual rights is becoming increasingly important, particularly in the burgeoning area of social welfare law.

Before his appointment as Chief Justice, Warren E. Burger made some of the most important lower court contributions to administrative law. Two of his court of appeals opinions rank as landmarks in the movement to broaden the due process rights of individuals dealing with administrative agencies.¹ It is therefore scarcely surprising that the Burger Court has focused upon administrative law to a much greater extent than its predecessor. If its

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¹ Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) (viewers opposing renewal of television station’s license entitled to be heard before FCC); Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964) (determination to debar contractor must follow established procedural standards and is subject to judicial review).
administrative law jurisprudence does not form an altogether consistent corpus, it does cover all of the subject's important facets.

This Article discusses the administrative law decisions of the Burger Court. Those decisions are categorized, and the different subject areas of administrative law are analyzed. The conclusion discusses the present Court's administrative law jurisprudence in relation to that of prior Courts.

**ADMINISTRATIVE AGENCIES AND ADMINISTRATIVE POWER**

**Appointment**

The Burger Court has confronted basic questions concerning the nature of the administrative agency. It is surprising that in 1976 and 1979, almost a century after the first modern agency was created, the Supreme Court was still dealing with fundamental issues concerning the organization of administrative agencies.

*Buckley v. Valeo* confirmed the President's exclusive constitutional power to make appointments to federal agencies. At issue was the constitutionality of key provisions of the Federal Election Campaign Act, as amended in 1974. The 1974 amendments created the Federal Election Commission, charged with administering and enforcing the Act. The Commission was composed of six voting members: Two to be appointed by the president pro tempore of the Senate, two by the Speaker of the House, and two by the President. All appointments were subject to confirmation by both houses of Congress. The Court held that the appointment scheme violated article II of the Constitution, which provides for appointment of "Officers of the United States" by the President, subject to Senate confirmation. The Court construed "Officers of the United States" broadly, stating that it was intended "to include 'all persons who can be said to hold an office under the government' . . . [and that] its fair import is that any appointee exercising significant

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authority pursuant to the laws of the United States is an ‘Officer of the United States,’ ” and must be appointed in the manner prescribed by article II.7 Unless their selection is provided for elsewhere in the Constitution, all officers of the United States must be appointed by the President in accordance with the appointment clause of article II.

Buckley lends emphasis to the constitutional role of the President as administrative head of the government. Its principle plainly applies to the typical administrative agency, even those with predominantly legislative and judicial functions. Though Congress may provide for the independence of such agencies from presidential control,8 it cannot exclude the President from the selection process. But Buckley’s implications are broader. The Court’s far-reaching definition of “Officers of the United States” appears applicable to the Office of Management and Budget (OMB) and many members of the White House staff. As Buckley expressly states, “No class or type of officer is excluded because of its special functions.”9 This would mean that Senate confirmation of all but “inferior” OMB and White House officials is required by article II, and these officials would presumably be subject to far more direct congressional oversight than has been exercised until now.

From this broader point of view, Buckley may be seen as part of the Court’s effort during the past decade to help curb the “imperial presidency”10 that, under Richard Nixon, threatened the very constitutional structure. On its face, Buckley protects presidential power against congressional infringements. Yet the Court’s reasoning would subject virtually all presidential appointees, including those in the White House and OMB, to direct congressional control. That result is wholly consistent with the constitutional intent: The President, as administrative chief, possesses a monopoly over the appointing power, but his appointees are subject to the vital check provided by legislative oversight.

Composition

Few questions are as crucial to administrative law as the composition of the administrative agency itself. This is particularly rele-

7. 424 U.S. at 126 (citation omitted).
vant because of the prevalence of state agencies whose members are chosen from the ranks of the regulated interests. More often than not, the result has been agencies that equate the “public interest” with the interest of those being regulated. For the age-old question of political science, Quis custodiet ipsos custodes? (Who will regulate the regulators?), our system has supplied a new answer: those who are regulated themselves.

Seven years ago, in *Gibson v. Berryhill*, the Court appeared to strike a blow against agencies composed of members drawn from those regulated. *Friedman v. Rogers* indicates, however, that the blow was far from lethal. *Friedman* concerned a Texas law that required four of the six members of the Texas Optometry Board, the agency that regulates the practice of optometry, to be members of the Texas Optometric Association, the professional organization of optometrists. The constitutionality of the statute was attacked by an optometrist who practiced commercially and was therefore ineligible for membership in the Association. He claimed that the statute violated his due process and equal protection rights by subjecting him to regulation by the professional faction of optometrists. The statute was also attacked by the Texas Senior Citizens Association, which claimed that its members had a fourteenth amendment right to representation of the general public on the Board. The Court unanimously rejected the constitutional challenge. “[I]t was reasonable,” said the Court, “for the legislature to require that a majority of the Board be drawn from a professional organization that had demonstrated consistent support for the rules that the Board would be responsible for enforcing.” Plaintiff had “no constitutional right to be regulated by a Board that is sympathetic to the commercial practice of optometry”; nor was there a constitutional basis for a “due process claim that the legislature is required to place a representative of consumers on the Board.” The Court limited *Gibson’s* application to cases where the pecuniary bias of members of the regulatory board interfered with the right to a fair and impartial hearing.

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11. *411 U.S. 564 (1973)* (pecuniary interests of members of optometry board who practiced privately disqualified them from adjudicating dispute involving non-private practitioners).
12. *440 U.S. 1 (1979).*
13. *See* *TEX. REV. CIV. STAT. ANN.* art. 4552-2.02 (Vernon 1976).
14. *See* *Brief for Appellant at 13, 27, Friedman v. Rogers, 440 U.S. 1 (1979)* (consolidated on appeal with Rogers v. Friedman).
15. *See* *Jurisdictional Statement for Appellant at 12, Friedman v. Rogers, 440 U.S. 1 (1979)* (consolidated on appeal with Rogers v. Friedman).
16. *440 U.S. at 18 (citations omitted) (footnotes omitted).*
Delegations of Power

During the past half century, a prime task of administrative law has been to legitimize the vast delegations of power given to agencies. In *Panama Refining Co. v. Ryan*\(^1\) and *A.L.A. Schechter Poultry Corp. v. United States*\(^2\) the Court sought to control excessive delegations by requiring that Congress establish standards to limit administrative discretion. More recently the opinions in those cases have seemed written from another world. Courts have all but abandoned the view expressed in *Panama* and *Schechter* that delegations of power are invalid unless they contain limiting standards.\(^3\) Wholesale delegations have become the rule in our administrative law: the new touchstone is the "public interest."\(^4\) Charles Reich summarized this trend: "The basic theme [is] simple: economic power . . . must be subjected to the 'public interest'"—as defined by the administrator.\(^5\)

The Burger Court, however, has gone out of its way to indicate that the old law on delegation may not be entirely passé. In *National Cable Television Association v. United States*,\(^6\) which involved a Federal Communications Commission order revising fees imposed upon Community Antenna Television systems, the Court stated the governing rule in terms of the standards requirement: "Congress, of course, does delegate power to agencies, setting standards to guide their determination."\(^7\) Whether the statute authorizing agencies to impose fees met the *Schechter* requirement was a question the Court did not reach. "But the hurdles revealed in [*Schechter Poultry and Hampton & Co. v. United States*] lead us to read the Act narrowly to avoid constitutional problems."\(^8\)

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1. 293 U.S. 388 (1935) (Congress must establish standards when delegating legislative power).
2. 295 U.S. 495 (1935) (Congress cannot abdicate or transfer to others essential legislative functions with which it is vested).
3. Though the federal courts continue to use the traditional language, asserting the need for standards for delegations to be upheld, there seem in practice to be few constitutional restrictions on delegation today. See generally *Arizona v. California*, 373 U.S. 546 (1963); *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737 (D.D.C. 1971).
5. Id. at 342.
6. Id. in *Hampton & Co. v. United States*, 276 U.S. 394, 409 (1928), the Supreme Court held that a congressional delegation of power will not be unconsti-
Court thus hinted that Schechter remained a potential barrier to overly broad delegations.

In two 1976 cases the Court expressly restated the standards requirement as a limitation upon delegations. City of Eastlake v. Forest City Enterprises\textsuperscript{26} held that a referendum authorized by the state constitution did not involve a "delegation" of power, which would have required standards to guide the voters' decision. The Chief Justice's majority opinion stated: "Courts have frequently held in other contexts that a congressional delegation of power to a regulatory entity must be accompanied by discernible standards, so that the delegatee's action can be measured for its fidelity to the legislative will."\textsuperscript{27} In Federal Energy Administration v. Algonquin SNG, Inc.\textsuperscript{28} the Court repeated the rule that a delegation of power must be accompanied by discernible standards.\textsuperscript{29}

Of particular significance is the indication in National Cable that certain types of power must be exercised directly by Congress and cannot be delegated by that body.\textsuperscript{30} National Cable rejected the argument that the FCC's imposition of fees amounted to the levying of taxes.\textsuperscript{31} The Court stressed that "[i]t would be such a sharp break with our traditions to conclude that Congress had bestowed on a federal agency the taxing power"; thus the enabling statute had to be read "narrowly as authorizing not a 'tax' but a 'fee.'"\textsuperscript{32} The clear implication is that the power to levy taxes may not be delegated.

The National Cable case should be compared with Algonquin, in which the Court held that the Trade Expansion Act\textsuperscript{33} authorized the President to impose substantial license fees on imported petroleum in order to reduce petroleum imports. The Court found the statute gave the President discretion to determine the method used to adjust imports. This discretion was not limited to quantitative methods such as quotas; monetary methods such as license fees were also permissible.\textsuperscript{34} Nor was it necessary to narrow the statute's application to avoid any question of an unconstitutional instruction if it provides an "intelligible principle" to which the agency is directed to conform.

\begin{itemize}
  \item 26. 426 U.S. 668 (1976).
  \item 27. Id. at 675 (citations omitted).
  \item 28. 426 U.S. 548 (1976).
  \item 29. Id. at 559.
  \item 30. 415 U.S. at 341-42.
  \item 31. See Brief for Petitioner at 42, National Cable Television, Ass'n v. United States, 415 U.S. 336 (1974).
  \item 32. Id. at 341 (citation omitted).
  \item 34. 426 U.S. at 559.
\end{itemize}
delegation. The standards provided in the law were sufficient to meet any delegation doctrine attack.35

In effect, the *Algonquin* statute was read as authorizing the President to impose a tax on imported oil. It is distinguishable from *National Cable* because the oil fees are imposed on imports, and the delegation thus relates to foreign affairs. Hence it may be supported under the flexible tariff cases,36 as well as by *United States v. Curtiss-Wright Export Corp.*37 Regardless of how the case may be distinguished, one is nevertheless left with an uneasy feeling that the Court has permitted the power to impose substantial taxes to be vested in the executive.

**Adjudicatory Power and Jury Trial**

It is unquestionable that agencies may be delegated the power to decide contested cases. Ever since *Crowell v. Benson*38 it has been recognized that delegation of adjudicatory authority does not conflict with article III's grant of the "judicial power" to the federal courts.39 Administrative law assumes that not all adjudication must be judicial.40 But an unanswered question remained about the relationship between an agency's exercise of adjudicatory authority and the constitutional right to jury trial in civil cases.41

That question was presented in *Atlas Roofing Co. v. Occupational Safety & Health Review Commission.*42 Under the Occupational Safety and Health Act of 197043 penalties up to $10,000 may be imposed by the Commission upon employers who violate the statutory duty to maintain safe working conditions.44 Petitioner employers contended that the imposition of penalties of $5,000 and $600 upon them violated their seventh amendment right to jury trial "in suits at common law."45 The Court rejected the conten-
tion, holding that the seventh amendment does not prevent Congress from assigning to an agency the task of adjudicating employment safety violations: "[W]hen Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be 'preserved' on 'suits at common law.'" 46

The easy answer to the seventh amendment claim is that the constitutional right to jury trial in civil cases exists only, as the seventh amendment expressly indicates, in cases where the right was recognized at common law. It has no application in noncommon law cases, such as those in equity, admiralty, and bankruptcy. Administrative proceedings did not exist at common law; they involve statutory requirements and procedures and may be litigated by the administrative machinery prescribed by the legislature without reference to the jury requirement.

Unfortunately the Court did not confine itself to this simple approach. Instead the Atlas opinion limits its holding to cases involving statutorily created "public rights." As another portion of the opinion puts it:

Our prior cases support administrative factfinding in only those situations involving "public rights," e.g., where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights. Wholly private tort, contract, and property cases, as well as a vast range of other cases, are not at all implicated. 47

The indicated division between "public" and "private" rights appears unwarranted. According to Crowell v. Benson, 48 a worker's compensation case "is one of private right." 49 Does this mean that the award of worker's compensation by an agency violates the constitutional right to trial by jury?

Narrowing the Vires

The Burger Court's attitude toward administrative power is demonstrated by the restrictive view it has expressed with regard to delegated powers. The principal administrative law function of the courts is to keep agencies within their statutory limits. From

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46. 430 U.S. at 455 (footnote omitted).
47. Id. at 458.
49. Id. at 51.
this point of view the celebrated Acton aphorism states the root principle of administrative law. Legal rules, unlike those in the physical sciences, do not have fixed areas of strains and stresses. There is a tendency to stretch legal rules to the breaking point permitted by expediency, to carry out the desired action even at the risk of illegality. "You cannot blame the Minister for trying it on," said an English official to counsel at an agency hearing over half a century ago.  

SEC v. Sloan was a case of an agency "trying it on" in which the agency's action was ruled invalid by the Supreme Court. Section 12k of the Securities Exchange Act of 1934 gives the SEC the authority "summarily to suspend trading in any security . . . for a period not exceeding ten days" if "in its opinion the public interest and the protection of investors so require." In Sloan the SEC issued a series of consecutive summary orders suspending trading in a particular stock for over a year. This action was not an extreme example of the section 12k suspension power; the SEC had used the power to suspend trading in a security for up to thirteen years, and the record was replete with suspensions lasting the better part of a year. It is not surprising that Justice Brennan's concurrence noted "how flagrantly abusive the Securities and Exchange Commission's use of its § 12k authority has been."  

The Court held that "tacking" ten-day summary suspension orders for an indefinite period was an abuse of the SEC's authority. The statute that authorized summary suspensions did not empower the Commission to issue successive orders to curtail trading in a security beyond the initial ten-day period. A different situation would be presented if a second manipulative scheme or improper activity unrelated to the first scheme was discovered. Only then could the SEC order a second ten-day suspension. But the Commission is not authorized to issue a series of summary suspension orders based upon a single set of events or circumstances. Not only is section 12k clear on its face in compelling this result, but "a 1-year suspension as here, without notice or hearing, so obviously violates fundamentals of due process and fair play that no reason-

50. COMMITTEE ON MINISTERS POWERS, MINUTES OF EVIDENCE 75 (1932).
54. Id. at 123 (Brennan, J., concurring).
55. Id. at 111-12.
able individual could suppose that Congress intended to authorize such a thing.”

Sloan involved patent ultra vires action that was rebuffed by the Burger Court, as it would have been by any of its predecessors. The present Court’s own tendency to restrain administrative power may be seen in cases where an agency’s exercise of authority is not so flagrantly illegal. During the previous quarter century the Supreme Court had taken a more hospitable posture toward the scope of agency authority and had been willing to apply a broad doctrine of implied agency powers. Justice Frankfurter’s rationale explains the underlying premise: “[I]n enacting [delegating] legislation Congress is not engaged in a scientific process which takes account of every contingency. Its laws are not to be read as though every i has to be dotted and every t crossed.” Administrative powers were not to be construed in a niggardly manner; agencies were to be permitted to exercise not only authority expressly delegated, but also such powers as could reasonably be implied from the enabling legislation.

This administrative law counterpart of the McCulloch v. Maryland implied-powers doctrine is being applied in a more constricted manner by the present Court. The Court has been narrowing the vires of delegating statutes and refusing to read in authority not specifically conferred unless it is necessary, as well as proper, to exercise the delegated power. Thus, in NAACP v. Federal Power Commission the Court refused to construe the wholesale delegation, limited only by a public interest standard, as a blank check enabling the agency to take any measure it thought would further the public interest. According to the opinion, such a standard “is not a broad license to promote the general public welfare. Rather the words take meaning from the purposes of the regulatory legislation.” The principal purpose of the Federal Power Act was to encourage the orderly development of plentiful supplies of electricity and gas at reasonable prices. The words

56. Id. at 123-24 (Brennan, J., concurring).
57. Extending approximately from 1941, the date of the fourth Morgan case, United States v. Morgan, 313 U.S. 409 (1941), to 1969.
61. Id. at 669.
“public interest” in the statutes were a charge to promote this purpose, not a directive to eradicate racial discrimination. Hence the statutes did not delegate to the Federal Power Commission authority to issue a rule prohibiting discriminatory employment practices by regulated companies.64

More recent decisions refuse to allow agencies to exercise powers not specifically delegated by Congress. Two 1979 decisions illustrate this point. FCC v. Midwest Video Corp.65 struck down FCC rules requiring cable television operators to allow free access to certain channels by public, educational, governmental, and leased access users.66 The Court held that the rules were not reasonably necessary to the effective performance of the FCC’s responsibility for television regulation and hence were not within the Commission’s authority. In effect, the rules imposed common-carrier obligations on cable operators. Absent specific authority, the FCC may not regulate cable systems as common carriers any more than it may impose such obligations on broadcasters. Authority to compel cable operators to provide common carriage must come specifically from Congress.67 Similarly, in NLRB v. Catholic Bishop68 the Court held that the Board had no jurisdiction over lay teachers in church-operated schools. In the absence of a clear expression of congressional intent to bring teachers in church-operated schools within NLRB jurisdiction, the Court would not construe the enabling statute to give the Board such jurisdiction.69

As seen, the Burger Court has articulated doubts about the demise of the standards requirement, and these recent decisions are potential deterrents to uncanalized delegations. But its statements on the matter have thus far been only in the nature of obiter and have not yet affected the results in specific cases. One result of the decline of a meaningful standards requirement has been a growing ineptitude in the drafting of delegating statutes. Instead of drafting detailed standards, the legislature tends to leave it to the administrator. As Judge J. Skelly Wright has noted, it is so much “easier to pass an organic statute with some vague language about the ‘public interest’ which tells the agency, in effect, to get the job

64. 425 U.S. at 669-70.
67. 440 U.S. at 708-09.
69. Id. at 504. Serious first amendment questions would have been posed had the Court construed the enabling statute as giving the NLRB such authority. See id.
Prior Courts were willing to look beyond the explicit statutory language and find implied authority in light of what the Court referred to as "the mischief to be corrected and the end to be attained." The present Court is no longer willing to assume implied power from the inadequate draftsmanship that is all too common in laws containing wholesale delegations.

In the area of Information and Investigations, another area in which the present Court has refused to correct drafting inadequacies has been in applying the Freedom of Information Act (FOIA). Instead, the Court has consistently ruled that the FOIA provisions must be applied as written, even though that may lead to undesirable results in individual cases. The leading case is *Environmental Protection Agency v. Mink.* Members of Congress brought suit under FOIA to compel disclosure of documents that had been prepared for the President concerning a scheduled underground nuclear test. The documents had been classified Top Secret or Secret and the Government claimed that they came within the first exemption of FOIA that then applied to matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." The court of appeals reversed a summary judgment in the Government's favor, holding that the exemption permits the withholding of only the secret portions of classified documents, but requires disclosure of the nonsecret components if separable. The district court was to examine the documents in camera to determine if the nonsecret parts were separable. The Supreme Court reversed, holding that the exemption covers any documents classified pursuant to Executive Order 10501 and does not permit judicial review.

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70. Wright, *supra* note 20, at 585.
74. *Id.* at 75.
of the validity of the classification. Furthermore, it does not permit in camera inspection to sift out nonsecret components. The judicial role under FOIA is limited to determining if the given documents are classified; FOIA does not subject the soundness of executive security classifications to judicial review.\textsuperscript{78} It is true, as the dissent emphasized, that FOIA required the court to “determine the matter de novo.”\textsuperscript{79} But the majority held that the only “matter” to be determined de novo was whether the documents had been classified pursuant to Executive order. The Court’s literal application of the exemption disappointed those who had expected FOIA to weaken the executive privilege doctrine. If Congress intended a different result, an amendment would be necessary. This occurred when FOIA was substantially amended in 1974.\textsuperscript{80}

A primary purpose of the 1974 amendments was to overrule \textit{Mink} in this respect. Under these amendments the first exception applies only to matters whose secrecy is authorized by an Executive order to protect national defense or foreign policy, and the documents are in fact properly classified pursuant to such Executive order.\textsuperscript{81} In an FOIA action, the court is given the express power to examine the records in camera to determine whether the records should be withheld under the exception, and may now determine de novo whether an invocation of executive privilege is justified.\textsuperscript{82}

But the Court has continued to follow the \textit{Mink} rule that it must apply FOIA as written and may not correct legislative lacunae by judicious judicial interpretation. Thus, in \textit{NLRB v. Robbins Tire \\& Rubber Co.}\textsuperscript{83} the Court refused to allow FOIA to be used as a private discovery tool. After the NLRB filed an unfair labor practice complaint against respondent employer, respondent requested, pursuant to FOIA, that the Board make copies of all potential witnesses’ statements collected during the NLRB’s investigation available prior to the hearing.\textsuperscript{84} This request was denied on the ground that the statements were exempt from disclosure under exemption 7(A) of FOIA, which provides that disclosure is not re-

\textsuperscript{78} 410 U.S. at 84.
\textsuperscript{81} See \textit{id.} § 2(a)(1)(B) (current version at 5 U.S.C. § 552(b)(1)(B) (1976)).
\textsuperscript{82} See \textit{id.} § 1(b)(2) (current version at 5 U.S.C. § 552(a)(4)(B) (1976)).
\textsuperscript{83} 437 U.S. 214 (1978).
\textsuperscript{84} \textit{Id.} at 216.
quired of "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . interfere with enforcement proceedings." The lower court held that the NLRB had failed to sustain its burden of demonstrating the availability of exemption 7(A) because it had introduced no evidence that interference with the unfair labor practice proceeding in the form of witness intimidation was likely to occur in this case.

The Supreme Court reversed, rejecting an interpretation of exemption 7(A) under which determination of "interference" would be made only on a case-by-case basis. The exemption language does not prevent federal courts from determining that disclosure of particular kinds of investigatory records while a case is pending would "interfere with enforcement proceedings." In Robbins, disclosure of the witnesses' statements "would interfere with enforcement proceedings" since the dangers posed by premature release of the statements would involve precisely the kind of interference with enforcement proceedings that exemption 7(A) was designed to avoid. In this case the perceived risk was that employers or unions would coerce or intimidate employees and others who had given statements, in an effort to make them change their testimony or not testify at all. The Court stressed that "[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." But it was not intended to overturn the NLRB's longstanding rule against prehearing disclosure of statements by witnesses. A contrary rule would "have a chilling effect on the Board's sources."

The Court has also declined to go beyond FOIA's explicit language and interpret the statute as authorizing so-called "reverse FOIA" suits. Under FOIA third parties have been able to obtain governmental files containing information submitted by persons who thought the information would be held in confidence. To protect their expectations from being frustrated by disclosure, they brought "reverse FOIA" suits to enjoin the disclosure.

85. § 2(b) (current version at 5 U.S.C. § 552(b)(7)(A) (1976)).
86. 563 F.2d 724, 735-36 (5th Cir. 1977), rev'd, 437 U.S. 214 (1978).
87. 437 U.S. at 236 (quoting Freedom of Information Act § 2(b) (current version at 5 U.S.C. § 552(b)(7)(A) (1976))).
88. Id. at 239.
89. Id.
90. Id. at 242 (citations omitted).
91. Id. at 241 (footnote omitted).
Chrysler Corp. v. Brown\textsuperscript{92} was such a “reverse FOIA” suit. Petitioner was a governmental contractor who had been required to furnish detailed employment data to the Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP). When third parties made an FOIA request for disclosure, the contractor sought to enjoin release of the documents, contending that FOIA bars disclosure of the requested employment information.\textsuperscript{93} The Court rejected the contention.\textsuperscript{94} Its unanimous decision was that FOIA is exclusively a disclosure statute and affords no private right of action to enjoin agency disclosure. The FOIA provisions exempting specified material from disclosure are meant only to permit agencies to withhold certain information, not to mandate nondisclosure. FOIA protects the interest in confidentiality of persons submitting information only to the extent that this interest is endorsed by the agency collecting the information.\textsuperscript{95} FOIA ex proprio vigore does not forbid agencies from disclosing any information to the public, and in this case the agency had issued regulations that provided for public disclosure of the requested records.\textsuperscript{96}

Petitioner had also relied on the Trade Secrets Act, which specifically prohibits disclosure by governmental employees of certain information submitted to agencies.\textsuperscript{97} The Court rejected the Government’s claim\textsuperscript{98} that the OFCCP regulations providing for disclosure brought the case within the Trade Secrets Act’s exception for disclosures “authorized by law.” The case was remanded for determination of whether the contemplated disclosures would violate the Trade Secrets Act.\textsuperscript{99} This implies that while “reverse FOIA” suits, as such, are not permitted, the ability to prevent disclosure may be obtained under the Trade Secrets Act. Seeking review under the Administrative Procedure Act (APA)\textsuperscript{100} to determine whether disclosure violates the Trade Secrets Act’s prohibitions will replace “reverse FOIA” suits as a technique to protect information furnished to agencies.

\textsuperscript{92} 441 U.S. 281 (1979).
\textsuperscript{93} Brief for Petitioner at 33, Chrysler Corp. v. Brown, 441 U.S. 281 (1979).
\textsuperscript{94} 441 U.S. at 294.
\textsuperscript{95} Id. at 292-94.
\textsuperscript{96} See 41 C.F.R. §§ 60-1.3, 60-1.7 (1979).
\textsuperscript{99} 441 U.S. at 318-19.
\textsuperscript{100} See Administrative Procedure Act § 3, 5 U.S.C. § 552 (1976).
Investigatory Power

The decisions of the Burger Court make a logical corpus out of the case law on one of the most significant administrative investigatory powers, the power of inspection. Prior to the Burger Court, the leading cases on inspection power were Camara v. Municipal Court and See v. City of Seattle, both of which were decided in 1967. In Camara the Court ruled that the fourth and fourteenth amendments prohibited an administrative inspection without a search warrant. In See the Court held that the protections extended to business premises as well. Three years later in Colonnade Catering Corp. v. United States the Court implied that Congress was not bound by the See holding in dealing with a closely regulated industry, such as the liquor business. The legislature could validly provide for warrantless inspections of such businesses by the relevant regulatory agency, although in Colonnade a divided Court held that Congress had not authorized warrantless inspections in the governing statute.

United States v. Biswell made explicit what had been implied in Colonnade. It held that a warrantless search of a locked storeroom during business hours as part of an inspection authorized by the Gun Control Act of 1968, which resulted in the seizure of unlicensed firearms from a dealer federally licensed to deal in sporting weapons, did not violate the fourth amendment. Even though federal regulation of traffic in firearms is not as long-standing as governmental control of the liquor industry, close scrutiny and frequent inspections are essential to enforce the law; these would be frustrated by a warrant requirement. When a dealer chooses to engage in this pervasively regulated business, he or she does so with knowledge that he or she is subject to effective inspection. The Court explained a year after Biswell: “A central dif-

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103. U.S. Const. amend. IV.
104. Id. amend. XIV.
105. 387 U.S. at 532-33.
106. 387 U.S. at 543.
108. Id. at 76-77.
109. Id. at 77.
111. § 902(g), 18 U.S.C. § 923(g) (1976).
112. 406 U.S. at 317.
ference between those cases [Colonnade and Biswell] is that businessmen engaged in such federally licensed and regulated enterprises accept the burden as well as the benefits of their trade . . . . The businessman in a regulated industry in effect consents to the restrictions placed upon him."113

However, Colonnade and Biswell did not make clear the basis for and extent of the warrantless inspection exception. Did it apply to all regulated businesses or only to those subject to pervasive regulation by an ICC-type regulatory agency? Did it turn on whether the business operated under a license, so that implied consent could be assumed? Could the legislature authorize warrantless inspections in every case where there was a direct public interest in effective enforcement of the agency's regulatory scheme?

These questions were answered in 1978 by Marshall v. Barlow's, Inc.114 That case arose out of an attempt by an Occupational Safety and Health Act (OSHA) inspector to conduct a search of an electrical and plumbing installation business. The inspector acted under a statutory provision authorizing agents of the Secretary of Labor to enter and inspect the work area of any employment facility within OSHA's jurisdiction to search for safety hazards and violations of OSHA regulations.115 Admission was denied because the inspector did not have a search warrant. The business sought injunctive relief against warrantless OSHA searches. The Court held that the fourth amendment required a warrant for this type of search; the statutory authorization for warrantless inspections was unconstitutional.116

The Secretary of Labor had argued that the case came within the Colonnade-Biswell exception.117 Although the Court noted that those cases were indeed exceptions, it stated that "they represent responses to relatively unique circumstances."118 Certain businesses have such a history of governmental regulation that there can be no reasonable expectation of privacy by those engaged in such businesses. Liquor and firearms are examples; "when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regula-

116. 436 U.S. at 325.
118. 436 U.S. at 313.
Barlow’s involvement in interstate commerce did not make it subject to the same degree of close supervision; nor did this imply constructive consent to inspections. Since few businesses operate without having some effect on interstate commerce, a contrary approach would remove the fourth amendment requirement and permit warrantless inspections of business premises. A regulatory scheme that cuts across industry and imposes requirements in a given field for all businesses does not fall within the warrantless inspection exception. For the exception to apply, the business must be under the jurisdiction of an agency vested with pervasive regulatory authority, including licensing power, over the specific industry.

Barlow's stressed that the warrant requirement in cases not within the Colonnade-Biswell exception did not include the same showing of probable cause demanded in criminal law cases. OSHA entitlement to inspect will not depend on demonstrating probable cause to believe that conditions in violation of OSHA exist on the premises: A showing that a business has been chosen for an OSHA inspection based on a general enforcement plan, considering such factors as the dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would adequately protect fourth amendment rights. Presumably this would allow traditional inspection tools, such as the “spot check” or random inspection, as well as area-by-area or industry-by-industry inspections.

The dissent in Barlow’s urged that under the Court’s diluted probable cause standard the inspection warrant is a formality that adds little in the way of protection. This overlooks the dangers of harassment inspections that are reduced by requiring a warrant. The warrant provides assurance of independent scrutiny by a judicial officer. That assurance is lacking where the only check is within the agency itself: The authority to make warrantless inspections confers almost unbridled discretion upon inspectors in the field concerning when and whom to search.

119. Id.
121. 436 U.S. at 320-21.
122. Id. at 334 (Stevens, J., dissenting).
RULEMAKING

Legal Effect

In the perspective of American history, the most important case decided by the Burger Court may well be United States v. Nixon,\(^\text{123}\) which led to Mr. Nixon’s resignation from the nation’s highest office. The Nixon case also confirms a basic administrative law principle: Administrative rules and regulations have the legal effect of statutes. Nixon arose out of an action by the Special Prosecutor to enforce a subpoena directing the President to produce tape recordings and documents. The President contended that “the matter was an intra-branch dispute between a subordinate and superior officer of the Executive Branch and hence not subject to judicial resolution.”\(^\text{124}\) The contention was rejected because the Attorney General had issued regulations conferring on the Special Prosecutor unique tenure and authority to represent the United States and “explicit power to contest the invocation of executive privilege in the process of seeking evidence . . . .”\(^\text{125}\) The executive branch was bound by the regulation: “So long as this regulation is extant it has the force of law.”\(^\text{126}\) Thus a regulation has the same legal effect as a statute, and it is equally binding on the government and private citizens. The Court found that “as the sovereign composed of the three branches,” the government “is bound to respect and to enforce [the regulation].”\(^\text{127}\)

The Court itself appears to have ignored the basic principle affirmed in Nixon in the 1979 case of United States v. Caceres,\(^\text{128}\) involving tape recordings of monitored conversations. The Court held that these recordings could be introduced into evidence even though they had been recorded by IRS agents in violation of IRS regulations requiring authorization prior to monitoring and recording.\(^\text{129}\) According to the Court, “as a matter of administrative law . . . it seems clear that agencies are not required, at the risk of invalidation of their action, to follow all of their rules, even those properly classified as ‘internal.’”\(^\text{130}\) In view of cases such as Nixon,
such a statement is questionable, to say the least. The Court stressed that the violated regulations were required neither by the Constitution nor by statute.\textsuperscript{131} But the cases are legion that hold agencies to rules more generous than those demanded by the Constitution or by a statute.\textsuperscript{132} Justice Frankfurter endorsed this principle: "He that takes the procedural sword shall perish with that sword."\textsuperscript{133} Agency violation of its own rules is considered arbitrary action that "cannot be reconciled with the fundamental principle that ours is a government of laws."\textsuperscript{134} It violates every sense of decency for the agency to abrogate a rule to accomplish the ends of a particular case.\textsuperscript{135} "What a farce the attempt to secure rights in any judicial tribunal must become, if its rules and practice are ignored or applied at the arbitrary will of the judge . . . !"\textsuperscript{136} The same is true where an agency ignores its own rules and practice.

The principle that a rule or regulation has the force and effect of law applies only where the rule or regulation meets certain criteria. One factor relates to the distinction between interpretive and substantive rules.\textsuperscript{137} A substantive rule, or a "legislative-type rule," is one "affecting individual rights and obligations."\textsuperscript{138} For a substantive rule to come within the "force and effect of law" principle it must be rooted in a legislative delegation.

This important limitation was spelled out in \textit{Chrysler Corp. v. Brown},\textsuperscript{139} discussed above as a leading case under the Freedom of Information Act. As seen, \textit{Chrysler} disallowed a "reverse FOIA" action, and the Court ruled that FOIA does not afford a private right of action to enjoin agency disclosure of information supplied by petitioner.\textsuperscript{140} Petitioner argued that its injunction suit could

\begin{itemize}
  \item \textsuperscript{131} Id. at 751-52.
  \item \textsuperscript{133} Vitarelli v. Seaton, 359 U.S. 535, 547 (1959) (Frankfurter, J., concurring in part and dissenting in part).
  \item \textsuperscript{134} Hammond v. Lenfest, 398 F.2d 705, 715 (2d Cir. 1968).
  \item \textsuperscript{136} Germania Iron Co. v. James, 89 F. 811, 818 (8th Cir. 1898).
  \item \textsuperscript{137} See Chrysler Corp. v. Brown, 441 U.S. 281, 301-02 (1979); B. Schwartz, \textit{Administrative Law} § 58; id. § 59, at 155-57 (1976).
  \item \textsuperscript{138} Chrysler Corp. v. Brown, 441 U.S. at 302 (quoting Morton v. Ruiz, 415 U.S. 199, 236 (1974)); id. at 232.
  \item \textsuperscript{139} Id. at 285. See text accompanying notes 92-99 supra.
  \item \textsuperscript{140} 441 U.S. at 292-94.
\end{itemize}
also be premised on the Trade Secrets Act provision prohibiting
disclosure by governmental employees "in any manner or to any
extent not 'authorized by law' " of certain information submitted to
agencies.41 The Government argued that the instant disclosure
was “authorized by law” because regulations42 of the Department
of Labor’s Office of Federal Contract Compliance Programs
(OfCCP) provide for public disclosure of information such as that
furnished by petitioner.43 The Court rejected this argument, hold-
ing that only those regulations that are the product of a congres-
sional grant of legislative authority can be “law” within the mean-
ing of the Trade Secrets Act:44 “The legislative power of the
United States is vested in the Congress, and the exercise of quasi-
legislative authority by governmental departments and agencies
must be rooted in a grant of such power by the Congress and sub-
ject to limitations which that body imposes.”45 The OFCCP regu-
lations were promulgated under authority delegated not by statute
but by an Executive Order;46 the OFCCP regulations were not
reasonably within the contemplation of any statutory grants of au-
thority, either to the President or to the Department of Labor. Ab-
sent an identifiable delegation, “the thread between these regula-
tions and any grant of authority by the Congress is so strained that
it would do violence to established principles of separation of powers
to denominate these particular regulations ‘legislative’ and credit
them with the ‘binding effect of law.’ ”47

Procedure

As discussed above, the Burger Court has refused to go be-
yond statutory language and recognize implied powers of agencies
that were not specifically conferred by Congress. The Court’s ten-
dency to confine itself to the literal language of statutes is also ap-
parent in its decisions on the provisions of the Federal Administra-
tive Procedure Act governing rulemaking procedure.48 But this

(quoting Trade Secrets Act, 18 U.S.C. § 1905 (1976)).
144. 441 U.S. at 315-16.
145. Id. at 302.
147. 441 U.S. at 307-08.
(1976).
time the result has favored agency authority: The decisions on rulemaking procedure leave the details up to the agencies concerned, subject only to the requirements imposed by the literal language of the APA.

Under the APA "notice and comment" system of rulemaking procedure, the APA mandates only that the agency publish notice of proposed rulemaking in the Federal Register and give interested persons some opportunity to comment on the proposed regulations. This system has been criticized as providing insufficient procedural safeguards, particularly in the newer fields of environmental and nuclear regulation, which involve complex scientific and technical issues. The factual issues in those fields have been deemed inappropriate for trial-type procedures; instead issues have been resolved in rulemaking proceedings. Some courts, however, have been unwilling to allow the agencies to limit themselves to the informal procedural requirements imposed by the APA. Some proceedings involve factual components of such importance that a greater assurance of accuracy is required than that which accompanies ordinary rulemaking procedures: "[M]ore precision may be required than the less rigorous development of scientific facts which may attend notice and comment procedures." The Court of Appeals for the District of Columbia, in particular, handed down a series of decisions holding that, in those rulemaking cases involving complicated scientific issues, procedures in excess of the minima prescribed by the APA may be required.

The District of Columbia Court of Appeals had struck down a rule of the Nuclear Regulatory Commission dealing with the uranium fuel cycle in nuclear power reactors because of procedural inadequacies in the rulemaking proceedings. The agency had complied with the APA notice and comment requirements, but the court of appeals held that more was required to ensure that the issues were ventilated fully. In particular, the court accepted the argument of the public interest intervenors that the agency's decision to preclude discovery or cross-examination denied a meaningful opportunity to the environmental associations that had sought to participate in the proceeding. The Supreme Court reversed, holding that the APA lays down the only procedural requirements for informal rulemaking. To require more "almost compels the agency to conduct all rulemaking proceedings with the full panoply of procedural devices normally associated only with adjudicatory hearings."

The Supreme Court has recently explained that Vermont Yankee "held that courts could only in 'extraordinary circumstances' impose procedural requirements on an agency beyond those specified in the APA. It is within an agency's discretion to afford parties more procedure, but it is not the province of the courts to do so." This means that if agencies are going to be required to follow stricter procedures than those imposed by the APA, the requirements must be imposed by Congress, not by the courts.

It is undesirable for the APA to be amended to require more than notice and comment procedures in most rulemaking proceedings. Recent years have seen a tremendous expansion of rulemaking powers. Both Congress and the courts have fostered this trend. But that does not mean that rulemaking should be conformed to the judicial process; that would defeat the principal advantages of the rulemaking process. As a member of the court of appeals in Vermont Yankee concedes, "requiring cross-examination in a rule-

157. Id. at 643.
158. 435 U.S. at 547.
The making proceeding is radical therapy, which may cause the patient to suffer a slow, painful death."160 The Supreme Court recognizes that agencies are free to grant additional procedural rights in rulemaking; "but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them."161

Formal Rulemaking

The Burger Court has also adopted a restrictive approach to the APA provisions for formal rulemaking,162 refusing to go beyond a narrow and literal approach to the relevant APA language. Formal rulemaking requires a "trial-type" hearing, in accordance with the APA requirements for adjudicatory procedures.163 The APA mandates such a hearing "[w]hen rules are required by statute to be made on the record after opportunity for an agency hearing."164 The APA requires most of the procedural formalities that are found in adjudication, including the right to submit evidence and to cross-examine.165 The approach is a hybrid one that imposes adjudication requirements upon a rulemaking proceeding.

In United States v. Florida East Coast Railway,166 the Court held that formal rulemaking is required under the APA only where the enabling legislation expressly provides for the rules to be made "on the record after opportunity for an agency hearing."167 Whatever Congress may have meant by a phrase Judge Friendly has termed reminiscent of certiorari by the seventeenth century King's Bench,168 the Court held that Congress clearly intended to hold the agency to APA formal adjudicatory procedures only when the agency was otherwise required to hold a "trial-type" hearing before issuing the rules. Statutory language authorizing the agency to act "after hearing" is not the equivalent of a requirement that a rule be made "on the record after opportunity for an agency hearing." In a 1972 case the Court had implied that something less

160. 547 F.2d at 655 (Bazelon, C.J., separate statement).
161. 435 U.S. at 524.
163. See id.
164. Id. § 4(c), 5 U.S.C. § 553(c); id. § 5(a), 5 U.S.C. § 554(a) (1976).
167. Id. at 237 (construing Administrative Procedure Act § 4(c), 5 U.S.C. § 553(c) (1976)).
than the precise words "on the record" might suffice for formal rulemaking to be required. Florida East Coast virtually established those words as a touchstone test of when compliance with the APA adjudicatory procedure sections was demanded. Unless a statute expressly demands that rules be based "on the record" of a required hearing, the agency need follow only the notice and comment rulemaking procedures specified in the APA.

**Rulemaking Versus Adjudication**

The problem in this area involves retroactive lawmaking by adjudication. In exercising adjudicatory power, an agency, like a court, must frequently decide cases on the basis of new doctrines. The retroactive effect in lawmaking by adjudication may prove unfair to the parties. A court, which has the power to decide only contested cases, may find it difficult to avoid such unfairness. But the agency has another instrument at its disposal: It can lay down the new law by rulemaking and thereby give fair notice in advance. Should it be legally required to do so? In the now-famous second Chenery case, the Court answered that question in the negative: An agency is not barred from applying a new principle in an adjudicatory proceeding simply because it had the power to announce that principle in advance by using its power of rulemaking.

Chenery has been criticized as unfair in cases where adjudications are used to accomplish marked policy departures. Justice Harlan noted that this may occur where the new policy revolutionizes long-established patterns of conduct and those affected have justifiably relied upon an agency-engendered belief in an established policy. Even in such cases, however, the Burger Court has adhered to the Chenery principle. The Court reaffirmed its position by its unanimous reversal of the second circuit decision in NLRB v. Bell Aerospace Co. The court of appeals had refused to enforce an NLRB bargaining order, finding that the Board had

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171. *Id.* at 201-02.
made such a significant change in its previous definition of types of workers protected by the National Labor Relations Act that rulemaking rather than adjudication was required. The Supreme Court reversed, holding that even in cases involving marked policy departures, agencies are not precluded from announcing new principles in an adjudicative proceeding; the choice between rulemaking and adjudication still lies within the agency's discretion. The Board can decide to proceed with caution, developing its standards in a case-by-case manner rather than through a generalized rule.

Bell Aerospace may be criticized as failing to distinguish between the proper spheres of legislative and judicial power. Use of rulemaking to make innovations in agency policy may be fairer than relying on case-by-case adjudications. Rulemaking provides the agency with a forum that maximizes the degree of participation by affected interests. Adjudication limits participation to the parties in the particular case. It may be said that Bell Aerospace is consistent with the present Court's tendency to refuse to go beyond the statutory language in interpreting agency powers. Since Congress has vested agencies with both rulemaking and adjudicatory powers and has not specified when either type of authority is appropriate, the judiciary may not impose such limits. Here, too, the Court is unwilling to fill in possible statutory lacunae.

RIGHT TO BE HEARD

Legislative Versus Judicial Functions

In United States v. Florida East Coast Railway, the Court expressly confirmed that the "recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other" determines the due process right to be accorded. In so doing the Court reaffirmed the validity of the two classic cases in

178. 416 U.S. at 294.
179. See National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 681 (D.C. Cir. 1973).
181. 410 U.S. at 245.
the area, *Bi-Metallic Investment Co. v. State Board of Equalization*\(^{182}\) and *Londoner v. City of Denver*,\(^ {183}\) saying that “[t]he basic distinction between rulemaking and adjudication is illustrated by this Court’s treatment of [those] two related cases under the Due Process Clause.”\(^ {184}\)

Professor Nathanson has criticized the different results in *Bi-Metallic* and *Londoner*.\(^ {185}\) He finds Justice Holmes’ explanation of the difference unconvincing, and has also criticized the *Florida East Coast* approval of the Holmes approach. According to Nathanson, the question before the agency in *Bi-Metallic*—whether the assessed valuation of all property in Denver should be increased by forty percent—“seems to present a factual issue eminently suitable for resolution either in judicial or quasi-judicial proceedings by examination of the data, or examination of witnesses familiar with the data, or both.”\(^ {186}\) One wonders whether the Nathanson criticism is fair to either Justice Holmes or the *Florida East Coast* opinion. It may be doubted whether a trial-type proceeding would have been appropriate to resolve the *Bi-Metallic* factual issues. It is hard to see how evidence and arguments relating to plaintiff’s particular property would be relevant to the agency’s decision whether to increase the valuation of all property in Denver. In *Londoner*, however, where the question was “‘whether, in what amount, and upon whom’ a tax for paving a street should be levied for special benefits,”\(^ {187}\) a trial would be appropriate for presentation of evidence and argument concerning plaintiff’s individual facts in relation to those of his neighbors.

Be that as it may, the present Court has expressly confirmed the traditional rulemaking-adjudication distinction adopted in *Bi-Metallic* and *Londoner*.\(^ {188}\) In *Florida East Coast* the Court applied the distinction to reject a claim\(^ {189}\) that there was a right to a

\(^{182}\) 239 U.S. 441 (1915).

\(^{183}\) 210 U.S. 373 (1908).

\(^{184}\) 410 U.S. at 244; accord, Alaska Airlines v. CAB, 545 F.2d 194, 200 (D.C. Cir. 1976).


\(^{186}\) Id. at 725.


trial-type hearing before the ICC issued an order establishing incentive per diem rates for use by one railroad of freight cars owned by another. The ICC had acted in a rulemaking proceeding, following only the informal APA procedures, even though the Interstate Commerce Act required the Commission to act "after notice and an opportunity for a hearing." The Court upheld the Commission's actions and rejected the claim that because ratemaking was involved there had to be a full trial-type hearing. The term "hearing" was used in the Act in the context of a rulemaking-type proceeding, not in the context of a proceeding devoted to the adjudication of particular disputed facts. The railroads had relied on the second Morgan case; the Court distinguished Morgan on the ground that the proceedings there had been characterized as "quasi-judicial" and thus presumably distinct from the rulemaking proceeding in Florida East Coast. Yet Morgan involved comparable ratemaking with a similar statutory requirement. Chief Justice Hughes had described these proceedings as "quasi-judicial" only because the statute was interpreted as requiring a full adjudicatory hearing. The Court's attempt to distinguish Morgan is largely irrelevant and constitutes a gratuitous watering down of a decision long considered a landmark in administrative procedure.

If Florida East Coast is to be supported on its merits, one must analogize to the rule governing a Federal Power Commission (FPC) area rate order. When the FPC engages in traditional ratemaking by fixing the rates to be charged by an individual gas producer, it must give the producer an opportunity to be heard in a trial-type hearing. But when the Commission decided to fix gas rates upon an area basis, fixing the rate of sales in the entire Rocky Mountain area, it was permitted to proceed through APA

191. 410 U.S. at 244-46.
193. Brief for Appellee, supra note 189, at 39-40 (citing Morgan v. United States, 304 U.S. 1 (1938) (rate order set by Sec'y of Agriculture void for failure to allow full hearing)).
194. 410 U.S. at 245-46.
rulemaking and forego an evidentiary hearing. This was permissible because the FPC had moved from particularized ratemaking to a group or class proceeding in which the separate fact pattern of each member of the class was not evaluated. The same is true of the ICC rate order in Florida East Coast:

Here, the incentive payments proposed by the Commission in its tentative order, and later adopted in its final order, were applicable across the board to all of the common carriers by railroad subject to the Interstate Commerce Act. No effort was made to single out any particular railroad for special consideration based on its own peculiar circumstances. The fact that the order may in its effects have been thought more disadvantageous by some railroads than by others does not change its generalized nature. Though the Commission obviously relied on factual inferences as a basis for its for order, the source of these factual inferences was apparent to anyone who read the order of December 1969. The factual inferences were used in formulation of a basically legislative-type judgment, for prospective application only, rather than in adjudicating a particular set of disputed facts.

Due Process Explosion

The Burger Court’s decision in Goldberg v. Kelly triggered what Judge Friendly terms the “due process explosion.” Goldberg marked a culmination in the movement from the traditional concept of governmental benefits as mere “privileges” not entitled to procedural due process protection. The Supreme Court held “that due process requires an adequate hearing before termination of welfare benefits.” It was no answer to the due process claim to argue that welfare benefits were a “privilege” and not a “right.” “It may be realistic today to regard welfare entitlements as more like ‘property’ than a ‘gratuity,’ ” since “such benefits are a matter of statutory entitlement for persons qualified to receive them.” Public assistance “is not mere charity . . . . The same governmental interests that counsel the provision of welfare, counsel as well

199. Id. at 849-50.
200. 410 U.S. at 245-46.
203. 397 U.S. at 261.
204. Id. at 262, 262 n.8.
its uninterrupted provision to those eligible to receive it; pre-
termination evidentiary hearings are indispensable to that end."

As the Court recently conceded, its post-Goldberg decisions "do not form a checkerboard of bright lines between black squares and red squares, neither do they leave courts, and parties litigating federal constitutional claims in them, quite . . . at sea." However, the Court's decisions do "supply an analytical framework for determining whether the Fourteenth Amendment rights of a person . . . have been violated."

The first question is what interests are protected by procedural due process. When a denial of due process is claimed, the courts must inquire into the nature of the individual's interest. According to the Court's 1979 decision in Greenholtz v. Inmates of the Nebraska Penal Complex, the test to determine whether a person has a protected right is not whether the person has a need, desire, or even a unilateral expectation of it, but whether he or she has "a legitimate claim of entitlement to it."

Goldberg and its progeny at first advanced the frontiers of due process so rapidly that it seemed there might be no stopping place. Goldberg's holding that there was a right to be heard was extended en masse to all the newer areas of administrative power, including welfare, disability, unemployment, education, and housing. In these areas due process was held to require a full adversary hearing governed by the adjudicatory requirements of the APA. Perhaps the culmination of the post-Golberg due process expansion was the decision in Goss v. Lopez, where the right to be heard was extended to school suspension cases, even those involving suspensions of less than ten days.

However, if the Goldberg v. Kelly revolution reached its apo-
gee in Goss v. Lopez, it may have met its thermidor in Mathews v.
Eldridge. The issue was whether due process required that the recipient of social security disability payments be afforded an opportunity for an evidentiary hearing prior to termination of those benefits. The statute and regulations provided that after an initial determination by the Social Security Administration (SSA) terminating payments, the recipient could seek reconsideration and then an evidentiary hearing before an SSA administrative law judge. Payments were terminated after the initial determination, but if the recipient prevailed at the reconsideration, hearing, or a later agency appeal, he or she would be entitled to retroactive payments. The lower courts ruled that the “interest of the disability recipient in uninterrupted benefits [was] indistinguishable from that of the welfare recipient in Goldberg” and held that due process required a pretermination hearing. The Supreme Court reversed, holding that due process was satisfied by the posttermination procedures provided by the agency. In Goldberg the Court stressed that welfare benefits involved the “'brutal need’” of persons on the very margin of subsistence, where termination “may deprive an eligible recipient of the very means by which to live while he waits.” In contrast, eligibility for disability benefits was not based upon financial need.

Eldridge appears inconsistent with Goss, which held that school pupils must be afforded presuspension hearings. The Court in Eldridge noted that Goldberg illustrates how “the degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking process.” If that is determinative, who suffers the greater deprivation: the pupil subject to a short suspension or the disabled worker whose disability payments are ended?

There is, of course, a basic difference: Eldridge involved monetary benefits, and retroactive back payments can theoretically re-

222. 424 U.S. at 349.
223. 397 U.S. at 261 (quoting Kelly v. Wyman, 294 F. Supp. 893, 900 (S.D.N.Y. 1968)).
224. Id. at 264 (emphasis omitted).
226. Id. at 341 (citation omitted).
store the recipient to his or her pretermination position. In Goss, however, the effects of the suspension could not be so readily undone. If that is the key factor, does it mean that Goldberg now stands alone and that, if a posttermination hearing is enough in disability cases, the same is true in other monetary benefit cases other than welfare cases? Eldridge may permit summary action in non-emergency cases, where deprivation of the monetary entitlement occurs immediately, even though the posttermination hearing and decision may not occur for a long time. As the Eldridge opinion concedes, in the disability case this period may be longer than one year. 227

In short, although Goldberg v. Kelly will probably continue to be followed, its effect will be confined to the welfare termination case. In cases involving other types of monetary largess, Matheus v. Eldridge will set the procedural theme. This does not mean that there will be no due process protection, but only that a pretermination hearing is not necessary. The right to a posttermination hearing was reaffirmed in Eldridge, in which the Court stressed the claimant's right to an evidentiary hearing and administrative review of the decision terminating his or her disability benefits.

Waiver and Exceptions

Administrative lawyers tend to speak of the “right to be heard,” which may be guaranteed by due process and/or by statute. However, it is more accurate to speak of the right to an opportunity to be heard. Like other rights, the right to be heard can be waived. It is widespread waiver of that right that makes the administrative process workable in practice, and the vast bulk of agency decisions are made without resort to formal proceedings.

This point is illustrated in National Independent Coal Operators’ Association v. Kleppe. 228 At issue was the enforcement scheme of the Coal Mine Health and Safety Act, which authorized the Secretary of the Interior to assess penalties based upon notices of violation issued by mine inspectors. 229 The operators were to be advised that they had fifteen days to protest the proposed assessment and to request a formal hearing. If an operator failed to make timely protest, he or she was deemed to have waived the right to a

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227. Id. at 342.
The Court upheld this procedure.\textsuperscript{230} The statute provided only "an opportunity" for a hearing; it did not require formal adjudication when a hearing was waived. A formal decision with findings is not required unless the mine operator exercises the right to request a hearing.

The \textit{Coal Operators} case also illustrates the application of the principle of \textit{United States v. Illinois Central Railroad},\textsuperscript{231} which permitted provisional agency action subject to the right to request a hearing after the provisional order is issued.\textsuperscript{232} Due process does not establish "a Procrustean rule of a prior adversary hearing,"\textsuperscript{233} the right to be heard is not a right to be heard at any particular point in the agency's process.\textsuperscript{234} The opportunity to be heard may be given after the agency provisionally acts; "[w]here only property rights are involved, mere postponement of the [opportunity to be heard] is not a denial of due process."\textsuperscript{235}

As a general proposition, hearings are not required when no disputed issues are raised. In \textit{Codd v. Velger},\textsuperscript{236} a probationary police officer had been dismissed without a hearing. The dismissal had been based upon a report that the officer had put a revolver to his head in an apparent suicide attempt. Respondent claimed that he was entitled to a hearing before dismissal because of the stigmatizing effect of the material on the suicide attempt in his personnel file.\textsuperscript{237} The Court rejected the claim. Even assuming the elements necessary to make out a claim of stigmatization, due process mandates only an opportunity to refute the charge; the purpose of a hearing is to provide an opportunity to clear one's name. But if the due process clause is to serve any useful purpose, there must be some factual dispute that has a significant bearing on the employee's reputation. Here respondent had not asserted that the report of the apparent suicide attempt was substantially false. The absence of any such allegation was fatal to the officer's claim, since his failure to dispute the report indicated that he was not harmed by the denial of a hearing.\textsuperscript{238}

\begin{itemize}
\item \textsuperscript{230} 423 U.S. at 398-99.
\item \textsuperscript{231} 291 U.S. 457 (1934).
\item \textsuperscript{232} Id. at 464.
\item \textsuperscript{234} Opp Cotton Mills, Inc. v. Administrator of the Wage & Hour Div., 312 U.S. 126, 152 (1941).
\item \textsuperscript{235} Phillips v. Commissioner, 283 U.S. 589, 596-97 (1931).
\item \textsuperscript{236} 429 U.S. 624 (1977) (per curiam).
\item \textsuperscript{237} Brief for Respondent at 19-21, Codd v. Velger, 429 U.S. 624 (1977) (per curiam).
\item \textsuperscript{238} 429 U.S. at 627.
\end{itemize}
There are also emergency situations that justify summary action. One example is the tax collection case where "in view of the necessity of the collection of the revenues to sustain the Government . . . the taxing authorities may lawfully seize a citizen's property in payment of taxes, prior to the opportunity for any adjudication of his liability."239 This exception to the right to be heard has been criticized as inconsistent with expanding due process concepts.240 But the Burger Court has gone out of its way to reaffirm the governmental power to collect taxes by summary administrative proceedings; as long as there is adequate opportunity for a post-seizure determination of the taxpayer's rights, the requirements of due process are met.241 The Court has restated the traditional rationale for the tax cases: "[T]he very existence of government depends upon the prompt collection of the revenues."242 Even Justice Brennan, the member of the present Court most solicitous of procedural rights, has indicated that seizure of a taxpayer's assets upon a finding by the Commissioner absent a preseizure hearing is valid: "Seizures pursuant to jeopardy assessments are clearly necessary to protect important governmental interests and there is a 'special need for very prompt action.' "243 Nevertheless, one may wonder whether the tax cases should validly be treated as a wholesale exception to the right to be heard. Increasingly they appear as an outmoded relic of an earlier day when the quaint notion persisted that, without tax revenue, the wheels of government would stop.

Another exception to the due process right to be heard is set forth in Board of Curators v. Horowitz.244 A student challenged her dismissal from the medical school of a state university, alleging that the university had not accorded her procedural due process prior to her dismissal. The dismissal had been based upon faculty dissatisfaction with respondent's clinical performance. The Council on Evaluation, which assessed academic performance, had recommended her dismissal. As an "appeal" of that decision, respondent was permitted to take examinations under seven physicians. Only two of them recommended her graduation. The Council then reaff-

244. 435 U.S. 78 (1978).
firmed its decision. The recommendation was approved by the faculty coordinating committee and dean and sustained, on appeal, by the provost.  

The Court rejected respondent’s due process claim, dismissing the argument that a different result was compelled by *Goss v. Lopez,* 419 U.S. 565 (1975), which mandated a hearing before students were suspended from public schools for disciplinary reasons. There are differences between disciplinary actions and actions “taken for academic reasons which may call for hearings in connection with the former but not the latter.” Academic evaluations bear little resemblance to the factfinding proceedings involved in disciplinary determinations, to which the hearing requirement has traditionally been attached. A decision that rests on academic judgments is “more subjective and evaluative than the typical factual questions presented in the average disciplinary decision.”

The determination to dismiss for academic reasons is comparable to deciding the proper grade for a student in a course; it “requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.” Under these circumstances, the Court declined to ignore the historic deference to the judgment of educators and formalize the academic dismissal process by requiring a hearing. “A school [must remain] an academic institution, not a courtroom or an administrative hearing room.”

In more traditional terms, *Horowitz* is justified by the “pure administrative process” exception to the due process right to be heard: “cases where decisions are made on the basis of observation by technical experts or objective tests.” A trial-type proceeding is inappropriate when the decision is based upon evaluation of the skill or competence of an individual. A test of the individual’s competence is needed, and in an academic setting evaluation of performance by the appropriate educational authorities is all that is required.

It is elementary that there is a due process right to be heard only when “life, liberty, or property” are adversely affected by gov-

245. *Id.* at 80-82.
247. 435 U.S. at 87.
248. *Id.* at 89.
249. *Id.* at 90.
250. *Id.*
251. *Id.* at 88.
ernmental action. As a general proposition, due process furnishes no protection against private summary action: The state, not the private individual, is the addressee of the due process clause. *Jackson v. Metropolitan Edison Co.* all but aborted a prior trend toward what may be termed “corporate due process.” There the Court held that due process restraints do not extend to privately owned utilities. Hence, termination of electric service without notice and hearing did not violate due process. That the utility was subject to pervasive state regulation did “not by itself convert its action into that of the State for purposes of the fourteenth amendment.”

Though *Jackson* cut short a trend toward extending due process requirements to corporate action, the underlying problem remains. Constitutional limitations were designed to shelter us from the rapacities, cruelties, and compulsion of governmental power. We may now need similar protection from neo-statist corporate concentrations of economic power. On the other side is the question of the suitability of administrative procedures in non-governmental operations. Are procedures that have proved so cumbersome in regulatory administration the proper model for decisionmaking in the area of corporate activity?

**Procedural Problems**

*Procedure Versus Due Process*

A law professor cannot but feel grateful to the present Court for emphasizing a point on which law students, and even lawyers and judges, are too often unclear. There is a common tendency to confuse nonconstitutional procedural rights with due process procedural rights. The Supreme Court itself has not been immune from this imprecision. In the already-discussed case of *Board of Curators v. Horowitz*, however, the Court was careful to stress the distinction between due process and other procedural rights. The student in *Horowitz* contended that the university had failed to follow its own rules respecting evaluation of medical students and

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254. See B. Schwartz, *supra* note 137, § 87, at 246.
255. A different result is reached where the utility is publicly owned. See, e.g., *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978).
256. 419 U.S. at 350.
258. 435 U.S. 78 (1978). See text accompanying notes 244-252 *supra*. 

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that this failure amounted to a constitutional violation. The Court disagreed with both the factual and legal contentions. The facts showed that the medical school had followed its established rules. Respondent’s legal contention was also erroneous: The cases laying down the basic principle that an agency must follow its own procedural rules “enunciate principles of federal administrative law rather than of constitutional law binding upon the States.” This issue is one of practical as well as semantic significance. To elevate a procedural right to the due process plane would make it binding on the states under the fourteenth amendment.

Social Security Procedure

Next to Goldberg v. Kelly the most important case on administrative procedure decided by the Burger Court is Richardson v. Perales. Perhaps the most difficult procedural problem in our administrative law is adapting the formal adversary procedures that have been developed in regulatory agencies to the newer areas of benefactory administration, where the weight of numbers alone makes it all but impossible to give each individual the full trial to which he or she would be entitled under traditional administrative law principles.

This was the underlying problem in Perales. At issue were the procedures followed in Social Security Administration disability cases, which depart significantly from the adjudicatory pattern customarily followed by administrative agencies. The SSA in operation is perhaps the best example of the need for assembly-line justice that still retains the essentials of fair procedure. A two-stage screening process disposes of the vast majority of cases without a hearing. At the hearing stage itself, the SSA has developed its own procedures, which differ in several important respects from those of other agencies. The hearing officer in an SSA proceeding presents the case for the Government, develops the case for the claimant unless claimant is represented by counsel, and then makes the initial decision.

260. 435 U.S. at 92 n.8 (citations omitted).
264. See 402 U.S. at 392-94.
In *Perales*, the Court rejected an attack on these multiple functions of the SSA examiner:266 "[W]e [are not] persuaded by the advocate-judge-multiple-hat suggestion. It assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity."267 The examiner does not act as counsel, but as an examiner charged with developing the facts. While at first glance the SSA hearing sounds like an American version of inquisitorial procedure it seems to work fairly and represents a reasonable adaptation in an agency that must cope with a staggering caseload.

Also at issue in *Perales* was another aspect of the SSA hearing procedure that departs from the traditional adjudicatory pattern. Perales had filed for disability benefits, claiming that a back injury had disabled him. After his claim was disapproved, he requested and was granted a hearing.268 Over the objection of claimant's attorney, the hearing examiner introduced into evidence a number of unsworn medical reports of doctors who were not present at the hearing and did not testify. The examiner also allowed a doctor who had been flown to the hearing by the agency to testify as an expert. The doctor had never examined the claimant and his testimony consisted of his "interpretation" of the absent doctors' unsworn medical reports; he interpreted them in such a way as to indicate that Perales was not disabled.269 The procedure was typical of that followed in SSA disability hearings.

The Court rejected the claim that the SSA procedure violated Perales' right to confront and cross-examine the witnesses270 against him.271 A written report by an examining physician may be received in evidence despite its hearsay character and an absence of cross-examination. The APA guarantee of cross-examination does not change the result, since it allows the admission of hearsay as long as it is relevant.272 The Court emphasized the claimant's right to subpoena examining physicians as witnesses. However, this right is more theoretical than real where, as is usually the case, the

267. 402 U.S. at 410.
268. Id. at 392-98.
269. Id. at 396.
270. See U.S. CONST. amend. VI.
271. 402 U.S. at 410.
claimant is not represented by counsel. It is hard to disagree with the dissent’s position that the agency’s use “of its stable of defense doctors without submitting them to cross-examination is the cutting of corners—a practice in which certainly the Government should not indulge.”273

Findings and Informal Hearings

The Burger Court is the first Supreme Court to deal with a new administrative procedure technique that is halfway between the traditional, formal regulatory-type hearing and no procedure at all. The technique developed as the focus of our administrative law began to shift from the older areas of regulatory administration, which are covered by the formal APA requirements274 to newer areas that reflect the assumption of new functions by government. An informal hearing technique has been developing in some of these areas as a compromise between the full panoply of the APA’s formal adversary procedure and the rejection of all procedural rights. This procedure is increasingly employed in administrative decisions regarding the future use of land or the institution of certain types of governmental services. For example, there are over twenty instances in the area of land acquisition where public hearings are provided for by federal statute.275

The public hearing technique is more analogous to the public local inquiry procedure followed in Great Britain276 than the formal adjudicatory procedure established by the hearing requirements of the APA. Significantly, the informal hearing procedure has been developed in both countries in similar fields.277 The reason becomes apparent if we look at the purpose served by a hearing procedure in a field such as land acquisition. In this area the procedure is not intended to serve as a trial-type proceeding, but to provide some means of giving those affected an opportunity to present their side, without imposing the requirements of a trial on the relevant agency. From this perspective, the public inquiry or hearing technique is more a device to allow citizen participation in the whole decisionmaking process than a technique for arriving at a specific decision, as in a formal APA hearing. It is a forum for

information-gathering and an instrument of community persuasion more than it is a trial. This was confirmed in *Citizens to Preserve Overton Park, Inc. v. Volpe.* At issue was a decision of the Secretary of Transportation authorizing release of federal funds for construction of an expressway, part of which was to go through a public park. The statute required a “public hearing” before the construction could be authorized. But the Court held that the required hearing “is nonadjudicatory, quasi-legislative in nature.” As “a ‘town hall’ type meeting . . . not intended to be a quasi-judicial or adversary legal type hearing,” its purpose is to inform the community about the proposed project and to elicit community views on the design and route.

The end result of a formal APA hearing is a decision supported by adequate findings on all the material issues presented in the record. *Overton Park* holds that this need not be true of the decision that follows an informal public hearing. The relevant statutes prohibit the Secretary from approving any program or project that involves use of parkland unless there is no feasible and prudent alternative, and the program’s plan minimizes the harm to the park. In *Overton Park* the Secretary’s announcement approving the construction was not accompanied by any findings indicating whether any feasible and prudent alternative routes existed or why design changes could not reduce the harm to the park. The Court ruled that formal findings were not required and conceded that this undoubtedly will hamper review of the Secretary’s action. The Court indicated that this problem can be overcome by having the reviewing court require that the Secretary provide some explanation so the court can determine if the statutory standard has been met. This may include requiring the officials who participated in the decision to give testimony. The normal rule against probing the mental processes of administrative decisionmakers must give way where there are no formal findings; the sole means of attaining effective review may be by examining the decisionmakers themselves. As I have written elsewhere, “one wonders whether this reopening of the Pandora’s Box closed shut by the fourth

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280. 401 U.S. at 415.
281. Lathan v. Brinegar, 506 F.2d 677, 691 (9th Cir. 1974) (citations omitted).
283. 401 U.S. at 409.
284. Id. at 420.
Morgan case was really necessary”; requiring findings supported by the record would surely have been preferable.285

Bias and Concentration

The Burger Court has dealt with two important related issues that have caused difficulty in administrative procedure: Decision-makers’ bias, and the concentration of functions. It has further refined the rule disqualifying judicial and administrative adjudicators who are biased. Ward v. Village of Monroeville286 reaffirmed the holding in the leading case of Tumey v. Ohio,287 while broadening it to indicate that the proscribed financial stake need not be as direct or positive as it appeared to be in Tumey.288 Ward, like Tumey, involved convictions in a mayor’s court for traffic offenses. In Tumey the mayor had shared directly in the fees and costs levied against violators. In Ward the mayor was responsible for village finances; the mayor’s court, through fines, forfeitures, costs, and fees provided a major part of the village’s income. The difference was not decisive. The Court held that the trial was not before the disinterested and impartial adjudicator demanded by due process.289

Gibson v. Berryhill290 involved a direct claim of institutional bias in an agency. The Alabama Board of Optometry charged licensed optometrists with unprofessional conduct because they were employed by a corporation.291 By statute the board could be composed only of optometrists in private practice.292 The Court held that the board was disqualified by personal interest.293 Success in the board’s efforts in the case would redound to the personal benefit of the board members, since they competed with the optometrists employed by corporations. One may wonder whether the Court was fully aware of the ramifications of its bias holding. It is common for regulatory agencies to be composed of people drawn from the businesses and occupations regulated. They all have a fi-

285. B. Schwartz, supra note 137, § 142, at 428 (citing United States v. Morgan, 313 U.S. 409 (1941)). See National Nutritional Foods Ass’n v. FDA, 491 F.2d 1141, 1146 (2d Cir. 1974).
288. 409 U.S. at 60.
289. Id. at 58-60.
291. Id. at 567.
293. 411 U.S. at 578-79.
nancial interest, in the Court's sense, in cases before them. Are such agencies to be disqualified by potential bias? If they are, it may be difficult to obtain people with knowledge of the regulated field willing to serve on these agencies. On the other side, however, there is the agency's tendency to confuse the public interest with that of the regulated group to which its members belong. A licensing law such as the Alabama optometry law enables the dominant group in an occupation to set up a present-day version of the guild system, with the licensing requirement a euphemism for a guild-type monopoly.294

Friedman v. Rogers,295 already discussed in another connection, narrows these possible Gibson ramifications. In this more recent decision the Court rejected a due process attack upon the composition of the Texas Optometry Board where the governing statute296 required two-thirds of the agency members to be members of the professional organization of optometrists in private practice.297 Friedman reaffirmed that under Gibson a commercial optometrist has a due process right to an impartial hearing in any board disciplinary proceeding against him.298 In Gibson the Court examined whether personal interests precluded an impartial hearing after disciplinary proceedings were actually instituted. In Friedman the challenge to the board's fairness did not arise from an actual disciplinary proceeding. Tying together both Gibson and Friedman, the result is that an agency composed of or dominated by representatives of those regulated is not per se invalid. However, its proceedings can be challenged on the ground of the members' personal interests. When an agency is set up in the manner of the Texas Optometry Board, it is difficult to conceive of any disciplinary proceeding against a commercial optometrist in which the four professional optometrists on the board do not have a sufficient personal interest within the Gibson rule, since they may benefit professionally from any disciplinary action imposed on their commercial competitor.

Claims of bias have arisen in connection with one of the central features of our administrative organization—that of the so-

294. This was pointed out many years ago by Justice Peckham before his elevation to the Supreme Court. People ex rel. Nechamcs v. Warden of the City Prison, 144 N.Y. 529, 543, 39 N.E. 686, 690-91 (1895) (Peckham, J., dissenting).
297. 440 U.S. at 17-18.
298. Id. at 18.
called concentration of functions. The issue of concentration, once highly controversial, has largely been resolved by the separation-of-functions provisions of the Federal APA. But concentration may still be a problem in cases not governed by the APA’s provisions or in state agencies. Withrow v. Larkin arose out of the acts of the Wisconsin Medical Examining Board. After an investigation, the board determined that appellee physician had engaged in proscribed acts. The lower court enjoined the board from suspending the physician’s license because the board did not satisfy the procedural due process requirement of having an independent decisionmaker rule on the merits of the charges it itself had investigated.

The Supreme Court reversed. The Court’s opinion recognizes that a fair trial by a fair tribunal is a basic requirement of due process. This bars a biased decisionmaker. However, the combination of investigative and adjudicative functions does not necessarily create an unconstitutional risk of bias. The Court conceded that the concentration issue was “substantial” and one with which legislators and others involved with the operation of agencies had properly been concerned. But that hardly supports “the bald proposition applied in this case by the District Court that agency members who participate in an investigation are disqualified from adjudicating.” On the contrary, there is no broad rule that agency members may not investigate, institute proceedings, and then adjudicate. “The mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing.”

The holding that the combination of investigative and adjudicatory functions does not, without more, violate due process scarcely breaks new ground. The lower courts had consistently rejected due process attacks against concentration. In Withrow the

303. id. at 51.
304. id. at 52.
305. Id. at 55.
306. See B. Schwartz, supra note 137, § 111, at 320 (citing FTC v. Cinderella Career and Finishing Schools, Inc., 404 F.2d 1308, 1315 (D.C. Cir. 1968); Amos Treat & Co. v. SEC, 306 F.2d 260, 267 (D.C. Cir. 1962); National Harness Mfrs.’ Ass’n v. FTC, 268 F. 705, 707-08 (6th Cir. 1920)).
Supreme Court gave its imprimatur to this jurisprudence. It should be stressed, however, that there is a fundamental distinction between constitutionality and desirability. Concentration may not be subject to due process attack, but it leaves the litigant with an uneasy feeling. Withrow's confirmation that the remedy is not in the courts only emphasizes the widespread need for statutory separation provisions at least as strong as those in the Federal APA.

Administrative Procedure Act Requirements

The Burger Court has emphasized the importance of the administrative law judge corps set up under the Federal Administrative Procedure Act. In Butz v. Economou, the Court's most significant recent decision on the tort liability of administrative officers, the Court went out of its way to discuss the role of the modern federal hearing examiner or administrative law judge, which the Court says is "functionally comparable" to that of a judge. The Court described in detail the functions of these agency hearing officers and stressed their judicial-type independence. "In light of these safeguards, we think that the risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women." The considerations that led to absolute immunity for judges apply equally to agency personnel entrusted with adjudicatory authority.

However, the Court has taken a narrow approach to the applicability of the APA's adjudication requirements, ruling that they do not apply to NLRB proceedings under section 10(k) of the National Labor Relations Act, which provides for a speedy hearing on union jurisdictional issues. This issue arose in International Telephone & Telegraph Corp. v. Local 134, in which a hearing was held, pursuant to section 10(k), before an NLRB attorney, and the Board eventually found against respondent in the jurisdictional dispute. Respondent refused to comply, and the Board's General Counsel issued a complaint upon an unfair labor practice charge.

At that hearing the General Counsel was represented by the same attorney who had presided over the section 10(k) hearing. The Board issued a cease and desist order, but the lower court refused to enforce it, finding that the APA separation-of-functions provisions had been violated because the same person had performed the functions of section 10(k) hearing officer and prosecutor of the subsequent unfair labor practice charge.

The Supreme Court held that the APA separation-of-functions requirements did not apply to a section 10(k) hearing because section 5 of the APA applies only to an “adjudication.” The APA defines “adjudication” as “the agency process for the formulation of an order”; “order” is defined as “the whole or a part of a final disposition... of an agency.” The section 10(k) hearing did not result in a “final disposition” within the meaning of the APA. The Board did not order anybody to do anything at the conclusion of the proceeding; its determination was analogized to an advisory opinion, and therefore a section 10(k) hearing did not involve an “adjudication” subject to section 5 of the APA.

One may question whether the Court construed the APA in the “hospitable” manner it has otherwise indicated is the proper judicial attitude toward such broadly remedial legislation. Coercive decree is not the exclusive hallmark of an adjudicatory order. What would the Court say about a declaratory order that does not order anybody to do anything yet is plainly subject to section 5 of the APA? What is clear is that the Court permitted an actual prosecutor in a case to preside at an adjudicatory hearing at an earlier stage of the case. It is hard to conceive of anything more violative of the spirit, even if the Court is right on the letter, of the APA.

**Notice**

Fundamental to the law of administrative procedure is the right to notice upon the commencement of a proceeding. According to the Court, “[t]he purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending ‘hearing.’” Accordingly,

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316. 419 U.S. at 444-48.
318. Id. § 2(d), 5 U.S.C. § 551(6).
the Court has tried to ensure that the agency adequately apprises those affected. The notice required in a municipal utility-termination-of-service case does not comport with constitutional requirements when it does not advise the customer of the availability of a procedure for protesting the proposed termination. In a different context, perhaps, a person threatened with deprivation of a protected interest need not be told "how to complain." Here, however, lay customers of various levels of education, experience, and resources should be informed clearly of the availability of an opportunity to present their complaint, including where, when, and before whom disputed bills may be considered.\footnote{Id. at 14 n.15.}

Another type of notice involves an agency's power to take notice of facts that are obvious and notorious to it as an expert in its particular area of administration. An aspect of official notice was involved in a case involving review of Federal Communications Commission regulations\footnote{40 Fed. Reg. 6,471 (1975), as amended by 40 Fed. Reg. 24,733 (1975), as amended by 41 Fed. Reg. 25,008 (1976) (current version at 3 C.F.R. § 73.636(c) (1979)).} barring future ownership of stations by an owner of the only newspaper in the community.\footnote{National Citizens Comm. for Broadcasting v. FCC, 555 F.2d 938 (D.C. Cir. 1977), aff'd in part and rev'd in part, 436 U.S. 775 (1978).} The Commission had refused to require dissolution of most existing broadcast-newspaper combinations. The court of appeals held that the FCC had acted arbitrarily in not providing for divestiture of all existing combinations because the record did not adequately disclose the extent to which divestiture would actually threaten the competing policies relied upon by the Commission.\footnote{Id. at 965.} The Supreme Court reversed.\footnote{FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978).} According to the Court, to the extent that factual determinations were involved in the FCC's "decision to grandfather most existing combinations, they were primarily of a judgmental or predictive character."\footnote{Id. at 813.} Therefore the Court held that "complete factual support in the record for the Commission's judgment or prediction is not possible or required."\footnote{Id. at 814.} This conformed with an earlier decision, Market Street Railway v. Railroad Commission,\footnote{328. 324 U.S. 548 (1945).} involving findings predicting the effect of a rate reduction in stimulating carrier traffic, where the Court held that the forecast...
necessarily involves deductions based on the expert knowledge of the agency.\textsuperscript{329}

\textit{Findings}

The decision of the Burger Court in \textit{Atchison, Topeka & Santa Fe Railway v. Wichita Board of Trade}\textsuperscript{330} has helped foster a judicial movement from the traditional requirement of findings to one of reasoned explanation of agency decisions. In \textit{Atchison} the Court remanded a case to the ICC because the Commission had not stated its reasons with sufficient clarity to justify its order. The order departed from the ICC's long-standing rule governing charges for inspection of grain in transit.\textsuperscript{331} Although the Court did not say so expressly, it seemed to be demanding an explanation beyond the findings requirement when the agency departed from an established policy it had previously followed. There is at least a presumption that the act will be carried out best if the agency adheres to the settled rule: "From this presumption flows the agency's duty to explain its departure from prior norms."\textsuperscript{332} This demand for a fuller explanation when an agency departs from precedent has been echoed in the lower courts, and an increasing number are demanding reasons when an agency deviates from established policies or refuses to follow precedents.\textsuperscript{333} In such a case, the agency "cannot be permitted simply to abandon the rules of the game ad libitum. Some explanation is due both the parties and the reviewing court when a decision is made that conflicts with relevant precedent."\textsuperscript{334}

The \textit{Atchison} decision, as it is being followed by the lower courts, may help to fill in the lacuna in the law left by the previously discussed \textit{Overton Park} decision.\textsuperscript{335} Although formal findings need not be made in an \textit{Overton Park}-type case, the agency may still be required to disclose its reasons for a decision, particularly where the decision is a departure from the agency's established policy.

\begin{itemize}
  \item \textsuperscript{329} \textit{Id.} at 560-61.
  \item \textsuperscript{330} 412 U.S. 800 (1973).
  \item \textsuperscript{331} Inspection in Transit, Grain and Grain Products, 339 I.C.C. 364, 385 (1971). \textit{See} 412 U.S. at 816, 826.
  \item \textsuperscript{332} 412 U.S. at 808 (citation omitted).
  \item \textsuperscript{333} \textit{E.g.}, Pennsylvania v. ICC, 561 F.2d 278 (D.C. Cir. 1977), \textit{cert. denied}, 434 U.S. 1011 (1978); Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255 (4th Cir. 1974).
  \item \textsuperscript{334} Waterways Freight Bureau v. ICC, 561 F.2d 947, 955 (D.C. Cir. 1977) (emphasis in original).
  \item \textsuperscript{335} 401 U.S. 402 (1971). \textit{See} text accompanying notes 278-284 supra.
\end{itemize}
JUDICIAL REVIEW: AVAILABILITY

Review Preclusion

During the past decade there has been increasing emphasis on the need for judicial review as a safeguard against administrative abuses. In the Burger Court that emphasis has developed into a presumption in favor of review. The Court asserted a decade ago that "[t]here is no presumption against judicial review and in favor of administrative absolutism."336 On the contrary, review is the rule and nonreviewability an exception that must be demonstrated: "[P]reclusion of judicial review of administrative action adjudicating private rights is not lightly to be inferred."337

Dunlop v. Bachowski338 illustrates the strong policy of the present Court in favor of judicial review. An unsuccessful candidate for labor union office filed a complaint with the Secretary of Labor alleging violations of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA).339 He invoked the provision requiring the Secretary to investigate the complaint and decide whether to bring a civil action to set aside the election.340 After investigation the Secretary decided that such an action was unwarranted; respondent challenged the Secretary's decision as being arbitrary and capricious and filed an action to order that suit be filed to set aside the election.341 The Secretary argued that his decision was not subject to review.342 The LMRDA did not expressly prohibit review, and the Court held that absent a prohibition the Secretary "bears the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of his decision."343 The Court found this burden had not been met. At most, the materials the Secretary relied on suggested that Congress had not addressed the matter. This was insufficient to overcome the presumption by "clear and convincing evidence" that Congress meant to prohibit all judicial review.344

A statute may, on its face, give "clear and convincing evi-

340. Id. § 402(b), 29 U.S.C. § 482(b) (1976).
343. 421 U.S. at 567.
344. Id. (citations omitted).
idence” of a legislative intent to preclude review. Such evidence is to be found in the broadside bar against review in the statute governing the Veterans’ Administration (VA).345 Yet the present Court has held that even such a no-review clause does not prohibit all judicial review. In Johnson v. Robison346 the VA had denied educational benefits to a conscientious objector who had completed two years of required alternate civilian service, relying on statutory provisions that denied “eligible veteran” status to such an individual.347 Appellee challenged the statute’s constitutionality on first and fifth amendment grounds.348 The Court held that the district court had jurisdiction despite the no-review clause. A no-review clause does not “preclude judicial cognizance of constitutional challenges to the veterans’ benefits legislation.”349 Such challenges obviously do not contravene the purposes of the no-review clause”; further there is no “clear and convincing evidence” that Congress intended to preclude them.350

What happens, however, if the intent of the legislature to cut off review meets the “clear and convincing evidence” test? May the legislature cut off judicial review entirely, or is there a due process right of review? The Supreme Court has never addressed these key questions. According to two dissenting Justices,351 a 1973 per curiam affirmance answered the questions sub silentio. In Ortwein v. Schwab352 the majority affirmed that the imposition of a twenty-five dollar filing fee for indigents seeking judicial review of agency decisions reducing their welfare payments did not violate due process of law. It is, however, difficult to see how the majority decision answers the question whether judicial review can be entirely precluded. To uphold a nominal uniform filing fee is not to hold that the state can cut off review entirely, whether rights or entitlements are being restricted. To those who have urged that due

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345. Act of Sept. 2, 1958, Pub. L. No. 85-857, § 211(a), 72 Stat. 1115 (current version at 38 U.S.C. § 211(a) (1976)). This provision provides that the decisions of the Administrator on any question of law or fact under any law administered by the Veterans’ Administration . . . shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.
349. 415 U.S. at 373.
350. Id. (citation omitted).
352. 410 U.S. 656, 660 (1973) (per curiam).
process does require some judicial review, it is significant that the two dissenting members of the Court expressly agreed with this view.

Another aspect of review preclusion arises under the introductory language of the judicial review chapter of the APA, which provides that APA review is not available "to the extent that . . . agency action is committed to agency discretion by law." The present Court has refused to accept the view that this language precludes review of discretionary administrative acts. In the previously discussed case of *Citizens to Preserve Overton Park, Inc. v. Volpe*, an action was brought to enjoin the Secretary of Transportation from releasing federal funds for the construction of part of an expressway through a public park. A statute allowed park land to be used only if no feasible or prudent alternative exists, and only if harm to the park was minimized; it was contended that the Secretary had violated this prohibition. The Court rejected the claim that the Secretary's decision fell within the exception for action committed to agency discretion. "This is a very narrow exception" that "is applicable in those rare instances where 'statutes, are drawn in such broad terms that . . . there is no law to apply.' Here the statutory prohibition contained an explicit bar against the building of highways through parks except in the specific instances stated. In such a situation, there was a standard to apply and the exemption for action committed to agency discretion was inapplicable.

The prevailing theme in construing the APA language, as *Overton Park* demonstrates, is to extend the availability of judicial review. This is further shown by another case already discussed, *Chrysler Corp. v. Brown*. The Court held that APA review was available of an agency's decision to disclose employment data furnished by a governmental contractor. The *Chrysler* Court ruled that the Trade Secrets Act did not authorize disclosure. Though that statute did not create a private right of action, petitioner could

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357. 441 U.S. 281 (1979). See text accompanying notes 92-99, 139-147 supra.
obtain review of the agency disclosure decision. Petitioner was a person "adversely affected or aggrieved" within the meaning of section 10(a) of the APA, and since the Trade Secrets Act places substantive limits on agency disclosure action, such action is not "committed to agency discretion" so as to bar application of the general APA rule of reviewability.

Other decisions go further than Overton Park and Chrysler and allow review even where there may be no "law to apply." An example is Barlow v. Collins, where the Secretary of Agriculture was empowered to 'prescribe such regulations, as he may deem proper to carry out the provisions of this chapter.' The Court rejected the argument that this broad language committed the content of the regulations wholly to the Secretary's discretion. It reaffirmed that judicial review would be restricted "'only upon a showing of "clear and convincing evidence" of a contrary legislative intent.' Thus, the Court confines the exception for agency discretion to situations where the relevant statute shows some positive intention to eliminate review. "Indeed, judicial review of such administrative action is the rule, and nonreviewability an exception which must be demonstrated." Under this interpretation, the APA simply restates the previous law, and infringes the principle of reviewability only where Congress itself shows an intention to infringe upon it. The exception of action "committed to agency discretion by law" accordingly adds little or nothing to that of cases where "statutes preclude judicial review."

Administrative Procedure Act and Review Jurisdiction

Although Chrysler Corp. v. Brown held that APA review of an agency decision could be obtained, this does not mean that the APA itself can be construed as an independent grant of review jurisdiction. This was made clear in Califano v. Sanders. Sanders

360. Id.
366. Id. at 166 (citation omitted).
arose out of a decision by the Secretary of HEW not to reopen a previously adjudicated claim for disability benefits. The court of appeals had held that review was not authorized under the relevant Social Security Act section, but that review was available under section 10 of the APA which contained an independent grant of subject matter jurisdiction. The Supreme Court recognized that the APA evinced Congress’ intention that judicial review should be widely available to challenge federal administrative action. In addition, the Court referred to three prior decisions that arguably had assumed that the APA was an independent grant of subject matter jurisdiction. However, the Court said that a newly enacted statute persuaded it that the better view was that the APA should not be interpreted as an implied grant of subject matter jurisdiction to review agency actions.

The statute referred to was the 1976 amendment to the Judicial Code eliminating the $10,000 jurisdictional amount requirement in administrative law cases. The “effect of this modification, subject only to preclusion-of-review statutes created or retained by Congress, is to confer jurisdiction on federal courts to review agency action, regardless of whether the APA of its own force may serve as a jurisdictional predicate.” According to the Court, the statute “largely undercut[s] the rationale for interpreting the APA as an independent jurisdictional provision.” By filling the jurisdictional void created by the preexisting amount-in-controversy requirement, the Court concluded Congress eliminated the need for the APA to be interpreted in jurisdictional terms.

Sanders represents a backward step, based upon the type of inhospitable reading of the APA that the Court itself has deplored. The Court errs in assuming that “the argument in favor

373. Id.
375. 430 U.S. at 105.
376. Id.
of APA jurisdiction rests exclusively on . . . the shortcomings of federal mandamus jurisdiction.\textsuperscript{378} Those shortcomings were only part of the rationale behind the case for the APA as a source of review jurisdiction; there is also the broader policy against unreviewable agency action. By holding that the APA does not provide an independent source of review, the Court allows the SSA provision in Sanders and similar statutes to preclude review of certain agency decisions. This is further illustrated by Shaughnessy v. Pedreiro,\textsuperscript{379} the strongest pre-Sanders holding to assume that the APA is an independent grant of review jurisdiction. Pedreiro was not cited in Sanders. If the Sanders approach had been followed in Pedreiro, review would not have been available in that case, and aliens seeking to challenge deportation orders might still be relegated to habeas corpus review.\textsuperscript{380} It is true that many of the practical effects of Sanders are mitigated by the 1976 amendment to the Judicial Code on which the Court relies; in virtually all cases, nonstatutory review actions can now be brought under that provision. But cases like Pedreiro and Sanders show that there may still be a lacuna in the availability of review that this amendment does not wholly fill.

\textit{Primary Jurisdiction}

The Supreme Court has developed two related doctrines to deal with the issue of the proper timing of review actions: Primary jurisdiction, and exhaustion of administrative remedies. So far as the first of these is concerned, the decisions of the Burger Court have not followed a consistent pattern. The two important primary jurisdiction cases during the past decade reach conflicting results that are difficult to reconcile.

The first of these is the Court's decision in Ricci v. Chicago Mercantile Exchange.\textsuperscript{381} Petitioner brought an antitrust action charging respondents with restraint of trade in violation of the Sherman Act\textsuperscript{382} for transferring petitioner's membership in the Chicago Mercantile Exchange to another person. He alleged\textsuperscript{383} that the transfer without notice and hearing violated the rules of

\textsuperscript{378} 430 U.S. at 106 (citations omitted).
\textsuperscript{379} 349 U.S. 48 (1955) (alien can obtain judicial review of deportation order).
\textsuperscript{380} See U.S. Const. art. I, § 9; 349 U.S. at 351.
\textsuperscript{381} 409 U.S. 289 (1973).
both the Exchange\textsuperscript{384} and of the Commodity Exchange Act.\textsuperscript{385} The Court held that the antitrust proceeding should be stayed until the Commodity Exchange Commission could pass on the validity of respondents’ conduct under the Commodity Exchange Act, even though the Commission had no jurisdiction to decide whether the Act and rules immunized conduct from the antitrust laws.\textsuperscript{386} The Court ruled that the determination of whether the Exchange’s rules were violated required a factual determination within the special competence of the Commission. This determination would assist the court in considering the antitrust claim and arriving at the essential accommodation between the antitrust and regulatory schemes.\textsuperscript{387}

Four dissenting Justices stressed that petitioner was a private citizen with no legal right to any agency action.\textsuperscript{388} The relevant statute did not provide petitioner with a means to require the agency to consider his case.\textsuperscript{389} Thus he was remanded to a procedure that he had no power to invoke, in which he had no right to participate if it were invoked, and which could not provide the treble damage remedy he sought even if he were allowed to participate. The majority held that these factors were irrelevant. The need for prior agency resolution was not lessened by the absence of any legal right of access to the administrative forum. If agency proceedings were “sought in vain, there would be no further problem for the antitrust court.”\textsuperscript{389} But what of the time and money lost by petitioner in having to seek the administrative remedy if there is no right to invoke agency jurisdiction?

\textit{Ricci} marks the culmination of the primary jurisdiction cases that began two decades earlier.\textsuperscript{391} It is anomalous to require petitioner to seek an agency determination of whether the rules it is charged with enforcing were violated when the agency has already shown by its inaction that it sanctions the alleged violation. The dissent wryly noted that “[b]y remanding, we are requiring the peti-


\textsuperscript{385} \S\S\ 1-13, 7 U.S.C. \S\S\ 1-22 (1976).

\textsuperscript{386} 409 U.S. at 302.

\textsuperscript{387} \textit{id.} at 305-06.

\textsuperscript{388} \textit{id.} at 311 (Marshall, J., dissenting) (joined by Douglas, Stewart, and Powell, JJ.).

\textsuperscript{389} Commodity Exchange Act \S\ 8a, as amended by Act of Feb. 19, 1968, Pub. L. No. 90-258, \S\ 23, 82 Stat. 26 (current version at 7 U.S.C. \S\ 12(a)(7) (1976)).

\textsuperscript{390} 409 U.S. at 304-05 n.14.

tioner to seek from the regulators an admission of their failure to regulate (or negligence in regulating).”

A more rational approach is that stated by Justice Marshall in his Ricci dissent: “An agency cannot have primary jurisdiction over a dispute when it probably lacks jurisdiction in the first place.” The alternative is a result that “needlessly bifurcates and complicates a suit that could readily be resolved by the District Court,” which alone has jurisdiction to grant the full relief sought. The road that Ricci requires the litigant to travel to obtain justice is long and expensive and available only to those with large purses.

Ricci should be compared with the decision three years later in Nader v. Allegheny Airlines, Inc. That case arose out of an action by the famous consumer advocate for damages against the airline, which had refused him his reserved seat on a flight because all the seats were occupied. The action was a common law tort action based on an alleged fraudulent misrepresentation arising from the airline’s failure to apprise petitioner of its deliberate overbooking practices. The lower court held that the action must be stayed pending reference to the Civil Aeronautics Board (CAB) for determination of whether respondent’s practice was deceptive within the meaning of section 411 of the Federal Aviation Act, which provides that the Board may investigate and determine whether any air carrier has engaged in unfair or deceptive practices. The Supreme Court reversed, holding that the primary jurisdiction doctrine was not applicable because the issue raised did not involve technical questions of fact uniquely within the expertise and experience of an agency.

If the Nader decision stood alone, one would have little difficulty in agreeing with its result. Why should plaintiff be forced into a lengthy and burdensome proceeding in an agency that has no jurisdiction over his cause of action and no power to award the desired remedy? But Ricci had applied the primary jurisdiction doctrine to bar a judicial remedy prior to resort to an agency in a comparable case. The Court states that in Nader “considerations of

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392. 409 U.S. at 309 (Douglas, J., dissenting).
393. Id. at 310 (Marshall, J., dissenting).
394. Id. (Marshall, J., dissenting).
395. Id. at 309 (Douglas, J., dissenting).
397. Id. at 293.
400. 426 U.S. at 307.
uniformity in regulation and of technical expertise do not call for prior reference to the Board. "\(^401\) It is hard to see, however, why the reasonableness of the overbooking practice is not as much within the specialized competence of the regulatory agency as the practices involved in \textit{Ricci}. The \textit{Nader} opinion emphasizes that consumers have no right to initiate proceedings in the CAB;\(^402\) that was true in \textit{Ricci} as well.

Perhaps we must conclude, as indicated at the outset of this discussion, that the two principal Burger Court decisions on primary jurisdiction are simply inconsistent. Prior to \textit{Nader} a district court summed up the federal rule governing primary jurisdiction:

Whenever the doctrine of primary jurisdiction requires that administrative questions be decided first by the ICC, the district court must refer such questions to the Commission even if the ICC has no power to award damages or otherwise grant the relief sought, and even if plaintiff has also alleged a violation of the railroad's duties under the common law.\(^403\)

One may wonder whether such a statement, consistent though it may be with the Supreme Court decisions until \textit{Ricci}, is compatible with the \textit{Nader} case.

\textit{Exhaustion of Remedies}

Five years ago, the present Court summarized the rationale for the exhaustion rule. Exhaustion of administrative remedies is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review.\(^404\)

A debatable aspect of the exhaustion rule was involved in \textit{Moore v. City of East Cleveland}.\(^405\) At issue was a municipal housing ordinance that limited occupancy of a dwelling unit to mem-

\textbf{Footnotes:}

\(^401\) Id. at 304.
\(^402\) Id. at 302.
bers of a single family. The Court ruled that the ordinance violated due process, since it defined "family" in such a way as to make it a crime for a grandmother to live with her grandson. Chief Justice Burger dissented on the ground that appellant had failed to exhaust her administrative remedies; her deliberate refusal to file an application for a variance to exempt her from the ordinance's restrictions should foreclose her from pressing in court any constitutional objections to the zoning ordinance.

The Chief Justice's dissent contains a useful summary of the exhaustion doctrine's rationale: "[A]bsent compelling circumstances . . . the avenues of relief nearest and simplest should be pursued first." Thus, according to the dissent the exhaustion rule applies where a constitutional issue is raised. Indeed, asserts the Chief Justice, exhaustion may be required precisely because constitutional issues are present: to avoid unnecessary adjudication of those issues by giving the administrative agency an opportunity to resolve the matter on nonconstitutional grounds.

One may, however, question whether the logic of the exhaustion rule requires it to go as far as the Chief Justice urges. Supreme Court decisions require exhaustion even in cases where constitutional issues are raised, but only where the constitutional challenge is to an agency's application of a statute. This should not be the case where the constitutionality of a statute or other act is challenged as invalid on its face. In such a case the administrative process is unlikely to contribute to the resolution of the challenge. Moore indicates that the majority of the present Court accepts the rule that where constitutionality of a statute or other act is challenged on its face, rather than as applied, exhaustion should not be required.

The Moore opinion also deals with another important aspect of the exhaustion issue. In a footnote the Court states that the exhaustion requirement is "wholly inappropriate where the party is a criminal defendant in circumstances like those present here." It is not clear, however, how far the Court meant to go by this state-

406. Housing Code of the City of East Cleveland, Ohio, § 1341.08 (1966) (defines family); id. § 1351.02 (limits occupancy of dwelling unit to single family).
407. 431 U.S. at 499.
408. Id. at 521 (Burger, C.J., dissenting).
409. Id. at 524 (Burger, C.J., dissenting).
410. Id. at 526 (Burger, C.J., dissenting).
411. See B. SCHWARTZ, supra note 137, § 178.
412. 431 U.S. at 497 n.5.
413. Id. (emphasis omitted) (citations omitted).
ment. The Court went on to say that it had never applied the exhaustion principle to foreclose a criminal defendant from asserting the unconstitutionality of a statute under which he or she is prosecuted. This implies that a criminal defendant may assert only facial invalidity of a statute without first exhausting other remedies. However, the present writer and others who have urged that exhaustion should not be required in a criminal case may find support in the Court's further statement that those cases denying constitutional defenses to criminal defendants for failure to exhaust did so pursuant to statutes that mandated such a holding. Such statutes put defendants on notice that failure to pursue available administrative relief may result in forfeiture of defenses in a criminal enforcement proceeding. Therefore, absent a comparable statute mandating exhaustion, criminal defenses may be raised despite lack of exhaustion.

**Yakus Redivivus?**

My position that exhaustion of administrative remedies should not be required in a criminal case is based on the view that the policy in favor of exhaustion should give way to the overriding policy of the sixth amendment—that a criminal defendant should be given a full trial on all aspects of the crime with which he or she is charged. This includes being able to assert that no crime was committed because the agency act he or she is accused of violating was itself invalid.

The conflict between the sixth amendment and administrative law principles also arises in other issues concerning availability of review. It is a basic constitutional principle that the sixth amendment guarantees a fair trial to a criminal defendant in which the defendant can dispute every element of the alleged crime with which he or she is charged. It is a basic administrative law principle that a defendant in an enforcement proceeding cannot attack the legality of the administrative rule or order that he or she is charged with violating if the defendant did not take advantage of a statutory provision for obtaining judicial review when the rule or

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414. *Id.*
417. 431 U.S. at 497 n.5.
418. *See U.S. Const. amend. VI.*
order was issued, and the statute indicates that there shall be no review in the enforcement proceeding. What happens when these two basic principles conflict?

In the celebrated case of Yakus v. United States\(^\text{420}\) the Court ruled that the administrative law principle must prevail. The provision in the Yakus statute for exclusiveness of the statutory review procedure\(^\text{421}\) was held to deprive the criminal court of the power to consider the validity of the regulation as a defense to a prosecution for its violation.\(^\text{422}\) To critics, Yakus results in the splitting of a criminal trial into segments; unlike other criminal defendants, one accused of violating an administrative rule or order can be convicted on what amounts to a trial in two parts, or in the alternative, on a trial that shuts out what may be the most important of the issues material to one's guilt.\(^\text{423}\)

This writer has asserted that Yakus should be treated as a wartime aberration; the splitting of the criminal case permitted there should, absent a war emergency, be considered contrary to the sixth amendment.\(^\text{424}\) In his concurring opinion in Adamo Wrecking Co. v. United States\(^\text{425}\) Justice Powell indicated agreement with this view.\(^\text{426}\) The Yakus statute, he said, can be viewed as a valid exercise of congressional war powers. Without a comparable war emergency, the Yakus shortcutting of normal due process rights is unjustified. Yakus does not foreclose the issue of the constitutional validity of preclusion provisions in nonwar power statutes in the context of a criminal prosecution.\(^\text{427}\)

The Adamo majority avoided the Yakus issue by judicious interpretation of the governing statute so as not to preclude judicial challenge to the agency order at issue in the case. The case arose out of a prosecution for violating an Environmental Protection Agency emission standard. The statute provided that, in an emission standard enforcement proceeding, civil or criminal, the standard itself would not be subject to review.\(^\text{428}\) The lower court

\(^{420}\) 321 U.S. 414 (1944).


\(^{422}\) 321 U.S. at 435.

\(^{423}\) See, e.g., id. at 489 (Rutledge, J., dissenting).

\(^{424}\) See B. SCHWARTZ, supra note 137, § 194.


\(^{426}\) Id. at 290 (Powell, J., concurring).

\(^{427}\) Id. at 291 (Powell, J., concurring).

held *Yakus* applicable. The Supreme Court ruled that *Yakus* did not bar consideration of the defense that the regulation at issue was not an "emission standard" and hence outside the preclusion provision. On the merits of that defense, the Court held that the regulation in question was a work practice standard and not an emission standard. Hence its validity could be challenged in the criminal prosecution.

**Standing**

Three years after Warren E. Burger became Chief Justice, Judge Friendly expressed doubt about a proposal by this writer and an English colleague that we follow the English practice of not demanding standing as a prerequisite to judicial review: "One may . . . endorse recent relaxation of the requirement of standing . . . without agreeing to its abolition." The Burger Court has followed Judge Friendly's view. While it has relaxed standing requirements, it has certainly not eliminated them. For example, in *Schlesinger v. Reservists Committee to Stop the War* the Court refused to allow standing in an action brought by citizens and taxpayers challenging the armed forces reserve membership of members of Congress. The lower courts had held that respondents had standing to sue as representatives of the class of all United States citizens, but not as taxpayers. The Supreme Court reversed, holding that standing was lacking in the citizen suing qua citizen. Though the cases have broadened the categories of judicially cognizable injury, they have not abandoned the requirement that the party seeking review must have suffered an injury. Standing may not be predicated upon an interest held in common by all members of the public. The necessary personal stake only exists where the action challenged as unlawful causes the complaining party to suffer "some particularized injury that sets him apart from the man on the street." The Court held this to be lacking here.

430. 434 U.S. at 278.
431. Id. at 288.
432. B. SCHWARTZ & H. WADE, supra note 277, at 291.
433. Friendly, Foreword to id. at xx.
436. 418 U.S. at 222-23.
Critics have focused on some of the Burger Court’s standing decisions as too restrictive.\textsuperscript{438} From a broader point of view, however, it cannot be doubted that the past decade has seen a dramatic broadening of standing, which has opened the courtroom doors to ever-wider classes of would-be plaintiffs. The high bench’s jurisprudence on standing has had an impact that extends beyond the still-arcane mysteries of administrative law.\textsuperscript{439} The narrow concepts of standing that prevailed not too long ago were appropriate to a legal system geared only to hearing John Doe’s private claim against Richard Roe. If public interest claims are to be considered adequately in today’s legal system, the concept of who is able to vindicate a public interest must be accordingly expanded.

The Burger Court articulated its basic standing test in the 1970 case of \textit{Association of Data Processing Service Organizations, Inc. v. Camp}.\textsuperscript{440} To have standing, plaintiffs must show (1) that the challenged agency act caused them “injury in fact,” and (2) that the alleged injury was to an interest “arguably within the zone of interests to be protected or regulated” by the statutes involved.\textsuperscript{441} This writer has criticized this test as being needlessly complex,\textsuperscript{442} and instead favors a state court decision that rejected the bipartite injury test in favor of a single “injury in fact” test.\textsuperscript{443} If an agency act causes injury to plaintiff, that should suffice to allow standing to challenge the act, unless the injury itself is too remote.

Such criticism of \textit{Data Processing} should not overlook the present Court’s accomplishment in broadening the law of standing to meet the needs of much public interest litigation. The result has been what Justice Powell has termed a “revolution in standing doctrine.”\textsuperscript{444} One of the most important developments is the abolition of the “legal interest” requirement. In \textit{Data Processing} the Court did away with the requirement that a plaintiff allege invasion of a legally protected interest. “The ‘legal interest’ test goes to the merits.”\textsuperscript{445} When standing is at issue, the question

\begin{itemize}
  \item \textsuperscript{438} See, e.g., Lewin, \textit{Avoiding the Supreme Court}, N.Y. Times, Oct. 1, 1976, § 6 (Magazine), at 31.
  \item \textsuperscript{439} This is underscored by a full-column article on standing in the \textit{New York Times}. N.Y. Times, Feb. 19, 1974, at 9, col. 1.
  \item \textsuperscript{440} 397 U.S. 150 (1970).
  \item \textsuperscript{441} Id. at 153.
  \item \textsuperscript{442} See B. SCHWARTZ, supra note 137, §158.
  \item \textsuperscript{443} New Hampshire Bankers Ass’n v. Nelson, 113 N.H. 127, 302 A.2d 810 (1973).
  \item \textsuperscript{444} United States v. Richardson, 418 U.S. 166, 194 (1974) (Powell, J., concurring).
  \item \textsuperscript{445} 397 U.S. at 153.
\end{itemize}
is whether plaintiff is a proper party to seek review, not "whether, on the merits, the plaintiff has a legally protected interest that defendant's action invaded."\textsuperscript{446} Whether the harm comes within the concept of "legal wrong" is irrelevant to the existence of standing.

Equally significant has been the relaxation of the requirement of "pocketbook injury." Under \textit{Data Processing}, plaintiff must show "injury in fact—economic or otherwise."\textsuperscript{447} The present Court has emphasized that standing is no longer confined to those who can show economic harm; nor does the number of persons sharing the same injury constitute sufficient reason for denying standing to any person who has in fact suffered injury.\textsuperscript{448} "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process."\textsuperscript{449}

\textit{United States v. Students Challenging Regulatory Agency Procedures (SCRAP)}\textsuperscript{450} illustrates how far the Court has gone in giving effect to noneconomic interests. An environmental association formed by law students brought an action challenging Interstate Commerce Commission regulations that allowed railroads to collect a 2.5% surcharge on freight rates pending adoption of selective rate increases.\textsuperscript{451} SCRAP alleged that the higher rate structure would discourage the use of recyclable materials, causing further consumption of forests and other natural resources and resulting in more refuse and undisposable materials that would pollute the environment.\textsuperscript{452} The Court held that SCRAP had standing, relying on the allegation that their members used the forests, streams, mountains, and other natural resources in the Washington, D.C., area for recreation. Thus SCRAP would be given the opportunity to show such use would be disturbed by the adverse environmental impact caused by the use of nonrecyclable goods brought about by the rate increase.\textsuperscript{453}

\textsuperscript{446} \textit{Id.} at 171 (Brennan, J., concurring in the result and dissenting) (citation omitted).

\textsuperscript{447} \textit{Id.} at 152.

\textsuperscript{448} \textit{See United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 686 (1973).}


\textsuperscript{450} \textit{United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973).}

\textsuperscript{451} \textit{Id.} at 674.

\textsuperscript{452} \textit{Brief of Appellee at 58, United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973).}

\textsuperscript{453} 412 U.S. at 688.
The cases during the past generation have shown a continuing "enlargement of the class of people who may protest administrative action. The whole drive for enlarging the category of aggrieved 'persons' is symptomatic of that trend." The Court has extended that category to competitors and consumers—first to consumers asserting a pocketbook interest and then to those alleging non-economic injuries. SCRAP extends standing to "consumers of the environment," even those whose interests reflect an "attenuated line of causation." SCRAP indicates that any identifiable injury in fact may be enough to confer standing, no matter how remote. This is a major step toward doing away with the standing requirement altogether. The Court may be moving toward permitting citizens at large to litigate any administrative decision that falls in an area of interest to them.

**JUDICIAL REVIEW: SCOPE**

**Review Without Record**

Prior to the Burger Court, the prevailing theory of the proper scope of judicial inquiry on review had centered upon the substantial-evidence rule. This principle provided that "the scope of judicial review over administrative action is limited to . . . whether or not the findings of fact underlying the administrative conclusion are based upon substantial evidence." There is no doubt that the substantial-evidence rule governs agency proceedings where a formal record is kept. Under *Universal Camera Corp. v. NLRB,* the reviewing court must determine whether the agency fact findings are supported by substantial evidence in the record considered as a whole. The test governing review of agency adjudications made without a formal hearing and record was laid down in *Citizens to Preserve Overton Park,*

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455. See B. Schwartz, supra note 137, §§ 159-160.
456. 412 U.S. at 688.
457. Id. at 723 (White, J., dissenting). For a more recent decision indicating this, see Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978).
460. Id. at 487-88.
At issue was the Secretary of Transportation's authorization of the use of federal funds to finance construction of a highway through a public park despite a statutory prohibition against such construction if a "feasible and prudent" alternative route is available. The statute required a public hearing to inform the community about the proposed project and to elicit their views on the design and route. This hearing was not the formal adjudicatory hearing required under the APA. "It is not designed to produce a record that is to be the basis of agency action—the basic requirement for substantial-evidence review." Hence, the Court held, the substantial-evidence test was not the applicable standard by which to review the Secretary's action. Instead, the reviewing court must determine whether the approval of the construction was, under the APA, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." This amounts to a reasonableness standard. The "court must be able to find that the Secretary could have reasonably believed that in this case there are no feasible alternatives or that alternatives do involve unique problems." Since the test under the substantial-evidence rule is essentially one of reasonableness, one wonders whether, in practice, the arbitrary-capricious standard does not make for a similar scope of review. As Judge Friendly put it, review under the "arbitrary and capricious" standard as opposed to the substantial-evidence standard "is semantic in some degree... [I]t is hard to see in what respect we would have treated the question differently if we had been applying a 'substantial evidence' test."

Sanctions

The present Court has continued to follow the rule that the scope of review over agency imposition of sanctions is no broader than that over agency action generally. In Butz v. Glover Livestock

464. 401 U.S. at 415 (citation omitted).
465. Id. at 416 (quoting Administrative Procedure Act § 10(e), 5 U.S.C. § 706(2)(A) (1976)).
466. Id.
Commission Co.\(^{468}\) the court of appeals upheld a cease and desist order against violating the Packers and Stockyards Act\(^{469}\) while setting aside a twenty-day suspension imposed on the violator.\(^{470}\) The Supreme Court reversed, finding the court of appeals had exceeded the proper scope of judicial review of administrative sanctions.\(^{471}\) The relation of sanction to policy was a matter committed to agency discretion; the agency choice of sanction was not to be overturned unless unwarranted in law or without justification in fact. Nor was the sanction rendered “unwarranted in law” because it was more severe than sanctions imposed in other cases. The choice in the given case was to be made by the agency, not by the reviewing court.\(^{472}\)

Here, as in other areas of administrative law, the Burger Court has been unwilling to read in power not provided for in the governing statute. This means that if judicial review of sanctions is to be broadened, an express statute authorizing review is needed. For example, a New York statute permits the courts to substitute their judgment on the penalty imposed, even if the agency sanction is not contrary to law and is supported by substantial evidence.\(^ {473}\) Under the New York statute, there are no objective standards to guide the judges in substituting their judgment on sanctions. The result is a virtual “Chancellor’s foot” dispensation of justice in the New York review cases.\(^{474}\) Yet, in today’s much-regulated society, may it not be important for there to be something like the residual power of the Chancellor to mitigate injustice in penalties?

**Mixed Questions and Statutory Interpretation**

The most interesting scope-of-review cases are those involving mixed findings of law and fact, particularly those applying statutory terms to the facts of a given case. The early approach of the Supreme Court in cases involving the application of law to fact was to treat the cases as review of law for purposes of scope of review. Thus in *FTC v. Gratz*\(^ {475}\)—the first case concerned with the power of the newly created FTC to restrain “unfair methods of competi-

\(^{470}\) 454 F.2d 109 (8th Cir. 1972), rev’d, 411 U.S. 182 (1973).
\(^{471}\) 411 U.S. at 186-88.
\(^{472}\) Id. at 188-89.
\(^{473}\) N.Y. CIV. PRAC. LAW § 7803 (McKinney 1963).
\(^{474}\) See B. SCHWARTZ, supra note 137, § 221.
\(^{475}\) 253 U.S. 421 (1920).
tion—the Court did not confine itself to the question of whether reasonable grounds existed for the administrative conclusion that certain practices were unfair. Instead, it independently determined the application of the statutory concept: "The words 'unfair method of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include."

FTC v. Sperry & Hutchinson Co. illustrates how far the present Court has departed from the Gratz doctrine. The FTC had issued a cease and desist order against respondent for unfairly attempting to suppress the operation of trading stamp exchanges and other "free and open" redemption of stamps. Respondent argued that its conduct was beyond the reach of section 5 of the FTC act, which it claimed permitted the Commission to restrain only those practices that violate the antitrust laws, are deceptive, or that are repugnant to public morals. The Court upheld the FTC power to determine whether challenged practices, though posing no threat to competition under the antitrust laws, are nevertheless unfair methods of competition within the FTC act's prohibition. The Court accepted "the view that the perspective of Gratz is too confined." It is primarily for the FTC, not the courts, to determine whether trade practices are "unfair." Great weight is to be given to the Commission conclusion that particular business practices fall within the statutory concept of "unfair methods of competition."

The Court has consistently reiterated the theme of deference to administrative interpretations. As the Court noted in an NLRB case, "the Board's resolution of the conflicting claims in this case represents a defensible construction of the statute and is entitled to considerable deference." In another case, the rule of deference was argued not to apply because the case concerned hospitals and the employer hospital and not the Board was arguably the expert. The Court rejected the claim:

477. Id. at 427.
481. 405 U.S. at 242.
482. NLRB v. Local Union No. 103, 434 U.S. 335, 350 (1978).
It is true that the Board is not expert in the delivery of health-care services, but neither is it in pharmacology, chemical manufacturing, lumbering, shipping, or any of a host of varied and specialized business enterprises over which the Act confers its jurisdiction. But the Board is expert in federal national labor relations policy, and it is in the Board, not petitioner, that the 1974 amendments vested responsibility for developing that policy in the health-care industry.484

The judicial role is narrow: It is for the Board, not the courts, to fashion rules and apply them based on its experience. Regardless of how the Court might have resolved the question initially, deference must be given to the judgment of the agency whose special duty it is to apply the broad statutory language to varying fact patterns.485

The rule of deference to administrative construction of statutes was reaffirmed in Ford Motor Co. v. NLRB.486 At issue was a Board order requiring an employer to bargain with a union over proposed price increases for in-plant cafeteria and vending machine food and beverages. The question was whether the cafeteria and vending machine prices were “terms and conditions of employment” subject to mandatory collective bargaining under the National Labor Relations Act.487 According to the Court, Congress had delegated to the Board the primary responsibility of determining the scope of the statutory language. Hence, the Board’s judgment as to what is a mandatory bargaining subject was entitled to considerable deference. To be sure, the Board’s judgment was subject to judicial review, “but if . . . defensible, it should not be rejected merely because the courts might prefer another view of the statute.”488 In this case, the Board’s view that in-plant food prices and services were mandatory bargaining subjects was not an unreasonable or unprincipled construction of the statute, and it must therefore be accepted and enforced.

Despite these Supreme Court reaffirmations of the deference doctrine, the doctrine is being subjected to increasing doubt in an era of growing malaise about the administrative process. As Judge Bazelon put it a few years ago, it is no longer enough for the courts perfunctorily to uphold agency action “with a nod in the direction

488. 441 U.S. at 497 (citation omitted).
of the 'substantial evidence' test, and a bow to the mysteries of administrative expertise."\footnote{489} The lower courts, at least, have begun to look more closely at claims of agency expertise. Though the deference doctrine limits review power over substantive determinations, it is within the scope of the court's oversight responsibilities to ascertain whether the agency applied the correct legal standard.\footnote{490} While courts may not be experts in the particular administrative area, they "do try, however, to develop some expertise about integrity. In overseeing the administrative process, our primary goal should not be to insure 'correct' decisions, but to preserve the integrity of the decision-making process."\footnote{491}

**Constitutional and Jurisdictional Fact**

Despite continuing academic interest, the doctrines of so-called "constitutional" and "jurisdictional fact" have largely been discarded. In the area of personal rights, however, there may still be room for application of those doctrines. In particular, commentators have assumed that, despite the demise of *Ohio Valley Water Co. v. Ben Avon Borough*\footnote{492} and *Crowell v. Benson*,\footnote{493} the rule of *Ng Fung Ho. v. White*,\footnote{494} under which a claim of citizenship in a deportation case is subject to de novo review, is still good law. This assumption was recently confirmed in *Agosto v. INS*,\footnote{495} where the Court stated that "the Constitution requires that there be some provision for de novo judicial determination of claims to American citizenship in deportation proceedings."\footnote{496} A resident of this country has a right to de novo determination of a claim to citizenship, because this is a "fact" upon which both congressional and agency power to order deportation depend.

Since 1961, the *Ng Fung Ho* rule of de novo review of citizenship claims has been given statutory effect. An amendment to the Immigration Act provides for direct review in courts of appeals of deportation orders, but carves out an exception for cases in which

\footnote{489. Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 597 (D.C. Cir. 1971) (footnotes omitted).}  
\footnote{490. See American Airlines, Inc. v. Secretary of Labor, 578 F.2d 38 (2d Cir. 1978).}  
\footnote{491. Barnes Freight Line, Inc. v. ICC, 569 F.2d 912, 923-24 (5th Cir. 1978).}  
\footnote{492. 253 U.S. 287 (1920).}  
\footnote{493. 285 U.S. 22 (1932).}  
\footnote{494. 259 U.S. 276 (1922).}  
\footnote{495. 436 U.S. 748 (1978).}  
\footnote{496. Id. at 753 (citation omitted).}
citizenship is claimed; in these cases, de novo review in district court is expressly made available.\textsuperscript{497}

Agosto indicates that Congress provided this exception in recognition of the constitutional basis of the \textit{Ng Fung Ho} rule.\textsuperscript{498} Aside from cases involving the personal right of citizenship, the "constitutional" and "jurisdictional fact" doctrines have all but "slipped into oblivion."\textsuperscript{499} It is unfortunate that the Court has not seized the occasion expressly to confirm this development. In fact, \textit{Crowell v. Benson} has been cited by two members of the present Court with no hint that its doctrine has been discredited.\textsuperscript{500} Yet, in \textit{Northeast Marine Terminal Co. v. Caputo}\textsuperscript{501} the Court was concerned with deciding whether workers were "employees" and met the "situs test" under the 1972 amendments to the Longshoremen's Act:\textsuperscript{502} the same statute involved in \textit{Crowell v. Benson}.\textsuperscript{503} The findings at issue in \textit{Caputo} appear to be the very two "jurisdictional" findings that, under \textit{Crowell v. Benson}, are subject to full review in a trial de novo.\textsuperscript{504} The governing case would thus seem to be \textit{Crowell}; yet it was not mentioned in the Court's opinion. Does this mean that it has at last earned the repose Justice Frankfurter once asserted it deserved?\textsuperscript{505}

**TORT LIABILITY**

The Burger Court has been ambivalent concerning the scope of the federal government's tort liability. It expressly reaffirmed \textit{Dalehite v. United States},\textsuperscript{506} the most restrictive decision interpreting the Federal Tort Claims Act.\textsuperscript{507} This decision drastically

\textsuperscript{498} 436 U.S. at 753 (citing H.R. REP. No. 1086, 87th Cong., 1st Sess. 22 (1961); H.R. REP. No. 565, 87th Cong., 1st Sess. 15 (1961)).
\textsuperscript{501} 432 U.S. 249 (1977).
\textsuperscript{503} See Longshoremens' and Harbor Workers' Compensation Act, ch. 509, 44 Stat. 1424 (1927) (current version at 33 U.S.C. §§ 901-950 (1976)).
\textsuperscript{504} 285 U.S. at 55.
\textsuperscript{505} Estep v. United States, 327 U.S. 114, 142 (1946) (Frankfurter, J., concurring). For a more recent case following the \textit{Northeast Marine Terminal} approach, see P.C. Pfeiffer Co. v. Ford, 100 S. Ct. 328 (1979).
limited that statute's remedial intent to make the federal government liable in tort on the same basis as private individuals. On the other hand, the Court has recently reopened the door to tort suits against administrative officers, which had all but been closed by the broad rule of officer immunity laid down by a 1959 decision.\footnote{508}

**Governmental Liability**

After the broad trend toward expansion of governmental tort liability during this century,\footnote{509} the decision in *Laird v. Nelms*\footnote{510} appears to be a backward step. The Court held that damage from sonic booms caused by military planes was not actionable under the Tort Claims Act if no negligence was shown in either the planning or operation of the flights.\footnote{511} The Court concluded that though Congress intended to make the government liable under respondeat superior, it did not intend to impose liability based solely on the ultrahazardous nature of an activity undertaken by government.\footnote{512} The Court expressly reaffirmed the decision in *Dalehite*, which held that the Act did not authorize the imposition of strict liability of any sort upon the federal government.\footnote{513} The *Laird* decision is unfortunate. The Tort Claims Act makes the United States liable for "negligent or wrongful acts" in those cases where a private employer would be held liable.\footnote{514} Under applicable tort law, a private person who creates a sonic boom is absolutely liable for any injuries caused thereby.\footnote{515} The creation of a sonic boom is thus a "wrongful act" within the Tort Claims Act. To hold otherwise is to create an exception in a case covered by the express language of the Act.

**Officer Liability**

Though the Burger Court has thus taken a restrictive approach to liability under the Tort Claims Act, its decision in *Butz v. Economou*\footnote{516} has given substance to the ancient boast of the com-
mon law that public officers have no immunity from the sanctions of law applicable to private individuals. In this century the common law rule of officer liability had increasingly given way to one of officer immunity. The trend in that direction culminated in Barr v. Matteo, where absolute immunity from tort liability was extended to virtually the entire federal bureaucracy acting within "the outer perimeter of [their] line of duty," even where malice was alleged.

All this may have been changed by Butz. The Department of Agriculture had brought a proceeding to revoke the registration of respondent's commodity futures commission company. After a hearing, the Department's Chief Hearing Examiner recommended revoking the license. The Judicial Officer, to whom the Secretary had delegated his decisional authority, affirmed; this order was vacated on judicial review. Respondent filed an action for damages against numerous officials, alleging that by instituting unauthorized proceedings they had violated his constitutional rights, including violation of his right to procedural due process. The Government moved to dismiss on the ground that the individual defendants, as federal officials, were entitled to absolute immunity for all discretionary acts within the scope of their authority. The Court ruled that dismissal should be denied, holding that federal officials are not absolutely immune from liability for damages where they knowingly infringe upon an individual's constitutional rights.

In the Court's view, because the conduct complained about in Butz was not within the outer limits of the officials' duties, the case was not controlled by Barr. The reasoning in the Barr opinion indicates that a different question would have been presented had the officer ignored a statutory or constitutional limitation on his authority: "[W]e are confident that Barr did not purport to protect an official who has not only committed a wrong under local law, but also violated those fundamental principles of fairness embodied in the Constitution."
Thus a federal official may not with impunity ignore the limitations the law places on his or her powers. The official is protected from liability from tortious acts only if the acts are authorized by controlling federal law. *Barr* did not purport to abolish the liability of federal officers for actions beyond their line of duty. If they are accountable when they stray beyond the limits of statutory authority, it would be incongruous to hold that they may willfully or knowingly violate constitutional rights without liability.

*Butz* builds upon prior decisions, particularly those in *Bivens v. Six Unknown Narcotics Agents* and *Wood v. Strickland*. But it makes explicit what those cases had only implied: The *Barr* rule of absolute immunity does not apply in tort actions charging violations of constitutional rights. A citizen suffering a compensable injury to a constitutionally protected interest can invoke the general jurisdiction of the district courts to obtain an award of monetary damages against the responsible federal official. Nor is the right of action limited to cases brought under the Civil Rights Act provision for civil liability of officials who deprive persons of their constitutional rights. On the contrary, as *Bivens* had implied, it applies to all damage suits against federal and state officials that charge violations of constitutional rights. *Butz* thus opens the door to some of the liability foreclosed by *Barr v. Matteo*, since tortious official conduct can frequently be described in constitutional terms. Cases where recovery has been denied under the *Barr* approach can readily be recast in *Butz* terms: Illegal detention can be reframed as a constitutional deprivation of liberty; abusive treatment of prisoners as infliction of punishment without due process; and a seizure of property to satisfy a pretended tax lien as a taking of property without due process. If *Butz* can be pressed that far, it may allow a major extension of liability in cases involving constitutional deprivations by public officers, even those previously immunized under *Barr*.

The Court in *Butz* did, however, go out of its way to affirm the immunity of officers performing adjudicatory functions in an

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526. 438 U.S. at 489.
528. 438 U.S. at 500-01.
529. E.g., Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949).
530. E.g., Norton v. McShane, 332 F.2d 855 (5th Cir. 1964).
531. E.g., Bershad v. Wood, 290 F.2d 714 (9th Cir. 1961).
agency. Though Butz rejected the claim of absolute immunity for most of the officials, it did hold that absolute immunity existed for administrative prosecuting and hearing officials, extending to them the absolute immunity of prosecutors and judges in the judicial process. Absolute immunity is afforded to those responsible for the decision to initiate or continue a proceeding subject to agency adjudication, to those agency personnel who present evidence on the record in the course of an adjudication, as well as to those persons performing adjudicatory functions within a federal agency. This provides a needed imprimatur of the importance of the adjudicatory function and the elevated status of those engaged in it. In particular the Court highlighted the status of administrative law judges, whose judicial role and dignity require that they be vested with the absolute immunity that shields judges in the courts.

CONCLUSION

The law, to paraphrase Holmes, is a magic mirror wherein we see reflected the society, its people, and its institutions. This is particularly true of administrative law, whose 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 alteration of the government's role that has occurred to deal with those changes.

The administrative law decisions of the Burger Court reflect both the society of the past decade and the period through which it has been passing. Inevitably the general malaise about administrative agencies has had its influence on Supreme Court decisions. Two principal themes in the Burger Court's administrative law jurisprudence may be seen as direct responses to this growing distrust of agencies and their failure to protect the public interest they were created to serve.

First, the availability of judicial review has been expanded, stemming directly from doubts about agency performance and a growing conviction of the need to submit administrative authority to effective control. The Burger Court reflected these feelings by erecting a virtual presumption in favor of judicial review. As the Court stated in a 1970 case, "judicial review of . . . administrative action is the rule, and nonreviewability an exception which must

532. 438 U.S. at 508-09.
533. See O. W. Holmes, Speeches 17 (1913).
be demonstrated." Precluding review, in Justice Douglas' phrase, makes a "tyrant" out of every agency officer. That situation is avoided only by ensuring access to the courts to those aggrieved by administrative actions. Availability of judicial review, declared Justice Douglas in another case, "seems to me to be the essence of due process." Though these words were spoken in a dissent, they reflect the present Court's attitude toward availability of review.

The second theme in the Burger Court's administrative law jurisprudence cuts across the entire subject. Statutes that relate to agencies must be strictly interpreted. This has resulted in a substantial change in the Court's posture toward agencies. While prior Courts were willing to look beyond the black letter of delegating statutes and read in implied powers in the light of presumed congressional intent to confer broadside authority, the Burger Court has adopted a narrower approach. It no longer tends to go beyond the legislative language and read in powers not expressly conferred.

This changed attitude of the highest Court is also a direct response to the growing distrust of agencies. The crisis in confidence that has infected governmental institutions has had particular impact on perceptions of the administrative process in operation. Not long before his elevation to the highest bench, then-Judge Burger referred to the theory that an agency such as the FCC effectively represents the public interest as

one of those assumptions we collectively try to work with so long as they are reasonably adequate. 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.

It is hardly surprising that the skeptical attitude evidenced by this statement has had its effects on the tribunal over which its author now presides.

In 1971 Judge Bazelon asserted that "[w]e stand on the threshold of a new era in the history of the long and fruitful collab-

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oration of administrative agencies and reviewing courts."\(^{538}\) The Burger Court may have started another crucial swing of the administrative law pendulum. Certainly the swing appears likely to increase as the Justices, like the citizenry generally, become increasingly disenchanted with claims of administrative expertise. But it is still too early to say whether it will culminate in a retreat from the past generation's reconciliation between administrative and judicial power. If it does we may ultimately expect a drastic alteration in traditional restrictions on the scope of judicial power in administrative law cases. If agencies prove increasingly unable to meet societal needs, we can expect the courts to play a more activist role. The Burger Court's constricted view of agency authority may foreshadow a broadening of the judicial role in administrative law, or it may be only a temporary manifestation of the current distrust of agencies.

From a broader perspective, the Burger Court's administrative law jurisprudence illustrates the rapidly changing nature of our administrative law. It has been thirty-five years since enactment of the Administrative Procedure Act.\(^ {539}\) In terms of administrative law development it seems longer than that. The movement that led to the APA's enactment was part of the era of extremism in administrative law fostered by the then-recent New Deal expansion of agency authority and the efforts of those who resisted the new governmental devices. By now, we have come to see that neither the thrill of the New Dealers nor the chill of their opponents adequately reflected the reality of the administrative process.\(^ {540}\) Extremists on both sides have moved toward the middle. Thus most of the controversy engendered by extremism has itself tended to abate.

The cases decided by the Burger Court show how the focus of administrative law interest has shifted during the past quarter century. The key problems dealt with in those cases were not even relevant three decades ago: procedure in rulemaking;\(^ {541}\) procedural rights in welfare and social security proceedings;\(^ {542}\) informal hear-


\(^{539}\) Administrative Procedure Act, ch. 324, §§ 2-12, 60 Stat. 237 (current version at 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 5362, 7521 (1976)).


\(^{541}\) See text accompanying notes 123-179 supra.

\(^{542}\) See text accompanying notes 180-273 supra.
ing techniques;\textsuperscript{543} timing of review\textsuperscript{544} and standing;\textsuperscript{545} freedom of information;\textsuperscript{546} and agency investigatory power.\textsuperscript{547} The cases in the 1940's dealt with these matters in a rudimentary fashion if at all; in the 1970's they were the stuff of administrative law jurisprudence.

In 1943, the Supreme Court referred to a particular area of administrative regulation as one "the dominant characteristic of which was the rapid pace of its unfolding."\textsuperscript{548} In the 1970's, that statement could be made about the entire field of administrative law. The paramount characteristic of administrative law today is what we may term its Heraclitean nature: The subject is in a continual state of flux, as it increasingly seeks to meet the needs posed by changing conceptions of governmental function and expanding expectations of those subject to public power.

\textsuperscript{543} See text accompanying notes 274-285 \textit{supra}.
\textsuperscript{544} See text accompanying notes 336-431 \textit{supra}.
\textsuperscript{545} See text accompanying notes 432-457 \textit{supra}.
\textsuperscript{546} See text accompanying notes 72-100 \textit{supra}.
\textsuperscript{547} See text accompanying notes 101-122 \textit{supra}.
\textsuperscript{548} National Broadcasting Co. v. United States, 319 U.S. 190, 219 (1943).