Administrative Law in the United States -- Past, Present and Future

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This paper will take a contextual approach to American administrative law. It will examine the historic context and the legal significance of certain administrative law doctrines and approaches. In so doing, it will examine three distinct eras of administrative law: (1) the New Deal-A.P.A., which I date from 1929 to 1959; (2) the environmental era which I date from 1960 to 1980; and (3) the global era of administrative law, whose beginnings I somewhat arbitrarily mark as 1980. This takes us to the present and the foreseeable future.¹ I do not mean to imply that these eras are so distinct that there is little overlap between and among them. Nor do I wish to imply that somehow one effectively and fully supplants another. Quite the contrary; they are cumulative. Most of the law developed in each forms the legal framework and provides the legal rhetoric for the developments of the next. Law evolves by making use of the past; like time, it moves "backwards from a receding past into an unknown future."² These three eras of administrative law thus represent three layers of law that interact with one another, often drawing on the legal approaches and legal rhetoric of the past, but also transforming them in their application to new problems and situations.

I will link interpretive and substantive trends in administrative law with trends in constitutional law. In particular, I will examine two facets of constitutional and administrative law. First, I will analyze the overall constitutional structure within which administrative agencies must fit and act; this will be followed by a comparison of the procedural demands of the fourteenth amendment to our Constitution with those required by the relevant procedural statutes of each era. Closely related to this analysis will be the role that courts play in interpreting both the constitution and the relevant statutes involved.

The New Deal-A.P.A. Era

In 1933, Professor, but soon to be Justice, Felix Frankfurter commented on the special significance of the Great Depression in the U.S.:

In this the fourth winter of our discontent it is no longer timorous or ignorant to believe that this depression has a significance very different from prior economic stresses in our national history. The more things change the more they remain the
same is an epigram of comfortable cynicism. There are new periods in history and we are in the midst of one of them.³

Frankfurter, along with most New Dealers, believed that these extraordinary times required extraordinary solutions, experimentation, and innovation. Much of this reform was to come in the form of national legislation. Frankfurter thus advocated the need for judicial restraint in the face of such legislative attempts to lift us out of the depths of the Great Depression. He criticized the Supreme Court as being too activist a court, far too willing to substitute its judgments for those of duly elected legislators. He had good reason to be critical. The Supreme Court had been very tough indeed on previous legislative experiments that arguably interfered with the Court’s conception of “liberty.” The Court’s substantive due process approach evident in *Lochner v. N.Y.*⁴ gave it, in Holmes’ dissenting view, the right to read Herbert Spencer into the Constitution.⁵ More importantly, the Court’s view of a state’s rights would also make national legislation vulnerable to constitutional attack. Up to the Great Depression and beyond, its decisions reflected a very narrow interpretation of the commerce, contracts, and other clauses of the Constitution.⁶ This view resulted in a number of judicial decisions declaring a variety of federal statutes void on constitutional grounds.⁷ Congress’ early attempts at delegating legislative power to federal administrative agencies also conflicted with the Court’s demand that these delegations be accompanied by clear legislative standards. Thus, in *A.L.A. Schechter Poultry Corp. v. United States*⁸ and *Panama Oil Refining Co. v. Ryan*, the Court voided federal legislation for failure to provide the kind of legislative standards required by the non-delegation doctrine.

In anticipating these legal battles and in advocating judicial restraint, Professor Frankfurter did not ask that courts ignore reality or, as he put it, “life.” But “in reading life,” the Court “must have a seasoned understanding of affairs, the imagination to see the organic relations of society, and above all, the humility not to set up its own judgment against the conscientious efforts of those whose primary duty is to govern.”⁹ So convinced of the primacy of legislative as opposed to judicial solutions, he argued that “it is unlikely that a legislature, in its efforts to solve these societal problems, will otherwise than through inadvertences violate the most obvious and cardinal dictates of justice; gross miscarriages of justice are probably less frequent in legislation than they are in the judicial determination of controversies.”¹⁰

Eventually the Court began to adopt the restrained approach to judicial review of the constitutionality of federal and state statutes advocated by Frankfurter and other New Dealers. In *West Coast Hotel Co. v. Parrish*,¹¹ the Court sustained a state minimum wage law for women, taking an approach that foretold a significant change in the Court’s approach to a wide range of economic regulatory legislation. This was the beginning of the end for the
doctrine of substantive due process. This more deferential judicial approach to legislation was deepened and extended by such new Roosevelt appointees to the Court as Justices Black, Murphy, Douglas, and of course, Frankfurter himself. The doctrine of substantive due process was eventually buried, at least in economic cases; the commerce clause was read more and more broadly; the tenth amendment became a mere truism; and the contracts clause seemed to drop out of sight. The non-delegation doctrine used to strike down federal legislation in Schechter and Panama Oil seemed to have peaked in 1935, only to resurface in the odd dissent from then on.

Ironically, there was one opinion that came down during the heyday of the Supreme Court’s confrontation with the New Deal that, in fact, led to the extension of federal power. At the time it was handed down, however, it was not only viewed as another setback for the Roosevelt Administration, but a most unexpected one. From the point of view of the long-run growth of the administrative state, however, it turned out to be a blessing in disguise.

In *Humphrey's Executor v. United States*, the Supreme Court would not allow President Roosevelt to remove William E. Humphrey, a Federal Trade Commissioner appointed by President Hoover. Humphrey was not at all sympathetic to the economic policies of the new President. Roosevelt saw in Humphrey a reactionary and obstructive Commissioner who had no place in his government. Humphrey, however, was determined to serve out his full statutory term. He refused to resign. Roosevelt then fired him, but sought grounds other than personal; therefore, he based Humphrey's removal on economic policy grounds that highlighted the philosophical disagreement between Humphrey's policy preferences and those of the new Administration.

At the time, presidential discretion to remove an official like Humphrey seemed well within executive powers. *Myers v. United States* was the controlling precedent. As Chief Justice Taft explained in *Myers*:

> [T]here may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control. But even in such a case he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised. Otherwise he does not discharge his own constitutional duty of seeing that the laws be faithfully executed.

It is not surprising that this passage was written by a former President. *Myers* certainly regards the problems of “recalcitrant commissioners” from a presidential viewpoint, emphasizing that it is the President’s Article II duty to faithfully execute the laws. It was a shock to the Roosevelt Administration,
though, when the Supreme Court in *Humphrey's Executor* rebuffed its attempt to exert this same kind of control. Many years later, Justice Jackson characterized the decision in this way:

What the Court had before declared to be a constitutional duty of the President had become in Mr. Roosevelt a constitutional offense. Small wonder that the decision became a political instrument. Those who saw executive dictatorship just round the corner had their fears confirmed: the President could be restrained only by the Court. Those who thought the ghost of dictatorship wore judicial robes had their fears, too, confirmed: the Court was applying to President Roosevelt rules different from those it had applied to his predecessors.²

In retrospect, one might now add that *Humphrey's Executor* justified the fears of those who foresaw a dramatic expansion of the administrative state. The decision set forth an approach to separation-of-powers analysis that constitutionally accommodated the “headless fourth branch.” For Justice Sutherland and the majority, this case did not deal with purely executive officers since Federal Trade Commissioners occupy “no part of the executive power vested by the Constitution in the President.”²² The Court recognized that Federal Trade Commissioners could investigate and report antitrust violations, but it conveniently concluded that to the extent that an officer “exercises any executive function – as distinguished from executive power in the constitutional sense – [the officer] does so in the discharge and effectuation of ... quasi-legislative or quasi-judicial powers, or as [an officer of] an agency of the legislative or judicial departments of the government.”²³

This approach to the separation-of-powers questions raised by administrative agencies was, in fact, typical of the pragmatism of the New Deal. Writing in 1938, James Landis, one of the New Deal’s foremost architects, set forth his views on separation-of-powers questions by emphasizing what he called “intelligent realism.” He compared corporate organization with the way he believed governments must be structured if they are to carry out their functions effectively. Landis wrote:

If in private life we were to organize a unit for the operation of an industry, it would scarcely follow Montesquieu’s lines. As yet no organization in private industry either has been conceived along those triadic contours, nor would its normal development, if so conceived, have tended to conform to them. Yet the problems of operating a private industry resemble to a great degree those entailed by its regulation ....

The significance of this comparison is not that it may point to a need for an expanding concept of the province of governmental regulation, but rather that it points to the form which governmental action tends to take. As the governance of industry, bent upon the shaping of adequate policies and the development of means
for their execution, vests powers to this end without regard to the creation of agencies theoretically independent of each other, so when government concerns itself with the stability of an industry it is only intelligent realism for it to follow the industrial rather than the political analogue. It vests the necessary powers with the administrative authority it creates, not too greatly concerned with the extent to which such action does violence to the traditional tripartite theory of governmental organization.\textsuperscript{24}

\textit{Humphrey's Executor} provided the constitutional flexibility necessary for this approach to governance to work.

As New Deal agencies became institutionalized, as the needs of an integrated national economy became apparent, national solutions to nationally perceived problems became the norm. The Administrative State gradually grew in size, complexity, and legitimacy. Constitutionally, the Court's willingness to defer to economic legislation meant that various regulatory solutions were advanced in an attempt to deal with the kinds of market failure spawned by the Depression. This, however, did not mean that the administrative agencies created to implement these solutions had complete discretion to act. The \textit{Administrative Procedures Act (A.P.A.)}, passed in 1946, provided a generic statutory procedural framework with which these agencies had to comply. The procedural requirements of this Act were a significant check on the exercise of agency discretion.

\textit{The A.P.A.}

The \textit{Administrative Procedures Act} is a generic statute that applies to most federal agencies. It assumes that fundamental procedural questions and approaches are the same, no matter what the particular substantive mission of an agency may be. Adjudication is adjudication. Rulemaking is rulemaking. Indeed, the \textit{A.P.A.} divides the procedural world into two parts – rules and orders. It provides elaborate adjudicatory procedures for agency proceedings that trigger ss. 554, 556, and 557 of the Act,\textsuperscript{25} and it provides more legislative procedures for proceedings that qualify as informal rulemaking.\textsuperscript{26} The \textit{A.P.A.} thus requires that we distinguish between what Professor Davis has called adjudicative and legislative facts\textsuperscript{27} by establishing these two primary kinds of agency proceedings – adjudication and rulemaking, both formal and informal.

Section 706 of the \textit{A.P.A.} provides for judicial review of these various types of agency proceedings. It sets forth the complete spectrum of judicial involvement in agency decisions – from no judicial review for actions committed to agency discretion\textsuperscript{28} to \textit{de novo} judicial review of certain other agency actions.\textsuperscript{29} Between these two judicial approaches to agency decisions lie varying degrees of judicial deference to agency judgments. Questions involving the exercise of agency discretion are usually subject to a kind of

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rational basis test inherent in the *A.P.A.*’s arbitrary and capricious standard of review. Underlying this standard of review is the assumption that agencies are best able to determine what policies it would be wise to pursue. Agencies exist to exercise this kind of expertise and are better equipped to do so than generalist judges.\(^{30}\) When adjudicative facts are involved in formal agency proceedings, however, courts apply the *A.P.A.*’s more stringent substantial evidence standard.\(^{11}\) This standard usually results in a good deal of judicial deference to agency fact-finding as well, particularly when issues of credibility are involved and the fact-finder has had occasion to observe the witness. Deference to agency fact-finding is also due to the agency’s expertise, but it is especially due to reasons of judicial economy and efficiency. The *A.P.A.* assumes that courts could not, and should not, practically speaking, essentially retry agency cases at the judicial level.

Courts can assume much more decision-making responsibility when reviewing questions of law. Since *Marbury v. Madison*,\(^{32}\) it has been “emphatically the province and duty of the judicial department to say what the law is.”\(^{33}\) In such cases, traditional wisdom is that courts have the requisite competence to interpret statutes and legislative histories and rule on any constitutional or statutory issues that might arise. But focusing on “questions of law,” as if only one kind of question of law existed is misleading. In fact, many kinds of questions of law can arise. Some involve the jurisdictional power of an agency to act.\(^{34}\)

Others involve the application of a statutory term to a set of facts.\(^{35}\) Such cases are usually complicated by the fact that courts are often reviewing an agency decision that merges the agency’s legal interpretation of a statutory term with its own fact-finding functions. Still other legal issues involve the agency’s interpretation of its own regulations.\(^{36}\) Some of those regulations may be in the form of legislative rules and others may be interpretive rules,\(^{37}\) or result in judicial consideration of the constitutional effects of certain agency action.\(^{38}\) All these contexts present questions of law, but courts can and often do treat these various kinds of legal questions differently, deferring to the agency in some cases and engaging in essentially *de novo* review in others. To complicate matters further, these various legal issues arise in a variety of factual contexts. Some cases may involve agency decisions that may have, quite literally, life and death effects on the litigants involved.\(^{39}\) Others arise in the context of technical statutory regimes that require expert bureaucratic solutions if day-to-day agency life is to proceed apace.\(^{40}\)

If one were to generalize about the role courts played during the New Deal-*A.P.A.* era, it could best be characterized by the word deference. Courts, of course, deferred to the legislature when it came to constitutional challenges to an agency’s enabling act. They also generally deferred to agency fact-finding, policy-making, and often even to determinations of law, particularly when questions of agency jurisdiction were involved. When courts did not defer to agency interpretations of their own powers, it was usually
because they interpreted them even more broadly than the agency. Courts almost invariably interpreted the agency’s jurisdictional statutes in such a way as to extend rather than restrict agency power.\textsuperscript{41} In this era, courts were willing to give Congress and its agents – administrative agencies – the benefit of the doubt in most cases.

This is not to say that judicial deference to agency A.P.A. decision-making meant that agency discretion was unchecked or unfettered. A.P.A. procedures themselves helped control agency discretion to a considerable extent. This is particularly true when one notes the fact that ss. 554, 556, and 557 of the A.P.A. require procedures approaching the kinds of procedural protections associated with federal court civil litigation – cross examination, an impartial decision maker, and a decision based on the record. More importantly, most New Deal agencies used adjudicatory procedures extensively – even when policy questions were at stake. These adjudicatory procedures did much to structure and confine agency discretion. As agencies implemented their public law mandates, the A.P.A. in general and its formal adjudicatory and rulemaking procedures in particular provided the kind of procedural protections that helped ensure that the individual rights of the regulated were adequately protected. As Justice Jackson noted in one of the first opinions to reach the Supreme Court involving the A.P.A.,\textsuperscript{42} the A.P.A. embodied a number of compromises between those whose view of government intervention was skeptical, at best, and those who believed ardently in the need for government intervention:

The Act ... represents a long period of study and strife; it settles long continued and hard fought counteractions, and exacts a formula upon which opposing social and political forces have come to rest.\textsuperscript{43}

In that case, Justice Jackson went on to hold that the adjudicatory procedures of the A.P.A. were, in fact, triggered by the constitutional requirement of a hearing before a deportation order could be executed. This decision was ultimately reversed by Congress. It was, as we shall see, very much out of step with the way Courts generally interpreted the due process clause of the fourteenth amendment in the New Deal-A.P.A. era.

\textit{The Due Process Clause in the New Deal-A.P.A. Era}

Wong Yang Sung was a Chinese national who had overstayed his shore leave as a member of a shipping crew.\textsuperscript{44} He was arrested by Immigration officials. After a hearing before an immigration inspector, the inspector recommended that he be deported. The Acting Commissioner approved and the Board of Immigration Appeals affirmed. Wong Yang Sung then filed a writ of \textit{habeas corpus} arguing that his constitutional right to due process had been violated. He argued, in effect, not only that the Constitution required more of a hearing than he received in this case, but that his constitutional

\textsuperscript{41}ibid.

\textsuperscript{42}See \textit{ibid.}

\textsuperscript{43}See \textit{ibid.}

\textsuperscript{44}See \textit{ibid.}
rights triggered the adjudicatory procedures of the A.P.A.. In particular, Wong Yang Sung argued that he did not have an impartial judge, as required under the A.P.A.. The government admitted non-compliance with the A.P.A. but argued that the Immigration Act of 1917 did not trigger the formal adjudicatory procedures of the A.P.A. and that the procedures it provided fully complied with the demands of the Constitution. The A.P.A. and the Constitutional demands of the due process clause, they argued, were not to be equated. The constitutional demands for a fair hearing could be satisfied by less procedure than that required under the A.P.A..

Writing for the majority, Justice Jackson disagreed. He reasoned that the due process clause of the fourteenth amendment clearly required a hearing in a case of this sort. He then ruled, in effect, that the constitutional requirement of a hearing necessarily triggered the adjudicatory provisions of the A.P.A.. Section 554 of that Act triggers its formal adjudicatory procedures when a hearing on the record is “required by statute.” But Justice Jackson held that “the limitation to hearings ‘required by statute’ ... exempts from that section’s application only those hearings which administrative agencies may hold by regulation, role, custom, or special dispensation; not those held by compulsion.” In his view, the constitutional requirement of procedural due process of law derives from the same source as Congress’ power to legislate and, where applicable, “permeates every valid enactment of that body.” Given the adjudicatory nature of a deportation hearing and the constitutional requirement that some kind of hearing be held, Justice Jackson read the A.P.A.’s language “required by statute” in § 554(a) to include the Constitution as well.

When comparing the procedures used by Immigration officials with those mandated by the A.P.A., the Court concluded that Wong Yang Sung had not received a proper hearing. In particular, the A.P.A.’s requirement that the A.L.J. be separate from the prosecutorial and policy-making functions of the agency was violated in this case. The Court concluded that “when the Constitution requires a hearing, it requires a fair one, before a tribunal which meets at least currently prevailing standards of impartiality.”

This expansive reading of s. 554 did not last long. Congress statutorily overruled the Court’s decision to apply the A.P.A. in an immigration context. The implication in Wong Yang Sung that there was a constitutional basis for a formal A.P.A. adjudicatory hearing on the record in immigration proceedings also was rejected by the Supreme Court in Marcello v. Bonds. In Marcello an alien had been convicted of a felony. He was ordered deported pursuant to the terms of Immigration and Naturalization Act of 1952. The terms of the Act provided for an evidentiary hearing “specially adapted to meet the needs of the deportation process.” It then provided that this procedure be the “sole and exclusive procedure for determining the deportability of an alien under this section.” After a hearing administered under these provisions, Marcello was ordered deported. He challenged the
procedure as violative of the A.P.A. on grounds similar to those invoked in *Wong Yang Sung*. Justice Clark, speaking for the majority, rejected Marcello's arguments relying both on the legislative history of the Act and the due process clause. Justice Clark found the history of the Act clearly indicated a desire on the part of Congress to create an exemption to the A.P.A. Moreover, he held that the relationship between the hearing officer and his supervisors did not "strip the hearing of fairness and impartiality so as to make the procedure violative of due process."³ In so doing, Justice Clark treated the procedural requirements of the due process clause as separate and distinct from the statutory procedural requirements of the A.P.A.

Once the due process clause was decoupled, as it were, from the A.P.A., it provided little in the way of procedural protection in most situations. This is due largely to the fact that due process analysis during the New Deal-A.P.A. era was dominated by the right/privilege distinction. This distinction was based on a model that saw administrative law "as a mechanism for preventing government officials from trespassing on private interests when such invasions have not been authorized by the legislature."² The due process clause thus protected only those interests protected by statute or the common law. Thus, as Judge Breyer and Professor Stewart have noted: "If a private person fails to give me a gratuity, or refuses me employment, or denies me a supply contract, the common law ordinarily affords me no redress. Similarly, when a government official refuses me welfare benefits, or terminates my at-will employment or declines to purchase my goods, that official has not infringed on any of my common law protected 'liberty' or 'property' interests, and accordingly need not show legislative warrant for his action."⁵ Such governmental benefits were privileges, not rights. They certainly did not constitute "property" or "liberty" as defined by the common law. Thus, in *Bailey v. Richardson*, the D.C. Circuit Court of Appeals rejected a claim for a hearing by a government employee who lost her job because she was suspected of being disloyal. The Court stated that the due process clause provides:

"No person shall ... be deprived of life, liberty, or property, without due process of law; ... ." It has been held repeatedly and consistently that Government employ is not 'property' and that in this particular it is not a contract. We are unable to perceive how it could be 'liberty'. Certainly it is not 'life'... . In terms the due process clause does not apply to the holding of a Government office.⁷

The Court went on to explain that this is as it should be:

Constitutionally, the criteria for retention or removal of subordinate employees is the confidence of superior executive officials. Confidence is not controlled by process. What may be required by acts of the Congress is another matter, but there is no requirement in the Constitution that the executive branch rely upon the services of persons in whom it lacks confidence.⁸

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A federal government job was, in effect, a privilege, not a right. The due process clause protected only interests that were protected by the common law or by statute. Otherwise, what was involved was a privilege and the plaintiff had no constitutional recourse.

This constitutional approach to the due process clause was, in many ways, out of step with the new and extensive role that the federal government was beginning to play in the New Deal-A.P.A. era. It was, however, consistent with the deferential approach the Court was taking to substantive constitutional challenges to regulatory legislation under the due process, commerce, contracts, and taking clauses of the Constitution. As the modern welfare and service state assumed a far more significant role, however, the right/privilege approach began to break down. The environmental era of administrative law witnessed a due process explosion triggered by the landmark case of Goldberg v. Kelly.9 Indeed, the constitutional due process approach taken by the Court in that case is very much of a piece with the overall judicial and congressional activism that characterized the environmental era we shall now examine.

The Environmental Era

The environmental era began in the 1960’s and reached its peak in the 1970’s.10 The growth in bureaucracy during this era was enormous, adding significantly to the regulatory structure established during and after the New Deal. As Professor Lowi has noted:

Between 1969 and 1979, Congress enacted and Presidents Nixon, Ford and Carter signed into law over 120 regulatory programs (by conservative count) ... . In 1960, there were 28 major federal regulatory agencies; in 1980 there were 56, and all but one of those was created after 1969. (The exception was the National Highway Traffic Safety Administration, established in 1966.) Between 1970 and 1980, the budgets for the federal regulatory agencies increased by 300% measured in real dollars.11

Moreover, these new agencies were much more policy-oriented than the New Deal agencies that preceded them. Rather than rely on case-by-case adjudication which had long been the hallmark of such New Deal agencies as the National Labor Relations Board or the Federal Power Commission (now the Federal Energy Regulatory Commission), agencies such as the Environmental Protection Agency, the Occupational Safety and Health Administration, and the Consumer Products Safety Commission relied heavily on the rulemaking process. This, in part, accounts for another indicium of bureaucratic growth relied upon by Professor Lowi:
[A]lthough many kinds of announcements are printed in the Federal Register, it is nevertheless indicative of the growth of regulation that the number of pages in the Federal Register increased from 14,479 in 1960 to just 20,000 in the whole decade of the 1960’s, and then jumped by 300% to 60,000 pages in 1975. By the end of 1980, the number of pages had increased to 86,000.62

Statutory Procedures in the Environmental Era

The procedural provisions of the many statutes passed during this era significantly glossed the A.P.A. Agency policy-making was now done pursuant to rulemaking provisions, rather than the adjudicatory provisions of the A.P.A. But the informal rulemaking of the A.P.A. was supplanted by the hybrid rulemaking provisions of these new statutes. These provisions disregarded the bright line the A.P.A. draws between informal rulemaking and formal rulemaking and adjudication. They combined aspects of adjudication with rulemaking. Most notable was the use these statutes made of the substantial evidence standard in policy-making proceedings. Such procedural innovations often affected the role courts played in reviewing the substance of agency results. The reasoned decision-making mandated by the § 553(c) of the A.P.A. took on new meaning in some cases. Given the substantial evidence standard in the agency’s enabling act, courts often looked for more than just a reason to support an agency policy decision. They began to look for a good reason to uphold the agency. Judicial review of policy decisions became, at times, more stringent and demanding than during the New Deal-A.P.A. era. The so-called hard look doctrine of judicial review came into its own. This doctrine allowed courts to reverse and remand agency decisions if the court believed the agency did not take a hard look at the substance of the decision it made. In theory, the court was not itself taking a hard look, but simply requiring the agency to explain itself more clearly. In reality, the court sometimes could not help but take a hard look at an agency decision, disagree with it, and demand better reasons from the agency that satisfied the courts’ view of the problem.63

Both the substance and the nature of many of these new environmental, health and safety statutes encouraged a more comprehensive approach to judicial review. In addition to the procedural detail of the statutes of the environmental era, the statutes were often more substantively detailed as well.64 The broad delegations of legislative power so typical of New Deal legislation often gave way to a statutory specificity that, in some cases, made statutes read like agency regulations.65 The agency had more specific instructions as to what it should do, often necessitating more detailed reasons for the choices it made. Moreover, agency action now tended to cut across industry boundaries. Rather than the single mission agencies that so typified the New Deal, environmental agencies like the E.P.A. and safety and health agencies like the Occupational Health and Safety Commission

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tried to achieve very broad statutory goals that applied to a variety of industries and entities. Such statutes also dealt with potentially irrevocable harms. Thus, statutes such as the *Clean Water Act* and the *Clean Air Act* initially tended to set forth their solutions in absolutist terms. In short, in place of the more common law-like approaches to economic problems (dealing, for example, with “just and reasonable rates” of interstate utility companies) came more specific, almost civil code-like statutory commands of various environmental statutes. The procedural complexity of these statutes, the perceived irrevocable harms with which they dealt, and the specific and absolutist nature of some of their substantive provisions, all led courts to make more demands in assessing both the procedural and substantive rationality of the cases that came before them.

As we have seen, the post-Lochner cases of the New Deal and beyond resulted in a relatively deferential constitutional approach to constitutional challenges to economic legislation. The civil rights movement and the more demanding constitutional scrutiny courts were providing in these individual rights contexts created an activist role for the judiciary, one frequently applied in health and safety contexts as well. This is not to say that the *A.P.A.* model was abandoned completely or that deference was still not accorded to most agency policy judgments and choice of procedures. Rather, judicial activism and a judicially demanded form of agency rationality was now not only possible but much more common than ever before. This increase in judicial activism triggered by these new statutes also had a constitutional counterpart in a new era of due process decisions beginning with the Supreme Court’s landmark decision in *Goldberg v. Kelly* in 1970.

**Due Process and the Environmental Era**

*Goldberg v. Kelly* involved an action brought by residents of New York City who were receiving financial aid under the federally assisted program of Aid to Families with Dependent Children (A.F.D.C.). Their complaint focused on the state officials who were administering these programs. They alleged that the state had terminated benefits for some individuals and were about to terminate them for others in violation of the due process clause of the fourteenth amendment.

There were certainly some pre-termination procedures set forth in state law. State law at that time provided that a case worker who had doubts about a recipient’s continued eligibility would first have to discuss these doubts with the recipient. If not satisfied, she could recommend termination of aid to a unit supervisor. If the supervisor agreed, she then sent a letter stating the reasons for terminating the aid and notifying the recipient that he could request, within seven days, that a higher official review the record. This request could be supported with a written statement prepared personally or with the aid of an attorney or another person. If, however, the reviewing official affirmed the recipient’s ineligibility, aid would stop immediately. A
letter from this official would state the reasons for the decision. At this point, post-termination, the recipient could request a “fair hearing” before an independent state hearing officer at which he may appear personally, offer oral evidence, confront and cross-examine the witnesses against him, and compile a record. If the agency fails to overturn the decision at this point, the recipient could then seek judicial review.

In *Goldberg*, the plaintiffs, in effect, argued that they were entitled to the procedural protections of a “fair hearing” prior to termination of their benefits, not after termination. Specifically, they requested a personal appearance before the reviewing official, an opportunity to present oral evidence, and an opportunity to confront and cross-examine adverse witnesses. Logically prior to the question of how much process was due is the question of whether the due process clause applies at all. Thus, the first major issue presented to the Supreme Court was whether the welfare benefits the New York welfare officials terminated were, in fact, “property” protected by the due process clause. Such benefits had long been characterized as a privilege under the approach taken by the Court in *Bailey*. Prior to *Goldberg*, there had been a few creative judicial opinions that sidestepped the right/privilege distinction as well as a rather famous law review article by Charles Reich entitled “The New Property.” In that article Professor Reich argued in 1964 that:

One of the most important developments in the United States during the past decade has been the emergence of government as a major source of wealth ... .

The valuables dispensed by government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth - forms which are held as private property. ... The wealth of more and more Americans depends upon a relationship to government. Increasingly, Americans live on government largess - allocated by government on its own terms, and held by recipients subject to conditions which express “the public interest.”

In 1970, given the important and activist role played by federal courts in the civil rights movement as well as the War on Poverty launched by Congress during the Johnson Administration of 1964 to 1968, few could doubt the fact that this was a reasonably accurate perception of the world on which a judicially active court would most likely act. In fact, the government conceded that welfare benefits constituted “property” for the purposes of the due process clause. The Court thus stated the new law in a very modern and increasingly typical way - in a footnote. It said:

It may be realistic today to regard welfare entitlements as more like ‘property’ than a ‘gratuity’. Much of the existing wealth in this country takes the form of rights that do not fall within traditional common law concepts of property.

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The right/privilege distinction fell with hardly a sound.

For the Court in *Goldberg*, the primary constitutional issue to be decided was whether the due process clause requires that the recipient be afforded an evidentiary hearing *before* the termination of benefits. In analyzing this procedural issue, substance inevitably affected the Court's analysis. The Court considered as part of its due process calculus, the nature of the claimant and what, in effect, was at stake:

For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care .... Thus the crucial factor in this context ... is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.74

In assessing the constitutionality of the state's pre-termination processes, the Court thus took into account what it termed the "brutal need" of welfare recipients. It also emphasized the fact that one could not assume that welfare recipients would be literate enough or sufficiently skillful to lodge a *written* complaint with their supervisor. The Court was thus critical of the fact that "the city's procedures ... do not permit recipients to appear personally with or without counsel before the official who finally determines eligibility."75 Similarly, failure to cross-examine witnesses was also considered to be "fatal to the constitutional adequacy of the procedures."76 Indeed, by the time the majority was done, it was clear that in a case such as this, the due process clause required a full oral, evidentiary hearing, on the record, with an opportunity for counsel to be present before such welfare benefits could be terminated. Underlying this procedural approach were important dignitary values:

From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty. This perception, against the background of our traditions, has significantly influenced the development of the contemporary public assistance system. Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. ... Public assistance, then, is not mere charity, but a means to "promote the general welfare, and secure the Blessings of Liberty to ourselves and to our Posterity."77

This case became the rallying cry for a new breed of poverty lawyers. Legal aid clinics and public interest law firms, armed with *Goldberg v. Kelly,*

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were now able to challenge the procedural practices of a number of state bureaucracies in federal court. The battle was procedural, but the substantive and political overtones of some of these cases were clear. Nor did the applications of *Goldberg* stop with welfare bureaucracies. The case was applied in a wide variety of contexts – on behalf of government employees who lost their jobs, prisoners involved in discipline cases or parole revocation or parole granting cases, students involved in school disciplinary proceedings, and teachers challenging tenure denials. It became a potent weapon, particularly for those whose claims were often ignored in mainstream politics. For the first time, legal aid lawyers could constitutionally question the administration of state bureaucracies; invoke the scrutiny of federal courts; and provide, if nothing else, bargaining chips for the broad-based substantive and procedural negotiations that usually also were involved. *Goldberg v. Kelly* was the foundation for law reform cases designed, for example, to reform a state penitentiary system or provide more bargaining power to individuals who usually had little. In the process, there is no question that some procedural abuses were exposed and corrected. There also is little question that federal courts began to feel, at times, quite uneasy about their ever-expanding role.

The due process explosion begun by *Goldberg*, particularly as applied in cases involving the poor and the powerless, was very much of a piece with the civil rights movement that preceded and overlapped it. While courts were able, on constitutional grounds, to void statutes and state practices that discriminated on the basis of race, wealth never achieved the status of a suspect class. Challenges to statutes based primarily on their wealth distribution effects were held not to be appropriate for federal courts and more of a legislative matter. The due process approach to dealing with recalcitrant state bureaucracies, however, allowed a federal court to assess at least the procedural fairness of these wealth redistributive programs. The glare of publicity, the fact that, perhaps for the first time, some state agencies had to deal with their recipients as legal equals, had a profound political impact. But the procedural implications of these decisions were not without cost. Procedures cost money to implement, and, as we shall see, particularly in social programs involving hundreds of thousands of recipients, providing more process necessitated trade-offs with actual substantive benefits and thus raised important fiscal allocation questions. Moreover, procedural due process claims were on occasion abused and courts were undoubtedly subject to their share of frivolous due process cases.

Particularly since the due process logic of *Goldberg v. Kelly* applied to a variety of other new property situations, it was important for the court to clarify just what would constitute a property or liberty interest in contexts other than welfare. Perhaps the most important methodological case to be decided after *Goldberg* was *Board of Regents of State Colleges v. Roth*. David Roth was hired for a one-year term as assistant professor at Wisconsin

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State University from September 1968 through June 1969. At the end of the year, he was not rehired. The University gave no reason. Under Wisconsin law, a state university teacher acquires tenure only after four consecutive years of employment; a decision to re-hire a one-year appointee is completely discretionary. Roth brought suit claiming, among other things, that the University’s failure to give him reasons or an opportunity for a hearing prior to termination violated the due process clause.

In holding that he had no due process right in this case, the Supreme Court set forth the basic analytical approach it would take in determining whether the due process clause applied:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. ...

Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state laws—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Given this approach, the Court easily concluded that the property interest in this case consisted of a one-year contract that had already expired. Since this contract made no provision for renewal, there was no longer any property interest left to trigger due process clause protections.

The Court also addressed the liberty strand of this case as well, noting that “in a Constitution for a free people, there can be no doubt that the meaning of ‘liberty’ must be broad indeed....” The Court, however, failed to see how failure to re-employ Roth in this case affected this interest:

The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in the community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty or immorality.

Moreover, the Court noted, there was no suggestion that the respondent’s “good name, reputation, honor, or integrity” is at stake. Nor did the Court conclude that there was “any stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities....” With neither a liberty nor a property interest present, the Court could not reach the question of how much process was due.

This case thus set the basic guidelines governing cases such as these, but the requirement of legitimate claims of entitlement established by positive state law hardly limited the flow of cases that could and did come to Federal Court—cases involving tenure disputes, prison discipline, public employment, student discipline, as well as a whole range of welfare and social
security kinds of challenges. Given a property right or a liberty interest, a litigant could almost always argue that the procedures provided in his case were constitutionally inadequate. A federal court could and did then examine the procedures of a vast variety of state agencies and bureaucracies. This is not to suggest that in many of these cases justice was not done; rather, the role of the federal court began to appear to be quite extensive if not, at times, intrusive as well.

Inevitably, courts attempted to cut back on the flow of procedural due process cases. Some opinions tried to cut them off at the very beginning of the case by construing narrowly the property interest involved or the liberty interest that could be protected. Justice Rehnquist tried to do this by use of what he called “the bitter with the sweet” approach. In Arnett v. Kennedy, he argued that the procedural provisions in a federal statute governing the employment of a federal civil servant, Wayne Kennedy, substantially modified the substantive rights that that statute provided. Kennedy was fired because it was alleged that he falsely and recklessly accused his superior with attempted bribery. The statute that governed his employment provided for some procedures before he could be dismissed. Justice Rehnquist reasoned that these statutory procedures affected his substantive right to the job: “where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of the appellee must take the bitter with the sweet.” This attempt to, in effect, re-introduce the right/privilege distinction into the law did not command a majority of the court and was explicitly rejected in a later case.

Justice Rehnquist was more successful in his attempt to limit the range of liberty interests to which the due process clause applied. In Paul v. Davis, he successfully held that damage to one’s reputation was not necessarily enough to trigger the due process clause. This may, in part, have been due to the implicit argument in that case that state tort law processes could effectively provide the process due to Davis, a person who had his photograph and name included in materials identifying “active shoplifters,” circulated among local merchants even though he had never been convicted of such a crime.

A due process implosion occurred, however, when courts began to show much more deference to the processes provided by various state agencies. At the same time, courts became rather creative in determining what precisely constituted the kind of process that would satisfy the due process clause. Though the logic of Goldberg dictated that a property or liberty interest usually existed, courts were willing to find that even state court remedies in tort would give the plaintiff the kind of process necessary to satisfy the due process clause; or that the informal processes the state might have provided were adequate for the administrative task at hand. But I am getting ahead of my story.

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Despite these various attempts to pull back from the implications of Goldberg v. Kelly, it is important to note how this due process explosion fit in with the civil rights issues of the day; how it resonated with closer judicial scrutiny of agency decisions, particularly those involving life and death issues in health and safety regulation or irreversible environmental damage. Courts treated the due process clause of the fourteenth amendment very expansively. The right/privilege distinction was repudiated. An individual rights perspective dominated the application of the due process clause — a perspective already familiar to an activist court that had been courageously establishing, clarifying, and extending the civil rights of all Americans.

The Global Era of Administrative Law

Just as Professor Frankfurter saw the Great Depression as the beginning of a new era, then lower court Judge Scalia (soon to be Justice Scalia) saw a new era taking shape in the deregulation movement 50 years later:

There are vast tides in human history: The Age of the Industrial Revolution, the Age of Enlightenment. Ours will doubtless go down as the Age of Deregulation in the history books of the future ...

While it is, perhaps, hyperbole to compare deregulation to either the Industrial Revolution or the Age of Enlightenment, the “Age of Deregulation” to which Scalia refers, undoubtedly constitutes a definitive movement.

The Regulatory and Constitutional Context of Administrative Law in the Global Era

Deregulation, regulatory cost consciousness, and regulatory forbearance have typified the 1980’s and most likely will typify the foreseeable future. This shift in approach to problems once seen as clearly within government’s domain is part of a deeper trend that marks a third era of administrative law — the global era. Quite apart from ideology, deregulation is fueled not only by major changes in technology in some industries, but by the increasingly global competition that this technology facilitates. Global competition places the costs of domestic regulation in stark relief. This is particularly true when some of the new global competitors involved manufacture their products in countries that impose few or no regulatory costs on domestic industries. This not only favors such industries; it attracts new ones, as well. Though a variety of manufacturing costs may account for the decision of some industries to shift the production phase of their operations abroad, a significant cost component for many of them includes regulatory costs. Environmental and worker safety costs, for example, have had a significant effect on the copper, silver, and automobile industries in particular. Regulatory costs such as these are thus exacerbated by the global competitive
dimension that now exists in many industries. Perhaps more importantly, the mere perception of this kind of competition can have important political repercussions.

Regulatory cost-consciousness highlighted by global competition has created and intensified a new kind of regulatory politics – a politics of efficiency. This politics is also fueled in the United States by numerous other factors, such as the budgetary deficits that threaten our collective economic well-being, growing political sensitivity to governmental expenditures, as well as the imposition of governmental costs of all kinds (including taxes). Regulatory goals must be achieved in as cost-efficient a manner as possible. Cost-consciousness pervades the implementation of most regulatory programs today, particularly those administered by the President and subject to Office of Management and Budget review.

Closely related to cost cutting is deregulation. Abolishing existing regulation in certain areas, as well as avoiding the creation of new regulations in areas as yet untouched, would seem to constitute the ultimate cost-cutting device. Deregulation for cost-cutting purposes readily blends into anti-regulation for ideological reasons. The momentum generated by deregulatory change easily blurs the differences between attempts to achieve regulatory goals more efficiently and the wholesale substitution of market goals and market values for a regulatory regime already in place. Yet these differences often are essential.

The perception of global competition with foreign corporations that do business in countries with few or no environmental, health and safety rules at all creates increased pressure for domestic regulatory cost-cutting. In such circumstances legislative mandates based on reasonably acceptable notions of market failure arguably may be undermined by the market values and goals of a deregulatory regime. When deregulatory policies, such as those advocated under the Clean Air Act, are superimposed by the executive onto existing legislative and regulatory schemes devised under very different legal assumptions, the Article II powers of the President may begin to take on a new meaning. In extreme cases, the “take care” clause of Article II risks being converted into an independent and unconstitutional source of executive legislation. Thus, particularly in the context of deregulation, judicial deference to executive policy-making should be carefully analyzed.

Courts do not always review agency deregulatory actions deferentially. In some cases, they have applied the hard look approach. Though generalization is difficult, the deregulatory efforts of agencies involved in economic regulation pursuant to the broad delegation clauses that typify New Deal statutes have fared better than the deregulatory efforts of agencies engaged in health, safety, and environmental regulation. Courts are more willing to defer when an agency can convincingly show that it is using the market as a regulatory tool, not as an ideological means of frustrating the goals of

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the statutes involved. Health, safety, and environmental issues usually involve the kinds of value conflicts that make it difficult, if not impossible, for an agency to contend that adherence to market approaches fully accords with the goals and values of the Act involved. Moreover, the nature of the statutes involved, their use of the substantial evidence standard in policy-making proceedings, and the usually more detailed delegation clauses in the statute itself, give courts more to work with when reviewing agency deregulation in these areas.

Deregulation or non-regulation can be achieved in a variety of ways in addition to the recision of existing rules. Many of these other forms of deregulation are essentially unreviewable. Agencies, for example, have enormous discretion when it comes to deciding which rules to enforce. Moreover, they have a great deal of discretion in deciding whether to regulate new areas or simply to leave these new areas to market forces. Courts have usually deferred to this kind of agency deregulation or non-regulation. In fact, executive deregulatory initiatives have generated a new basis for judicial deference — the political accountability of the President.

Deregulatory agency policies have coincided with a perceived need for a more active presidential role in controlling and directing agency discretion. Indeed, the explosion of regulatory law and agencies in the 1970’s has given rise to what some commentators have called the “Administrative Presidency.” This has also coincided with the development of constitutional theories that seek to justify greater and greater executive control over the administrative process.

The sheer growth and the complexity of the regulation that resulted in the 1970’s has created great need to coordinate and control the policies of these disparate agencies. Given the tendency of agencies to view the world only from their own vantage point, executive coordination can help further a broader, perhaps more realistic, view of the public interest. Increased executive supervisory power is somewhat more likely to occur due to the fact that many of the regulatory structures Congress created in the 1970’s departed significantly from the independent commission model that typified the New Deal. The Environmental Protection Agency, for example, is headed by a single cabinet level Administrator appointed by the President, with the advice and consent of the Senate. Moreover, Congress delegated much of the substantive regulation dealing with health and safety issues to executive cabinet officials such as the Secretary of Labor. Such governmental bodies are naturally more accountable to the President and more easily influenced by presidential views as to policy. In addition, the executive branch itself has tried to institutionalize its influence and control through greater use of executive orders and a strengthening of its own Office of Management and Budget. The Supreme Court in *Chevron v. N.R.D.C.* has helped to transform New Deal deference to agency expertise to deference to the political accountability of executive-controlled agencies, noting that:

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While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to ... [resolve] the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.110

All of these forces add up to a regulatory process which favors least-cost regulatory alternatives to problems, and often the use of market forces instead of command-control regulations. It is also one that tolerates more abrupt change, driven by the President and the executive branch rather than by Congress or the courts. The global era more easily rationalizes change in terms of political power and accountability rather than agency expertise and reasoned, deliberative and incremental change.

Due Process

The cost-consciousness of the global era is very much reflected in the due process jurisprudence of the 1980's. It begins, however, in 1976 with the Supreme Court's landmark decision in Mathews v. Eldridge.111 Like Goldberg v. Kelly, this case dealt with a challenge to the constitutionality of state pre-termination procedures. These procedures, however, were provided in the course of a social security disability program that provided benefits to workers during periods in which they were completely disabled. The plaintiff, George Eldridge, was first awarded benefits in 1968. When they were terminated in 1972, he challenged the state agency's pre-termination procedures as unconstitutional.

The pre-termination procedures then in effect were as follows. After a worker had been granted disability benefits, the agency periodically communicated with him and requested information concerning his present condition. Information was also obtained from his doctors. If there was a conflict between the information provided by the beneficiaries and that provided through medical sources, the agency could arrange for a medical examination by an independent consulting physician. If the agency's assessment of the beneficiary's condition differed from that of the beneficiary, the beneficiary was informed that his benefits might be terminated. He was also provided a summary of the evidence and afforded an opportunity to review his file, submit additional evidence, and respond in writing. The state agency then made a final determination and notified the recipient in writing of the decision and of his right to seek de novo reconsideration before a Social Security Administrative Law Judge if he so chose. Once the state agency's report was accepted by S.S.A., however, his benefits were terminated. The de novo hearing and judicial review that follow could lead to a retroactive award, but no payments were made while those procedures were underway.

The Court began its analysis of this case by distinguishing it from Goldberg v. Kelly. Eligibility for disability benefits was not based on financial

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need and thus was "wholly unrelated to the worker's income or support from many other sources." The Court assumed that brutal need did not generally exist in this kind of case. It thus ignored the fact that the termination of benefits in Eldridge's case resulted in his eviction from his home. It also ignored the fact that the welfare bureaucracy can be very slow. Though Eldridge presumably could and eventually did qualify for welfare relief, the intervening time between termination and the grant of such relief left him with no financial support. The Court, however, did not see this case through the eyes of George Eldridge. It did not take an individual rights approach to the due process clause. It saw the class of disability cases as one in which the individual claimants varied considerably. If anything, the Court viewed the case from the perspective of the agency, an agency responsible for thousands of cases.

Unlike the Court in Goldberg, the Mathews majority was thus unwilling to assume that members in this class could not effectively deal with the kind of written pre-termination hearing procedures provided. Indeed, the Court emphasized the numbers involved, noting that in 1974, 3,700,000 persons received assistance under the program. Most significantly, however, the case set forth an approach to due process that clearly resonates with the cost-consciousness of the global era. To determine how much process is due, the Court identified three distinct factors:

1. the private interest that will be affected by the official action;
2. the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally,
3. the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

One commentator has translated this approach into the cost-benefit language of the global era, as follows:

The first function takes into account the social value at stake in a legitimate private claim - it discounts that value by the probability that it will be preserved through the available administrative procedures and it then subtracts from that discounted value the social cost of introducing additional procedures.

Such an approach to due process may make particular sense in mass-justice programs that involve, quite literally, hundreds of thousands of claims. But Mathews v. Eldridge has not been so restricted. It has been applied in a variety of situations. Its flexible, cost-benefit formula makes it easy for courts to decide that there may indeed be a property right or a liberty interest, but the process due is subject to cost-benefit analysis. This utilitarian
approach to due process avoids the individual rights perspective of Goldberg v. Kelly and gives courts both considerable discretion and the opportunity to defer to agency procedures. This has been an important trend in the case law following Mathews v. Eldridge. Courts are increasingly willing to find that the process provided was, indeed, due.116

Conclusion: The Global Era and Beyond

We have dealt, thus far, with administrative law – past and present. Predicting the future is, of course, a most difficult task. But if we are correct in our approach to the subject, we know that past approaches and past rhetoric will be very much a part of the future of administrative law. At least two aspects of the present are likely to feature prominently in the future: regulatory cost-consciousness and an important, perhaps even an enhanced, supervisory administrative role for the executive branch.

The rise of the trading state and the intensification of global competition has dominated the global perspective on the issues I have been discussing. It has placed the cost of domestic regulation in stark relief and has, at times, not only fueled a cost-conscious and economic efficiency approach to deregulation but an anti-regulatory attitude as well. The cost-consciousness of the global era is not likely to disappear, but it is likely to be tempered by the more complex, less anti-regulatory global regulatory discourse now developing.

This new global regulatory discourse is increasingly more complex than one that focuses primarily on global competition. It involves the interrelationships of at least two other important global factors: the global environment and the disparities in wealth that exist between developed and developing countries. These three global components – trade, the environment, and development – are directly linked to an important domestic concern with global implications: national security. The end result of the complex global regulatory discourse that these factors generate and the interrelated trade, environmental, and developmental issues to which it applies is the emergence of new bodies of international law such as the Montreal Protocol dealing with the protection of the earth’s ozone layer. More importantly, for our purposes, these global regulatory trends encourage domestic regulatory approaches that are internationally responsive. Despite its flaws, the Bush Administration’s proposed clean air act represents a significant shift from the deregulatory and, at times, anti-regulatory approaches of the past to a more streamlined and economic approach to U.S. domestic regulation of the environment.

Whether the global perspective of the future is primarily an economic one, based largely on global competition, or whether it is more complex, and made up of environmental and wealth distribution components as well, the trend toward greater and greater executive control of the administrative
process is likely to continue. Congress as an institution is made up of individuals whose primary goal is to represent a particular locality or region. Particularly in an era dominated by political action committees, negative advertising, and the high cost of media-dominated elections, short-term local perspectives tend to dominate. There is little room for statespersons. As an institution, the Presidency is most likely to fill this vacuum. The President has a constituency broad and diverse enough to make it, theoretically at least, politically possible to pursue a more global vision of change and the future needs of the republic.

The more complex the global regulatory discourse becomes, the more likely this trend toward greater presidential control of the administrative process will continue. Issues such as the environment were long thought of as essentially local and domestic concerns. The more global our perspective becomes, the more domestic issues become a part of foreign policy and even an aspect of national defense. The elimination of bright line distinctions between the domestic and the foreign could also theoretically encourage the revival of a strong Congress willing to treat as domestic what the executive branch argues is a foreign policy concern. The basis of such future conflict between the branches might be differing congressional and executive views on alternative global solutions to problems. To the extent that congressional approaches to such issues are regional or arguably protectionist in nature, however, power will most likely continue to flow to the executive branch. The use of executive orders, particularly in conjunction with the executive’s use of its constitutional treaty-making powers may become an increasingly important source of both international and domestic law.

A more complex global regulatory discourse is likely to have important interpretive consequences, as well. I have argued elsewhere that the reappearance of formalism in judicial approaches to separation of powers issues as well as the non-delegation doctrine was of a piece with an almost minimalist approach to the expected role of the federal government. An interpretive approach that emphasized the separation of legislative, executive, and judicial powers made a number of agencies, particularly New Deal agencies, constitutionally vulnerable. It also was of a piece with a more ideological approach to deregulation that saw the return to the market as something akin to a return to nature. The end result was, implicitly at least, the re-emergence of an approach to administrative law that resulted in judicial protection of individual economic rights from interference by the federal government.

This formalistic approach to separation of powers issues is in contrast to the Supreme Court’s most recent decision in *Morrison v. Olson*, upholding the *Special Prosecutor Act*. That Act provided for appointment of a special prosecutor beyond the executive’s immediate control when allegations of fraud and corruption in the executive branch were made. In that case the Court refused to take a narrow, fundamentalist approach to the question of
whether executive power was unduly limited by Congress. The Court, in
effect, rejected the approach to separation of powers issues inherent in such
cases as *I.N.S. v. Chada* and *Bowsher v. Synar*. It opted, instead, for a balanc-
ing approach that, in effect, deferred greatly to the political compromises
struck by Congress and the President. The Court recognized the funda-
mentally political nature of the issues involved and its consequent inability
to engage in any kind of truly principled decision-making. The Constitu-
tional approach it chose gives Congress and the President a good deal of
discretion to determine how best to protect the integrity of the executive
branch. It is also one that is more accepting of a public law conception of
administrative law. The Court no longer treats, nor is it likely to treat, sepa-
ration of powers principles as if they were a part of the Bill of Rights
designed to protect individuals from the government.

In non-constitutional cases, the deference to executive decision-making
shown by the Court in *Chevron v. N.R.D.C.* is likely to continue to domi-
nate the judiciary's approach to agency policy decisions and agency inter-
pretations of unclear statutory provisions. This is not to say that the hard
look doctrine or reasoned decision-making is dead. But rather that it will
take a strong case indeed before the Supreme Court is likely to scrutinize
agency decisions. This is not to say that lower courts might not continue to
ride herd on certain agencies, even in policy contexts, but the general trend
will continue to treat executive policy decisions as largely beyond the
Court's competence. Of course, new global regulatory statutes that explic-
itly incorporate market approaches as statutory, regulatory tools, might find
future courts scrutinizing agency actions to be sure that they are sufficiently
efficient. Most likely, however, deference to the executive will prevail.

Increasing use of market concepts and market approaches to regulation
will not replace a public law model of administrative law. Market approaches
are not a return to 19th century individualism. The market is and will con-
tinue to be seen as a regulatory tool. Even in the global era of administra-
tive law, the New Deal will continue to play an important conceptual role.

Notes

* Professor of Law, Cornell University. This article is based on a talk given to the Canadian
Bar Association in November of 1989. A version of these remarks has been published in

1 For a more complete treatment of administrative law in these three eras, see Aman,
"Administrative Law In A Global Era: Progress, Deregulatory Change and the Rise of
the Administrative Presidency" (1988) 73 Cornell L. Rev. 1101. This paper draws heavily
upon the framework established in that article and many of the arguments made in it, but
it will also focus on the interrelationship of the Supreme Court's interpretations of the
due process clause with other administrative law doctrines during these eras.


3 F. Frankfurter, "Social Issues Before the Supreme Court" (1933) 22 Yale L. Rev. 476.

4 198 U.S. 45 (1905) [hereinafter *Lochner*].
Ibid. at 75.

5a See, for example, Article I, s. 8 of the U.S. Constitution which grants Congress the power "to regulate commerce with foreign nations, and among the several States, and with Indian Tribes." Commerce... among the several States" was construed very narrowly by the courts in the early 20th century, making it difficult for Congress to legislate. Article I, s. 10 prohibits any state from passing a "Law impairing the obligation of Contracts." During the 19th century, courts construed this provision in such a manner as to limit considerably the power of the state to regulate economic activity.


7 295 U.S. 495 (1935) [hereinafter Schechter].
8 293 U.S. 388 (1935) [hereinafter Panama Oil].
9 Supra, note 3 at 486.
10 Ibid.
11 300 U.S. 379 (1937).
13 See United States v. Darby, 312 U.S. 100 (1941).
14 Ibid.
15 See, for example, Home Building & Loan Association v. Blaisdell, 290 U.S. 398 (1934).
16 It was not until Justice Rehnquist's dissent in Industrial Union Department, A.F.L.-C.I.O. v. American Petroleum Institute, 448 U.S. 607, 671-88 (1980) that the doctrine began to experience a revival. Yet, there still is not a majority in the Court that would apply it as Justice Rehnquist has advocated.
17 295 U.S. 602 (1935) [hereinafter Humphrey's Executor].
19 272 U.S. 52 (1926) [hereinafter Myers].
20 Ibid. at 135.
20a Article II, s. 3 of the U.S. Constitution states that the President "shall take care that the Laws be faithfully executed... ." 
21 Jackson, supra, note 18 at 109.
22 Humphrey's Executor at 628.
23 Ibid.
29 5 U.S.C.A. § 706(2)(F)(1982). See, for example, Porter v. Califano, 592 F.2d 770 (9th Cir. 1979) (free speech issues in administrative context receive de novo review).
30 See generally, Landis, supra, note 24.
33 Ibid. at 177.
34 See, for example, Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954) [hereinafter Phillips Petroleum].
35 See, for example, N.L.R.B. v. Hearst Publications, 322 U.S. 111 (1944) (applying the statutory term “employee”).
36 See, for example, Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980) (invoking, in part, application by the Federal Reserve Board of its own Regulation Z) [hereinafter Ford Motor].
38 See, for example, Porter v. Califano, supra, note 29.
40 See, for example, Ford Motor, supra, note 36.
41 See, for example, Phillips Petroleum, supra, note 34 (the Court extended the Federal Power Commission’s jurisdiction to cover the price of natural gas sold at the wellhead).
43 Ibid. at 40.
44 Ibid.
45 Ibid. at 50.
46 Ibid. at 49.
47 Ibid. at 50. “We would hardly attribute to Congress a purpose to be less scrupulous about the fairness of a hearing necessitated by the Constitution than the one granted to it as a matter of expediency.”
48 Ibid.
49 Because aliens were involved, Congress did not consider itself bound by the Court’s constitutional reasoning. Thus, six months after this opinion was issued, Congress specifically provided, in the Supplemental Appropriations Act of 1951, 64 Stat. 1048, that deportation proceedings under the Immigration Act of 1917 were not governed by the A.P.A.
50 349 U.S. 302 (1955) [hereinafter Marcello].
51 Section 241(a) (11) of the 1952 Act provides that a felony conviction at any time is grounds for an alien’s deportation.
52 Marcello at 310.
53 Ibid. at 311.
55 Ibid.
56 182 F.2d 46 (D.C. Cir. 1950), aff’d by an equally divided Court, 341 U.S. 918 (1951) [hereinafter Bailey]. See also, Cafeteria Workers v. McElroy, 367 U.S. 886 (1961); Breyer & Stewart at 701-05.
58 Bailey, ibid.

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62 Ibid.


64 See, for example, O.S.H.A., supra, note 60. See generally, B.A. Ackerman & W.T. Hassler “Beyond the New Deal: Coal and the Clean Air Act” (1980) 89 Yale L.J. 1466.

65 Ibid.


67 Ibid.

68 See, for example, authorities in note 60, supra. For a full discussion of these issues, see Aman, supra note 1.

69 Goldberg, supra, note 59.

70 See, for example, Ault Unemployment Compensation Case, 398 Pa. 250 (1960)(unemployment benefits not barred because of refusing to respond to rumors about disloyalty).


72 Ibid. at 773.

73 Goldberg, supra, note 59 at 262, note 8. The Court went on in that footnote to quote another passage from Reich in a related law review article, to wit:

[Society today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses, the worker his union membership, contract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence. Many of the most important of these entitlements now flow from government: subsidies to farmers and businessmen; routes for airlines and channels for television stations; long term contracts for defense, space, and education; social security pensions for individuals. Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced.

(From C.A. Reich, “Individual Rights and Social Welfare: The Emerging Legal Issues” (1965) 74 Yale L.J. 1245 at 1255.)

74 Goldberg, supra, note 59 at 264.

75 Ibid. at 268.

76 Ibid.

77 Ibid. at 264-65.


79 See, for example, Parratt v. Taylor, 451 U.S. 527 (1981)(claim that negligent loss of a hobby kit by prison officials constituted violation of due process); Daniels v. Williams, 106 S.Ct. 662 (1986).

80 408 U.S. 564 (1972).

206 16 Queen’s Law Journal
81 Ibid. at 577.
82 Ibid. at 573.
83 Ibid.
84 Ibid.
85 Ibid.
87 Ibid. at 153-154.
90 See, for example, Ingraham v. Wright, 430 U.S. 651 (1977).
91 See, for example, Guev v. Lopez, 419 U.S. 565 (1975).
93 See, for example, G. Faulhaber, Telecommunications In Turmoil: Technology and Public Policy (Cambridge, Mass.: Ballinger, 1987) at 23-37.
95 Ibid.
98 See, for example, Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance, 463 U.S. 29 (1983) [hereinafter State Farm]. For an earlier rejection of market approaches to regulatory problems, see Federal Power Commission v. Texaco, 377 U.S. 33 (1964) (the Court held that the statutory mandate of just and reasonable rates required regulation and not a determination that the market price would suffice).
99 See, for example, Chevron, supra, note 37.
100 Ibid. See also Aman, supra, note 1 at 1223-35.
101 See, for example, State Farm, supra, note 98.
106 See, for example, OSHA, 29 U.S.C.A. § 651 (1970).
107 See authorities in Breyer, supra, note 96.
108 Ibid.
109 Chevron, supra, note 37.
110 Ibid. at 865-66.
112 Ibid. at 340-41.

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113 Ibid. at 323, note 1.
114 Ibid. at 335.
118 *Morrison*, supra, note 105.