

CHAPTER 2

THE ORIGINS AND MEANING OF ADMINISTRATIVE LAW

So far we have said surprisingly little about the subjects administrative law addresses. This is because administrative law operates within such a complex political and economic context that it makes little sense to explain the law without first having some idea of the setting in which it operates. The three themes of chapter 1 examined aspects of this context. We now turn to two main themes of administrative law itself. The bulk of this chapter defines administrative law and illustrates it in action.

Administrative law is a mechanism designed to control and correct administrative government. Political checks exercised in legislatures and executive offices are another such mechanism. Administrative law, however, not only limits the authority of bureaucratic government but also gives legitimacy and authority to state actions. Therefore, as we describe administrative law, think about the ways in which this body of law both *limits* administrative discretion and *empowers* administrative government.

The description of administrative law begins with a sketch of the legal process in general. It proceeds to show how administrative law differs from other branches of law and offers a brief history of administrative law in the twentieth and early twenty-first centuries. This part of the chapter will distinguish, more particularly, between regulatory law and administrative law. Regulatory law includes such things as antitrust statutes and environmental protection policy. It is part of the machinery of governmental power. Administrative law, by contrast, creates rules and procedures

for controlling that power. Administrative law regulates the regulators. It also empowers administrators to act. Administrative law is not the actual rules, decisions, and policies that administrators make. We often refer to these substantive rules as *regulatory laws*. Administrative law deals not primarily with the substance, or content, of policy outcomes but with the process of making policies. Administrative law focuses on the procedural problems of *fairness and accuracy* in governmental decision making. Distinctions between administrative law and regulatory law, and between making public policy and the substance of those policies, may be analytically useful at times, but in fact, particular procedures may or may not lead to certain substantive outcomes. In other words, the process may affect or even determine the kind of regulatory policies agencies like the Occupational Safety and Health Administration (OSHA) make and enforce. One cannot understand the significance of procedural requirements or principles of administrative law apart from the substantive responsibilities of particular agencies and the means available to agencies for accomplishing their goals.

This chapter's final section tackles theme five, the ethical issue that lurks in any administrative law case. Starting on page 45, we examine a variety of ethical models for shaping and evaluating administrative law. Notwithstanding the merits of the first six approaches, we develop our own, seventh, approach and explain why we do not altogether agree with the previous models. You should study this section carefully as these ethical issues

will present themselves in every administrative law case you encounter.

Before turning to the description of administrative law itself, let us alert you to the philosophical debate toward which our description points. In America, we often say ours is a government of laws, not of men. The concept of the *rule of law* expresses this idea more formally. The rule of law means that government in the United States must operate within limits created and policed by law. In its most familiar form the rule of law idea specifies that the government should not have too much power, that the bulk of human activity should remain in nongovernmental hands, that we should avoid a totalitarian police state. There are, however, applications of the rule of law concept that do not narrow power so much as they clarify and rationalize the use of power. The rule of law tries to keep the use of power open to participation by the governed. It seeks to call the use of power to public account and thus prevent the emergence of the unresponsive and unfathomable bureaucracies found in Franz Kafka's¹ literary nightmares.

Administrative law refers to the way that judges, like referees and umpires in sports, translate the theory of the rule of law into controls on bureaucratic power. But while American political philosophy rejects the idea of totalitarian, unresponsive government, the slogan that we are a government of laws, not of men, is a misleading oversimplification. Individual men and women, after all, make and enforce the laws. Furthermore, the laws they make and enforce are not always crystal clear. Unlike the rules of sports like baseball, vague or ambiguous laws leave room for human discretion. Law does not act "alone" but in relation to political, social, and economic choices and policies of the legislators and judges who make and enforce the law. The judicial opinions you read in this book might look at first like mechanical and inevitable constructions, like making a cake from a recipe. But as you learn more about the politics of administrative law you will see how the individual judges in administrative law cases must often search for or even create theories about fairness, equality, and democracy to arrive at what they believe is a just solution.

1. See Franz Kafka, "Before the Law," *The Penal Colony, Stories and Short Pieces* (New York: Schocken Books, 1972), 148–50.

How can we evaluate the wisdom of these theories? That is the crucial ethical question in administrative law. It is the most important question in this book.

WHAT IS LAW?

Law is one of several techniques people use to prevent or resolve conflicts. Unlike fighting or going to a counselor, law is a process that starts by referring to governmental rules and practices. The United States political system makes legal rules in four kinds of ways. Each of the four kinds of law contains both substantive and procedural rules.

1. *Statutes*. State legislatures and the Congress of the United States pass laws after gathering information, debating the meaning of the evidence and the wording of the bill, and, in most cases, after compromising differing political interests in the final product. A *statute* is simply a law established by an act of a legislature. Statutes may address social conditions and problems, for example, the threat of a business monopoly, the need to prevent fraudulent advertising, or the desire to create and fund an agency charged with giving emergency assistance to people whose homes and livelihoods have been wiped out by natural disasters. Statutes speak for the future. Because legislators cannot tell precisely what shape the problem will take in the future, or predict what new methods of monopolizing trade or what new consumer fraud schemes people will dream up, statutes must address the future in language that is general and flexible enough to be adapted to new conditions. Since general and flexible statutory language cannot resolve specific cases (and because people deliberately violate clear rules), the courts exist to interpret the meaning of statutes when they are applied to human activities.

2. *Common Law*. In the old English legal system judges decided conflicts between citizens without the benefit of statutes. If someone damaged your water wheel by banging it with his boat, if someone agreed to buy your cow and then broke her promise, if three of your pigs wandered into a neighbor's field and he refused to return them, your only legal recourse would be to ask a judge to resolve the conflict. No formal, written body of law

governed the judge's decision. But as time went on, the judicial decisions themselves came to constitute a body of *precedent* to which other judges would refer in deciding similar cases that came before them. Rules that emerged from earlier cases provided the authority a judge needed to decide a particular case. The aggregation of such rules and principles eventually constituted the common law of a variety of discrete legal subfields, such as torts, contracts, property, and so on.

Today in the United States, if your dog gets loose and digs up the prizewinning flowers in your neighbor's garden, or if you agree to perform a service for someone and then break your promise, or if you keep a package of valuable silver delivered to your home by mistake, a judge will determine your legal responsibility, if any, and decide what you must do to correct any harm. Unless a statute clearly indicates what the outcome should be, the judge's decision will often be based on common-law principles that resemble the judge-made law that prevailed in England centuries ago. This is also sometimes referred to as "case law," as distinguished from "statutory law."

Statutes are especially important in administrative law because agencies are created by statutes and derive their powers from legislatures. Common law, or case law, nevertheless has special significance for our purposes because it rests on the questionable assumption that judges decide cases correctly even in the absence of clear direction from the legislature.

3. *Constitutions.* Constitutions state the underlying rules for the operation of a political system. They create and govern the government. When it became clear that the original Articles of Confederation did not establish an effective form of government, the representatives from the colonies met in Philadelphia to create a new constitution. Gatherings of political leaders in the territories similarly drafted constitutions as these territories sought admission to the Union. Legislatures update constitutions by amendment. In some states this process is almost as simple as legislating. In the case of the national government, however, amendments must win approval from the Senate, the House of Representatives, and three-fourths of the states before they become part of the Constitution.

Constitutional provisions also regulate the citizenry directly. This occurred with the prohibition amendment, and amendments to state constitutions do so more often. However, the bulk of constitutional law clearly defines not what citizens can and cannot do but what powers the government may or may not exercise. The first three articles of the United States Constitution, for example, prescribe a general structure for the three branches of government. They also detail some of the powers those branches may exercise: "Congress shall have power . . . to regulate commerce . . . among the several states," or "The President shall be Commander in Chief of the Army and Navy of the United States." You may already discern that if we care about limiting the power of bureaucratic government, and if the Constitution is the law that governs the government, then the Constitution must play a central role in administrative law.

4. *Regulatory Law.* Congress makes statutes, judges create common law, constitutional conventions and the amendment process develop constitutions. The fourth and final kind of law takes an interesting twist. Administrative agencies also make law. The Federal Communications Commission (FCC), by rule, limits the number of commercial broadcasting stations a company may own. The Internal Revenue Service (IRS), by rule, decides which groups qualify as "charities" and therefore need not pay taxes. The IRS creates tax law. The Federal Drug Administration (FDA) decides whether to classify red yeast rice as a "drug," a designation that makes it legally available only by prescription. These laws regulate citizens. So do environmental law, antitrust law, and consumer protection law. Books have been written about each one of these fields of substantive law made by bureaucrats. *Administrative law, on the other hand, governs the bureaucrats themselves.* It focuses on matters of procedural law in contrast to substantive law. Yet, as we noted above, these two kinds of law may affect each other in important ways over time.

Administrative law applies legal principles from each of the four basic kinds of law. Thus administrative law tries to insure that agencies operate within their statutory

limits. Its equally important mission, however, is to apply the Constitution to the administrative process. Therefore we must take a second look at constitutional law.

Americans have long accepted the legal authority of the Constitution. Therefore let us agree that when the United States Constitution or the constitution of any state prohibits the government from doing something, it becomes just as illegal for the government to go ahead and do it as it is for a person to rob a bank in violation of the criminal law. No law means very much, however, if courts do not try to follow its meaning when making legal decisions. All law—statutory law, common law, constitutional law, and regulatory law—depends for legal force on the willingness of judges to make its provisions (or what judges believe are its provisions) stick. Therefore, when a constitution prohibits the government from depriving any person “of life, liberty, or property, without due process” as do the Fifth and Fourteenth amendments to the Constitution, courts must enforce this provision. Courts do so when presented with lawsuits claiming that some governmental action violates this or that constitutional provision. This, in a nutshell, is the rule of law. If governments, including their administrative agencies, remained free to step beyond their legal boundaries whenever they wish, free of judicial interference, the rule of law itself would evaporate.

Unfortunately this description may mislead you. Constitutional law is not as straightforward. Does it, for example, violate “due process” to hold an accused person in jail simply because he is too poor to pay the bail money? Does government violate the equal protection rights of same-sex couples if it passes a law prohibiting such couples from adopting children? Judges must *choose* or interpret what the vague, general, and ambiguous words in the Constitution mean. Judges cannot avoid making up the law, or at least filling in the holes and clarifying the uncertainties, as they go along. Lawyers also supply judges with arguments why one particular interpretation of the Constitution is better than another; they, too, actively participate in the lawmaking. The following chapters spend a great deal of time studying what judges have to say about administrative law but much less time on the words of the Constitution itself. The classic question in political philosophy, “Who polices the policeman?” continues to stir

political controversy. In administrative law, as elsewhere in law, social scientists claim that judges and lawyers *are* the police. This observation has provoked considerable debate about the power of judges and lawyers in a democratic society.

A FIRST LOOK AT THE DEVELOPMENT OF ADMINISTRATIVE LAW

At the end of this book you will be in a better position to decide how satisfactorily the administrative law that courts have created polices bureaucratic power. Bear in mind, however, that administrative law is a remarkably new field. Courts in the United States have had little more than a century to come to grips with the reality of bureaucratic power, so the presence of unsolved problems and confusing legal doctrines should not surprise us. Furthermore, we have seen that administrative agencies exist, in part, because courts are not well structured to make and implement administrative policy.

The legal profession has come to occupy a prominent role in regulatory politics and administrative lawmaking despite these differences. It is still puzzling how lawyers and judges acquired this position. The field of government administration originally presumed that public policy and administrative practices had to be free from the constraints of procedural legality. Indeed during the late nineteenth and early twentieth centuries, *nonlawyers* such as traffic engineers, city planners, and businessmen practiced administrative law.² Also during the early period, the leadership of the American Bar Association (ABA), a private organization of lawyers established in 1879, raised questions about the constitutionality of administrative agencies. Their claim was based on the assertion that Congress had unconstitutionally delegated its legislative authority to agencies and that these same agencies violated the principles of due process by adjudicating conflicts involving their own rules and regulations. By the early 1930s, the private bar lobbied Congress for a statute that would impose legal procedures on administrative

2. See Louis L. Jaffe, “Law Making by Private Groups,” *Harvard Law Review* 51 (1937): 201; and Louis L. Jaffe, “Investive and Investigation in Administrative Law,” *Harvard Law Review* 52 (1939): 1201.

agencies.³ The politics of the ABA's design for administrative agencies emphasized the common-law view of fairness. The common-law definition of procedural fairness to the client was the main argument put forward by the private bar. It argued that agencies should be allowed to proceed, for example, to order rate reductions or cease and desist orders, only after following many of the judicial characteristics of a hearing. If agencies departed from the lawyers' model, as one did in the *Morgan* case reported later in this chapter, judges should strike down the agency's decision.

At the same time these debates were going on, a new flow of judicial blood came to the Supreme Court. William O. Douglas, a former chairman of the Securities and Exchange Commission (SEC), and Felix Frankfurter, both former law professors who had specialized in administrative problems and who had actively helped design the New Deal's response to the Great Depression, joined the Court. As President Franklin Roosevelt's appointees to the Court, they argued that the courts needed to give agencies greater freedom to make decisions based on their own expertise, and they encouraged courts to defer to agencies' expertise in policymaking.

Along with FDR's new appointments to the Supreme Court, a "new breed of lawyers" went to Washington to work for the government. Jerold S. Auerbach, a legal historian, argues that these lawyers were not from the same ethnic or racial backgrounds as traditional private lawyers who represented corporations.⁴ New Deal agencies provided openings for black and Jewish lawyers who had not found opportunities in private practice. Women lawyers were less active in government agencies in part because law schools and the legal profession discriminated against women. The number of women lawyers did not increase significantly until the 1970s, with substantial pressure placed on law schools to admit qualified women. Today women comprise between 40 and 50 percent of entering

law school classes. Auerbach's studies were of men, since they predominated. And despite differences in their class backgrounds and political orientations, Auerbach suggests that after the novelty of being a government lawyer wore off, the professional training and professional bonds between lawyers on both sides prevailed and a consensus on administrative procedure began to form.⁵

While some politicians and administrators agreed that a general administrative procedure statute might be useful, they disagreed over the extent to which the legislation should force agencies to act like courts. The ABA, having not fully endorsed the New Deal, pushed for the creation of an administrative law court to which all final contested administrative decisions would go. Congress did not buy that idea, but it did pass the Walter-Logan Bill in 1940. This bill required the agencies to follow court-like procedures for nearly all administrative policymaking, thus formalizing much that agencies had informally done in the past. The bill also authorized the regular courts to review all agencies' decisions. Peter Woll describes the bill this way:

The Walter-Logan bill provides an interesting example of the extent to which the legal profession was willing to go in forcing the administrative process into a judicial mold. With respect to the rule-making (legislative) functions of administrative agencies, the bill provided that "hereafter administrative rules and all amendments or modifications or supplements of existing rules implementing or filling in the details of any statute affecting the rights of persons or property shall be issued . . . only after publication of notice and public hearings." In addition to this extreme provision regarding rule-making, the bill provided that any "substantially interested" person could, within a three-year period, petition the agency for a reconsideration of any rule, and could furthermore demand a hearing. In this manner the bill attempted to enforce common-law due process, applicable only to adjudication, upon the legislative process of administrative agencies. It would have been equally appropriate to enforce judicial procedure upon Congress!⁶

3. See Louis G. Caldwell, "A Federal Administrative Court," *University of Pennsylvania Law Review* 84 (1936): 966.

4. Jerold S. Auerbach, *Unequal Justice* (New York: Oxford University Press, 1976). See also Fritz Morstein Marx, "The Lawyer's Role in Public Administration," *Yale Law Journal* 55 (1946): 498; and Peter H. Irons, *The New Deal Lawyers* (Princeton, NJ: Princeton University Press, 1982).

5. Auerbach, *Unequal Justice*, 215. Also see Patrick Schmidt, *Lawyers and Regulation: The Politics of the Administrative Process* (New York: Cambridge University Press, 2005).

6. Peter Woll, *Administrative Law: The Informal Process* (Berkeley: University of California Press, 1963), 18–19.

President Roosevelt successfully vetoed the bill. However, in 1946 Congress passed a more modest version with the backing and support of the ABA—the Administrative Procedure Act (APA).⁷ The act did not judicialize administrative action as thoroughly as did Walter-Logan. The APA (sec. 554) requires agencies to follow court-like hearings only when the legislation creating the agency expressly requires the agency to hold hearings. The APA also does not authorize judicial review of anything and everything the agency does (sec. 701a). This was a prudent move in light of the fact that the legislation creating some agencies specifically forbade judicial review and/or explicitly permitted the agencies to take certain steps at their own discretion.

Nonetheless, as Martin Shapiro points out, “American administrative procedures had been proceeding for 150 years without such a statute,” which “fact is crucial to understanding the qualities of American administrative law that place it so firmly in the *intermediate realm*.”⁸ Shapiro uses the phrase “intermediate realm” to convey the idea that administrative law requires both constitutional and statutory interpretation. The passage of the APA in 1946 does not remove administrative law from this realm. Indeed, according to Shapiro, the APA “in theory does [not] provide a complete set of procedures adequate to the needs of each agency and its clients. Instead it establishes a kind of residual body of procedural rules that come into play if the rules particular to any given agency are insufficient.”⁹

Although the APA is but one source of administrative law, it has become an important document, like the U.S. Constitution, for administrative agencies. You will read cases that address specific portions of the APA, but by way of introducing you to the document let us mention four important areas of administration it governs: (1) *adjudication*, which deals with the process for hearing and deciding controversies; (2) *rule making*, which concerns the

procedures for developing and amending regulatory rules; (3) *discretion of administrative agencies*, which is defined in the statute that creates an agency (i.e., the organic act), and reviewing courts must defer to the statute; and (4) *judicial review*, which establishes the standards that courts must apply when reviewing agency actions.

As you proceed through this book, particularly through the chapters that describe the law regulating formal adjudication and semiformal rule making, keep in mind that in many circumstances the APA permits agencies to act informally without following any prescribed due process. Before cases reach the formal stage, many attempts to resolve them informally have usually occurred. Indeed, the vast majority of cases never reach formal administrative decision levels at all.

In its short history, administrative law has developed along four tracks: administrative, judicial, constitutional, and statutory. The administrative track developed first out of procedures originating within the agencies. The APA gave statutory authority to these existing agency-made procedures. The judicial track depends on how judges interpret agency procedures. In the 1960s and 1970s nearly all of the current rules for notice and comment rule making¹⁰ were created in the common-law manner by court decisions not based on the wording of statutes or past procedural practices of agencies. The constitutional track has also depended primarily on the judicial applications of the due process clauses that apply to all agencies at all levels of government. Much administrative law labors to articulate the circumstances in which agency procedures do or do not “deprive citizens of life, liberty, or property without due process of law.” The statutory track is somewhat more complicated. It includes judicial interpretations of the provisions in statutes that grant agency powers. For example, does the Federal Power Act require the Federal Power Commission to eliminate racial discrimination by producers of electricity and natural gas? The statutory track also includes the generic administrative procedure acts at the national and state levels. These acts specify certain procedures that apply to many agencies, not just one.

7. See Appendix B. On April 6, 1982, the Senate approved, 94–0, the first substantial revision of the APA. More will be said of this bill later.

8. Martin Shapiro, “The Supreme Court’s ‘Return’ to Economic Regulation,” *Studies in American Political Development* 1 (1986): 102.

9. *Ibid.* See also Martin Shapiro, *Who Guards the Guardians? Judicial Control of Administration* (Athens: University of Georgia Press, 1988).

10. For more information on “notice and comment rule making” see “Chapter 7: Elements of an Administrative Hearing,” starting on page 204.

At this point, students new to the field may be confused about the definition of administrative law. It is not regulatory law itself, but what is it? The next section provides three administrative law cases. All three involve the constitutional track of administrative law. You should study them with several goals in mind. First, familiarize yourself with the format and style of judicial opinions in general. Second, develop your skill in extracting the important points and conclusions from these cases. Third, think about the issues themselves. We say relatively little about the administrative law issues in these cases so that you can focus on the mechanics of analyzing cases. You can be sure, however, that these important questions of law will come up in many contexts in later chapters. Finally, as you read, begin to evaluate the role of the courts in governing the government.

ADJUDICATION AND THE BASICS OF DUE PROCESS: THREE ILLUSTRATIONS

Adjudication is the focal point in any study of either the constitutional or statutory track of administrative law. This is so because laws so often contain uncertainties that courts ultimately must determine and announce what the laws mean. Having declared what the law means, the courts proceed to enforce their declarations. Fortunately, judges in our system have traditionally given reasons for their decisions. In this book you will find many references to judicial opinions giving reasons for their interpretations of constitutions and of the national and state administrative procedure statutes mentioned above. These statutes, like constitutions, govern how bureaucrats regulate us, and the courts have much to say about their meaning.

If you have not studied law by the *case method* before, you may still struggle with some of the technical terms and concepts of legal analysis. The most important of these is the concept of *precedent*. Each judicial decision tries to justify itself by showing that it is consistent with published judicial decisions that preceded it. Each new decision also speaks to the future. To read a judicial opinion is therefore to read the law, just as much as reading a statutory clause. Students of cases need a method of abstracting and summarizing cases. We recommend the following: 1. Read the

entire case through; and 2. Reread the case noting in the following order as you read: (a) the key facts in the case, (b) the primary legal questions in the case, (c) the court's answer(s) to the question(s) ("holdings"), (d) the court's reasons for the holdings, and (e) the arguments of a dissenting opinion (if we include one). You will soon discover that the process of reasoning from precedents in law is not mechanical. The key to understanding holdings is to discover the normative, or value, judgments the judges make about the facts surrounding the case.

Morgan v. United States

304 U.S. 1 (1938) 6-1

+ *Hughes, McReynolds, Brandeis, Butler, Stone, Roberts*
– *Black*

NP Cardozo, Reed

[In *Morgan* we have a complex set of facts that led up to a legal dispute over whether regulated parties, in this case stockyard operators, were treated fairly by government administrators. In 1921, Congress authorized the secretary of agriculture to specify maximum "just and reasonable" charges that stockyard operators could set for their services. In the Packers and Stockyards Act of 1921, Congress instructed the secretary to do so only after a "full hearing." In 1930 the department notified *Morgan* and other stockyard operators to appear for a hearing concerning their prices. The hearing, which had to be held twice due to the rapidly changing conditions in the Depression, took many months and accumulated a 10,000-page transcript of oral testimony and another 1,000 pages of statistical exhibits. Initially the secretary of agriculture did not personally review the hearing at all. He delegated to subordinates the job of listening to the oral arguments based on the hearing. In an earlier case involving *Morgan* the stockyard operators appealed to the Supreme Court claiming that they did not have a full or fair hearing because the decider had not reviewed the evidence. The Court agreed and sent the case back to the Department of Agriculture to try again.

Before the completion of the next round a new secretary was appointed. He did receive and review a list of 180 hearing findings organized by the department's Bureau of Animal Industries. The secretary made a few minor changes in the findings but otherwise approved

them and ordered the stockyards to lower their prices. This time when the Court heard the case, the stockyard operators had a new set of complaints. The Bureau of Animal Industries had been, in effect, the prosecutor in the case. For the secretary to rely only on its assessment of the issues seemed unfair to the stockyard operators. Also, the operators were not allowed to see the tentative report of the examiner in the hearing, so they had no basis for defining and making their final arguments, nor were they allowed to see the bureau's findings. The department, in effect, left them punching the air. Indeed, from the very beginning of the case, the department never formulated a specific complaint against the prices the stockyards charged.

The opinion of the Court that follows properly insists on basic administrative fairness. *Morgan* was one of the Court's first serious efforts to define administrative fairness in a modern administrative setting. In fact, the case had to go back twice more to the Court before the dust finally settled. As you read this first example of administrative law in action, try to imagine some additional potential defects in a hearing that would make it unfair.]

Mr. Chief Justice Hughes delivered the opinion of the Court

The first question goes to the very foundation of the action of administrative agencies entrusted by the Congress with broad control over activities which in their detail cannot be dealt with directly by the Legislature. The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system of adherence to the basic principles that the Legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand "a fair and open hearing," essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an "inexorable safeguard." *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38. [Other citations omitted.] And in equipping the Secretary of Agriculture with extraordinary powers under the Packers and Stockyards Act, the Congress explicitly recognized

and emphasized this recruitment by making his action depend upon a "full hearing. . . ."

No opportunity was afforded to appellants for the examination of the findings . . . prepared in the Bureau of Animal Industry until they were served with the order. Appellants sought a rehearing by the Secretary, but their application was denied on July 6, 1933, and these suits followed.

The part taken by the Secretary himself in the departmental proceedings is shown by his full and candid testimony. . . . He did not hear the oral argument. The bulky record was placed upon his desk and he dipped into it from time to time to get its drift. He decided that probably the essence of the evidence was contained in appellants' briefs. These, together with the transcript of the oral argument, he took home with him and read. He had several conferences with the Solicitor of the Department and with the officials in the Bureau of Animal Industry, and discussed the proposed findings. He testified that he considered the evidence before signing the order. The substance of his action is stated in his answer to the question whether the order represented his independent conclusion, as follows: "My answer to the question would be that that very definitely was my independent conclusion as based on the findings of the men in the Bureau of Animal Industry. I would say, I will try to put it as accurately as possible, that it represented my own independent reactions to the findings of the men in the Bureau of Animal Industry."

Save for certain rate alterations, he "accepted the findings."

In the light of this testimony there is no occasion to discuss the extent to which the Secretary examined the evidence, and we agree with the Government's contention that it was not the function of the court to probe the mental processes of the Secretary in reaching his conclusions if he gave the hearing which the law required. The Secretary read the summary presented by appellants' briefs and he conferred with his subordinates who had sifted and analyzed the evidence. We assume that the Secretary sufficiently understood its purport. But a "full hearing"—a fair and open hearing—requires more than that. The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised

of what the Government proposes and to be heard upon its proposals before it issues its final command.

No such reasonable opportunity was accorded appellants. The administrative proceeding was initiated by a notice of inquiry into the reasonableness of appellants' rates. No specific complaint was formulated and, in a proceeding thus begun by the Secretary on his own initiative, none was required. Thus, in the absence of any definite complaint and in a sweeping investigation, thousands of pages of testimony were taken by the examiner and numerous complicated exhibits were introduced bearing upon all phases of the broad subject of the conduct of the market agencies. In the absence of any report by the examiner or any findings proposed by the Government, and thus without any concrete statement of the Government's claims, the parties approached the oral argument.

Nor did the oral argument reveal these claims in any appropriate manner. The discussion by counsel for the Government was "very general," as he said, in order not to take up "too much time." It dealt with generalities both as to principles and procedure. . . .

Congress, in requiring a "full hearing," had regard to judicial standards—not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature. If in an equity cause, a special master or the trial judge permitted the plaintiff's attorney to formulate the findings upon the evidence, conferred *ex parte* with the plaintiff's attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections, there would be no hesitation in setting aside the report or decree as having been made without a fair hearing. The requirements of fairness are not exhausted in the taking or consideration of evidence, but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps.

The answer that the proceeding before the Secretary was not of an adversary character, as it was not upon complaint but was initiated as a general inquiry, is futile. It has regard to the mere form of the proceeding and ignores realities. In all substantial respects, the Government acting through the Bureau of Animal Industry of the Department was prosecuting the proceeding against the owners of the market agencies. The proceeding had all the essential elements of contested litigation, with the Government and its counsel on the one side and the appellants and their counsel on the other. . . .

Again, the evidence being in, the Secretary might receive the proposed findings of both parties, each being notified of the proposals of the other, hear argument thereon, and make his own findings. But what would not be essential to the adequacy of the hearing if the Secretary himself makes the findings is not a criterion for a case in which the Secretary accepts and makes as his own the findings which have been prepared by the active prosecutors for the Government, after an *ex parte* discussion with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them. That is more than an irregularity in practice; it is a vital defect.

The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play.

As the hearing was fatally defective, the order of the Secretary was invalid. In this view, we express no opinion upon the merits. The decree of the District Court is **reversed**. . . .

[Justice Black's dissenting opinion is omitted.]

When they finally finished in 1941, the *Morgan* cases had consumed nearly a decade of litigation. Indeed, two decades had passed since Congress enacted the Packers and Stockyards Act, and by the early 1940s wartime conditions and the programs to deal with them made the act obsolete. One complaint aimed at the administrative process is that its cumbersome machinery allows wealthy interests with clever lawyers to delay the implementation of important policies for years. Against such tactics, scholars and practitioners of administrative law suggested a flexible discretionary space for administrative agencies, allowing them to ignore certain individual complaints and focus on efficiency and public interest instead. But how far can a bureaucracy go in the name of efficiency without denying a citizen due process of law? How close can an agency come to shooting first and asking questions

later? Suppose a state welfare agency receives information that a certain welfare recipient is a drug addict. Can the agency cut off the recipient's payments until he agrees to accept counseling and rehabilitation for drug addiction? A number of people imprisoned at Guantanamo Bay, Cuba, made just this claim, that they were innocent bystanders, rounded up by mistake by U.S. forces seeking to defeat the Taliban. What if the recipient insists he does not use drugs, that the agency has made a mistake? Should courts interpret the due process clause so as to give the welfare recipient a hearing at which the agency would have the burden of proving its claim that he or she is a drug user? If so, must the agency offer the hearing *before* it stops sending the checks? *Goldberg v. Kelly* (1970), the next case, addressed this last question.

While *Morgan* involved a federal statute and federal administration, *Goldberg* is a state case. Nevertheless, the Constitution and federal law still govern. That is because the Fourteenth Amendment, which requires due process of law in state government, is part of the Constitution. And the case reached the Supreme Court of the United States, not merely a state supreme court, because Article III of the Constitution gives the Supreme Court power to decide cases arising under the Constitution. There is further federal involvement: Because Congress has authorized the expenditure of federal funds to supplement state welfare programs, the federal government could impose conditions on how states administer the federal money. Prior to *Goldberg*, the Department of Health, Education, and Welfare already required states to offer hearings. Whether these hearings had to precede termination as a constitutional matter remained, however, in doubt. Before *Goldberg*, the due process requirements of a fair termination hearing were also uncertain. Chapter 7 will cover the components of fair hearings more thoroughly, but a careful reading of both *Morgan* and *Goldberg* will allow you to anticipate many of these components.

Goldberg also illustrates several characteristics of the judicial machinery that you need to master. First, recall that the *Morgan* opinion closed with the sentence, "The decree of the District Court is reversed." What is the "District Court," and how does it differ from the Supreme Court? Both federal and state legal systems are hierarchies. Figure 2.1 shows the United States court system and paths of

appeals from federal trial courts (United States District Courts), federal administrative agencies, and state courts to the appellate courts (state appellate courts, state supreme courts, United States Courts of Appeals, and the United States Supreme Court). Lawsuits usually begin in trial courts, where judges preside over a process of fact-finding. Trials in our legal system try to find out who did what to whom—or, rather, what can be *proved* to have happened. Decisions about the meaning of law often enter the picture only at the edges, either because both sides agree about the meaning of the law or because the trial judge makes rather quick decisions about the law to keep the fact-finding process moving. The federal system refers to its trial courts as "district courts." Hence the Supreme Court, which disagreed with the trial result in *Morgan*, "reversed" the district court. In *Goldberg* the Supreme Court agreed with the trial court and "affirmed" its results in the case.

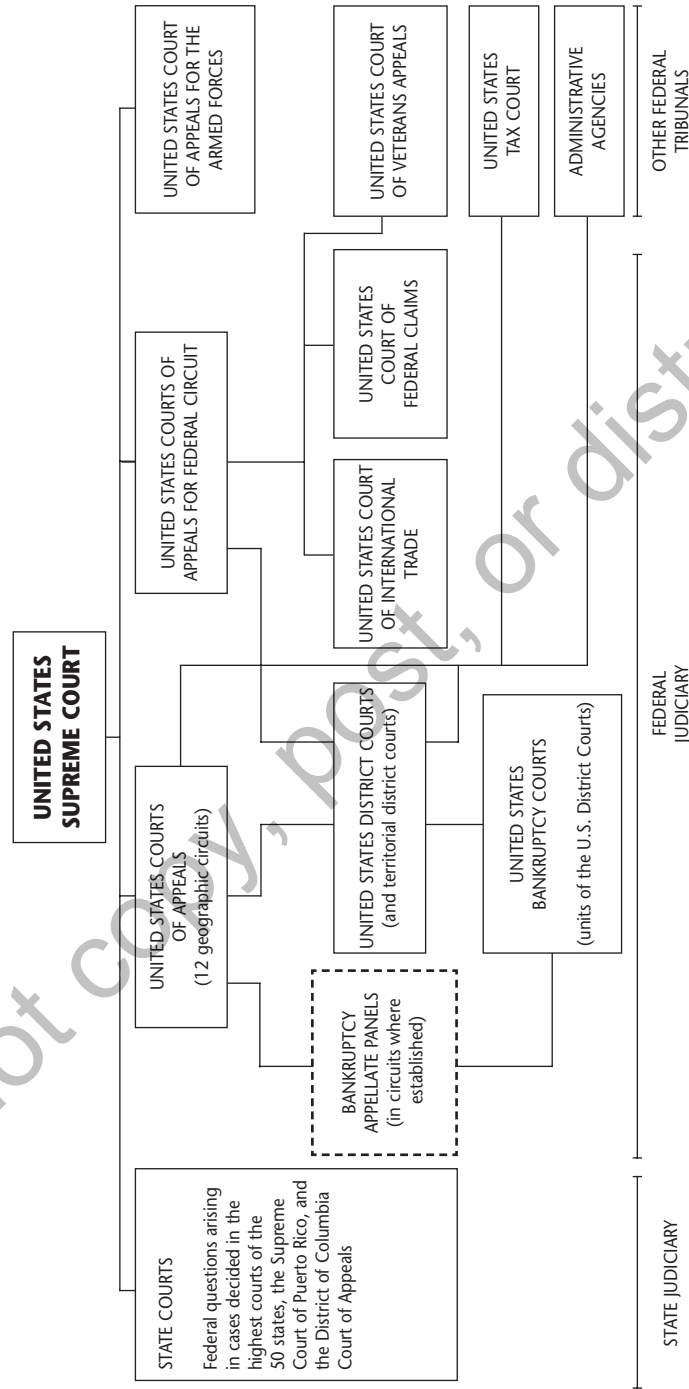
Second, if a party believes the trial judge applied the law incorrectly, that party can appeal to a higher appellate court. Appellate courts do not hold new trials. They accept as true the facts as the trial determined them. But they do resolve legal questions, sometimes affirming the trial court's legal decisions, sometimes reversing them. The United States Courts of Appeals hear most of the appeals from administrative agencies, although this was not the case in *Goldberg*.¹¹ Figure 2.2 is a map of the twelve regional U.S. Courts of Appeals, which are sometimes called *circuit* courts. The District of Columbia Court of Appeals decides a disproportionately high number of agency cases. Almost half of its docket is made up of appeals from regulatory agencies. The United States Court of Appeals for the Ninth Circuit also hears a substantial percentage of administrative appeals.¹² The circuit courts tend to affirm nearly three-quarters of the agency cases they hear. Table 2.1 shows the disposition of administrative appeals in the circuit courts for 1945–2010.

Third, unlike the *Morgan* excerpt above, the *Goldberg* opinion refers favorably to ideas it attributes to opinions in

11. See Woodford J. Howard, *Courts of Appeals in the Federal Judicial System: A Study of the Second, Fifth, and District of Columbia Circuits* (Princeton, NJ: Princeton University Press, 1981).

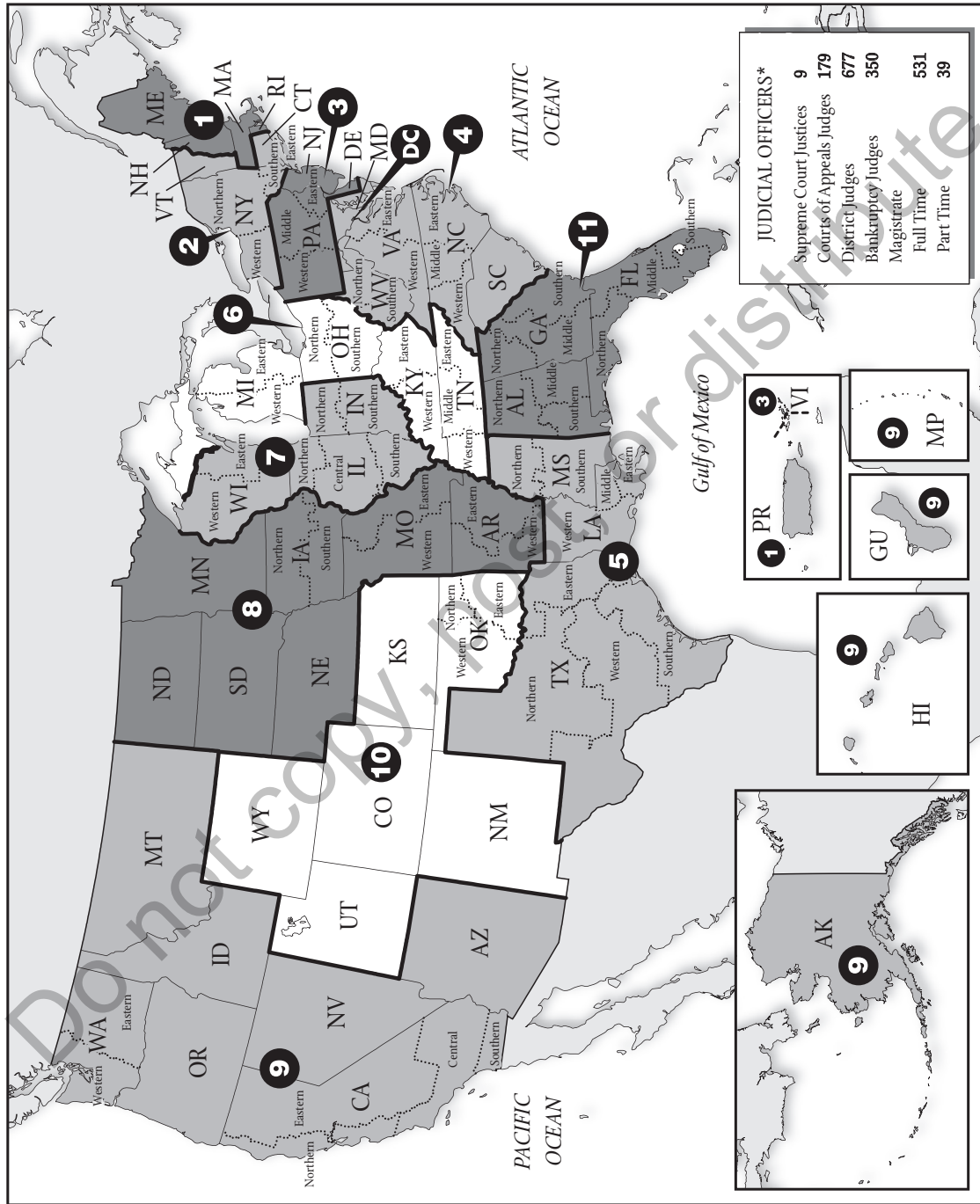
12. See Christine B. Harrington, "Regulatory Reform: Creating Gaps and Making Markets," *Law & Policy* 10 (1988): 300.

Figure 2.1 The United States Court System



Source: *The United States Courts: Their Jurisdiction and Work* (Washington, DC: U.S. Administrative Office of the United States Courts, 1989), 3.

Figure 2.2 Number and Composition of Federal Judicial Circuits



Sources: *Understanding Federal Courts* (Washington, DC: Administrative Office of the U.S. Courts, 2003), 11. *Box: *Judicial Business of the United States Courts* (Washington, DC: U.S. Government Printing Office, 2012).

Table 2.1 Disposition of Administrative Appeals in the U.S. Courts of Appeals, 1945–2010

Year	Total Cases Disposed	Without Hearing	With Hearing	Affirmed		Reversed		Dismissed	
1945	566	185	381	297	(78%)	81	(21%)	3	(1%)
1950	541	169	372	273	(74%)	77	(21%)	15	(4%)
1955	523	150	373	247	(66%)	107	(29%)	13	(3%)
1960	660	299	361	258	(71%)	91	(25%)	4	(1%)
1965	866	377	489	367	(75%)	95	(19%)	7	(1%)
1970	1,248	584	664	527	(79%)	103	(16%)	16	(2%)
1975	1,553	874	679	474	(70%)	146	(22%)	37	(5%)
1980	2,210	1,217	993	662	(67%)	222	(22%)	53	(5%)
1985	2,485	1,229	1,256	953	(76%)	141	(11%)	57	(5%)
1990	2,868	1,026	1,159	841	(73%)	148	(13%)	54	(5%)
1995	3,264	1,405	1,585	1,042	(66%)	168	(11%)	232	(15%)
2000	3,764		1,455	706	(54%)	102	(7%)	397	(27%)
2005	10,960		4,421	2,439	(55%)	293	(7%)	792	(18%)
2010	9,794		5,378	3,939	(73%)	375	(7%)	357	(7%)

Sources: Christine B. Harrington, "Regulatory Reform: Creating Gaps and Making Markets," *Law and Policy* 10 (1988): 305. Data derived from U.S. Administrative Office of the United States Courts, Annual Reports. A few cases categorized as "other" have been excluded from this table. The data for 1990 is from *Federal Judicial Workload Statistics*, December 31, 1990 [published 1991] (Washington DC: Administrative Office of the United States Courts, Statistical Analysis and Reports Division). For 1995, 2000, 2005, and 2010, data is derived from *Judicial Business of the United States Courts 1995, 2000, 2005, and 2010 Report of the Director* respectively (Washington DC: Administrative Office of the United States Courts, Statistical Analysis and Reports Division).

other cases. This reasoning from the example of other cases—precedents—is an important part of legal reasoning. It is a habit inherited from common law. Remember that in common law, judges make decisions without referring to statutes at all. They try to keep their decisions consistent by making their results agree with results in similar cases. The reasons they give in their opinions become part of, and build up further, the body of common law. In many of the cases in this book you will see citations to other opinions.¹³

13. Lief Carter and Thomas Burke's *Reason in Law*, 8th ed. (New York: Longman, 2009) explores the complexities of legal reasoning in much more detail.

Goldberg v. Kelly

397 U.S. 254 (1970) 5–3¹⁴

+ Douglas, Harlan, Brennan, White, Marshall
– Black, Stewart, Burger

[Several residents of New York City, Kelly among them, received welfare payments under the federally assisted Aid to Families with Dependent Children program or the state's Home Relief program. They brought suit to

14. This decision was only 5–3 because Justice Fortas left office May 14, 1969, but Justice Blackmun was not sworn in until June 9, 1970. *Goldberg* was decided March 23, 1970.

prevent the termination of their welfare payments before a hearing had taken place. New York law did, however, allow an oral hearing before an independent state hearing officer *after* termination, at which time the recipient could offer oral evidence, cross-examine witnesses, and have a record made of the hearing. If the recipient wins at this hearing, he or she receives all the funds erroneously withheld. The Supreme Court held that New York State's procedure violated the constitutional requirements of due process.^{15]}

Mr. Justice Brennan delivered the opinion of the Court

[T]he State Department of Social Services Official Regulations . . . require that local social services officials proposing to discontinue or suspend a recipient's financial aid do so according to a procedure [which] . . . must include the giving of notice to the recipient of the reasons for a proposed discontinuance or suspension at least seven days prior to its effective date, with notice also that upon request the recipient may have the proposal reviewed by a local welfare official holding a position superior to that of the supervisor who approved the proposed discontinuance or suspension, and, further, that the recipient may submit, for purposes of the review, a written statement to demonstrate why his grant should not be discontinued or suspended. The decision by the reviewing official whether to discontinue or suspend aid must be made expeditiously, with written notice of the decision to the recipient. The section further expressly provides that "[a]ssistance shall not be discontinued or suspended prior to the date such notice or decision is sent to the recipient and his representative, if any, or prior to the proposed effective date of discontinuance or suspension, whichever occurs later." . . . [T]he New York City Department of Social Services promulgated Procedure No. 68-18. A caseworker who has doubts about the recipient's continued eligibility must first discuss them with the recipient. If the caseworker concludes that the

recipient is no longer eligible, he recommends termination of aid to a unit supervisor. If the latter concurs, he sends the recipient a letter stating the reasons for proposing to terminate aid and notifying him that within seven days he may request that a higher official review the record, and may support the request with a written statement prepared personally or with the aid of an attorney or other person. If the reviewing official affirms the determination of ineligibility, aid is stopped immediately and the recipient is informed by letter of the reasons for the action. Appellees' challenge to this procedure emphasizes the absence of any provisions for the personal appearance of the recipient before the reviewing official, for oral presentation of evidence, and for confrontation and cross-examination of adverse witnesses. . . .

The constitutional issue to be decided, therefore, is the narrow one whether the Due Process Clause requires that the recipient be afforded an evidentiary hearing *before* the termination of benefits. The District Court held that only a pre-termination evidentiary hearing would satisfy the constitutional command, and rejected the argument of the state and city officials that the combination of the post-termination "fair hearing" with the informal pre-termination review disposed of all due process claims.

For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. . . . [T]hus the crucial factor in this context—a factor not present in the case of the black-listed government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental largesse is ended—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 of daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.

Moreover, important governmental interests are promoted by affording recipients a pre-termination evidentiary hearing. 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

15. If your school or public library subscribes to Lexis/Nexus "UNIVerse," you will find hyperlink connections to many of the cases cited in those opinions. "Findlaw" (www.findlaw.com) is a free service that includes all U.S. Supreme Court decisions. Some of the more famous U.S. Supreme Court decisions even have the recorded oral arguments of the lawyers available on the Web via RealAudio. For this unrestricted service, contact <http://oyez.nwu.edu>, where oral arguments in both *Goldberg* and *Mathews* (the next case in this chapter) can be heard.

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. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to “promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.” The same governmental interests which counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.

Appellant does not challenge the force of these considerations but argues that they are outweighed by countervailing governmental interests in conserving fiscal and administrative resources. These interests, the argument goes, justify the delay of any evidentiary hearing until after discontinuance of the grants. Summary adjudication protects the public by stopping payments promptly upon discovery of reason to believe that a recipient is no longer eligible. Since most terminations are accepted without challenge, summary adjudication also conserves both the fiscal and administrative time and energy by reducing the number of evidentiary hearings actually held.

We agree with the District Court, however, that these governmental interests are not overriding in the welfare context. The requirements of a prior hearing doubtless involve some greater expense, and the benefits paid to ineligible recipients pending decisions at the hearing probably cannot be recouped, since these recipients are likely to be judgment-proof. But the State is not without weapons to minimize these increased costs. Much of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pre-termination hearings and by skillful use of personnel and facilities. Indeed, the very provision for post-termination evidentiary hearing in New York’s Home Relief program is itself cogent evidence that the State recognizes the primacy of the public interest in correct eligibility determinations and therefore in the provision of procedural safeguards. Thus, the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State’s interest that his payments not be erroneously terminated, clearly outweighs the State’s competing concern to prevent any increase in its fiscal and administrative burdens. . . .

We also agree with the District Court, however, that the pre-termination hearing need not take the form of a judicial or quasi-judicial trial. We bear in mind that the statutory “fair hearing” will provide the recipient with a full administrative review. Accordingly, the pre-termination hearing has one function only: to produce an initial determination of the validity of the welfare department’s grounds for discontinuance of payments in order to protect a recipient against an erroneous termination of his benefits. . . . Thus, a complete record and a comprehensive opinion, which would serve primarily to facilitate judicial review and to guide future decisions, need not be provided at the pre-termination stage. We recognize, too, that both welfare authorities and recipients have an interest in relatively speedy resolution of questions of eligibility, that they are used to dealing with one another informally, and that some welfare departments have very burdensome caseloads. These considerations justify the limitation of the pre-termination hearing to minimum procedural safeguards, adapted to the particular characteristics of welfare recipients, and to the limited nature of the controversies to be resolved. We wish to add that we, no less than the dissenters, recognize the importance of not imposing upon the States or the Federal Government in this developing field of law any procedural requirements beyond those demanded by rudimentary due process.

“The fundamental requisite of due process of law is the opportunity to be heard.” *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). The hearing must be “at a meaningful time and in a meaningful manner.” *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. These rights are important in cases such as those before us, where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases.

We are not prepared to say that the seven-day notice currently provided by New York City is constitutionally insufficient per se, although there may be cases where fairness would require that a longer time be given. Nor do we see any constitutional deficiency in the content or form of the notice. New York employs both a letter and a personal conference with a caseworker to inform

a recipient of the precise questions raised about his continued eligibility. Evidently the recipient is told the legal and factual bases for the Department's doubts. This combination is probably the most effective method of communicating with recipients.

The city's procedures presently do not permit recipients to appear personally with or without counsel before the official who finally determines continued eligibility. Thus a recipient is not permitted to present evidence to that official orally, or to confront or cross-examine adverse witnesses. These omissions are fatal to the constitutional adequacy of the procedures.

The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard. It is not enough that a welfare recipient may present his position to the decision maker in writing or second-hand through his caseworker. Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision. The second-hand presentation to the decision maker by the caseworker has its own deficiencies; since the caseworker usually gathers the facts upon which the charge of ineligibility rests, the presentation of the recipient's side of the controversy cannot safely be left to him. Therefore a recipient must be allowed to state his position orally. Informal procedures will suffice; in this context due process does not require a particular order of proof or mode of offering evidence. . . .

In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. . . .

. . . What we said in *Greene v. McElroy*, 360 U.S. 474, 496–497 (1959) is particularly pertinent here:

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact-finding, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important

in the case of documentary evidence, it is even more important where evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination.

Welfare recipients must therefore be given an opportunity to confront and cross-examine the witnesses relied on by the department.

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932). We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires. . . .

Finally, the decision maker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing. *Ohio Bell Tel. Co. v. PUC*, 301 U.S. 292 (1937). . . . To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on, cf. *Wichita R.R. & Light Co. v. PUC*, 260 U.S. 48, 57–59 (1922), though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law. And, of course, an impartial decision maker is essential. Cf. *In re Murchison*, 349 U.S. 133 (1955); *Wong Yang Sung v. McGrath*, 330 U.S. 33, 45–46 (1950). We agree with the District Court that prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decision maker. He should not, however, have participated in making the determination under review.

Affirmed.

Goldberg's extension of the due process requirement of an evidentiary hearing to routine state administrative matters initiated a dramatic change in administrative law, one that later chapters analyze in depth. One very significant aspect of such change is the reconceptualization of the link between citizens in need and the state. Justice Brennan's majority opinion put forward a very significant argument about welfare and welfare beneficiaries: Brennan argued, citing eminent legal scholars of his day, that welfare benefits must be treated and protected

as “property.” In the famous footnote -8- to his decision, Justice Brennan explained:

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. It has been aptly noted that “[s]ociety 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.” Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 *Yale L. J.* 1245, 1255 (1965). See also Reich, The New Property, 73 *Yale L. J.* 733 (1964).

A close reading of *Goldberg*, however, shows that the Court neglected to answer perhaps the most important question of all: *In what circumstances* does the due process clause require an evidentiary hearing? The next case did address the issue. Here the Court *denied* the recipient’s claim to a pre-termination hearing. You should use the techniques of case analysis discussed above to dig out the reasons for this denial.

Mathews v. Eldridge

424 U.S. 319 (1976) 6–2

+ Burger, Stewart, White, Blackmun, Powell, Rehnquist
– Brennan, Marshall
NP Stevens

[Eldridge had received Social Security benefits because he claimed he was completely disabled. The Social Security Administration determined after some years that Eldridge had recovered sufficiently to hold a job. It

therefore terminated his Social Security benefit checks without holding an oral hearing. The District Court and the Court of Appeals had held that prior to termination of benefits, Eldridge must be afforded an evidentiary hearing of the type required for welfare beneficiaries. The Supreme Court reversed this decision. The facts of the dispute are reported in the opinion.]

Mr. Justice Powell delivered the opinion of the Court

The issue in this case is whether the Due Process Clause of the Fifth Amendment requires that prior to the termination of Social Security disability benefit payments the recipient be afforded an opportunity for an evidentiary hearing. . . .

Cash benefits are provided to workers during periods in which they are completely disabled under the disability insurance benefits program created by the 1956 amendments to . . . the Social Security Act. . . . Eldridge was first awarded benefits in June 1968. In March 1972, he received a questionnaire from the state agency charged with monitoring his medical condition. Eldridge completed the questionnaire, indicating that his condition had not improved and identifying the medical sources, including physicians, from whom he had received treatment recently. The state agency then obtained reports from his physician and psychiatric consultant. After considering these reports and other information in his file the agency informed Eldridge by letter that it had made a tentative determination that his disability had ceased in May 1972. The letter included a statement of reasons for the proposed termination of benefits, and advised Eldridge that he might request reasonable time in which to obtain and submit additional information pertaining to his condition.

In his written response, Eldridge disputed one characterization of his medical condition and indicated that the agency already had enough evidence to establish his disability. The state agency then made a final determination that he had ceased to be disabled in May 1972. This determination was accepted by the Social Security Administration (SSA), which notified Eldridge in July that his benefits would terminate after that month. The notification also advised him of his rights to seek reconsideration by the state agency of this initial determination within six months.

Instead of requesting reconsideration Eldridge commenced this action challenging the constitutional

validity of the administrative procedures established by the Secretary of Health, Education, and Welfare for assessing whether there exists a continuing disability. He sought an immediate reinstatement of benefits pending a hearing on the issue of his disability. . . . The Secretary moved to dismiss on the grounds that Eldridge's benefits had been terminated in accordance with valid administrative regulations and procedures and that he had failed to exhaust available remedies. . . .

. . . [The] District Court held that prior to termination of benefits Eldridge had to be afforded an evidentiary hearing of the type required for welfare beneficiaries under . . . the Social Security Act. . . . [T]he Court of Appeals for the Fourth Circuit affirmed. . . . We reverse. . . .

Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. The Secretary does not contend that procedural due process is inapplicable to terminations of Social Security disability benefits. He recognizes, as has been implicit in our prior decisions, . . . that the interest of an individual in continued receipt of these benefits is a statutorily created "property" interest protected by the Fifth Amendment. . . . Rather, the Secretary contends that the existing administrative procedures . . . provide all the process that is constitutionally due before a recipient can be deprived of that interest.

This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. . . . [T]he "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." . . . The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." Eldridge agrees that the review procedures available to a claimant before the initial determination of ineligibility becomes final would be adequate if disability benefits were not terminated until after the evidentiary hearing stage of the administrative process. The dispute centers upon what process is due prior to the initial termination of benefits, pending review.

In recent years this Court increasingly has had occasion to consider the extent to which due process requires an evidentiary hearing prior to the deprivation

of some type of property interest even if such a hearing is provided thereafter. In only one case, *Goldberg v. Kelly*, . . . has the Court held that a hearing closely approximating a judicial trial is necessary. In other cases requiring some type of pre-termination hearing as a matter of constitutional right the Court has spoken sparingly about the requisite procedures. . . .

These decisions underscore the truism that "[d]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances." . . . "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." . . . Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. . . . More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, 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, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. . . .

Despite the elaborate character of the administrative procedures provided by the Secretary, the courts below held them to be constitutionally inadequate concluding that due process requires an evidentiary hearing prior to termination. In light of the private and governmental interests at stake here and the nature of the existing procedures, we think this was an error.

Since a recipient whose benefits are terminated is awarded full retroactive relief if he ultimately prevails, his sole interest is in the uninterrupted receipt of this source of income pending final administrative decision on his claim. . . .

Only in *Goldberg* has the Court held that due process requires an evidentiary hearing prior to a temporary deprivation. It was emphasized there that welfare assistance is given to persons on the very margin of subsistence. . . . Eligibility for disability benefits, in contrast, is not based upon financial need. Indeed, it is wholly unrelated to the worker's income or support from many other sources, such as earnings of other family members, workmen's compensation awards, tort claims awards, savings, private insurance, public or private pensions, veterans' benefits, food stamps, public

assistance, or the “many other important programs, both public and private, which contain provisions for disability payments affecting a substantial portion of the work force. . . .”

As *Goldberg* illustrates, 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 decision-making process. . . . The potential deprivation here is generally likely to be less than in *Goldberg*, although the degree of difference can be overstated. . . . [T]o remain eligible for benefits a recipient must be “unable to engage in substantial gainful activity. . . .”

As we recognized last Term, . . . “the possible length of wrongful deprivation of . . . benefits [also] is an important factor in assessing the impact of official action on the private interests.” The Secretary concedes that the delay between a request for a hearing before an administrative law judge and a decision on the claim is currently between 10 and 11 months. Since a terminated recipient must first obtain a reconsideration decision as a prerequisite to invoking his right to an evidentiary hearing, the delay between the actual cutoff of benefits and final decision after a hearing exceeds one year.

In view of the torpidity of this administrative review process, . . . and the typically modest resources of the family unit of the physically disabled worker, the hardship imposed upon the erroneously terminated disability recipient may be significant. Still, the disabled worker’s need is likely to be less than that of a welfare recipient. In addition to the possibility of access to private resources, other forms of government assistance will become available where the termination of disability benefits places a worker or his family below the subsistence level. . . . In view of these potential sources of temporary income, there is less reason here than in *Goldberg* to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action. . . .

An additional factor to be considered here is the fairness and reliability of the existing pre-termination procedures, and the probable value, if any, of additional procedural safeguards. Central to the evaluation of any administrative process is the nature of the relevant inquiry. . . . In order to remain eligible for benefits the disabled worker must demonstrate by means of “medically acceptable clinical and laboratory diagnostic techniques . . .” that he is unable to “engage in

any substantial gainful activity by reason of any *medically determinable* physical or mental impairment . . .” [emphasis supplied]. In short, a medical assessment of the worker’s physical or mental condition is required. This is a more sharply focused and easily documented decision than the typical determination of welfare entitlement. In the latter case, a wide variety of information may be deemed relevant, and issues of witness credibility and veracity often are critical to the decision-making process. . . .

By contrast, the decision whether to discontinue disability benefits will turn, in most cases, upon “routine, standard, and unbiased medical reports by physician specialists,” . . . concerning a subject whom they have personally examined. . . . To be sure, credibility and veracity may be a factor in the ultimate disability assessment in some cases. But procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions. The potential value of an evidentiary hearing, or even oral presentation to the decision maker, is substantially less in this context than in *Goldberg*. . . .

A further safeguard against mistake is the policy of allowing the disability recipient’s representative full access to all information relied upon by the state agency. In addition, prior to the cutoff of benefits the agency informs the recipients of its tentative assessment, the reasons therefor, and provides a summary of the evidence that it considers most relevant. Opportunity is then afforded the recipient to submit additional evidence or arguments, enabling him to challenge directly the accuracy of information in his file as well as the correctness of the agency’s tentative conclusions. These procedures . . . enable the recipient to “mold” his argument to respond to the precise issues which the decision maker regards as crucial. . . .

In striking the appropriate due process balance the final factor to be assessed is the public interest. This includes the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing upon demand in all cases prior to the termination of disability benefits. The most visible burden would be the incremental costs resulting from the increased number of hearings and the expense of providing benefits to ineligible recipients pending decision. No one can predict the extent of the increase, but the fact that full benefits would continue until after such hearings would assure the exhaustion in most cases of this attractive option.

Nor would the theoretical right of the Secretary to recover undeserved benefits result, as a practical matter, in any substantial offset to the added outlay of public funds. . . . [E]xperience with the constitutionalizing of government procedures suggests that the ultimate additional costs in terms of money and administrative burden would not be insubstantial.

Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources, is a factor that must be weighed. At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society, in terms of increased assurance that the action is just, may be outweighed by the cost. Significantly, the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited. . . .

But more is implicated in cases of this type than ad hoc weighing of fiscal and administrative burdens against the interest of a particular category of claimants. The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness. We reiterate the wise admonishment of Mr. Justice Frankfurter that differences in the origin and function of administrative agencies "preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts." . . . The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decision making in all circumstances. The essence of due process is the requirement that "a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." . . . All that is necessary is that the procedures be tailored, in light of the decision to be made, to "the capacities and circumstances of those who are to be heard," . . . to insure that they are given a meaningful opportunity to present their case. In assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals.

. . . This is especially so where, as here, the prescribed procedures not only provide the claimant with an effective process for asserting his claim prior to any administrative action, but also assure a right to an evidentiary hearing, as well as to subsequent judicial review, before the denial of his claim becomes final. . . .

We conclude that an evidentiary hearing is not required prior to the termination of disability benefits and that the present administrative procedures fully comport with due process. . . .

Reversed.

*Mr. Justice Brennan, with whom
Mr. Justice Marshall concurs, dissenting*

. . . I agree with the District Court and the Court of Appeals that, prior to termination of benefits, Eldridge must be afforded an evidentiary hearing of the type required for welfare beneficiaries. . . . I would add that the Court's consideration that a discontinuance of disability benefits may cause the recipient to suffer only a limited deprivation is no argument. It is speculative. Moreover, the very legislative determination to provide disability benefits, without any prerequisite determination of need in fact, presumes a need by the recipient which is not this Court's function to denigrate. Indeed, in the present case, it is indicated that because disability benefits were terminated there was a foreclosure upon the Eldridge home and the family's furniture was repossessed, forcing Eldridge, his wife and children to sleep in one bed. . . . Finally, it is also no argument that a worker, who has been placed in the untenable position of having been denied disability benefits, may still seek other forms of public assistance.¹⁶

The central legal issues in these three cases concern the rule of law itself, which we shall address shortly. To complete this chapter's descriptive theme, consider three background aspects of the legal process reflected in these cases. First, readers may wonder why these cases do not draw upon the requirements stated in *any* administrative procedure act. The answer regarding *Morgan* is simple. The Court decided the case before the federal APA was

16. Eldridge, a truck driver, claimed in a post-termination hearing that his bad back prevented him from working. The administrative law judge ruled in his favor. Eldridge recovered "back" benefits in both senses!

passed in 1946. As to the relatively recent cases, the APA does not apply because by its own words it does not cover welfare payment programs.

Second, students who have studied the legal process may wonder about the applicability of the doctrine of *stare decisis*. This doctrine encourages courts to follow the precedents in previous cases that *control*, that is, are factually similar to, the case in question. Thus one might expect *Goldberg* to control or dictate the result in *Mathews* and to suspect the Court of employing devious reasoning to reach the *Mathews* result. However, a careful reading of *Mathews* shows that the Court believed the case did not factually resemble *Goldberg*. The conclusion—that Eldridge did not deserve an oral pretermination hearing because he, unlike Kelly, could obtain other forms of public assistance while awaiting a post-termination hearing—is a choice on the part of the six-member majority to narrowly distinguish the two cases. Courts use judicial discretion to decide whether previous cases do or do not factually resemble the one before them.

Finally, recall the earlier point that regulatory law in large part responds to perceived shortcomings in the private economic system. You may ask yourself what welfare cases have to do with the shortcomings of free markets. An important, if not obvious, linkage exists, however. Welfare programs exist *because* society has come to accept a public obligation to support those whom the private system does not, for a variety of reasons, support. For better or worse, once the obligation to provide relief becomes by political agreement a public responsibility, the Due Process Clause and the rule of law do affect how government carries the programs out.

THEME FOUR: WHAT IS ADMINISTRATIVE LAW?

The agencies themselves, with varying degrees of legal help from legislatures, create regulatory law. Administrative law, by contrast, comes primarily from judicial interpretations of legal statements setting forth the *procedures* agencies must follow. These come mainly from due process clauses in federal and state constitutions, from administrative procedure statutes when they

apply, and from the occasional clause within a statute creating an agency. It was in this last category that the “full hearing” requirement adjudicated in *Morgan* originated. Regulatory law governs the citizenry; administrative law governs the government. We might say that administrative law governs the bureaucracy as other constitutional provisions govern the judicial, legislative, and presidential powers in government. Together with constitutional law, administrative law operationalizes the framework of political commitment to the rule of law.

THEME FIVE: THE ETHICS OF THE RULE OF LAW IN BUREAUCRATIC GOVERNMENT

The philosophical concept of the rule of law plays a central role in administrative law because it has been a part of our liberal-legal political tradition since the founding of the nation and the adoption of our national constitution. It is a command to those who govern to obey the law and a command to all citizens to respect the law. Abraham Lincoln, in a speech he delivered as a young man, said:

[L]et every man remember that to violate the law, is to trample on the blood of his father, and to tear the charter of his own, and his children's liberty. Let reverence for the laws be breathed by every American mother, to the lisping babe, that prattles on her lap; let it be taught in schools, in seminaries, and in colleges; let it be written in primers, spelling books, and in almanacs; let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice. And, in short, let it become the political religion of the nation. . . . Reason, cold, calculating, unimpassioned reason, must furnish all the materials for our future support and defense. Let those materials be moulded into general intelligence, sound morality and, in particular, a reverence for the Constitution and laws. . . .¹⁷

In spite of Lincoln's appeal and Americans' general agreement with the principle of the rule of law, no single operational definition of the concept has won general

17. Abraham Lincoln, “Address to the Young Men's Lyceum of Springfield, Illinois,” January 27, 1838, from T. Harry Williams, ed., *Abraham Lincoln: Selected Speeches, Messages, and Letters* (New York: Rinehart and Co., 1957), 10, 14.

acceptance, among either scholars or the public. This book adopts one of several definitions of the ethical meaning of the rule of law. On this definition rests this book's most important assessments and conclusions about modern administrative law. Therefore let us make this definition as clear as possible by contrasting it with the definitions we reject.

Before describing the various concepts of the rule of law, one further point needs coverage. While the rule of law as a philosophical matter urges all citizens to obey and respect the law, in practical terms the concept applies primarily to courts. The courts in our constitutional scheme have primary responsibility for deciding what laws mean as they decide concrete cases. The rule of law commands judges to play an impartial role in this process, just as the rules of football or baseball specify roles of impartiality for referees and umpires. But just what law do judges apply and how do they do so impartially? The answers to this question provide various ethical, or normative, models of the rule of law. This book endorses the last of these models.

1. *Constitutions are the supreme law in the United States; the rule of law therefore requires courts to follow the constitution.* The difficulty with this view is that a constitution's words are often so broad, general, and ambiguous that they provide in themselves no limit on judicial discretion. To cite a due process requirement does not really constrain a judge or help define impartiality because a judge can assert that whatever he or she wishes to accomplish is or isn't due process. This pattern occurred during that point in our economic history when judges struck down a wide variety of social programs regulating business simply by asserting that they violated due process. To extend the analogy to referees, constitutions often say nothing more specific than would a basketball rule that commanded referees "to call a foul whenever a player does something dirty." Such a rule would leave referees free to define *dirty* as they choose.

2. *The rule of law requires judges to enforce statutes as written.* Some legislative language is concrete and clear, but very often it is no less general or ambiguous than the language of constitutions. In fact, statutory imprecision

pops up particularly often in administrative law for the simple reason that if Congress could make clear law on a subject, it would not need to create a regulatory body in the first place. Part II of this book will reveal instances in which Congress has merely commanded agencies "to regulate in the public interest." Also, the phrase *full hearing* is not much clearer than *due process*. In such circumstances judges are just as free under statutes as they are under constitutions to draw on their personal biases. And if you criticize this argument by citing statutes that do state concrete and unambiguous provisions, you must recall that cases involving these statutes usually do not reach the appellate courts precisely because the law is clear. Parties do not routinely invest tens of thousands of dollars of legal fees in cases they expect to lose. For both parties to carry a suit forward, they must be able to predict, or strongly believe, that the law in question is uncertain enough to take a shot at winning their claims.

3. *The rule of law requires judges to follow precedents.* This more limited formulation of the rule of law recognizes that judges simply draw on their biases in deciding cases otherwise. The restraint of law arises merely in the obligation to follow these decisions in future similar cases. The trouble here is that, as we saw in *Mathews's* treatment of *Goldberg*, judges are free to say a case is factually different from a previous case and hence escape the restraining influence of prior law.

4. *The rule of law refers to a philosophy of justice, not a concept of "following the law."* If we seek a test of judicial impartiality but cannot find it in the black and white letters of society's rules, a philosophy of justice may offer the only alternative. But which philosophy should judges choose? Should they attempt to articulate prevailing social customs? Marxism? A natural law theory? We are on the right track but have yet to get on the proper philosophical train.

5. *The rule of law is a philosophy of compromising and balancing among social interests.* This statement pinpoints a common political as well as judicial approach to constitutional and administrative law problems. The Supreme Court selected this very test in its decision in *Mathews*. It said the costs in *Goldberg* of denying a hearing were

greater than in *Mathews* because Eldridge could get welfare payments while he waited, but Kelly could not. Many administrative law cases use the language of “balancing interests” because it conveys some idea of weighing interest and producing a fair outcome. But the balancing test usually leaves judges free to define the balance any way they wish, and the “public” interest almost always outweighs one individual person’s problem. To be sure, not all disabled recipients depend on the checks. But most do, and Eldridge certainly did. Being deprived of a hearing may be less costly to him than it was to Kelly, but is the difference *enough* to justify the Court’s decision against him? Balancing will play a part in the judicial administrative law role, but it does not fully satisfy the obligation to the rule of law.

6. *The rule of law seeks to achieve fairness, rationality, and social equality by promoting public participation in decision making.* Return to the Supreme Court’s reasoning in *Morgan and Goldberg*. The requirements the cases call for do not leap out of the phrases “full hearing” or “due process of law.” These two opinions call for a set of procedures—confrontation, cross-examination, and so forth—designed to minimize the likelihood that a secretary of agriculture or a welfare supervisor will make the wrong decision in a case. They hope to offset the chances that laziness, the desire to preserve pride, loyalty to one party, biased views toward the facts or the parties, or any other common human failing will produce an irrational decision, that is, a decision not justified by the facts and the law. Legal disputes may be framed in certain ways so as to call for different judicial solutions. In *Mathews*, for example, the Court was concerned with balancing costs and benefits, which is very different from its approach in *Goldberg*. This perspective on the rule of law provides students of American politics and public administration with a guide for interpreting and evaluating the role of judges in administrative law. You will need to study several cases in the following chapters before you begin to feel comfortable with this approach.

This sixth ethical model for administrative law holds that governmental decisions must take place through an open and public process—open at least to the participation

of those immediately affected, open at most to observation by the whole community. *Open* and *public* are not mere ideals. They rest on the demonstrated fact that when decision makers must decide and/or defend their decision in front of potential critics, they are less likely to commit the kind of errors that result from laziness, bias, and other sources of arbitrariness. Appellate courts attempt to meet this test by writing opinions that justify their rulings, exposing their reasoning to professional criticism. Public elections seek to push the legislative process toward openness. Two of the three cases above promoted openness in government. When the Court forbade the Secretary of Agriculture from meeting in private with the Bureau of Animal Industry, or when the Court told a welfare office not to deny a recipient access to his or her only funds with which to finance a protest, the Court pushed the administrative decision-making process toward publicness.

Note here one critically important aspect of this definition of the rule of law. It does *not* ask the courts themselves to inquire so deeply into decision making as to *guarantee* that the administrator reached a correct decision on the facts. The courts are usually in a poorer position than the parties to judge what is substantively best. The courts’ role is instead predominantly procedural. From this perspective, administrative law assumes that open participation will minimize arbitrariness in administrative decision making.

7. *The rule of law checks and shapes the power of government by seeking the maximum feasible reduction of arbitrariness.* Our sixth ethical model for administrative law certainly appeals to our democratic political values. What could be more right and fair than insisting on full and open participation? Did we not see in chapter 1 that such openness might have prevented the evils perpetrated by the Mississippi State Sovereignty Commission? How could we reject this democratic model?

We don’t actually reject it, but the participation model is not by itself a solution. To achieve full participation in every case costs too much time and money. Worse, practical experience with administrative politics teaches that those who resist new regulatory programs will convert their opportunity to participate into delaying tactics,

dragging out the processes and preventing, sometimes for many years, the implementation of new rules. We thus believe that the ethical demand that administrative law must meet is to articulate for different situations different mixes of participation, on one hand, and rapid policy response (for example, to the unique problems faced by residents of New Orleans after Hurricane Katrina) on the other. The overall goal is not participation per se, but something more like “common sense in the circumstances.”¹⁸

To refine the concept, consider the definition of the “ideal of legality” offered by Philippe Nonet and Philip Selznick:

But the ideal of legality should not be confused with the paraphernalia of legalization—the proliferation of rules and procedural formalities. The bureaucratic patterns that pass for due process (understood as an “obstacle course”) or for accountability (understood as compliance with official rules) are alien to responsive law. The ideal of legality needs to be conceived more generally and to be cured of formalism.

18. See Phillip K. Howard, *The Death of Common Sense* (New York: Random House, 1994).

In a purposive system legality is the progressive reduction of arbitrariness in positive law and its administration. To press for a maximum feasible reduction of arbitrariness is to demand a system of law that is capable of reaching beyond formal regularity and procedural fairness to substantive justice. That achievement, in turn, requires institutions that are competent as well as legitimate.¹⁹

The precise nature of legal rationality in administrative law will emerge through the pages of this book. While readers may disagree with each other and with us about the components of rationality, administrative law boils down to a dialogue or political debate about just what is procedurally fair in modern politics and government. Debates have more than one side, however. This book takes a position in the debate, but in the end you must develop the analytical skills to make reasoned judgments for yourself. Every case you read in this book is, either implicitly or explicitly, a comment upon the nature of legal rationality and arbitrariness in government.

19. *Law and Society in Transition: Toward Responsive Law* (New York: Harper & Row, 1978), 107–108.

EXERCISES AND QUESTIONS FOR FURTHER THOUGHT

1. The space limits of this book prevent it from covering all aspects of the administrative process itself. There are, however, some general categories of administrative agencies and classifications of their tasks that may help you decipher the facts and issues in cases to follow. It is useful to differentiate the major *values* that drive administrative policies. These include (a) promoting personal safety, (b) assuring social and economic justice, and (c) reallocating wealth. Think of an agency or program in government that illustrates each of these values. Where, for example, does OSHA’s regulation of toxic substances in the workplace fit in this scheme? Which of these values figure in the government programs in the three cases in this chapter?

Next, consider the *tools* of administration. The main administrative task is to shape events and

influence behavior. In this regard, the bureaucrat and the businessperson, the parent and the football coach, share the same task. How do any of us influence events and behavior? The most common way to control something is to claim ownership. Feudalism was a system of government built upon this idea. Kings claimed they and those beneath them literally possessed their kingdoms just as we possess automobiles and homes, at least once we pay off the loan. Today public or governmental ownership plays a less significant role than it once did, at least in Western civilization. But public ownership and management nevertheless remain important governmental tools. Governments build and manage many things. The Tennessee Valley Authority, for example, controls flooding and produces energy by owning and managing resources.

The second main tool of government is regulation. Parents do not own their children, but they do regulate their behavior. The administrator may work with a more complex set of problems than the parent, but when they regulate, both will resort to one or a combination of these factors they hope will influence behavior: *prescription*, *promotion*, *permission*, and *prohibition*. The Federal Communications Commission *prescribes* that station operators must provide the FCC routinely with logs and other information about their daily programming. The National Science Foundation *promotes* scholarly research by giving money to the best research proposals. The Nuclear Regulatory Commission *permits* a nuclear power plant to begin operation if it has passed its safety tests. The FCC *prohibits* any company from owning more than the maximum number of station outlets promulgated in FCC rules. Think of others.

Is it not true that each public agency is a mix of values and tools but that the mix varies from agency to agency? What, for example, is the mix of values and tools in Amtrak? The Environmental Protection Agency? The Food Stamp program? Can you think of other mixes of values and tools in “real world” administrative agencies? Which mixes characterize the agencies in this chapter’s three cases?

2. Scholars of regulation have argued for at least the last two decades that prohibitions and penalties, what are commonly known as “command and control” techniques, are poor tools of regulatory governance in many circumstances. They argue that an ongoing relationship between regulators and regulatees requires a more flexible and sometimes informal set of tools. Do you agree? How would you define “better outcomes”? For example, think about what type of regulatory tool would more likely reduce carbon emissions from automobiles, trucks, and so on. If the EPA decides to regulate such emissions, what outcomes should be considered? Air quality? Global warming? Profit margins of the automobile companies?

3. Suppose an elected county “commission” creates and funds a “County Health Department.” The commissioners appoint a department head who in turn employs various subordinates, each with

responsibility for a different kind of health problem. One such division is called the “Division of Animal and Livestock Diseases.” The head of this division decides to issue the following rule, which the division head has published in the legal notice section of the local paper: “The maintaining of any pen or lot for the keeping of swine within 200 feet of any dwelling or potable water supply shall not be permitted.”

A parent living in that town gives his son a pet piglet for Christmas. When the pig gets too smelly and unmanageable to live in its cardboard box in the house—that is, about December 26—the boy moves the pig under the house, where it lives in the crawlspace running the entire length of the house. Assume the family lets the pig out to play from time to time, and a cranky neighbor becomes offended by the sight. Assume also the pig badly startles more than one jogger trotting down the street late on winter afternoons.

Pigs are one of nature’s most efficient converters of grain into meat, and this pig soon becomes equal in size, footspeed, and friendliness to a St. Bernard dog. The neighbor complains to the Health Department and, one March afternoon, a Ms. South, of the Animal and Livestock Disease Division, appears at the door. She informs the family that the pig must go because, she says, “You can’t keep pigs in the county. It’s against the law.”

When the parent reads the rule in question she immediately sees she can make at least three arguments that the rule does not apply to her son’s pig:

- (i) The crawlspace under the house is not a pen or lot for the keeping of swine.
- (ii) “Swine” is a plural word and does not cover keeping one pet pig.
- (iii) The purpose of the rule is clearly to prevent noise and nose pollution, water pollution, and so on, and one pet pig simply cannot do the harm the act seeks to prevent. Therefore the rule does not apply.

List separately all the questions of (a) regulatory law and (b) administrative law this story might raise. Invent further facts if they will help.