



1983

# Afterword

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## Recommended Citation

Stephen Breyer, *Afterword*, 92 *YALE L.J.* (1983).  
Available at: <https://digitalcommons.law.yale.edu/ylj/vol92/iss8/13>

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# Afterword

Stephen Breyer†

This conference on the New Deal's fiftieth anniversary has focused not on the New Deal's basic philosophy or the administration of particular programs, but on the general problems of the administrative state. The very fact that one might have a successful conference with such a focus is interesting, for it tells us what is *not* on the public agenda of debate. We have not discussed the New Deal's major public works programs—the TVA, the WPA, and their successors. We have not discussed its major benefit program, social security. We have talked about regulation in general, but not about the regulation of securities or of the minimum wage. And the discussion of the frailties of our labor law, while interesting, sounds theoretical, for there is no serious political effort to repeal the National Labor Relations Act.

We have not talked more about the New Deal's substantive programs mostly because these programs are a well-accepted part of modern government. Their general acceptance may reflect, as Stewart suggests, the compatibility at a deep level of principles underlying both the New Deal and its more “laissez faire” predecessors.<sup>1</sup> It may reflect simple pragmatic success in satisfying human needs. Or it may reflect the passage of time. Whatever the reason, debate about most New Deal programs concerns not “whether,” but “how much.” It is the Great Society, not the New Deal, which is the object of political attack. Even radical curtailment (or modification) of New Deal regulation of transportation and communication is taken as a critique of particular programs, not as an indictment of government intervention in general. Some old programs, such as securities regulation, are generally considered to work well; some new problems, such as environmental pollution or worker safety, are generally considered to require some form of governmental intervention.

Instead, our discussion has focused on the great structural problem of administrative control, a problem not solved by the New Deal or since: Who will regulate the regulators? How, through the wise use of management techniques, internal procedures, or court controls, can we assure a better regulatory product? How can we increase the likelihood that governmental intervention—in whatever form—will in fact help the people it

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1. See Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 YALE L.J. 1537 (1983).

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is supposed to benefit? The papers presented do not answer these questions, nor do they seek directly to do so. Yet they are relevant to the question, for they discuss at length the efficacy of “court control” as an answer. And it is of particular interest that so many of them reflect disillusionment with, or even hostility to, reliance upon courts and legal actions as effective instruments for bringing about either more efficient, or more fair, administrative actions.

This mood—if it exists—is consistent with New Deal administrative philosophy. After all, New Deal lawyers and judges sought to free the agencies from judicial control—a control that they believed interfered with sound substantive policymaking. Courts were to defer to agency “expertise” on matters of substance unless those adversely affected could show that under no plausible state of the world would the agency’s decisions seem reasonable.<sup>2</sup> Procedural controls were minimal as well. Agencies could legislate simply by giving notice and allowing comment—or less. The SEC promulgated Rule 10(b)(5) without a record and with minimal debate. A judicial gloss did not put meat on these very bare procedural bones until well after the Second World War.

In part, the minimal nature of procedural control reflected a belief that the agencies, not the courts or a set of procedures or some collection of special advocates, would best protect the “public interest.” For example, a carrier could (and still can) demand a hearing and seek court review when the commission suspended a tariff, thereby raising rates, but the consumer could not (and still cannot) demand a hearing when the commission refused to suspend the tariff and thus allowed the rate increase.<sup>3</sup> There was thought to be no *need* for a hearing in the latter case, for the *agency*, not a consumer group, would protect the “public interest.” Fairness demanded only that the carrier, when adversely affected, have the opportunity to create a record and to protest to the courts.

Insofar as there was a felt need to control the agencies, it was presumed that that need would be satisfied by the “canons” of the regulatory discipline itself. One need only read the words of Dean Landis<sup>4</sup> and his contemporaries<sup>5</sup> to detect the prevalent belief that “regulation” and “administration” were branches of “science,” to be practiced by professionals. That

2. See Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review under the Administrative Procedure Act and Other Federal Statutes*, 75 COLUM. L. REV. 721 (1975).

3. See generally *Southern Ry. v. Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979).

4. See J. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938).

5. See, e.g., PRESIDENT’S COMMISSION ON ADMINISTRATIVE MANAGEMENT, *ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES* (1937) (Brownlow Committee); U.S. COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, *THE INDEPENDENT REGULATORY COMMISSIONS* (1949) (Hoover Commission).

science, practiced conscientiously by professional civil servants, would lead to sound, fair outcomes. As with lawyers, doctors, architects, or accountants, "self-regulation" was thought to be the proper mode of regulation for those who practiced regulation as a craft.

By the late 1960's and 1970's this view had broken down. Students of the subject had little confidence in the scientific accuracy of agency decisionmaking. But they found no consensus as to either regulatory ends or means. Some felt that agencies were "captured" by those they were to regulate.<sup>6</sup> Others felt that agencies fanatically pursued their single missions with tunnel vision and without common sense.<sup>7</sup> Still others felt that agencies were too often lazy, unfair, mistaken, or all three.<sup>8</sup> Regardless of the theory, different groups, for different reasons, argued that one or another agency was "out of control" and acting "against," rather than "in," the public interest. Along with diminished confidence in the effectiveness of "internal control" came an increased demand for increased court supervision of agency decisionmaking.<sup>9</sup> And, as the papers in this Symposium show, the courts responded with increased scrutiny of individual decisions, increased attention to procedural requirements, and increased liberality in allowing the assertion of claims against the government.

The suggestion that I find implicit in much that has been said here is that courts are unlikely to expand much further their efforts to control agency behavior. This suggestion does not reflect doubt about the need for such control. It is not difficult to find examples of such need. The suggestion does reflect skepticism, however, about the courts' *ability* to provide further controls. For example, to what extent can courts significantly affect agency behavior by carefully reviewing for substantial evidence, denials of disability benefits or findings of anti-union motivated discharges? Fiss' article, in accurately describing the problem of increasing court bureaucracy,<sup>10</sup> suggests that the judge's role in this area is inevitably limited. A judge can do little more in such a case than read the record and ask if the result is reasonable. The records are lengthy and the number of such cases vast. Given the enormous judicial workload, which has doubled in the last five years in our circuit to 200 cases per appellate judge annually,<sup>11</sup> these cases are prime candidates for delegation. In run of the mill

6. See, e.g., R. FELLMETH, *THE INTERSTATE COMMERCE OMISSION: THE PUBLIC INTEREST AND THE ICC* (1970); T. LOWI, *THE END OF LIBERALISM* (1969); J. TURNER, *THE CHEMICAL FEAST* (1970).

7. For a cross-section of criticisms of the regulatory process, see S. BREYER & R. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 106-35 (1979).

8. See *id.* at 32-35.

9. See generally S. BREYER, *REGULATION AND ITS REFORM*, 15-35, 341-68 (1982).

10. See Fiss, *Bureaucratization of the Judiciary*, 92 *YALE L.J.* 1442 (1983).

11. During the 12-month period ending June 30, 1982, 1,040 cases were filed in the First Circuit, see 1982 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED

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cases, a law clerk or an administrative staff member may be assigned initial responsibility for checking the record for “problems”; the individual judge’s decision thus becomes an “institutional” decision. The time needed to conduct a thorough review in all (or many) such cases is simply lacking.

To what extent can the courts control directly the substantive outcome of agency policy decisions? Judge Leventhal and Judge Bazelon have debated this question.<sup>12</sup> The former urges a “hard look” at certain types of substantive agency decisions;<sup>13</sup> the latter is skeptical of the courts’ abilities.<sup>14</sup> Yellin’s paper too is skeptical of the “hard look” approach, at least where scientific questions are involved.<sup>15</sup> Moreover, scientific factors may be so mixed with ethical, political, or related matters that a special scientific “court” like the one Yellin proposes, schooled in “science” alone, would not necessarily help. Yellin’s observations are equally applicable to areas outside the hard sciences. For evidence of the difficulty that courts have in bringing about substantive changes in agency policy, one need only review the efforts of the District of Columbia Circuit to affect the substance of television regulation.<sup>16</sup> A similar review of the Supreme Court cases related to the regulation of natural gas suggests that a court is no more qualified than an agency to determine the substance of regulatory decisions.<sup>17</sup>

To what extent can courts instead control agency behavior through “generosity” in allowing judicial review, in finding private causes of action, and in providing procedural protections? The Shapiro and Mashaw papers together suggest that, here too, a court’s impact is inevitably limited. Shapiro notes the expansion of court review in the areas of formal and informal rulemaking and in formal adjudication.<sup>18</sup> He notes that there is room to offer more extensive review of informal adjudicatory deci-

STATES COURTS 190, compared with only 563 during the 12-month period ending June 30, 1977, see 1977 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 300.

12. See *Ethyl Corp. v. EPA*, 541 F.2d 1, 66-68 (D.C. Cir.) (Bazelon, C.J., concurring), cert. denied, 426 U.S. 941 (1976); 541 F.2d at 68-69 (Leventhal, J., concurring).

13. 541 F.2d at 68-69 (Leventhal, J., concurring). Leventhal had coined the “hard look” standard six years earlier in *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).

14. 541 F.2d at 66-68 (Bazelon, C.J., concurring).

15. See Yellin, *Science, Technology, and Administrative Government: Institutional Decisions for Environmental Decisionmaking*, 92 YALE L.J. 1300 (1983).

16. See, e.g., *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971); *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971), clarified, 463 F.2d 822 (D.C. Cir. 1972). These cases are discussed in S. BREYER & R. STEWART, *supra* note 7, at 377-98.

17. See, e.g., *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *Atlantic Refining Co. v. Public Serv. Comm’n*, 360 U.S. 378 (1959). These cases are discussed in S. BREYER & R. STEWART, *supra* note 7, at 421-45.

18. Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1491-95 (1983).

sionmaking, but in doing so he calls attention to the vast number of such decisions made each day, the vast diversity of subject matter, the need for speedy agency determination, the limited nature of court resources and the slowness with which courts move.<sup>19</sup> In other words, the institutional nature of the court decisionmaking process makes it difficult to see how the courts can expand the role of judicial review in this area in an effective, principled manner.

Mashaw provides a set of institutional explanations for what some might see as a "retreat" from such "strong" judicial review.<sup>20</sup> At bottom he sees the strength of the courts as lying in their ability to decide issues fairly. Accuracy is less important. Judges base their decisions on a record, which typically reflects a trial, a hearing or some other procedure under which lawyers present evidence and make arguments. The system is fair (at least if the contesting parties have roughly equivalent resources), for the parties have a roughly equivalent chance to present their own side of the story and to contest that of their opponents. It may even be reasonably accurate as to typically adjudicative matters, such as who did what to whom. But these typical courtroom procedures may be less accurate when applied to contested, uncertain matters of legislative policy. Is saccharine really dangerous? What about carnauba wax? A record on these subjects made at length by paid advocates reflects what they choose to put into it. Such a record, once made, is not readily changed, and the judge who reviews the record cannot use the telephone to clarify obscurity or to discover, by calling different experts, the present state of scientific knowledge. Where what really counts from society's point of view is that a matter be decided *fairly*, court-type procedures and judicial review are likely to help. Justice, after all, not truth, is the aim of the judicial system. Where society, however, is vitally interested in the *accuracy* of the result, and particularly where legislative facts are involved, one must be less sanguine about the usefulness of legalistic procedures.

Finally, we are left uncertain even about the extent to which the courts can help by imposing "due process" type procedural requirements when particularly important interests are at stake. Simon's paper casts doubt upon the substantive effectiveness of those requirements in the very area where they might have been thought most useful, namely in offering protection to those entitled to minimum-income cash grants.<sup>21</sup> Such hearings may, of course, limit the number of agency mistakes, but they also encourage the agency to promulgate detailed eligibility rules which, in turn, help legally to justify its actions. Simon points out that detailed rules may

19. *Id.* at 1500-19.

20. Mashaw, "Rights" in the Federal Administrative State, 92 YALE L.J. 1129, 1150-58 (1983).

21. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198 (1983).

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lead to increased fairness in one sense: Like cases are more likely to be treated alike. But he also notes that detailed rules leave less room for agency discretion, making it more difficult for the agency to pay attention to the special needs of the client. Detailed rules diminish fairness in that special sense encapsulated in the ancient tradition of “equity”—a notion that often suggests treating seemingly similar cases differently. The need for equity is a significant check on the ability of the courts to provide better outcomes by insisting upon the creation of agency rules, or even by imposing procedural requirements that encourage the creation of such rules.

In sum, we have heard a description of courts limited in their power to control agencies, limited in part by their limited resources, in part by the difficulty of obtaining adequate information, in part by the slowness of their reactions, in part by other tendencies to create rules that work by limiting discretion, and in part by their institutional tendency to sacrifice equity for law. Moreover, all these tendencies reflect institutional biases which are unlikely to be overcome and which, for other reasons, should not be changed.

The growing disenchantment—if I correctly catch the tone of the discourse—with the courts’ abilities to control the work of the agencies suggests a reaffirmation of what are by now traditional principles of administrative law. But it does not suggest that we should abandon the effort to control the agencies or to improve their work. Rather, one can hear calls for controls of a more sophisticated sort. Yellin, for example, suggests creating a career path for scientists of promise that will bring them into the agencies in positions where their knowledge is likely to influence policy.<sup>22</sup> Ackerman provides us not only with a framework for thinking about regulatory problems, but also with a demonstration of the importance of teaching lawyers, administrators, and judges statistics as well as economics.<sup>23</sup> Such an effort would make easier the implementation of his other suggestion—that policymakers be induced or required to consider the implications of their decisions by using an economic framework for analysis.<sup>24</sup> Such a framework, while not determining any particular outcome, may at least help to eliminate from consideration outcomes that are likely to prove counterproductive.

Government intervention, then, is well accepted in principle; the need for controls on, and improvements of, many governmental programs is evident; the courts’ abilities to provide the needed checks are highly limited. The exploration of more sophisticated, individualized control techniques,

22. Yellin, *supra* note 15, at 1327–31.

23. Ackerman, *Foreword: Law in an Activist State*, 92 *YALE L.J.* 1083, 1111 (1983).

24. *Id.* at 1124.

based upon knowledge of substantive subject matter, thus seems warranted. The key words, however, are "individualized" and "substantive." For, if this conference has a "lesson," it is one of return to the New Deal's skepticism of the value of judicial control—a skepticism concerning both general and procedural approaches to the problem of controlling the administrative state. The New Deal created programs pragmatically. In doing so, it created a new kind of government with a new set of problems. This conference suggests that we must approach those problems pragmatically. We shall not find generalized, legal answers to such questions as where and whether government intervention is needed, what type of intervention is appropriate, or how that intervention can be controlled in practice. Rather, armed with appropriate intellectual tools, we are now urged to search for individual, substantive answers.