ALLOCATING POWER BETWEEN AGENCIES AND COURTS: THE LEGACY OF JUSTICE BRANDEIS

G. EDWARD WHITE*

The discipline of administrative law has long been characterized by a preoccupation with the task of striking the appropriate balance between judicial and administrative activity. Justice Louis D. Brandeis, whose career on the Supreme Court was contemporaneous with the rise of the administrative agency to a position of institutional prominence, played a preeminent role both in fixing the focus of administrative law on agency-court interaction and in formulating an analytical approach for the coordination of that interaction. In this Article, Professor White reviews and analyzes Justice Brandeis' contributions to the development of a pragmatic theory for the allocation of power between courts and agencies. He concludes with a discussion of how those contributions have been variously endorsed, modified, or discarded by contemporary courts and commentators.

INTRODUCTION

From the turn of the last century, when administrative law was only beginning to acquire an academic and professional identity,¹

* Assistant Professor of Law, University of Virginia. B.A. 1963, Amherst College; M.A. 1964, Ph.D. 1967, Yale University; J.D. 1970, Harvard University. The author is indebted to Robert M. Walmsley of the University of Virginia School of Law, Class of 1974, for assistance in the preparation of this Article.

1. See generally T. GOODNOW, *COMPARATIVE ADMINISTRATIVE LAW* (1893); T. GOODNOW, *PRINCIPLES OF ADMINISTRATIVE LAW OF THE UNITED STATES* (1905); Schwartz, *The Administrative Agency in Historical Perspective*, 36 *IND. L.J.* 260 (1961).

HEREAFTER THE FOLLOWING CITATIONS WILL BE USED IN THIS ARTICLE:

J. BLUM, *THE REPUBLICAN ROOSEVELT* (1954) [hereinafter cited as BLUM];

K. DAVIS, *ADMINISTRATIVE LAW TREATISE* (1958) [hereinafter cited as DAVIS];

L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* (1965) [hereinafter cited as JAFFE].

through more recent debate concerning the proper function of independent regulatory agencies as agents of government in America,² a recurrent theme of conventional wisdom has been that most administrative law issues can be viewed as revolving around the allocation of power between administrative agencies³ and reviewing courts. Questions involving the scope of judicial review of agency action or the doctrines of primary jurisdiction and exhaustion of administrative remedies, may, under this approach, be viewed essentially as inquiries into whether it is more desirable to have a court or an agency exercise supervisory control over some aspect of American life. Even the language employed by the courts in considering such questions, invariably glossed with such terms of art as "expertise," "administrative discretion," and "substantial evidence," suggests a significant preoccupation with power allocation. A court's deference to the "expert" judgments of an agency can be thought of as an implicit concession of supervisory power; a court's refusal to find that an agency determination has been based on "substantial evidence" can be read as implying suspicion of the agency's supervisory competence.

This method of analyzing the interaction between administrative agencies and reviewing courts has been so dominant in administrative law in the last thirty years⁴ that any other approach may seem eccentric. Yet the allocative approach reflects concerns that were not the primary interests of the founders of the modern regulatory agency and tends to deemphasize issues which at one time were the major battlefields of administrative law—issues such as the constitutionality of legislative delegations of lawmaking power to agencies and the worth of uniform national regulatory standards.⁵ The contributions of one man, Justice Louis D. Brandeis, reoriented the focus of administrative law toward

2. Compare Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713 (1969), with Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183 (1973).

3. The term "agency" is used in this Article to designate three different kinds of administrative bodies: independent regulatory agencies such as the Interstate Commerce Commission; executive agencies such as the Post Office or the Department of the Interior; and "hybrid" agencies, which combine the characteristics of the first two types of agency. For a more detailed discussion and explanation of the "hybrid" agencies, see text accompanying notes 159-62 *infra*. The term is also used more generally as a synonym for "administrative body" itself. Whether the term is being used in its general sense or as a means of describing a particular type of administrative body should be apparent from the context in which it appears.

4. See generally T. COOPER, *ADMINISTRATIVE AGENCIES AND THE COURTS* (1951); R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* (1941); JAFFE.

5. See text accompanying notes 34, 35 *infra*. See generally Davis, *supra* note 2, at 713; Merrill, *Standards—A Safeguard for the Exercise of Delegated Power*, 47 NEB. L. REV. 469 (1968).

the appropriate allocation of functions and power between courts and agencies. The gradual elevation of Brandeis' approach to such a dominant position and the contemporary ramifications of that development are the subjects of this Article.

I. THE ORIGINAL CONCEPTION OF REGULATORY AGENCIES:

THE HEPBURN ACT DEBATE

The Early ICC and the Progressives

The first modern federal regulatory agency, the Interstate Commerce Commission, was the logical outgrowth of efforts by the states in the early 1880's to deal with abuses generated by the unrestrained growth and power of the great railroads. The device employed by the states in this endeavor was the special study commission.⁶ Like those early state commissions, the ICC, as originally structured, was not necessarily intended to be a permanent body: the impetus for its creation arose from inequitable discrepancies in railroad rates, and it was generally believed that as the contours of that problem changed, the Commission's mandate might also vary significantly.⁷

Shortly after its emergence, the ICC became severely hampered in its operations as a result of narrow judicial interpretations of the permissible scope of the Commission's activities. In *ICC v. Cincinnati Railway*,⁸ decided in 1897, the Supreme Court held that the Commission had neither the power to prescribe minimum or maximum interstate railway rates nor the power to obtain a court order directing the railroads to follow past rates which the Commission had previously determined to have been "reasonable and just."⁹ Additionally, in two other decisions in that same decade, *Chicago, Milwaukee & St. Paul Railway v. Minnesota*¹⁰ and *Smyth v. Ames*,¹¹ the Court resorted, respectively, to procedural and substantive due process analyses to sharply curtail the ability of state commissions to regulate intrastate railroad rates. The first of these two cases maintained that the reasonableness of railroad rates was ultimately a judicial question under the requirements of procedural due process,¹² while the latter case held

6. For a discussion of the essentially ad hoc nature of these early state commissions, see R. CUSHMAN, *THE INDEPENDENT REGULATORY COMMISSIONS* 22-23 (1941).

7. *Id.* at 64-65.

8. 167 U.S. 479 (1897).

9. *Id.* at 511.

10. 134 U.S. 418 (1890).

11. 169 U.S. 466 (1898).

12. In *Chicago Railway*, the Court held unconstitutional a Minnesota statute regulating railroad rates because it made the state commission's determination conclusive

that the due process clause required commission-established rates to yield a "fair return" on a "fair present value."¹³ Both decisions reflected the Court's underlying concern for the potential reach of regulatory bodies. As stated by the Court in *Smyth v. Ames*, "[t]he idea that any legislature . . . can conclusively determine for the people and for the courts that what it . . . authorizes its agents to do . . . is consistent with the fundamental law . . . is in opposition to the theory of our institutions."¹⁴

After the turn of the century, however, the concept of regulation by administrative agency was revived as a result of its adoption by a more general and more enduring wave of reform that came to be known as Progressivism. One ingredient of Progressivism was a re-examination of the effectiveness of the traditional institutions of American government and the subsequent formulation of specific proposals for reform. In diverse ways and in varying degrees, the legislative and judicial branches of government were, according to the Progressives, unresponsive to the needs of the time. The Progressives asserted that legislatures, especially at the state level, were corrupt and partisan, furthering "special interests" at the expense of the public; they also contended that the judiciary was hopelessly isolated from social change and therefore unmindful of the new challenges facing governing institutions in early twentieth-century America.¹⁵ The Progressives resolved to meet these difficulties not only by fighting special interests in the legislatures and by calling for a shift from "mechanical" to "sociological" jurisprudence,¹⁶ but also by expanding the powers of

with respect to the reasonableness of those rates. Stressing the procedural infirmities of the statute, the Court stated:

It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which . . . cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice. 134 U.S. at 457.

13. In *Smyth* the Court held Nebraska's railroad rate regulation statute unconstitutional. Instead of basing its decision upon procedural defects, as was the case in *Chicago Railway* (see note 12 *supra*), the Court found the Nebraska statute defective in that the rates fixed therein did not permit a fair return on the fair market value of property employed for the public use. 169 U.S. at 546-47.

14. *Id.* at 527.

15. See generally H. CROLY, *THE PROMISE OF AMERICAN LIFE* 278 (1909); C. MCCARTHY, *THE NEW IDEA* 179 *et seq.* (1910).

16. See Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 608-10 (1908). A primary attraction of mechanical jurisprudence was its supposedly precise scientific method of administration through deductive logic. Roscoe Pound maintained that to base legal conclusions on preliminary assumptions was neither scientific nor precise. He urged a shift to a "pragmatic jurisprudence based on an empirical examination of human conditions rather than on a priori assumptions." *Id.* at 610.

regulatory agencies. Appropriately structured and staffed administrative agencies, they believed, could encompass the blend of technical expertise, enlightenment, and impartiality needed to solve the complex problems besetting an evolving industrial society. Through such non-partisan agencies, the "best men" of the time could return to public service; in the operations of such institutions, the skills of modern business management could be combined with the old-fashioned virtues of honesty and integrity.¹⁷

The *Cincinnati Railway* and *Smyth v. Ames* decisions¹⁸ had thus dealt jarring blows to the Progressives' great expectations for the independent regulatory agency in general and the ICC in particular. Robert LaFollette, a leading Progressive, called the *Cincinnati Railway* decision "crushing," asserting that it robbed the ICC of its power to fix rates and left it "worse than helpless."¹⁹ When Theodore Roosevelt became President, he noted that although the ICC technically had power over the railways, its power "was either not exercised at all or exercised with utter inefficiency."²⁰ The original purpose of the Interstate Commerce Act, Roosevelt maintained, had been subverted.

The Hepburn Act Debate

Accordingly, in 1904 President Roosevelt proposed legislation²¹ which was later to become the Hepburn Act of 1906;²² the provisions of that bill presaged the revitalization of the independent regulatory agency as a unit of government. The Hepburn bill proposed that the ICC be vested with the power to decide what should constitute a reasonable railroad rate in those circumstances wherein an existing rate had been challenged and, after a full hearing, had been found to be unreasonable.²³ This proposal was consistent with President Roosevelt's view that administrative agencies could be utilized to serve as expert watchdogs on large-scale industrial enterprises, penalizing inefficient and criminal practices and rewarding efficient and honest ones. Moreover, it was good politics: the country at large was increasingly disturbed by discriminatory practices in the shipping of

17. See generally White, *The Social Values of the Progressives: Some New Perspectives*, 70 S. ATLANTIC Q. 62, 73-74 (1971) (citing authorities).

18. See text accompanying notes 8-14 *supra*.

19. R. LAFOLLETTE, LAFOLLETTE'S AUTOBIOGRAPHY 172 (1960).

20. T. ROOSEVELT, AN AUTOBIOGRAPHY 473 (1919).

21. Hepburn bill, H.R. 12987, 59th Cong., 1st Sess. (1904).

22. Act of June 29, 1906, ch. 3591, 34 Stat. 584, as amended 49 U.S.C. §§ 1-40 (1970). For a full discussion of Roosevelt's role in the passage of the Hepburn Act, see BLUM 87-105.

23. Hepburn bill, H.R. 12987, 59th Cong., 1st Sess. (1904).

goods on railroads and increasingly suspicious of growing industrial combinations.²⁴ During the summer and fall of 1905, Roosevelt made speeches which suggested that the most effective way of dealing with "the monopoly power" was to curb it through administrative regulation before the industrial combines grew so massive that not even the courts could control them.²⁵ Augmented power in the Interstate Commerce Commission, he argued, "would put a stop to abuses of big corporations . . . would destroy monopoly, and make the biggest business man in the country transform squarely to the principles laid down by the American people, while at the same time giving fair play to the little man"²⁶ Rhetoric of this kind responded to a widespread public desire for solutions to the alleged abuses of "monopolists," a category in which the nation's large railroads were often placed.²⁷ The House of Representatives, also attentive to this sentiment, passed the Hepburn bill in February, 1906, by a nearly unanimous vote.²⁸

The Hepburn bill then went to the Senate. There it was debated until May, when it was passed after the addition of an amendment introduced by Senator William Allison of Iowa and backed by Roosevelt.²⁹ The story of the bill's tortuous journey through the Senate is a familiar one, filled with suggestions of intrigue and political trade-offs.³⁰ But a central aspect of the Senate debate has often been minimized: the question of judicial review of the ICC's decisions. Although that question dominated the legislators' attention in their deliberations, it has been considered almost inconsequential in contrast to

24. See, e.g., G. MOWRY, *THE ERA OF THEODORE ROOSEVELT* 133, 198-99 (1958).

25. T. ROOSEVELT, *THE WORKS OF THEODORE ROOSEVELT, PRESIDENTIAL ADDRESSES AND STATE PAPERS* 369-71 (address in Chicago, Ill., May 10, 1905), 405-07 (address in Williamstown, Mass., June 22, 1905), 448-55 (address in Chautauqua, N.Y., Aug. 11, 1905), 462-65 (address in Richmond, Va., Oct. 18, 1905), 492-95 (address in Atlanta, Ga., Oct. 20, 1905), 562-67 (address to a joint session of Congress in Washington, D.C., Dec. 5, 1905). See also BLUM 87-90. Roosevelt was forced to turn to the regulatory commission as a means of controlling trusts because of the failure of previous antitrust legislation. The Sherman Antitrust Act, July 2, 1890, ch. 647, 26 Stat. 209, as amended 15 U.S.C. §§ 1-7 (1970), directed at monopolies, had been emasculated by the Supreme Court in such cases as *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

26. T. ROOSEVELT, *supra* note 20, at 232.

27. See, e.g., BLUM 86; D. BURTON, *THEODORE ROOSEVELT* 136-38 (1972).

28. 40 CONG. REC. 2303 (1906) (yeas 346, nays 7). See text accompanying notes 22, 23 *supra*.

29. See BLUM 92-105. While granting the courts power to "enjoin, set aside, annul, or suspend any order" of the ICC, the Allison Amendment failed to specify the grounds for suspension. *Id.* at 103 (quoting Allison Amendment). This "purposeful obscurity" allowed advocates of both narrow and broad review to claim victory. *Id.* at 102. See text accompanying notes 50-52 *infra*.

30. G. KOLKO, *RAILROADS AND REGULATION 1877-1916* at 127-44 (1965).

"the large and varied significance of the whole railroad measure."³¹ One commentator has described the judicial review question as an issue revealing only "detailed matters of emphasis" rather than differences "of principle and basic political philosophies."³²

To relegate the controversy over judicial review to a position of peripheral significance, however, is to misconstrue the meaning of the Hepburn Act debate. While other serious issues certainly present themselves in retrospect—such as the role of the Hepburn Act in establishing a trend of governmental regulation of private enterprise or the possibility that the Act may have furthered the interests of those parties it purported to regulate—these matters were not of primary concern to Congress in the context of the actual hearings on the bill. Those hearings reflect less concern with the relative effectiveness of regulation than with the question of which institutional forum—agency or court—should be the primary regulator. This latter question was at the heart of the Hepburn Act debate.³³ It forced consideration of the purposes and functions of regulatory agencies in the American system of government; it tested the commitment of Progressives, particularly those trained in the law, to the agency forum as a viable legal institution.

The controversial nature of the Hepburn bill was immediately emphasized by its opponents in the Senate. On February 28, Ohio Senator Joseph B. Foraker made a lengthy address challenging the constitutionality of the bill on three grounds: first, the bill assumed that Congress had power to make rates, which in Foraker's view it did not;³⁴ second, the bill combined executive, legislative, and judicial powers in an administrative body, hence violating the separation of powers envisaged by the Constitution;³⁵ third, the bill constituted an illegal delegation of legislative power, since the provision that rates established by the Commission be "just and reasonable and fairly remunerative" was too vague to serve as a governing standard.³⁶ Foraker also attacked the bill's provision establishing the scope of judicial review, which was to be confined to the question of whether orders by the

31. BLUM 96.

32. G. KOLKO, *supra* note 30, at 129.

33. *See, e.g.*, 40 CONG. REC. 4431-46 (1906) (debate on a proposed amendment to the Hepburn Act, limiting judicial review of ICC orders to the question of whether such orders violated constitutional due process by being confiscatory, thus excluding from judicial review any inquiry into whether ICC orders were in fact just and reasonable).

34. *Id.* at 3105.

35. *Id.* at 3108.

36. *Id.* at 3112.

Commission had been "regularly made."³⁷ He contended that rate-making was a legislative act and that, by delegating a ratemaking power to the Commission, Congress had vested the Commission with a legislative discretion for determining what was a reasonable rate. Foraker argued that, absent a contrary statutory provision, such legislative discretion could only be overturned by the courts in those instances where the rate was fixed so high that it was extortionate as to the shipper or so low that it was confiscatory as to the carrier. Hence, he maintained, where the challenged rate fell between these two extremes, the Commission's decisions would be final. The unavailability of judicial review in these "intermediate" rate cases disturbed him; the courts had "been from the beginning of the common law the sure bulwark of the liberties and rights of the Anglo-Saxon race. . . . the conservative, steadying, reassuring factor in American Government."³⁸ That the Hepburn bill demonstrated an unwillingness to allow the courts unrestricted scope of review was in Foraker's judgment "enough not only to excite distrust [of the bill] . . . but also to condemn it."³⁹

Twelve days later Senator Charles A. Culberson of Texas countered Foraker's attacks. After a lengthy discussion of the history of the commerce clause, Culberson concluded that since the congressional power to regulate transportation necessarily implied the power to fix the conditions under which transportation might be conducted, the delegation of that regulatory power to an agency logically implied the attendant power in that agency to fix rates of transportation.⁴⁰ Further, he rationalized the combination of legislative and judicial functions in the ICC as necessary to protect the public in some degree against "the selfishness of . . . a body of capitalists who control the great systems."⁴¹ Finally, Culberson asserted that the standard prescribed by the delegation from Congress to the ICC—that all rates fixed be "just and reasonable"—was "as clear as . . . any other general principle" and was a test that had been so repeatedly declared by judges as to be regarded as a part of American law.⁴²

Senator Culberson was also concerned about attempts to insert in the bill a more detailed provision for judicial review. Such an inser-

37. *Id.* at 3117. The concept of limited judicial review of administrative decisions was not unprecedented at this time. It had been previously advanced in *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902).

38. 40 CONG. REC. 3118 (1906).

39. *Id.*

40. *Id.* at 3678.

41. *Id.* at 3682.

42. *Id.* at 3678.

tion, in his opinion, might extend the jurisdiction of the courts "to matters of business and policy respecting rates with which [they should] not concern themselves, because it is no part of the judicial function"⁴³ In Culberson's opinion, the courts could review rates alleged to be extortionate or confiscatory despite the absence of a statutory provision, but they had no authority to interfere with rates established under a "just and reasonable" standard except when the rates in question were so patently unreasonable as to justify the claim that they were equivalent to confiscation.⁴⁴

Of the four points⁴⁵ raised by Foraker and disputed by Culberson, the Senate quickly focused on the scope of judicial review of the Commission's decisions. As the debate passed through March to April and May, opponents of the bill conceded the delegation and combination-of-functions points in order to concentrate their energies on attempts to amend the bill to secure broad review. The central issue of the debate was whether rates established by the ICC which were not clearly confiscatory but which were arguably less than "just and reasonable and fairly remunerative" should fall within the permissible scope of judicial review. Advocates of the bill, among them such Progressives as Francis Newlands of Nevada and Alexander Clay of Georgia, wanted to deny the courts any power to inquire into whether the Commission's rates were in fact just and reasonable;⁴⁶ they contended that judicial review should be confined to the confiscatory situation,⁴⁷ where it was compelled by the Constitution.⁴⁸ Articulating the prime rationale of the supporters of narrow review, Senator Newlands noted that most of the amendments proposed by those favoring broad review gave the courts the right to review not only Commission action in determining rates but also ICC orders relating to practices and regulations. "I fear," he proclaimed, "that the result of [the amendments] will be to turn over to the judiciary review of the legislative discretion of the Commission"⁴⁹

Newlands' remarks dramatizing the conflict between advocates of narrow review and proponents of broad review were made on March

43. *Id.* at 3680.

44. *Id.* Cf. *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902).

45. See text accompanying notes 34-42 *supra*.

46. 40 CONG. REC. 4435 (1906) (remarks of Senators Clay and Newlands).

47. *Id.* at 4434 (remarks of Senator Clay).

48. See, e.g., *Chicago, M. & St. P. Ry. v. Minnesota*, 134 U.S. 418, 458 (1890). For a discussion of the holding in the *Chicago Railway* case, see note 12 *supra*.

49. 40 CONG. REC. 4435 (1906). For further remarks on this issue by Senator Newlands, see *id.* at 4445.

29. Three weeks later the parties appeared to be at an impasse, and the Hepburn bill's chances of passage seemed dubious. Shortly thereafter, however, through a mysterious set of circumstances,⁵⁰ a compromise was reached, whereby the Senate adopted the Hepburn bill with an amendment introduced by Senator Allison. The amendment contained language that explicitly granted review of Commission decisions to the federal district courts, struck out the troublesomely vague "fairly remunerative" phrase from the delegation provision of the Hepburn bill,⁵¹ but did not define the scope of review.⁵²

Advocates of narrow review claimed victory, and in a sense the absence of a specific authorization for the courts to reexamine Commission orders or practices gave hope to those who believed in agency autonomy. As a practical matter, however, the Allison amendment left the courts with a relatively free hand to define their relationship to regulatory agencies. It also provided judges with an opportunity to assess the effectiveness of agencies in solving social problems and to test that effectiveness against the alternative of a judicial solution—to define, in other words, the limits of agency power and, by implication, the correlative extent of judicial power. In one of the ironies of American politics, the legislation which was to revitalize the regulatory agency as an alternative forum for conflict resolution simultaneously set the stage for subsequent judicial limitation of agency autonomy. Those who had welcomed the emergence of regulatory agencies, in part because of their loss of faith in the courts' ability to promote social justice, faced the prospect that further agency growth after 1906 would be subject to the judiciary's willingness to tolerate supervisory power in agencies.

While the outcome of the Hepburn Act debate suggested that future controversies in administrative law would tend to be reduced to exercises in institutional power allocation, such did not prove to be the case. Other questions debated by Senators Foraker and Culberson—notably those concerning the permissibility of combining constitutionally separate powers in one agency and those involving the required specificity of standards governing powers delegated to an agency⁵³—were still unanswered. Thus, threshold questions of consti-

50. Senator Aldrich, the leader of the Senate forces opposing the Hepburn bill, inexplicably retreated from his position. Aldrich may have made the political judgment that further opposition might mobilize support for an even more radical proposal by Senator LaFollette, while the Allison Amendment was at least ambiguous. See BLUM 101-03.

51. See text accompanying note 36 *supra*.

52. BLUM 102.

53. See text accompanying notes 35, 36 *supra*.

tutionality remained; consequently the regulatory agency had not yet achieved legitimacy as an institution of American government. Further, the original conception of regulatory agencies as being independent of both courts and legislatures, uniform in practice and procedures, and zealously opposed to corruption and influence-peddling among regulatees persisted in some quarters,⁵⁴ affecting court decisions as well as public opinion. An allocation calculus, weighing the respective powers of courts and agencies, was slow to materialize in the face of these distractions. It gained momentum largely from the accident of Louis Brandeis' appointment to the Supreme Court.

II. JUSTICE BRANDEIS AND THE ALLOCATION CALCULUS

The Rise of the Regulatory Agencies

In the ten years between the passage of the Hepburn Act and Brandeis' confirmation as a Supreme Court Justice, regulatory agencies became a more pervasive feature of American government. Woodrow Wilson, with whom Brandeis had developed a close relationship during the 1912 presidential campaign, had taken office determined to insure that large corporate enterprises would not be allowed complete freedom either to grow to gigantic proportions or to dominate their respective markets. After some internal debate, the Wilson administration ultimately settled on the use of federal regulatory agencies as checks upon industrial enterprise.⁵⁵ In 1914 Brandeis participated in the drafting of legislation⁵⁶ creating the Federal Trade Commission, whose original mandate was to oversee and suppress industrial practices which tended to further unfair competition. Complementing the Federal Trade Commission Act was the Clayton Act,⁵⁷ likewise enacted in 1914, which was designed to prohibit practices that tended to substantially lessen competition. By 1916 Progressives were able to maintain that the major industrial and financial centers of power in the country were each subject to agency supervision: the railroads,

54. See H. CROLY, *PROGRESSIVE DEMOCRACY* 364-67 (1914). See also White, *supra* note 17, at 73-74 (citing authorities).

55. H. FORD, *WOODROW WILSON: THE MAN AND HIS WORK* 192-94 (1916); M. UROFSKY, *A MIND OF ONE PIECE: BRANDEIS AND AMERICAN REFORM* 90-92 (1971).

56. Federal Trade Commission Act, Sept. 26, 1914, ch. 311, 38 Stat. 717, as amended 15 U.S.C. §§ 41-46, 47-58 (1970). For discussion of Brandeis' role in the development of the provision establishing the FTC, see A. LIEF, *BRANDEIS, THE PERSONAL HISTORY OF AN AMERICAN IDEAL* 287-91 (1936); M. UROFSKY, *supra* note 55, at 85-92.

57. Act of Oct. 15, 1914, ch. 323, 38 Stat. 730, as amended 15 U.S.C. §§ 12-13, 14-21, 22-27 (1970).

through the ICC; the trusts, through the FTC, Clayton Act, and revived enforcement of the Sherman Act;⁵⁸ and the banks, through the Federal Reserve Board, created in 1913.⁵⁹

Brandeis had been closely identified with these policies⁶⁰ and was regarded as favorably disposed toward governmental supervision of free enterprise. But his attitude toward the regulatory agency form of government as such was somewhat ambivalent. His initial critiques of the trusts and the banking industry had focused upon the structural deficiencies of excessive size and overcentralization endemic to those institutions rather than upon the need for federal regulation of their business practices.⁶¹ In accordance with this view, Brandeis had originally favored fragmentation of large industrial combinations and had advocated placing regulatory power in the states rather than in the federal government.⁶² He had gone on record before his appointment to the Court as favoring employee participation in industrial management;⁶³ yet he had simultaneously demonstrated some skepticism about the place of regulatory agencies in furthering that goal. "[N]o commission," Brandeis wrote in 1914, "however able, fearless and diligent its members, can . . . supply the incentive and the eagerness to please the public . . . which [result] from the necessities of competition."⁶⁴ Although he played a leading role in drafting legislation establishing the Federal Trade Commission,⁶⁵ he had initially argued that it be limited to fact-finding and advisory powers.⁶⁶ Administrative regulation, he believed, might "prevent positive abuses, like discriminations, or rebating, or excessive rates"; but it could neither

58. The Supreme Court, however, showed little sign of cooperating with the government in Sherman Act cases. See, e.g., *United States v. United States Steel Corp.*, 251 U.S. 417 (1920).

59. The Federal Reserve Board was established pursuant to the Federal Reserve Act, Dec. 23, 1913, ch. 6, 38 Stat. 251.

60. In addition to his work on the Federal Trade Commission and Sherman Acts, Brandeis had testified at hearings before the Pugo Committee on banking reform and had written an influential polemic attacking the banks and the trusts. See L. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* (1933) (originally published in book form in 1914).

61. See generally L. BRANDEIS, *BUSINESS—A PROFESSION* (1933); L. BRANDEIS, *supra* note 60, at 47-62.

62. See L. BRANDEIS, *supra* note 60, at 310.

63. 8 COMM'N ON INDUS. RELATIONS, FINAL REPORT AND TESTIMONY, S. DOC. 415, 64th Cong., 1st Sess. 7659-60, 7662, 7664 (1916).

64. L. BRANDEIS, *BUSINESS—A PROFESSION* 295-96 (1933).

65. See note 56 *supra*.

66. A. LIEF, *supra* note 56, at 219-20; cf. Rublee, *The Original Plan and Early History of the Federal Trade Commission*, 11 PROCEEDINGS OF ACADEMY OF POL. SCI. [666]-[667] (1926).

"make an inefficient business efficient" nor "supply initiative or energy."⁶⁷

In general, Brandeis supported or criticized the activities of governmental institutions in accordance with their apparent ability to foster social objectives that he believed to be desirable. Among these goals were the preservation of self-reliance and individual initiative; internal efficiency in business management, which flowed, in Brandeis' view, from moderate size and sound accounting; and the preservation of certain moral values, such as temperance, honesty, and industry.⁶⁸ To these beliefs Brandeis added a conviction that policy decisions ought to be grounded on carefully analyzed empirical data. These attitudes, over time, would lead him to view the function of regulatory agencies somewhat differently than did the original sponsors of the Hepburn Act.

Defining "Administrative" Functions

A potential consequence of the Progressives' enthusiasm for administrative agencies, as noted, was the emergence of a sphere of governmental influence that could not be invaded by the courts. The creation of permanent regulatory agencies implied a judgment that those bodies were somehow eminently qualified to supervise certain areas of American life. But this judgment had largely been expressed in generalities: by 1916 there had been little definition, by the judiciary or otherwise, of the specific functions that could be called uniquely "administrative" or especially amenable to the exercise of agency power. With the proliferation of federal regulatory agencies during the Wilson administration, a need for a more precise articulation of the rationale for agency control emerged. One of Brandeis' major judicial contributions was the formulation of a set of criteria to aid in the process of meeting this need.

Development of the Doctrine of Primary Jurisdiction

The doctrine of primary jurisdiction,⁶⁹ by which agencies, as opposed to courts, are deemed the appropriate entities to make initial decisions that are in some sense adjudicative, was one of the early devices

67. L. BRANDEIS, BUSINESS—A PROFESSION 295 (1933). But see also L. BRANDEIS, THE CURSE OF BIGNESS 122-24 (1934) (suggesting that "prohibition of monopoly" coupled with "regulation of competition" would be sufficient to preserve and restore competition).

68. See, e.g., L. BRANDEIS, BUSINESS—A PROFESSION xlii-lvi (1933).

69. See 3 DAVIS §§ 19.01-.09.

utilized for establishing agency autonomy. An initial justification for the doctrine was uniformity. In the 1907 case of *Texas and Pacific Railway v. Abilene Cotton Oil Co.*,⁷⁰ for example, Justice White employed the following analysis in deciding that preliminary resort to the ICC was necessary to determine the reasonableness of an interstate carrier rate:

For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, . . . a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached . . . by the various courts called upon to consider the subject as an original question.⁷¹

The Interstate Commerce Act of 1887,⁷² White maintained, had as its primary purpose the elimination of localized rate discriminations; if courts could revise a uniform ICC rate, that purpose would be defeated.⁷³ Following *Abilene*, additional Supreme Court cases⁷⁴ focused on the uniformity requirement and distinguished between instances wherein, as in *Abilene*, a rate was attacked as unreasonable⁷⁵ and instances wherein a carrier was charged with violating an existing

70. 204 U.S. 426 (1907).

71. *Id.* at 440.

72. Act of Feb. 4, 1887, ch. 104, 24 Stat. 379, as amended 49 U.S.C. §§ 1 *et seq.*, 301 *et seq.*, 901 *et seq.*, 1001 *et seq.*, 1231 *et seq.* (1970).

73. 204 U.S. at 440-41. The result in *Abilene* seemed contrary to the concurrent jurisdiction which the Act of 1887 had seemingly given to the courts:

[A]ny person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any District or Circuit Court of the United States of competent jurisdiction Act of Feb. 4, 1887, ch. 104, § 9, 24 Stat. 379, as amended 49 U.S.C. § 9 (1970).

The Supreme Court held, however, that this provision granted to the courts concurrent jurisdiction only as to the questions which would not necessitate prior action by the Commission. This construction was compelled because,

[i]f the power existed in both courts and the Commission to originally hear complaints on [the reasonableness of rates], there might be a divergence between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible. 204 U.S. at 441.

In Professor Davis' opinion, "[t]he *Abilene* case is probably one of the outstanding examples in all Supreme Court history of 'interpretation' which leads to a result diametrically opposed to clear and unambiguous statutory language." 3 DAVIS § 19.02, at 7.

74. *E.g.*, *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121 (1915); *Robinson v. Baltimore & O.R.R.*, 222 U.S. 506 (1912).

75. *E.g.*, *Robinson v. Baltimore & O.R.R.*, 222 U.S. 506, 509 (1912).

common law custom or practice.⁷⁶ In the latter class of situations, "where the decision did not involve the determination of matters calling for the exercise of the administrative power and discretion of the Commission,"⁷⁷ the state courts retained concurrent jurisdiction.

The uniformity rationale for upholding agency decisions became increasingly inadequate, however, as the Progressives formulated more ambitious schemes of regulation through agencies. Enthusiasts for agency government came to be interested in more than avoiding geographic inequalities in the shipment of interstate goods; they were concerned with nothing less than the revitalization and modernization of the American governmental apparatus.⁷⁸ In their minds, carving out an area of agency supremacy was equated with the infusion of expertise, efficiency, and integrity into the governing process. The primary jurisdiction doctrine constituted, in their view, a recognition by the courts of the inherent superiority of regulatory agencies in the performance of certain tasks. In the hands of Justice Brandeis, the doctrine began to receive a more elaborate and extended justification: he viewed the exercise of primary jurisdiction as a necessary means of agency self-definition.

In *Northern Pacific Railway Co. v. Solum*,⁷⁹ a 1918 decision, Brandeis considered the question of whether a Minnesota state court, in the absence of initial consideration by the ICC, could investigate the reasonableness of the rate-setting practices of railroads operating in interstate commerce passing through Minnesota. At the turn of the twentieth century, the Northern Pacific operated two routes in Minnesota, one intrastate and the other interstate, each of which charged the same rates. Minnesota passed a statute in 1907 fixing intrastate rates at a figure lower than those charged by the Northern Pacific. The Northern Pacific ultimately reduced its intrastate rates to conform with the statute, but it maintained its interstate rates at their previous levels and continued its past practice of routing outbound shipments from some Minnesota cities via the interstate rather than the intrastate line. Several shippers on the Duluth line brought suits in a Minnesota state

76. *E.g.*, *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121 (1915). In *Puritan*, there was an alleged breach of the carrier's common law duty to furnish a reasonable number of cars as well as a violation of a state statute prohibiting discrimination between shippers in furnishing cars. *Id.* at 130-31. The Court was of the opinion that the latter factor was irrelevant because the liability would be the same in either event. *Id.* at 132.

77. *Id.* at 130.

78. H. CROLY, *supra* note 54, at 364-77; H. CROLY, *supra* note 15, at 362. See also White, *supra* note 17, at 73-74 (citing authorities).

79. 247 U.S. 477 (1918).

court to compel the railroad to select the cheaper intrastate route for their future shipments and to recover the rate differential which resulted from past routing on the interstate line. The state court found that under common law the Northern Pacific owed a duty to transport shipments over the line which would give the shipper the benefit of the cheaper rate.⁸⁰ On appeal to the United States Supreme Court, the Northern Pacific contended that the duty of the carrier was in part defined by the "general practices" of carriers dealing in interstate commerce and that the reasonableness of those practices was an administrative question which could not be anticipated by the state court. The aggrieved shippers, citing the *Abilene Cotton Oil Co.* case,⁸¹ urged that preliminary resort to the ICC was only compelled in those cases involving the questions of whether a particular rate was unreasonable or whether a particular practice was discriminatory.⁸²

Writing for the Court, Brandeis upheld the Northern Pacific's assertion of the primary jurisdiction doctrine, stating that the reasonableness of its practice of shipping over the interstate route was "an administrative question . . . of perhaps considerable complexity."⁸³ He noted that the carrier's obligations required it to consider "its own [interests] and those of the general public" as well as "to deal justly with the shipper," adding that in some circumstances "[r]esort to the more expensive route may be justified."⁸⁴ The duty of the carrier, in Brandeis' judgment, was not an absolute one: the standard was the reasonableness of the practice, "all things considered."⁸⁵ Brandeis rejected the contention that the primary jurisdiction doctrine was limited in applicability to cases involving the reasonableness of a particular rate or the discriminatory effects of particular practices. Such instances merely represented the minimum reach of the rule.⁸⁶

The rationale for preliminary jurisdiction in *Northern Pacific* was not notable for its clarity. Brandeis did attempt to characterize situations where the "interest of the general public" was involved as being better suited to agency consideration, and he sought to identify questions involving complicated economic analysis as issues especially suitable for "administrative" determination. But the opinion balked at

80. *Solum v. Northern Pac. Ry.*, 133 Minn. 93, 96, 157 N.W. 996, 997 (1916).

81. See notes 70-73 *supra* and accompanying text.

82. 247 U.S. at 480, 482-83.

83. *Id.* at 483.

84. *Id.* at 482.

85. *Id.*

86. *Id.* at 483. In resolving the primary jurisdiction issue, Brandeis also resolved affirmatively the larger question of whether the federal forum was appropriate for regulation in that type of case. *Id.* at 483-84.

attempting an actual definition of administrative functions or an indication of the proper scope of agency power—other than to state that “any practice of the carrier which gives rise to the application of a rate” was a matter for initial agency consideration.⁸⁷ This latter language, however, was not related to the underlying purposes or functions of agencies; the decision did little more than state one example of an “administrative” question.

In the 1922 case of *Great Northern Railway v. Merchants Elevator Co.*,⁸⁸ Brandeis was faced with a similar problem of definition; this time his response was somewhat more specific. Like *Northern Pacific*, this case arose from railroad activities in Minnesota: the plaintiff shipper brought an action in state court claiming that the railroad had overcharged it in violation of the railroad’s own tariff schedule. The case appears to have been an attempt to test the power of the ICC to construe tariff provisions, since the sum in dispute was a mere eighty dollars.⁸⁹ The Great Northern claimed that primary resort to the ICC was required for a determination of which of two conflicting tariff provisions applied; the shipper claimed that the court could take initial jurisdiction over the entire controversy. Counsel for the Great Northern argued that uniformity in tariff rates was impossible to achieve unless the proper construction of tariffs was determined by the ICC and that the purpose of the Act establishing the ICC was “to secure and preserve uniformity” in the regulation of commerce.⁹⁰

Brandeis conceded that uniformity was the paramount purpose of the Commerce Act, but held that the attainment of uniformity did not require preliminary resort to the Commission in every case where the construction of a tariff was in dispute. In so holding, he attempted to characterize the kinds of questions that gave rise to the doctrine of primary jurisdiction. If the controversy involved “the exercise of administrative discretion” or “issues essentially of fact,” preliminary resort to the Commission was necessary.⁹¹ Both of these criteria addressed the relative ability of courts and agencies to deal with the precise question at issue. If answering the litigated point required the exercise of “discretion in technical matters,” such as the assessment of large amounts of conflicting factual evidence, the decision should be entrusted to an administrative body of experts. Similarly, if a consideration of extrinsic factual evidence was necessary to establish a

87. *Id.* at 483.

88. 259 U.S. 285 (1922).

89. *Id.* at 288.

90. *Id.* at 290.

91. *Id.* at 295-96.

usage of trade or to impart special meaning to words, the agency was the appropriate initial forum. Questions of "fact" should be resolved by commissions as a preliminary matter, since their resolution necessitated the gathering and analyzing of empirical data, a task which agencies were better prepared to perform. In *Great Northern*, however, Brandeis felt that there was no occasion for the exercise of administrative discretion and that no "fact" was in controversy. Resolution of the dispute before the court merely called for a construction of the words of the tariff, used in their "ordinary" sense, and the application of that construction to a set of undisputed facts.⁹² In such circumstances, the Justice held, preliminary resort to the administrative agency was unnecessary.

The *Northern Pacific* and *Great Northern* decisions, viewed together, employed three criteria to define the circumstances which could trigger the requirement of preliminary agency jurisdiction: whether the questions presented were by their nature "administrative," whether "administrative discretion" was involved, and whether the questions presented involved issues of "fact" or "law." Brandeis tended, especially in *Great Northern*, to equate administrative discretion with technical expertise and thus suggested that he shared in some measure the desire of the Progressives to infuse government with independent, scientific-minded experts, whose special competence was the justification for their authority. The Justice did not discuss the other criteria in depth. His distinction in *Great Northern* between questions of fact and questions of law, for example, turned on whether words were used in their ordinary sense or as terms of art. But it was difficult to ascertain from that distinction whether the primary jurisdiction doctrine could be invoked upon the mere allegation that words in a statute had specialized import for a particular group of persons.

Nevertheless, Brandeis' decision in *Great Northern* and his brief remarks in *Northern Pacific* moved him towards a fuller articulation of the justifications for the agency form of government. In subsequent cases in which the primary jurisdiction doctrine was not involved, Brandeis maintained his interest in defining administrative functions. In his dissent in *Pennsylvania v. West Virginia*,⁹³ a 1923 decision, he elaborated on a distinction he had made in *Great Northern* between "legislative or administrative" functions, on the one hand, and judicial functions, on the other.⁹⁴ His purpose was to describe the special

92. *Id.* at 290-92, 294.

93. 262 U.S. 553 (1923).

94. *Id.* at 605-23 (dissenting opinion of Brandeis, J.).

character of regulatory agencies and to justify entrusting them with authority in particular areas.

The case involved suits by Pennsylvania and Ohio to enjoin West Virginia from enforcing an act of its legislature which was designed to divert or retain, for the benefit of West Virginia consumers, natural gas that otherwise would have gone to consumers in adjacent states through established channels of interstate commerce. The West Virginia statute created a public service commission with power to prevent exportation of gas from the state when, in the commission's judgment, local demand equaled or exceeded the amount of gas produced.⁹⁵ At the time the suits were brought, the commission had taken no action with regard to the distribution of natural gas. A majority of the Court, through Justice Van Devanter, nonetheless held the statute unconstitutional as an impermissible interference with interstate commerce.⁹⁶

Brandeis dissented, maintaining that a determination of what constituted an equitable allocation of natural gas among contiguous states required an investigation of the production and demand, both actual and potential, in each state; an estimate of the undeveloped gas territory; and a review of the business judgment of those managing the gas companies. Such determinations "would be of the character which calls for the informed judgment of a board of experts."⁹⁷ A court clearly could not undertake such determinations: equitable distribution was a "task of . . . complexity and difficulty" that should be allocated to "an interstate public service commission with broad powers, perfected administrative machinery, ample resources [and] practical experience."⁹⁸

This complexity-expertise rationale was coupled in *Pennsylvania v. West Virginia* with a suggestion that certain problems gave rise to the need for what have come to be called "on-going" solutions. Public service regulation, in Brandeis' judgment, was a field in which the "controlling body" was confronted with "baffling" factors and changing circumstances that required "continuous supervision and control."⁹⁹ Courts were simply not equipped to make continual investigations into the variables influencing the growth and change of particular sectors of the economy; they functioned to decide specific controversies presented to them at given times. The investment of resources required

95. Act of Feb. 10, 1919, ch. 71, [1919] W. Va. Acts.

96. 262 U.S. at 596-600.

97. *Id.* at 621-22 (dissenting opinion of Brandeis, J.).

98. *Id.* at 623.

99. *Id.* at 621.

to accumulate the kind of information necessary to make an informed decision as to the proper distribution of natural gas among West Virginia and neighboring states was beyond the capability of the courts, whose officers were generalists and advocates rather than experts and fact-finders. Brandeis therefore concluded that the administrative agency—with its presumed abilities to cope with complex economic and social problems, to consider and digest the multiple and diverse interests affected within its area of expertise, and to provide ad hoc and even experimental solutions—was the proper forum in which to address such controversies.

In sum, Brandeis developed four principal criteria to aid in defining administrative functions and in determining whether or not the exercise of primary agency jurisdiction was indicated in a particular context: (1) whether the complexity of the social problem necessitated that it be addressed by a body of experts with specialized training; (2) whether the question presented was one that could be conclusively resolved in one sitting or was one that required the continued involvement over time of the decision-making body; (3) whether the controversy presented questions that were by their very nature "administrative"; and (4) whether particular issues raised were issues of "fact" or "law." The first two criteria served to define the third by providing justifications for why a particular set of issues required for its proper resolution the use of techniques that in themselves served to define the functions and purposes of an administrative agency. The fourth criterion defined "facts" in a special way: evidence that, for reasons suggested in the other criteria, an agency was peculiarly suited to assess.¹⁰⁰

These criteria became the principal devices for allocating power between courts and regulatory agencies in modern America and, beyond that, a source of post-World War II justifications for the regulatory agency form of government.¹⁰¹ From them have been derived

100. The last criterion implicitly raised the question of whether there were limits on the power of regulatory agencies to gather facts as opposed to analyzing them. In *United States v. Abilene & S. Ry.*, 265 U.S. 274 (1924), Brandeis considered this question and held, for the Court, that an agency could not rely in making its decisions on evidence that had not been introduced into the record.

101. In its report, the Hoover Commission's Task Force on Regulatory Commissions emphasized the expertise of the commissions and their continuing involvement in the problem being regulated as justifications for Congress' increasing reliance on the agency form of government. See COMM. ON INDEPENDENT REGULATORY COMM'NS, TASK FORCE REPORT ON REGULATORY COMMISSIONS PREPARED FOR THE COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT 19, 22-23 (1949) (app. N). See also Pritchett, *The Regulatory Commissions Revisited*, 43 AM. POL. SCI. REV. 978, 982 (1949).

the standard arguments on behalf of agency control: expertise, public-mindedness, flexibility, and the peculiar ability to gather and analyze factual information.¹⁰² In developing these arguments, Brandeis had gone far toward formulating a rationale for the continued presence of regulatory agencies in the American governmental process. As current social problems came to be perceived as "complex," expertise, efficiency, and flexibility came to be viewed as the appropriate institutional virtues required for their solution. Yet Brandeis, as indicated earlier,¹⁰³ was not unqualifiedly enthusiastic about the virtues of the agency form of government; he viewed it, rather, as having distinct limitations. Even as his judicial decisions served to augment the powers of agencies, they served to articulate a rationale for judicial limitation of those powers.

The Scope of Judicial Review of Administrative Action

If the doctrine of primary jurisdiction may be said to have invited the formulation of a rationale for agency power, questions involving the scope of judicial review of agency activities stimulated discussion of the limits of that power. Whereas the former doctrine determines whether the court or the agency should make a particular decision in the first instance, the scope of review determines those issues which the court may finally resolve after the agency has initially decided them.¹⁰⁴ The literature on judicial review of administrative action suggests that decisions defining the scope of review can be viewed, ultimately, as indications of the extent of public confidence in an agency's governing abilities.¹⁰⁵ Whether an agency or a court is the preferred supervisory unit for a particular area of conflict-generating activity may be determined by the extent to which particular qualities, relevant and desirable in that area, are perceived as characteristic of the one unit or the other. At the time of Brandeis' appointment to the Court, however, the concept of agency government largely remained an unknown quality; and the general perception of agency performance had not yet hardened into fixed opinion. While regulatory agencies had become an approved part of the system of American government, the justifications for their power had been only vaguely formulated, and the limitations upon that power had yet to be fixed.¹⁰⁶ There thus existed a substantial interface between the areas of clearly

102. See generally 4 DAVIS §§ 29.01-30.14.

103. See text accompanying notes 60-67 *supra*.

104. See 3 DAVIS § 19.01; 4 *id.* § 29.01.

105. See generally 4 DAVIS § 30.09; JAFFE 123-24.

106. See text accompanying notes 53-54 *supra*.

administrative and clearly judicial activity; the extent to which the agencies would come to preempt that area was to be largely determined by the courts' own definition of the proper scope of judicial review of administrative action. Justice Brandeis was quick to seize the initiative in formulating that definition.

The Uncertain Standards of Union Pacific. Before Brandeis assumed his seat, the Supreme Court formulated some tentative conditions governing the scope of judicial review in *ICC v. Union Pacific Railroad*,¹⁰⁷ decided in 1912. The Court, through Chief Justice White, concluded that orders of the ICC were "final" and nonreviewable in the courts unless they were beyond the power which the agency could constitutionally exercise, beyond its statutory power, or based on a "mistake of law."¹⁰⁸ Such guidelines were vague indeed. They suggested that the courts, on an appeal from agency action, had considerable province to investigate both the statutory scheme creating the agency involved and the particular practice in issue. In a railroad rate case, for example, a court could determine whether the ICC rate was so low as to amount to a confiscation of property without due process of law¹⁰⁹ or decide whether Congress had delegated power to the ICC to interpret provisions in tariffs.¹¹⁰ The *Union Pacific* decision left a whole range of agency determinations potentially vulnerable to judicial reversal. Brandeis' decisions in subsequent cases involving the scope of judicial review of administrative action attempted to clarify this uncertain agency-court relationship.

Agency Discretion and Judicial Responsibility: Fixing the Focus of Review. In the 1919 case of *Skinner & Eddy Corp. v. United States*,¹¹¹ the Supreme Court was asked to determine whether a decision by the ICC to increase rates on iron and steel products shipped from Pittsburgh to Seattle could be reviewed by a district court before the shippers had exhausted their administrative remedies. Prior to *Skinner*, a 1910 amendment to the Hepburn Act had declared that railroad carriers who had reduced their rates "in competition with a water route or routes" could not subsequently increase rates in the absence of an ICC finding that the proposed increase rested "upon changed condi-

107. 222 U.S. 541 (1912). In *American School of Magnetic Healing v. McAnulty*, 187 U.S. 94 (1902), the Court had previously addressed this issue, but the intervention of the Hepburn Act had rendered that holding nugatory.

108. 222 U.S. at 547.

109. Cf. *ICC v. Cincinnati Ry.*, 167 U.S. 479 (1897).

110. Cf. *Great N. Ry. v. Merchants Elevator Co.*, 259 U.S. 285 (1922), discussed in text accompanying notes 88-92 *supra*.

111. 249 U.S. 557 (1919).

tions other than the elimination of water competition."¹¹² In March of 1916, at the request of carriers forming connecting lines between Pittsburgh and Seattle, the ICC had approved a fifteen-cent-per-hundred-pound rate reduction on Pittsburgh-Seattle routes, in accordance with its then existing policy of allowing lower rates for overland routes to coastal terminals than the rates permitted for intermountain routes. At the same time, the Commission's order allowed the carriers to retain the higher rates to intermediate shipping points. The Commission's policy of permitting the carriers to charge these discriminatory rates had been thought justified by the serious competition from coast-to-coast water carriers previously faced by overland shippers to coastal ports.¹¹³ In response to pressures from intermountain merchants and carriers who claimed that the setting of lower rates for routes which terminated at coastal ports discriminated against them, the ICC reopened consideration of its March order. Among the grounds for reconsideration cited by the intermountain interests was the decline of water competition to coastal ports. The ICC held a hearing, determined that effective water competition between the coasts had virtually ceased, and in July rescinded the March order.¹¹⁴ The Commission then ordered the Pittsburgh-Seattle carriers to "reduce the degree of discrimination" in favor of shippers to coastal points and against the intermountain shippers.¹¹⁵

Accordingly, the Pittsburgh-Seattle carriers proposed an increase in rates to coastal points from sixty-five cents to ninety-four cents, effective in September, 1916. Skinner & Eddy, an Oregon corporation, protested to the ICC in August and asked for a hearing, claiming that the proposed increase in rates violated the Hepburn Act's provision forbidding an increase in rates unless the increase was justified by changed conditions other than the decline of water competition. The ICC denied Skinner & Eddy's request, but postponed until December the effective date for the ninety-four-cent rate. Subsequently the proposed rate was altered, with the ICC's consent, from ninety-four to seventy-five cents, effective the same date. On the date the revised rates were filed, Skinner & Eddy reiterated its claims and again requested a hearing; the ICC again denied the request.¹¹⁶ Skinner & Eddy then brought suit in the District Court of Oregon to enjoin

112. Act of June 18, 1910, ch. 309, § 8, 36 Stat. 539 (codified at 49 U.S.C. § 4(2) (1970)).

113. 249 U.S. at 560-61.

114. *Id.* at 558, 561.

115. *Id.* at 561.

116. *Id.* at 561-62.

the ICC from enforcement of its order granting the increased rates, alleging that in so doing the ICC had exceeded its statutory powers. The suit, heard by a three-judge court, was dismissed for failure to state a cause of action; and a direct appeal was taken to the Supreme Court.¹¹⁷

Brandeis, for the Court, held that the district court could immediately review the ICC's order without further proceedings before the Commission because the plaintiff's claim for relief went directly to the Commission's authority to issue the order rather than to the content of the order.¹¹⁸ He then proceeded to set forth the considerations which justified the Commission's approval of the proposed increase of shipping rates to coastal points.

Noting that the ICC had no power to prevent directly the setting of unreasonably low rates to eliminate competition, Brandeis explained that the 1910 Hepburn Act amendment,¹¹⁹ which limited the circumstances under which rates once reduced because of competition with water routes could thereafter be increased, was intended as a substitute deterrent to predatory price-cutting. But the earlier rate reduction made by the Pittsburgh-Seattle carriers, Brandeis pointed out, had not been an instance of such predatory behavior; rather, it had been made with the express approval of the Commission as a justifiable response to previously existing water competition. A reduction so made did not fall within the prohibition against subsequent rate increases embodied in the Act. In any event, as Brandeis noted, to freeze the Pittsburgh-Seattle rates at the lower level when water competition had virtually disappeared would tend to "ensure monopoly [rather] than preserve competition."¹²⁰ With railroad rates set so low, the feasibility of renewed water competition would be substantially reduced. Observing that the conditions which had once justified the lower rate level for railroad routes to coastal terminals no longer obtained, Brandeis concluded that the Commission's authority to relieve carriers from orders which had been "improvidently" granted or which had been based upon conditions no longer operative justified approval of the increased rates for the Pittsburgh-Seattle carriers.¹²¹

The *Skinner* decision demonstrated Brandeis' cognizance of the fact that, although flexibility and autonomy were prerequisites for ef-

117. See *id.* at 558-59.

118. *Id.* at 562-63.

119. Act of June 18, 1910, ch. 309, § 8, 36 Stat. 539 (codified at 49 U.S.C. § 4 (2) (1970)).

120. 249 U.S. at 568.

121. *Id.* at 567-69.

fective agency functioning, the courts could decide for themselves whether particular administrative practices furthered those goals. Agency jurisdiction did not have to be exhausted first in such a case because the appellant was challenging the agency's authority to take a particular course of action rather than the content of the action taken. Hence *Skinner* stood for the proposition that the prospect that certain agency practices exceeded the scope of the agency's authority could justify judicial review, as well as for the proposition that the exercise of power clearly delegated to an agency could be tempered by the agency's sense of justice and fairness.¹²² The procedure envisaged by the decision gave freedom to administrative bodies to modify their judgments on the basis of new information, but permitted the courts speedy review of those modifications.

The pattern of *Skinner* was followed in later Brandeis opinions defining the scope of judicial review of administrative action.¹²³ The Justice was willing to concede substantial deference to administrative expertise and flexibility within what he considered to be the proper confines of agency activity; yet he insisted that the courts vigilantly assure themselves that questions of ultimate judicial cognizance were not left to the discretion of the agencies. When appropriate, Brandeis weighed expertise and flexibility against the threat of administrative usurpations of individual rights. He was inclined to assume, in the regulatory context, that discretion in an administrative official was necessary to accomplish enlightened economic and social planning, but in contexts where individual rights hung in the balance, he was quick to see potential violations of the Constitution in discretionary activity.¹²⁴

Economic Rights and Individual Rights: A Double Standard for Judicial Review. Brandeis' tolerance of administrative discretion in economic regulation was illustrated by the decision in the *New England Divisions Case*,¹²⁵ where, writing for the Court, he sustained the constitutionality of an ICC order substantially increasing the New England railroads' share of the joint rates on freight moving between that section and the rest of the country. This increased allocation had been requested

122. *Id.* at 562, 567.

123. *E.g.*, *Crowell v. Benson*, 285 U.S. 22, 65-94 (1932) (dissenting opinion of Brandeis, J.); *New England Divisions Case*, 261 U.S. 184, 201-04 (1923); *Ohio Water Valley Co. v. Ben Avon Borough*, 253 U.S. 287, 292-99 (1920) (dissenting opinion of Brandeis, J.).

124. *See, e.g.*, *Ng Fung Ho v. White*, 259 U.S. 276 (1922); *Milwaukee Publishing Co. v. Burleson*, 255 U.S. 407, 417-36 (1921) (dissenting opinion of Brandeis, J.).

125. 261 U.S. 184 (1923).

by a group of New England railroads, who argued that their needs required a higher share of the joint rates which were apportioned between the New England carriers and the more prosperous carriers in other locales. The situation was further complicated by the fact that the overall joint rates had themselves been increased just prior to the request of the New England group. Carriers outside the New England area sued to enjoin the Commission's order, claiming that the new apportionment of rates to meet the needs of the New England carriers constituted a taking of their property without due process. Brandeis, in dismissing this argument, noted that the "just share" of a carrier was the amount "properly apportioned" out of a joint rate; and that amount could be fixed by the ICC at a figure which it found to be "just, reasonable and equitable."¹²⁶ He added that it might well be "just" to give prosperous carriers a smaller proportion of the increased rate than of the original rate.¹²⁷ Furthermore, courts could neither evaluate the weight of the evidence used by the ICC to arrive at its decision nor scrutinize the wisdom of the order entered,¹²⁸ even though the evidence on which the ICC had based its judgment was admittedly far from conclusive in this instance.¹²⁹ The only recourse the carriers had, if they believed an order of this kind to be unjust, was a petition to the ICC for modification of the order.¹³⁰

In contrast to the broad discretion he was willing to tolerate in the agencies' activities in the economic sphere, Brandeis soon demonstrated his conviction that close judicial reins were necessary to restrain administrative discretion in those areas where regulatory activity might intrude upon constitutionally protected freedoms. This dualistic approach to the proper scope of judicial review was suggested by Brandeis' dissent in the 1921 case of *Milwaukee Publishing Co. v. Burleson*,¹³¹ which had tested the power of the Postmaster General to deny second-class mail privileges to the *Milwaukee Leader*, a newspaper which had printed allegedly seditious material. That case also forced Brandeis to address the peripheral issue of whether the decisions of executive agencies, as distinguished from independent regulatory agencies, entailed the exercise of such broad discretion as to negate meaningful judicial review.

126. *Id.* at 195.

127. *Id.*

128. *Id.* at 204.

129. *Id.* at 200.

130. *Id.* at 204. See also *United States v. Abilene & S. Ry.*, 265 U.S. 274, 281 (1924).

131. 255 U.S. 407 (1921).

The Postmaster General maintained that his denial of the privileges rested on "representations and complaints from sundry good and loyal citizens of the United States" and from personal reading and consideration of the *Leader*, which suggested to him, "in the exercise of his judgment and discretion," that the publication systematically and continually violated the Espionage Act of 1917.¹³² He further claimed that his order denying the *Leader* access to second-class mail rates was "not subject to [being] reviewed, set aside, or controlled by a court of law" since it involved the exercise of judgment and discretion.¹³³ The Court majority, while ignoring the Postmaster General's contention that his actions were nonreviewable, conceded that "the conclusion of the head of an executive department . . . on such a question . . . will not be disturbed by the courts unless they are clearly of the opinion that it is wrong."¹³⁴ Having determined that the Postmaster General's conclusion that the Espionage Act had been violated was supported by substantial evidence, and having further upheld the constitutionality of the Act, the Court upheld the challenged order.

Brandeis, in an impassioned dissent, maintained that the Postmaster General had no power either to exclude the paper from the mails on the grounds given or to deny the publisher the second-class mail rate. The power of exclusion, in Brandeis' view, would make the Postmaster General "the universal censor of publications";¹³⁵ a denial of the use of the mails would be tantamount to a denial of the right of circulation. Rejecting the Government's argument that the maintenance of a second-class mail permit was a "privilege," Brandeis pointed out that the terms and conditions of the permit's existence had been defined by Congress and rested "wholly upon mandatory legislation"; accordingly, in the case of one who met those conditions, the "permit" became a "right," independent of the Postmaster General's discretion.¹³⁶ Brandeis further contended that an official's determination of whether the conditions prescribed by law for a certain rate existed was "a strictly judicial one, although exercised in adminis-

132. *Id.* at 420 (quoting return filed by Postmaster General). See Espionage Act of 1917, § 3, 18 U.S.C. § 2388(a) (1970).

133. 255 U.S. at 420 (quoting return filed by Postmaster General).

134. *Id.* at 413.

135. *Id.* at 423 (dissenting opinion of Brandeis, J.).

136. *Id.* at 427. In rejecting the "right-privilege" distinction in this context, Brandeis anticipated the later critics of that doctrine by some fifty years. See generally Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

tering an executive office."¹³⁷ It was not a function which either involved or permitted the exercise of discretionary power. Delegating discretionary power to an administrative official to police the mails raised a series of constitutional problems: it was arguably violative of the first amendment's guaranty of freedom of the press, of the fifth amendment's prohibition against taking property without due process of law, of the sixth amendment's provision for trial by jury in criminal cases, and of the eighth amendment's protection against cruel and unusual punishment.¹³⁸ "If, under the Constitution," Brandeis observed, "administrative officers may, as a mere incident of the . . . administration of their departments, be vested with the power to issue such orders as this, there is little of substance in our Bill of Rights"¹³⁹

The different outcomes reached by Brandeis in cases involving only the proper exercise of administrative expertise and flexibility as distinguished from those cases where individual rights were threatened by administrative usurpations suggest the difficulties he had with undifferentiated application of the model of agency government that had been conceived in the context of economic regulation of large industrial enterprises. For Brandeis, effective government in America depended on governmental institutions' having a clear sense of their purposes and limitations.¹⁴⁰ Regulatory agencies had been created to meet a special need that courts and legislatures were less capable of fulfilling: the resolution of social problems which, because of their recent origin, complexity, and changing shape, necessitated the ongoing attention of a body of experts. The experimental and amorphous character of solutions to these types of problems called for flexibility and discretion in the presiding officials; imposition by the courts of too rigid a set of functional limitations on those officials ran counter to the purposes of regulatory agencies. By and large, in Brandeis' view, the courts should be prepared to defer to administrative discretion in the performance of specialized regulatory tasks.

And yet Brandeis recognized that courts would be remiss in the performance of their own functions if they failed to provide a forum for review of administrative activity. More specifically, in the process of review, the courts had to insure that the discretionary acts of officers or commissions conformed to the specific purposes underlying the ad-

137. 255 U.S. at 428 (footnote omitted).

138. *Id.* at 429-30.

139. *Id.* at 436. Justice Holmes filed his own dissent and "agree[d] in substance with [Brandeis'] view." *Id.* (dissenting opinion of Holmes, J.).

140. See M. UROFSKY, *supra* note 55, at 57-59.

ministrative regulation, as well as to any constitutional limitations on the reach of the regulatory activity. Agency discretion to regulate prices in the transportation industry was one thing; agency discretion in the area of free speech was quite another. Discretion in the latter class of cases could not fairly be related to the purposes of administrative bodies as governing institutions; where purported extensions of agency discretion threatened civil liberties, the courts had an obligation to check those extensions.

The Fact/Law Dichotomy in Judicial Review. Brandeis believed, in sum, in a flexible, continuous agency-court partnership in which the "division of labor" would be made on the basis of the peculiar capabilities and ultimate responsibilities of the respective "partners." The "senior partner," the judiciary, would defer to the specialized competence of the agencies whenever its constitutional responsibilities, coupled with considerations of efficiency and expedition, permitted it to do so. But in matters of ultimate judicial responsibility, such as the custodianship of the protection afforded by the Bill of Rights, the courts would retain full supervisory and reviewing power, regardless of more pragmatic considerations.

This approach was illustrated in Brandeis' treatment of the traditional distinction, in cases involving judicial review of administrative action, between questions of law and questions of fact. In his opinion in the *Great Northern Railway* case,¹⁴¹ Brandeis had cited that distinction as one of the criteria to be employed in determining whether a particular issue was peculiarly amenable to initial agency resolution, so that the application of the doctrine of primary jurisdiction might be invoked. The distinction between questions of law and ones of fact has been employed to describe the paradigmatic functions of courts and agencies (the former deal with matters of "law," the latter "find facts"),¹⁴² but the distinction's value as an analytical device is limited. There are numerous instances, for example, where the finding of a particular fact suggests a particular legal result; this situation is commonly referred to as a question of "mixed law and fact."¹⁴³ If agencies are supposed to pass upon "the facts" and courts "the law," which body controls the mixed situation? The answer might appear to be, whichever body a given court on review decides is best suited to supervise a particular area of conduct, because of reasons conceivably extending well beyond the circumstances of an individual case. Bran-

141. See text accompanying notes 88-92 *supra*.

142. 4 DAVIS § 29.01.

143. See JAFFE 546-49.

deis, at least, employed the fact-law doctrine in this fashion.

A celebrated Brandeis decision on the scope of judicial review of fact determinations by executive agencies was *Ng Fung Ho v. White*.¹⁴⁴ Two Chinese immigrants who had been summarily deported by an immigration official challenged the decision on the ground that they were American citizens. Brandeis, writing for the Court, held that their claim of citizenship was entitled to judicial review, since jurisdiction in the immigration agency to pass on deportation cases existed if the person being evaluated was, in fact, an alien. Brandeis viewed the petitioners' claim of citizenship as "a denial of an essential jurisdictional fact";¹⁴⁵ placed in that context, the agency's determination of the issue could not be conclusive. *Ng Fung Ho* consequently modified an earlier decision, *United States v. Ju Toy*,¹⁴⁶ in which Justice Holmes had suggested that findings of fact by the immigration authorities under the procedures of the Chinese Exclusion Acts were conclusive. Therefore, Holmes asserted, such rulings were not subject to judicial review unless the hearing had been unfair, an erroneous rule of law had been applied, or the evidence had been inadequate. Brandeis, writing for the majority in *Ng Fung Ho*, rejected this suggestion: to deport one who claimed to be a citizen without review of that claim was an obvious denial of due process.¹⁴⁷

The *Ng Fung Ho* decision implied that Brandeis might have favored judicial review of all constitutionally significant fact determinations even in the absence of a provision for review in the applicable statute. But Brandeis did not consider review of an administrative finding of fact to be automatic in every instance where the result of the fact-finding allegedly would be to deprive the party involved of a constitutional right. This relativistic approach to the "fact-law" dichotomy was illustrated by his dissent in the 1920 case of *Ohio Valley Water Co. v. Ben Avon Borough*.¹⁴⁸ The Supreme Court of Pennsylvania had held that courts could not weigh the evidence used by the Pennsylvania Public Service Commission to set water rates, despite the fact that a water company had claimed that the rates were confiscatory.¹⁴⁹ The Supreme Court of the United States, through Justice McReynolds, reversed. Maintaining that the company had not been giv-

144. 259 U.S. 276 (1922).

145. *Id.* at 284.

146. 198 U.S. 253 (1905).

147. 259 U.S. at 284-85.

148. 253 U.S. 287 (1920).

149. *Borough of Ben Avon v. Ohio Valley Water Co.*, 260 Pa. 289, 103 A. 744 (1918).

en a proper hearing on the confiscation issue,¹⁵⁰ the majority further held that the courts, in reviewing commission orders fixing maximum rates, could consider questions of fact as well as questions of law.¹⁵¹

Brandeis, in dissent, alluded to the "established principle applied in reviewing the findings of administrative boards, that 'courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order.'" ¹⁵² A commission order, he noted, could not of itself create a limitation upon the scope of review, but there was nevertheless a presumption in favor of "the conclusion of an experienced administrative body reached after a full hearing."¹⁵³ In Brandeis' view the proper relationship between agencies and courts in matters such as those presented by the *Ben Avon* case was one in which courts accepted the facts found by the agency, even though the findings of fact served to determine whether or not there had been a taking of property. Courts could examine the entire record to determine whether what purported to be a finding of "fact" was "so involved with and dependent upon questions of law as to be in substance and effect a decision of the latter,"¹⁵⁴ but they should not pass upon the relative weight of conflicting evidence nor substitute their judgment on "pure matters of fact" for that of the agency.¹⁵⁵ Implicit in these concessions was the suggestion that where the constitutional repercussions of an agency's factual determination were *economic* in nature, a court could view those determinations as "pure matters of fact."

The agency-court partnership approach fashioned by Brandeis regarded distinctions drawn between the proper functions of each body not merely as linguistic smokescreens but as viable standards tied to the historical or legislative purposes of the respective institutions. Thus, in matters affecting economic regulation, while agency findings of fact might incidentally affect constitutional rights (such as the right to just compensation), regulatory agencies should be allowed broad discretion to make judgments based on specialized empirical fact-finding, absent an instance of patently confiscatory action.¹⁵⁶ Admittedly, the process of finding facts could function as a limited resolution

150. 253 U.S. at 291.

151. *Id.* at 289.

152. *Id.* at 297 (dissenting opinion of Brandeis, J.).

153. *Id.*

154. *Id.* at 298, quoting *Kansas City S. Ry. v. C.H. Albers Comm'n Co.*, 223 U.S. 573, 591-93 (1912).

155. 253 U.S. at 298-99 (dissenting opinion of Brandeis, J.).

156. See, e.g., *New England Divisions Case*, 261 U.S. 184 (1923), discussed in text accompanying notes 125-30 *supra*.

of questions of law, but this was not particularly troublesome for Brandeis: the purpose of these agencies, after all, was to regulate the excesses of industrial enterprises. In those areas of regulatory activity where civil liberties were involved, however, Brandeis tended to scrutinize executive agency action more carefully and to interpret the fact-law distinction more strictly.¹⁵⁷ Any decision, however closely related to the factual determinations usually delegated to the agencies, was for the courts alone to make if the determination had the ultimate effect of circumscribing the exercise of individual liberties guaranteed by the Constitution. Although he believed that government had a duty to maintain moral standards in public life, Brandeis was persistently wary of the potentially stifling effects of large institutions, public or private, on individual freedom.¹⁵⁸

Refinements on the Allocation Calculus

The proliferation of agencies continued throughout the early twentieth century; and after the election of Franklin Roosevelt in 1932, administrative agencies fairly exploded in number, size, and influence. The diverse character of these burgeoning agencies further accentuated an issue that had already captured Brandeis' attention. The issue, in its starkest form, was whether the partnership model of agency-court interaction could sensibly be applied outside the context of the standard independent regulatory agencies.

The early planners of the New Deal had created a type of administrative agency which was neither a permanent department of the executive branch nor an independent regulatory commission.¹⁵⁹ These agencies were viewed as a temporary, experimental extension of executive prerogative in an economic emergency and thus were somewhat more immune from continued legislative scrutiny than were the standard regulatory commissions. On the other hand, although some of these experimental agencies were equipped to perform fact-finding and adjudicative functions similar to those of independent regu-

157. Compare, e.g., *United States v. One Ford Coupe Auto.*, 272 U.S. 321 (1926), and *Lambert v. Yellowley*, 272 U.S. 581 (1926) (two decisions where Brandeis interpreted the power of the federal government to enforce the eighteenth amendment very broadly), with *Whitney v. California*, 274 U.S. 357, 372 (1927) (concurring opinion of Brandeis, J.) and *Gilbert v. Minnesota*, 254 U.S. 325, 334 (1920) (dissenting opinion of Brandeis, J.) (opinions in which Brandeis protested against governmental attempts to suppress freedom of speech and association).

158. See generally L. BRANDEIS, *THE CURSE OF BIGNESS* (1934).

159. See, e.g., R. CUSHMAN, *supra* note 6, at 374-89 (discussing the National Bituminous Coal Commission).

latory commissions, their ability to control the activities of their "regulatees" was not regarded as comparable to that of the existing regulatory commissions.

Because of their eclectic nature, these experimental New Deal agencies may accurately be described as "hybrids." Notable examples of these hybrid agencies were the National Recovery Administration, which proposed codes of conduct for the operations of private enterprise and applied limited sanctions in the event of noncompliance,¹⁶⁰ and the Public Works Administration, which centralized the functions of other New Deal agencies, distributed jobs to unemployed persons, and coordinated federal heavy construction projects.¹⁶¹ Although they exhibited great variety in function and organization, the hybrid agencies of the New Deal could all be fairly described as individualized responses to a national emergency, with loosely defined roles and uncertain futures.

Because of the vast delegation of legislative power involved in the operations of the hybrid agencies, they quickly became objects of political controversy.¹⁶² Since the framers of the New Deal assumed a wide-ranging public commitment to agency government, administrative law doctrine took on more than an academic character when applied in this context. The courts were forced therefore to determine the legal distinctions, if any, between the established independent regulatory commissions and the New Deal hybrids.

The 1932 case of *Crowell v. Benson*¹⁶³ had anticipated several of these issues. The case involved an appeal from the decision of a deputy commissioner of the United States Workmen's Compensation Commission. The Longshoremen's and Harbor Workers' Compensation Act of 1927¹⁶⁴ established this agency and gave it power to adjudicate disputes arising out of injuries suffered by certain employees while working upon the navigable waters of the United States.¹⁶⁵ Empowered with certain fact-finding and adjudicative powers,¹⁶⁶ the Commission was a "hybrid" agency, possessing neither the summary authority of an executive department nor the broad regulatory powers

160. *See id.* at 354-57.

161. *See id.*

162. *See* PEARE, *THE LOUIS D. BRANDEIS STORY* 266-69 (1970).

163. 285 U.S. 22 (1932).

164. Act of Mar. 4, 1927, ch. 509, 44 Stat. 1424 (codified at 33 U.S.C. §§ 901-50 (1970)).

165. 33 U.S.C. § 919(a) (1970).

166. *Id.* §§ 919(c), 923, 927.

of an independent commission. The principal issue on appeal in *Crowell* was the reviewability of a "finding of fact" by the deputy commissioner that one Knudsen, who had been injured while working on the navigable waters of the United States, was an "employee" within the meaning of the Act.¹⁶⁷ The statute made the employer liable for injuries without fault only if the injured person were such an "employee."¹⁶⁸ The employer, challenging the deputy commissioner's finding as to Knudsen's status as an "employee," sued in federal district court to enjoin enforcement of the Commission's award to Knudsen.¹⁶⁹ The district court granted a de novo hearing upon the facts and the law,¹⁷⁰ reversed the Commissioner's finding that the claimant had been in the employ of the petitioner, and restrained the enforcement of the award.¹⁷¹

A majority of the Supreme Court, through Chief Justice Hughes, held that the district court could make an independent determination of the fact of Knudsen's employment.¹⁷² In a remarkable opinion, which blended older conceptions of the inalienable rights of property holders with a recognition of the primacy of modern social welfare legislation limiting those rights, Hughes made it clear that Congress was not at complete liberty to legislate a general prescription of liability without fault in maritime cases. Only the special circumstances of the employment relation, the Chief Justice contended, had allowed no-fault workmen's compensation legislation to withstand due process challenges. Hence, he maintained, the fact of employment was not only a necessary factor in establishing the jurisdiction of the Commission but also an essential element of the statute's constitutional validity.¹⁷³ The employer could be required to compensate injured claimants, in the absence of any negligence on his part, only if they were truly his employees. The employer's rights and duties were inextricably bound up in that fact, as was the authority of the Commission to adjudicate such disputes. Consequently, the majority held that the determination of so crucial a fact could not be withdrawn from the purview of the courts.¹⁷⁴

167. 285 U.S. at 37.

168. 33 U.S.C. § 903(a) (1970).

169. *Benson v. Crowell*, 33 F.2d 137 (S.D. Ala. 1929), and *Benson v. Crowell*, 38 F.2d 306 (S.D. Ala. 1930) (supplemental opinion), *aff'd*, 45 F.2d 66 (5th Cir. 1930), *aff'd*, 285 U.S. 22 (1932).

170. 33 F.2d at 142.

171. *See* 285 U.S. at 37.

172. *Id.* at 65.

173. *Id.* at 54-56.

174. *Id.* at 64.

Brandeis dissented and, in the process, attempted to refute the problems inherent in the application of his agency-court partnership model to cases involving hybrid agencies.¹⁷⁵ He warmed to his task by differing with the majority over the proper construction of the Compensation Act (maintaining that Congress did not contemplate de novo proceedings in a trial court),¹⁷⁶ the correct interpretation of the due process clause (asserting that Congress could prescribe liability without fault outside the employment relation),¹⁷⁷ and the necessity of de novo judicial review when property rights are at stake (claiming that such review was not required under the circumstances).¹⁷⁸

Brandeis then sought to explain the use of the agency-court partnership concept in different contexts. One category of agencies he described as "fact-finding and fact-gathering tribunals" whose purpose was to "withdraw from the courts, subject to the power of judicial review, a class of controversies which experience has shown can be more effectively and expeditiously handled in the first instance by a special and expert tribunal."¹⁷⁹ Another category, which the majority had lumped with the first, encompassed "in no sense fact-gathering or fact-finding tribunals of first instance," but rather "tribunals of final resort within the scope of their authority."¹⁸⁰ The first category included the compensation commission in *Crowell v. Benson* and similar independent regulatory agencies, such as the Interstate Commerce Commission and the Federal Trade Commission; the "very function" of these agencies was to supplement the courts by making initial determinations of fact.¹⁸¹ Brandeis asserted that this supplementary relationship would be subverted by "permitting special reexamination in a trial court of so-called 'jurisdictional facts,'" a practice which the majority was sanctioning in *Crowell*.¹⁸² Such judicial scrutiny of "jurisdictional facts," he contended, was only appropriate in the case of the second category of agencies—the executive agencies charged with the resolution of matters "ordinarily outside of judicial competence" and "within the power of Congress to commit to conclusive executive determination."¹⁸³ Brandeis included in this category such administra-

175. *Id.* at 65-95 (dissenting opinion of Brandeis, J.).

176. *Id.* at 66-72.

177. *Id.* at 77-80.

178. *Id.* at 80-84.

179. *Id.* at 88.

180. *Id.* at 88-89.

181. *Id.* at 93.

182. *Id.* at 92-93.

183. *Id.* at 89.

tive bodies as the Postal Department, the Immigration Service, and the Department of the Interior.¹⁸⁴ Since these agencies possessed "otherwise final jurisdiction over matters properly committed to them,"¹⁸⁵ the courts could properly reexamine any factual determinations which were a prerequisite to the exercise of that jurisdiction.

In Brandeis' view the nature of judicial intervention should vary significantly as between these different agency categories. With respect to the "fact-finding tribunals," the function of the courts was to review all questions of law;¹⁸⁶ with respect to executive agencies, it was "essentially [one] of control—the function of keeping [the agencies] within their statutory authority."¹⁸⁷ The latter function might properly entail a reexamination of "jurisdictional facts"; but if those facts existed, the judicial function was complete. The partnership theory of agency-court interaction was therefore best suited to those situations where an agency functioned as a surrogate, though specialized, court, performing "adjudicative" as opposed to "legislative" functions. With respect to the executive agencies, however, which operated in areas beyond the purview of judicial competence, a court was more of a censor than a partner.¹⁸⁸ Hybrid agencies such as the commission in *Crowell v. Benson* were at least partially fact-gatherers and adjudicators, and hence the "partnership" approach could be sensibly applied to them.

Brandeis' formulation in the *Crowell* case appeared to be designed to give courts optimum freedom of choice in reviewing the discretionary judgments of agencies.¹⁸⁹ Although the Justice distinguished between fact-gathering and executive agencies as well as between "review" and "control," those distinctions broke down in practice. Executive agencies such as the Immigration Service found facts: *Ng Fung Ho*¹⁹⁰ was a case about the implications of a finding of fact,

184. *Id.* at 90-91 n.26.

185. *Id.* at 93.

186. *Id.* at 88.

187. *Id.* at 89.

188. *Id.*

189. Professor Jaffe has described the manner in which Justice Brandeis utilized this flexibility of the review-control formulation to achieve the result he desired in particular cases. See Jaffe, *The Contributions of Mr. Justice Brandeis to Administrative Law*, 18 IOWA L. REV. 213, 219-24 (1933). In this article, Jaffe maintained that Brandeis'

devotion is not to doctrine; he is not primarily concerned to presume an artificial consistency with what he may have said in this or that case. Rather he seeks an intuitive judgment of what will be a just, a "social" result, after a very elaborate and careful consideration of the pertinent realities. *Id.* at 226.

190. See text accompanying notes 144-47 *supra*.

and Brandeis permitted review. Denominating this type of review as "control" did little to clarify the distinction. The major difference between *Ng Fung Ho* and *Crowell*, for Brandeis' purposes, appeared to be the character of the right infringed by agency discretion. In *Ng Fung Ho* it was citizenship; in *Crowell* it was a property right. The *Crowell* case, for Brandeis, was in that respect like *Ben Avon*:¹⁹¹ the courts had less obligation to make independent judgments on the validity of an agency decision where property rights were involved.¹⁹² Thus, Brandeis' device of dividing the agencies into categories probably served a purpose other than that of establishing a general rule as to when judicial review would be appropriate and when not. It would allow the courts to peg the hybrid agencies as "fact-gathering tribunals," thus providing a rationale for their inclusion in Brandeis' formulation of an agency-court partnership.

Shortly after the *Crowell* decision, and during the height of President Roosevelt's New Deal reforms, the political and economic realities of the era seemed to move Justice Brandeis' brethren on the Court closer to his views on the desirability of substantial agency independence in the area of economic regulation. A protracted series of anti-New Deal cases,¹⁹³ in which the Court had resurrected such shopworn objections to agency government as the delegation doctrine, had generated such political ill will towards the Court that its very composition had been threatened. In surviving President Roosevelt's Court-packing attempt,¹⁹⁴ the Court found it necessary by the late 1930's to abandon many of the views that served to link it with the jurisprudence of the late nineteenth century. Among the abandoned views, apparently, was that of open resistance to the notion of agency government.¹⁹⁵ Indeed, the language of at least one case from the later years of the New Deal suggested that the Court had accommodated itself to Brandeis' concept of the agency-court partnership.

In *United States v. Morgan*¹⁹⁶ the Court considered the appropriate disposition of a fund of money being held in escrow while a

191. See text accompanying notes 148-55 *supra*.

192. For a discussion of the Brandeis predilection for protecting intangible personal rights with greater diligence than property rights, as illustrated in his opinions in *Ng Fung Ho*, *Crowell*, and *Ben Avon*, see Jaffe, *supra* note 189, at 224-27 & n.40.

193. The chronology of this line of cases is exemplified by the following list: *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *United States v. Butler*, 297 U.S. 1 (1936); *Jones v. SEC*, 298 U.S. 1 (1936); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

194. See R. JACKSON, *supra* note 4, at 187-96.

195. See *id.* at 87-165.

196. 307 U.S. 183 (1939).

previous controversy over stockyard brokers' rates was being settled. That controversy had itself been before the Court on three prior occasions and had generated three muddled opinions.¹⁹⁷ The apparent outcome of that series of litigation had been a holding that an order of the Secretary of Agriculture fixing brokers' commission rates was defective because of procedural irregularities.¹⁹⁸ Eventually, however, in passing on the disposition of the escrowed fund, the Court held that the Secretary could correct his own procedural missteps without further judicial scrutiny.¹⁹⁹ In the process Justice Stone, for the Court, stated:

[I]n construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other Court and agency are the means adopted to obtain the prescribed end [N]either can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim.²⁰⁰

Thus, at the very end of Brandeis' judicial career, his view of a symbiotic agency-court relationship seemed to have been partially vindicated.

III. THE BRANDEISIAN LEGACY IN MODERN AMERICA

The previous portions of this Article have described the leading role played by Brandeis in formulating a "modern" approach to that aspect of administrative law which is concerned with the allocation of power between courts and agencies. Brandeis' approach may be termed "modern," in this context, because of the nature of the criteria he employed in his allocation calculus. Those criteria, at least on their face, were non-normative: they emphasized "objective" factors such as efficiency and expertise, while deemphasizing the subjective notion that some branches of government were more susceptible to influence and corruption than others. These standards focused on the interdependence of all governing institutions in America and underscored the delicate interactions between governmental institutions and their

197. *Morgan v. United States*, 304 U.S. 1, *rehearing denied*, 304 U.S. 23 (1938); *Morgan v. United States*, 298 U.S. 468 (1936).

198. *See* 304 U.S. at 25-26.

199. 307 U.S. at 198.

200. *Id.* at 191.

constituents.²⁰¹ The agency-court partnership envisioned by Brandeis entailed no hard and fast lines between court and agency jurisdiction, no competitive assessments of the capacity of institutions to achieve upright or enlightened government, and no rigid barriers between the private and public sectors of the nation.

Brandeis' approach to administrative law, viewed in this fashion, appeared closer to the philosophy of government expressed in the New Deal than to that expressed in the Progressive Era. He was hailed, in 1933, as one of the most contemporary of men; the concerns he had articulated about the proper structure and function of various institutions of government in the early years of the twentieth century had anticipated similar needs felt by many Americans in the depression years.²⁰² Yet Brandeis' contemporary-mindedness in the Thirties had its paradoxical aspects: his solutions to then current problems demonstrated a suspicion of size in industry and government and a passionate concern for individual freedom that were associated with an earlier era.²⁰³

The paradox ran deeper on a personal level. Brandeis demonstrated in his private social attitudes an absolutist approach to moral issues and a faith in the capacity of Americans to control their destinies that identified him more closely with Progressives than with New Dealers.²⁰⁴ It was as though he simultaneously contained within himself two personae: the detached social accountant, whose judgments rested on his cost-benefit analyses, and the moral philosopher/social planner, who passionately wished to see the restructuring of American government in the pattern of his own high ideals. For Brandeis the two roles were integrated. Detached analysis justified moral commitment, which in turn stimulated further empirical inquiry. For others in the 1930's, however, the roles were separable; hence Brandeis' pragmatic concept of an agency-court partnership could attain great influence while his more visceral opinions on the deficiencies of "Big Government" were being disregarded.

While the experience of the 1930's partially vindicated Brandeis' approach to agency-court allocation problems, subsequent develop-

201. See Beard, *Introduction* to *THE SOCIAL AND ECONOMIC VIEWS OF MR. JUSTICE BRANDEIS* at xix (A. Lief ed. 1930); M. UROFSKY, *supra* note 55, at xii.

202. See Hart, Book Review, 82 U. PA. L. REV. 668, 668 (1934).

203. *Id.* at 670.

204. For a description of the differences between the two "reform movements," see R. HOFSTADTER, *THE AGE OF REFORM* 300-26 (1955); White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999 (1972).

ments suggested that his theories were vulnerable to the pressures of changing events and attitudes. While certain of Brandeis' assumptions about the purposes of agency government—notably the conviction that administrative expertise should be given broad discretion in regulating the economic activity of industrial enterprises—were generally shared by the policymakers of the New Deal, it was clear that an earlier generation of policymakers had rejected those assumptions and that subsequent generations might do so as well.

Thus some two decades after the New Deal had established the administrative agency as an ubiquitous institution of American government, another assumed quality of agency government, that of detached impartiality, was attacked. Agencies came to be criticized as being overly responsive to and protective of the industries which they regulated; some agencies came to be viewed as the "captives" of their regulatees.²⁰⁵ At the same time, the formerly favorable code words associated with administrative regulation took on pejorative meanings: "expertise" came to be viewed as "elitism" and "discretion" as "arbitrariness."²⁰⁶

205. See generally M. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 154-60, 263-71, 294-95 (1955); 1 DAVIS § 1.03; E. REDFORD, *ADMINISTRATION OF NATIONAL ECONOMIC CONTROL* 220-71 (1952). For an interesting exchange on the causes of and the cure for the "capture" of the ICC, see Huntington, *The Marasmus of the ICC: The Commission, The Railroads, and the Public Interest*, 61 YALE L.J. 467 (1952); Morgan, *A Critique of "The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest,"* 62 YALE L.J. 171 (1953); Huntington, *The ICC Reexamined: A Colloquy*, 63 YALE L.J. 44 (1953). Professor Jaffe argues that the phenomenon should be attributed not to any misfeasance on the part of agency personnel, but rather to Congress' habit of granting to the agencies extremely broad and ill-defined powers which fail to engender a sense of mandate. Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105, 1109-10 (1954). See also JAFFE 12-13; Jaffe, *supra* note 2, at 1187, 1198-99. But see Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HAR. L. REV. 436, 474 (1954):

The direction of a mature administrative agency can easily drift into the hands of people, able and devoted indeed, but of the second level of competence or initiative. Often they will be men who find congenial the routine security of office and the reliable deference of the small group of important businessmen and counsel who regularly appear before them. They will naturally be responsive to plans for making business life more orderly and secure through integration and price regulation. Unplanned and ruthless commercial rivalry will be distasteful to them. On the other hand, small victories over those whom they regulate will suffice to maintain their self-esteem, while large issues can be postponed or avoided.

206. See JAFFE 576-85; Cragun & deSeife, *A Skeptic Views Twenty-five Years of Administrative Process*, 16 FED. B.J. 556, 559-60 (1956); Schwartz, *supra* note 205, at 471-75. Justice Douglas, dissenting from the Court's affirmance of a rate order the propriety of which he felt the ICC had failed to adequately establish, warned that [u]nless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discre-

The extent to which the Brandeisian approach retains contemporary viability, then, depends on the degree to which its underlying assumptions are still considered valid. Affecting this variable are the changed circumstances under which administrative agencies currently operate and the jurisprudential theories which those circumstances have helped to foster.

The Ramifications of the Broad Delegation Model

One immediate illustration of the changed character of administrative law since Brandeis' retirement is the "current acceptance of the broad delegation model"²⁰⁷ governing relations between agencies and the legislatures that create them. Delegation of legislative power to agencies, as noted, was a serious issue in the 1930's: the Supreme Court on one occasion openly stated that Congress could not delegate any part of its legislative power except under the limitation of a prescribed standard.²⁰⁸ By the advent of the 1970's, however, other trends had surfaced: regulatory agencies customarily asserted and exercised power in the absence of congressional guidelines, and courts had come to tolerate this practice.²⁰⁹ Noting this development, Professor Kenneth Culp Davis has labeled the nondelegation doctrine a "failure" and has called for open tolerance by the courts of broad delegations from legislatures to agencies.²¹⁰

If broad delegation is assumed to be an important facet of the contemporary American administrative process, the differences between the current environment and that in which Brandeis operated are readily apparent. For the presence of broad delegation implicitly raises a series of problems which Brandeis was not compelled to address. First, agencies have continued to proliferate and diversify since the New Deal: there are more executive and regulatory agencies, in the traditional sense of the terms, and far more "hybrids."²¹¹ Should a broad delegation model be applied across the board, so that differences between types of agencies as well as variations in their statutory underpinnings are minimized?

Brandeis had only begun to examine differences between stand-

tion, like corruption, marks the beginning of the end of liberty. *New York v. United States*, 342 U.S. 882, 884 (1951) (dissenting opinion of Douglas, J.) (emphasis in original).

207. Jaffe, *supra* note 2, at 1184.

208. *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932).

209. See, e.g., *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *American Trucking Ass'n v. Atchison, T. & S.F. Ry.*, 387 U.S. 397 (1967).

210. Davis, *supra* note 2, at 714.

211. See text accompanying notes 159-62 *supra*.

ard regulatory agencies and "hybrid" agencies in *Crowell v. Benson*, and he viewed questions of delegation of power at a time when the broad delegation model was a mere gleam in the eye of academic apologists for the New Deal.²¹² His theory of allocation conceded the importance of having independent, expert regulatory agencies; assumed that Congress would provide them with some guidance, as it had the ICC; assumed further that the agencies would try simultaneously to make use of their expertise and to follow statutory guidelines; and reserved for the courts a power to make judgments about whether the agency's actions usurped important rights or seriously interfered with interests deserving protection. But his theory did not address the question of indiscriminately broad delegations which accompanied the proliferation and diversification of traditional regulatory and executive agencies and of the new hybrids.²¹³

A second issue arises from the fact that the broad delegation model encourages informal agency discretion. Broad delegations invite agencies to develop their own informal decision-making criteria, which, from the point of view of administrators, are more flexible and efficient. But as agency jurisdiction expands, the impact of agency decisions broadens correspondingly; and the fairness of informal actions becomes a matter of concern to more persons. Arbitrariness, especially in light of the widening scope of procedural due process safeguards,²¹⁴ thus becomes an important negative value; informal agency decisions have increasingly been challenged in the courts as arbitrary.²¹⁵

212. See, e.g., J. LANDIS, *THE ADMINISTRATIVE PROCESS* 68-70 (1938).

213. In three recent cases the Supreme Court has upheld agency assertions of power to deal with problems which were not even contemplated by Congress when the agencies were created. In each of the three decisions, the Court permitted the agency to establish the requisite delegation by relying on general statutory language describing the mission of the administrative body. See *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) (upholding the Federal Communication Commission's Community Antenna Television (CATV) regulations); *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968) (upholding the Federal Power Commission's area price-fixing for natural gas); *American Trucking Ass'n v. Atchison, T. & S.F. Ry.*, 387 U.S. 397 (1967) (upholding the Interstate Commerce Commission's "piggyback" regulations). For a discussion of these three cases, see DAVIS, *supra* note 2, at 715-19.

214. For example, the Supreme Court has recently expanded the number of contexts in which a hearing is required by the due process clause. In *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Court held that public assistance officials must conduct a hearing before terminating a recipient's welfare payments on ineligibility grounds. *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969), invalidated prejudgment garnishment because the system provided for no hearing at the time of garnishment. Similarly, in *Fuentes v. Shevin*, 407 U.S. 67 (1972), the Court held that prejudgment replevin was impermissible due to failure to assure a hearing before repossession of chattels. See generally K. DAVIS, *ADMINISTRATIVE LAW TEXT* §§ 7.01-16 (3d ed. 1972).

215. See, e.g., *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584 (D.C.

Such challenges force consideration of two related questions: can the courts properly function as a check on informal agency discretion by providing ad hoc judicial content to imprecise legislative standards? And, if the first question is answered affirmatively, to what extent are the courts capable of formulating criteria to aid themselves in the performance of this function? The answers to these questions can be expected to determine the continued viability of the pragmatic and flexible agency-court partnership visualized by Justice Brandeis.

Contemporary Challenges to Agency Discretion: Demise of the Agency-Court Partnership?

Both courts and academicians have recently taken positions on these issues. The District of Columbia Circuit has announced a "new era"²¹⁶ in agency-court relations, wherein informal agency discretion will receive close judicial scrutiny to insure that the agency has taken a "hard look" at the problems before it and has minimized "unconscious preference and irrelevant prejudice" in its decision.²¹⁷ Under the "new era" approach, such traditional standards of judicial review as the "rational basis" test for informal rulemaking²¹⁸ may no longer be followed. Thus, at least with respect to certain agencies,²¹⁹ the District of Columbia Circuit may be expected to examine the discretionary judgments of "expert" agency personnel— not only to assure adequate procedural protections for affected parties²²⁰ but also to assure that such "expert" judgments, even though involving "technical

Cir. 1971) (alleging arbitrary refusal to suspend registration of DDT as a pesticide); *Holmes v. New York City Housing Authority*, 398 F.2d 262 (2d Cir. 1968) (alleging arbitrary exclusion from public housing); *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964) (alleging arbitrary denial of liquor license); *Smith v. Ladner*, 288 F. Supp. 66 (S.D. Miss. 1968) (alleging arbitrary refusal to grant charter for nonprofit corporation). See Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974).

216. *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584, 597 (D.C. Cir. 1971). See generally K. DAVIS, *supra* note 214, §§ 2.09-10.

217. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

218. Under the "rational basis" test, "whenever the [reviewing] court believes that substitution of judicial judgment is inappropriate," the court recites "that the administrative determination must be upheld if it has warrant in the record and rational basis in law." 4 DAVIS § 30.05, at 214. See generally *id.* § 30.05.

219. A difficulty with making generalizations about the "new era" and the "hard look" doctrine is that the case law has thus far been confined to a few agencies, notably the Federal Communications Commission and the Environmental Protection Agency.

220. See *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584, 594 (D.C. Cir. 1971); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850 (D.C. Cir. 1970). See also *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 630-33 (D.C. Cir. 1973).

and specialized matters," are based on sound reasons.²²¹ That court appears to be assuming that it can and should serve as a check on informal agency discretion and that it will be able to develop evaluative criteria that will prove useful in performing this new role. At the moment these criteria seem to focus on assuring "principled decision-making" in an agency through insistence that it give "reasoned opinions" for its informal judgments.²²² So stated, the criteria do not reflect a great deal of analytical crispness. Perhaps they are merely intended to give the District of Columbia Circuit additional time to further develop and refine its position.

Commentators in the field of administrative law have recently addressed themselves to the question of court supervision of agency discretion. Professor Davis, as indicated earlier, has urged the courts to forgo attempts to "prevent delegation of legislative power or to require meaningful statutory standards" and, instead, to focus their inquiries on the ability of administrators to "structure" and "confine" their discretionary power.²²³ Realistic reform of administrative procedures should properly be addressed to "the protections the administrators in fact provide, irrespective of what the statutes say or fail to say."²²⁴ In Davis' view broad delegation is helpful because it allows deference to expertise: he has no difficulty with agencies making policy judgments in their area of specialized competence, just as Brandeis was untroubled by the exercise of broad agency discretion in the area of economic regulation. Davis' concerns are that the judgments be reasoned rather than arbitrary and that they be made in a procedural context which allows affected parties a panoply of safeguards. If the agency can show that it has established, through its own regulations, "procedural safeguards and . . . standards to guide discretion,"²²⁵ the courts ought to tolerate its informal decisions.

221. See *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 648 (D.C. Cir. 1973); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850 (D.C. Cir. 1970). But see *id.* at 651 (concurring opinion), where Chief Judge Bazelon protests court investigation into "the technical intricacies of the agency's decision." See also *Mobil Oil Corp. v. FPC*, 483 F.2d 1238, 1257-59 (D.C. Cir. 1973).

222. See *Mobil Oil Corp. v. FPC*, 483 F.2d 1238, 1260, 1262 (D.C. Cir. 1973); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 647-50 (D.C. Cir. 1973); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851-53 (D.C. Cir. 1970). See also *Phillips Petroleum Co. v. FPC*, 475 F.2d 842 (10th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3401 (U.S. Jan. 14, 1974).

223. Davis, *supra* note 2, at 713. See generally K. DAVIS, *DISCRETIONARY JUSTICE* (1969). But see Wright, Book Review, 81 YALE L.J. 575, 578 (1972), in which Judge J. Skelly Wright of the District of Columbia Circuit expresses skepticism that the agencies will "see the error of their ways."

224. Davis, *supra* note 2, at 713.

225. *Id.* at 732.

Professor Louis L. Jaffe has challenged Davis' approach on at least two levels. He questions Davis' reliance on the interplay between agencies and courts rather than on that between agencies and legislatures, and he expresses skepticism concerning universal applicability of the Davis model.²²⁶ Jaffe feels that Davis' approach unduly minimizes "the peculiar political process which provides the milieu and defines the operation of each agency."²²⁷ If openness, as opposed to arbitrariness, is a desirable social goal in the administrative process, Jaffe argues, "the extent to which an agency is open . . . is determined by the definiteness and specificity of the congressional expression of the agency's methods and objectives."²²⁸ Consequently Jaffe calls for renewed attention, even in broad delegation contexts, to legislative standards and to distinctions between various types of agencies. He prefers that "political choices" be made by the legislature.

By political choices Jaffe means both a balancing of competing social values, such as a need for sources of energy versus a need to protect the environment, and a balancing of competing institutional values, such as expertise and efficiency as opposed to bureaucratic "rigidity and displacement of objectives by . . . routine."²²⁹ For Jaffe, a primary purpose of judicial review in broad delegation contexts is to ascertain what sets of choices the legislature has made and whether it has reserved the power to make further ones. Shifting the focus of judicial inquiry to administrative rules and procedures, in Jaffe's view, directs attention away from the crucial question of legislative policy choices. Moreover, it unduly minimizes the possibility that the current diversity in the types of agencies may be a function of legislative judgments.²³⁰

Statutory standards in broad delegations, then, still have real meaning for Jaffe: they are the means by which a legislature articulates its social and institutional value preferences in a given area. A broad delegation to an agency without precise standards, in this view, may reflect deliberate congressional choice rather than mere oversight—a judgment, in effect, that the agency forum is best designed to assess and solve a social problem. An important question which must be faced on judicial review, then, is whether the courts agree with that judgment or whether, because of the importance of the

226. Jaffe, *supra* note 2, at 1183-84.

227. *Id.* at 1188.

228. *Id.* See also Jaffe, Book Review, 14 VILL. L. REV. 773 (1969).

229. Jaffe, *supra* note 2, at 1188.

230. See *id.* at 1188-89.

interests affected or rights invaded by agency decision-making, they would prefer that they themselves make an assessment and offer a solution.

Jaffe, a former Brandeis clerk, appears interested in retaining and refining portions of the Brandeisian model. His blueprint for reviewing courts in the broad delegation context appears designed to continue the agency-court partnership, with the court, as he has said elsewhere, being the "senior partner."²³¹ Jaffe is willing to defer to expertise, but only if it is a meaningful prerequisite to the effective governance of an area of American life. His analysis rests heavily on distinctions between types of agencies and statutory contexts. He regards informal policy choices by agencies as appropriate if Congress has opted to allow them broad supervisory powers, but he would retain the option for reviewing courts to scrutinize those choices. In short, Jaffe's approach appears intended to maintain flexibility for both courts and agencies and to insure cooperation among them, as far as possible, rather than to establish the courts as the zealous guardians of the justice and fairness of agency activity.²³² Brandeis' approach to allocation had rather similar goals, albeit in a dramatically different environment.

It is possible to read the "new era" decisions of the District of Columbia Circuit as supporting Jaffe as well as Davis, but on balance this court appears to be moving away from Jaffe's position. Those decisions²³³ involved agencies, such as the Environmental Protection Agency, entrusted with broad legislative delegations and therefore especially prone to making informal discretionary judgments. Close scrutiny by the courts of these judgments might be consistent with Jaffe's position if one regards the decisions as *sui generis*—the products of a peculiar lack of confidence in the judgment of the agency in question.²³⁴ Context, then, might help to explain the decisions. Yet Jaffe's writings point to the conclusion that when such broad delegations have been granted, Congress has provisionally decided to concede an agency substantial discretion in the regulation of a particular area of activity. If this is so, reviewing courts should not lightly as-

231. JAFFE 546 (referring to Justice Brandeis' concurring opinion in *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936)).

232. *Id.* at 572-73.

233. See cases cited in note 221 *supra*.

234. In some instances, however, such close scrutiny may be the product of particular dissatisfaction with Congress: Jaffe had bemoaned the failure of Congress to provide standards for FCC license renewals. See Jaffe, WHDH: *The FCC and Broadcasting License Renewals*, 82 HARV. L. REV. 1693 (1969).

sume the function of setting aright the regulatory mechanisms of such an agency.

It is difficult to harmonize the "new era" cases with this last suggestion. The court remanded two of the cases²³⁵ to the agency for a formulation of reasoned criteria to justify its decision; in the third,²³⁶ the court ultimately supported the agency's findings. The approach adopted by the District of Columbia Circuit in those cases reflected little, if any, deference to the notion that broad legislative delegation necessarily entails broad leeway for discretionary administrative procedures. In each of the cases the court seemed preoccupied with insuring that the agency had provided internal procedural safeguards for affected parties and that it had supported its "discretionary decisions by . . . reasoned opinions."²³⁷ In language which could just as easily have been uttered by Professor Davis, the court in *Environmental Defense Fund v. Ruckelshaus* maintained that judicial review "must operate to insure that the administrative process itself will confine and control the exercise of discretion."²³⁸ Absent was any talk of an agency-court partnership or of a pragmatic and complementary division of labor between the two institutions.

In sum, the broad delegation model appears to have merged with a greater judicial interest in procedural due process, resulting in a modification of Brandeis' allocation calculus. Brandeis operated in a time when aggressive court intervention on behalf of minority groups or other disadvantaged interests was rare; now the practice has become commonplace. He also formulated his allocation criteria in an age when the case law on judicial review of administrative action was largely concerned with a regulatory context which was far narrower in its scope and impact. No "captive" theory of the administrative process had become influential;²³⁹ no comparable attention to procedural safeguards existed; agency discretion had not yet been equated with "unconscious preference and irrelevant prejudice."²⁴⁰ Brandeis had to counter arguments that began with a presumption against administrative regulation of any kind; his successors must contend with a prevalent notion that, while the administrative forum is here to stay,

235. *Mobil Oil Corp. v. FPC*, 483 F.2d 1238, 1263-64 (D.C. Cir. 1973); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 649 (D.C. Cir. 1973).

236. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970).

237. *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584, 598 (D.C. Cir. 1971).

238. *Id.*, citing K. DAVIS, *DISCRETIONARY JUSTICE* (1969).

239. Cf. Jaffe, *supra* note 2, at 1187. See note 205 *supra* and accompanying text.

240. See note 217 *supra* and accompanying text.

it cannot be presumed to reach just results without continuing judicial supervision of its procedures.

CONCLUSION

Despite these trends, the legacy of Justice Brandeis to contemporary administrative law is still considerable although as the differences widen between the social and jurisprudential climate of his time and ours, tenets of his philosophy may have to be modified to reflect current conditions. Two examples will suffice. As noted, Brandeis played an important part in the refinement of the doctrine of primary jurisdiction, which, in his decisions, came to serve as a technique for allocating the initial supervision of a social or economic controversy between courts and agencies. One of his decisions previously discussed, *Great Northern Railway v. Merchants Elevator Co.*,²⁴¹ reserved considerable power to the court to construe the language of regulatory agency tariffs. That decision has been narrowed by later cases,²⁴² which suggest that agency jurisdiction can extend to matters of tariff interpretation and that judicial review should only be exercised after a regulating agency has construed a tariff and has clarified its underlying purposes. This development is viewed by some as a response to growing faith in agency expertise,²⁴³ but it can also be characterized simply as a tactic designed by the courts to relieve increasingly crowded dockets by consigning more disputes to agencies as a preliminary matter. The expanded role and impact of courts on society since the 1950's has had a reciprocal effect: the more "justice" is to be dispensed on a broadening scale, the greater the number of controversies requiring supervision, and, as a necessary corollary, the greater the need to enlarge the scope of agency primary jurisdiction.

A second modification of a Brandeis contribution can be seen in the law of standing. Standing issues have not previously been discussed because they raise questions of allocating power between courts and agencies only peripherally; their essential impact is on the initial scope of agency decision-making. But insofar as a standing issue requires the courts to determine the potential reach of an agency decision—since it is the reviewing court, ultimately, which decides how many sets of interests an agency rule or regulation may fairly affect—the issue may be viewed as raising allocation questions.²⁴⁴ In two impor-

241. 259 U.S. 285 (1922). See notes 88-92 *supra* and accompanying text.

242. See *United States v. Chesapeake & O. Ry.*, 352 U.S. 77 (1956); *United States v. Western Pac. R.R.*, 352 U.S. 59 (1956).

243. See Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037, 1045 (1964).

244. See Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 683-90 (1973).

tant pre-New Deal decisions,²⁴⁵ Brandeis formulated a test for standing based on the aggrieved party's membership in a class protected by the statute creating the agency. Under this test a party did not have standing merely if he was injured, economically or otherwise, by the agency's action; he needed to be within that class which the statute specifically sought to protect.

Recent cases have substantially altered that test.²⁴⁶ Plaintiffs have been conceded standing to sue if they can show that they are *arguably* within the zone of interest to be protected²⁴⁷ and have suffered some injury.²⁴⁸ Direct statutory support for a plaintiff's interest no longer seems to be a *sine qua non*, nor need the injury be economic in nature.²⁴⁹ The broadening of the standing test since Brandeis' tenure may likewise be attributed to changed social conditions and jurisprudential perceptions. As agencies have become more pervasive in their impact, more persons have been affected, directly and indirectly, by their decisions; as this phenomenon of "polycentrism"²⁵⁰ is perceived, it summons up a new spate of due process questions in a society increasingly conscious of the values of procedural fairness and justice. The fact of increased agency presence generates a perception of growing agency power; a fear of the effect of unchecked power on disadvantaged persons has been one of the sources of the "due process revolution"²⁵¹ of the fifties and sixties. Changes in the law

245. *Alexander Sprunt & Son, Inc. v. United States*, 281 U.S. 249 (1930); *Chicago Injunction Case*, 264 U.S. 258 (1924).

246. See *Investment Co. Institute v. Camp*, 401 U.S. 617 (1971); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970); *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970); *Hardin v. Kentucky Util. Co.*, 390 U.S. 1 (1968) (all granting standing). See generally Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970); Jaffe, *Standing Again*, 84 HARV. L. REV. 633 (1971).

247. *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150, 156 (1970).

248. *Sierra Club v. Morton*, 405 U.S. 727 (1972). The plaintiffs in *Sierra Club* were denied standing because they had failed to allege that any club members had suffered any direct environmental injury. It would appear, however, that this pleading defect can be rectified in future cases if public interest organizations merely allege direct harm to their members. See Note, *The New Law of Threshold Standing: The Effect of Sierra Club on Jus Tertii and on Government Contracts*, 1973 DUKE L.J. 218.

249. Although the cases cited in note 246 *supra* all involved economic interests, *Sierra Club* (see note 248 *supra*) did not. *Sierra Club* can be read to obviate any economic-interest component in standing, assuming that direct noneconomic injury has been properly pleaded. See generally Scott, *supra* note 244, at 667.

250. Cf. Fuller, *The Forms and Limits of Adjudication*, in H. Hart & A. Sacks, *The Legal Process* 421 (tent. ed. 1958).

251. See, e.g., *Holmes v. New York City Housing Authority*, 398 F.2d 262 (2d Cir. 1968). See generally F. GRAHAM, *THE DUE PROCESS REVOLUTION* (1972).

of standing have reflected these developments.

The Brandeisian approach, then, will not have the impact in the future that it once had; one could not expect otherwise if history has a meaning. Brandeis was peculiarly suited, intellectually and temperamentally, to make a major contribution to administrative law in its formative years. So wide-ranging and influential was that contribution that it has survived well beyond Brandeis' own career; and it may, with refinements and modifications, continue to make its mark on administrative law. But just as Brandeis helped shift the original focus of administrative law during his career, so a combination of changed circumstances and ideas may already have shifted that focus once more. One need not lament this situation: Brandeis' views reflected his special concerns and in one sense had a certain narrowness and rigidity, for all their usefulness. From a contemporary perspective, one can admire Brandeis' achievement without longing for his reincarnation.