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COMMENTS

LAND USE AND DUE PROCESS—AN EXAMINATION OF CURRENT FEDERAL AND STATE PROCEDURES

CURTIS T. VAUGHAN, III

The real estate salesman's technique of inducing a buyer to close a deal frequently includes a slogan to the effect that no more land is being created.¹ Until this century, most developers generally have been able to exploit and develop land without the restraint of any federal or state land use regulations.² The legacy of that development can be measured today in the social, environmental, and economic costs unnecessarily imposed upon the nation.³ Waste and inefficiency of land use can result from the lack of planning for growth. When this occurs as part of urban growth, the cost to the taxpayers in terms of the capital expenditures necessary to provide for the extension of utilities and for the building of arterial roads is both obvious and significant. More difficult to ascertain, however, are the costs of development by expediency, tradition, and short-term economic considerations. Their environmental and socio-economic impact on urban communities is difficult to measure since a lack of empirical data restricts the ability of planners to calculate the possible effects.⁴ For example, although there is a lack of adequate housing in urban areas, that fact provides only subjective material for the calculation of the social costs. The incapacity of zoning and other regulatory schemes to provide for effective urban growth is well documented.⁵ Passive schemes like these are hardly

1. Russell Train, as Chairman of the Council on Environmental Quality stated that: [I]t is a matter of urgency that we develop more effective nationwide land use policies and regulations. Land use is the single most important element affecting the quality of our environment which remains substantially unaddressed as a matter of national policy. Land is our most valuable resource. There will never be any more of it. *Hearings on S. 632 Before the Senate Comm. on Interior and Insular Affairs*, 92d Cong., 1st Sess., pt. 1, at 98 (1971).

2. *Cf. Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386-87 (1926) (notice taken of newness of zoning laws). For further historical background see NATIONAL SCIENCE FOUNDATION, ENVIRONMENT: A NEW FOCUS FOR LAND-USE PLANNING 23-54 (1973).

3. See *Opening Statement of the Chairman: Hearings on S. 268 Before the Senate Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess., pt. 1, at 1 (1973).

4. The difficulty of calculating environmental costs relates in large part to decisions that attempt to strike a balance between the "environmental crisis" and land use. STAFF OF SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, 92D CONG., 2D SESS., BACKGROUND PAPERS ON PAST AND PENDING LEGISLATION AND THE ROLES OF THE EXECUTIVE BRANCH, CONGRESS, AND THE STATES IN LAND USE POLICY AND PLANNING 1 (Comm. Print 1972). Another possible reason could be connected to the relative infancy of environmental concern in comparison with two hundred years of land development.

5. See generally Branfman, Cohen & Trubeck, *Measuring the Invisible Wall: Land Use*

adequate to deal with the problems of vibrant city growth.⁶ The failure of municipal zoning as a concept for regulation of land use can also be ascribed to the lack of uniform, general policies within which zoning commissions might successfully operate.⁷ A logical conclusion that can be deduced from this failure is that land use regulation may often be arbitrary and capricious. Even though the fifth amendment protects one from an arbitrary deprivation of liberty or property by the government,⁸ the property owner has other rights due him. Under the fourteenth amendment, the individual property owner is also guaranteed procedural due process.⁹

BACKGROUND

A precise definition of the phrase "due process of law" has not emerged from the Supreme Court.¹⁰ The Court has, however, taken note of the difficulty of defining this fundamental right. In an 1877 case which presented the issue of due process, the Court noted that due process "remains today without that satisfactory precision of definition which judicial decisions have given to nearly all the other guarantees of personal rights. . . ." It decided, however, that since there was some danger in proposing a definition of due process, the best course would be to glean the meaning of the due process clause from the principles of each case as it arose.¹¹ The Court's more recent definition of due process, while retaining the notion of flexibility,¹² has frequently included the requirement of a hearing before the lawful deprivation of one's property interests is al-

Control and the Residential Patterns of the Poor, 82 YALE L.J. 483 (1973); Note, *Land Use Controls in Metropolitan Areas: The Failure of Zoning and a Proposed Alternative*, 45 S. CAL. L. REV. 335 (1972).

6. Booth, *A Realistic Reexamination of Rezoning Procedure: The Complementary Requirements of Due Process and Judicial Review*, 10 GA. L. REV. 753, 753 (1976).

7. See *id.* at 753. See also Dukeminier & Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 KY. L.J. 273 (1962); Note, *Land Use Control in Metropolitan Areas: The Failure of Zoning and a Proposed Alternative*, 45 S. CAL. L. REV. 335 (1972).

8. *Dent v. West Virginia*, 129 U.S. 114, 124 (1889).

9. The fourteenth amendment to the Constitution provides: "No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1, cl. 2. Similarly, the fifth amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V. Similar provisions can also be found at the state level. For example, the Texas Constitution provides that "[n]o citizen of this State shall be deprived of life, liberty, property . . . except by the due course of the law of the land." TEX. CONST. art. I, § 19.

10. See *Shaughnessy v. United States*, 345 U.S. 206, 224-28 (1953) (Jackson, J., dissenting).

11. *Davidson v. New Orleans*, 96 U.S. 97, 101-02 (1877).

12. *Id.* at 104.

13. See, e.g., *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Cafeteria & Restaurant Workers Local 473 v. McElroy*, 367 U.S. 886, 895 (1961).

lowed.¹⁴ Perhaps the most widely known definition of due process is contained in Daniel Webster's argument before the Supreme Court in the *Dartmouth College Case*,¹⁵ when he declared that due process of law meant "a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial."¹⁶

Development of the Requirement of a Hearing

The case of *Goldberg v. Kelly*¹⁷ is the current landmark decision in support of the proposition that procedural due process requires a hearing. While the opinion specifically stated that a pre-termination hearing concerning welfare benefits did not have to take "the form of a judicial or quasi-judicial trial,"¹⁸ the elements explicitly required for the hearing can be fairly said to be patterned on the full trial model.¹⁹ In subsequent cases, however, the Court was much less explicit on the question of whether a party is entitled to a trial type hearing.²⁰ Hearings involving some degree of formality, which include the elements enumerated in *Goldberg*,²¹ historically have been deemed necessary when the pivotal issue concerned personal liberty.²² Where the issue concerned merely a property right, however, the full panoply of a judicial hearing was not required.²³

At one point recently, the Court seemed to retreat from its previous position in *Goldberg* and its requirement of some type of hearing. In *Arnett v. Kennedy*²⁴ a federal employee who had been dismissed from his job was

14. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974); *Hannah v. Larche*, 363 U.S. 420, 442 (1960). See also *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (extending definition of "property" to include welfare benefits).

15. *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

16. *Id.* at 581.

17. 397 U.S. 254 (1970).

18. *Id.* at 266.

19. The elements of a hearing specifically required by the Court included: (1) "timely and adequate notice detailing the reasons" for termination of benefits, (2) confrontation of adverse witnesses, (3) oral presentation of arguments and evidence, (4) disclosure of opposing evidence, (5) right to have counsel present, (6) findings based "solely on the legal rules and evidence adduced at the hearing," (7) an impartial tribunal, and (8) a statement by the decision maker of the reasons for the decision and the evidence relied upon to reach that decision. *Id.* at 267-71.

20. See *Fuentes v. Shevin*, 407 U.S. 67, 80-84 (1972) (required something more than an *ex parte* hearing before court clerk); *Bell v. Burson*, 402 U.S. 535, 542 (1971) (driver's license prerevocation hearing involves only determination of a reasonable possibility of judgment being rendered against him); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 341-42 (1969) (wage garnishment not an extraordinary situation where due process can be suspended).

21. See case and materials cited note 19 *supra*.

22. See, e.g., *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (probation); *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (parole).

23. See cases cited note 20 *supra*.

24. 416 U.S. 134 (1974).

held not entitled to a hearing prior to his removal if a hearing was subsequently provided.²⁵ Congress apparently intended to exclude elaborate procedural mechanisms in federal employment situations because such lengthy proceedings would render the determination of employee complaints more burdensome to the government.²⁶ In another case, the Court indicated a willingness to accept less than a full trial type hearing when there existed a good reason for doing so.²⁷ A thread that runs through all these decisions dealing with the issue of due process and the necessity of some kind of hearing is a tendency toward the balancing of private interests in procedural safeguards against the governmental expense and burden of providing those safeguards.

In the cases that followed the apparent retreat on the requirement of a hearing, the march toward greater reliance and insistence on providing some kind of hearing continued. Two cases decided in the 1974 term pushed the requirement of a hearing into a new area—public high schools.²⁸ This is not, however, an indication that the balancing test's importance has diminished. On the contrary, when the Court in other recent decisions found that the interest to be protected was outweighed by the burden of imposing hearings, the evidentiary hearing as illustrated in *Goldberg* was held to be unnecessary in order to satisfy the requirements of due process.²⁹

Assuming a Hearing is Required, What Kind?

The classic dissertation on the need for a hearing was given by Justice Frankfurter in his concurring opinion in *Joint Anti-Facist Refugee Committee v. McGrath*,³⁰ where he required only that one be given "notice of the case against him and opportunity to meet it."³¹ This leaves unresolved

25. *Id.* at 163.

26. *Id.* at 152. The Court distinguished the property interest present in *Arnett* from those in *Goldberg*, *Bell*, *Fuentes* and *Sniadach* because it was "conditioned by the procedural limitations which had accompanied the grant of that interest," and because the other cases did not deal with this special area of governmental employer-employee relations. *Id.* at 154-55.

27. See *Wolff v. McDonnell*, 418 U.S. 539, 561 (1974) (hearing concerning loss of "good time" credits in prison).

28. See *Wood v. Strickland*, 420 U.S. 308, 326 (1975); *Goss v. Lopez*, 419 U.S. 565, 571-72 (1975).

29. See *Ingraham v. Wright*, ___ U.S. ___, 97 S. Ct. 1401, 1414-15, 51 L. Ed. 2d 711, 732-33 (1977) (due process does not require a prior hearing before corporal punishment); *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) (due process does not require hearing prior to termination of disability benefits). For an informative analysis of recent Supreme Court decisions in this area see K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* § 7.00-8, at 260-66 (1976).

30. 341 U.S. 123 (1951).

31. *Id.* at 172. The pioneering case in this area seems to be *Londoner v. City of Denver*, 210 U.S. 373 (1908), where the Court stated that while "[m]any requirements essential to strictly judicial proceedings may be dispensed with. . . . [A] hearing in its very essence

the question of how the parties must actually structure the "opportunity" to contest the issues in order to pass muster on the issue of due process. Balancing tests to determine which of the elements of a hearing are proper and necessary are generally too cumbersome and subjective to be applied on a case-by-case basis.³²

In an attempt to address the problem of due process and the requirement of a hearing, Judge Henry J. Friendly of the United States Court of Appeals for the Second Circuit, in a 1975 article, listed a number of elements required for an administrative hearing to provide the constitutional guarantees of due process.³³ In order of priority, the list includes rights to an unbiased tribunal, notice of the action, the opportunity to present reasons why the action should not be taken, to call witnesses, to know the evidence against one and to have the decision based solely on the evidence presented.³⁴ This listing of proposed constitutionally required elements for a fair hearing provides, at least to some degree, an excellent cornerstone for a comparison with current federal and state land use practices and procedures.

FEDERAL LAND USE PROCEDURES

Limitations on the Government's Power of Taking

More often than not, the fundamental question concerning governmental control of land use is the choice between the requirement of compensation under eminent domain powers and the exercise of the police power through zoning and similar regulatory acts not requiring compensation. The problem, as expressed by Justice Holmes, is where one draws the line between the available alternatives.³⁵ Although certain property rights are enjoyed subject to reasonable limitation by the government in the exercise of its police power, this "implied" limitation must itself be limited "or the contract and due process clauses are gone."³⁶ Holmes expressed the general rule on limitation in terms of the magnitude of the loss suffered by the property owner,³⁷ arguing that once the loss reached a certain point, then

demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and . . . by proof, however informal." *Id.* at 386.

32. Justice Black addressed this problem in his dissent in *Goldberg v. Kelly*, 397 U.S. 254, 272 (1970) (dissenting opinion).

33. Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1276 (1975) (discussing administrative processes).

34. *Id.* at 1279-95. The article concludes with an array, also in order of priority, of various actions by the government that should call for a hearing of some kind. These were limited, however, to those actions that seemed most prominent and timely such as parole revocation, civil commitment, and treatment of aliens. See generally *id.* at 1295-1304.

35. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413-16 (1922).

36. *Id.* at 413.

37. *Id.* at 413.

an exercise of the power of eminent domain was required.³⁸

As Justice Holmes indicated, some limitations on the government's power to interfere with private property are constitutionally mandated. The fifth amendment contains two express limitations: "No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."³⁹ The language of the amendment poses several questions, such as the time at which there is a taking such that compensation to the property owner is necessary, and what constitutes a public use.

Other limitations on the power to interfere with property are not so explicitly expressed. For example, regulation of the use of property, which is an interference with its enjoyment, is not considered such a "taking" that requires any compensation for its owner. Such regulatory acts are instead considered to be part of the government's police power⁴⁰ which has been described as the least limitable of the government's powers.⁴¹ Although the police power is limited in scope,⁴² unfortunately those limitations have not been precisely drawn.⁴³ Courts seem more inclined to recognize the existence of the power than to define its limits.⁴⁴ Nevertheless, the term is used to justify various governmental restrictions as valid exercises of the power because, in some form or another, these restrictions protect the health, safety, morals, and welfare of the community.⁴⁵ In situations where a governmental entity is engaged in the practice of zoning, regulation of commerce, or similar regulatory functions, the courts generally have held that any resulting economic loss suffered by the property owner is outweighed by the benefit to the community as a whole and that therefore the loss to the owner is not compensable.⁴⁶ The difficult issue is that of

38. *Id.* at 413. The Holmes approach fell into disfavor quickly and apparently was never used by Holmes at all. Sax, *Takings and the Police Power*, 74 *YALE L.J.* 36, 37 (1964).

39. U.S. CONST. amend. V.

40. See, e.g., *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592 (1962); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958); *Maher v. City of New Orleans*, 516 F.2d 1051, 1066 (5th Cir. 1975).

41. *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80, 83 (1946).

42. The police power may not be exercised in an arbitrary or capricious manner. *E.g.*, *Kelley v. Johnson*, 425 U.S. 238, 247-48 (1976); *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 415 (1935); *Nectow v. City of Cambridge*, 277 U.S. 183, 187-88 (1928). The power extends, however, to all such measures which, under the circumstances and in contemplation of the Constitution, are reasonable to promote the public welfare. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

43. *Berman v. Parker*, 348 U.S. 26, 32 (1954); see *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926); *Goldman v. Crowther*, 128 A. 50, 54 (Md. 1925).

44. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 62 (1872). As Justice Holmes described it, the limits on the police power are discerned by the gradual approach of decisions on opposite sides of the question. *Noble State Bank v. Haskell*, 219 U.S. 104, 112 (1911).

45. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 391 (1926).

46. See *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592 (1962); *Consolidated Rock Prods. Co. v. City of Los Angeles*, 370 P.2d 342, 351, 20 Cal. Rptr. 638, 647, *appeal dismissed*,

determining the point at which proper regulation for the purposes of health, safety, morals, and welfare ends and an actual compensable taking begins. The Supreme Court has been unable to provide an answer to this question, preferring instead to remark when necessary that there are no "rigid rules"⁴⁷ or "set formula"⁴⁸ to supply the necessary guidance.

Rulemaking and Adjudication

The legislative authority of Congress regarding land use programs and policy has been delegated to various agencies such as the Army Corps of Engineers,⁴⁹ the Soil Conservation Service of the Department of Agriculture,⁵⁰ the Tennessee Valley Authority,⁵¹ the Department of Interior,⁵² and the Department of Housing and Urban Development.⁵³ Additionally, Congress has established various funding programs for land use and resource development such as the Open Space Law,⁵⁴ Urban Renewal,⁵⁵ Community Development,⁵⁶ and Coastal Zone Management.⁵⁷ At one point, there existed twenty-three federal departments and agencies with land use policy programs and over 100 federal land oriented programs providing funds for development.⁵⁸

Generally, the delegation of legislative authority to departments and agencies must be accompanied by limits on that authority. This authority is often restrained by various notions of procedural fairness which are prescribed for the agencies either constitutionally,⁵⁹ statutorily,⁶⁰ or judicially.⁶¹

371 U.S. 36 (1962). See generally Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 50 (1964).

47. *United States v. Caltex, Inc.*, 344 U.S. 149, 156 (1952).

48. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962).

49. 33 U.S.C. § 701b (1970). See also *id.* §§ 591-598 (1970 & Supp. V 1975).

50. 16 U.S.C. § 590e (1970).

51. *Id.* § 831.

52. Authority for the Secretary of the Department of the Interior may be found at 43 U.S.C. § 1457 (1970). Various other statutes dealing with more specific programs also empower the Secretary to act. See, e.g., 16 U.S.C. § 590e (1970); 30 U.S.C. § 1 (1970); 43 U.S.C. § 2 (1970). The department has established a body named the Board of Land Appeals and has provided procedures for actions before it. See 43 C.F.R. §§ 4.400-478 (1975).

53. A good example of HUD's authority to act in regard to land use is section 1453a of the Slum Clearance and Urban Renewal Act, 42 U.S.C. §§ 1441-1490 (1970).

54. 42 U.S.C. § 1500 (1970).

55. *Id.* § 1441a-c (1970 & Supp. V 1975).

56. *Id.* §§ 5301-5317 (Supp. V 1975).

57. 16 U.S.C. §§ 1451-1464 (Supp. V 1975).

58. STAFF OF SENATE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, 92D CONG., 2D SESS., BACKGROUND PAPERS ON PAST AND PENDING LEGISLATION AND THE ROLES OF THE EXECUTIVE BRANCH, CONGRESS, AND THE STATES IN LAND USE POLICY AND PLANNING 79 (Comm. Print 1972).

59. See generally *Yakus v. United States*, 321 U.S. 414, 424, 433-34 (1944) (Congress must comply with constitutional mandates in delegation of authority).

60. See 5 U.S.C. §§ 551-559 (1970 & Supp. V 1975) (Administrative Procedure Act).

61. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 409-13 (1971);

In the past the degree of fairness in administrative proceedings depended upon whether the agency was involved in a determination of legislative or adjudicative facts.⁶² The distinction between the two types of proceedings is best understood by looking at the effect of the action. If the effect is general in character or clearly a matter of policy determination, then the action is deemed to be rulemaking.⁶³ On the other hand, if the action applies only to named parties, then it is considered adjudication.⁶⁴ If the agency is involved in adjudication, then a higher level of procedural due process is required to be maintained than if only legislative facts are involved.⁶⁵ Judge Friendly comments that while this is a useful approach in determining the necessary procedures for compliance with the requirements of due process, it is only one approach and suffers from several defects.⁶⁶ He points out that because of the increasing amount of interaction between the government and private individuals, common sense will require many of the agency's formal adjudicatory hearings to be dispensed with in favor of something less time consuming in order that all the cases presented may be heard.⁶⁷ By contrast, something more than mere notice and the right to comment may be necessary in other actions previously regarded simply as rulemaking.⁶⁸

Required Minimum Procedures for Federal Proceedings

The Administrative Procedure Act⁶⁹ (APA) provides two distinct procedural models for agencies of the federal government to use depending upon the type of fact determination in which the agency is engaged.⁷⁰ If employed in rulemaking, the agency is merely required to follow a streamlined

Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 597-98 (D.C. Cir. 1971).

62. Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1268 (1975).

63. See *Buckeye Power, Inc. v. Environmental Protection Agency*, 481 F.2d 162, 170 n.4 (6th Cir. 1973); *American Express Co. v. United States*, 472 F.2d 1050, 1055 (C.C.P.A. 1973). See also Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 924 (1965).

64. See 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.02, at 413 (1958). The distinction is implicit in the opposite holdings of two cases. Compare *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 444-45 (1915) with *Londoner v. City of Denver*, 210 U.S. 373, 385-86 (1908). In *Londoner*, Denver property owners were assessed for street repairs on the basis of the enhanced property values resulting from the public improvements. The Court held the property owners entitled to a hearing before the assessment. *Id.* at 385-86. But see *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 444-45 (1915) (property owners held not entitled to a hearing before a uniform increase in property valuations).

65. Compare 5 U.S.C. § 553 (1970 & Supp. V 1975) (rulemaking) with *id.* §§ 554-557 (1970) (adjudication).

66. Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1268 (1975).

67. *Id.* at 1268.

68. *Id.* at 1268.

69. 5 U.S.C. §§ 551-559 (1970 & Supp. V 1975).

70. Compare *id.* § 553 (rulemaking) with *id.* §§ 554, 556, 557 (adjudication).

procedure known as "notice and comment."⁷¹ This procedure requires only publication of notice of the proposed action in the Federal Register⁷² and the opportunity for interested or affected parties to comment on the proposal by submission of statements either for or against the intended action.⁷³ Once the proposed rule is adopted, the agency is required to include "a concise general statement" of the reasons for adoption.⁷⁴ It is possible for the procedures of rulemaking to be formalized to the point of a trial type hearing "[w]hen rules are required by statute to be made on the record after opportunity for an agency hearing . . ."⁷⁵ As far as rulemaking is concerned, the APA provides only for the extremes of procedures required, either informal or formal rulemaking. There are no intermediate or alternative types of procedures set forth.

When an agency is employed in adjudication, then the extent of the required procedures depends upon whether the determination is considered formal or informal. When the adjudicatory process is "required by statute to be determined on the record after opportunity for an agency hearing," it is considered formal adjudication.⁷⁶ In this situation, the APA provides most of the elements that Judge Friendly considered necessary and constitutionally required for a fair hearing.⁷⁷

The process of adjudication, however, generally is not the means with which federal agencies and departments implement statutes which in any manner deal with land use. Since these statutes are usually couched in terms of national policy,⁷⁸ the promulgation of regulations dealing with these statutes generally involves a determination of legislative facts—that

71. *Id.* § 553(b),(c) (Supp. V 1975).

72. The statute requires the notice to include: "(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved." *Id.* § 553(b) (1970 & Supp. V 1975).

73. "After notice required by this section, the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, arguments with or without opportunity for oral presentation." *Id.* § 553(c) (Supp. V 1975).

74. *Id.* § 553(c) (Supp. V 1975). Unless the procedures are required by statute, the agency can circumvent these requirements by finding the procedures to be "impracticable, unnecessary, or contrary to the public interest." *Id.* § 553(b) (Supp. V 1975).

75. *Id.* § 553(c) (Supp. V 1975). In this situation the procedures and attendant rights contained in sections 556 and 557 apply. *Id.* §§ 556, 557 (1970).

76. *Id.* § 554(a) (1970).

77. *See id.* §§ 554, 556, 557 (1970). The requirement of the more formal hearing under the APA is, however, subject to several statutory exceptions. *See id.* § 554(a)(1)-(6) (1970). *See generally*, Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1279-96 (1975).

78. *See, e.g.*, 16 U.S.C. § 590a (1970) (soil conservation); *id.* § 1451 (Supp. V 1975) (coastal zone management); 42 U.S.C. § 1500 (1970) (open space land development). A particular example is illustrative. The Coastal Zone Management Act declaration of policy states "that it is the national policy (a) to preserve, protect, develop, . . . restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations . . ." 16 U.S.C. § 1452 (Supp. V 1975).

is, general information upon which policy decisions can then be founded. As a result, the regulatory process is not adjudication but rulemaking.⁷⁹ Consequently, adjudication procedures and any rights accorded under those procedures are not applicable to most federal land use statutes nor the major decisions "affecting property rights made pursuant thereto."

The language of the APA suggests that the statute establishing the particular program need only include the requirement of hearings "on the record" in order to make the formal procedures of rulemaking or adjudication applicable.⁸⁰ This phrase is located twice in the APA, once in section 553 dealing only with rulemaking, and again in section 554 which applies only to adjudications. The apparent result of these provisions is to allow Congress to designate its intention as to the type of adjudicatory or rulemaking hearing required to be given by each agency. The Supreme Court, using the due process requirement of a hearing, has broadened the scope of formal adjudicatory hearings. In *Wong Yang Sung v. McGrath*⁸¹ the requirements of due process were held equivalent to the statutory provision expressly requiring "on the record" hearings so that the formal procedures of the APA would apply to constitutionally mandated adjudicatory actions even though the statute itself did not require them.⁸² The Court has not, however, used the justification of due process as a means of enlarging the scope of rulemaking to include the formal procedures of the APA.⁸³ In other words, due process does not require hearing procedures in rulemaking beyond those of section 553 when the hearings are not required to be "on the record."⁸⁴

79. "Adjudicative facts are the facts about the parties and their activities, businesses, and properties. . . . Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law . . ." 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.02, at 413 (1958).

80. See 5 U.S.C. §§ 553(c), 554(a) (1970 & Supp. V 1975).

81. 339 U.S. 33 (1950).

82. See *id.* at 49-50.

83. See *United States v. Florida E. Coast Ry.*, 410 U.S. 224, 245-46 (1973); *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972).

84. See *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 625 (1973); *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972); *Anaconda Co. v. Ruckelshaus*, 482 F.2d 1301, 1306-07 (10th Cir. 1973). See also *United States v. Florida E. Coast Ry.*, 410 U.S. 224, 244-46 (1973). In *Florida East Coast*, the Court seems to say that the hearing provisions of regulatory statutes have been modified by the APA to the point where only notice and comment procedures are necessary as long as the action falls within the agency definition of rulemaking. Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1307 (1975). The APA defines a rule as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . ." 5 U.S.C. § 551(4) (1970) (emphasis added). In the words of Professor Davis, "[t]he words 'or particular' were not intended to change into rule making what . . . was regarded as adjudication. Those words mean no more than that what is otherwise rule making does not become adjudication merely because it applies only to particular parties or to a particular situation." 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 5.02, at 296 (1958). It would be just as accurate to say that the words mean no less as well as no more.

While some statutes expressly impose a requirement that rulemaking accomplished under the authority of the statute be "on the record,"⁸⁵ a random examination of federal statutes indicates that generally older ones impose no requirements for rulemaking procedures conducted pursuant to them.⁸⁶ Congress has become sympathetic to fears expressed by those who feel broad grants of rulemaking authority without the imposition of any procedural rules afford no protection against arbitrary or ill-considered regulations.⁸⁷ New legislation frequently requires additional procedural requirements beyond the applicable provisions of the APA to the extent of full-scale, formal, on-the-record type hearings.⁸⁸ Other legislation is less clear, providing only a general requirement that hearings must be held or that the agency or Secretary may act only after opportunity for a hearing.⁸⁹ In these cases, notice and comment procedures satisfy the requirement.⁹⁰ The Coastal Zone Management Act of 1972, for example, requires "full participation by relevant Federal agencies . . . and other interested parties, public and private"⁹¹

Specific Rights Provided the Parties to the Hearing

The major attraction of rulemaking is the streamlined procedures outlined by the APA. The notice and comment procedure set out in section 553 is obviously weighted in favor of economy and has been praised for providing a fair and efficient procedure as well.⁹² In a situation such as a non-adversary action, these informal and incomplete proceedings could be considered to be in conformance with the requirements of due process. A distinction could be noted in that the right to oral presentation is not guaranteed by section 553.⁹³ The Supreme Court, however, has held that the right to oral argument is not always essential to due process.⁹⁴ In these

See *Anaconda Co. v. Ruckelshaus*, 482 F.2d 1301, 1305 (10th Cir. 1973) (promulgation of air pollution standard affecting only one polluter properly held rulemaking).

85. For a partial list of such statutes, see Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CAL. L. REV. 1276, 1279-80 (1972). None of the statutes listed deals with land use.

86. *Id.* at 1278.

87. *Id.* at 1314.

88. Statutes enacted that require additional procedures include the Fair Packaging and Labeling Act, 15 U.S.C. §§ 1451, 1455(a) (1970) and the Federal Metal and Nonmetallic Mine Safety Act, 30 U.S.C. §§ 721, 725(c), (d) (1970).

89. See, e.g., 16 U.S.C. § 1455(c) (Supp. V 1975) (Coastal Zone Management Act); 42 U.S.C. § 3254c (1970) (Solid Waste Disposal); 42 U.S.C. § 1500b (1970) (Open-Space Land).

90. See *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972).

91. 16 U.S.C. § 1455(c)(1) (Supp. V 1975).

92. 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 6.15, at 283 (Supp. 1970).

93. 5 U.S.C. § 553(c) (Supp. V 1975).

94. *United States v. Florida E. Coast Ry.*, 410 U.S. 224, 241 (1973); *FCC v. WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 275-76 (1949). See also *Goldberg v. Kelly*, 397 U.S. 254, 268 n.15 (1970).

holdings, the Court also emphasized that broad generalizations concerning the requirements of due process should be avoided.⁹⁵ This presupposes that in balancing the interests, the interest of the private party was found to be too small to need full protection.⁹⁶

The more inclusive procedures for formal adjudication found in sections 554, 556, and 557 of the APA stand in stark contrast to the notice and comment procedures of rulemaking. A party's rights in a hearing before the agency approach those that were laid down by the Supreme Court in *Goldberg v. Kelly*.⁹⁷ But in order for these sections to apply, the agency must be engaged in adjudication that is required by statute "to be determined on the record after opportunity for an agency hearing. . . ."⁹⁸ Since most if not all the federal land use statutes are generally regulatory in nature, agencies are normally engaged in rulemaking, and therefore need not comply with the procedural requirements of an adjudicative hearing.⁹⁹

While rulemaking procedures are attractive to agencies who are charged with the duty of proposing regulations in order to implement policies, they are not so attractive to the property owner who is likely to be affected by them. One of the largest problems of the administrative process is probably attributable to the massive size of most agencies and their apparent insensitivity to communications addressed to them by the general public. When an agency's proposed rule adversely affects a person's enjoyment of land, he undoubtedly finds little comfort in possessing the mere opportunity to comment. He has no means of knowing whether it will eventually be read by anyone with decision-making power, or if indeed it will be read at all. Even if the comment submitted is read by the proper authorities, it may have little effect on his personal problem since no further consideration of his situation is required by the rulemaking process.

The characterization of land use regulations as "legislative" means that the right to participate in the making of the rules is denied to the affected landowners since there is no constitutional right to a hearing on a legislative decision made by an administrative agency.¹⁰⁰ The landowner has some protection from arbitrary and capricious actions by administrative agencies, but before he can get to the courts to prevent implementation of

95. See *FCC v. WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 277 (1949).

96. Professor Davis, in his treatise on administrative law, suggests that for the future, the balancing done for smaller interests should be omitted in favor of the comment by the Supreme Court in the case of *Goss v. Lopez*, 419 U.S. 565 (1975), that: "as long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process clause." K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* § 7.00-9, at 267 (1976) (quoting *Goss v. Lopez*, 419 U.S. 565, 576 (1975)).

97. 397 U.S. 254 (1970). See note 19 *supra*.

98. 5 U.S.C. § 554(a) (1970).

99. For example, see statutes cited note 77 *supra*.

100. See, e.g., *United States v. Welch*, 327 U.S. 546, 556-57 (1946) (Reed, J., concurring); *Joslin Co. v. City of Providence*, 262 U.S. 668, 678-79 (1923); *Bragg v. Weaver*, 251 U.S. 57, 58 (1919).

the action, he must first exhaust his administrative remedies.¹⁰¹ This implies a lengthy procedure that only an affluent property owner may be able to undertake. The less affluent owner is left with either an unsalable piece of property or the option of settling for a sacrifice price. Perhaps it is time to include a factor in the balancing of rights and interests that represents the difficulty of wading through the evolving regulatory morass so as to place the affected property owners in a position to be better able to protect their property interests.

TEXAS LAND USE PROCEDURES

Practically all levels of government recognize that land use control is more effective at the local level.¹⁰² Even federal statutes concerning land use involve state and local agencies for planning purposes.¹⁰³ Traditional concepts of land use control and regulation at the local level include the right to zone for land use and the power of eminent domain. The Texas enabling statute¹⁰⁴ granting the power to zone to municipalities specifically enumerates the authorized purposes of the power.¹⁰⁵ These purposes are the traditional ones and include the health, safety, morals, and welfare of the public.¹⁰⁶ The Texas Supreme Court upheld the zoning enabling act in *Lombardo v. City of Dallas*¹⁰⁷ in 1934. Since that time, the Texas courts consistently have held that strict compliance with the statute's requirements concerning notice and hearings is necessary in order to sustain the validity of the municipal ordinances.¹⁰⁸ In terms of due process, the constitutionality of the zoning enabling act is settled.¹⁰⁹ The focus on procedural due process in land use regulation should shift from the concern for the constitutionality of the entire concept to the situation where a request is made for rezoning or a variance from present requirements. Proceedings in this circumstance are concerned with adjudication of specific factual issues as they relate to individuals so that the resulting decision can be

101. See *Ideal Basic Indus., Inc. v. Morton*, 542 F.2d 1364, 1370 (9th Cir. 1976); *Union Oil Co. v. Udall*, 289 F.2d 790, 792 (D.C. Cir. 1961). See also 5 U.S.C. § 604 (1970).

102. See Evans, *Regional Land Use Control: The Stepping Stone Concept*, 22 BAYLOR L. REV. 1, 4 (1970).

103. See, e.g., 42 U.S.C. § 5312(a) (Supp. V 1975) (requiring Secretary of Housing and Urban Development to consult with local agency); 16 U.S.C. § 1455(c) (Supp. V 1975) (requiring state to develop program for management prior to grant of approval).

104. TEX. REV. CIV. STAT. ANN. art. 1011a (Vernon 1963).

105. *Id.*

106. *Id.*

107. 124 Tex. 1, 18, 73 S.W.2d 475, 483 (1934).

108. See, e.g., *Bolton v. Sparks*, 362 S.W.2d 946, 950 (Tex. 1962); *Smart v. Lloyd*, 370 S.W.2d 245, 248 (Tex. Civ. App.—Texarkana 1963, no writ); cf. *Peters v. Gough*, 86 S.W.2d 515, 516-17 (Tex. Civ. App.—Waco 1935, no writ) (steps required by statute essential to acquire jurisdiction). But cf. *Lawton v. City of Austin*, 404 S.W.2d 648, 651 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.) (legislature not required to provide any notice).

109. *Lombardo v. City of Dallas*, 124 Tex. 1, 18, 73 S.W.2d 475, 483 (1934).

characterized as an exercise in judgment that is more judicial than legislative. Consequently, due process should require that the individual be provided with rights which would be denied him were the decision characterized as legislative. This seems appropriate since a rezoning decision enforces or interprets existing law, therefore greater procedural protection should be supplied in the application of that law to specific individuals.¹¹⁰ Texas has supplied this protection with the creation of the Board of Adjustment and by specifically requiring certain procedures and rights for a party appearing before the Board.¹¹¹

While the legislature delegated the authority to zone for land use, it also insisted that some minimum procedures be utilized by the local authorities.¹¹² The "housekeeping" or nonessential details of the procedures to establish various zones were left to the discretion of the municipalities. The legislature did, however, explicitly require that no regulation enacted by such a body be considered valid unless accompanied by a hearing affording interested parties and other citizens the opportunity to be heard.¹¹³ In addition, "[a]t least 15 days' notice of the time and place of such hearing" was required to be published.¹¹⁴

The Texas Legislature has also delegated to local governments the power to acquire property by means of eminent domain.¹¹⁵ The legislature has enacted a statutory procedural system which governs all appropriations of private property.¹¹⁶ The procedure outlined by the statute is substantially the same as those enacted by other states whose statutes have been held to be constitutional by the United States Supreme Court.¹¹⁷ Additionally, the legislature has delegated the power of eminent domain to other entities, not necessarily governmental bodies.¹¹⁸ Whatever the agency or governing body, substantive due process in eminent domain proceedings requires only that the taking be necessary to accomplish a legitimate public purpose or use and that the property owner be compensated.¹¹⁹ Beyond these, however, the property owner has little recourse. He is not constitu-

110. See Booth, *A Realistic Reexamination of Rezoning Procedure: The Complementary Requirements of Due Process and Judicial Review*, 10 GA. L. REV. 753, 776 (1976).

111. See TEX. REV. CIV. STAT. ANN. art. 1011g (Vernon Supp. 1978).

112. *Id.* art. 1011d (1963).

113. *Id.* art. 1011d.

114. *Id.* art. 1011d.

115. *Id.* art. 1175(15).

116. See TEX. REV. CIV. STAT. ANN. art. 3264 (Vernon 1968), art. 3265 (Vernon Supp. 1978), art. 3266 (Vernon 1968), 3266a, b (Vernon Supp. 1978) & art. 3268 (Vernon Supp. 1978).

117. See *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 284 (1925); *Joslin Co. v. City of Providence*, 262 U.S. 668, 678 (1923); *Bragg v. Weaver*, 251 U.S. 57, 58 (1919).

118. *E.g.*, TEX. REV. CIV. STAT. ANN. art. 1269j-4.5, § 32 (Vernon Supp. 1978) (civic center authorities), art. 1435a, § 4(2) (Vernon Supp. 1976-1977) (public and private utility companies), art. 4494p, § 11 (Vernon 1976) (hospital districts).

119. U.S. CONST. amends. V, XIV.

tionally entitled to a prior hearing to contest the taking determination.¹²⁰

In *Joiner v. City of Dallas*,¹²¹ the petitioners chose to attack the entire Texas scheme of eminent domain powers and procedures as violative of due process. They particularly indicated that the failure to allow petitioners to participate in a hearing prior to the decision to acquire the property denied them due process¹²² as developed in the modern cases of *Goldberg v. Kelly*,¹²³ *Mitchell v. W.T. Grant Co.*,¹²⁴ and *Fuentes v. Shevin*.¹²⁵ The court, however, was disinclined to apply the due process standards urged by the petitioners since the clear mandates of the Supreme Court indicated otherwise.¹²⁶ It therefore held that the standards of due process in the context of eminent domain proceedings were minimal and did not include the right to a hearing prior to the taking determination.¹²⁷

While the district court's holding in *Joiner* is undoubtedly correct from the standpoint of stare decisis, it conflicts sharply with the Supreme Court decisions discussed earlier which represent the latest interpretations of due process when a person's property is at stake.¹²⁸ Those cases generally held that one has a constitutional right to have a hearing before his property rights may be lawfully removed by governmental action.¹²⁹ This illustrates a distinction that seems to have developed in the application of due process to control over speech and the press compared with control over property.¹³⁰ Society treats the application of controls on personal liberties and on property rights in startlingly divergent ways. It tolerates little interference with personal rights but accepts more and more regulation of property rights.¹³¹

120. *E.g.*, *Joslin Co. v. City of Providence*, 262 U.S. 668, 678 (1923); *Bragg v. Weaver*, 251 U.S. 57, 58-59 (1919); *Government of V.I. v. 19.623 Acres of Land*, 536 F.2d 566, 570 (3d Cir. 1976); *Joiner v. City of Dallas*, 380 F. Supp. 754, 769-70 (N.D. Tex.) (per curiam), *aff'd mem.*, 419 U.S. 1042 (1974).

121. 380 F. Supp. 754 (N.D. Tex.) (per curiam), *aff'd mem.*, 419 U.S. 1042 (1974).

122. *Id.* at 767 n.15.

123. 397 U.S. 254 (1970).

124. 416 U.S. 600 (1974).

125. 407 U.S. 67 (1972).

126. The district court listed fourteen United States Supreme Court cases from various dates, which stood for the proposition that landowners have no right to participate in a hearing prior to the taking determination. *Joiner v. City of Dallas*, 380 F. Supp. 754, 764 n.6 (N.D. Tex.) (per curiam), *aff'd mem.*, 419 U.S. 1042 (1974). The court also attempted to distinguish cases the petitioners insisted represented the "modern" view of procedural due process by noting that the power of eminent domain is a sovereign right and is therefore not subject to prior approval by affected property owners. *Id.* at 774.

127. *Id.* at 773-74; see *Government of V.I. v. 19.623 Acres of Land*, 536 F.2d 566, 570-71 (3d Cir. 1976).

128. See text at notes 17-34 *supra*.

129. See, *e.g.*, *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 605 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 611 (1974); *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970).

130. Compare *Kusper v. Pontikes*, 414 U.S. 51, 56-57, 58 (1973) and *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960) with *Joiner v. City of Dallas*, 380 F. Supp. 754, 773-74 (N.D. Tex.) (per curiam), *aff'd mem.*, 419 U.S. 1042 (1974).

Government is impeded in its quest to take one's property only by the requirements of compensation and public use and needs little provocation to impose use restrictions on property. But when the issue of personal liberties is involved, then "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation."¹³²

PROPOSAL AND A COMMENT

When Congress establishes an agency or grants authority to one already in existence, a trade-off results. On one hand, Congress could provide a specific, detailed description of the necessary duties. On the other, the proposal might be outlined in general terms and accompanied by a broad grant of power. The usual result is probably a compromise between the two, made necessary in order to muster a majority of votes for the measure to pass. In this manner, agencies end up with a large amount of discretion, not only with the extent of the task assigned but the means to accomplish it as well. In the case of land use legislation, this result should be avoided to as great an extent as possible. Since Congress may not be able to solve all land use problems alone, the delegation of authority to agencies becomes necessary in order to solve these problems more effectively. But with this delegation of authority should be the realization that the rights of property owners are not *de minimus*, when considered in juxtaposition to the welfare of the community. As more and more legislation is enacted containing lofty goals about preservation of one thing or another, this country's strong concept of private property is likely to be at least partially compromised.

Specifically, Congress should not allow an administrative agency to propose rules that might have a drastic effect on property owners without at least according the affected parties the opportunity for an oral hearing before the agency involved. To this end, the polar approach of the APA should be rejected for decisions related to land use, and instead, a variety of rulemaking procedures made available. This use of multiple procedures would provide a comparison of rights and interests between the agency and the property owner which more fairly represents all possible results. Thus, agencies will not be compelled to waste time and money by the forced utilization of formal hearing procedures for more trivial matters. As the possibility of interference with the use of property increases, however, an agency should be required to provide the property owner due process by including more and more of the elements of a hearing such as those discussed in Judge Friendly's article¹³³ or by the Supreme Court in *Goldberg*

131. See NATIONAL SCIENCE FOUNDATION, ENVIRONMENT: A NEW FOCUS FOR LAND-USE PLANNING 152 (1973) (land use controls are society's way to resolve conflicts between various means of using land).

132. *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

133. Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1279-95 (1975).

v. Kelly.¹³⁴ Furthermore, affected parties in a land use decision should be afforded the opportunity to participate in some manner in the earlier stages of rulemaking,¹³⁵ at least to the extent of a provision for discovery. The APA contains no provisions for any discovery procedure prior to the hearing.¹³⁶ Finally, as in any solution attempting to deal with procedural requirements, Congress should draft the statutes delegating its authority so as to specify clearly that public participation is required in the rulemaking process. The assumption that due process will provide sufficient protection simply is not valid in light of the case law.¹³⁷ The complaint that imposition of uniform procedures reduces agency flexibility is avoided by focusing on specific procedures for agencies involved in particular functions.¹³⁸

CONCLUSION

While regulation of land use does not necessarily have to increase in the future, it may well do so, with profound effects upon the concept of private property. Additional legislation establishing new motives for land use control will most likely breed new levels of government with which the property owner will have to contend. More and more pressure on government to control land use may result in further limitations on the right to own and use property unless the due process clause is applied to protect property rights with the same vigor and zeal that it is used to insure the preservation of personal liberties. Application of the recent Supreme Court cases concerning the requirements of notice and a hearing¹³⁹ to the problems of property owners would be a step toward that goal.

134. 397 U.S. 254, 267-71 (1970).

135. See *Railroad Comm'n v. Graford Oil Corp.*, 557 S.W.2d 946, 953 (Tex. 1977).

136. The Federal Rules of Civil Procedure do not apply to administrative hearings. 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 8.15, at 588 (1958).

137. See *United States v. Florida E. Coast Ry.*, 410 U.S. 224, 241 (1973); *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 756-57 (1972).

138. See Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 536-37 (1970).

139. See generally *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969).