The Supreme Court and Administrative Law, 1936-1940

Reuben Oppenheimer

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THE SUPREME COURT AND ADMINISTRATIVE LAW, 1936-1940

By REUBEN OPPENHEIMER*

In four terms,¹ the Supreme Court has decided over one hundred cases dealing, in whole or in part, with questions of administrative law. Some of these decisions are legal landmarks, but the chief significance of the period is the philosophy of judicial review which the cases as a whole represent.

The emphasis of the decisions in the period immediately preceding was on the limits which must be observed in the delegation of legislative power to administrative boards and commissions, and the requisites of the fair hearing which those boards and commissions must accord.² The cases in the period here considered give ample proof of the extent to which those signposts have been followed both in legislative draftsmanship and in administrative procedure. That the Court is still concerned with those fundamentals is shown by the recent decisions which afford additional protection to the basic rights of fair play. In-

* Of the Baltimore City Bar. A.B., 1917, Johns Hopkins University; LL.B., 1920, Harvard University.

¹ The cases here considered are those decided in the October Terms of 1936, 1937, 1938 and 1939. They are reported in Volumes 299 U. S. to 310 U. S., both inclusive.

Acknowledgment is gratefully made to Dean James M. Landis, of the Harvard Law School, who read this article in a preliminary stage and made valuable suggestions.

² *Panama Refining Co. v. Ryan*, 293 U. S. 388, 55 S. Ct. 241, 79 L. Ed. 446 (1935); *Schechter v. United States*, 295 U. S. 495, 55 S. Ct. 837, 79 L. Ed. 1570 (1935); *Jones v. Securities and Exchange Commission*, 298 U. S. 1, 56 S. Ct. 654, 80 L. Ed. 1015 (1936); *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 56 S. Ct. 720, 80 L. Ed. 1033 (1936); *Carter v. Carter Coal Co.*, 298 U. S. 238, 56 S. Ct. 855, 80 L. Ed. 1160 (1936); *Morgan v. United States*, 298 U. S. 468, 56 S. Ct. 906, 80 L. Ed. 1288 (1936). An attempt was made to analyze the import of these cases in an earlier article by the writer, *The Supreme Court and Administrative Law* (1937) 37 Col. L. Rev. 1.

deed, the scope of judicial review has been broadened at the same time that its intensity has in certain respects been modified. But in the cases as a group, far more than at any other time in the history of administrative law, the judicial and administrative processes appear, not as protagonists of conflicting ideals, but as companion instruments in the workings of our government.

The range of the decisions extends from broad questions of the manner in which constitutional responsibility can be delegated to analyses of specific factual situations. Cases in administrative law do not fit well into pigeon-holes, for they are not exercises in analytical classification, but rather applications of a trained judicial instinct which can perceive and weigh the intangibles whose reconciliation is so often the test of statesmanship. Nevertheless, a consideration of the different phases of the administrative process with which the decisions deal reflects, to some extent, both the varied nature of the problems presented and the consistency of the approach to those problems.

DELEGATION TO THE PRESIDENT

The Court, in two important decisions, has further clarified the extent to which Congress can constitutionally delegate functions to the President.³ In the case of *U. S. v. Curtiss-Wright*,⁴ the Court passed upon the constitutionality of a proclamation of the President, in pursuance of a Congressional joint resolution providing that "if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and if after consultation with the governments of other

³ Questions of delegation of power by a state are usually to be passed upon only by the state, not the Federal courts. *Great Northern R. Co. v. Washington*, 300 U. S. 154, 57 S. Ct. 397, 81 L. Ed. 573 (1937); *Highland Farms Dairy, Inc., v. Agnew*, 300 U. S. 608, 57 S. Ct. 549, 81 L. Ed. 835 (1937); *Neblett v. Carpenter*, 305 U. S. 297, 59 S. Ct. 170, 83 L. Ed. 182 (1938); *Higginbotham v. Baton Rouge*, 306 U. S. 535, 59 S. Ct. 705, 83 L. Ed. 968 (1939).

⁴ 299 U. S. 304, 57 S. Ct. 216, 81 L. Ed. 255 (1936).

American Republics and with their cooperation, as well as that of such other governments as he may deem necessary, he makes proclamation to that effect, it shall be unlawful to sell, . . . any arms or munitions of war in any place in the United States to the countries now engaged in that armed conflict . . ." The appellees were indicted for conspiring to sell arms of war to one of the countries then engaged in the Chaco War in violation of the provisions of the proclamation. One of their contentions was that the joint resolution attempted to effect an invalid delegation of legislative power to the Executive. The validity of the resolution and the proclamation were sustained.

The *Bush* case⁵ involved the validity of action taken under the flexible tariff provisions of the Tariff Act of 1930. Under this Act, the President is charged with the duty of approving, by proclamation, the rates, duty and changes in classification and in basis of value specified in any report of the Tariff Commission, "if in his judgment such rates of duty and changes are shown by such investigation of the Commission to be necessary to equalize such differences in costs of production." After public notice and hearing, the Commission recommended an increase in the ad valorem rate on the American selling price of canned clams imported from Japan. The President's proclamation stated that this change in duty so recommended was, in his judgment, necessary, although the appellee contended that the Commission had computed the cost of the Japanese production of clams on an erroneous basis. The Supreme Court, in upholding the action of the President, refused to consider the reasoning which underlay his action.

These two cases, each of which upheld a delegation of power to the President in the exercise of different kinds of national power, may be contrasted with the decision in *Panama Refining Company v. Ryan*,⁶ in which an attempted delegation of power from the Congress to the

⁵ U. S. v. *Bush & Co.*, 310 U. S. 371, 60 S. Ct. 944, 84 L. Ed. 1259 (1940).

⁶ *Supra*, n. 2; see *The Supreme Court and Administrative Law*, *supra*, n. 2 (1937) 37 Col. L. Rev. 1, 11-17.

President to prevent the transportation of "hot oil" in interstate commerce was held invalid. In all three of the cases, the President was charged with the duty and authority merely to put a general policy laid down by the Congress into operation upon the happening of certain previous events. The nature of the subject-matters involved in the three decisions, however, differed greatly. The "hot oil" act in the *Panama Refining* case was a regulation of the flow of goods in interstate commerce. The Chaco resolution, on the other hand, involved the exercise of the national will in its sovereign capacity, through the conduct of our foreign relations. The provisions of the Tariff Act before the Court in the *Bush* case affected both our foreign trade and our domestic economy.

There is also a considerable difference in the nature of the functions of the President in the three situations. The President, in the first case, was, in effect, regarded as in himself an administrative agency for the regulation of the subject matter involved, and the act was held invalid because the discretion entrusted to him in that capacity was not canalized by the laying down of reasonably adequate standards. In the second case, the real function of the President was that of the Chief Executive, to whom, even without action of Congress, the Constitution entrusts great powers over our foreign relationships. "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation."⁷ The opinion, however, further attempts to distinguish delegation to the President from Congressional delegation to others, on the ground that in foreign relationships the President has, through the State Department, access to confidential information often not available to the Congress itself, an argument which seems to prove too much, for there is no reason why an expert commission or executive officer, other than the President, could not acquire the same type of information. In the third case, the delega-

⁷ 299 U. S. 304, 319, 57 S. Ct. 216, 220, 81 L. Ed. 255, 262 (1936).

tion of authority was in substance, to an independent administrative body, the Tariff Commission, which operates in a manner usual in administrative law, but whose determinations cannot be effective unless approved by the President. Here the President acted only as an additional check upon an administrative body to whom most of the delegation of power had been entrusted.

Again, there were substantial differences in the relationships of the Government and the persons affected by the governmental acts. The refining companies in the "hot oil" case were engaged in the ordinarily lawful business of transporting a basic commodity in interstate commerce. That right can be regulated or curtailed by governmental authority if properly exercised, but the constitutionality of the regulation and of the means by which the regulation is to be made effective can be attacked by any one directly affected. The makers and sellers of munitions for warring South American countries, however, are in quite another category, for they, like the rest of us, are political subjects and bound by the actions which our Government, in its capacity as sovereign, takes in the realm of international affairs. There is involved here no question of domestic economy, no ordinary and usual rights to transact interstate business within the confines of the United States, but rather the necessarily great powers which the Federal Government must have in its dealings with other nations of the world. Similarly, the well-established doctrine that no one has a legal right to the maintenance of an existing tariff rate or duty⁸ is a recognition of the fact that tariff-making is an extension of the legislative power⁹ in a field of constantly changing internal and external conditions where individual interests cannot be allowed to accrue against action believed to be for the national good.

The historical backgrounds of the actions involved in the three cases are also dissimilar. There is a long and

⁸ *Norwegian Nitrogen Products Co. v. U. S.*, 288 U. S. 294, 53 S. Ct. 350, 77 L. Ed. 796 (1933).

⁹ See BLACHLY AND OATMAN, *FEDERAL REGULATORY ACTION AND CONTROL* (1940) 67.

unbroken chain of legislative action similar to the kinds of delegation involved in the *Curtiss-Wright* and *Bush* cases. In contrast, the form of delegation before the Court in the "hot oil" case, while not unprecedented, was the kind of delegation more generally given to administrative bodies or commissions. The legislation there involved and the executive action taken in pursuance of it bore evidence of the stress and confusion of a time of national crisis, and the defects which the Court found were easily susceptible of cure by remedial legislation.

Yet, despite these essential differences between the *Curtiss-Wright* and *Bush* cases, on the one hand, and the *Ryan* case, on the other, the two former decisions seem to mark a withdrawal, if not from the narrow precedent of the *Ryan* case, at least from some of the broad language of that decision. Clearly, the effect of the two former cases is to make more certain the right of Congress to delegate certain functions to the President—a result which may be of tremendous importance in the present crisis.

There is a further contrast between the decisions of the Court in the *Panama Refining* case and the *Bush* case. In the former, Justice Cardozo, in his dissent, was of the opinion that the presumption of the validity of executive action should apply to the President's proclamation, but the majority opinion held it to be one of the deficiencies of the proceedings before it that the President had not made a finding of fact. By the decision of the majority, the President, in the capacity in which he was serving under the statute, was regarded as performing a function essentially administrative in nature, so that his actions were judged by the criteria usually applicable to the validity of administrative proceedings rather than those governing the action of public officials in their executive capacity. In the *Bush* case, however, Mr. Justice Douglas, who delivered the opinion of the majority of the Court,¹⁰ stated that:

¹⁰ Mr. Justice McReynolds dissented.

“ . . . where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review.”¹¹

This is the very doctrine which Justice Cardozo, as a minority of one, thought should govern on the corresponding point in the *Panama* case. It is suggested that the essential difference between the two cases is that, in the tariff decision, the essential administrative function was carried out by the Tariff Commission, an administrative board, whereas, in the *Panama* case, the entire delegation was to the President alone. The Presidential action in accepting or rejecting the recommendation of the Tariff Commission is more executive than administrative in nature, and, therefore, the doctrine of those cases which assume the validity of the action of executive officials seems entirely applicable.

DELEGATION TO BUSINESS

The decisions of the Supreme Court subsequent to *Schechter v. U. S.*¹² make it clear that, in holding the National Industrial Recovery Act was an improper delegation of Congressional authority to private industry, the Court did not erect any barrier against a proper cooperation between government and business.¹³ Under the N.R.A., the codes were to be administered by advisory committees selected by trade associations and members of the industry. The functions of the Secretary of Agriculture and the Administrator for Industrial Recovery, once the code authority had been established, were largely perfunctory. The Act presented a situation, therefore, where, in reality, Congress had entrusted the carrying out of its general policies almost entirely to representatives of private business rather than to governmental bodies and experts. Four

¹¹ 310 U. S. 371, 380, 60 S. Ct. 944, 946, 84 L. Ed. 1259, 1262 (1940).

¹² 295 U. S. 495, 55 S. Ct. 837, 79 L. Ed. 1570 (1934).

¹³ See *The Supreme Court and Administrative Law*, *supra*, n. 2, 37 Col. L. Rev. 1, 18-22.

decisions in the last few years¹⁴ show that the *Schechter* case on this point goes no farther than to prevent Congressional abdication.

*Currin v. Wallace*¹⁵ involved the constitutionality of the Tobacco Inspection Act. Under that Act, the Secretary of Agriculture is authorized to designate tobacco markets, but he is not to designate a market unless two-thirds of the growers voting at a prescribed referendum favored it. The Court in its majority opinion, delivered by Mr. Chief Justice Hughes,¹⁶ held that this provision of the Act does not constitute an unconstitutional delegation of legislative power. Congress had not attempted to abdicate in favor of private business, but, on the contrary, had laid down its policy and entrusted the carrying out of it to the Secretary of Agriculture under proper administrative safeguards, and had merely placed a restriction upon its own regulation by giving a certain proportion of the growers voting at the referendum power to prevent its operation.

It is true that this provision of the Act amounts to giving a private industry a veto power over one of the functions which the Secretary of Agriculture is to perform, but this veto power is to be regarded in the light of the particular situation presented. The veto does not apply to the broader functions of the Secretary of Agriculture as to investigation and establishment of standards, but has reference only to the specific act of the designation of markets. A part of the purpose of such designation is to assist the growers of tobacco, and their approval of the selection of a particular market seems therefore properly required.

That this decision does not necessarily sanction the giving of an unrestricted right to industry to repeal administrative actions taken for the effectuation of a general policy is indicated in the case of *Highland Farms Dairy*,

¹⁴ *Currin v. Wallace*, 306 U. S. 1, 59 S. Ct. 379, 83 L. Ed. 441 (1939); *U. S. v. Rock Royal Cooperative*, 307 U. S. 533, 59 S. Ct. 993, 83 L. Ed. 1446 (1939); *Mulford v. Smith*, 307 U. S. 38, 59 S. Ct. 648, 83 L. Ed. 1092 (1939); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 60 S. Ct. 907, 84 L. Ed. 1263 (1940).

¹⁵ *Supra*, n. 14.

¹⁶ Mr. Justice McReynolds and Mr. Justice Butler dissented.

Inc., v. Agnew.¹⁷ In that case there was involved the validity of a Virginia statute establishing a milk commission. One of the grounds for the attack on the constitutionality of the Act was that it provided for the cancellation of the prices established by the Commission for a market, if cancellation were requested by a majority of the producers and distributors in the area affected. It was argued that the effect of that provision was to vest in private industry a power of repeal to be exercised at its pleasure. The majority opinion, in upholding the constitutionality of the Act, refused to pass upon this question because the power of cancellation had not been exercised or even threatened. In delivering the majority opinion, however, Justice Cardozo said:

"Delegation to official agencies is one thing, there being nothing in the concept of due process to require that a particular agency shall have a monopoly of power; delegation to private interests or unofficial groups with arbitrary capacity to make their will prevail as law may be something very different."¹⁸

The Agricultural Marketing Agreement Act provides, among other things, that an order of the Secretary of Agriculture fixing minimum prices for milk under certain conditions shall only become effective if its issuance is approved by a certain proportion of the interested producers. The Court, in the *Rock Royal* case, overruled the objection that this was an unlawful delegation to producers of the legislative power to put an order into effect. Mr. Justice Reed, in delivering the opinion of the Court,¹⁹ said:

"In considering this question, we must assume that the Congress had the power to put this Order into effect without the approval of anyone. Whether producer approval by election is necessary or not, a question we reserve, a requirement of such approval would not be an invalid delegation."²⁰

¹⁷ 300 U. S. 608, 57 S. Ct. 549, 81 L. Ed. 835 (1937).

¹⁸ 300 U. S. 608, 614, 57 S. Ct. 549, 552, 81 L. Ed. 835, 841 (1937).

¹⁹ Mr. Justice McReynolds and Mr. Justice Butler dissented.

²⁰ 307 U. S. 533, 577-578, 59 S. Ct. 993, 1015, 83 L. Ed. 1446, 1472 (1939).

The partnership between an administrative official and a private industry under the Agricultural Marketing Agreement Act is similar in form to that in the designation of tobacco markets. In substance, however, it goes further, for it makes the approval of industry a condition to the exercise of one of the vital functions entrusted to the Secretary of Agriculture, that of providing for minimum prices when such a provision can not be worked out by voluntary cooperation. The veto of an order establishing a minimum price is more far-reaching than the veto of the designation of a particular market, for the latter involves only a geographical choice, while the former involves a broad legislative policy. Yet even the power to prevent the establishment of a minimum price does not go as far as the power to repeal such a price after it has been fixed; there is a substantive difference as well as a theoretical distinction between the operation of a condition precedent and the revocation of a completed legislative act.

The result of the *Rock Royal* case seems sound, although there may not be agreement with the Court's language above quoted. To argue that, because Congress has the power to put an order into effect without the approval of the industry concerned, it can make its regulation effective upon the condition of such an approval, seems to disregard the doctrine of unconstitutional conditions. The majority opinion on this point in the *Carter* case²¹ rests largely upon the ground that approval of an industry is such an unconstitutional condition. It seems unnecessary to overrule that doctrine, which certainly has considerable force, for the *Rock Royal* decision can be rested upon the reasonableness of giving industry some part in the administrative mechanism while confining the actual moving force to the governmental agency.

A still different kind of partnership between a governmental official acting in an administrative capacity and the private industry affected was presented to the Court in

²¹ 298 U. S. 238, 56 S. Ct. 855, 80 L. Ed. 1160 (1936). See Jaffe, *Law Making by Private Groups* (1937) 51 Harv. L. Rev. 1; and *The Supreme Court and Administrative Law*, *supra*, n. 2, 22-26.

Mulford v. Smith.²² That case involved the constitutionality of the Agricultural Adjustment Act of 1938 with respect to providing marketing quotas for flue-cured tobacco. The Act provides for the apportionment of the state allotment among the farms which previously produced tobacco as well as to new tobacco farms. The quota among individual farms is to be fixed by local committees of farmers according to standards prescribed in the Act, amplified by regulations of the Secretary of Agriculture. A farmer dissatisfied with his allotment is given the right to have his quota reviewed by a local review committee, and there is further provision for judicial review. The constitutionality of the Act on the point involved was sustained by a majority of the Court.²³ Here, the delegation to private industry is of a detail of administration which can best be handled locally by those familiar with the conditions of their neighborhood. The local committees of farmers, moreover, are, in effect, made administrative bodies in themselves, and there is provision for administrative and judicial review.

Just as the conglomeration of functions thrust upon the code authorities under the N.R.A., as a result of the *Schechter* case, have been distributed among properly constituted administrative agencies, without stultification of any national policy,²⁴ so the hybrid provisions of the original Bituminous Coal Conservation Act, some of which were declared unconstitutional in the *Carter* case, have been clarified in the Bituminous Coal Act of 1937. The

²² *Supra*, n. 14.

²³ Mr. Justice Butler and Mr. Justice McReynolds dissented.

²⁴ The Fair Labor Standards Act has created a new administrative agency within the Department of Labor for the administration of the wage and hour provisions, and has given the Chief of the Childrens Bureau administrative functions for the enforcement of the child labor provisions. The Agricultural Marketing Agreement Act and the Bituminous Coal Act provide for the fixing of maximum and minimum prices by governmental agencies. The National Labor Relations Board is entrusted with greater power to protect the right of collective bargaining than Section 7 A of the N.R.A. ever gave. Even the sick chickens which were the subject matter of the *Schechter* case are now dealt with by the Packers and Stockyards Administration in the Department of Agriculture. Act of August 14, 1935, c. 532, 49 Stat. 648, Title 7, U. S. C. A. secs. 218 *et seq.* The fair trade provisions of the old codes have not been resuscitated, but there apparently has been a change in national policy with respect to the anti-trust laws.

new Act provides for regulation of the sale of bituminous coal by the Bituminous Coal Commission, an administrative body organized in an accepted form. The coal producers accepting membership are to be organized under the Bituminous Coal Code; provision is made for a district board of code members to act as an aid to the Commission but subject to its authority. The Commission is empowered to fix minimum prices for code members in accordance with stated standards. Each board is to propose minimum prices, which are to be approved, disapproved or modified by the Commission as the basis for the coordination of minimum prices. The new Act was declared constitutional in *Sunshine Anthracite Coal Co. v. Adkins*.²⁵ The opinion of the majority, delivered by Mr. Justice Douglas,²⁶ expressly held that there was no improper delegation of legislative authority to industry. Industry's part in the price-fixing machinery here is that of initiation, not termination. The code authority suggests, but the administrative authority acts. The function of industry is more than advisory, for action cannot be completed until the code authorities perform their functions, but the act itself and the responsibility for it is that of the governmental agency.

Perhaps the chief significance of these cases lies in the variations in administrative structure which the Court has upheld. It is a sign of legislative and judicial statesmanship that there has been no attempt to lay down a norm of division of functions between administrative boards or officials and private industries. The Court, in the *Schechter* case, only put a ceiling to experimentation along this line. That ceiling has proved, not a handicap, but a stimulus to administrative architectonics.

STANDARDS

In a number of cases, the Court had occasion to pass upon the question of whether or not a Federal or State statute provided a reasonably clear standard to govern

²⁵ *Supra*, n. 14.

²⁶ Mr. Justice McReynolds dissented.

the discretion of an administrative body or official to whom the carrying out of the legislative policy had been delegated. In each of these cases it was found that the standards were sufficient.

The subject matters involved in these decisions include the granting or withholding of licenses to broadcasting stations;²⁷ the processes whereby minimum and maximum prices are to be prescribed for bituminous coal;²⁸ fixing of rates for a state public utility;²⁹ the establishment of market areas and the fixing of minimum prices for milk under the Agricultural Marketing Agreement Act;³⁰ the granting or withholding of licenses to distributors by a state milk commissioner;³¹ the fixing of a quota for the production of tobacco and its apportionment among the farmers;³² the prohibition of the sale of munitions to warring South American countries;³³ and the determination of what constitutes an interurban railway by the Interstate Commerce Commission.³⁴

The standards laid down for the carrying out of these different determinations presented a wide range of particularization. The banks within which the discretion of the President must be canalized in determining whether or not to apply a prohibition of the sale of munitions must necessarily be far less circumscribed than the boundaries for the action of an administrative commission in determining the minimum and maximum prices for an industry. In the one case, the President is acting not only as an arm of the Congress, but also in his own capacity as the representative of the nation in the conduct of foreign affairs. In the other case, there is involved the regulation of a

²⁷ Federal Communications Commission v. Pottsville Broadcasting Company, 309 U. S. 134, 60 S. Ct. 437, 84 L. Ed. 656 (1940).

²⁸ Sunshine Anthracite Coal Company v. Adkins, *supra*, n. 14.

²⁹ Texarkana v. Arkansas, Louisiana Gas Co., 306 U. S. 188, 59 S. Ct. 448, 83 L. Ed. 598 (1939).

³⁰ U. S. v. Rock Royal Cooperative, Inc., *supra*, n. 14.

³¹ Highland Farms Dairy, Inc., v. Agnew, 300 U. S. 608, 57 S. Ct. 549, 81 L. Ed. 835 (1937).

³² Mulford v. Smith, *supra*, n. 14.

³³ U. S. v. Curtiss-Wright Export Corporation, 299 U. S. 304, 57 S. Ct. 216, 81 L. Ed. 255 (1936).

³⁴ Shields v. Utah Idaho Central Railroad Company, 305 U. S. 177, 59 S. Ct. 160, 83 L. Ed. 111 (1938).

turbulent industry whose history, in the striking phrase of Mr. Justice Douglas, is written "in blood as well as in ink".³⁵ The breadth of discretion entrusted to the President is supported by a long line of unchallenged legislative enactments; the specificity of the standards in the other case is the product of the conflicting forces within the industry as well as of the decision of the Supreme Court on the former abortive statute.³⁶

There are substantial differences in the nature of the individual interests affected by administrative actions which, in themselves, may play their part in judicial review. The Agricultural Marketing Agreement Act affects the doing of business in economic fields only recently subject to Federal regulation, where the private interests are strong and diversified. The Act was drawn with due regard to the signposts erected by the *Schechter* decision.

"Unlike the language of the National Industrial Recovery Act condemned in the *Schechter* case . . ., the tests here to determine the purpose and the powers dependent upon that conclusion are defined. In the Recovery Act the Declaration of Policy was couched in most general terms. In this Act it is to restore parity prices, §2. Under the Recovery Act, general welfare might be sought through codes of any industry, formulated to express standards of fair competition for the businesses covered. Here the terms of orders are limited to the specific provisions, minutely set out in 8 c (5) and (7). While considerable flexibility is provided by 8 (c) (7) (D), it gives opportunity only to include provisions auxiliary to those definitely specified."³⁷

In the *Agnew* case, however, which happened to involve the same particular subject of milk regulation, it was held that the Virginia statute was not invalid for failing to prescribe any standards to be applied by the Commission in granting or refusing licenses to distributors and

³⁵ 310 U. S. 381, 395, 60 S. Ct. 907, 913, 84 L. Ed. 1263, 1272 (1940).

³⁶ *Carter v. Carter Coal Co.*, 298 U. S. 238, 56 S. Ct. 855, 80 L. Ed. 1160 (1936).

³⁷ 307 U. S. 533, 575, 576, 59 S. Ct. 993, 1013, 1014, 83 L. Ed. 1446, 1471 (1938).

producers. The obvious purpose of the license was merely to provide the Commission with a record to aid in supervision and enforcement. This specific phase of the legislation did not of itself affect the doing of business.

The *Pottsville Broadcasting* case also involved the granting or withholding of a license, although here the economic interests affected by the administrative action were far more substantial than in the *Agnew* case. Mr. Justice Frankfurter, in delivering the opinion of the Court, pointed out that what was involved was a system of permits for short periods of time

“to protect the national interest involved in the new and far-reaching science of broadcasting. . . . The Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication. Rather it expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission.”³⁸

The independence and expertness of the administrative agency to which the discretion is entrusted may, of themselves, be intangible elements in these decisions. The Interstate Commerce Commission, with its long handling of problems in its specialized field, is peculiarly equipped to weigh the distinguishing factual characteristics which must determine whether a railroad company is “interurban” for the purpose of the Railway Labor Act. The “touchstone” of “public convenience, interest, or necessity” for the exercise of the authority of the Federal Communications Commission, while “as concrete as the complicated factors for judgment in such a field of delegated authority permit, . . . serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy.”³⁹

The policies to be carried out by a single administrative organization may so vary in nature as to warrant different degrees of canalization of discretion. The decision of the

³⁸ 309 U. S. 134, 137, 138, 60 S. Ct. 437, 439, 84 L. Ed. 656, 659 (1940).

³⁹ 309 U. S. 134, 138, 60 S. Ct. 437, 439, 84 L. Ed. 656, 659 (1940).

Secretary of Agriculture that regulation of tobacco marketing is advisable for any particular year is to be determined by readily ascertainable factual criteria, but the determination of the quota among the states is necessarily based on intangibles, such as production trends or abnormal producing conditions, as well as upon concrete facts such as past output.

In all these cases, the Court evinces its awareness of the amazing variation in the problems of regulation which modern economic life produces. It is properly loath to declare invalid any delegation to Federal or State administrative bodies where the Legislature has seriously attempted to prescribe standards sufficiently definite under the circumstances to give fair protection to those regulated without impairing the efficiency of the regulatory process. Here, as in other phases of administrative law, the Supreme Court has shown its function to be that of a surveyor of the administrative structure, not its builder.

THE REQUIREMENT OF NOTICE AND HEARING

The constitutional safeguard, under both the Fifth and Fourteenth Amendments, of notice and hearing in administrative proceedings affecting specific individual rights has been so consistently made clear by the Supreme Court in the past that recent legislation generally contains such provisions as one of its most salient characteristics. The Court, in reviewing the processes of administrative agencies, has emphasized the importance of these requirements.⁴⁰

The giving of notice and the opportunity to attend a hearing are not necessary as a matter of due process of law in an action taken by a clearly legislative body, even though they might be necessary were the power to take the same action entrusted to an administrative board. While

⁴⁰ *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 46, 47, 57 S. Ct. 615, 628, 629, 81 L. Ed. 893, 916, 917 (1937), and *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 49, 58 S. Ct. 459, 462, 82 L. Ed. 638, 643 (1938) (dealing with the National Labor Relations Act); *Railroad Commission of California v. Pacific Gas & Electric Co.*, 302 U. S. 388, 393, 58 S. Ct. 334, 337, 82 L. Ed. 319, 322 (1938) (dealing with a rate order of a state railroad commission).

the result may be the same, additional safeguards are held called for when the action is carried out as part of a delegated function by a body other than one of the three primary parts of government.⁴¹ Notice and hearing are not constitutionally necessary as to persons or corporations against whom the order of an administrative body does not run, even though they may be affected by it.⁴² Although an act establishing an administrative procedure makes no specific provision for the opportunity of notice and attendance at a hearing, it will be assumed that those requirements will be complied with unless the contrary is proved.⁴³

Where the administrative action was in the nature of a police regulation to prevent the sale of cosmetics which a State Commissioner and Director of Public Health believed would be injurious, and where there was a provision for

⁴¹ *Chesebro v. Los Angeles County Flood Control District*, 306 U. S. 459, 464, 59 S. Ct. 622, 624, 83 L. Ed. 921, 926 (1939). See *Townsend v. Yeomans*, 301 U. S. 441, 451, 57 S. Ct. 842, 847, 81 L. Ed. 1210, 1218 (1937); and *Clark v. Gray*, 306 U. S. 583, 594, 59 S. Ct. 744, 750, 83 L. Ed. 1001, 1010 (1939).

⁴² *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271, 58 S. Ct. 571, 578, 82 L. Ed. 831, 837 (1938), holding that the National Labor Relations Board does not have to notify an employees' association of a proposed hearing on a charge that the employer had created and fostered the organization and dominated its administration, and that the presence of that association at the hearing is not necessary in order to enable the board to determine whether the employer has violated the statute or to make an appropriate order against the employer. Cf. *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 232, 233, 59 S. Ct. 206, 218, 219, 83 L. Ed. 126, 141, 142 (1938), holding that the board had no authority to invalidate the contracts of independent labor unions without notice and hearing to them. In *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350, 60 S. Ct. 569, 84 L. Ed. 799 (1940), the Court held the Board had authority to order an employer not to enforce contracts with its individual employees found to have been procured in violation of the National Labor Relations Act and to have contained provisions violating that Act, even though the employees were not parties to the proceedings. While no court can make a binding adjudication of rights in personam if the party is not brought before it by due process of law, the Board was here only asserting a public right vested in it as an administrative body. Its order ran only against the employer and did not foreclose the employees from taking any action to secure an adjudication upon their rights under the contracts. See (1940) 40 Col. L. Rev. 898.

Where the statute under which a board of land commissioners was created to pass upon the status of Mexican grants upon the annexation of California did not require adversary proceedings, notice to other parties was not essential for the validity of its action. *U. S. v. O'Donnell*, 303 U. S. 501, 524, 58 S. Ct. 708, 720, 82 L. Ed. 980, 993 (1938).

⁴³ *Anniston Manufacturing Co. v. Davis*, 301 U. S. 337, 356, 357, 57 S. Ct. 816, 825, 81 L. Ed. 1143, 1155, 1156 (1937).

court review from refusal to issue a certificate of registration, it was held that the Fourteenth Amendment does not require that there must be a hearing of the applicant before the Department exercises its judgment.⁴⁴ Mr. Justice Brandeis, in delivering the opinion, called attention to the circumstances and the character of the action involved. If health may be jeopardized unless administrative action is quickly taken, the paramount consideration of public safety justifies the waiving of the usual requirements as to notice, particularly where the individual rights are safeguarded by the opportunity of court appeal.

It is interesting to note how far both recent legislation and administrative practice go in making provision for notice and hearing, even where those provisions may not be necessary as a matter of constitutional law. Fairness in administrative functioning goes beyond the observance of constitutional mandates. Moreover, even though the action of the board may be legislative in nature, the opportunity of those affected to express their views is a salutary safeguard, tending to promote the efficiency of the regulatory process and to secure acquiescence in its ultimate decision.⁴⁵ The extent to which notice of proposed action substantially legislative in nature and opportunity to be present at the hearing is given by Federal administrative agencies, whether because of statute or because of regulations of the administrative bodies themselves, is set forth in detail in the Monographs published by the Attorney General's Committee on Administrative Procedure.⁴⁶

⁴⁴ *Bourjois v. Chapman*, 301 U. S. 183, 57 S. Ct. 691, 81 L. Ed. 1027 (1937).

⁴⁵ See *U. S. v. Rock Royal Cooperative, Inc.*, 307 U. S. 533, 546, 547, 576, 59 S. Ct. 993, 1000, 1001, 1014, 83 L. Ed. 1446, 1455, 1456, 1471 (1939). Cf. *Bi-Metallic Investment Co. v. Board of Equalization*, 239 U. S. 441, 36 S. Ct. 141, 60 L. Ed. 372 (1915).

⁴⁶ Those Monographs dealing with the practices and procedures of the Division of Public Contracts, Department of Labor; the Veterans' Administration; the Federal Communications Commission; the United States Maritime Commission; the Federal Alcohol Administration; the Federal Trade Commission; the Administration of the Grain Standards Act, Department of Agriculture; the Railroad Retirement Board; the Federal Reserve System; the Bureau of Marine Inspection and Navigation, Department of Commerce; the Administration of the Packers and Stockyards Act, Department of Agriculture; the Post Office Department; the Bureau of the Comptroller of the Currency, Treasury Department; and the Federal Deposit Insurance Corporation, have been published under the general title

REQUISITES OF A FAIR HEARING

The Court has continued to clarify the essentials of what constitutes a fair hearing in administrative procedure. Administrative law, with its kaleidoscopic variations in economic background and with its constant balancing of the public and private interests involved, necessarily has few absolutes. One of those few is the doctrine that, in adversary proceedings on specific issues between definite parties, the hearing must observe the elements of fair play. Fair play in such a hearing is not a matter of definition, but of the application of long recognized principles of justice to the different types of actual situations presented.

The cases of *U. S. v. Morgan*⁴⁷ present a series of decisions which, while between the same parties, have had far-reaching effects in the whole field of administrative law. Through the dramatic fortuity characteristic of our legal system, the Court has been able in the course of this litigation both to buttress the protection which must be accorded to individual parties and, at the same time, to promote the cooperation between courts and administrative agencies without which the whole governmental process would be seriously handicapped.

It is probable that no decisions in administrative law have had more far-reaching effects on the workings of administrative agencies than the first two *Morgan* cases. Each opinion immediately caused a number of important alterations in the procedure of boards, commissions and departments dealing with adversary situations, and, while the full extent of the decisions is not yet entirely clear, the process of self-examination within the agencies which they brought about is still going on.

of "Administrative Procedure in Government Agencies". Senate Document No. 186, 76th Congress, 3rd Session, in thirteen parts, Government Printing Office, Washington, D. C., 1940.

⁴⁷ *Morgan v. U. S.*, 298 U. S. 468, 56 S. Ct. 906, 80 L. Ed. 1288 (1936); *Morgan v. U. S.*, 304 U. S. 1, 58 S. Ct. 773, 82 L. Ed. 1129 (1938), petition for rehearing denied 304 U. S. 23, 58 S. Ct. 999, 82 L. Ed. 1135 (1938); *U. S. v. Morgan*, 307 U. S. 183, 59 S. Ct. 795, 83 L. Ed. 1211 (1939). For a discussion of the first *Morgan* case, see *The Supreme Court and Administrative Law*, *supra*, n. 2, 37 Col. L. Rev. 1, 33-36.

The second *Morgan* case, like the first, presented the question of the validity of an order of the Secretary of Agriculture fixing maximum rates to be charged by market agencies under the Packers and Stockyards Act. As in the first case, the question was whether the Secretary's order had been made without a proper hearing. The original proceedings as to the reasonableness of the charges of the appellants for stockyards services had been begun by the Secretary of his own motion. Evidence on the original hearing and on the rehearing had been taken from time to time over a two year period. There were about ten thousand pages of transcript of oral evidence and over one thousand pages of statistical exhibits. Apart from what was said at the sketchy oral argument, the Government formulated no issues and furnished the appellants no statement or summary of its contentions and no proposed findings. The appellants' request that the examiner prepare a tentative report was refused. Instead, findings were prepared in the Bureau of Animal Industry of the Department of Agriculture, whose representatives had conducted the proceedings for the Government. There were one hundred and eighty findings, which dealt in detail with various phases of the economic problems presented by the Kansas City Live Stock Market as well as the general and specific ways the appellants conducted their business. These findings were submitted to the Secretary, who signed them with only a few changes in the rates suggested.

The Court held that this procedure did not constitute a fair and open hearing:

"The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. . . . Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."⁴⁸

⁴⁸ 304 U. S. 1, 18, 19, 58 S. Ct. 773, 776, 82 L. Ed. 1129, 1132, 1133 (1938).

Mr. Chief Justice Hughes, in delivering the opinion of the Court,⁴⁹ emphasized that the doctrine laid down related to substance and not form. While it is good practice to have the examiner prepare a report as a basis for exceptions and argument, that particular type of procedure is not essential. What matters is whether the parties against whom specific action is proposed to be taken know what that action is proposed to be; the manner in which knowledge of the issues is brought home to them is immaterial. The Court made it clear that it was not attempting to make any form of notice and procedure mandatory in all administrative proceedings. It was the complicated nature of the issues and the multiplicity of findings in the second *Morgan* case which made notice essential.

The non-technical nature of that decision is made all the clearer by the *Mackay Radio* case,⁵⁰ decided in the same term. The Company was summoned by the Board to answer a complaint that it discriminated by discharging five men. After evidence had been taken, the complaint was withdrawn and a new one presented based on its refusal to reemploy any of these men. When the Board made its findings, it reverted to its original position that what the Company did was not a failure to reemploy, but a wrongful discharge. The Company claimed that it was found guilty of an unfair labor practice which was not within the issues upon which the case was tried. The Court overruled this contention characterizing the Company's position as:

" . . . highly technical. All parties to the proceeding knew from the outset that the thing complained of was discrimination against certain men by reason of their alleged union activities."⁵¹

The form of the proceeding may have been technically defective, but the Company, at every stage, knew of the real substantive issue involved. The *Mackay* case makes

⁴⁹ Mr. Justice Black dissented. Mr. Justice Cardozo and Mr. Justice Reed took no part in the consideration and decision.

⁵⁰ National Labor Relations Board v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 58 S. Ct. 904, 82 L. Ed. 1381 (1938).

⁵¹ 304 U. S. 333, 349, 58 S. Ct. 904, 912, 82 L. Ed. 1381, 1392 (1938). Cf. National Labor Relations Board v. *Sands Mfg. Co.*, 306 U. S. 332, 346, 59 S. Ct. 508, 515, 83 L. Ed. 682, 691 (1939).

clear by way of decision what the Court, in the *Morgan* case, made clear by way of language. The Court is the guardian of substantive individual rights in administrative proceedings as well as in every other field of the law, but that guardianship is not to be construed as an obstructive insistence upon the observance of technicalities to delay the workings of the administrative process.⁵²

There is an additional overtone in the second *Morgan* case, whose full implications are yet to be realized—the advisability of the separation of functions within the organization in adversary proceedings, where the administration is acting in a dual capacity, such as prosecutor and judge. To accomplish that separation, as some Federal agencies are showing, it is not necessary to withdraw functions from the agency; the full spirit of fair play can be generally achieved by a division of responsibility within the agency's personnel.⁵³

In another case, the Court had occasion to reannounce the fundamental principle that administrative adversary

⁵² For an example of the changes in administrative procedure made advisable by the second *Morgan* case, see *In the Matter of the Petition of the National Labor Relations Board*, 304 U. S. 486, 58 S. Ct. 1001, 82 L. Ed. 1482 (1938). Cf. *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 228, 229, 59 S. Ct. 206, 216-217, 83 L. Ed. 126, 139, 140 (1938). The extent to which particular administrative processes in the Federal agencies should be changed, either by reason of the holding in the second *Morgan* case or, even though such change may not be necessary as a matter of constitutional law, to reflect the spirit of fair play, depends upon a number of factors. Different answers to the problem may well be proper in different agencies. See the Monograph of the Attorney General's Committee on Administrative Procedure on the Administration of the Grain Standards Act, Department of Agriculture, United States Government Printing Office, Senate Document No. 186, 76th Congress, 3rd Session, pages 18-20 (Washington, 1940).

⁵³ For an analysis of the administrative functions within the Department of Agriculture where such division of responsibility seems called for to effectuate the spirit of fair play, see Memorandum of the Solicitor of the Department of Agriculture, dated May 11, 1939, printed in the Monograph of the Attorney General's Committee on the Administration of the Grain Standards Act, 22-25. See also the Report of the Committee named by the Secretary of Labor to study the immigration practice and procedure and to make such recommendations as it deemed advisable, dated May 17, 1940, at page 80:

"Clearly if the Central Office in a deportation case were to accept confidential recommendations from a prosecutor-inspector, not disclosed to the alien, the principle of the second *Morgan* case would be directly violated. We think the case is not better when the prosecutor-inspector at a primary hearing makes any decision given presumptive weight by the Central Office, and this whether or not the findings and decision were disclosed to the alien. For in such case,

orders cannot be based upon facts not appearing on the record. A commission cannot cut down the value of a public utility upon the strength of information "secretly collected and never yet disclosed . . . This is not the fair hearing essential to due process. It is condemnation without trial."⁵⁴

THE POWER OF ADMINISTRATIVE BOARDS OVER THEIR OWN PROCEDURE

The decisions of the Court show a consistent attitude that, within certain limits, administrative agencies are to be left free, in so far as judicial review is concerned, to develop their own procedure. It is for the courts to determine whether the principles of fair play have been observed in adversary proceedings, or whether the particular board or commission has exceeded the statutory authority given it, but it is not for them to decide whether the technique which any of these agencies is developing to meet its own particular problems is the best possible approach, nor to insist upon the uniform adoption of even a procedure generally approved. Like the social experimentations in the forty-eight States which are made possible by our Federal system, the variations in both structure and procedure which the administrative organisms exhibit may be an aid to the evolutionary process.

The recent cases permit more latitude in the form of findings of fact as a condition precedent to certain types of administrative action than the *Panama Refining* case⁵⁵

where weight attaches to the decision of an officer who in his own person combines the functions of prosecutor and judge, mere disclosure of what the findings are is futile as a corrective.

"Whatever may be the conclusions of the courts, which are and must be hesitant to hold administrative action to be in violation of the Constitution, there seems to us no question of the duty of administrative officials themselves by every practicable means to remove the basis of criticism."

See Stason, *Administrative Tribunals—Organization and Reorganization* (1938) 36 Mich. L. Rev. 533, 554.

⁵⁴ *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U. S. 292, 300, 57 S. Ct. 724, 728, 81 L. Ed. 1093, 1099 (1937). Cf. *Patterson v. Stanolind Oil & Gas Co.*, 305 U. S. 376, 59 S. Ct. 259, 83 L. Ed. 231 (1939).

⁵⁵ *Panama Refining Co. v. Ryan*, 293 U. S. 388, 55 S. Ct. 241, 79 L. Ed. 446 (1935). See LANDIS, *THE ADMINISTRATIVE PROCESS* (1933) 148, 149.

seemed to foreshadow. The findings by the President in the *Curtiss-Wright* case,⁵⁶ affecting future sales of munitions, could hardly have been more general, but their sufficiency was sustained. An order of the Interstate Commerce Commission, requiring certain carriers to cease and desist from spotting cars on industrial plant tracks as part of the services rendered, was upheld upon bare findings that the carrier service of transportation is complete upon the delivery to the interchange tracks, and that spotting within the plants is not included in the services for which the line-haul rates were fixed.⁵⁷ Findings of the Federal Communications Commission, which were the basis of its refusal to grant a permit for a radio broadcasting station, were held sufficient even though they were not "as detailed upon the subject as might be desirable".⁵⁸ These three cases, it is to be noted, deal with administrative action which is predominantly legislative in character, or which is concerned with the granting or withholding of licenses. There seems to have been no relaxation in the requirement of specific findings to support an order quasi-judicial in nature.⁵⁹

The Court continues to uphold the vitally necessary power of administrative officials to fill in the details of Congressional enactments through the making of proper rules.⁶⁰ But the power of amplifying the legislative policy

⁵⁶ U. S. v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 57 S. Ct. 216, 81 L. Ed. 255 (1936).

⁵⁷ U. S. v. *American Sheet & Tin Plate Co.*, 301 U. S. 402, 406, 407, 57 S. Ct. 804, 806, 807, 81 L. Ed. 1186, 1190, 1191 (1937).

⁵⁸ *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U. S. 470, 477, 60 S. Ct. 693, 698, 84 L. Ed. 869, 875 (1940).

⁵⁹ *National Labor Relations Board v. Fansteel Metal Corporation*, 306 U. S. 240, 261, 59 S. Ct. 490, 498, 83 L. Ed. 627, 637-8 (1939). There must be a request for findings before an administrative board to support the claim of denial of procedural due process. *American Toll Bridge Company v. Railroad Commission of California*, 307 U. S. 486, 492, 493, 59 S. Ct. 948, 951, 952, 83 L. Ed. 1414, 1420, 1421 (1939). It will be presumed that a hearing complied with all the requirements of procedural due process unless the contrary is made affirmatively to appear. *Anniston Manufacturing Company v. Davis*, 301 U. S. 337, 357, 57 S. Ct. 816, 825, 81 L. Ed. 1143, 1155-6 (1937).

⁶⁰ *Helvering v. Wilshire Oil Co.*, 308 U. S. 90, 100-103, 60 S. Ct. 18, 24-25, 84 L. Ed. 101, 107-109 (1939); *Atchison, T. S. F. R. Co. v. Scarlett*, 300 U. S. 471, 57 S. Ct. 541, 81 L. Ed. 748 (1937). See Alvord, *Treasury Regulations and the Wilshire Oil Case* (1940) 40 Col. L. Rev. 252; Fuchs, *Procedure in Administrative Rule Making* (1938) 52 Harv. L. Rev. 259.

is far different from an attempt by an administrative board to waive the carrying out of such a policy.⁶¹ There can be administrative amplification, but not administrative repeal.

In the same general way that courts retain control, for certain periods, of cases which have been heard before them, so it has been held, through the process of statutory interpretation, that the National Labor Relations Board can modify or set aside its order, in whole or in part, at any time before the filing in Court of a certified transcript of the record,⁶² although that authority is ended, as an absolute right, when the record is filed in court.⁶³ The Interstate Commerce Commission was held to have the right to reconsider and set aside its reparation order, although the originally successful shipper had paid out one-half of the amount recovered to the expert who represented it, and recovery of the fee was barred by the statute of limitations;⁶⁴ the power of the Commission to modify its own findings in order to effectuate a Congressional policy is more important than incidental hardship to a private party prematurely elated.

Even though the Federal Communications Commission erred in denying a permit to construct a broadcasting station, on a new hearing the Commission can hear other applications for the same facilities and take new evidence, for the issue involved is one of public convenience, and private parties can obtain no vested interests against the public through the Commission's prior error.⁶⁵ Conversely, a board, in controlling its own procedure, cannot, through

⁶¹ See *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 201-208, 225-227, 60 S. Ct. 811, 834-837, 846, 84 L. Ed. 1129, 1156-1160, 1170 (1940).

⁶² In the Matter of the Petition of the National Labor Relations Board, 304 U. S. 486, 58 S. Ct. 1001, 82 L. Ed. 1482 (1938).

⁶³ *Ford Motor Co. v. National Labor Relations Board*, 305 U. S. 364, 59 S. Ct. 301, 83 L. Ed. 221 (1939).

⁶⁴ *Baldwin v. Scott County Milling Co.*, 307 U. S. 478, 59 S. Ct. 943, 83 L. Ed. 1409 (1939).

⁶⁵ *Fly v. Heitmeyer*, 309 U. S. 146, 60 S. Ct. 443, 84 L. Ed. 664 (1940). See also *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134, 60 S. Ct. 437, 84 L. Ed. 656 (1940). The National Labor Relations Board is not precluded from dealing with unfair labor practices related to those alleged in the original charge and growing out of them, although the new practices occur while the proceeding is pending before the Board. *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350, 367, 60 S. Ct. 569, 578-579, 84 L. Ed. 799, 812 (1940).

unexpectedly closing the hearing, prejudice a corporation by refusing to receive the testimony of some of its witnesses.⁶⁶

A rather perplexing situation is presented by the case of *Paramino Lumber Company v. Marshall*.⁶⁷ In that case, it was held that Congress can, by private act, direct a review of an order for compensation under the Longshoremen's and Harbor Workers' Compensation Act, even after the Compensation Commission had passed its final award and after the time for review of the award had expired. The Court held that the action involved was a curative act to remedy a mistake in administration where the remedy could be applied without injustice, but, it is submitted, that the situation presented is not quite so uncomplicated. Once that Congress has lawfully delegated its power to an administrative body in a particular field, does it have the power to withdraw that delegation as to an action properly taken by that body within the power delegated to it? Is there not as strong an argument for finality as to Congressional action, in so far as a past administrative order is concerned, as there is when the question is raised as to the scope of judicial review? On the other hand, should Congress be held by its prior delegation to have stultified itself from remedying what it believes to be a specific injustice? The decision, to one reader at least, leaves the answers to such questions in considerable doubt.

THE RIGHT TO JUDICIAL REVIEW

Probably the most important phase of the decisions of the Supreme Court during the period here considered is their clarification of the scope and extent of judicial review of the workings of the administrative agencies. Judicial review involves the situations in which the Court will undertake examination of the administrative process as well as the degree of supervision once review has been granted.

The case of *Tennessee Electric Power Co. v. Tennessee*

⁶⁶ See *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 225, 59 S. Ct. 206, 215, 83 L. Ed. 126, 138 (1938).

⁶⁷ 309 U. S. 370, 60 S. Ct. 600, 84 L. Ed. 814 (1940).

*Valley Authority*⁶⁸ involved actions of the United States acting, analytically, in its capacity as a proprietor or owner. But the operations of the T.V.A., in the development of the dams on the Tennessee River and its tributaries, and the sale of power created by the dams, in their impact upon the large private interests involved and upon the millions of persons directly affected, come within the modern concept of administrative law.⁶⁹ The Tennessee Electric Power Company, and a number of other corporations carrying on business in the area involved filed a bill to enjoin the T.V.A. from carrying out its plan of generating and selling electricity, on the ground that the Tennessee Valley Authority Act was unconstitutional. The Supreme Court, in an opinion delivered by Mr. Justice Roberts,⁷⁰ held that the bill had been properly dismissed by the lower court. The ground of the decision was that, irrespective of the amount of the damage which the proposed activities of the T.V.A. would admittedly inflict upon the utility companies, that damage would not result from the violation of any right recognized by law. Not even the constitutionality of the statute under which a governmental agency is carrying out its functions can be challenged by any one "unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."⁷¹ The private utilities had no monopoly, no contractual or property rights to be free of competition either from individuals or government.

The same principle was followed by the Court in the case of *Perkins v. Lukens Steel Company*.⁷² Under the Public Contracts Act of 1936, sellers must agree to pay employees engaged in producing goods purchased for government supplies not less than certain minimum wages to be

⁶⁸ 306 U. S. 118, 59 S. Ct. 366, 83 L. Ed. 543 (1939).

⁶⁹ See (1937) 37 Col. L. Rev. 4, n. 16.

⁷⁰ Mr. Justice Butler and Mr. Justice McReynolds dissented. Mr. Justice Reed took no part in the consideration of the case.

⁷¹ 306 U. S. 118, 137, 59 S. Ct. 366, 369, 83 L. Ed. 543, 549 (1939). See also *Massachusetts v. Mellon*, 262 U. S. 447, 488, 43 S. Ct. 597, 601, 67 L. Ed. 1078, 1085 (1923).

⁷² 310 U. S. 113, 60 S. Ct. 869, 84 L. Ed. 1108 (1940). Mr. Justice McReynolds dissented.

determined by the Secretary of Labor as the prevailing minimum wages in the locality in which the supplies are to be manufactured. Individual iron and steel manufacturers obtained an injunction against six members of the Cabinet from observing the minimum wage determined by the Secretary of Labor under the Act, on the ground that the Secretary had erroneously construed the term "locality" for the iron and steel industry. The Court, in reversing the judgment of the Court of Appeals for the District of Columbia, held that the respondents had not shown such an injury or threat to particular rights of their own, as distinguished from the public interest in the administration of the law, to have a standing to sue. Mr. Justice Black, in delivering the opinion of the Court, said:

"Judicial restraint of those who administer the Government's purchasing would constitute a break with settled judicial practice and a departure into fields hitherto wisely and happily apportioned by the genius of our policy to the administration of another branch of Government. . . .

"The record here discloses the 'confusion and disorder' that can result from the delays necessarily incident to judicial supervision of administrative procedure developed to meet present day needs of Government and capable of operating efficiently and fairly to both private and public interests."⁷³

Both of these cases involved actions of administrative agencies of the Government acting in its proprietary capacity. A cognate decision, in a broader field of administrative law, is the case of *Federal Communications Commission v. Sanders Brothers Radio Station*.⁷⁴ The Court held that, in passing upon an application for a broadcasting license, resulting economic injury to a rival station is not of itself, apart from considerations of public convenience, interest or necessity, an element which the Federal Communications Commission must weigh or as to which it must make findings. Licenses under the Act are not in the

⁷³ 310 U. S. 113, 127, 128, 130, 131, 60 S. Ct. 869, 876, 877, 878, 878-9, 84 L. Ed. 1108, 1114-5, 1115, 1116, 1117 (1940).

⁷⁴ 309 U. S. 470, 60 S. Ct. 693, 84 L. Ed. 869 (1940).

nature of property rights; the purpose of the legislation is not to protect licensees against competition but to protect the public.⁷⁵

Further light is cast upon the right to judicial review by a series of decisions in which the protestants admittedly had legal standing, but in which the question was whether there was such irreparable injury as to justify the granting of an injunction. It has long been established that no one is entitled to judicial relief against a supposed or threatened injury until the prescribed administrative remedy has been exhausted.⁷⁶ The Court held that, under this principle, equity has no jurisdiction to enjoin the National Labor Relations Board from proceeding, even where it is contended that the Board lacks power over the subject matter because it does not involve interstate commerce.⁷⁷

"Obviously, the rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage. Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact."⁷⁸

An investigation by a state public service commission of wholesale rates for gas was held not to be enjoined

⁷⁵ Although the Court held that economic injury to the respondent was not a proper issue before the Commission, it also held that, under the Act, the respondent had standing to prosecute an appeal. It was within the power of Congress to determine that "one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license." 310 U. S. 469, 477, 60 S. Ct. 982, 84 L. Ed. 1311 (1940).

⁷⁶ Decisions of the Supreme Court to this effect during the period here considered are: *Highland Farms Dairy, Inc., v. Agnew*, 300 U. S. 608, 57 S. Ct. 549, 81 L. Ed. 835 (1937); and *Bourjois v. Chapman*, 301 U. S. 183, 57 S. Ct. 691, 81 L. Ed. 1027 (1937); *Natural Gas Pipe Line Co. v. Slattery*, 302 U. S. 300, 58 S. Ct. 199, 82 L. Ed. 276 (1937); *St. Louis, B. & M. R. Co. v. Brownsville Navigation District*, 304 U. S. 295, 58 S. Ct. 868, 82 L. Ed. 1357 (1938).

⁷⁷ *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 58 S. Ct. 459, 82 L. Ed. 638 (1938); *Newport News Shipbuilding & Dry Dock Co. v. Schaffner*, 303 U. S. 54, 58 S. Ct. 466, 82 L. Ed. 646 (1938).

⁷⁸ *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51, 52, 58 S. Ct. 459, 463, 464, 82 L. Ed. 638, 644, 645 (1938).

in the Federal Court, even though the appellant claimed that any regulation of the rates charged would be beyond the statutory power of the commission, when compliance with the order of the commission would only subject the appellant to expense in preparing for and carrying out the investigation.⁷⁹ The Court balanced the interests involved and decided that the extraordinary powers of injunction should not be here employed to interfere with the action of the administrative agency. The statute in question contained detailed provisions for hearings and judicial review, and the compulsory and punitive powers of the commission could only be exercised through judicial process. The Court also affirmed the dismissal of a petition to enjoin an order of the Interstate Commerce Commission which only required the appellant to file with the Commission certain maps and schedules for use in valuing its property, even though the order was made after a determination by the Commission that the appellant was a common carrier within the provisions of the Interstate Commerce Act, which the appellant denied.⁸⁰ Mr. Justice Reed, in delivering the opinion of the Court, pointed out that the data required by the order might never be used to fix rates. "Publicity alone may give effective remedy to abuses, if any there be."⁸¹ A bill against the Railroad Retirement Board and the Commissioner of Internal Revenue to enjoin the enforcement of the Railroad Retirement Acts and the Carriers' Taxing Act on the ground that, as a matter of statutory construction, the federal system was not applicable to a state railroad, was held without equity, when the proposed action complained of was only to require the railroad to gather and keep records of its employees. The expense of temporarily complying with the regulation until the applicability of the Act had been judicially determined was held not to be sufficient to support the irreparable injury indispensable to relief. Any tax claimed by the

⁷⁹ *Petroleum Exploration, Inc., v. Public Service Commission of Kentucky*, 304 U. S. 209, 58 S. Ct. 834, 82 L. Ed. 1294 (1938).

⁸⁰ *Valvoline Oil Co. v. U. S.*, 308 U. S. 141, 60 S. Ct. 160, 84 L. Ed. 151 (1939).

⁸¹ 308 U. S. 141, 146, 60 S. Ct. 160, 162-3, 84 L. Ed. 151, 154-5 (1939).

Commissioner of Internal Revenue could, if paid, be recovered, with interest, if ultimately found not to have been due.⁸²

On the other hand, the balancing of the interests involved resulted in a holding that there was general equity jurisdiction to consider a bill to enjoin the enforcement of a determination by the Interstate Commerce Commission that the appellant was not an "interurban electric railway", and therefore excepted from the Railway Labor Act.⁸³ If the determination of the Commission were held valid (as it was on the merits), disobedience would be immediately punishable through the institution of criminal proceedings. Moreover, if the railroad were subject to the Railway Labor Act, it would be excluded from the operation of the National Labor Relations Act, and otherwise not, so that the railroad could not, without court relief, determine which agency had jurisdiction over it.

In another case,⁸⁴ the petitioners were producers of bituminous coal. The National Bituminous Coal Commission had obtained information from them with respect to the cost of producing their coal and the prices realized, on the assurance that the reports would be kept confidential. This assurance was authorized by the National Bituminous Coal Act. After the reports had been made on this assurance, the Commission announced that it would give public notice of a hearing to determine the average of the total cost of coal for the year in question, and that, upon such hearing, the information obtained from the individual coal producers would be made available for inspection and introduction into evidence. Mr. Justice McReynolds, in delivering the opinion of the Court, held that the District Court had jurisdiction over the controversy, and that the complainants could properly ask for relief in equity because of the great and obvious damage which might be suffered and the lack of any other remedy, if the informa-

⁸² *California v. Latimer*, 305 U. S. 255, 59 S. Ct. 166, 83 L. Ed. 159 (1938).

⁸³ *Shields v. Utah Idaho Central R. Co.*, 305 U. S. 177, 59 S. Ct. 160, 83 L. Ed. 111 (1938).

⁸⁴ *Utah Fuel Co. v. National Bituminous Coal Commission*, 306 U. S. 56, 59 S. Ct. 409, 83 L. Ed. 483 (1939).

tion which they had supplied were improperly made public. The Court then proceeded to consider the case upon the merits, and decided that as Congress had adequate power to authorize the Commission to use the information and had used language adequate thereto, the bill was properly dismissed, despite the obvious fact that publication of the reports might be harmful to the petitioners. The public interest tipped the scales in justification of the act of the Commission, although the private interests involved weighted them on the other side in determining the right to ask for injunctive relief.

Another series of cases, arising under the National Labor Relations Act, emphasizes that there is no constitutional right to a court review of interim phases of an administrative process, even though the successive steps in themselves may involve substantive private rights. The Act was held not to give jurisdiction to Federal Circuit Courts of Appeal to review a certification by the National Labor Relations Board that a particular labor organization was a collective bargaining representative of the employees in a designated unit,⁸⁵ or a Board direction for a run-off election,⁸⁶ or the exclusion of an alleged company union from the ballot in an election.⁸⁷ It is true that none of these determinations in themselves commanded action, and that an employer, under the Act, has the right to court review of an order where he is directed to take action or to cease an unfair labor practice. Nevertheless, as the Court stated:

"Administrative determinations which are not commands may for all practical purposes determine rights as effectively as the judgment of a court, and may be reexamined by courts under particular statutes providing for the review of 'orders'."⁸⁸

⁸⁵ *American Federation of Labor v. National Labor Relations Board*, 308 U. S. 401, 60 S. Ct. 300, 84 L. Ed. 347 (1940).

⁸⁶ *National Labor Relations Board v. International Brotherhood of Electrical Workers*, 308 U. S. 413, 60 S. Ct. 306, 84 L. Ed. 354 (1940).

⁸⁷ *National Labor Relations Board v. Falk Corporation*, 308 U. S. 453, 60 S. Ct. 307, 84 L. Ed. 396 (1940).

⁸⁸ *American Federation of Labor v. National Labor Relations Board*, 308 U. S. 401, 408, 84 L. Ed. 347, 60 S. Ct. 300 (1940).

Any hardship which may result from a lack of court review of a particular step, however, is for Congress, not the courts, to remedy. There is no infringement of due process of law in withholding jurisdiction from Federal appellate courts over such an administrative determination.⁸⁹

Nor does the fact that a private party has been incidentally benefited by an administrative order necessarily give such a party the right to have the order enforced by judicial process. The National Labor Relations Board had ordered an employer to desist from certain labor practices found to be unfair and to take certain affirmative action. The labor union found to have been discriminated against applied to the Circuit Court of Appeals to have the company adjudged in contempt for failure to comply with requirements of the decree. The Supreme Court affirmed a denial of the motion.⁹⁰ Mr. Chief Justice Hughes, in delivering the Court's opinion, pointed out that the procedure under the National Labor Relations Act was prescribed in the public interest as distinguished from statutes intended to afford remedies to private persons, such as the provisions of the Interstate Commerce Act in relation to unjust discrimination. The National Labor Relations Board is entrusted with the exclusive authority to seek enforcement of its orders on behalf of the public, and although the carrying out of those orders may result in benefits to a party directly affected, it is for the governmental agency alone to determine when to seek court redress for violations. Hardship or benefit to individual parties is immaterial, in so far as court review is concerned, unless the statute gives them the right to appeal, or unless recognized legal rights are substantially invaded.

⁸⁹ See also *Shannahan v. U. S.*, 303 U. S. 596, 603, 82 L. Ed. 1039, 1043, 58 S. Ct. 732, 735 (1938), holding that there was no jurisdiction in a Federal District Court under the Urgent Deficiencies Act to set aside a determination of the Interstate Commerce Commission that a particular railroad is not exempt under the Railway Labor Act, even though the action of the Commission may not be reviewable by any other judicial procedure.

⁹⁰ *Amalgamated Utility Workers v. Consolidated Edison Company of New York*, 309 U. S. 261, 84 L. Ed. 738, 60 S. Ct. 561 (1940).

THE SCOPE OF JUDICIAL REVIEW

Probably no case in administrative law has been more discussed than *Rochester Telephone Corporation v. U. S.*,⁹¹ in which the Court declared that it would no longer treat the distinction between "negative" and "affirmative" orders as governing judicial review. If the matter is one in which ordinarily there would be a right to review, the Court will no longer abstain merely because the administrative action is of itself incomplete without further action, or because the agency has only declined to relieve the plaintiff from a statutory command, or because the action sought to be reviewed is attacked on the ground it does not forbid or compel conduct by a third person. "The considerations of policy for which the notions of 'negative' and 'affirmative' orders were introduced, are completely satisfied by proper application of the combined doctrines of primary jurisdiction and administrative finality."⁹²

No useful purpose is to be served by attempting further to expound either the doctrine which the case announces or that which it overrules. The decision has, however, two connotations even more important than its actual holding.

First, the decision enlarges the scope of judicial review over the actions of administrative bodies. It is all the more significant that this extension comes at a time when the Court's decisions, on the whole, tend to give a greater degree of finality to administrative determinations. The *Rochester* case is an answer to those who claim that the Court has been retreating from its proper function of maintaining the supremacy of law over the form of government

⁹¹ 307 U. S. 125, 146, 83 L. Ed. 1147, 1161, 59 S. Ct. 754, 765 (1939). Mr. Justice McReynolds and Mr. Justice Butler, while concurring in the majority opinion, did so because they believed that the order of the Federal Communications Commission involved was, in substance, an affirmative one, and that the findings of the District Court were amply sustained by the evidence. In their opinion, there was no occasion to overrule any prior decisions of the Court or to repudiate the negative order doctrine. See Hart, *The Business of the Supreme Court at the October Terms, 1937 and 1938* (1940) 53 Harv. L. Rev. 579, 617; (1939) 48 Yale L. J. 1257; (1939) 87 U. of Pa. L. Rev. 1010; (1940) 24 Minn. L. Rev. 379.

⁹² 307 U. S. 125, 142, 83 L. Ed. 1147, 1159, 59 S. Ct. 745, 763 (1939).

carried out through boards and commissions. But it is an answer which has been made without violation of the basic principle that the work of administration, if it is to be a successful instrument of government, must be carried on by those boards and commissions and not by the courts themselves.

Second, the case is a heartening example of how justice can simplify and reframe its own rules. Involved and difficult criteria are discarded, and in their place the Court now follows a consistent approach to the entire matter of judicial review. The negative order doctrine was largely an attempt to formalize the right to court action in administrative matters, but that right must depend on a balancing of specific factors too variable for generalization. If both the fairness and efficiency of the administrative process are to be safeguarded, substance and not form must guide the Court in its decisions.

The scope of judicial review, in Mr. Justice Frankfurter's words, embraces only "questions affecting constitutional power, statutory authority and the basic prerequisites of proof . . ."⁹³ The question of whether or not an administrative rule, order or other action is within the confines of the authority delegated by the legislative body, like the broader question of constitutional interpretation, is more than a matter of construing the written word. One of the reasons for the existence of administrative organizations is that the various situations which they are called upon to resolve cannot be anticipated in the statutory enactment; the process of filling in the details involves both interstitial interpretation and legislation. Yet all administrative action must be kept within the general intent of the statutory authorization, otherwise the banks within which discretion must be canalized might soon disappear beneath the flood of administrative authority, even if originally they were constructed in accordance with the constitutional mandate of proper standards. No board or commission can, under our system of law, be allowed of itself

⁹³ 307 U. S. 125, 140, 83 L. Ed. 1147, 1158, 59 S. Ct. 745, 762 (1939).

finally to determine the meaning of the statute which it is administering. As a result, the final and potent power of determination must remain in the courts.

Judicial review, in matters of statutory construction, may involve merely the consideration of a clearly legal question,⁹⁴ or it may involve the whole "synthesis of design"⁹⁵ in which the administrative agency, the legislature, and the courts are only units.

In the decisions on statutory construction, as in other phases of judicial review, there may be reflected the degree of expertness which the particular administrative organization has shown. Courts cannot fail to be aware of the general manner in which the different agencies conduct their affairs, and a more intense scrutiny of the workings of some agencies may result. More troublesome questions, also, are apt to arise in connection with the acts of an administrative agency in a new field of regulation than with respect to agencies longer established.

The conduct of the work of the Interstate Commerce Commission, the oldest Federal administrative agency, resulted, during the period here considered, in a series of decisions which nicely evidence the degree to which such an organization can interpret the legislation under which it acts without judicial curtailment. The determination, for example, of what is a "bona fide operation" as a common carrier by motor vehicle on a certain date, so as to exempt it from certain requirements of proof in obtaining a certificate of public convenience, was held, in two cases with differing facts, to be primarily for the Commission, in order that the remedial purposes of the Federal Motor Carrier Act might be achieved.⁹⁶ There was a similar

⁹⁴ As in *Perkins v. Elg*, 307 U. S. 325, 83 L. Ed. 320, 58 S. Ct. 886 (1939), in which a person born in the United States was held entitled to an injunction against the Secretary of Labor from prosecuting proceedings for her deportation, and against the Secretary of State to require him to issue a passport, on the ground that, even though taken to another country by her parents, she had the right to elect retention of her United States citizenship on reaching majority.

⁹⁵ LANDIS, *THE ADMINISTRATIVE PROCESS* (1933) 155.

⁹⁶ *McDonald v. Thompson*, 305 U. S. 263, 83 L. Ed. 164, 59 S. Ct. 176 (1938); *U. S. v. Maher*, 307 U. S. 148, 83 L. Ed. 1162, 59 S. Ct. 768 (1939).

holding as to a finding by the Commission as to what constitutes a "device" of discrimination between shippers.⁹⁷ In another case, the portion of the Interstate Commerce Act empowering the Commission to authorize leases which promote the public interest, subject to such terms and conditions as it shall find to be just and reasonable, was held to authorize the Commission to require, as a condition of a lease of one railroad by another, that employees of the lessor be compensated for the losses sustained by reason of the resulting discharge or transfer.⁹⁸

In contrast, while the National Labor Relations Board was held to have acted within the statutory discretion given to it in such matters as an order requiring an employer to withdraw all recognition of a dominated employee organization as the representative of its employees,⁹⁹ and a determination that a strike called by a union because of prolongation of negotiations was a labor dispute, irrespective of whether or not the strikers were justified in considering the employer unreasonable,¹⁰⁰ in other important cases, the Board was held to have exceeded its authority. The National Labor Relations Act does not go so far as to enable the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board is of the opinion that the general policies of the Act might thereby be effectuated.¹⁰¹ In the *Fansteel* case,¹⁰² the majority of the Court overruled the Board's contention that the Act

⁹⁷ *Baltimore & Ohio Railroad Company v. U. S.*, 305 U. S. 507, 83 L. Ed. 318, 59 S. Ct. 284 (1939).

⁹⁸ *U. S. v. Lowden*, 308 U. S. 225, 84 L. Ed. 208, 62 S. Ct. 48 (1939).

⁹⁹ *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 82 L. Ed. 831, 58 S. Ct. 571 (1938).

¹⁰⁰ *National Labor Relations Board v. Mackay Radio & Telegraph Corporation*, 304 U. S. 333, 82 L. Ed. 1381, 58 S. Ct. 904 (1938). See also *National Licorice Company v. National Labor Relations Board*, 309 U. S. 350, 84 L. Ed. 799, 60 S. Ct. 569 (1940) holding, *inter alia*, that the Board is authorized to preclude an employer from taking any benefit of individual contracts with employees procured in violation of the Act.

¹⁰¹ *Consolidated Edison Company v. National Labor Relations Board*, 305 U. S. 197, 235, 83 L. Ed. 126, 143, 59 S. Ct. 206, 219 (1938). Mr. Justice Reed and Mr. Justice Black dissented from the finding that the Board had exceeded its authority in this respect.

¹⁰² *National Labor Relations Board v. Fansteel Metal Corporation*, 306 U. S. 240, 83 L. Ed. 627, 59 S. Ct. 490 (1939). Mr. Justice Reed and Mr. Justice Black dissented.

authorized it to treat as an unfair labor practice the discharge of employees who had taken part in a sit-down strike and seized the employer's factory. Nor, the Court held, does the Act, properly construed, authorize the Board to treat as an unfair labor practice the failure of an employer to negotiate with employees who had wrongfully repudiated the terms of a collective bargaining agreement properly entered into.¹⁰³

One aspect of the decisions on statutory construction affords an interesting illustration of the fact that, more and more, courts, legislatures and administrative boards are being regarded as cooperative rather than antagonistic agencies in the carrying out of governmental functions. In the construction of the statutes under which administrative agencies are functioning, the Court considers the interpretations and regulations of the agencies themselves. An administrative construction of a statute, if permissible, is "persuasive";¹⁰⁴ a long continued administrative interpretation by the Comptroller of the Treasury is given "decided weight" in reaching a conclusion upon a construction of a land grant statute;¹⁰⁵ "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law";¹⁰⁶ customs regulations in force when a Tariff Act was adopted are held incorporated by

¹⁰³ *National Labor Relations Board v. Sands Manufacturing Company*, 306 U. S. 332, 83 L. Ed. 682, 59 S. Ct. 508 (1939). Mr. Justice Black and Mr. Justice Reed dissented. Mr. Justice Frankfurter took no part in the consideration or decision of the case.

¹⁰⁴ *Bowen v. Johnston*, 306 U. S. 19, 30, 83 L. Ed. 455, 463, 59 S. Ct. 442, 447 (1939) (dealing with the question of whether a national park administered by the War Department is within the exclusive jurisdiction of the United States).

¹⁰⁵ *Southern Pacific Company v. U. S.*, 307 U. S. 393, 401, 83 L. Ed. 1363, 1368, 59 S. Ct. 923, 928 (1939). Mr. Justice Butler, Mr. Justice McReynolds and Mr. Justice Roberts dissented; Mr. Justice Douglas took no part in the consideration or decision of the case. See also *Armstrong Paint & Varnish Works v. Nu-Enamel Corporation*, 305 U. S. 315, 331, 83 L. Ed. 195, 204, 59 S. Ct. 191, 199 (1938) (giving weight to the construction by the Patent Office of a statutory provision as to trade-marks).

¹⁰⁶ *Helvering v. Winmill*, 305 U. S. 79, 83, 83 L. Ed. 52, 55, 59 S. Ct. 45, 46 (1938); *Helvering v. R. J. Reynolds Tobacco Company*, 306 U. S. 110, 116, 83 L. Ed. 536, 541, 59 S. Ct. 423, 426 (1939).

reference.¹⁰⁷ But this doctrine does not go so far as to give legal effect to a Treasury regulation which is plainly in conflict with the statute, in so far as its retroactive application is concerned.¹⁰⁸

JUDICIAL REVIEW OF FINDINGS OF FACT

One of the basic characteristics of an administrative body is its intimate acquaintance with the facts in the fields in which it operates and its expertness in dealing with them. It is well settled that, except in cases of so-called "constitutional" or "jurisdictional" facts, findings of fact by administrative bodies will not be set aside by the courts if there is substantial evidence to support them, even though a court might reach a different conclusion if it substituted its own for the administrative judgment. The requirement that there must be substantial evidence to support the administrative findings of fact is generally set forth in the governing statutes; if it is not, it is announced as part of the general doctrine of judicial review. This doctrine has been applied by the Court, in the period considered, to a number of situations, in which the range of the different kinds of expertness involved is a cogent argument in support of the doctrine the cases follow.¹⁰⁹

¹⁰⁷ *McGoldrick v. Gulf Oil Corporation*, 309 U. S. 414, 84 L. Ed. 840, 60 S. Ct. 664 (1940). See Brown, *Regulations, Reenactment and the Revenue Act* (1940) 54 Harv. L. Rev. 377; and Griswold, *A Summary of the Regulations Problem* (1940) 54 Harv. L. Rev. 398.

¹⁰⁸ *Rasquin v. Humphreys*, 308 U. S. 54, 84 L. Ed. 77, 60 S. Ct. 60 (1939). In *Helvering v. Hallock*, 309 U. S. 106, 84 L. Ed. 604, 60 S. Ct. 444 (1940), dealing with the effect, under the Federal Estate tax, of the reservation by a decedent of a contingent interest in property transferred during his lifetime, it was held that neither the reenactment by Congress of the statute without alteration after its interpretation by the Supreme Court, nor the fact that the Treasury Department had not sought revision of the Act, barred the Court from reversing its previous decision on the question of statutory construction. Mr. Justice Roberts and Mr. Justice McReynolds dissented.

¹⁰⁹ The following decisions within this category are typical: *Swayne & Hoyt, Ltd., v. U. S.*, 300 U. S. 297, 81 L. Ed. 659, 57 S. Ct. 478 (1937) (suspension of schedule of rates for coastal shipping by the Secretary of Commerce); *U. S. v. American Sheet & Tin Plate Company*, 301 U. S. 402, 81 L. Ed. 1186, 57 S. Ct. 804 (1937) (a finding by the Interstate Commerce Commission that spotting service within certain industrial plants was not a part of the service of transportation); *Washington, V. & M. Coach Company v. National Labor Relations Board*, 301 U. S. 142, 81 L. Ed. 965, 57 S. Ct. 648 (1937) (a finding of the Board that the Company had discriminated against its employees because of membership in a union); *Federal Trade Commission v. Standard Education Society*, 302 U. S. 112,

What constitutes substantial evidence is necessarily a matter for determination in each particular case. "The courts cannot pick and choose bits of evidence to make findings of fact contrary to the findings of the Commission."¹¹⁰ If there is a sufficient basis for an order, it is not rendered illegal by some improper motive in the mind of the officer issuing it.¹¹¹ However, substantial evidence "is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. . . . it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."¹¹² Judicial notice can not be assumed of matters connected with the value of property, especially when the particular or evidential facts of which the Commission took judicial notice do not appear.¹¹³ "Mere uncorroborated hearsay or rumor does not constitute substantial evidence."¹¹⁴

It is in the cases dealing with "constitutional" or "jurisdictional" facts that the most important development has occurred. The majority opinion in the *Ben Avon* case¹¹⁵ announced the doctrine that rate making was an appropriate exercise of the legislative power only when the rates fixed were not confiscatory, that whether or not they were

82 L. Ed. 141, 58 S. Ct. 113 (1937) (a determination of an unfair trade practice); *Rochester Telephone Corporation v. U. S.*, 307 U. S. 125, 83 L. Ed. 1147, 59 S. Ct. 754 (1939) (a finding by the Federal Trade Commission that a telephone company was under the control of another company); *South Chicago Coal & Dock Company v. Bassett*, 309 U. S. 251, 84 L. Ed. 732, 60 S. Ct. 544 (1940) (a finding by a Deputy Commissioner under the Longshoremen's & Harbor Workers' Compensation Act that an employee was not a member of a crew).

¹¹⁰ *Federal Trade Commission v. Standard Education Society*, 302 U. S. 112, 117, 82 L. Ed. 141, 145, 58 S. Ct. 113, 115 (1939).

¹¹¹ *Isbrandsten-Moller Co. v. U. S.*, 300 U. S. 139, 81 L. Ed. 562, 57 S. Ct. 407 (1937).

¹¹² *National Labor Relations Board v. Columbian Enameling & Stamping Company*, 306 U. S. 292, 300, 83 L. Ed. 660, 665, 59 S. Ct. 501, 505 (1939).

¹¹³ *Ohio Bell Telephone Company v. Public Utilities Commission*, 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724 (1937). Cf. *McCart v. Indianapolis Water Company*, 302 U. S. 419, 82 L. Ed. 336, 58 S. Ct. 324 (1938), where an appellate court took judicial notice of an upward trend in prices, but did not attempt to make a specific application of that trend.

¹¹⁴ *Consolidated Edison Company v. National Labor Relations Board*, 305 U. S. 197, 230, 83 L. Ed. 126, 140, 59 S. Ct. 206, 217 (1938) (dictum).

¹¹⁵ *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287, 64 L. Ed. 908, 40 S. Ct. 527 (1920). Mr. Justice Brandeis, Mr. Justice Holmes and Mr. Justice Clarke dissented. See Cooper, *Administrative Justice and the Role of Discretion* (1938) 47 Yale L. J. 577, 588.

confiscatory depended upon the correctness of the finding as to value, and that, therefore, in such a proceeding, the facts must be found by the Court independently of the action of the administrative tribunal. The same syllogistic reasoning was invoked in *Crowell v. Benson*¹¹⁶ to justify the decision that there must be an independent review of the facts with respect to admiralty jurisdiction and the employer-employee relation under the Longshoremen's & Harbor Workers' Compensation Act. It has also been held that, in deportation proceedings, a person claiming to be a citizen of the United States is entitled to an independent judicial determination of the facts.¹¹⁷

There was apparently some modification of the doctrine as to rate making in the case of *St. Joseph Stock Yards Company v. United States*,¹¹⁸ in which the majority opinion stated that, while there must be an independent review of the facts by the Court, there is, nevertheless, a strong presumption in favor of the conclusions reached by the administrative body. The approach to judicial review of the facts in rate making announced in the *St. Joseph* case was followed by the Court in several other decisions.¹¹⁹

The arguments against the constitutional fact doctrine are summarized in the concurring opinion delivered by Mr. Justice Brandeis in the *St. Joseph Stock Yards* case. The same line of reasoning would call for independent review of the acts of most administrative agencies. Findings of fact by juries of independent laymen, if supported by substantial evidence, may be conclusive within the Constitution; the Court has repeatedly held that due process is not necessarily judicial process. Pragmatically, rate regulation cannot be effective unless the legality of the

¹¹⁶ 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285 (1932). Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice Roberts dissented.

¹¹⁷ *Ng Fung Ho v. White*, 259 U. S. 276, 66 L. Ed. 938, 42 S. Ct. 492 (1922).

¹¹⁸ 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720 (1936). Mr. Justice Roberts, Mr. Justice Brandeis, Mr. Justice Stone, and Mr. Justice Cardozo concurred in the result. The last three dissented from the doctrine of independent judicial review of the facts.

¹¹⁹ *Thompson v. Consolidated Gas Utilities Corporation*, 300 U. S. 55, 81 L. Ed. 510, 57 S. Ct. 364 (1937); *Lone Star Gas Co. v. Texas*, 304 U. S. 224, 82 L. Ed. 1304, 58 S. Ct. 883 (1938); *Denver Union Stock Yard v. U. S.*, 304 U. S. 470, 82 L. Ed. 1469, 58 S. Ct. 990 (1938).

rates prescribed may be determined with reasonable promptness. The determination of the questions of fact in these complicated cases is a heavy burden for the courts as well as an emasculation of the rate making administrative process.

In June, 1940, the Court decided the case of *Railroad Commission of Texas v. Rowan & Nichols Oil Company*.¹²⁰ That case involved the validity of an oil proration order promulgated by the Railroad Commission of Texas. The respondent challenged the administrative order, not merely as unfair or unreasonable, but as confiscatory. The Federal District Court enjoined the Commission from carrying the proration plan into effect and was affirmed by the Fifth Circuit Court of Appeals. The decree was reversed by the Supreme Court in a six to three decision. The majority opinion, after reviewing the controversy, said:

"The state was confronted with its general problem of proration and with the special relation to it of the small tracts in the particular configuration of the East Texas field. It has chosen to meet these problems through the day-to-day exertions of a body specially entrusted with the task because presumably competent to deal with it. In striking the balances that have to be struck with the complicated and subtle factors that must enter into such judgments, the Commission has observed established procedure. If the history of proration is any guide, the present order is but one more item in a continuous series of adjustments. *It is not for the federal courts to supplant the Commission's judgment even in the face of convincing proof that a different result would have been better.*" (Italics supplied.)¹²¹

This majority opinion was characterized in the dissent of Mr. Justice Roberts, in which Mr. Chief Justice Hughes and Mr. Justice McReynolds joined, as announcing "principles with respect to the review of administrative action challenged under the due process clause directly contrary to those which have been established." It is true that the

¹²⁰ 310 U. S. 573, 84 L. Ed. 1368, 60 S. Ct. 1021 (1940).

¹²¹ 310 U. S. 583, 584, 84 L. Ed. 1368, 1374, 60 S. Ct. 1021, 1025 (1940).

decision dealt with proration of oil rather than the fixing of rates, and so is distinguishable in that narrow factual aspect from the *Ben Avon* case. But it is submitted that the minority's analysis of the purport of the majority decision is correct, and that the *Rowan* case goes a long distance, if not the whole way, in reversing the constitutional fact doctrine as to rights of property. There has been no express reversal, as there was of the negative order doctrine in the *Rochester* case, but the remaining step seems a short one. That the minority opinion in the *St. Joseph* case will soon become the holding of a majority of the Court would seem a not unreasonable prophecy, if it is not already a statement of fact.

It by no means follows, however, that the Court will no longer independently review the facts underlying any administrative order. Mr. Justice Brandeis, in the *St. Joseph* case, expressly limited his dissent from the doctrine of independent judicial review of the facts to cases involving property rights. He was of the opinion that in matters of personal constitutional rights, the practice of independent judicial review of facts should be continued. "The second distinction is between the right to liberty of person and other constitutional rights. . . . A citizen who claims that his liberty is being infringed is entitled, upon habeas corpus, to the opportunity of a judicial determination of the facts."¹²²

There is no logic in the distinction between independent review of the facts in a rate making case and in a case involving personal liberties. But in our legal system logic is only one of the component ingredients in the judicial process.¹²³ Where issues of personal rights are concerned,

¹²² 298 U. S. 38, 77, 80 L. Ed. 1033, 1054-55, 56 S. Ct. 720, 737 (1936).

¹²³ "Our fourfold division separates the force of logic or analogy, which gives us the method of philosophy; the force of history, which gives us the historical method, or the method of evolution; the force of custom, which yields the method of tradition; and the force of justice, morals and social welfare, the *mores* of the day, with its outlet or expression in the method of sociology." CARDOZO, *THE GROWTH OF THE LAW* (1924) 62.

"... Mr. Justice Holmes attributed very different legal significance to those liberties of the individual which history has attested as the indispensable conditions of a free society from that which he attached to liberties which derived merely from shifting economic arrangements." FRANKFURTER, *MR. JUSTICE HOLMES AND THE SUPREME COURT* (1938) 50.

there is no countervailing consideration of expedition. In such matters as rate making, the general public interest may be stultified by the delays inherent in independent judicial review. No economic ills threaten through the court hearing of a civil liberties case. Here the public interest all lies in the protection of those liberties to the utmost possible extent.¹²⁴

COOPERATION OF COURTS AND ADMINISTRATIVE BOARDS

Some of the most interesting of the recent decisions are those in which an administrative board and a court appear as partners, each contributing its own special technique toward the common aim of good government. Such a case is the third *Morgan* case.¹²⁵ In the two prior *Morgan* cases,¹²⁶ orders of the Secretary of Agriculture, fixing rates for stock yard agencies, had been set aside because, in each case, the Court held that there had not been the full and proper hearing which was essential. As a result of these decisions, the case had been remanded and a fund, consisting of the difference between the scheduled rates and those prescribed by the Secretary's order, had been paid into the District Court. The third case involved the proper disposition of this fund. The appellees contended that, under the Packers and Stockyards Act, there was no legal warrant for restitution of the impounded monies to the patrons of the market agencies, even though the Secretary should now determine, by a proper procedure, that the scheduled rates exceeded the reasonable rates prescribed. The lower court had granted a motion for distribution of the fund among the appellees. This order the Supreme Court reversed. Mr. Justice Stone, in delivering the majority

¹²⁴ The Court will independently examine the facts in a criminal proceeding to see if there has been a violation of due process of law, *Chambers v. Florida*, 309 U. S. 227, 84 L. Ed. 716, 60 S. Ct. 472 (1940); *Pierre v. Louisiana*, 306 U. S. 354, 83 L. Ed. 757, 59 S. Ct. 536 (1939); or of the right of freedom of speech and religion, *Cantwell v. Connecticut*, 310 U. S. 296, 84 L. Ed. 1213, 60 S. Ct. 900 (1940). See also, *Perkins v. Elg*, 307 U. S. 325, 83 L. Ed. 320, 59 S. Ct. 884 (1939), as to the issue of United States citizenship in a deportation proceeding.

¹²⁵ *U. S. v. Morgan*, 307 U. S. 183, 83 L. Ed. 1211, 59 S. Ct. 795 (1939).

¹²⁶ See *supra*, n. 47.

opinion,¹²⁷ held that, even assuming, after the Secretary's prior order had been set aside, he could not promulgate a rate order as of the earlier date nor make an order for payment of the money under the statute, he was nevertheless free to make an order fixing rates for the future. The District Court, under its general equitable power, could, if the Secretary's determination had been properly made, use it as a basis for distributing the funds in its custody. In that manner, the District Court could both avoid the risk of using its processes as an instrument of injustice and could implement by a full use of its own powers a weakness in the administrative procedure.

"Court and agency are the means adopted to attain the prescribed end and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither 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."¹²⁸

Another instance of such cooperation is shown in the case of *Palmer v. Massachusetts*.¹²⁹ The bankruptcy trustees of a railroad had applied to the Massachusetts Department of Public Utilities for leave to abandon a number of passenger stations. Hearings were held by the State Department on the questions raised by the application. During the pendency of the hearings and before the State Department had taken any action, the trustees and creditors of the railroad prayed the Federal District Court, which

¹²⁷ Mr. Justice Butler, Mr. Justice McReynolds and Mr. Justice Roberts dissented. Mr. Justice Reed took no part in the consideration or decision of the case.

¹²⁸ 307 U. S. 183, 191, 83 L. Ed. 1211, 1217, 59 S. Ct. 795, 800 (1939). See also *Inland Steel Company v. U. S.*, 306 U. S. 153, 83 L. Ed. 557, 59 S. Ct. 415 (1939) and *General American Tank Car Corporation v. El Dorado Terminal Company*, 308 U. S. 422, 84 L. Ed. 361, 60 S. Ct. 235 (1940). See Hart, *supra*, n. 91, (1940) 53 Harv. L. Rev. 622; and (1939) 39 Col. L. Rev. 1406.

¹²⁹ 308 U. S. 79, 84 L. Ed. 93, 60 S. Ct. 34 (1939).

had jurisdiction over the bankruptcy proceedings, for an order directing the trustees to abandon the local services. The District Judge passed an order granting the relief prayed. The Second Circuit Court of Appeals reversed the order of the lower court and was affirmed by the Supreme Court. Mr. Justice Frankfurter, in delivering the unanimous opinion,¹³⁰ said:

"The judicial process in bankruptcy proceedings under §77 is, as it were, brigaded with the administrative process of the Commission. From the requirement of ratification by the Commission of the trustees appointed by the Court to the Commission's approval of the Court's plan of reorganization the authority of the Court is intertwined with that of the Commission. . . . But, in any event, against possible inconveniences due to observance of state law we must balance the feelings of local communities, the dislocation of their habits and the over-riding of expert state agencies by a single judge sitting, as in this case, in another state, removed from familiarity with local problems, and not necessarily gifted with statesman-like imagination that transcends the wisdom of local attachments."¹³¹

In two cases, the cooperation between courts and an administrative agency was evidenced in proceedings in which judicial discretion was exercised at the behest of the agency to aid the crystallization of issues important to the administrative process. In *Landis v. North American Company*,¹³² certain public utility holding companies brought suit in the District Court for the District of Columbia to enjoin the enforcement of the Public Utility Holding Company Act, on the ground that the act was unconstitutional. At about the same time, the Securities and Exchange Commission filed a bill in the District Court for the Southern District of New York to compel other holding companies to register with it in accordance with the statute. The defendants in the latter suit also contested the validity of the act. The Commission prayed for a stay of the proceedings in the case in the District of Columbia,

¹³⁰ Mr. Justice Butler took no part in the consideration or decision of the case.

¹³¹ 308 U. S. 87, 89, 84 L. Ed. 99, 100, 60 S. Ct. 38, 39 (1939).

¹³² 299 U. S. 248, 81 L. Ed. 153, 57 S. Ct. 163 (1936).

in which it was the defendant, until the validity of the act had been determined by the Supreme Court in the second case, pledging itself to prosecute with all due diligence the suit which it had chosen as a test. The Commission's motion was granted, and the Supreme Court held that the limitations of the judicial discretion had not, except as to the length of the stay, been exceeded. Justice Cardozo, in delivering the opinion of the Court, said:

"Especially in cases of extraordinary public moment, the individual may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted. In these Holding Company Act cases great issues are involved, great in their complexity, great in their significance. On the facts, there will be need for the minute investigation of intercorporate relations, linked in a web of baffling intricacy. On the law there will be novel problems of far-reaching importance to the parties and the public. An application for a stay in suits so weighty and unusual will not always fit within the mould appropriate to an application for such relief in a suit upon a bill of goods."¹³³

In the *United States Realty* case,¹³⁴ a corporation had filed a petition for an arrangement of its unsecured debts under Chapter XI of the Bankruptcy Act. The Securities and Exchange Commission does not, under Chapter XI, have the advisory functions with which it is charged by Chapter X. It was granted permission to intervene in the proceedings by the District Court, and thereupon contended, unsuccessfully in that Court, that the proceedings should have been brought under Chapter X. The Second Circuit Court of Appeals dismissed an appeal by the Commission, holding that it had no right to intervene and hence no right to appeal. On writ of certiorari, the Supreme Court reversed this holding. Mr. Justice Stone, in delivering the opinion of the majority of the Court, said:

¹³³ 299 U. S. 256, 81 L. Ed. 159, 57 S. Ct. 166.

¹³⁴ *Securities & Exchange Commission v. United States Realty & Improvement Company*, 310 U. S. 434, 84 L. Ed. 1693, 60 S. Ct. 1044 (1940).

"The Commission is, as we have seen, charged with the performance of important public duties in every case brought under chapter X, which will be thwarted, to the public injury, if a debtor may secure adjustment of his debts in a chapter XI proceeding when, upon the applicable principles which we have discussed, he should be required to proceed, if at all, under Chapter X. . . . The Commission did not here intervene to perform the advisory functions required of it by chapter X, but to object to an improper exercise of the court's jurisdiction which, if permitted to continue, contrary to the court's own equitable duty in the premises, would defeat the public interests which the Commission was designated to represent."¹³⁵

Apart from the specific holdings of the decisions here considered, viewing them as an entity, two strong currents of judicial intent emerge.

The Court desires, and succeeds in its desire, to show the importance and nature of the administrative process. The cases are expositions of "the practical functions" of the various administrative agencies whose processes have come before it, and of how they are "to be reconciled to existing governmental machinery, for the vindication of the rights of the public."¹³⁶ At some distant date, a student of the American civilization of the first part of the twentieth century could probably do no better than to go to the decisions of the Supreme Court for their analyses of some of the social and economic questions which beset us and of how we are attempting to solve them. There he will find the reasons for and the workings of the administrative process in such diverse fields as agriculture,¹³⁷ the coal in-

¹³⁵ 310 U. S. 458, 459, 84 L. Ed. 1305, 60 S. Ct. 1054 (1940). Mr. Justice Roberts, Mr. Chief Justice Hughes, and Mr. Justice McReynolds dissented. Mr. Justice Douglas did not participate in the decision.

¹³⁶ Chief Justice Taft, in the proceedings on the death of Chief Justice White, 257 U. S. v. xxv, quoted by Mr. Justice Frankfurter in the *Rochester* case, 307 U. S. 138, n. 15.

¹³⁷ *United States of America v. Rock Royal Cooperative*, 307 U. S. 533, 83 L. Ed. 1446, 59 S. Ct. 993 (1939); *Curran v. Wallace*, 306 U. S. 1, 83 L. Ed. 441, 59 S. Ct. 379 (1939); and *Townsend v. Yeomans*, 301 U. S. 441, 80 L. Ed. 1210, 57 S. Ct. 842 (1937).

dustry,¹³⁸ radio broadcasting,¹³⁹ telephone communication,¹⁴⁰ and the manifold business of the Government itself.¹⁴¹

There is hardly a case, among them all, which does not make clear, either expressly or by implication, that judicial review is only one phase in the development of the administrative process. Not the least hopeful sign in that development is the increase in the study of administrative proceedings by agencies other than the courts. The Monographs of the Attorney General's Committee on Administrative Law,¹⁴² the Final Report of the Attorney General's Committee,¹⁴³ the House Committee Investigation of the Labor Board and Wagner Act, the debates in and out of Congress on the recently vetoed Walter-Logan Bill, the growing insistence in magazines and press upon securing and maintaining the highest possible type of personnel for the manning of administrative agencies, the studies made by many of those agencies of their own workings, all show we are beginning to realize that the successful conduct of this phase of government, which affects our lives in so many ways, is a charge upon all the instruments of our democracy.

¹³⁸ *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 84 L. Ed. 1263, 60 S. Ct. 907 (1940).

¹³⁹ *Federal Communications Commission v. Pottsville Broadcasting Company*, 309 U. S. 134, 84 L. Ed. 656, 60 S. Ct. 437 (1940).

¹⁴⁰ *Rochester Telephone Corporation v. U. S.*, *supra*, n. 109.

¹⁴¹ *Tennessee Electric Power Company v. Tennessee Valley Authority*, 306 U. S. 118, 83 L. Ed. 543, 59 S. Ct. 366 (1939) and *Perkins v. Lukens Steel Company*, 310 U. S. 113, 84 L. Ed. 1108, 60 S. Ct. 869 (1940).

¹⁴² *Supra*, n. 46.

¹⁴³ *Administrative Procedure in Government Agencies*, U. S. Govt. Printing Office (1941) 77th Congress, 1st Session, Senate Document No. 8.