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John Dickinson

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JUDICIAL REVIEW OF ADMINISTRATIVE DETERMINATIONS, A SUMMARY AND EVALUATION*

By JOHN DICKINSON†

JUDICIAL review of administrative determinations has been a subject of active discussion in this country for more than a quarter of a century. During that period the discussion has fairly well settled upon a three-fold classification of the problems involved, namely, first, review of interpretations of law by the administrative agency, second, review of determinations of fact where no constitutional issue is involved, and third, review of determinations of fact on which the decision of a constitutional issue depends. Due recognition has also usually been given to the fact that the conclusions to be reached under each heading of this three-fold classification may properly differ in the light of differences between the administrative agencies concerned, as, for example, the Interstate Commerce Commission on the one hand and a local health officer on the other; and depending also upon the nature or field of governmental action involved, as, for example, the functions of regulating private conduct in contrast with the functions of distributing a bounty like a pension or land grant, or managing the internal affairs of a government department.

At the outset we are met today with a new difficulty. At a time when careful discussion of the principles of judicial review is more important than ever, the subject threatens to be thrown into confusion by the appearance of a school of thought which denies most of the basic assumptions upon which discussion has hitherto proceeded. Thus, for example, it is denied that any distinction can properly be drawn between questions of law and questions of fact, or that there is any valid distinction between rule and discretion. Those who advocate this view do so in the supposed interest of realism, and for the purpose of bringing the discussion more directly to bear on practical considerations which they believe are in danger of being obscured by sterile analysis. Certainly it is of the utmost importance to employ a realistic approach to the problems of judicial review. But in this as in other fields of human

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†Professor of Law, University of Pennsylvania and General Solicitor of the Pennsylvania Railroad Co.

thinking it seems difficult, if not impossible, to assemble and fruitfully discuss data of reality except by the aid of concepts. Safeguards will be provided against error if concepts are treated as servants rather than masters, and are employed to focus considerations which are valid from a practical standpoint rather than to exclude realities for the sake of an artificial pattern. I suggest that this can be done without abandoning the basic distinctions about which the discussion of judicial review has hitherto revolved.

There is a further preliminary point. This is that the character and scope of review is necessarily associated in the most intimate fashion with the type of judicial proceeding in which the review is sought, or which is available as a method of obtaining review. All review procedure may be broadly classified into direct and indirect. With the increase of administrative authority to make determinations affecting individuals it has become the general practice to provide in statutes which establish administrative agencies a method of obtaining direct review of their determinations in the courts. A review proceeding of this character is a frank appeal to a court to pass upon the administrative determination. In the case of many of the older types of administrative agencies it was necessary to obtain judicial review, if at all, by some indirect method, such as a damage suit against the official or a writ of habeas corpus. For obvious reasons of public policy these methods of indirect review were not always available. At common law the defect was to a large extent remedied by the writ of certiorari, but certiorari did not entirely fill the gap, and is, of course, unavailable in the field of federal power because of *Degge v. Hitchcock*.¹ There are no doubt fields of administrative activity where indirect review is more appropriate than direct, and must for practical reasons be preserved. There are other cases where indirect review will be permitted by the courts to make good a statutory failure to provide for direct review. For the present I wish to point out that the considerations affecting the scope of review are not always the same in direct and indirect review, and that what I shall have to say with respect to scope of review is focussed on situations where direct review is available.

I. SUMMARY OF THE CASES

A. JUDICIAL REVIEW OF ADMINISTRATIVE ERRORS OF LAW.— With respect to review of administrative determinations of ques-

¹(1913) 229 U. S. 162, 33 Sup. Ct. 639, 57 L. Ed. 1135.

tions of law, the clearest recent statement is in the concurring opinion of Mr. Justice Brandeis in the *St. Joseph Stock Yards Case*² and is as follows:

"The inexorable safeguard which the due process clause assures is . . . that there will be opportunity for a court to determine whether the applicable rules of law . . . are observed. . . . The order of an administrative tribunal may be set aside for any error of law, substantive or procedural. . . . There must be the opportunity of presenting in an appropriate proceeding at some time to some court every question of law raised, whatever the nature of the right invoked or the status of him who claims it."

Substantially the same rule applies in common law proceedings of certiorari, where it is held that the office of the writ reaches all errors of law.³

The reason of the rule seems clear. Where the error of law consists in misinterpreting the statute from which the administrative agency derives its authority, the result of the error, if not corrected, would permit the agency to violate the intent of its creator by acting outside the sphere within which the legislature has sought to confine it. Where, on the other hand, the error consists in disregarding some rule or principle of general law as, for example, if an industrial commission were to grant compensation for the death or injury of an individual who, on settled principles of law, did not stand in the employe relationship, the effect would be the same, and would amount to permitting the administrative agency to act with regard to a subject-matter upon which the legislature did not intend it to act.⁴ Thus in recent instances the Supreme Court has reversed a determination of the Board of Tax Appeals which held taxable what, on principles of property law, was not the income of the taxpayer but of someone

²(1936) 298 U. S. 38, 72, 73, 77, 56 Sup. Ct. 720, 80 L. Ed. 1033. Compare the earlier statement of Mr. Justice Brandeis in his dissenting opinion in the *Gratz Case*, (1920) 253 U. S. 421, 437, 40 Sup. Ct. 572, 64 L. Ed. 993: "The question whether the method of competition pursued could, on the facts, reasonably be held by the commission to constitute an unfair method of competition, being a question of law, was necessarily left open to review by the court."

³*Morewood v. Hollister*, (1852) 6 N. Y. 309; *Jackson v. People*, (1860) 9 Mich. 111.

⁴"The difficulty of distinguishing between a rule of law for the guidance of a court and a limit set to its power is sometimes considerable. Words that might seem to concern jurisdiction may be read as simply imposing a rule of decision," Holmes, J., in *Interstate Commerce Commission v. Northern Pacific R. Co.*, (1910) 216 U. S. 538, 544, 30 Sup. Ct. 417, 54 L. Ed. 608. And so, conversely, words that seem simply to impose a rule of decision may be construed as limiting or extending jurisdiction.

else,⁵ and a determination of the secretary of labor to deport a person who was legally a citizen.⁶

Accordingly, it is established that courts in review proceedings will examine whether the administrative agency has misconstrued its statutory authority,⁷ and also whether or not in purporting to exercise its authority it has violated any established rule of law.⁸

In one special and restricted class of cases there has been a departure from the general rule that error of law is reviewable. These are the mandamus cases under the Public Land Acts where the relator seeks to compel the secretary of the interior to issue patents or allow claims on the ground that his refusal to do so is based on an erroneous construction of the statutes. In part for historical reasons it became settled that in these cases mandamus would be denied,⁹ the court going so far as to say:

"Neither an injunction nor a mandamus will lie against the officer of the Land Department to control him in discharging an official duty which requires the exercise of judgment and discretion. . . . Having jurisdiction to decide at all he had necessarily jurisdiction, and it was his duty, to decide *as he thought the law was*, and the courts have no power under those circumstances to review his determination by mandamus or injunction."

The application of the rule just referred to has been limited to mandamus proceedings, and to injunction proceedings affecting the administration of the Public Land Laws.

However, the later cases in this field have tended to suggest an interesting and possibly significant development. In *United States ex rel Hall v. Payne*,¹⁰ a mandamus proceeding, the usual rule was applied and mandamus refused, but the court in its opinion, after stating the rule, went on to justify the refusal of the writ on the ground that "the view [of the law] for which the

⁵*Helvering v. Fuller*, (1940) 310 U. S. 69, 60 Sup. Ct. 784, 84 L. Ed. 715.

⁶*Perkins v. Elg*, (1939) 307 U. S. 325, 59 Sup. Ct. 884, 83 L. Ed. 1320.

⁷*Interstate Commerce Commission v. Northern Pacific R. Co.*, (1910) 216 U. S. 538, 30 Sup. Ct. 417, 54 L. Ed. 608, per Holmes, J.; *United States v. Pennsylvania R. Co.*, (1916) 242 U. S. 208, 37 Sup. Ct. 95, 61 L. Ed. 251; *International Railway Co. v. Davidson*, (1922) 257 U. S. 506, 42 Sup. Ct. 179, 66 L. Ed. 341, per Brandeis, J.

⁸*Brown & Sons Lumber v. Louisville & N. R. Co.*, (1937) 299 U. S. 393, 57 Sup. Ct. 265, 81 L. Ed. 301, per Brandeis, J.

⁹*United States ex rel. Riverside Oil Co. v. Hitchcock*, (1903) 190 U. S. 316, 23 Sup. Ct. 698, 47 L. Ed. 1074; *United States ex rel. Ness v. Fisher*, (1912) 223 U. S. 683, 32 Sup. Ct. 356, 56 L. Ed. 610; *Work v. United States ex rel. Rives*, (1925) 267 U. S. 175, 45 Sup. Ct. 252, 68 L. Ed. 561; *United States ex rel. McLennen v. Wilbur*, (1931) 283 U. S. 414, 51 Sup. Ct. 502, 75 L. Ed. 1148.

¹⁰(1920) 254 U. S. 343, 41 Sup. Ct. 172, 65 L. Ed. 349.

relator contends was not so obviously and certainly right as to make it plainly the duty of the secretary to give effect to it." In *Santa Fe R. R. Co. v. Fall*,¹¹ where the plaintiff sought relief by injunction rather than mandamus, the court, speaking through Mr. Justice Holmes, went further and overturned an administrative determination on the ground that the construction upon which the determination rested was plainly and palpably untenable, and the court was of the opinion that the plaintiff's position was right.

The cases just reviewed suggest a possibility of wider application than to mandamus and injunction proceedings under the Land Laws. The suggestion is that possibly a distinction should be recognized, at least in certain special fields, between two kinds of questions of law. On the one hand, there are legal determinations which are of such a specialized character that if there is room for reasonable doubt as to the correctness of the administrative determination, the courts will not disturb it. On the other hand, if in the opinion of the reviewing court the administrative error is clear and palpable, or violates settled legal principles which are not technical and not confined to the specialized field of administrative competence, the courts will reverse.

Such a distinction, if definitely recognized and more generally applied, would constitute a limitation, although a self-imposed one, on judicial review for error of law. It would mean that the courts would not review for all legal error, but would first inquire as to the nature of the legal issues involved, and if those issues were confined to matters of reasonable doubt within the field of what the court regards as specialized administrative competence, would refuse to review, while preserving the power to reverse for palpable error, or error lying in the field of general legal principles.

The comparatively recent case of *Brown Lumber Co. v. Louisville & Nashville Railroad Co.*,¹² contains at least the suggestion of an approach to this position. In that case an order of the Interstate Commerce Commission, construing a tariff, was reversed for error of law in an opinion by Mr. Justice Brandeis. The significance of the case lies in the emphasis given in the opinion to the fact that the issue in dispute involved the construction of words not technical in character and not requiring the application of expert knowledge for correct appreciation of the meaning of the tariff. The implication is, therefore, strong that if in fact the

¹¹(1922) 259 U. S. 197, 42 Sup. Ct. 466, 66 L. Ed. 896.

¹²(1937) 299 U. S. 393, 57 Sup. Ct. 265, 81 L. Ed. 301.

legal construction involved had turned upon what the court regarded as purely technical issues and matters of specialized administrative knowledge, it might have refused to review, although the error alleged was one of law. I know of no other case which illustrates any further development in the direction suggested by these decisions.

B. JUDICIAL REVIEW OF ADMINISTRATIVE DETERMINATIONS OF FACT.—Turning to review of so-called questions of fact—which, in accepted parlance, mean the conclusions to be drawn from evidence with respect to matters peculiar to the case,^{12a}—the present state of the law has been most recently summarized by the Supreme Court in the *Consolidated Edison Case*¹³ as follows:

"The statute, in providing that 'the findings of the Board as to the facts, if supported by evidence, shall be conclusive,' means supported by substantial evidence. Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . . Desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force."

There is now general agreement that courts will review the evidence supporting administrative fact determinations not merely to see whether there was *any* evidence to support the determination, but whether there was *substantial* evidence, having rational probative force, to support it.¹⁴ Unsatisfactory as this formula is to many who would enlarge the sphere of unfettered administrative discretion, the problems which it generates are primarily problems of application, arising out of the freedom allowed to the courts to determine what is rationally probative, and how much evidence is necessary to constitute substantial evidence. There can be no doubt that under the formula courts at times have gone so far as in effect to weigh the evidence for themselves,¹⁵ while in other cases they have made it an excuse to do no more than perfunctorily skim the record.¹⁶

^{12a}See Dickinson, Administrative Justice and the Supremacy of Law, (1927) 168-170.

¹³*Consolidated Edison Co. v. National Labor Relations Board*, (1938) 305 U. S. 197, 229, 230, 59 Sup. Ct. 206, 83 L. Ed. 126.

¹⁴This doctrine was announced as early as *Interstate Commerce Commission v. Union Pacific R. R. Co.* (1912) 222 U. S. 541, 32 Sup. Ct. 108, 56 L. Ed. 308.

¹⁵*Planters Operating Co. v. Commissioner of Internal Revenue*, (C.C.A. 8th Cir. 1932) 55 Fed. (2d) 583; *Dubiske v. Commissioner of Internal Revenue*, (C.C.A. 7th Cir. 1932) 58 F. (2d) 51.

¹⁶It is interesting to note with what uniformity the courts have adopted the substantial evidence rule of review in cases where it is not specifically

In the past, much of the debate concerning judicial review of administrative determinations of fact has turned on whether or not a broader scope of review should be required as to so-called jurisdictional facts. A theory has been applied that, where a fact is jurisdictional in the sense that, if decided adversely to the administrative conclusion, the subject matter acted upon would then lie beyond the scope of the administrative body's power, the court should not content itself with merely inquiring whether the administrative finding is supported by evidence, but should determine the fact for itself. Nowhere has this theory been elaborated with more rigid logic than in Mr. Justice Brandeis' opinion in *Ng Fung Ho v. White*,¹⁷ where he says:

"Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact. . . . If the jurisdiction of the department of labor may not be tested in the courts by means of the writ of habeas corpus . . . then obviously deportation of a resident may follow upon a purely executive order. . . . For where there is jurisdiction, a finding of fact by the executive department is conclusive and the courts have no power to interfere unless there was either denial of a fair hearing or the finding was not supported by evidence or there was an application of an erroneous rule of law."

The implication is plain that where the finding is on a question of fact jurisdictional in character, it is not sufficient for the courts merely to inquire whether it is supported by evidence. Similarly, where a statute authorized the Interstate Commerce Commission to establish through routes and joint rates but limited the power to cases where no reasonable or satisfactory through route already existed, Mr. Justice Holmes expressed the view that the question of whether or not a reasonable or satisfactory through route ex-

prescribed by the statute. Thus the Veterans Relief Act of 1924 provided that all determinations of the Director of the Veterans Bureau should be conclusive except as otherwise provided. The Supreme Court construed this provision as meaning that the director's determination on questions of fact should be conclusive only where supported by substantial evidence (*Silberschein v. United States* (1924) 266 U. S. 221, 45 Sup. Ct. 69, 69 L. Ed. 256). Similarly, the statutory provisions governing review of decisions of the board of Tax Appeals are silent as to the scope of review, but the courts have unhesitatingly adopted the substantive evidence rule.

¹⁷(1922) 259 U. S. 276, 42 Sup. Ct. 492, 66 L. Ed. 938.

See also *Great Western Power Co. v. Pillsbury*, (1915) 170 Cal. 180, 149 Pac. 35; *Western Indemnity Co. v. Pillsbury*, (1915) 170 Cal. 686, 151 P. 398; *Employers Assurance Corp. v. Industrial Accident Commission*, (1915) 170 Cal. 800, 151 P. 423; *Kinnerson v. Thames Towboat Co.* (1915) 89 Conn. 367, 94 Atl. 372; *In re Burns* (1914) 218 Mass. 8, 105 N. E. 601; *In re Nickerson* (1914) 218 Mass. 158, 105 N. E. 604; *In re Buckley* (1914) 218 Mass. 354, 105 N. E. 979.

isted was a question of jurisdictional fact which the courts must decide.¹⁸

The question of whether or not a different scope of review exists where facts are jurisdictional, and whether in such cases the reviewing court must draw its own conclusions from the evidence independently of the administrative finding, arose in the application of the common law or statutory writ of certiorari and was almost universally decided in the negative. As one court has said:

"Want of credible evidence which, in the case of the verdict of a jury, would be sufficient upon appeal to require a reversal, is jurisdictional error—error committed outside of jurisdiction instead of in the exercise of jurisdiction. . . . The evidence cannot be weighed for the purpose of determining whether the same clearly preponderates against the decision. It may be looked into only to see whether there was competent evidence, sufficient in reason, to incline the mind efficiently to the conclusion reached."¹⁹

And again:

"There is evidence which supports the finding of fact made by the commission, hence it cannot be said that the board acted without or in excess of its powers, even though this court, if trying the fact, might reach a different conclusion. If there was substantial creditable evidence supporting the findings of the commission, the courts cannot interfere."²⁰

C. JUDICIAL REVIEW OF ADMINISTRATIVE DETERMINATIONS OF QUESTIONS OF CONSTITUTIONAL FACT.—The controversy as to whether or not in cases of jurisdictional fact the courts should make their own findings or merely inquire into the sufficiency of the evidence to support the administrative finding, has been most severe where the fact is one upon the determination of which a claim of constitutional right depends, such as "fair value" in cases of administrative rate orders, citizenship in deportation orders, and the like. The *Ben Avon Case*²¹ held, over Mr. Justice Brandeis' dissent, that since constitutionality is a question of law for ultimate determination by the courts, the courts must make an independent determination of questions of constitutional fact and may not limit themselves to deciding whether the administrative

¹⁸*Interstate Commerce Commission v. Northern Pacific R. Co.*, (1910) 216 U. S. 538, 544, 30 Sup. Ct. 417, 54 L. Ed. 608.

¹⁹*State ex rel. Milwaukee Medical College v. Chittenden*, (1906) 127 Wis. 468, 107 N. W. 500.

²⁰*Milwaukee Coke Co. v. Industrial Commission*, (1915) 160 Wis. 247, 151 N. W. 245.

²¹*Ohio Valley Water Co. v. Ben Avon Borough*, (1920) 253 U. S. 287; 40 Sup. Ct. 527, 64 L. Ed. 908.

findings are supported by the evidence. The decision was much criticized as causing the administrative finding to go for naught and depriving it of even presumptive validity. In this respect, it has been clarified if not modified by the recent *St. Joseph Stock Yard Case*.²² Dean Landis apparently regards the latter case as doing no more than to reaffirm the Ben Avon rule,²³ but from a somewhat close personal connection with the case, I suggest that it at least supplies new light on what is meant by the statement that the reviewing court must exercise its independent judgment on the evidence. Since the *St. Joseph Case*, the rule can no longer be held to mean that the court must make its own findings as independently as if there had been no administrative finding. On the contrary, in the language of the Chief Justice:

"This judicial duty to exercise an independent judgment does not require or justify disregard of the weight which may properly attach to findings upon hearing and evidence. On the contrary, the judicial duty is performed in the light of the proceedings already had and may be greatly facilitated by the assembling and analysis of the facts in the course of the legislative determination. Judicial judgment may be none the less appropriately independent because informed and aided by the sifting procedure of an expert legislative agency. Moreover, as the question is whether the legislative action has passed beyond the lowest limit of the permitted zone of reasonableness into the forbidden reaches of confiscation, judicial scrutiny must of necessity take into account the entire legislative process, including the reasoning and findings upon which the legislative action rests. We have said that 'in a question of ratemaking there is a strong presumption in favor of the conclusions reached by an experienced administrative body after a full hearing.' *Darnell v. Edwards*, 244 U. S. 564, 569. The established principle which guides the court in the exercise of its judgment on the entire case is that the complaining party carries the burden of making a convincing showing and that the court will not interfere with the exercise of the rate-making power unless confiscation is clearly established. . . ."

What this obviously means is that in reviewing administrative determinations of constitutional fact, while the courts will not sustain such findings merely because there is substantial evidence to support them, they will not, on the other hand, reverse such findings unless the presumption of validity which such findings enjoy is clearly and convincingly overcome by the evidence on

²²*St. Joseph Stock Yards Co. v. United States* (1936) 298 U. S. 38, 56 Sup. Ct. 720, 80 L. Ed. 1033.

²³Landis, *The Administrative Process*, (1938) 128.

which they purport to be based. The opinion in the *Ben Avon Case* contained no such express limitation.

Another controversy which has arisen with respect to administrative fact determinations is as to the extent to which in the review proceeding the facts must be determined by evidence de novo. This question was brought into exceptional prominence by the unique decision in *Crowell v. Benson*²⁴ eight years ago. Evidence had been taken at a quasi-judicial administrative hearing held under the authority of the Longshoremen and Harbor Workers Compensation Commission and an award in favor of the claimant had been made on findings that he was an employee and had been injured in the course of his employment. The party against whom the award was made denied that the claimant was his employee and brought a statutory review proceeding to test the validity of the order. The Supreme Court held that he was entitled to have the question of employment decided not on the record made in the administrative proceeding, but on evidence introduced in the review proceeding.

The case stands practically alone, and is apparently to be explained primarily by the fact pointed out in the opinion, that here administrative power was employed, not as usually for the purpose of enforcing the regulatory authority of government, but as a substitute for the judicial process in determining rights and liabilities between private individuals. An administrative proceeding under a workmen's compensation act, at least where the Act is compulsory and not elective, is a substitute for an action for damages and not a regulatory proceeding. In this connection, it is significant to note that when Congress conferred on the Interstate Commerce Commission authority to determine reparation claims between shipper and carrier, it apparently doubted its power to make the record in the administrative proceeding conclusive and expressly provided that in judicial proceedings to enforce the award the administrative findings might be rebutted by new evidence. I suggest that this is the real basis for *Crowell v. Benson*, and that it indicates on the part of the Supreme Court an unwillingness to have administrative bodies vested with jurisdiction to adjudicate claims between private individuals with the same degree of freedom which they enjoy in applying regulatory statutes.

The question of judicial review of administrative determina-

²⁴(1932) 285 U. S. 22, 52 Sup. Ct. 285, 76 L. Ed. 598.

tions of constitutional fact has been presented in an essentially different connection by the recent decision of the Supreme Court in *Railroad Commission v. Rowan & Nichols Oil Co.*²⁵

This was an application brought in a federal district court to enjoin and set aside, as violating due process, a general order of the Texas Railroad Commission which established a scheme for prorating allowable oil production in the East Texas oil field under a state statute regulating oil production. The district court, after hearing factual evidence going to the constitutional question and bearing upon whether or not the scheme embodied in the order was reasonable, or arbitrary and discriminatory, found that in the light of the facts the order was offensive to the due process clause and granted the injunction. The Supreme Court reversed the decree, saying, among other things:

"A controversy like this always calls for fresh reminder that that courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulation and execution of policy have been entrusted."²⁶

The clue to the distinction between this case and the *St. Joseph Case* is that in the *Rowan & Nichols Case* the order under attack was a general regulation of a quasi-legislative character. It was not an order directed to particular individuals or concerns as a result of a quasi-judicial hearing by the commission going to the specific facts applicable to those individuals. It was essentially similar to an enactment of the legislature, which might have embodied in a statute the scheme of apportionment prescribed by the order. A proceeding to have such an order set aside is accordingly analogous to an injunction proceeding against the enforcement of a statute alleged to be invalid, and the question presented in the one case, as in the other, is how far the showing of facts made in court by the person attacking the validity of the statute or order is to be regarded as overcoming the general presumption which exists in favor of the validity of a legislative act. In such a proceeding, the facts necessarily have to be presented *de novo* in court, since the statute or quasi-legislative order are not supported by a hearing or findings of a quasi-judicial character.

The issue presented is, therefore, simply to what extent the factual presentation before the court may properly be held to overcome the presumption in favor of legislative validity. The basis of that presumption is revealed in the statement, quoted

²⁵(1940) 310 U. S. 573, 60 Sup. Ct. 1021.

²⁶(1940) 310 U. S. 573, 580-581, 60 Sup. Ct. 1021.

above, from the opinion in the *Rowan & Nichols Case*, viz., that courts must not substitute their notions of expediency and fairness for those of the policy-making agencies. Of course, if clear and convincing proof is made of the arbitrary character of the statute or quasi-legislative administrative order, the presumption in favor of its validity will be held to be overcome, and this was the result in the earlier Texas proration case of *Thompson v. Consolidated Gas Utilities Corporation*,²⁷ where the Supreme Court, in an opinion by Mr. Justice Brandeis, affirmed a decree granting an injunction against the proration order there involved.

In the *St. Joseph Case*, on the other hand, the administrative proceeding and order, although concerned with rate-making, which has been judicially held to be "legislative in character," were nevertheless quasi-judicial proceedings in the sense that the administrative agency was concerned with the rates of a particular utility rather than with the establishment of a general rule applicable to all utilities, and in the further sense that the hearing upon which the order was predicated was required to be a full quasi-judicial hearing. Accordingly, the case went to the courts on the administrative record made in this quasi-judicial proceeding, and the question considered and decided by the Supreme Court was as to the extent to which the courts should review such a quasi-judicial record in order to test the validity of the findings of fact based thereon. In holding that an independent review of the findings of fact on constitutional issues was essential, the court nevertheless gave full recognition to the presumption of validity attached to such quasi-judicial findings.

It is no doubt true that the decision in the *Rowan & Nichols Case* apparently indicates a tendency on the part of the Supreme Court to require an exceptionally, if not impossibly, high degree of proof to establish the arbitrariness of a statute or quasi-legislative regulation in a court proceeding. While such a tendency may presage an erosion or eventual destruction of the principle established by the *St. Joseph Case*, no less than of that applied in the *Consolidated Gas Utilities Case*, it is nevertheless true that the actual decision in the *Rowan & Nichols Case* is not in conflict with the *St. Joseph* decision, which incidentally is not even mentioned in either the majority opinion of Mr. Justice Frankfurter or the dissenting opinion of Mr. Justice Roberts.

²⁷(1937) 300 U. S. 55, 57 Sup. Ct. 364, 81 L. Ed. 510.

II. CRITICISMS EMBODYING VIEW THAT EXISTING SCOPE OF REVIEW IS IN ONE RESPECT OR ANOTHER TOO BROAD

So much by way of a cursory summary of the present state of the law. What is to be said of it from the point of view of public policy? Much is, of course, at the moment, being said, and too frequently from the standpoint of extreme positions.

A. JUDICIAL REVIEW FOR ADMINISTRATIVE ERRORS OF LAW.—

First as to the rule that the courts will review administrative determinations for error of law. Naturally, this creates dissatisfaction among those who teach that no valid distinction can be drawn between law and fact, that rules and principles are illusions, and that law is nothing but what officials do. To discuss this criticism would require an excursion into jurisprudence exceeding the space allotted to us here. It seems sufficient to say that, as a matter of knowledge and experience, administrators and judges do reach different results as they allow themselves to be influenced, or refuse to be influenced, by general propositions which, for convenience, we call rules or principles of law; and that if an administrative determination results from following or not following such a rule or principle there exists as a fact the possibility that it may for that reason be held by a reviewing body to constitute error.

Whether the courts, in the exercise of a power of review, should properly reverse administrative determinations for such a reason is, of course, another question; and two lines of thought are current at the moment as to why they should not do so. The first of these is the view, becoming more pervasive, which opposes in toto the practice of making decisions in accordance with rules and suggests more and more openly the substitution of unfettered governmental discretion as essential for dealing with the complex problems of our time. To discuss adequately so fundamental a challenge would again take us too far afield; but at least two points may be noted.

There is, first, the suggestion of history, that while rules may at times seem to create a hampering lag on progress, on the other hand unfettered discretion has never, outside the realm of Plato's philosopher kings, been known to have been employed mainly in the interest of social welfare and the public good. The second consideration is that, in so far as it is possible for government to operate rationally and through the medium of discussion and

debate, it must operate on the basis of principles and concepts which inevitably take form in rules and laws.

The second objection to judicial reversal of administrative determinations for error of law is less sweeping and based on a more plausible appeal to practical considerations. It is said that in the fields in which administrative agencies operate the issues which present themselves, and the considerations which should govern the determination of those issues, are usually so specialized and complex that the law which is to govern and the rules of decision which are to be applied should properly be left for development to the specialized administrative bodies themselves with their fund of expert knowledge, rather than to the courts which are habituated to deal with the simpler and cruder principles applicable to human conduct generally.

Such a view would appear to require qualification in two important particulars. The first of these is that, in so far as it has merit, it is in no way inconsistent with holding that there should be judicial review for error of law. All that "judicial review for error of law" means is that the courts shall, in the ultimate analysis, retain and exercise the power to invalidate the rules of decision built up by administrative agencies, when those rules, possibly as a result of an over-specialized and technical point of view on the part of administrative officials, transgress the limits of well-settled principles of legal justice. The existence of judicial power to reverse administrative determinations for error of law does not in any sense mean that administrative agencies should not or may not, within the field of their specialty, build up technical rules of decision which their technical expertness suggests. It simply means that those technical rules shall always be subject to be brought ultimately to the test of the broader and more fundamental principles of human justice worked out in the general law; and that there is a real and substantial need for such a test is illustrated by the numerous occasions on which such liberal judges as Holmes and Brandeis have spoken for the court in reversing administrative determinations for legal error. A few instances among many are *Gegiow v. Uhl*,²⁸ where officials undertook to exclude immigrants as likely to become public charges because destined for a city where the labor market was overstocked; *International Railway Co. v. Davidson*,²⁹ where customs officials sought to apply to automobiles crossing the Canadian

²⁸(1915) 239 U. S. 3, 36 Sup. Ct. 2, 60 L. Ed. 114.

²⁹(1922) 257 U. S. 506, 42 Sup. Ct. 179, 66 L. Ed. 341.

border legislation regulating the inspection of ships, which, if so applied, would have resulted in stopping all traffic across the border on Sundays; and *Campbell v. Geleno Chemical Co.*,³⁰ holding that where permits to withdraw whiskey for manufacturing purposes had been issued to remain in force until revoked or suspended, the bureau of prohibition might not by regulation provide that such permits should expire on a certain date, although the regulation would admittedly have facilitated the administration of the National Prohibition Act.

The second consideration which must be kept in mind in considering the view that rules of law should be developed by the administrative agencies themselves rather than by the courts is that there is a possibility of overvaluing, or at least over-emphasizing, the element of expertness which administrative agencies are supposed to possess. It is not necessary to say too much concerning the fact that the responsible heads of these agencies are frequently political characters brought into the agency from some other occupation far from the field of its specialty, and so having no expertness whatever of their own to start with. This deficiency is no doubt to some extent remedied by the fact that at least up to a certain point the action of the agencies is guided by their permanent technical staffs. It is the expertness of these staff officials which may in a certain sense be misconceived because it is a different kind of expertness from what we mean by the expertness of the practicing physician in curing patients or the expertness of the machinist in building and repairing machines. When we say that a physician or a machinist is an expert, we mean that he is habitually engaged in doing himself the things in which his expertness consists. The expertness of the technicians employed by regulatory bodies is usually something very different. Very few staff employees of a public utility commission have ever been engaged in the operation of a railroad or a power company. They are not experts in doing the things which they are regulating. They are experts as students or analysts, observing, but always from the outside and with a touch of unfamiliarity, the subject matter in which their expertness is supposed to consist, and this must inevitably be taken into account in evaluating the importance of that expertness and the degree of confidence to be reposed in it.

Taking all these considerations together, it seems fair to say

³⁰(1930) 281 U. S. 599, 50 Sup. Ct. 412, 74 L. Ed. 1063.

that with regard to judicial review for error of law, it is essential that the courts should retain the power in unrestricted form, but that in its exercise they may well follow the suggestion already considered in connection with *Brown Lumber Co. v. Louisville & Nashville Railroad Co.*,³¹ and refuse to disturb administrative rules and principles of decision where the latter lie within specialized technical fields and transgress no established principles of legal justice.

B. JUDICIAL REVIEW OF ADMINISTRATIVE DETERMINATIONS OF FACT.—When we turn to error of fact having no constitutional implications, the substantial evidence rule would appear to leave fully as wide a field to administrative discretion as is necessary to permit administrative efficiency and flexibility. The application of this rule with respect to review of fact determinations leaves at least no broader room for review than is afforded for review of questions of law by the *Brown Lumber Company Case*. In other words, so long as the conclusions drawn from the facts by the administrative body are such that, having regard to its supposed specialized knowledge, they could fairly and reasonably have been drawn from the evidence, the conclusion will under the present rule be permitted to stand. It will be reversed only when it transgresses some elementary principle of common sense reasoning, as where an employee was held by a workmen's compensation commission to have been going to the toilet on the sole basis of evidence that the injury occurred at a point in the room which was nearer to the toilet than the station at which he worked.³²

C. JUDICIAL REVIEW OF ADMINISTRATIVE DETERMINATIONS OF QUESTIONS OF CONSTITUTIONAL FACT.—When constitutional issues are involved, the question is whether any different rule should be applied than to other fact determinations. It seems clear that to permit a conclusion drawn from facts by an administrative agency to determine a constitutional issue where an alternative conclusion might have been drawn from the same evidence is in effect to permit the administrative agency to determine the constitutional question. To say that the courts in such a situation should have no choice but to accept the administrative determination without examining whether or not they can properly agree with it is to preclude them from determining constitutional issues which are issues of fact, as more and more constitutional

³¹(1937) 299 U. S. 393, 57 Sup. Ct. 265, 81 L. Ed. 301.

issues are coming to be. This conclusion is universally accepted without question where constitutional issues involving civil rights, such as rights of citizenship, freedom of speech, freedom of religion and the like, are concerned. As to such rights there is apparently no dispute. The sole issue, which was squarely posed by Mr. Justice Brandeis in his concurring opinion in the *St. Joseph Stock Yards Case*, is whether a different rule should be applied to rights of property. Without insisting that the right of property is a personal right if it is a right at all, the answer seems directly given, at least so far as concerns the due process clause, by the constitution itself. The fifth and fourteenth amendments mention life, liberty and property together as subjects of the same guarantee expressed in the same language, and it is hard to see that it would be less than a direct judicial amendment of the constitution to treat the guarantee in the case of one differently than in the case of the others. The rule in the *St. Joseph Case* would appear to go as far as permissible in protecting the freedom of administrative determinations in the field of constitutional facts. Under that rule the administrative determination enjoys a presumption of validity; the fact that the administrative body has reached a particular conclusion is one of the facts which it is said that the court must take into account in reaching its own conclusion on the facts; but in the last analysis the court, as the ultimate guardian of constitutional rights, must reverse the administrative body if it concludes that on all the facts that body has clearly and plainly erred. No other rule seems possible if civil rights are to be protected adequately, and no ground exists in the Constitution for distinguishing between civil rights and property rights however they may be distinguished in the social philosophy of individuals.

III. CRITICISMS EMBODYING VIEW THAT EXISTING OPPORTUNITIES FOR REVIEW ARE TOO NARROW

In opposition to the newer views which would make toward a further restriction of judicial review of administrative determinations, there has been steadily growing in recent years a conviction among members of the Bar and many thoughtful students of public affairs that the review available under existing statutes and decisions is in certain respects not sufficiently adequate, and that, with the great increase in administrative agencies, the need

³²Dube's Case, (1917) 226 Mass. 591, 116 N. E. 234.

is imperative for making adequate review more generally possible. This movement of opinion is directed not so much toward the question of the scope of the review as toward insuring that ample opportunity for review is provided and satisfactory review procedure made available in all cases where administrative determinations substantially affect private rights.

A. ABSENCE OF ADEQUATE OPPORTUNITY FOR REVIEW.—In the first place, there are important statutes which contain incomplete provisions, or no provisions at all, for judicial review. An outstanding instance is the Federal Power Act of 1920, the provisions of which were so defective in this respect that the circuit court of appeals has said that "it is not contended that jurisdiction to exercise review has been granted to the courts" over the actions of the Power Commission with regard to licenses and renewals.³³

Where the statute is thus silent, the courts themselves have in some instances developed a doctrine the effect of which is to preclude or limit review of certain kinds of administrative action. Take, for example, the highly important matter of the refusal of a license or permit or certificate by an administrative agency. In the absence of statutory provision, the only available opportunity for review is ordinarily through the writ of mandamus where mandamus will lie, and the common law rules applicable to the writ make it available only to review clear errors of law, and surround even such limited review with a mass of procedural technicalities. In the federal jurisdiction especially the cases have greatly restricted the availability of the writ.³⁴ Today no type of administrative power affects private action more importantly than the power of administrative bodies to grant or refuse permits. Under recent statutes the regulatory action of government is coming to be more and more exercised in the form of requiring such permits for a wide variety of acts hitherto left to private discretion. Refusal of a permit may entail a more important interference with the conduct of an established business than the issue of an administrative order.

Analogous to the difficulty of obtaining review of the refusal of a permit, and even more restrictive of judicial redress, has been

³³*Appalachian Electric Power Co. v. Smith* (C.C.A. 4th Cir. 1933) 67 F. (2d) 451, at 454.

³⁴*United States ex rel. Chicago Great Western R. Co. v. Interstate Commerce Commission*, (1935) 294 U. S. 50, 55 Sup. Ct. 326, 79 L. Ed. 752. This case extended to the Interstate Commerce Commission the principle of the public land cases referred to above, p. 591.

the doctrine of so-called "negative orders" followed for many years by the federal courts. Under this doctrine, a refusal by an administrative agency to take certain types of action was held to be not reviewable, even though the refusal produced a direct result on the legal status of an individual or corporation. In the recent *Rochester Telephone Case*,³⁵ it has apparently been the intention of the Supreme Court to overrule the "negative order" doctrine in toto, but it may well be that emanations from that doctrine will continue to influence decisions in certain situations for some time to come.

Again, many of the newer types of statutes which create or increase administrative power authorize the administrative agency to make findings of certain kinds which do not directly eventuate in administrative action, but which operate in one way or another as a measure of legal rights and obligations. Thus, the Railway Labor Act authorizes the Interstate Commerce Commission to determine whether or not a line operated by electric power is a part of a general steam railroad system, and also authorizes the commission to determine for certain other purposes who are the employees of a carrier subject to the Act. The Supreme Court several years ago held that a finding or determination made under such an authority is not covered by the statutory provisions which establish and prescribe methods of judicial review of the commission's orders.³⁶ So long as this decision stood, the result was to expose the affected carrier to all the legal consequences of the finding without opportunity to test its validity. Accordingly, it has recently been corrected in *Shields v. Utah-Idaho Central R. R. Co.*,³⁷ but only to the extent of holding that while the statutory review procedure is not applicable, the general equity jurisdiction of the courts may be invoked if essential to the protection of legal rights.

B. UNDUE COMPLEXITY AND LACK OF REASONABLE UNIFORMITY IN REVIEW PROCEDURE.—The examples which have just been listed illustrate a situation which under the existing decisions as to judicial review is felt to be unsatisfactory,—namely, the extreme and apparently meaningless procedural diversity which must be threaded with technical accuracy to obtain review of different

³⁵*Rochester Telephone Co. v. United States* (1939) 307 U. S. 125, 59 Sup. Ct. 754, 83 L. Ed. 1147.

³⁶*Shannahan v. United States*, (1938) 303 U. S. 596, 58 Sup. Ct. 732, 82 L. Ed. 1039.

³⁷(1938) 305 U. S. 177, 59 Sup. Ct. 160, 83 L. Ed. 111.

kinds of administrative action, all of which are alike in the significant respect that they affect private rights. In the words of Dean Pound's report for the Special Committee of this Association on Administrative Law a number of years ago,

"Many of the objections to judicial review of administrative action grow out of the manner in which such review is to be obtained. The procedure takes many forms, having grown up haphazard by statutory additions to and judicial development of certain common law and equitable remedies;"

and he then goes on to quote Professor Stason as follows:

"The remedies are part of a statutory chaos, a heterogeneous confusion of ill-conceived and badly drafted provisions, grown more or less like Topsy and badly in need of scientific attention."³⁸

It is no doubt true that, historical considerations apart, there are cases where the diversities in available review procedure are justified by special circumstances. Thus, for example, it seems clear that where the administrative action involved is of such a character that no record can be made, as in the case of a health inspector destroying diseased animals, or a customs officer forfeiting smuggled goods, the form which the review proceeding must take is necessarily different from that which would be applicable to an order of the Interstate Commerce Commission made after a quasi-judicial hearing. So in matters of taxation, public policy may be thought to require that the tax should first be paid and the review had in a proceeding to recover it back, although that this is not essential is plainly enough shown by the fact that under many tax statutes it is not required. Again, there may be a question as to whether, and, if so by what procedure, merely preliminary and procedural determinations of administrative bodies should be subject to review. All this being so, however, there seems no reason why, on the main question of providing review of administrative determinations arrived at after a hearing and the making of an administrative record, and which directly affect the legal rights of individuals, there should not be, save in exceptional cases, substantial uniformity of review procedure which will prune the existing chaos into order and prevent effective review from being denied because of purely technical considerations.

C. REVIEW OF ADMINISTRATIVE DETERMINATIONS OF FACT. Finally, it is thought by many that on judicial review of administrative determinations of fact, the substantial evidence rule, as at present formulated and applied, does not allow the courts sufficient

³⁸(1938) 63 Reports of American Bar Association, 330, 359.

scope to correct certain kinds of administrative errors and injustices. The suggestion is that if the rule as to review of constitutional facts laid down in the *St. Joseph Stock Yards Case* were applied to questions of fact generally, ample freedom for the legitimate exercise of administrative discretion would still be preserved, and at the same time the door would be closed against types of administrative arbitrariness which escape the operation of the substantial evidence rule. In the light of experience, there can be no doubt that where an administrative agency sets out to achieve a certain result, it can usually introduce into the record some evidence which, if taken by itself and apart from other evidence, or which, if interpreted in the light of certain assumptions and theories, can be said to supply a basis for the conclusion reached, whereas if the evidence were considered as a whole, or if the assumptions and theories were subtracted, the conclusion in question would plainly appear to be without sufficient rational foundation. It is no doubt possible that under the substantial evidence rule, courageously applied, these errors might be corrected, but it is also true that the tendency and effect of that rule is frequently to discourage courts from going far enough to supply the needed correction. As already seen, the rule of the *St. Joseph Case* vests the administrative determination with ample presumptive validity, attaches force and consequence to the mere fact that the administrative agency decided as it did, but lays on the court a mandate to reverse, if, after making all such allowances, it still concludes that the administrative determination must be regarded as clearly wrong. The issue would appear to be one mainly, if not solely, of emphasis, but the difference in emphasis is in practice apt to be sufficiently great to be determining; with the result that if the substantial evidence rule is not to be perverted into a cloak for ratifying administrative error, no harm would result from reformulating it into the rule of the *St. Joseph Case* and thereby permitting the court to reverse a fact determination which after due allowance for the presumption of validity, it concludes on all the evidence is clearly wrong.

D. THE LOGAN-WALTER BILL.—The considerations which have been summarized as expressing the view that judicial review as available under present law is in certain respects too restricted are those which are responsible for the provisions of the so-called Logan-Walter Bill, endorsed by this association, and recently vetoed by the president, in so far as those provisions dealt with

the question of judicial review. It would have been almost inevitable that that bill, if enacted into law, would from time to time have been found to be in need of amendment in matters of detail. Instances of administrative action would almost certainly have been disclosed to which its broad provisions would not have been properly applicable, or as to which its protection would not have been needed.

In considering the desirability of such legislation, however, two illuminating facts stand out from the prolific debate and controversy which it engendered. The first is that, leaving aside its possible inapplicability to special and exceptional situations, legislation of the general character of the Logan-Walter Bill would ensure the minimum requirements of review in a way in which they are not now ensured, and would supply those uniform minimum requirements with uniformity in all the cases where they are needed. This would appear to be a desirable result. The second fact is that, in spite of the attempt to concentrate attention upon the alleged impropriety of applying uniform standards of review to special and exceptional situations, the attack upon the bill did not rest fundamentally upon this criticism of its provisions, but penetrated to far deeper considerations which go to the root of the whole theory of government, and an understanding of which is essential to any consideration of the problem of judicial review.

In the first place, a view is beginning to crystallize, largely among government officials and those more immediately associated with them, to the effect that administrative action in the field of private conduct, and more particularly business and economic conduct, is not, as has hitherto been generally supposed, for the purpose of policing and regulating such conduct so as to make it conform to a standard of legislative requirements, but, on the contrary, is for the purpose of super-imposing governmental management over, and in substitution for, private management. On this view, the guiding consideration of administrative action is not to secure, through the flexibility incidental to such action, more effective conformity by individuals to lines of conduct prescribed by the legislature, but is instead the far broader one of making the individuals who are subject to the regulation do from time to time whatever the administrative body regards as conducive to the proper management of their affairs. Clearly, if such a view is taken, most of the thinking which has hitherto been applied to the scope of administrative action and the relation of that action to its statutory basis becomes irrelevant. A far broader field of

discretion opens up before the administrative agency than would be permissible if its functions were regarded as confined within the four corners of particular legislative mandates, no matter how vaguely stated. Clearly, for example, if a body empowered to regulate rates conceives its mandate as not merely to establish rates which are fair as between the utility and its patrons, but rates which in its managerial judgment will accomplish some result that for the time being it regards as for the good of the industry, the type of considerations which it will then be entitled, and indeed required, to apply include little or nothing that can properly be passed upon by a court whose function is to delimit spheres of competing interests in accordance with principles of every-day justice and fair play between man and man.

Associated with this new conception of administrative power, and closely related to it, is a novel and interesting conception of the relation of the administrative agency to the statute from which it derives its authority. The hitherto accepted view upon which all the decisional law has been based is that a statute, no matter how broadly and vaguely expressed, does not merely carve out a field of action for the administrative agency and prescribe a direction or directions for its activity, but also sets an end-limit to those activities beyond which they may not lawfully go. To adhere to the figure, the agency is circumscribed on all sides by a boundary of law, and the courts, in the exercise of their power of review, have the function of defining these boundaries and restraining the agency within them. The newer theory is a different one. To change the figure, it views the statute as an open-end instrument which brings the agency into existence, projects it in a certain direction, and then authorizes it to go as far in that direction as it pleases in its own unfettered discretion. Obviously, if this view is taken there is again little if any function left for judicial review. The only limitation upon the administrative authority is the supposed purpose of the statute, which is so broadly conceived as to lay no basis for judicial reasoning, and to convert all issues into issues of policy which are clearly more proper for decision by the administrative agency itself or by the legislature than by the courts.

So far these views have attained no wide acceptance either in the profession or among the public generally, which hardly knows of their existence, but they are already widespread among governmental administrators themselves. Their adoption would render

the discussion of judicial review simply irrelevant; but it would at the same time render irrelevant and obsolete, at least in the field of governmental action, most if not all of what has hitherto been understood as law.

There is a final view which discounts efforts to broaden the availability and increase the effectiveness of judicial review of administrative determinations for another reason. This view, which finds some support among the bar, and may well be described as defeatist in character, has been expressed by Mr. John Foster Dulles in a widely circulated article, as follows:

"As to the right of review by the court, the lawyer should not be under great illusions. As a practical matter it is only in rare cases that court review serves any substantial purpose."³⁹

Mr. Dulles goes on to speak discouragingly of the delays and expense of a review proceeding, and of the significant fact that the individual who brings such a proceeding loses the good will of the administrative body with which he must continue to deal. He then quotes the following sentences from an address by Mr. Chester T. Lane, General Counsel of the Securities and Exchange Commission:

"Candor compels me to admit that the remedy of judicial review in most cases has no practical content. Business transactions cannot wait upon the exigencies of appeal. The overwhelming mass of administrative determinations are never reviewed by the courts. Time is of the essence. Even appellate procedure within the administrative by no means insures that the unfortunate results of action unwise or arbitrary will be cured."⁴⁰

The facts stated by Mr. Dulles and Mr. Lane may be admitted in full without requiring the conclusion that court review does not serve a substantial purpose. It is, of course, quite true that relatively few administrative determinations can be, or will be, brought to the test of such review, but to draw from this fact the conclusion that review is therefore of no avail is precisely like saying that because relatively few disputes regarding contracts find their way into the courts, the right to enforce a contract in the courts is therefore unimportant. The point which such a view ignores is that it is the *possibility* of review which counts, rather than the question of whether or not any particular determination is taken into court for actual review. The possibility of review suspended over the administrative agency, like the possibility of

³⁹Dulles, *Administrative Law*, 17. An address given on January 14, 1939, at Langdell Hall, Cambridge, under the joint auspices of the Bar Association of the City of Boston and Harvard Law School.

⁴⁰Dulles, *Administrative Law* 19.

bringing suit against a party to a contract, operates in actual experience as no other tool which social invention has discovered to restrain the tendency to arbitrary action by keeping vividly before the mind of the administrator the fact that he is supposed to conform to requirements which the courts have laid down in previously decided cases and to confine his activities within the sphere which such decisions have marked out for him. In other words, the effectiveness of review is not so much that it will be applied in the particular case as that it creates an administrative attitude which minimizes the necessity of its being applied.

The comments and considerations suggested in this paper are those which appear to be consistent, and the only ones which appear to me to be consistent, with the assumptions and presuppositions on which the body of our decided cases depends; and not merely the body of decided cases but the governmental practices and institutions to which we have been accustomed. It may be that those practices and institutions after continuing their development for a good many hundred years are now suddenly on the verge of being overturned almost without our being aware of the catastrophe; but if they are not, and if they are to continue their orderly development in the future as in the past, then judicial review of administrative determinations must, I am convinced, develop in the direction outlined.