

## CHAPTER 18

# The Scope of Judicial Review

### A. FACTORS AFFECTING SCOPE OF REVIEW

THE factors determining the scope and extent of judicial review of administrative decisions are essentially temporal in nature, varying with the attitude of the particular court, the subject of the administrative activity, the reputation of the particular tribunal involved, the method by which review is obtained, and other elements which vary widely from case to case. Any specific conclusions as to what questions will be considered by the reviewing court must be reached on the basis of a detailed study of cases involving a particular agency.

But this does not mean that the forest must be examined tree by tree. Out of the confusing welter of decisions there appear certain broad trends—certain indications of the factors which influence courts in their determination of the extent to which they will review decisions of administrative agencies. Analysis of these factors affords some guide—only tentative, but still of practical value—in determining the scope of review likely to be afforded in a situation involving a new agency or a new issue, as to which there has been no direct pronouncement defining the scope of review.

In viewing the decisions for purposes of such horizontal classification, the question is not so much the precise extent to which the courts will review the correctness and validity of factual inferences or statutory interpretations made by the Interstate Commerce Commission or by the Federal Trade Commission or some other agency; but rather the inquiry is *why* the courts examine more searchingly the rulings made by one agency than those made by another. If the reason can

be discovered, some basis will be afforded for predicting the extent to which the courts will review rulings to be made by new tribunals whose decisions will be subjected to judicial scrutiny in future years.

## 1. Methods of Review

The extent of review is often controlled by limitations inherent in the procedural method by which the question is presented to the reviewing court.<sup>1</sup>

(a) *Statutory methods of review.* Where the statute setting up the agency makes specific provision for judicial review of the agency's determinations, the statutory method is ordinarily exclusive, and courts will but seldom permit the employment of any other procedural device (such as a writ of mandamus, or petition for certiorari) as a means of bringing the administrative determination into court for purposes of review.<sup>2</sup>

While the statutes seldom prescribe the scope of review (except in terminology so vague as to leave the determination of the actual extent of review to the courts) yet the fact that the statutory method is exclusive often operates indirectly to limit the scope of review. The statutory method may be inappropriate for the raising of certain questions that could be raised if other procedural devices were available.

So far as the statute does set out some indication of the permissible scope of review, it is controlling, subject only to constitutional requirements which preclude vesting in the

<sup>1</sup> The general problem is thoroughly discussed by E. B. Stason, "Methods of Judicial Relief from Administrative Tribunals," 24 A. B. A. J. 274 (1938); and McAllister, "Statutory Roads to Review of Federal Administrative Orders," 28 CAL. L. REV. 129 (1940).

<sup>2</sup> Federal Power Commission v. Metropolitan Edison Co., 304 U. S. 375, 58 S. Ct. 963 (1938); United Employees Ass'n v. National Labor Relations Board (C.C.A. 3d 1938), 96 F. (2d) 875; Arrow Distilleries, Inc. v. Alexander, 306 U. S. 615, 59 S. Ct. 489 (1939), aff'g (D. C. D. C. 1938), 24 F. Supp. 880; Securities and Exchange Commission v. Andrews (C.C.A. 2d 1937), 88 F. (2d) 441.

courts revisory powers so broad as to amount to a delegation of administrative duties,<sup>3</sup> and which preclude depriving the courts of the power to review constitutional questions and essential questions of statutory construction.<sup>4</sup>

(b) *Common-law methods of review.* In appropriate cases—usually, where no specific statutory method is provided<sup>5</sup>—relief may be had by virtue of the common-law writs of certiorari, mandamus, or prohibition; or by their statutory counterparts. Where such method of review is employed, the extent of relief is governed primarily by the limitations inherent in these procedural devices.

*Certiorari.* Certiorari is not ordinarily available in the federal courts as a device to review administrative orders.<sup>6</sup> In the state courts, it is probably the most commonly employed device to review orders of state tribunals; and while the questions which may be raised on certiorari proceedings vary widely in different states, depending on the effect of statutory modifications of the common-law scope of the writ, yet in general the extent of review available on certiorari proceedings is somewhat circumscribed. It is of course effective to raise questions as to the jurisdiction of the agency; and the general tendency in the state courts is to hold that when the writ is directed to an administrative agency, the court is enabled to pass upon (a) questions of law appearing on the face of the record, and (b) claims that the adminis-

<sup>3</sup> *Federal Radio Commission v. General Electric Co.*, 281 U. S. 464, 50 S. Ct. 389 (1930); *Williams v. United States*, 289 U. S. 553, 53 S. Ct. 751 (1933); *Courter v. Simpson Construction Co.*, 264 Ill. 488, 106 N. E. 350 (1914).

<sup>4</sup> *Crowell v. Benson*, 285 U. S. 22, 52 S. Ct. 285 (1932); *cf.*, *Otis Elevator Co. v. Industrial Commission*, 302 Ill. 90, 134 N. E. 19 (1922).

<sup>5</sup> Or where the statutory method of review does not cover the particular situation involved. *Shields v. Utah Idaho Central R. Co.*, 305 U. S. 177, 59 S. Ct. 160 (1938); *Utah Fuel Co. v. National Bituminous Coal Commission*, 306 U. S. 56, 59 S. Ct. 409 (1939).

<sup>6</sup> *Degge v. Hitchcock*, 229 U. S. 162, 33 S. Ct. 639 (1913); *Public Clearing House v. Coyne*, 194 U. S. 497, 24 S. Ct. 789 (1904).

trative order is plainly irregular or illegal.<sup>7</sup> Questions as to the weight of the evidence, of course, cannot be reviewed on certiorari proceedings.

The availability of judicial relief by way of a writ of certiorari is also limited by the doctrine that certiorari will lie only where the decision of the agency is judicial in character, rather than legislative or purely administrative. On the question as to when the agency's determination is to be described as judicial, there is of course a contrariety of opinion. Thus, denial of a certificate of convenience and necessity to a public utility has been described as judicial;<sup>8</sup> while the revocation of such a certificate has been described as nonjudicial.<sup>9</sup> The conclusion in each case is apparently affected by (a) the court's judgment as to the desirability of reviewing a particular type of determination; and (b) by the availability of other methods of review—the courts being inclined to permit the use of the writ where no other method of review would be open. Many of the state court decisions (but not all of them) can be reconciled on the basis that where the agency is required to grant a hearing and there consider a claim of legal right, the proceeding will be deemed reviewable by certiorari; and conversely the writ is not usually available where the agency is not required to grant a hearing.

*Mandamus.* In the comparatively few cases where mandamus is available to review agency determinations, the area of review is closely circumscribed by the nature of the writ. It is available as a means of compelling an officer or agency

<sup>7</sup> *Milwaukee Iron Co. v. Schubel*, 29 Wis. 444 (1872); *Jackson v. People*, 9 Mich. 111 (1860); comment, "Review of Acts of Non-Judicial Bodies by Certiorari," 19 *IA. L. REV.* 609 (1934).

<sup>8</sup> *People ex rel. Steward v. Board of Railroad Commissioners*, 160 N. Y. 202, 54 N. E. 697 (1899).

<sup>9</sup> *People ex rel. Keating v. Bingham*, 138 App. Div. 736, 123 N. Y. S. 506 (1910); *Southeastern Greyhound Lines v. Georgia Public-Service Commission*, 181 Ga. 75, 181 S. E. 834 (1935).

to perform a purely ministerial act where refusal to perform it violates a clearly established legal right, and it can be utilized to compel an agency to assume jurisdiction over a case which it is the duty of the agency to decide;<sup>10</sup> but it can seldom if ever be employed as a means of raising any other question of law. It does not reach questions of fact decided by the administrative agency.

Its only substantial function, then, is to compel an agency to perform its clear legal duty; and if any doubt is raised as to the existence of a strict and undoubted legal right in the petitioner to the claimed relief, the writ may be denied.<sup>11</sup> Thus, mandamus is unavailable where the act which petitioner seeks to compel the agency to perform is one involving some measure of discretion. A modicum of discretionary power is sufficient to render nugatory mandamus proceedings. Thus, where the requested administrative action involves the construction of a statute, the action of the agency is said by the federal courts, at least, to involve a measure of discretion, making mandamus unavailable.<sup>12</sup> Many of the state courts, however, will review some issues of statutory construction on mandamus.

Where the agency performs a judicial function, the courts will not, on mandamus proceedings, direct the agency as to what decision to make on a legal question involved in the administrative proceeding.<sup>13</sup>

Even where a strict legal right on the part of the petitioner can be shown, relief may be denied on the basis that mandamus is an equitable remedy, which should not be granted

<sup>10</sup> *Interstate Commerce Commission v. United States ex rel. Humboldt Steamship Co.*, 224 U. S. 474, 32 S. Ct. 556 (1912).

<sup>11</sup> *United States ex rel. Girard Trust Co. v. Helvering*, 301 U. S. 540, 57 S. Ct. 855 (1937). See Sherwood, "Mandamus to Review State Administrative Action," 45 MICH. L. REV. 123 (1946), for a general discussion of the availability of mandamus to review administrative proceedings.

<sup>12</sup> *United States ex rel. Hall v. Payne*, 254 U. S. 343, 41 S. Ct. 131 (1920); *Thomas v. Vinson* (App. D. C. 1946), 153 F. (2d) 636.

<sup>13</sup> *People ex rel. McCabe v. Matthies*, 179 N. Y. 242, 72 N. E. 103 (1904).

unless the inconvenience to the government is more than counterbalanced by a resulting substantial benefit to the petitioner.<sup>14</sup> On similar grounds, relief by mandamus is ordinarily denied where it can be shown that some other assertedly adequate remedy is available.<sup>15</sup>

In the federal courts, the usefulness of this writ is further impaired by the circumstance that (save for the courts of the District of Columbia, which have inherited some of the common-law powers of the Maryland courts)<sup>16</sup> the district courts have no general original power to issue writs of mandamus, but may grant the writ only in aid of already acquired jurisdiction,<sup>17</sup> or as empowered by statute in specific cases. The writ is rarely available to review determinations of federal agencies, for the state courts may not issue the writ against federal officers.<sup>18</sup>

*Prohibition.* The writ of prohibition, where available, raises only the single question as to whether the agency, in connection with the performance of a judicial function, is unlawfully assuming a power it cannot legally exercise, because beyond its statutory jurisdiction. It will not issue to prevent the performance of executive or ministerial functions,<sup>19</sup> in the absence of specific statutory provisions, such as are found in a few states. It is unavailable in the federal courts.<sup>20</sup>

<sup>14</sup> United States *ex rel.* Greathouse v. Dern, 289 U. S. 352, 53 S. Ct. 614 (1933); Matter of Dr. Bloom Dentist, Inc. v. Cruise, 259 N. Y. 358, 182 N. E. 16 (1932).

<sup>15</sup> United States *ex rel.* Frey v. Robertson (App. D. C. 1933), 63 F. (2d) 457; United States *ex rel.* Carroll Electric Co. v. McCarl (App. D. C. 1925), 8 F. (2d) 910.

<sup>16</sup> Kendall v. United States, 12 Pet. (37 U. S.) 524 (1838). See Miller, "Control of the Interstate Commerce Commission by Mandamus," 4 GEO. WASH. L. REV. 118 (1935).

<sup>17</sup> Bath County v. Amy, 13 Wall. (80 U. S.) 244 (1871); Labette County Commissioners v. United States, 112 U. S. 217, 5 S. Ct. 108 (1884).

<sup>18</sup> M'Clung v. Silliman, 6 Wheat. (19 U. S.) 598 (1821).

<sup>19</sup> Lodge v. Fletcher, 184 Mass. 238, 68 N. E. 204 (1903); Butler v. Selectmen of Wakefield, 269 Mass. 585, 169 N. E. 498 (1930); and cases cited in annotation, 115 A. L. R. 3; 159 A. L. R. 627.

<sup>20</sup> 34 COL. L. REV. 899, 905 (1934).

(c) *Collateral attack*. The extremely limited scope of review which may be obtained by means of the common-law writs, and their unavailability in many types of situations, has rendered it necessary to employ various methods of collateral attack as a means of reviewing administrative determinations, in cases where no statutory method of review is provided or where the method of review provided by statute is inadequate. The usual methods of collateral attack employed are (1) bills for injunction; (2) damage actions against administrative officers; (3) actions for restitution; and (4) actions for declaratory judgments.<sup>21</sup>

*Bills for injunction*. Not infrequently, statutory provisions authorize the filing of a bill for injunction to review particular agency determinations, and in such cases, the scope of review is determined on the same basis as in other instances where review is by statutory method. So far as the statute specifies the extent of review which is to be had, the statute is controlling. To the extent that the statute is silent as to the intended breadth of review, the question is one for the courts, to be determined in accordance with the general principles discussed *infra*.

Only where there is no such statutory provision does an application for injunctive relief assume the true character of a collateral attack. In such instances, it must usually be shown, in order to sustain the bill, that the agency action complained of is void rather than merely erroneous,<sup>22</sup> that

<sup>21</sup> While perhaps not strictly a method of collateral attack, petitions for declaratory judgment have recently become available as an effective method for raising questions as to the jurisdiction of an agency and as to the validity of agency rules. See cases collected in note: Stason, *THE LAW OF ADMINISTRATIVE TRIBUNALS*, 2d ed. (1947) 599-601; and 149 A. L. R. 349. For law review comment, see Borchard, "Declaratory Judgments in Administrative Law," 11 N. Y. U. L. Q. REV. 139 (1933); Ellingwood, "Declaratory Judgments in Public Law," 29 ILL. L. REV. 1, 174 (1934); Martin, "The Declaratory Judgment Act in Public Law Controversies," 7 GEO. WASH. L. REV. 514 (1939); Davison, "Administrative Legislation," 34 ILL. L. REV. 651 (1940).

<sup>22</sup> *Stone v. Heath*, 179 Mass. 385, 60 N. E. 975 (1901).

irreparable injury would be suffered,<sup>23</sup> and that there is no adequate remedy at law.<sup>24</sup>

A bill for an injunction may be utilized, typically, to review an assertion that a statute is unconstitutional, or that enforcement of a particular order will result in a deprivation of due process. It is employed frequently in tax cases. However, application of general doctrines of equity as to the availability and functions of injunctive remedies circumscribes the utility of this device as a means of obtaining a general review of the fairness, justice, or legal correctness of the determinations of administrative agencies.

*Damage actions against administrative officers.* Historically, the basic common-law remedy for the protection of an individual against illegal official action was a private action for damages. In such a case, if the plaintiff could show that the action of the officer was a private wrong (not justifiable under the statute), he was entitled to recover damages. The issue thus presented was whether or not an officer was legally entitled to do what he did do in the particular case—whether the law authorized his conduct under the circumstances. Obviously, the scope of review in such an action was necessarily limited. Because of these obvious inadequacies of this common-law remedy, indeed, it became largely displaced by the familiar bill for an injunction. However, the remedy is still available, and is occasionally used.<sup>25</sup>

The older cases allowed recovery quite freely, not only for action under an unconstitutional statute, but also in cases where, because of a mistaken determination of fact, the officer took some action not authorized by the statute. Thus, where an officer was authorized to destroy diseased cattle, and (on finding cattle to be diseased) destroyed them, but a jury later

<sup>23</sup> *California v. Latimer*, 305 U. S. 255, 59 S. Ct. 166 (1938).

<sup>24</sup> *Hurley v. Kincaid*, 285 U. S. 95, 52 S. Ct. 267 (1932).

<sup>25</sup> *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U. S. 118, 59 S. Ct. 366 (1939).



found that the cattle had not in fact been diseased, it was said that the officer had killed cattle which were not diseased, and had hence committed a wrong which could not be justified under the statute, and was therefore liable in damages.<sup>26</sup> But the results of this doctrine were unsatisfactory. The danger of an administrative official subjecting himself to substantial personal liability—if a jury, trying the factual question *de novo* (and often on less complete evidence than that on which the officer acted) should determine the factual question differently than the officer had—was an obvious deterrent to vigilant administrative enforcement. Further, the theory of according greater weight to the jury's fact finding than to the factual determination of the administrative officer was completely at odds with fundamental tenets of the doctrine of administrative *expertise*. Consequently, as a means of avoiding the harsh results of the rule, some courts developed a theory that where the administrative function is judicial in character (or quasi-judicial, as it has been commonly called), the administrative officer is exempt from liability so long as he acts within his jurisdiction and in good faith.<sup>27</sup> Sometimes it is said that the immunity is available only where no property right is invaded, but the courts have gone far, in order to protect an officer, in finding this requirement satisfied.<sup>28</sup>

*Actions for restitution.* Closely related to the damage action is a private suit seeking restitution of moneys collected by an administrative officer or agency, which are alleged to have been improperly collected. The typical case is the suit to recover taxes paid under protest.

<sup>26</sup> *Lowe v. Conroy*, 120 Wis. 151, 97 N. W. 942 (1904).

<sup>27</sup> See note, 34 MICH. L. REV. 113 (1935); *Raymond v. Fish*, 51 Conn. 80 (1883); *Beeks v. Dickinson County*, 131 Iowa 244, 108 N. W. 311 (1906); *Williams v. Rivenburg*, 145 App. Div. 93, 129 N. Y. S. 473 (1911).

<sup>28</sup> For example, it was held in *Wasserman v. City of Kenosha*, 217 Wis. 223, 258 N. W. 857 (1935), that revocation of a building permit did not invade any property right, and that therefore an officer who revoked the permit was not liable for damages.

At common law, there was doubt whether such an action could be maintained unless the actions of the administrative officer were void, rather than merely erroneous.<sup>29</sup> In most of the states, and under various federal statutes, these actions are now controlled by specific statutory provision, and the question as to the scope of review is primarily a question as to what the statute provides.

## 2. "Facts" v. "Law" as a Criterion of Review

The classical dichotomy (asserting that the courts should judicially review questions of law passed on by administrative agencies, but should not review their determinations of fact, beyond ascertaining whether the determinations are supported by substantial evidence) is of little use as a working tool. One cannot predict the scope of review which will be accorded by ascertaining whether the question involved is one of law or of fact.

The basic reason for this, as pointed out in the classic statement of Dickinson,<sup>30</sup> is that there is no fixed distinction between questions of fact and questions of law, but "The knife of policy alone affects an artificial cleavage." What would be considered in many connections as a question of law—e. g., a question as to whether, on stated facts, the relationship between two parties is that of employer and employee or independent contractor,<sup>31</sup> or a question of reasonableness<sup>32</sup>—may be treated as a question of fact to eliminate judicial review, where considerations of policy dictate such results. On the other hand, determinations which are labeled findings of fact, may be treated as involving questions of law,

<sup>29</sup> *United States Trust Co. of New York v. Mayor, etc., of City of New York*, 144 N. Y. 488, 39 N. E. 383 (1895).

<sup>30</sup> Dickinson, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* (1927) 55.

<sup>31</sup> *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111, 64 S. Ct. 851 (1944).

<sup>32</sup> *Trust of Bingham v. Commissioner of Internal Revenue*, 325 U. S. 365, 65 S. Ct. 1232 (1945).

and subject to review.<sup>33</sup> The distinction, as the Supreme Court has said, "is often not an illuminating test and is never self-executing."<sup>34</sup> Judges may often disagree as to whether a question is one of fact or of law; and the disagreement reflects merely different judgments as to the proper extent of review.<sup>35</sup>

Even if it can be agreed that a certain issue is one of fact or of law, the question as to the actual scope of review is still unanswered. As to whether a factual determination is supported by substantial evidence, judges of a court often disagree, the disagreement representing different philosophies as to the proper scope of review. And where the question is one of law, there still remains the question as to whether the court should ascertain merely whether the decision has "a reasonable basis in the law" or whether the court should determine the law question independently. Judgment on all these points reflects no logical distinctions but represents rather a delicate balancing of many imponderable policy factors. As it is well stated by Justice Brandeis:<sup>36</sup> ". . . in deciding when, and to what extent, finality may be given to an administrative finding of fact involving the taking of property, the court has refused to be governed by a rigid rule. It has

<sup>33</sup> *Baumgartner v. United States*, 322 U. S. 665, 671, 64 S. Ct. 1240 (1944), where the court pointed out that the determination of the so-called ultimate facts "implies the application of standards of law," and declared that in such cases "the conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of 'fact' that precludes consideration by this Court." Cf., *Williams v. North Carolina*, 325 U. S. 226, 236, 65 S. Ct. 1092 (1945), where the court said, "State courts cannot avoid review by this Court of their disposition of a constitutional claim by casting it in the form of an unreviewable finding of fact."

<sup>34</sup> *Baumgartner v. United States*, 322 U. S. 665, 671, 64 S. Ct. 1240 (1944).

<sup>35</sup> E.g., majority and dissenting opinions in *Gray v. Powell*, 314 U. S. 402, 62 S. Ct. 326 (1941).

<sup>36</sup> Concurring opinion, *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 81, 56 S. Ct. 720 (1936). How such considerations may affect the scope of review is pointed out in *McDermott*, "To What Extent Should the Decisions of Administrative Bodies be Reviewable by the Courts?" 25 A. B. A. J. 453 (1939).

weighed the relative values of constitutional rights, the essentials of powers conferred, and the need of protecting both. It has noted the distinction between informal, summary administrative action . . . and formal, deliberate, quasi-judicial decisions. . . . It has considered the nature of the facts in issue, the character of the relevant evidence, the need in the business of government for prompt final decision. . . . It has enquired into the character of the administrative tribunal provided and the incidents of its procedure."

Whether the question be one of fact or law, the scope of review does not depend on any logical or mechanical classification of the issue under one category or the other. Rather, the extent to which the court will review the agency's determination depends on more vital factors. These factors reflect the court's judgment as to the appropriate spheres of administrative and judicial activity. The judgment on this ultimate question is based not on logic but on experience and philosophy.

### 3. Conduct of Public Business v. Regulation of Private Business

The distinction between the regulation of private business and the conduct of public business furnishes a criterion capable of fairly definite and objective application as a basis on which to predict the scope of judicial review that will be afforded.

Where the purpose of the administrative tribunal is to discharge a function which is essential to the perpetuation of government itself, far different considerations apply than where the tribunal's purpose is to regulate the conduct of private business enterprise.

In administrative determinations which are incidental to the conduct of the public business, there are many cases where

the sovereign's free will is unfettered—where decisions do not determine legal rights, but merely establish the extent of a privilege which the government is free to grant or deny, as in public lands and veteran's pension cases, or the granting of licenses to establish businesses of the sort which the government may regulate to the point of extinction, like saloons and public dance halls.<sup>37</sup> In other instances, legal rights are to a larger degree involved, but the need for a prompt determination of the dispute is more impelling than the need for a detailed reconsideration of each case. Thus, in immigration matters, the courts have been willing to sacrifice some doubts as to the correctness and justice of individual determinations because of the practical necessity for the speedy disposition of such cases.<sup>38</sup> In tax cases and customs cases, the courts, recognizing the overwhelming public interest in the prompt collection of the public revenues in order to permit the uninterrupted operation of governmental processes, accord a large degree of finality to administrative decisions.<sup>39</sup>

On the other hand, where the incidence of the administrative function falls primarily on the conduct of private business, the administration's demands for autonomy are less persuasive. The courts have clearly recognized a need for more extensive review where administrative determinations directly affect the operation of business enterprise.<sup>40</sup> In this

<sup>37</sup> *United States ex rel. Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 23 S. Ct. 698 (1903); *United States ex rel. Dunlap v. Black*, 128 U. S. 40, 9 S. Ct. 12 (1888); *Wilson v. Eureka City*, 173 U. S. 32, 19 S. Ct. 317 (1899); *State of Kansas v. Sherow*, 87 Kan. 235, 123 Pac. 866 (1912); *State ex rel. Port Royal Mining Co. v. Hagood*, 30 S. C. 519, 9 S. E. 686 (1889); *McMillan v. Sims*, 132 Wash. 265, 231 Pac. 943 (1925).

<sup>38</sup> *Kwock Jan Fat v. White*, 253 U. S. 454, 40 S. Ct. 566 (1920); *Van Vleck, THE ADMINISTRATIVE CONTROL OF ALIENS* (1932) Ch. V.

<sup>39</sup> *Passavant v. United States*, 148 U. S. 214, 13 S. Ct. 572 (1893); *Stason, "Judicial Review of Tax Errors—Effect of Failure to Resort to Administrative Remedies,"* 28 MICH. L. REV. 637 (1930).

<sup>40</sup> *West v. Chesapeake & Potomac Telephone Co. of Baltimore*, 295 U. S. 662, 55 S. Ct. 894 (1935); *Norfolk & W. Ry. Co. v. United States*, 287 U. S. 134, 53 S. Ct. 52 (1932); *Federal Trade Commission v. Klesner*, 280 U. S. 19, 50 S. Ct. 1 (1929).

field, overly drastic restrictions of judicial review might serve ultimately to impair rather than foster the effectiveness of governmental processes; a reasonably broad review helps to maintain public confidence in the fairness of the administrative activity.

There are some agencies which neither carry on the necessary business of government nor regulate the actual operation of private business, but are rather charged with the duty of enforcing a general rule of conduct prescribed by statute. Thus, the National Labor Relations Board does not actually regulate industry (as the Securities and Exchange Commission regulates the investment banking business and some corporate reorganizations) but merely insists that industry in the conduct of business shall not transgress certain standards of behavior prescribed by Congress. Where such is the nature of the agency's task, it impinges less substantially on the conduct of private affairs. It does not regulate, but merely polices. In such cases, the trend is in the direction of a narrowing scope of review.

#### 4. Legislative v. Judicial Powers

Another guide which is of some assistance in predicting the scope of review which will be allowed in particular cases is based on the distinction between those administrative functions which are basically of a legislative character and those which are essentially judicial in nature. Administrative agencies act in three fields: (a) those which are traditionally deemed executive or administrative; (b) those in which the agency makes rules analogous to legislative enactments; and (c) those in which the determinative functions resemble so closely the processes of the constitutional courts that frankness compels the application of the adjective "judicial."

So far as the action is purely executive or ministerial, judicial review may be limited to a determination that the

agency has kept within its statutory powers and has followed statutory procedure.<sup>41</sup> The field of executive action is traditionally one for comparatively unbridled administrative discretion.

Where, however, the agency fulfills a function that is traditionally legislative, less freedom from control is permitted. A standard must be set up by which the agency's acts are to be measured. The courts must determine whether a proper standard has been set up, and whether the agency has complied with that standard.<sup>42</sup> The judicial approach is somewhat similar to that employed when a statute is attacked on constitutional grounds—highest respect is shown for the legislative or administrative determination, but the courts must intervene when the bounds imposed by the enabling enactments are overreached.

When the agency exercises judicial powers, it passes on questions intimately associated with personal rights of liberty and property, presented in a form readily susceptible to judicial consideration. Judicial review is likely to be granted at least to the extent of passing on vital issues of statutory construction, scrutinizing claims that the agency has violated those ordinary decencies of judicial procedure that constitute the requirements of procedural due process;<sup>43</sup> determining whether it has decided cases on the basis of matters not before the agency or on preformed opinions;<sup>44</sup> and deciding whether its findings are supported by substantial evidence.

<sup>41</sup> *Small v. Moss*, 279 N. Y. 288, 18 N. E. (2d) 281 (1938); *Federal Radio Commission v. General Electric Co.*, 281 U. S. 464, 50 S. Ct. 389 (1930).

<sup>42</sup> *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, 55 S. Ct. 837 (1935); *Panama Refining Co. v. Ryan*, 293 U. S. 388, 55 S. Ct. 241 (1935); *State ex rel. Wisconsin Inspection Bureau v. Whitman*, 196 Wis. 472, 220 N. W. 929 (1928).

<sup>43</sup> *Saxton Coal Mining Co. v. National Bituminous Coal Commission* (App. D. C. 1938), 96 F. (2d) 517; *Interstate Commerce Commission v. Louisville & N. R. Co.*, 227 U. S. 88, 33 S. Ct. 185 (1913).

<sup>44</sup> *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 55 S. Ct. 462 (1935); *Tri-State Broadcasting Co. v. Federal Communications Commission* (App. D. C. 1938), 96 F. (2d) 564.

## 5. Discretionary Powers

If an administrative agency is in fact endowed with truly discretionary powers, judicial review of its discretionary acts may properly be denied.<sup>45</sup> An act of free discretion, referable to no fixed standard except governmental desire, is not appropriate for judicial review.<sup>46</sup>

But instances are uncommon where an agency exercises pure and untrammelled discretionary powers. Rarely is an agency of the government granted discretionary powers as broad as those of its principal. Usually, the delegated discretion is limited to interstitial legislative powers—to the determination, within stated limits, of the proper means of executing a stated legislative purpose. In such cases, review is appropriate to determine whether the agency's discretion was controlled by improper considerations—whether its discretion was abused.<sup>47</sup>

Control of discretion is not typically a judicial function, nor is there promise of any assured gain to be derived from superimposing the discretion of the judge upon that of the administrator. Rather, the problem of controlling the scope of administrative discretion is fundamentally political; it is for the legislature, primarily, to determine the breadth of discretionary power to be vested in a branch of the government which is comparatively free of popular control. The most that the courts can do is to ascertain that the administrative action has not exceeded the limits of the delegated discretion.

<sup>45</sup> *Williamsport Wire Rope Co. v. United States*, 277 U. S. 551, 48 S. Ct. 587 (1928); *City of Chicago v. Kirkland* (C.C.A. 7th 1935), 79 F. (2d) 963. See Treves, "Administrative Discretion and Judicial Control," 10 MOD. L. REV. 276 (1947).

<sup>46</sup> *People ex rel. Keating v. Bingham*, 138 App. Div. 736, 123 N. Y. S. 506 (1910). Provisions allowing review in such cases may be unconstitutional. *Norwalk Street Railway Company's Appeal*, 69 Conn. 576, 37 Atl. 1080 (1897).

<sup>47</sup> *Interstate Commerce Commission v. Diffenbaugh*, 222 U. S. 42, 32 S. Ct. 22 (1911); *City of Monticello v. Bates*, 169 Ky. 258, 183 S. W. 555 (1916).



Hence, when an agency asserts that its decision is non-reviewable, because reached in the exercise of its discretionary power, the first task of the reviewing court is to determine to what extent the agency's powers are discretionary.<sup>48</sup> The court must then ascertain whether the agency has exceeded these limits. If it has stayed within the area of delegated discretion, there is no further question presented.

## 6. Character of Administrative Procedure

Because of the duty of the courts to review assertions that the course of proceedings adopted by an agency constituted a deprivation of procedural due process, the scope and extent of review is affected indirectly by the character of the agency's procedure. The more summary the administrative procedure, the more searching must judicial review be in order to permit the court to determine whether perfunctory adherence to customary forms masks arbitrary or capricious action. Similarly, where investigatory, prosecuting, and adjudicatory powers are combined in a single agency—and particularly where they are not rigidly divided between separate departments of that agency—searching inquiry may be required to determine whether there has been any infringement of the guaranties of fair procedure.<sup>49</sup>

Conversely, where the determination is based on evidentiary findings, made after a formal hearing at which there was afforded ample opportunity to present testimony and meet the arguments of the adverse party—where the procedure is essentially that of a legislative court—the inclination of the courts is to probe less deeply. In other words, the

<sup>48</sup> *Bates & Guild Co. v. Payne*, 194 U. S. 106, 24 S. Ct. 595 (1904); *Yudelson v. Andrews* (C.C.A. 3d 1928), 25 F. (2d) 80; *Baltimore & O. R. Co. v. Brady* (C.C.A. 4th 1932), 61 F. (2d) 242.

<sup>49</sup> It has been suggested that § 10 (3) (5) of the Administrative Procedure Act authorizes the determination *de novo* by the reviewing court of the facts pertinent to any relevant question of law, in cases where the agency's determination was not based on a statute-required hearing. See Congressional Debate, "The Congressional Record," May 24, 1946, 5654, 5657.

character of the administrative procedure affects the scope of judicial review to the extent that suspicions of arbitrary or careless administration prompt the courts to examine carefully the fairness of the procedures adopted.

Aside from this, the character of the administrative procedure may affect the scope of judicial review in another way. If the procedure is such as to beget lack of confidence in the probable correctness of the administrative determination, there is an inclination to allow a fuller review. Thus, it has been suggested that the doctrine according great weight to administrative findings of fact "has and should have" little bearing on certain findings of the Patent Office because of the *ex parte* nature of the particular proceedings, allowing interested parties but a limited opportunity to be heard.<sup>50</sup>

## 7. Experience of Agency

Both in legislative and judicial spheres of administrative activity, the experience of the particular agency is a factor which plays some part in judicial determination as to the proper extent of review. The greater experience an agency may possess, the greater confidence will be indulged by the courts in its decisions. The high quality of performance demonstrated by the Interstate Commerce Commission had won for its determinations the respect of the courts even before the Federal Trade Commission, for example, was organized.<sup>51</sup> The latter body was, for a time, viewed somewhat with mistrust by the courts.<sup>52</sup> In earlier days, for ex-

<sup>50</sup> Opinion of Frank, J., concurring in *Aero Spark Plug Co. v. B. G. Corporation* (C.C.A. 2d 1942), 130 F. (2d) 290, 294.

<sup>51</sup> E.g., *Illinois Cent. R. Co. v. Interstate Commerce Commission*, 206 U. S. 441, 27 S. Ct. 700 (1907); *Interstate Commerce Commission v. Louisville & N. R. Co.*, 227 U. S. 88, 33 S. Ct. 185 (1913).

<sup>52</sup> It is said that some ten years after the creation of the Federal Trade Commission, one appellate judge confessed that when reviewing a determination of the Interstate Commerce Commission, it was always his inclination to affirm; and that when reviewing a determination of the Federal Trade Commission, he entertained some predisposition toward reversal. 24 A. B. A. J. 285 (1938).

ample, the courts were inclined to insist that its factual inferences would be accepted only if they were "reasonable" or "legitimate" or "necessary," and there was considerable readiness to find the inferences unreasonable;<sup>53</sup> and similarly, it was declared that what constituted unfair competition was a question for the courts rather than for the agency.<sup>54</sup> But in more recent years, as the courts have come to repose more confidence in the Commission, its inferences have been more readily accepted without review,<sup>55</sup> and the courts give far greater weight to the Commission's determination as to the propriety or impropriety of a given trade practice.

The successful experience of an administrative agency is the best criterion of its true expertness; and the pleas that the expert knowledge of an administrative body should not be jettisoned, carry far greater weight where the asserted expertness has been demonstrated.<sup>56</sup>

#### 8. Miscellaneous Factors Affecting Likelihood of Fair Trial

The continued insistence of the courts on the maintenance of standards of fair play in administrative procedure has led reviewing judges to probe somewhat more deeply in cases where factors are present which may make it difficult for the

<sup>53</sup> *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, 651, 51 S. Ct. 587 (1931); *Federal Trade Commission v. Pacific States Paper Trade Ass'n*, 273 U. S. 52, 61, 47 S. Ct. 255 (1927).

<sup>54</sup> *Federal Trade Commission v. Gratz*, 253 U. S. 421, 40 S. Ct. 572 (1920); *Federal Trade Commission v. Curtis Pub. Co.*, 260 U. S. 568, 43 S. Ct. 210 (1923).

<sup>55</sup> *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U. S. 746, 65 S. Ct. 971 (1945); *Federal Trade Commission v. R. F. Keppel & Bro., Inc.*, 291 U. S. 304, 54 S. Ct. 423 (1934).

<sup>56</sup> *Cf.*, the discussion in *Skidmore et al. v. Swift & Co.*, 323 U. S. 134, 65 S. Ct. 161 (1944), as to the reasons for giving weight to an interpretative opinion of the Wage and Hour Division; and the reasons given in *Davies Warehouse Co. v. Bowles*, 321 U. S. 144, 156, 64 S. Ct. 474 (1944), for refusing to follow the construction given a statute by the Office of Price Administration.

agency to observe high standards of fairness.<sup>57</sup> Political pressure is present in varying degrees in different tribunals. Its significance, where present, is reflected by the frank statement of President Roosevelt's Committee on Administrative Management:

" . . . the independent commission is obliged to carry on judicial functions under conditions which threaten the impartial performance of the judicial work. . . . Pressures and influences properly enough directed toward officers responsible for formulating and administering policy constitute an unwholesome atmosphere in which to adjudicate private rights."<sup>58</sup>

Where the danger of improper political motivation is apparent, it is to be expected that judicial review will be somewhat more searching.

Opportunities for reaching an unbiased decision are in some fields rendered difficult by the highly subjective character of the inquiry. As has been wisely said, "The more indefinite the standard, the greater is obviously the temptation to use the law as a weapon."<sup>59</sup> A familiar example of the difficulty of applying vague standards is found in the fields of economic legislation, operating in terms of fraud, discrimination, monopoly, unreasonable charges, and similar concepts. In fields where technical competence plays a large part, and where a reasonably objective test is to be applied, administrative conclusiveness is more readily conceded than in fields where more judgment and less cold fact are in-

<sup>57</sup> "Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient." *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 52, 56 S. Ct. 720 (1936).

<sup>58</sup> Sen. Doc. No. 8, 75th Cong., 1st Sess. (1937) 68.

<sup>59</sup> Freund, *GROWTH OF AMERICAN ADMINISTRATIVE LAW* (1923) 31.

volved, and where distinctions between findings of fact and conclusions of law are almost obliterated.

## B. SCOPE OF REVIEW ON APPEALS FROM DETERMINATIONS OF SPECIFIC AGENCIES

Decisions laying down rules as to the extent of review on appeals from the determinations of various particular agencies illustrate the application of the general factors above discussed.

### 1. Workmen's Compensation Cases

The field of workmen's compensation presents a middle ground, so far as concerns the scope of judicial review of administrative determinations. Factors which in other types of cases prompt the courts to examine with care the agency's factual inferences are here lacking; but there are also absent the factors which in some cases are effective to eliminate review of issues involving questions that could be described as issues of law.

Workmen's compensation commissions are engaged essentially in administering a social insurance program, the costs of which are widely spread. The administrative activity does not bear so directly or so oppressively on private affairs as in cases where, for example, an agency undertakes to regulate the trade practices of some particular industry. In some respects, the task of the compensation commissions is coming to be viewed as the discharge of one of the normal functions of government—like carrying mail or policing highway traffic. To the extent that the function is thus coming to be considered as the conduct of the public business, there is a growing tendency in the courts to restrict the scope of judicial review. On the other hand, the compensation awards remain a direct burden on the individual employer or his insurance carrier, and a broader scope of review is granted than in cases

where a purely public program is being carried out which does not directly impinge on private rights of person or property.<sup>60</sup>

(a) *Factors tending toward broad review.* There are present in this field a number of factors which militate toward a substantial degree of judicial review. Thus, in the first place, the compensation commissions exercise a function which is typically judicial—determining contested issues of fact and law by hearing evidence and interpreting a governing statute. The tendency to grant broader review where the agency exercises judicial functions is thus operative in cases of this type. Secondly, the compensation commissions typically have but a small measure of discretion—when the facts are found, the decision must be based on the provisions of the controlling statute. There is thus but little occasion to restrict review on the principle that judicial respect and deference must be accorded the judgment of the agency in matters involving discretion. Thirdly, the law questions presented have a non-technical background; courts feel themselves on familiar grounds in considering such questions as the meaning of “dependent,” the significance of the phrase “arising out of and in the course of employment,” the definition of “engaged in trade or business,” and the like. Consequently, courts are more ready to impose their own judgments than in fields where the controlling statutes and regulations are cast in the terminology of a complex, technical field.

(b) *Factors tending toward narrow review.* On the other hand, there are also present factors which disincline the courts to probe extensively into the intrinsic correctness of the administrative determination. For one thing, the courts exhibit

<sup>60</sup> *Cf.*, the suggestion in *Crowell v. Benson*, 285 U. S. 22, 50, 52 S. Ct. 285 (1932), indicating that a narrower scope of review would have been afforded, had the matter related solely to the conduct of public business. For a general survey of the scope of review in workmen's compensation cases, see Horowitz, “Modern Trends in Workmen's Compensation,” 21 IND. L. J. 473 (1946).

some tendency toward viewing it as socially desirable to sustain the grant of compensation unless the decision is plainly erroneous. The fact that the amount involved in the individual case is not large likely contributes somewhat toward acceptance of this philosophy. There is little in the character of the administrative procedure to create concern or alarm. Judicial-type hearing procedures are usually employed, and there is seldom any serious question presented as to the granting of a fair trial. Even where this point is urged, the courts hear it with considerable scepticism.<sup>61</sup> There is usually but little if any political motivation in the functioning of compensation commissions, nor are such agencies often exposed to questionable pressures. These factors likewise incline the courts to accept the administrative determinations as presumptively fair and just. Finally, the long experience and demonstrated expertness of compensation commissions operate to create judicial respect for the administrative determination.

(c) *Fact and law*. In reconciling these opposed tendencies, the courts have been inclined to accept without critical examination determinations which are purely factual or based on inferences as to the facts, but at the same time to describe as issues of law and grant full review to issues of statutory interpretation and application which in other types of cases might be deemed nonreviewable issues of fact. Thus, the question as to whether an individual is an employee or an independent contractor is ordinarily deemed a reviewable question of law in compensation cases; whereas in unfair labor practice cases it may be deemed a question of fact.<sup>62</sup>

<sup>61</sup> E.g., *County of Los Angeles v. Industrial Accident Commission*, 202 Cal. 437, 261 Pac. 295 (1927); *King v. Alabam's Freight Co.*, 40 Ariz. 363, 12 P. (2d) 294 (1932), holding that the mere fact that the testimony given before a referee had not been transcribed when the award was made did not indicate that the Commission did not consider the testimony, since there was no proof that the Commission did not have the stenographer read the untranscribed testimony.

<sup>62</sup> *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111, 64 S. Ct. 851 (1944).

Decision on all ordinary questions of litigation facts is reserved almost exclusively for the commissions. It is frequently said, for example, that the court must view the evidence in the light most favorable to sustain the findings, and all presumptions are to be indulged in favor of the validity of orders granting compensation.<sup>63</sup> Doubts as to whether the award is supported by evidence should be resolved in favor of the injured employee.<sup>64</sup> Even if the findings of the commission are inconsistent, it is enough if some of the findings sustain the award.<sup>65</sup>

Likewise, the agency's inferences from established primary facts are ordinarily accorded the same conclusiveness as is granted the agency's findings as to the primary facts.<sup>66</sup>

It was in this field, to be sure, that the doctrine as to judicial review *de novo* of "jurisdictional facts" was established in *Crowell v. Benson*<sup>67</sup> but the validity of this doctrine, and its vitality even in the federal courts is open to serious doubt; and several state courts, both before and after this decision, have considered jurisdictional facts on the same basis as other factual questions.<sup>68</sup>

Because of the comparatively long time that workmen's compensation commissions have been functioning, there may

<sup>63</sup> *Sloss-Sheffield Steel & Iron Co. v. House*, 217 Ala. 422, 116 So. 167 (1928); *Crutcher v. Curtiss-Robertson Airplane Mfg. Co.*, 331 Mo. 169, 52 S. W. (2d) 1019 (1932); *Hackley-Phelps-Bonnell Co. v. Industrial Commission*, 173 Wis. 128, 179 N. W. 590 (1921).

<sup>64</sup> *Liberty Mut. Ins. Co. v. Hoage* (App. D. C. 1933), 65 F. (2d) 822.

<sup>65</sup> *Southern Pacific Co. v. Industrial Accident Commission*, 177 Cal. 378, 170 Pac. 822 (1918).

<sup>66</sup> *Goldsworthy v. Industrial Commission*, 212 Wis. 544, 250 N. W. 427 (1933); *Noto v. Hemp & Co.*, 231 Mo. App. 982, 83 S. W. (2d) 136 (1935); *Ginsberg v. Burroughs Adding Machine Co.*, 204 Mich. 130, 170 N. W. 15 (1918).

<sup>67</sup> 285 U. S. 22, 34, 52 S. Ct. 285 (1932).

<sup>68</sup> *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 Pac. 35 (1915); *County of San Bernardino v. State Industrial Accident Commission*, 217 Cal. 618, 20 P. (2d) 673 (1933); *O'Hara's Case*, 248 Mass. 31, 142 N. E. 844 (1924); *Matter of Dimino v. Independent Warehouses, Inc.*, 284 N. Y. 481, 31 N. E. (2d) 911 (1940); *Matter of Miles v. Colegrove*, 258 App. Div. 1014, 16 N. Y. S. (2d) 988 (1940), *aff'd* 284 N. Y. 609, 29 N. E. (2d) 929 (1940).



be found in this field a series of decisions regarding judicial review, which extend over a period of years and illustrate the changing trend of the courts. Thus, many early cases insisted that where the facts were such as to support equally an inference justifying an award or an inference denying it, it was the duty of the agency to make the inference which denied the award.<sup>69</sup> Early attempts of the legislatures to change this result by enacting "presumption statutes" to aid the compensation claimants were in some instances blandly disregarded by the courts.<sup>70</sup> But by the time of the decision of the Supreme Court in *Del Vecchio v. Bowers*,<sup>71</sup> sustaining the validity of, and giving substantial effect to such presumption statutes, there had developed a tendency (which under the Supreme Court's decision became a binding requirement) to grant a much larger degree of freedom to the compensation commissions to make such inferences as they choose.

## 2. Taxation

(a) *Determinations involve conduct of public business.* The overwhelming necessity of the prompt collection of the public revenues is a brooding omnipresence in the judicial consciousness, when courts are reviewing administrative determinations in tax matters. The exercise of the power of taxation (which has been characterized by the Supreme Court as an "imperious necessity of all government, not to be restricted by mere legal fictions")<sup>72</sup> through administrative agencies, is the outstanding example of the principle that where an agency is conducting the public business, the courts will review the administrative determinations less rigorously than where an agency is regulating private business.

<sup>69</sup> *Chaudier v. Stearns & Culver Lumber Co.*, 206 Mich. 433, 173 N. W. 198 (1919); *Sparks v. Consolidated Indiana Coal Co.*, 195 Iowa 334, 190 N. W. 593 (1922). Several state courts still follow this rule.

<sup>70</sup> *Joseph v. United Kimono Co.*, 194 App. Div. 568, 185 N. Y. S. 700 (1921).

<sup>71</sup> 296 U. S. 280, 56 S. Ct. 190 (1935).

<sup>72</sup> *Tyler v. United States*, 281 U. S. 497, 503, 50 S. Ct. 356 (1930).

In few fields is the scope of judicial review more narrow than in that of taxation. The slowness of the courts to interfere in cases involving collection of governmental revenue is illustrated by the vigorous application in tax cases of the principles requiring complete exhaustion of all possible administrative procedures, before the courts will even take jurisdiction over the controversy. In tax cases (though perhaps not in all other types of cases), this principle of prior resort is applied, even though the alleged error is one that would render the administrative determination void.<sup>73</sup>

(b) *Treatment of factual questions and inferences.* None of the important factual questions determined by agencies administering tax laws can be effectively reviewed in the courts. In cases involving *ad valorem* taxes, the underlying factual issue is usually that of the true value of the property; but this question of valuation is ordinarily deemed nonjudicial, the courts refusing to review the question unless it can be established that the assessors committed fraud or adopted fundamentally wrong methods of valuation.<sup>74</sup> Partly for the reason that assessments are often fixed on bases other than the taking of testimony, some courts even refuse to consider whether or not there was any evidence at all to support the administrative conclusion as to value.<sup>75</sup>

In many excise tax cases, decision turns primarily on an inference to be made from somewhat ambiguous circumstances; and in such cases the principle is met that it is the

<sup>73</sup> Stason, "Judicial Review of Tax Errors—Effect of Failure to Resort to Administrative Remedies," 28 MICH. L. REV. 637 (1930); among recent general discussions of the scope of review in tax cases, see Dwan, "Administrative Review of Judicial Decisions: Treasury Practice," 46 COL. L. REV. 581 (1946); Gordon, "Reviewability of Tax Court Decisions," 2 TAX L. REV. 171 (1947); Heidenreich, "Scope of Judicial Review of Decisions of the United States Tax Court," 29 MINN. L. REV. 186 (1945).

<sup>74</sup> See Luce, "Assessment of Real Property for Taxation," 35 MICH. L. REV. 1217, 1239 (1937); cases collected in Cooley on TAXATION, 4th ed. (1924), §§ 1612, 1645.

<sup>75</sup> Board of Commissioners of County of Finney v. Bullard, 77 Kan. 349, 94 Pac. 129 (1908).

function of the tax authorities, and not of the courts, to draw inferences from the facts and to choose between conflicting inferences.<sup>76</sup>

Where decision rests fundamentally on a factual question, the suggestion is made that there is no warrant for the expenditure of any great amount of judicial energy in discovering the truth;<sup>77</sup> and references are constantly found, both in state and federal decisions, to the greater expertness of the administrative officials in determining the difficult factual problems involved in taxation matters.

(c) *Treatment of questions of law.* Even where the controlling issue is clearly a question of law, the attitude of judicial abstinence is adhered to. In the famous *Dobson* case<sup>78</sup> the Supreme Court criticized the lower federal courts for interfering too readily with the determinations of the administrative authorities in the taxation field, and indicated that even though the question involved was one of law, the decision was not to be reversed so long as the administrative decision on the law question was reasonable.<sup>79</sup> Similarly, it has been suggested that the court's function, on review of a tax case, is limited to corrections of "obvious errors";<sup>80</sup> that the courts should reverse only for a "clear cut mistake of law";<sup>81</sup> and that the administrative decision should be ac-

<sup>76</sup> *Wilmington Trust Co. v. Helvering*, 316 U. S. 164, 62 S. Ct. 984 (1942); *Commissioner of Internal Revenue v. Scottish American Inv. Co., Ltd.*, 323 U. S. 119, 65 S. Ct. 169 (1944).

<sup>77</sup> *Commissioner of Internal Revenue v. Scottish American Inv. Co., Ltd.*, 323 U. S. 119, 65 S. Ct. 169 (1944).

<sup>78</sup> *Dobson v. Commissioner of Internal Revenue*, 320 U. S. 489, 496-498, 64 S. Ct. 239 (1943).

<sup>79</sup> For an analysis of this decision, see Paul, "Dobson v. Commissioner: The Strange Ways of Law and Fact," 57 HARV. L. REV. 753 (1944). Congressional disapproval of some phases of the decision is indicated in the 1948 Revenue Act (I.R.C. 1141 (a)).

<sup>80</sup> *Slee v. Commissioner of Internal Revenue* (C.C.A. 2d 1930), 42 F. (2d) 184.

<sup>81</sup> *Smith's Estate v. Commissioner of Internal Revenue* (C.C.A. 3d 1944), 140 F. (2d) 759.

cepted so long as it has "reasonable basis in the law."<sup>82</sup> About the most that can be said is that the administrative decision on law questions is not controlling, if clearly erroneous.<sup>83</sup>

The courts have, to be sure, reserved to themselves the right to speak with finality on issues of law, but unless the question is one of broad general interest the courts are likely to accept, without critical re-examination, the conclusion of the agency. The point will not necessarily be considered *de novo* merely because it involves an issue of law.

The state courts, partly because many of them have not reached the wholehearted acceptance of the doctrine (which is characteristic of the federal courts) that administrative agencies should be recognized as co-ordinate agencies of government, and partly because tax cases coming before them do not involve so many subtle technicalities as do many of the cases arising under the federal tax laws, are on the whole inclined to review tax cases somewhat more intensively than do the federal courts. But even in the state courts, the old aphorism to the effect that doubts as to the collectability of a disputed tax should be resolved in favor of the taxpayer, has been quite effectively displaced by the attitude that the demand of the administrative agency for the payment of the tax should be respected unless the agency can be shown to be wrong.

(d) *Role of discretion and expert judgment.* Another reason for the strict limitations imposed by the courts on the extent of judicial review in the tax field lies in the circumstance that the decisions of the tax agencies are not strictly judicial. In large measure their functions are execu-

<sup>82</sup> *Smith v. Helvering*, Commissioner of Internal Revenue (App. D. C. 1944), 141 F.(2d) 529.

<sup>83</sup> *Cf.*, *Hormel v. Helvering*, Commissioner of Internal Revenue, 312 U. S. 552, 556, 61 S. Ct. 719 (1941), where a footnote to the opinion says that the Board's rulings on questions of law are "not as conclusive as its findings of fact."

tive and ministerial, and this is often asserted as a basis for restricting the scope of review.<sup>84</sup> As one court put it, practical business experience and common sense are the best guides in administering tax laws.<sup>85</sup> Many of the questions involved are not deemed to be peculiarly within the special competence of the judges. Thus is effect given to the general principle that where a substantial measure of executive autonomy is involved in the operations of an agency, the scope of review will be restricted.

The principle that less review will be permitted where discretion is involved, is likewise reflected in cases passing on the proper scope of judicial review in the tax field. It is frequently pointed out that the courts should not interfere unless there has been a clearly arbitrary and unreasonable exercise of discretion by the taxing officials.<sup>86</sup> In many cases, the administrative officials are vested with a large measure of real discretion—a classical example being that where the tax collector was permitted to decide which of alternative bases was to be used to measure the tax.<sup>87</sup> In other cases, what is really involved is not so much discretion as the exercise of judgment. Thus, the determination of value is said to be a matter of discretion.<sup>88</sup>

<sup>84</sup> *Daffin v. Scotch Lumber Co.*, 226 Ala. 33, 145 So. 452 (1933); *Mannings Bank v. Armstrong*, 204 Iowa 512, 211 N. W. 485 (1926); *In re Opinion of the Justices*, 87 N. H. 492, 179 Atl. 357 (1935).

<sup>85</sup> *In re Harleigh Realty Company's Case*, 299 Pa. 385, 149 Atl. 653 (1930).

<sup>86</sup> E.g., *Rowley v. Chicago & N. W. Ry. Co.*, 293 U. S. 102, 55 S. Ct. 55 (1934); *Chicago Great Western Ry. Co. v. Kendall*, 266 U. S. 94, 45 S. Ct. 55 (1924); *Kinderman v. Harding*, 345 Ill. 237, 178 N. E. 71 (1931); *City of Birmingham v. Oakland County Supervisors*, 276 Mich. 1, 268 N. W. 409 (1936); *Alfred J. Sweet, Inc. v. City of Auburn*, 134 Me. 28, 180 Atl. 803 (1935).

<sup>87</sup> *Williamsport Wire Rope Co. v. United States*, 277 U. S. 551, 48 S. Ct. 587 (1928).

<sup>88</sup> E.g., *Meridian Highway Bridge Co. v. Cedar County*, 117 Neb. 214, 220 N. W. 241 (1928); *Colorado Tax Commission v. Midland Terminal Ry. Co.*, 93 Colo. 108, 24 P. (2d) 745 (1933).

There can also be plainly seen, in tax cases, the operation of the principle that where an agency through long experience has gained true expertness in its field, the extent of review will be narrow. The Supreme Court has more than once had occasion to refer to the tax administrators' "practical knowledge of the intricate details incident to tax problems."<sup>89</sup> Again, conceding candidly that the subject is "so complex as to be the despair of judges," the court has bluntly suggested that the administrative agency "is relatively better staffed for its task than is the judiciary."<sup>90</sup> Likewise in matters of state taxation, the state courts recognize and defer to the long experience of the administrative authorities. The practical knowledge of assessors as to property values, and their experienced judgment in choosing the proper method for assessment of utility, mining, or industrial properties, are effective deterrents to broad judicial review.

(e) *Confidence in fairness of administrative procedure.* The procedures adopted by the taxing authorities are ordinarily fair, and there is but seldom occasion for the courts to examine critically the course of the administrative proceedings, in order to determine whether due process has been denied. The Tax Court, in the field of federal taxation, has long been recognized as furnishing a model of proper administrative procedure. As the Supreme Court had occasion to summarize, this agency "is independent, and its neutrality is not clouded by prosecuting duties. Its procedures assure fair hearings. Its deliberations are evidenced by careful opinions. All guides to judgment available to judges are habitually consulted and respected. It has established a tradition of freedom from bias and pressures. . . . Individual cases

<sup>89</sup> *Burnet v. S. & L. Building Corp.*, 288 U. S. 406, 415, 53 S. Ct. 428 (1933).

<sup>90</sup> *Dobson v. Commissioner of Internal Revenue*, 320 U. S. 489, 498, 64 S. Ct. 239 (1943).

are disposed of wholly on records publicly made, in adversary proceedings, and the court has no responsibility for previous handling. Tested by every theoretical and practical reason for administrative finality, no administrative decisions are entitled to higher credit in the courts."<sup>91</sup> Similarly, the state courts have frequently recognized the general fairness of the procedures employed by the tax collectors, and have been content sometimes to rest decision on the presumption that the officers performed their duties properly.<sup>92</sup>

In summary, nearly all the factors above discussed as tending to affect the scope of judicial review, operate to restrict the scope of review in tax cases. The field involves the conduct of public business, a matter in which the courts are always reluctant to interfere. The administrative agencies exercise functions which are largely executive or ministerial, rather than purely judicial. They are vested with an important measure of discretion. Their procedures are fair. The agencies through long experience have developed true expertness. The questions involved are not such as to fall peculiarly within the particular competence of the courts.

### 3. Federal Trade Commission

Nearly all of the considerations which have prompted the courts narrowly to circumscribe the scope of review in tax cases may be seen in inverse operation in Federal Trade Commission cases, where the scope of review has traditionally been very broad. The various factors which affect judicial determination of the proper scope of review—the public or private sphere of the agency's activities, the character of its

<sup>91</sup> *Dobson v. Commissioner of Internal Revenue*, 320 U. S. 489, 498-499, 64 S. Ct. 239 (1943).

<sup>92</sup> *Golden Gate Bridge and Highway District v. Felt*, 214 Cal. 308, 5 P. (2d) 585 (1931); *Daly v. Fisk*, 104 Conn. 579, 134 Atl. 169 (1926); *People ex rel. Carr v. Immanuel Herald Publishing House*, 323 Ill. 574, 154 N. E. 439 (1926); *Kelly v. Wisconsin Tax Commission*, 203 Wis. 639, 234 N. W. 701 (1931).

functions (whether legislative or judicial), the extent of its discretionary powers, the experience of the agency, and the character of its procedure—have influenced the courts to probe searchingly in Federal Trade Commission cases, just as they have influenced the courts to limit the scope of review in tax cases.

For this reason, an examination of the cases wherein the courts have determined the proper scope of review of Federal Trade Commission orders is interesting as a means of further illustrating the operation of the deep imponderables which play so large a part in determining the scope of review of administrative orders. Further, an examination of the cases involving judicial review of Federal Trade Commission orders has an independent value because it illustrates how completely the attitude of the courts toward the determinations of a particular agency may change over a period of a decade. In the case of this particular agency, the change in judicial attitude may be ascribed in part to the recent broad trend of respect for administrative adjudication and the gradual adaptation of judicial doctrine to this new phenomenon,<sup>93</sup> but it is in part at least due to the fact that as the agency has gained experience and improved its administrative techniques, it has been granted greater deference than was formerly accorded.<sup>94</sup>

(a) *Regulation of private business.* One of the primary factors accounting for the attitude which the courts have dis-

<sup>93</sup> Countryman, "The Federal Trade Commission and the Courts," 17 WASH. L. REV. 1, 83 at 96 (1942); Davison, "The Place of Federal Trade Commission in Administrative Law," 8 GEO. WASH. L. REV. 280 (1940); Daniels, "Judicial Review of Fact Findings of Federal Trade Commission," 14 WASH. L. REV. 37 (1939).

<sup>94</sup> E.g., while in earlier cases the courts freely amended the form of the Commission's orders, in 1944 we find the Fourth Circuit Court of Appeals declaring, in response to a claim that an order was so broad that it might operate *in futuro* to prohibit lawful conduct, "Of course the influence of changed business conditions must be taken into account in reaching a decision; but there is no reason to believe that the Federal Trade Commission will fail in its duty in this respect." *American Chain & Cable Co. v. Federal Trade Commission* (C.C.A. 4th 1944), 139 F. (2d) 622.



played in reviewing Federal Trade Commission decisions is the fact that the Commission is not conducting public business, like tax collection, but is rather engaged in as far-reaching regulation of private business as has been undertaken by any governmental agency. Restrictions as to the price at which a manufacturer may sell, the discounts he may give, the forms of advertising a seller may employ, and the like, all reach to the very heart of private business operations; and all involve matters which had been traditionally subject to few controls. In such fields, the courts are reluctant to grant administrative agencies a free rein. This can be illustrated, of course, by earlier cases which imposed severe restrictions even on the right of the Commission to obtain information.<sup>95</sup> It can be seen in the courts' repeated characterization as questions of law issues which might be deemed questions of fact—e. g., the question as to what methods of competition are unfair, and the question as to whether a proceeding involves the public interest. It can be seen in the readiness of the courts to substitute their notions as to proper remedy for those of the Commission. While the general attitude of distrust toward any agency seeking to intermeddle in private affairs was of course far stronger a decade ago than it is now, nevertheless the impulse to watch with care administrative regulation of purely private business still remains. It has been recognized by the Supreme Court, in an opinion pointing out that decisions as to the scope of the Interstate Commerce Commission's jurisdiction could not be relied upon as establishing like powers for the Federal Trade Commission, for the reason—*inter alia*—that there is so wide a difference in the nature of the enterprises which these two agencies affect.<sup>96</sup> In regulating railroads, the Interstate Com-

<sup>95</sup> Federal Trade Commission v. American Tobacco Co., 264 U. S. 298, 44 S. Ct. 336 (1924); Federal Trade Commission v. Baltimore Grain Co. (D. C. Md. 1922), 284 Fed. 886, aff'd 267 U. S. 586, 45 S. Ct. 461 (1924).

<sup>96</sup> Federal Trade Commission v. Bunte Brothers, Inc., 312 U. S. 349, 353, 61 S. Ct. 580 (1941).

merce Commission is exercising a function which has been recognized as a responsibility of government. It has come to be thought of as a part of the public business. But regulating the sales methods of a vendor of penny candy bars is a different matter.

(b) *Adequacy of administrative procedure.* A second factor which in the past made for comparatively broad review of decisions of the Federal Trade Commission was a lack of confidence on the part of the courts in the fairness of the agency's procedures. In former years, there was perhaps some basis for such suspicion. The courts were not unaware, for example, that proceedings against a respondent were frequently inspired by the complaint of a competitor, who wished to utilize the agency as an ally in a private competitive struggle. The practice under which the agency's staff assistants prepared the Commission's findings also gave rise to doubts. Further, the form of the findings in many cases did not inspire confidence—witness the conclusion reached in 1924 by one writer that in a number of cases (1) the Commission's findings failed "to give an adequate account of respondent's defense, or even to mention the evidence given in respondent's behalf" and (2) that the "frequently obvious attempt to frame findings with a view to the legal result desired, rather than as a mirror of events and circumstances"<sup>97</sup> contributed in a substantial degree to the scant respect paid by the courts to the Commission's findings. Such cavalier treatment of the testimony was alluded to in court opinions.<sup>98</sup> While the Commission has gone far toward eliminating much of the basis for criticism on such grounds, the courts still find occasion to point out defects. In one case, for example, the Commission was taken

<sup>97</sup> Henderson, *THE FEDERAL TRADE COMMISSION* (1924) 140, 162-63.

<sup>98</sup> *L. B. Silver Co. v. Federal Trade Commission of America* (C.C.A. 6th 1923), 289 Fed. 985; *Curtis Pub. Co. v. Federal Trade Commission* (C.C.A. 3d 1921), 270 Fed. 881, *aff'd sub nom.* *Federal Trade Commission v. Curtis Pub. Co.*, 260 U. S. 568, 43 S. Ct. 210 (1923).

to task for its opposition to a request by respondent that the trial examiner's report be certified as part of the record, and the court pointed out that the variance between the findings of the Commission and those of the trial examiner detracted from the claim that the findings of the Commission were supported by substantial evidence.<sup>99</sup> The apparent reluctance of the Commission in some cases to submit to judicial review has been the subject of judicial comment.<sup>100</sup>

Despite the fact that such criticisms continue to appear occasionally, nevertheless the courts (accepting the philosophy of the new administrative freedom) are in recent years more ready to grant enforcement of the Commission's orders. In one case, for example, the court criticized the refusal on the part of the Commission to furnish respondent with a bill of particulars, remarking that the Commission should in fairness have done so; but the court still held that it could not be established that the refusal of the bill of particulars was prejudicial and accordingly determined that the order should be enforced.<sup>101</sup>

(c) *Experience and expertness of agency.* In the earlier days of the Commission's history, there was considerable skepticism as to the true expertness of the Commissioners. This was referred to in both leading discussions of the work of the Commission prior to 1935.<sup>102</sup> This attitude was unquestionably an important factor in many court decisions.

In the course of time, this attitude has to a large extent at least disappeared, and the Commission is recognized as a body of experts, duly informed by experience, whose judg-

<sup>99</sup> *Kidder Oil Co. v. Federal Trade Commission* (C.C.A. 7th 1941), 117 F. (2d) 892.

<sup>100</sup> *American Drug Corp. v. Federal Trade Commission* (C.C.A. 8th 1945), 149 F. (2d) 608.

<sup>101</sup> *E. B. Muller & Co. v. Federal Trade Commission* (C.C.A. 6th 1944), 142 F. (2d) 511.

<sup>102</sup> McFarland, *JUDICIAL CONTROL OF THE FEDERAL TRADE COMMISSION AND THE INTERSTATE COMMERCE COMMISSION* (1933) 176-177; and Henderson, *THE FEDERAL TRADE COMMISSION* (1924) 328.

ment is to be respected. But the courts still are more willing to displace their judgment for that of the agency in the case of this Commission than in the case of many other administrative tribunals, and for the reason that the formulae and concepts with which the Federal Trade Commission works fall within the particular competence of the courts. The judges have apparently felt <sup>103</sup> that only the courts are fully qualified to work with such formulae. Questions relating to unfair trade practices and unreasonable restraints of competition do not possess the baffling technicalities of the rate problems handled by the Interstate Commerce Commission, nor the newness and strangeness of the labor relations problems handled by the National Labor Relations Board. They are questions as to which the courts feel themselves on familiar ground. Consequently, there has never developed quite the respect for administrative *expertise* that other agencies have enjoyed.

(d) *Role of discretion.* In complaint proceedings, there is usually a rather narrow issue involved: Has the respondent violated a particular section of the statute? In determining this question, there is comparatively little room for the exercise of discretion. Rather, it is a matter of determining whether specified charges have been proved, and this is determined as a result of comparatively formal, court-like proceedings. This lack of opportunity for wide exercise of administrative discretion has served to broaden the permissible scope of judicial review.

In one phase of the procedure, however, there is a large amount of discretion involved. This is the matter of determining what remedy shall be adopted, in cases where a violation of the law has been established. Shall a respondent, for example, be completely enjoined from using a particular

<sup>103</sup> As suggested by Thurman N. Arnold, *THE BOTTLENECKS OF BUSINESS* (1940) 99.

trade name which infringes on the rights of another and is deceiving to the public, or shall he simply be required to add an explanatory statement, to wipe out the likelihood of deception? Here, increasing respect is being shown for the determinations of the Commission, although several of the circuit courts of appeal have exhibited considerable reluctance toward yielding their former prerogative of freely revising the form of the Commission's orders,<sup>104</sup> and there still remains a noticeable readiness to find that the Commission has abused its discretion in this regard.<sup>105</sup>

(e) *Lack of legislative power.* The functions of the Federal Trade Commission have been regarded primarily as judicial, rather than legislative. This again has served to permit a broad scope of review. The tendency of the courts to treat nearly all of the ultimate issues before the Commission as questions of law rather than of fact has of course served to accentuate this trend.

(f) *Treatment of questions of law and fact.* As a result of the fact that (because of the operation of the various factors above described) the courts have been inclined to

<sup>104</sup> E.g., see the concurring opinion in *Parke, Austin & Lipscomb v. Federal Trade Commission* (C.C.A. 2d 1944), 142 F. (2d) 437, 442, pointing out that "Until recently this court would have regarded itself as competent to modify an order which imposed a restraint broader than the necessities of the case required"; and see *Herzfeld v. Federal Trade Commission* (C.C.A. 2d 1944), 140 F. (2d) 207, 209, where it was said: "Such tribunals possess competence in their special fields which forbids us to disturb the measure of relief which they think necessary. . . . Congress having now created an organ endowed with the skill which comes of long experience and penetrating study, its conclusions inevitably supersede those of the courts, which are not similarly endowed."

<sup>105</sup> In *Federal Trade Commission v. A. P. W. Paper Co., Inc.*, 328 U. S. 193, 66 S. Ct. 932 (1946), it was held that the Commission lacked the power to prohibit a manufacturer's use of the words "Red Cross" and the Greek Red Cross emblem in the sale of its product. In *Jacob Siegel Co. v. Federal Trade Commission*, 327 U. S. 608, 66 S. Ct. 758 (1946), the court, while recognizing that the Commission had broad latitude to exercise its own judgment in shaping its order, reversed an order which prohibited the use of a trade name because the record did not show that the Commission had considered whether some change short of complete excision would have satisfied the ends of the act.

probe deeply when reviewing determinations of the Federal Trade Commission, issues which might well have been described as issues of fact (and hence closed to review) have been described as reviewable issues of law. Thus, the determination of the Federal Trade Commission as to the fairness of a trade practice is deemed a question of law for the courts; whereas the determination by the Interstate Commerce Commission as to the fairness of a preferential rate is deemed a question of fact. The difference is not logical, but empiric. It is accounted for by some difference in the attitude with which the courts view determinations of the Federal Trade Commission and those of the Interstate Commerce Commission.

This tendency to treat many of the issues decided by the Federal Trade Commission as issues of law has of course broadened the scope of review.

But even the Commission's decisions on the facts have not, until the last decade, been accorded the respect paid the factual determinations of other agencies. Thus, one student of the Commission has concluded that up to 1930 the courts had, in reviewing Commission orders, determined the sufficiency of the pleadings, determined what should constitute proofs, and what conclusions should be drawn from the evidence; and that in fact in only two instances during the decade from 1919 to 1929 did the Supreme Court express or approve a real deference to the Commission's findings.<sup>106</sup> Another student observed somewhat earlier that not a single case could be found in which it could be said that the findings of the Commission had in any way affected the decisions of the courts.<sup>107</sup>

During this earlier period, the courts had no difficulty in determining that the findings of the Commission were not supported by substantial evidence, and hence could be dis-

<sup>106</sup> McFarland, *JUDICIAL CONTROL OF THE FEDERAL TRADE COMMISSION AND THE INTERSTATE COMMERCE COMMISSION* (1933) 32, 96.

<sup>107</sup> Henderson, *THE FEDERAL TRADE COMMISSION* (1924) 336.

regarded. But two decisions of the Supreme Court in 1934<sup>108</sup> insisted that a more generous treatment must be accorded the findings of the Commission. Since that time, the courts have been cautious in disturbing the findings of the Commission on pure issues of litigation facts, but even in such instances, refusal to accept the findings of the Commission is sometimes encountered.<sup>109</sup>

Where the conclusion of the Commission rests on inference, rather than an issue of primary fact, the courts have been more ready to review the reasonableness of the inference than has been true in cases involving other agencies. In *Federal Trade Commission v. Pacific States Paper Trade Association*,<sup>110</sup> it was said that the inferences *reasonably* drawn from the facts were for the Commission, thus implying the existence of a somewhat broad power in the courts to determine the reasonableness of the inference. In *Federal Trade Commission v. Raladam Co.*,<sup>111</sup> the phrase used was "necessary inference." This led several of the courts of appeal to conclude that where the finding rested on inference, the court was free to disregard the Commission's conclusion, if it could be deemed in any way unreasonable or not a necessary inference.<sup>112</sup> Recently, the Supreme Court has indicated that

<sup>108</sup> *Federal Trade Commission v. Algoma Lumber Co.*, 291 U. S. 67, 54 S. Ct. 315 (1934), and *Federal Trade Commission v. R. F. Keppel & Bro., Inc.*, 291 U. S. 304, 54 S. Ct. 423 (1934).

<sup>109</sup> In *Gelb v. Federal Trade Commission* (C.C.A. 2d 1944), 144 F. (2d) 580, for example, a finding based on the opinion of a single expert, overlooking opposed testimony which was in part uncontradicted, was set aside as being without substantial support in the evidence.

<sup>110</sup> *Federal Trade Commission v. Pacific States Paper Trade Ass'n*, 273 U. S. 52, 63, 47 S. Ct. 255 (1927).

<sup>111</sup> *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, 651, 51 S. Ct. 587 (1931).

<sup>112</sup> See, e.g., *Dearborn Supply Co. v. Federal Trade Commission* (C.C.A. 7th 1944), 146 F. (2d) 5, where the facts had been stipulated, but an order based on inferences not included in the stipulated facts was held to be without support in the evidence; and see *Raladam Co. v. Federal Trade Commission* (C.C.A. 6th 1941), 123 F. (2d) 34, rev'd in *Federal Trade Commission v. Raladam Co.*, 316 U. S. 149, 62 S. Ct. 966 (1942).

a greater respect must be paid the Commission's inferences, remarking in *Corn Products Refining Co. v. Federal Trade Commission*<sup>113</sup> that the "weight to be attributed to the facts proved or stipulated, *and the inferences to be drawn from them* [italics added], are for the Commission to determine, not the courts." But even in that case, the court took pains to point out that "We cannot say that the Commission's inference here is not supported by the stipulated facts," thus indicating that there still remains some readiness to inquire whether the facts do support the inference.

Thus, it must be concluded that even on issues of fact, the findings of the Commission received for many years but scant deference from the courts. While the trend is clearly in the opposite direction, there still remains considerable reluctance on the part of some of the courts of appeal, at least, to accord the Commission's findings on the facts a full measure of respect, particularly in cases where the finding rests on inference.

On many of the issues decided by the Commission, full review is permitted because of the readiness of the courts to treat as issues of law what might be characterized as issues of fact. Thus, questions as to whether the public interest is involved in a proceeding, whether a trade practice is unfair, whether a practice fosters monopoly, or amounts to an interference with competition, have been deemed matters of law for the courts.

Here again, the present trend is toward a narrower scope of review. While still recognizing the early established doctrine<sup>114</sup> that what is an unfair method of competition is a question for the courts, the decisions are coming to emphasize

<sup>113</sup> *Corn Products Refining Co. v. Federal Trade Commission*, 324 U. S. 726, 739, 65 S. Ct. 961 (1945).

<sup>114</sup> *Federal Trade Commission v. Gratz*, 253 U. S. 421, 40 S. Ct. 572 (1920).



the great weight to be given to the findings and experienced judgment of the Commission in determining this question.<sup>115</sup> Similarly, the rule reserving to the courts the determination as to whether public interest is involved,<sup>116</sup> is coming to be tempered by the readiness of the courts to accept the finding of the Commission that the requisite public interest is present.<sup>117</sup>

#### 4. Interstate Commerce Commission

(a) *Judicial recognition of agency's expertness.* Recognition that the Interstate Commerce Commission exercises true expertness in passing on complex and technical problems led the courts, at a comparatively early period, to adopt a self-denying attitude in reviewing the determinations of this agency. There is probably no agency which enjoys in greater degree the confidence of the courts, and for this reason, the scope of review available in the courts is very narrow.<sup>118</sup> Long ago, the Supreme Court characterized this agency as a "tribunal appointed by law and informed by experience."<sup>119</sup> The respect thus indicated for the ability and fairness of the Commission has not lessened through the years. More re-

<sup>115</sup> *Hastings Mfg. Co. v. Federal Trade Commission* (C.C.A. 6th 1946), 153 F. (2d) 253.

<sup>116</sup> *Federal Trade Commission v. Klesner*, 280 U. S. 19, 50 S. Ct. 1 (1929).

<sup>117</sup> *E. B. Muller & Co. v. Federal Trade Commission* (C.C.A. 6th 1944), 142 F. (2d) 511; *Parke, Austin & Lipscomb v. Federal Trade Commission* (C.C.A. 2d 1944), 142 F. (2d) 437.

<sup>118</sup> It was not always thus. Before the turn of the century, courts determined the case *de novo* when the Commission applied for enforcement of its order, and the courts without hesitation substituted their judgment for that of the Commission on matters of fact, law, and policy. See 1 Sharfman, *THE INTERSTATE COMMERCE COMMISSION* (1931) 23 *et seq.* The passage of the Hepburn Act of 1906 (34 Stat. 584) had much to do with the change of attitude. For an excellent detailed history of changing judicial attitudes toward the decisions of the Commission, see 2 Sharfman, *THE INTERSTATE COMMERCE COMMISSION* (1931) 384-452; and McFarland, *JUDICIAL CONTROL OF THE FEDERAL TRADE COMMISSION AND THE INTERSTATE COMMERCE COMMISSION* (1933); Tollefson, "Judicial Review of the Decisions of the Interstate Commerce Commission," 5 *GEO. WASH. L. REV.* 503 (1937).

<sup>119</sup> *Illinois Cent. R. Co. v. Interstate Commerce Commission*, 206 U. S. 441, 454, 27 S. Ct. 700 (1907).

cently the court pointed out that "We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission."<sup>120</sup> Similarly, the court has reversed lower courts for redetermining "administrative" questions passed on by the Commission.<sup>121</sup>

The great respect of the courts for the demonstrated expertness and fairness of the Commission could be illustrated in many ways. It was no accident which led the courts to formulate with reference to this agency's decisions the primary jurisdiction doctrine (since applied to other agencies) which requires that initial resort be had to the agency for a determination of an otherwise justiciable question which could be presented to the agency.<sup>122</sup> It is commonplace that for many years the Interstate Commerce Commission fared better in the courts than did other agencies. Nor is this fact merely of historical significance. A general disposition to accord the Interstate Commerce Commission's determinations greater weight than that of newer and less experienced agencies can be seen in many recent cases.<sup>123</sup>

This respect for the ability and impartiality of the Commission, coupled with the fact that it works in a field so technical and complex as to be the despair of the uninitiated, are probably the two predominant factors which have induced the courts to limit very narrowly the available scope of review.

(b) *Legislative nature of determinations.* Many years ago, the Supreme Court declared the rate-making functions of the Interstate Commerce Commission to be legislative,

<sup>120</sup> *Board of Trade of Kansas City v. United States*, 314 U. S. 534, 548, 62 S. Ct. 366 (1942); and see *Levinson v. Spector Motor Service*, 330 U. S. 649, 67 S. Ct. 931 (1947).

<sup>121</sup> *Shields v. Utah Idaho Cent. R. Co.*, 305 U. S. 177, 59 S. Ct. 160 (1938).

<sup>122</sup> *Texas & P. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 S. Ct. 350 (1907).

<sup>123</sup> *Interstate Commerce Commission v. City of Jersey City*, 322 U. S. 503, 64 S. Ct. 1129 (1944); *Davies Warehouse Co. v. Bowles*, 321 U. S. 144, 64 S. Ct. 474 (1944); *Hecht Co. v. Bowles*, 321 U. S. 321, 64 S. Ct. 587 (1944).

rather than judicial,<sup>124</sup> and the Court has more recently taken occasion to observe that the rate-making process is essentially empiric.<sup>125</sup> Many of the other functions of the Commission fall within the same category, in that the agency is changing existing conditions by making a new rule to be applied thereafter rather than investigating, declaring, and enforcing liabilities as they stand on past facts, under laws already existing. Thus, in making regulations as to the assignment of railroad cars between competing prospective users, or deciding whether to compel the fixing of joint or through rates, or defining the scope of operations to be permitted under "grandfather clauses" (permitting long established carriers in a given field to continue certain operations without qualifying for a license under a subsequently adopted law), or deciding whether "need is found . . . to establish for private carriers . . . maximum hours of service of employees,"<sup>126</sup> the Commission is functioning rather in the field of delegated legislation than that of delegated adjudication.

The possible scope of judicial review is always more narrow, where the administrative determination is legislative. Further, where an agency's activities are predominantly in the legislative field, and where a legislative element creeps into activities which also bear some indicia of judicial proceedings, there is a tendency to deny review of matters which might otherwise be deemed to be reviewable by the courts as involving questions of law.

These factors account in large part for the very restricted scope of review which is available in the courts when orders of the Interstate Commerce Commission are challenged. The courts often conclude that the inquiry involved is essentially

<sup>124</sup> *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 226-227, 29 S. Ct. 67 (1908).

<sup>125</sup> *Board of Trade of Kansas City v. United States*, 314 U. S. 534, 62 S. Ct. 366 (1942).

<sup>126</sup> Sec. 204 (a) (3) Motor Carrier Act, 49 Stat. 546, as amended, 49 U.S.C. § 304.

legislative, or (as it is euphemistically called) "administrative," and hence the function is said to be "reserved for the Commission," and one in which the court is accordingly not at liberty to consider the soundness of the agency's reasoning or the wisdom of its determinations.<sup>127</sup>

(c) *Conduct of public business.* The functions of the Interstate Commerce Commission have not been viewed as involving the regulation of private business. Control of common carriers and other like utilities has been viewed as something much more closely related to the conduct of public business. While the actual operation of railroads has been made a function of government only in emergency periods, yet this industry has long been deemed to be one "affected with a public interest," and hence subject to a much greater degree of governmental control than those industries which until recently at least were deemed to be more or less purely the private affairs of the individual entrepreneurs. As the Supreme Court recently put it, ". . . the owners of . . . railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation."<sup>128</sup>

Since the regulation of railroads and other carriers by the Interstate Commerce Commission has thus been regarded as a matter closely akin to the conduct of the public business, the general principles which operate to restrict the scope of judicial review in cases where administrative agencies are merely conducting the public business, are applicable on review of Interstate Commerce Commission orders. The determinations of this Commission are thus viewed in a different light than those of such agencies as the Federal Trade Commission or the Securities and Exchange Commission,

<sup>127</sup> *Assigned Car Cases*, 274 U. S. 564, 47 S. Ct. 727 (1927); *Noble v. United States*, 319 U. S. 88, 63 S. Ct. 950 (1943).

<sup>128</sup> *Marsh v. Alabama*, 326 U. S. 501, 506, 66 S. Ct. 276 (1946).

whose activities in large measure involve the regulation of what has been called purely private business. The tendency to restrict judicial review, where the matter involved is the conduct of the public business, has been another factor influencing the very narrow scope of review of decisions of the Interstate Commerce Commission.

(d) *Discretion*. As is always true where an agency exercises substantial legislative powers, the determinations of the Interstate Commerce Commission involve a large measure of discretion. And always, where the role of discretion looms larger, the scope of review becomes smaller. The courts have not infrequently had occasion to allude to the importance of giving free rein to the Commission's discretion. Thus, where the question was as to the propriety of prescribed accounting methods, the court observed that it was "without power to usurp its [the Commission's] discretion and substitute our own."<sup>129</sup> Again, where it was claimed that the controlling statute in effect required the Commission to adopt a different hearing procedure than had been employed, the court declared that it was not "at liberty to prescribe general attitudes the Commission must adopt towards the exercise of discretion left to it rather than the courts."<sup>130</sup> Further, the court has recognized that because of the discretionary nature of the Commission's determinations, it is at liberty to make successive decisions which appear inconsistent. The court has thus pointed out that "Considerations that reasonably guide to decision in one case may rightly be deemed to have little or no bearing in other cases."<sup>131</sup>

<sup>129</sup> *Norfolk & W. Ry. Co. v. United States*, 287 U. S. 134, 141, 53 S. Ct. 52 (1932).

<sup>130</sup> *Interstate Commerce Commission v. Inland Waterways Corp.*, 319 U. S. 671, 691, 63 S. Ct. 1296 (1943).

<sup>131</sup> *Baltimore & O. R. Co. v. United States*, 298 U. S. 349, 359, 56 S. Ct. 797 (1936).

Thus, the important part that discretion plays in the Commission's determinations has been another factor which militates for restricted judicial review.

(e) *Character of procedure.* Proceedings before the Commission are marked by a degree of regularity (if not formality) strongly reminiscent of judicial proceedings. The Commission's rules are not unlike rules of court. It has its own roster of practitioners (specially admitted to practice before the Commission) who are mostly specialists in the field. Its practices as to the holding of hearings and as to the technique of decision making are well established. All of its standards of procedure have long been hailed as models for other agencies to follow. There has been little if any suggestion of bias or partiality on the part of the members of the Commission or its staff. The agency is comparatively isolated from political pressure. That its officers have special competence and ability, in a field where there is a real need for technical competence, is never challenged.

All of these factors further serve to disincline the courts to probe deeply into the fairness and reasonableness of the Commission's decisions.

(f) *Questions of fact and law.* Since all of the criteria on which the scope of review normally depends (absent statutory regulation) recommend, in the case of the Interstate Commerce Commission, that only a narrow review should be permitted, it is not surprising that in addition to being ready to find "substantial support" in the evidence for any challenged findings of fact, the courts show a readiness to describe as issues of fact matters which might otherwise be deemed questions of law. Thus, such questions as—(1) whether a rate is unreasonable or discriminatory;<sup>132</sup>

<sup>132</sup> *Western Paper Makers' Chemical Co. v. United States*, 271 U. S. 268, 46 S. Ct. 500 (1926).

(2) whether a preference is undue and unreasonable;<sup>133</sup> (3) whether a difference in rates constitutes an "unjust discrimination";<sup>134</sup> (4) whether the statutory term "transportation" includes yardage service;<sup>135</sup> and (5) whether the statutory term "deficit" should be construed one way or another<sup>136</sup>—have all been deemed to be questions of fact, on which the determination of the Commission is conclusive, unless it can be plainly shown that the determination was entirely without support in the record.

Why the reasonableness or fairness of a trade practice is a question of law, as to which the determination of the Federal Trade Commission is only advisory, whereas the question as to the reasonableness or fairness of a rate differential is a question of fact, as to which the determination of the Interstate Commerce Commission is conclusive, is a question which presents logical difficulties but which can be easily answered in the light of practical experience. And the life of the law, as the profession has been reminded by one of its masters, has been experience, not logic.

The courts have not insisted that there must be any showing of the reasonableness of the inferences of fact reached by the Interstate Commerce Commission. Rather, the court has recognized that the Commission may be presumed to be able to draw inferences that are not obvious to others.<sup>137</sup>

Even where it cannot be disputed that the issues involved present questions of law, within the proper competence of the courts, there has been great respect paid to the wisdom of the Commission. In at least one case, for example, the

<sup>133</sup> *United States v. Louisville & N. R. Co.*, 235 U. S. 314, 35 S. Ct. 113 (1914).

<sup>134</sup> *L. T. Barringer & Co. v. United States*, 319 U. S. 1, 63 S. Ct. 967 (1943).

<sup>135</sup> *Swift & Co. v. United States*, 316 U. S. 216, 62 S. Ct. 948 (1942).

<sup>136</sup> *Butte, A. & P. Ry. Co. v. United States*, 290 U. S. 127, 54 S. Ct. 108 (1933); noted in 33 MICH. L. REV. 120 (1934).

<sup>137</sup> *O'Keefe v. United States*, 240 U. S. 294, 36 S. Ct. 313 (1916).

Supreme Court asked the Commission for advice as to the meaning and application of its order.<sup>138</sup> And not long ago the court observed that "Only where the error is patent may we say that the Commission transgressed."<sup>139</sup> Fundamental questions of statutory interpretation and the like are of course reserved to the courts, particularly where the question affects the jurisdiction or powers of the Commission. Except in such cases, the courts are disinclined to make an independent determination of what might be termed questions of law unless the case be one where it appears that the question is not "technical," and where the inquiry "would, in all respects, be like that commonly made by courts when called upon to construe and apply any other document."<sup>140</sup>

In all respects, therefore, the complex and technical nature of the problems handled by the Interstate Commerce Commission, and likewise the demonstrated competence of the Commission in its special field, have been the keystone in the determination by the courts as to the scope of judicial review of its determinations. Any inquiry closely related to factual considerations is likely to be deemed a nonreviewable question of fact, and only those issues which are largely divorced of technical character are deemed reviewable questions of law.

## 5. National Labor Relations Board

The National Labor Relations Board operates largely in a field unknown to the common law. In determining, for example, what unit is appropriate for collective bargaining

<sup>138</sup> *Illinois Commerce Commission v. Thomson*, 318 U. S. 675, 63 S. Ct. 834 (1943).

<sup>139</sup> *United States v. Carolina Freight Carriers Corp.*, 315 U. S. 475, 482, 62 S. Ct. 722 (1942).

<sup>140</sup> *W. P. Brown & Sons Lumber Co. v. Louisville & N. R. Co.*, 299 U. S. 393, 398, 57 S. Ct. 265 (1937); and see *Interstate Commerce Commission v. Northern Pac. Ry. Co.*, 216 U. S. 538, 30 S. Ct. 417 (1910), where the court declared that the mere preference of customers for a particular route could not, as a matter of law, be taken as a basis for a determination that any other route was unreasonable and unsatisfactory.



purposes (considering such issues as whether the several plants of a single company should bargain jointly or separately, whether skilled tradesmen should be represented by the same union as unskilled factory help, and the like), and similarly in determining what remedies are appropriate to eradicate the effectiveness of a prior unfair labor practice, the Board is dealing with problems quite unfamiliar to the courts. The National Labor Relations Act <sup>141</sup> created whole congeries of rights and remedies for labor unions which had been previously without substantial judicial recognition. It is not surprising, therefore, that the courts should show but little inclination to substitute their judgment for that of the Board on such matters. The courts have no established legal standards by which to judge the propriety of the Board's action, in many types of cases.

On the other hand, in carrying out the varied tasks imposed upon it by the statute, the Board has had to face many questions involving statutory interpretation and certain basic constitutional questions, on which the courts feel themselves to be on familiar grounds. As to these issues, the courts have evinced a willingness to grant full review.

Thus, judicial review of determinations of the National Labor Relations Board stands on somewhat different footing than in the case of either the Federal Trade Commission or the Interstate Commerce Commission. The tendencies and basic principles which influence the courts in determining the scope of review remain much the same, but their application leads to somewhat different results. The courts are, on the whole, probably less willing to reverse the National Labor Relations Board than the Federal Trade Commission; on the other hand, the National Labor Relations Board has

<sup>141</sup> 49 Stat. 449, 29 U.S.C. § 151 *et seq.* Note that the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U.S.C. Supp. I, § 141, has limited the Board's power in many respects, and has narrowed its discretion in determining what constitutes an appropriate bargaining unit.

not enjoyed the immunity from extensive judicial supervision that has long been accorded the Interstate Commerce Commission.

(a) *Regard for expertness of agency.* Very frequently, proceedings before the Board involve difficult questions as to an employer's motive. Whether a certain course of action does or does not constitute an unfair labor practice often depends upon an employer's intent. Thus, granting an increase in pay is ordinarily proper. But if an increase is granted during a union's organizational campaign, it may appear to have been calculated to discourage organization, and thus to constitute an unfair labor practice. Such would be the case, for example, if the announcement of the pay increase were linked with a public reminder that it is not necessary to join a union in order to get a pay raise at that plant.<sup>142</sup> In its evaluations of the tangled web of contradictory evidence so often encountered in hearings on charges of unfair labor practice, the Board is credited with an expert ability to discover the truth. Similarly, when the question concerns the remedy which in the particular case will be most efficient to carry out the underlying purpose of encouraging collective bargaining, deference is paid to administrative experience. Further, the National Labor Relations Act is construed as having been intended to leave a great deal to the judgment of the Board. Thus, the Supreme Court has declared that "The Act . . . entrusts to an expert agency the maintenance and promotion of industrial peace . . . factors outside our domain of experience may come into play."<sup>143</sup>

Similarly, in upholding an order requiring restitution of dues checked off to a company dominated union, as against the argument that the order in question violated common-law

<sup>142</sup> E.g., *National Labor Relations Board v. W. A. Jones Foundry & Machine Co.* (C.C.A. 7th 1941), 123 F. (2d) 552.

<sup>143</sup> *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 194-195, 61 S. Ct. 845 (1941).

principles of estoppel, the court declared that the Board was not compelled to observe conventional legal principles in fashioning its order, and observed: "Whether and to what extent such matters should be considered is a complex problem for the Board to decide in the light of its administrative experience and knowledge."<sup>144</sup>

The court has likewise said, in sustaining the validity of a Board ruling prohibiting the enforcement of a company rule which forbade any solicitation on company premises, that one of the purposes of the Congress in creating the Board ". . . is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject."<sup>145</sup>

Again, in sustaining as a finding of fact the determination by the Board that newspaper distributors who by common-law tests might have been deemed independent contractors should be treated as employees for purposes of the act, the court pointed out: "Everyday experience in the administration of the statute gives it [the Board] familiarity with the circumstances and backgrounds of employment relationships in various industries . . . and with the adaptability of collective bargaining for the peaceful settlement of . . . disputes. . . . The experience thus acquired must be brought frequently to bear. . . . determining whether unfair labor practices have been committed, 'belongs to the usual administrative routine' of the Board."<sup>146</sup>

But judicial respect for the Board's informed knowledge does not go so far as in the case of the Interstate Commerce Commission. On such questions as to whether employees discharged for engaging in illegal activities retain the benefits

<sup>144</sup> *Virginia Electric & Power Co. v. National Labor Relations Board*, 319 U. S. 533, 543, 63 S. Ct. 1214 (1943).

<sup>145</sup> *Republic Aviation Corp. v. National Labor Relations Board*, 324 U. S. 793, 800, 65 S. Ct. 982 (1945).

<sup>146</sup> *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111 at 130, 64 S. Ct. 851 (1944).

of the statute,<sup>147</sup> or whether the Board's order may be permitted to go further than the immediate necessities of the case require,<sup>148</sup> or whether stipulated facts may be deemed to be an unfair labor practice,<sup>149</sup> the courts do not show a slavish acceptance of the conclusions of the Board, but rather determine the questions for themselves.

(b) *The role of discretion; legislative and judicial powers.* In refusing to review the Board's decision as to the appropriateness of a particular bargaining unit or the propriety of a particular remedy, the courts not infrequently refer to the fact that as to such matters, the Board exercises a broad measure of discretion. Thus, where one labor organization claimed that the Board's choice of a bargaining unit discriminated unfairly against its members, the court observed that the matter was one which "involves an exercise of discretion on the part of the Board."<sup>150</sup> Again, where the question involved the propriety of an order requiring that wages be paid retroactively to men who had never been hired, the court said, "Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy."<sup>151</sup>

But inasmuch as the functions of the National Labor Relations Board are primarily judicial in nature and involve but little legislative prerogative, the degree of discretion

<sup>147</sup> National Labor Relations Board v. Fansteel Metallurgical Corp., 306 U. S. 240, 59 S. Ct. 490 (1939).

<sup>148</sup> National Labor Relations Board v. Express Pub. Co., 312 U. S. 426, 61 S. Ct. 693 (1941).

<sup>149</sup> Medo Photo Supply Corp. v. National Labor Relations Board, 321 U. S. 678, 64 S. Ct. 830 (1944).

<sup>150</sup> International Association of Machinists; Tool and Die Makers Lodge No. 35 etc. v. National Labor Relations Board, 311 U. S. 72, 82, 61 S. Ct. 83 (1940).

<sup>151</sup> Phelps Dodge Corp. v. National Labor Relations Board, 313 U. S. 177, 194, 61 S. Ct. 845 (1941).

enjoyed is more limited than that possessed by the Interstate Commerce Commission in exercising its broad legislative powers. Thus, in one case, the court, after conceding that the authorization of the Board to determine the remedy is broad, yet insisted that this discretion "has its limits," and held that nothing in the act conferred upon the Board discretionary power to order reinstatement of seamen who had struck in violation of the federal mutiny statute.<sup>152</sup> In a somewhat similar case, the court declared that "whatever discretion may be deemed to be committed to the Board, its limits were transcended" by an order requiring the reinstatement of former employees who had engaged in a sit-down strike.<sup>153</sup>

The extent to which the Board's powers are discretionary varies with the type of proceeding. In selecting the unit which shall be used for collective bargaining, it exercises a large measure of discretion, and review is accordingly narrowed. But in deciding whether an unfair labor practice has been committed, or whether in order to effectuate the policy of promoting the bargaining power of unions it may condone illegal activities, the Board's activity is judicial, rather than discretionary, and a broader scope of review is permitted.

(c) *Public interest involved.* In carrying out its duties, the National Labor Relations Board cannot quite be said to be engaged in the conduct of the public business, in the sense that such observation can be made of the tax collector or the customs inspector or the immigration officer. But, on the other hand, neither can the National Labor Relations Board be viewed as an agency which regulates private business in the sense that the Federal Trade Commission restricts merchandising practices or the Securities and Exchange Commission controls the activities of brokers and investment

<sup>152</sup> *Southern Steamship Co. v. National Labor Relations Board*, 316 U. S. 31, 62 S. Ct. 886 (1942).

<sup>153</sup> *National Labor Relations Board v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 258, 59 S. Ct. 490 (1939).

bankers. Its functions are much more closely related to the conduct of the public business than to the regulation of private business, for the Board does not exercise any superintending control over the methods which the entrepreneur shall employ in running his business. It only insists that in running it, he must not discourage union activities among his employees. It does not undertake to fix hours, or wages, or prices, or trade practices, or employment conditions. Neither does it require disclosure of confidential information. Its function is merely that of a policeman, enforcing a more or less well defined rule of conduct. As the Supreme Court has put it, the function of the Board is to facilitate the "Attainment of a great national policy," which, it is judicially recognized, is to be sought "through expert administration in collaboration with limited judicial review."<sup>154</sup>

In other words, the courts take the attitude that it has become a part of the public business of the country to police labor relations to the extent, at least, of effectively discouraging unfair labor practices. There is thus a tendency to trim the scope of judicial review to the restricted scope customarily available where the administrative agency is merely conducting the public business.

(d) *Fairness of administrative procedure.* The National Labor Relations Board does not enjoy, as does the Interstate Commerce Commission, the benefits of a general or unanimous judicial conviction that its attitude is unbiased and its procedures carefully designed to assure fair treatment to the parties respondent. The Supreme Court from time to time has had occasion implicitly to criticize some of the attitudes and procedures of the Board. Thus, it has been necessary for the court to remind the Board that it does not

<sup>154</sup> *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 188, 61 S. Ct. 845 (1941).

have power to impose penalties.<sup>155</sup> Again, the Board has been cautioned that it does not have warrant to issue a general injunction against any violation of the statute, where the evidence disclosed only a limited violation and there was no basis shown for anticipating further attempts to violate the law.<sup>156</sup>

The Board has been found guilty of exhibiting an excess of zeal, with the pointed observation that "the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. . . . and it is not too much to demand of an administrative body that it undertake this accommodation [of one statutory scheme to another] without excessive emphasis upon its immediate task."<sup>157</sup>

The opinions of the Board have not been regarded as models of clarity. In one case, the Supreme Court complained, in remanding a case for further consideration by the Board, that "From the record of the present case we cannot really tell why the Board has ordered reinstatement of the strikers. . . . The administrative process will best be vindicated by clarity in its exercise."<sup>158</sup>

In another case, while the majority of the court sustained the Board in its refusal to admit or consider certain evidence which two of the parties to a Board proceeding wished to introduce, a minority protested bitterly against the unfair-

<sup>155</sup> Republic Steel Corp. v. National Labor Relations Board, 311 U. S. 7, 61 S. Ct. 77 (1940).

<sup>156</sup> National Labor Relations Board v. Express Pub. Co., 312 U. S. 426, 61 S. Ct. 693 (1941).

<sup>157</sup> Southern Steamship Co. v. National Labor Relations Board, 316 U. S. 31, 47, 62 S. Ct. 886 (1942).

<sup>158</sup> Phelps Dodge Corp. v. National Labor Relations Board, 313 U. S. 177, 196-197, 61 S. Ct. 845 (1941).

ness of this refusal to consider matters which might have been of importance.<sup>159</sup>

In another case, refusal to receive evidence was criticized by the court as unreasonable and arbitrary.<sup>160</sup>

In the earlier days of the Board's history, protests were frequently made against the practice which it was alleged the Board then followed, whereby decisions were sometimes actually made by "review attorneys" who had not heard the testimony. Similarly, it was claimed the Board entered orders without having familiarized itself with the contents of the record on which the order was based. These complaints were frequently considered by the courts of appeal,<sup>161</sup> and they were sufficiently numerous to raise considerable doubt as to the fairness of the Board's earlier procedures. Similarly, attacks were frequently made, and sometimes with success,<sup>162</sup> upon the unfair conduct of trial examiners, and their demonstrated bias and prejudice.

The doubts thus engendered had some influence (for a time, at least) in persuading the courts to probe more searchingly when reviewing orders of the National Labor Relations Board than when considering orders of such agencies as the Interstate Commerce Commission. As with developing

<sup>159</sup> *Pittsburgh Plate Glass Co. v. National Labor Relations Board*, 313 U. S. 146, 61 S. Ct. 908 (1941).

<sup>160</sup> *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 59 S. Ct. 206 (1938).

<sup>161</sup> *National Labor Relations Board v. Cherry Cotton Mills* (C.C.A. 5th 1938), 98 F. (2d) 444; *Botany Worsted Mills v. National Labor Relations Board* (C.C.A. 3d 1939), 106 F. (2d) 263; *Consolidated Edison Co. of New York v. National Labor Relations Board* (C.C.A. 2d 1938), 95 F. (2d) 390; *Cupples Company Manufacturers v. National Labor Relations Board* (C.C.A. 8th 1939), 103 F. (2d) 953; *Ford Motor Co. v. National Labor Relations Board*, 305 U. S. 364, 59 S. Ct. 301 (1939); *National Labor Relations Board v. Biles Coleman Lumber Co.* (C.C.A. 9th 1938), 98 F. (2d) 16.

<sup>162</sup> *Montgomery Ward & Co. v. National Labor Relations Board* (Union of Ward Employees) (C.C.A. 8th 1939), 103 F. (2d) 147; *National Labor Relations Board v. Phelps* (C.C.A. 5th 1943), 136 F. (2d) 562; *Inland Steel Co. v. National Labor Relations Board* (C.C.A. 7th 1940), 109 F. (2d) 9.



years the Board gained a maturity of judgment, and corrected many of the conditions which led to this criticism of its fairness, there has of course been a corresponding lessening of this earlier inclination to extend the scope of review.

(e) *Review of questions of fact.* While the Supreme Court on occasion<sup>163</sup> and the courts of appeal not infrequently<sup>164</sup> found that there was no vestige of substantial evidence to support the findings of the Board and accordingly refused to accept its factual findings, and while the courts have had not infrequent occasion to reiterate, in reviewing findings of the Board, that mere uncorroborated hearsay or rumor does not constitute substantial evidence,<sup>165</sup> yet any examination of the decisions makes it equally clear that very little evidence is required to meet the test of "substantiality" which prior to the recent amendment of the statute rendered the Board's factual findings conclusive.<sup>166</sup> Further, in those cases where it was believed that administrative experience

<sup>163</sup> E.g., *National Labor Relations Board v. Columbian Enameling & Stamping Co.*, 306 U. S. 292, 59 S. Ct. 501 (1939).

<sup>164</sup> E.g., *Bussmann Mfg. Co. v. National Labor Relations Board* (C.C.A. 8th 1940), 111 F. (2d) 783; *National Labor Relations Board v. Goshen Rubber & Manufacturing Co.* (C.C.A. 7th 1940), 110 F. (2d) 432; *National Labor Relations Board v. International Shoe Co.* (C.C.A. 8th 1940), 116 F. (2d) 31; *Magnolia Petroleum Co. v. National Labor Relations Board* (C.C.A. 5th 1940), 112 F. (2d) 545; *Martel Mills Corp. v. National Labor Relations Board* (C.C.A. 4th 1940), 114 F. (2d) 624.

<sup>165</sup> *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 59 S. Ct. 206 (1938); *Appalachian Electric Power Co. v. National Labor Relations Board* (C.C.A. 4th 1938), 93 F. (2d) 985; *Interlake Iron Corp. v. National Labor Relations Board* (C.C.A. 7th 1942), 131 F. (2d) 129.

<sup>166</sup> E.g., *National Labor Relations Board v. Southern Bell Telephone & Telegraph Co.*, 319 U. S. 50, 63 S. Ct. 905 (1943); *Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board*, 301 U. S. 142, 57 S. Ct. 648 (1937); *National Labor Relations Board v. Link-Belt Co.*, 311 U. S. 584, 61 S. Ct. 358 (1941). Note that the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U.S.C. Supp. I, § 141, broadens the courts' power to review issues of fact. *Universal Camera Corp. v. National Labor Relations Board*, 340 U. S. 474, 71 S. Ct. 456 (1951). See Iserman, "The Labor Management Act: New Law as to Evidence and the Scope of Review," 33 A. B. A. J. 760 (1947); George, "Evidence in NLRB. Cases in the Supreme Court," 30 CORN. L. Q. 350 (1945).

attributed trustworthiness to a determination which could be treated as either a question of law or fact, the courts have treated as questions of fact issues which would probably be considered reviewable as questions of law, were it not for the trust reposed in administrative *expertise*. Thus, the question as to whether or not, on undisputed facts, a relationship was one of employer-employee or of independent contractorship was treated as a question of fact;<sup>167</sup> and similarly the question as to whether the activities of a fraternal insurance association substantially affect commerce, so as to come within the Board's jurisdiction, has been treated (despite the doctrine thought to permit independent review of questions of jurisdictional fact) as a question for the Board to decide.<sup>168</sup>

The various factors above discussed which have persuaded the courts to review somewhat broadly those determinations by the Board which have a legalistic background have occasionally prompted the courts to examine critically inferences made by the Board from established primary facts. Thus, where it was thought a particular order might have been entered without giving due consideration to the employer's constitutional rights of free speech, the Supreme Court pointed out that it was doubtful whether the Board's finding of coercion was based solely on an announcement made by the company's president (in which case constitutional limitations would have vitiated the order) or whether it was based on a whole congerie of circumstances; and the court held that the findings of the Board were so ambiguous and doubtful that its inference could not be sustained. The court remanded the case to the Board for further consideration.<sup>169</sup>

<sup>167</sup> National Labor Relations Board v. Hearst Publications, Inc., 322 U. S. 111, 64 S. Ct. 851 (1944).

<sup>168</sup> Polish National Alliance of United States of America v. National Labor Relations Board, 322 U. S. 643, 64 S. Ct. 1196 (1944).

<sup>169</sup> National Labor Relations Board v. Virginia Electric & Power Co., 314 U. S. 469, 62 S. Ct. 344 (1941).

On the other hand, cases are much more frequent where the court's respect for the Board's particular experience in the complexities of labor relations has led it to sustain without inquiry the inference made by the Board from proved facts. The court has held, for example, that the Board need not show that there is evidence to support its inference that a rule against solicitation of any sort on company premises is an unfair labor practice.<sup>170</sup> Not infrequently, the Supreme Court has emphasized that Congress entrusted to the Board, and not to the courts, the drawing of inferences from inconclusive factual showings. The court has recognized that in unfair practice cases, the lack of positive evidence is natural;<sup>171</sup> and it has more than once reversed courts of appeal for substituting their judgment for that of the Board as to the inference to be drawn from disputed facts.<sup>172</sup>

(f) *Questions of law.* In those fields where it is felt that administrative competence and experience should be a controlling factor in decision, the courts have been satisfied if the Board's conclusion has a "reasonable basis in the law." Even if the law question might have been otherwise determined by the court, the administrative decision will not be upset unless it is patently wrong. In this connection, the courts have stressed the points (1) that where the question is one which arises initially in agency proceedings, it acquires a somewhat factual tinge even though it might otherwise be deemed purely a law question; and (2) that *application* of statutory language to given facts, as distinguished from pure *interpretation* of the statutory language, is rather for the

<sup>170</sup> Republic Aviation Corp. v. National Labor Relations Board, 324 U. S. 793, 65 S. Ct. 982 (1945).

<sup>171</sup> National Labor Relations Board v. Electric Vacuum Cleaner Co., Inc., 315 U. S. 685, 62 S. Ct. 846 (1942).

<sup>172</sup> E.g., National Labor Relations Board v. Link-Belt Co., 311 U. S. 584, 597, 61 S. Ct. 358 (1941); National Labor Relations Board v. Nevada Consolidated Copper Corp., 316 U. S. 105, 62 S. Ct. 960 (1942); National Labor Relations Board v. Waterman Steamship Corp., 309 U. S. 206, 60 S. Ct. 611 (1940).

Board than for the court. Thus, the court has said, "Undoubtedly questions of statutory interpretation, especially when arising for the first instance in judicial proceedings, are for the courts to resolve. . . . But where the question is one of specific application of a broad statutory term in a proceeding which the agency administering the statute must determine initially, the reviewing court's function is limited."<sup>173</sup> Again, the court has pointed out that ordinarily determination of what constitutes an unfair labor practice is for the Board as part of its task of "applying" the act's general prohibitory language in the light of infinite combinations of events which might be charged as violative of the act.<sup>174</sup> Still again, the question as to whether or not it is appropriate for the Board to order an employer to bargain with a union representing only a minority of his employees, where the union's majority status was lost because of the employer's unfair labor practices, was treated as a question for the Board.<sup>175</sup> While this could be viewed as presenting only a law question, yet it is obvious that such questions of interpretation are peculiarly susceptible to considerations of informed administrative judgment.

But the courts find somewhat more frequently in the case of the National Labor Relations Board than in the case of the Interstate Commerce Commission, perhaps, that the question involved is not controlled by considerations of specialized knowledge, and that accordingly the question falls within the peculiar competence of the courts and should be fully reviewed and redetermined as presenting questions of law. Thus, where the question was whether the term "employee" could be extended to include former employees dis-

<sup>173</sup> *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111, 130-131, 64 S. Ct. 851 (1944).

<sup>174</sup> *Republic Aviation Corp. v. National Labor Relations Board*, 324 U. S. 793, 65 S. Ct. 982 (1945).

<sup>175</sup> *National Labor Relations Board v. P. Lorillard Co.*, 314 U. S. 512, 62 S. Ct. 397 (1942).

charged for unlawful conduct, the court had no hesitancy in reviewing and reversing the Board's conclusion.<sup>176</sup> And while as above noted, the determination as to whether or not an unfair labor practice has been committed is ordinarily considered a question for the Board, yet where that question is presented on clearly established facts, it is treated as a question of law.<sup>177</sup>

The division of justiciable questions between unreviewable issues of fact and fully reviewable issues of law is, in other words, somewhat different in the case of this agency than in the case of either the Interstate Commerce Commission or the Federal Trade Commission. The differences can be accounted for largely by differences in the types of issues involved, and in the varying applicability of the general principles which influence the courts toward either broad or narrow review.

<sup>176</sup> *National Labor Relations Board v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 59 S. Ct. 490 (1939).

<sup>177</sup> E.g., *Medo Photo Supply Corp. v. National Labor Relations Board*, 321 U. S. 678, 64 S. Ct. 830 (1944).