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Administrative Discretion in the Interpretation of Statutes

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ADMINISTRATIVE DISCRETION IN THE INTERPRETATION OF STATUTES

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It is familiar doctrine that the interpretation of a statute by the agency charged with primary responsibility for its administration is entitled to the respectful consideration of the reviewing court. How much consideration may vary with the circumstances, including, as Mr. Justice Jackson has said, "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." [1] But all this assumes, as the foregoing statement indicates, that the ultimate test of the validity of the administrative interpretation is whether the reviewing court is indeed persuaded of its correctness. There is another doctrine, of somewhat more recent vintage, which teaches that there are occasions when the reviewing court need not be persuaded that the administrative agency's choice of conflicting interpretations is right, but only that it is reasonable—occasions when, as Chief Justice Vinson has said, "we need not find that its construction is the only reasonable one, or even that it is the one we would have reached had the question arisen in the first instance in judicial proceedings." [2] Concern has been expressed over this tendency "to treat many issues which, when subjected to adequate analysis, would be seen to be issues of law, as lying within the discretion of an administrative agency and therefore non-reviewable"; it has also been suggested that the Administrative Procedure Act, properly interpreted, should do something to arrest its further development.[3] In the following discussion I shall try to explore the basis of this concern and the validity of the corrective suggestion.

I

The principle of limited judicial review of certain administrative de-

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1. Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 Sup. Ct. 161, 89 L. Ed. 124 (1944).

2. Unemployment Compensation Commission of Alaska v. Aragon, 329 U.S. 143, 153, 67 Sup. Ct. 245, 91 L. Ed. 136 (1946).

3. Dickinson, *The Judicial Review Provisions of the Federal Administrative Procedure Act (Section 10) Background and Effect*, in FEDERAL ADMINISTRATIVE PROCEDURE ACT AND ADMINISTRATIVE AGENCIES 546, 582-85 (Warren ed. 1947). See also BENJAMIN, JUDICIAL REVIEW OF ADMINISTRATIVE ADJUDICATION: SOME RECENT DECISIONS OF THE NEW YORK COURT OF APPEALS 1, 12-19 (1948); BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK 347-50 (1942); Dickinson, *Judicial Review of Administrative Determinations, A Summary and Evaluation*, 25 MINN. L. REV. 588, 589-92 (1941); Note, *Administrative Tribunals—Judicial Review of Administrative Interpretations of Statutory Provisions—Recent Federal Developments*, 47 MICH. L. REV. 675 (1949); dissenting opinion of Judge Frank, in Duquesne Warehouse Co. v. Railroad Retirement Board, 148 F.2d 473, 479 (2d Cir. 1945), *rev'd*, 326 U.S. 446, 66 Sup. Ct. 238, 90 L. Ed. 192 (1946).

terminations of questions of law—or mixed questions of law and fact—probably achieved its greatest notoriety in *Dobson v. Commissioner*,[4] when the Supreme Court, for the first time, applied it explicitly to review of Tax Court decisions. Mr. Justice Jackson, speaking for a unanimous Court, in addition to characterizing as "only a question of proper tax accounting" [5] what counsel and the court below had regarded as a significant question of tax law,[6] also took occasion to express this general admonition:

> "It is difficult to lay down rules as to what should or should not be reviewed in tax cases except in terms so general that their effectiveness in a particular case will depend largely upon the attitude with which the case is approached. However, all that we have said of the finality of administrative determination in other fields is applicable to determinations of the Tax Court. Its decision, of course, must have a 'warrant in the record' and a reasonable basis in the law. But 'the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.'"[7]

This "reasonable basis in the law" principle of the *Dobson* case led an uneasy existence in tax administration,[8] until it was finally banished from the field

4. 320 U.S. 489, 64 Sup. Ct. 239, 88 L. Ed. 248 (1943).

5. 320 U.S. at 507.

6. The particular issue presented in the *Dobson* case was whether the taxpayer was required to include as income the amount received in settlement of a suit for fraudulent sale of securities, where the taxpayer had previously sold the securities at a loss, and treated such loss as a deduction for income tax purposes, but realized no tax benefit from such deductions. The Tax Court, then the Board of Tax Appeals, had held that the amount received in settlement was in the nature of capital recovery and was not subject to tax unless deductions of prior years had actually offset gross income of those years and had thus resulted in a tax benefit. The court of appeals held that the amounts received in settlement constituted income in the year received and could not be adjusted on account of deficits of previous years. In addition to supporting this ground, the government contended that if the recovery was in the nature of capital return, then it was nevertheless taxable in its entirety because the taxpayer's basis was zero. Mr. Justice Jackson summarized his discussion of these issues when he said: "We only hold that no statute or regulation having the force of one and no principle of law compels the Tax Court to find taxable income in a transaction where as a matter of fact it found no economic gain and no use of the transaction to gain tax benefit." 320 U.S. at 506.

7. 320 U.S. at 501.

8. See Trust under the Will of Bingham v. Comm'r, 325 U.S. 365, 65 Sup. Ct. 1232, 89 L. Ed. 1670 (1945); John Kelley Co. v. Comm'r, 326 U.S. 521, 66 Sup. Ct. 299, 90 L. Ed. 278 (1946). In the *Trust of Bingham* case, Chief Justice Stone writing for the Court, said of the issues presented: "They are 'clear cut' questions of law, decision of which by the Tax Court does not foreclose their decision by appellate courts, as in other cases, *Dodson v. Commissioner, supra*, 492-493, although their decision by the Tax Court is entitled to great weight." 325 U.S. at 371. The Chief Justice then went on to consider the merits of the various questions presented and resolved them in the same way as the Tax Court as opposed to the court of appeals. Mr. Justice Frankfurter, in a concurring opinion on behalf of himself and Justices Jackson and Roberts, objected to this method of disposition on the ground that "the manner in which it is reached is calculated to increase the already ample difficulties in judicial review of Tax Court determinations." 325 U.S. at 377. Apparently the difference between the Court's opinion and the concurring opinion was that under the former, the Tax Court's decision would have been properly set aside if it had gone the way the court of appeals had decided, whereas under the latter, the Tax Court's decision would not have been properly set aside, no matter which way it went.

In the *John Kelley Co.* case Mr. Justice Reed applied the *Dobson* rule to two decisions of the Tax Court on the distinction between interest and dividends for tax purposes, in two slightly different situations, one holding the particular payments to be

by legislative action.[9] Why it was so unwelcome there is a story in itself, but cursory examination suggests that the basic difficulty lay in the hydra-headed character of tax administration, rather than in the inherent weakness of the general principle.[10] Tax experience may be enlightening as to the conditions under which this particular doctrine is hardly likely to flourish, but for a rounded picture of its potentialities as well as its shortcomings, we must look outside the field of tax administration.

One of the leading cases from other fields, upon which Mr. Justice Jackson relied for the principle of judicial review applied in the *Dobson* case, was *Gray v. Powell*,[11] which involved judicial review of an administrative order denying an exemption under certain provisions of the Bituminous Coal Act of

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dividends, the other interest. Mr. Justice Burton dissented in one of the cases, and Justices Black and Rutledge in the other. Mr. Justice Rutledge based his dissent on the ground that even assuming that under the *Dobson* rule "the Tax Court's judgment should be accepted whatever way the die were cast, although reviewing courts might differ on the direction," still, "it would not follow . . . that they are powerless when the throw is in opposite directions at the same time." 326 U.S. at 533. But if Mr. Justice Rutledge really accepted the application of the *Dobson* principle to the particular problem, but thought the two decisions clearly inconsistent, he should more logically have voted to set aside both decisions of the Tax Court on the ground that neither one had a raional basis [*cf.* Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80, 63 Sup. Ct. 454, 87 L. Ed. 626 (1943)], leaving the Tax Court to go either way, but the same way, in both cases. If only one of the cases had reached the Court and the other had been merely called to its attention, the same escape would not have been so obviously present, but the Court could presumably remand to the Tax Court with directions to make up its mind which principle it intended to adopt for the future, and to apply that to the particular case. Presumably the requirement of a rational basis for decision does not prevent an administrative agency from reconsidering and revising its position, even though it is too late to change past decisions. *Cf.* Barrett Line v. United States, 326 U.S. 179, 201-02, 65 Sup. Ct. 1504, 89 L. Ed. 2128 (1945).

The difficulties of the Supreme Court in applying the *Dobson* rule were of course multiplied in the courts of appeals. See Gordon, *Reviewability of Tax Court Decisions*, 2 TAX L. REV. 171 (1946); Note, 45 MICH. L. REV. 192 (1946).

9. "The courts of appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without jury; . . ." INT. REV. CODE § 1141(a). The previous provision read: "Such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board." Whether, in making the change Congress also materially changed the weight to be accorded the Tax Court's determination with respect to disputed questions of fact, presents a nice question as to the difference if any, between the substantial evidence rule applied to administrative determination, and the "clearly erroneous" rule applied in the federal courts to the trial judge's findings of fact. *See* United States v. United States Gypsum Co., 333 U.S. 364, 394-95, 68 Sup. Ct. 525, 92 L. Ed. 746 (1948); Wright-Bernet Inc. v. Comm'r, 172 F.2d 343, 345 (6th Cir. 1949); Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 112-20 (1944). But see Note, *Dobson Rule Abolished*, 1 STAN. L. REV. 305 (1949). If there is a significant difference, it might be argued that Congress, by the very manner in which it abolished the *Dobson* rule, recognized that rule as an appropriate corollary of the substantial evidence rule; but this would be, in my judgment, an over-simplification of the problem.

10. See Paul, *Dobson v. Commissioner: The Strange Ways of Law and Fact*, 57 HARV. L. REV. 753, 841 *et seq.* (1944); Eisenstein, *Some Iconoclastic Reflections on Tax Administration*, 58 HARV. L. REV. 477, 539-43 (1945); Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153 (1944). Mr. Justice Frankfurter attempted to meet some of these objections in his concurring opinion in the *Trust of Bingham* case, *supra*, 325 U.S. at 378.

11. 314 U.S. 402, 62 Sup. Ct. 326, 86 L. Ed. 301 (1941).

1937.[12] This statute provided for administrative hearings on applications for exemption, followed by opportunity for review in a United States court of appeals, with the provision that "The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." [13] Exemption was sought under a particular clause which read: "The provisions of this section shall not apply to coal consumed by the producer, or to coal transported by the producer to himself for consumption by him." [14] With respect to the facts themselves, apart from the application of the statutory term, there was no dispute. An arrangement had been entered into whereby the Seaboard Railroad leased certain mines from the owners; a contractor selected by Seaboard simultaneously leased mining equipment on the premises from the owner; and Seaboard and the contractor also simultaneously entered into a contract for the mining of the coal by the contractor and delivery to Seaboard for its consumption. There was no suggestion that the mine operator was not an independent contractor in the usual common law sense; the issue was simply whether such an arrangement made Seaboard the "producer" of the coal within the sense of the statutory exemption. The court of appeals held that it did and set aside the order; the Supreme Court reversed on the ground, so far as this particular issue was concerned, that it could not "say that a set of circumstances deemed by the Commission to bring them within the concept 'producer' is so unrelated to the tasks entrusted by Congress to the Commission as in effect to deny a sensible exercise of judgment. . . ." [15]

But the real issue in the *Gray* case could scarcely be appreciated if attention were centered exclusively on the exemption clause set forth above. Whether there was a rational basis for the administrative application of the term "producer" itself depended upon a broader issue of statutory interpretation; namely, whether the regulatory provisions of the statute authorizing maximum and minimum prices could be applied to deliveries of coal which involved no change in its ownership.[16] If price regulation under the statute

12. 50 STAT. 72 (1937). [Expired May 21, 1943, 57 STAT. 84 (1943)].
13. Bituminous Coal Act, § 6, 50 STAT. 85 (1937).
14. *Id.* § 4-II(1), 50 STAT. 83 (1937).
15. 314 U.S. at 413. Mr. Justice Reed established the general outlines of the exemption when he said: "The separation of production and consumption is complete when a buyer obtains supplies from a seller totally free from buyer connection. Their identity is undouted when the consumer extracts from its own land with its own employees. Between the two extremes are the innumerable variations that bring the arrangements closer to one pole or the other of the range between exemption and inclusion. To determine upon which side of the median line the particular instance falls calls for the expert, experienced judgment of those familiar with the industry." 314 U.S. at 413. Nevertheless, as if to show that the administrative judgment was not without support in the facts, Mr. Justice Reed added: "The shortness of the leases, the freedom from investment in coal lands or mining facilities, the improbability of profit or loss from the mining operations, the right to cancel when cheaper coal may be obtained in the open market, all deny the position of producer to the railroad." *Id.* at 414.
16. The regulatory provision [section 4-II(e)] read: "No coal subject to the provisions of this section shall be sold or delivered or offered for sale at a price below the minimum or above the maximum therefor established by the Commission, and the

was necessarily limited in its application to sales in the usual sense of the word, the denial of the exemption served no useful purpose; but if transfers such as occurred between the contractor and Seaboard were within the scope of the Act, the denial might well be essential to prevent the development of an obvious and widespread pattern of evasion.[17] If the opinion of the Court had resolved this basic question in the same way it resolved the issue of the particular application of the producer-consumer clause, by reliance upon a principle of limited review, it might have been justly charged with substituting administrative for judicial interpretation of statutes. But Mr. Justice Reed, writing for the Court, did no such thing; instead, he faced and resolved the fundamental question with the conventional tools of statutory interpretation, analysis of language, consideration of objectives, and recognition of the unfortunate consequences to those objectives if the more limited interpretation were adopted.[18] But even after the resolution of this question, there still remained an area for administrative discretion in passing upon applications for exemption. Some independent-contractor relationships might be so closely

sale or delivery or offer for sale of coal at a price below such minimum or above such maximum shall constitute a violation of the code. . . ." 50 STAT. 80 (1937).

17. The dissenting opinion of Mr. Justice Roberts, for himself and Chief Justice Stone and Mr. Justice Byrnes, took the position that the regulatory provisions were "concerned only with those who sell or market coal," and did not apply to deliveries from the contractor to Seaboard. 314 U.S. at 419. This conclusion made it senseless to deny exemption in any situation where there was no such sale. But since Mr. Justice Reed concluded that the regulatory provisions did apply to situations where there was no sale within the usual meaning of the term, it would have been equally strange to conclude that the term "producer" necessarily applied to a consumer who received his coal from an independent contractor operating a mine leased by the consumer. Because Mr. Justice Reed considered the two questions separately and disposed of the problem of definition first, his opinion seems to make the administrative determination more significant than it necessarily was. This is not to suggest, however, that the administrative interpretation of the regulatory provisions may not have been persuasive, and even decisive, within the ordinary principle of the weight to be attached to administrative construction of ambiguous statutory provisions.

18. It is true that Mr. Justice Reed also said: "In a matter left specifically by Congress to the determination of an administrative body, as the question of exemption was here by §§ 4-II(1) and 4-A, the function of review placed upon the courts by § 6(b) is fully performed when they determine that there has been a fair hearing, wtih notice and an opportunity to present the circumstances and arguments to the decisive body, and an application of the statute in a just and reasoned manner." 314 U.S. at 411. But the contention that the regulatory provisions did not apply was as much ground for exemption as the claim based more specifically on the producer-consumer clause, yet the fact that the same procedure was applicable did not deter the court from passing on the fundamental question of interpretation. Furthermore, it is interesting to note that Mr. Justice Reed relies upon Shields v. Utah Idaho Central R.R., 305 U.S. 177, 59 Sup. Ct. 160, 83 L. Ed. 111 (1938), where the Court declined to set aside an order of the Interstate Commerce Commission denying an exemption from the Railway Labor Act claimed on the ground that the applicant was an "interurban electric railway." It is true that Chief Justice Hughes in the *Shields* case sustained the Commission on the grounds that it could not be said that its "determination lacked support or was arbitrary or capricious"; and that "the Commission performed its duty in weighing the evidence and reaching its conclusion in the light of the dominant characteristics of respondent's operations which were fairly comparable to those of standard steam railroads." 305 U.S. at 187. But it is also true that the Chief Justice called attention to Piedmont & Northern Ry. v. Interstate Commerce Comm'n, 286 U.S. 299, 52 Sup. Ct. 541, 76 L. Ed. 1115 (1932), where the Court had already considered and rejected the claim that an "interurban electric railway" necessarily meant a railway that "is operated by electricity and extends between cities." 286 U.S. at 307.

related to the usual market transaction with which the statute was concerned as to make exemption dangerous to effective regulation; others might be so far removed as to make exemption harmless. Within that area administrative discretion was left free to move, subject only to the requirement that it proceed along rational, as distinguished from capricious, lines.

The foregoing analysis of *Gray v. Powell* suggests a pattern which is in general applicable to several other instances where the principle of limited judicial review of questions of law has been invoked. In *National Labor Relations Board v. Hearst Publications, Inc.*,[19] for example, the question was whether newsboys were employees within the meaning of the National Labor Relations Act. The Board had ruled that they were, and this ruling was attacked on the ground that they were clearly independent contractors within the accepted meaning of the term. Mr. Justice Rutledge, writing for the Court, met this argument squarely as a question of statutory interpretation which a reviewing court could not dodge the responsibility for deciding. He concluded that the term "employee" was not used in the Act in contradistinction to the term "independent contractor," and that the common law distinction between the two terms was irrelevant to the statutory definition. But this did not necessarily dispose of the case; there remained for consideration whether the Board was justified in applying the term to the particular situation presented by the newsboy's relationship to the publishers; this question was resolved in favor of the Board after recitation of some of the relevant circumstances, on the ground that "The record sustains the Board's findings and there is ample basis in the law for its conclusion." [20] Similarly, in *Cardillo v. Liberty Mutual Ins. Co.*,[21] where a workmen's compensation award was under attack on the ground that the accident did not arise "out of and in the course of employment," Mr. Justice Murphy rejected the contention that the usual common law test of control by the employer over the employee's conduct was the decisive factor.[22] With that argument out of the way, it remained only to determine that the

19. 322 U.S. 111, 64 Sup. Ct. 851, 88 L. Ed. 1170 (1944).

20. 322 U.S. at 132. Mr. Justice Rutledge summarizes his own consideration of the statutory interpretation problem when he says: "In this light, the broad language of the Act's definitions, which in terms reject conventional limitations on such conceptions as 'employee,' 'employer,' and 'labor dispute,' leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications." *Id.* at 129. Mr. Justice Roberts draws the issue sharply in his dissenting opinion when he says: "There is a general and prevailing rule throughout the Union as to the indicia of employment and the criteria of one's status as employee. Unquestionably it was to this common, general, and prevailing understanding that Congress referred in the statute. . . ." *Id.* at 136.

21. 330 U.S. 469, 67 Sup. Ct. 801, 91 L. Ed. 1028 (1947).

22. "Indeed to impart all the common law concepts of control and to erect them as the sole or prime guide for the Deputy Commissioner in cases of this nature would be to encumber his duties with all the technicalities and unrealities which have marked the use of those concepts in other fields." 330 U.S. at 481. See, too, Voehl v. Indemnity Ins. Co., 288 U.S. 162, 169, 53 Sup. Ct. 380, 77 L. Ed. 676, 87 A.L.R. 245 (1933); Parker v. Motor Boat Sales, 314 U.S. 244, 245-46, 62 Sup. Ct. 221, 86 L. Ed. 184 (1941).

peculiar facts of the case, as found by the Commissioner, provided a rational basis for the conclusion. With regard to both cases it may be fairly said that the Court exercised an independent judgment with respect to the only general issue of statutory interpretation presented, even though the resolution of that issue resulted in leaving to the administrative agency a considerable measure of discretion to further develop the content of the term within limits only vaguely suggested.

The opinion of Chief Justice Vinson in *Unemployment Compensation Commission of Alaska v. Aragon* [23] does not yield so easily to the same analysis. The Commission had held certain claimants ineligible to receive benefits during a period of disqualification provided for by the statute if "the Commission finds that his total or partial unemployment is due to a labor dispute which is in active progress at the factory, establishment or other premises at which he is or was last employed. . . ." [24] The claimants had previously been employed by salmon canneries; negotiations between their union and the canneries had failed to result in an agreement to cover the seasonal operations normally undertaken; and, as a result, the contemplated expeditions had been abandoned for the season. The claimants contended that there was no "labor dispute in active progress" after the so-called deadline dates when the expeditions were called off because it was considered too late in the season for profitable operations.[25] The Commission, on the other hand, viewed a "dispute as 'active' during the continuance of a work stoppage induced by a labor dispute." [26] Assuming the facts to accord with the claimants' assertion, the Chief Justice sustained the Commission's position on the ground that it "might reasonably conclude that the unemployment resulting from such work stoppage is not of the 'involuntary nature' which the statute was designed to alleviate, as indicated by the statement of public policy incorporated in the Act by the Territorial Legislature." [27]

The foregoing statement, taken together with the general emphasis of the opinion on the limited nature of judicial review in this type of case, suggests that the Court, confronted with two fundamental and conflicting interpretations of the phrase "dispute in active progress," accepted the Commission's interpretation simply because it could not be deemed "irrational or without support in the record." The question presented in the *Aragon* case, comparable to the fundamental questions presented and decided in the *Gray*,

23. 329 U.S. 143, 67 Sup. Ct. 245, 91 L. Ed. 136 (1946).
24. 329 U.S. at 148.
25. The Compensation Referee had apparently adopted this position, finding that there was a labor dispute in active progress from the opening of the season until the deadline dates, but not thereafter. 329 U.S. at 148. The Commission, however, had held that "a labor dispute was in active progress throughout the entire eight-week statutory period of disqualification beginning with the opening of the season in each locality." 329 U.S. at 149.
26. 329 U.S. at 154.
27. *Ibid.*

Hearst and *Cardillo* cases, was whether a dispute was to be regarded as in active progress so long as it could be fairly called the cause of the unemployment, or only so long as there was a possibility that settlement of the dispute would provide employment. In choosing between the two competing interpretations, the Commission's view might well be given decisive weight, assuming that both were permissible under statutory language and that no more persuasive considerations, either in legislative history or in practical consequences, were forthcoming clearly to overbalance the Commission's view. If this is what the Chief Justice meant to say, he was far from explicit in saying it. If, on the other hand, the Chief Justice meant to shift to the Commission the authority and responsibility for the choice, merely on the ground that he could conceive of a reasonable man's deciding either way, he rendered the principle of limited review peculiarly susceptible to the attacks which have been levied upon it.

In *Board of Governors of the Federal Reserve System v. Agnew*,[28] the question of proper application of the principle under discussion is highlighted by the different approaches adopted in the opinion of the Court, by Mr. Justice Douglas, and in the concurring opinion of Mr. Justice Rutledge for himself and Mr. Justice Frankfurter. The administrative action under review was an order of the Board of Governors of the Federal Reserve System removing from office certain bank directors on the ground that they were associated with a partnership which was, within the meaning of the statute, "primarily engaged in the issue, flotation, underwriting, public sale, or distribution . . . of stocks, bonds, or other similar securities." [29] The court of appeals had set aside the Board's order on the ground that since underwriting did not by any standard constitute the chief, principal or major portion of its business, the partnership could not properly be regarded as "primarily engaged" in such business. The Board contended that the statute did not require a finding that underwriting was the chief or principal business of the partnership but that it was sufficient if underwriting constituted a significant or substantial part of the business. The Court sustained the Board, saying that, since as a matter of English usage the words "primarily engaged" were susceptible of such construction, and since as a matter of fact the apparent objectives of the particular provision would be defeated if the interpretation of the court of appeals were adopted, the Board's view was "not only permissible but also more consonant with the legislative purpose." [30] The opinion of Mr. Justice Rutledge, on the other hand, tried to make, as clear as words can make, so fine a distinction that the concurrence of himself and Mr. Justice Frankfurter was based not upon an "independent judicial determination of the question presented on the merits" but upon the proposition that the Board's "judgment should be conclusive upon any matter which, like this

28. 329 U.S. 441, 67 Sup. Ct. 411, 91 L. Ed. 408 (1947).
29. Banking Act of 1933, as amended, 12 U.S.C.A. § 78 (1945).
30. 329 U.S. at 447.

one, is open to reasonable difference of opinion." The reason is that "Their specialized experience gives them an advantage judges cannot possibly have, not only in dealing with the problems raised for their discretion by the system's working, but also in ascertaining the meaning Congress had in mind in prescribing the standards by which they should administer it." [31]

Here, I submit, Justices Rutledge and Frankfurter come dangerously close to running a good principle into the ground. It is true that the Governors of the Federal Reserve System have a familiarity with the operation of the system and a closeness to the formulation of legislation affecting it, and that this gives them an advantage in appreciating the objectives of such legislation. But the same may be said of the Treasury with regard to tax legislation, the Administrator with regard to the Fair Labor Standards Act, and many other administrative agencies whose interpretations have not as yet been accorded the limited review under consideration. Their interpretations have, it is true, been accorded respectful consideration, but there has been no suggestion that their validity was not being tested by the independent judgment of the court, except within a very limited field, soon to be discussed. It is also true that the Board had special knowledge of such facts as that, if the interpretation of the court of appeals were adopted, the prohibition would apply to no one; but this knowledge was available to a reviewing court through the medium of the Board's opinion and was properly used by the Court in exercising an independent judgment with respect to the meaning of the statute. Finally, resolution by the Court of the interpretative question presented in the *Agnew* case did not by any means deprive the Board of an area of discretion for the exercise of its judgment—a discretion which Congress apparently intended to confer, irrespective of which of the competing interpretations was adopted. If the words, "primarily engaged," implied the test of chief or principal business, there would unquestionably be problems of difficulty and doubt to be solved in applying that standard, even to undisputed facts. If, on the other hand, "primarily" is equivalent to "substantially," there is an even wider area of discretion within which the Board must still exercise a rational judgment in applying the statutory standard to the facts. But it is quite another matter to suggest that even though the words "primarily engaged" are susceptible of being read as the equivalent of "substantially," and that is the only meaning that will make sense out of the provision in its statutory context, the Board was, nevertheless, granted discretion by Congress to interpret it otherwise, and in so doing to render the provision entirely futile.[32] I recognize that if the

31. 329 U.S. at 450.

32. A comparable problem was presented in United States v. Carolina Freight Carriers Corp., 315 U.S. 475, 62 Sup. Ct. 722, 86 L. Ed. 971 (1942), where the Court was considering an order of the Interstate Commerce Commission under the so-called grandfather clause of the Motor Carrier Act of 1935 granting a certificate of convenience and necessity restricted to certain articles and certain routes. The Court expressed "doubts" as to the validity of these restrictions on the ground that they

Board did so interpret the statute, the Court would never have to face the question, since there would be no private party to present it, yet it seems to me that the Board would be justly chargeable with error in construction of the statute, or with an abuse of its discretion in failing to enforce it, even though only the public or a vigilant Congressional committee could complain.

Of course, it requires no great sophistication to suspect that the rational-basis rule of statutory interpretation is not really likely to impede a court in substituting its own judgment for that of an administrator when it is satisfied that the administrative judgment is wrong. In *Social Security Board v. Nierotko*,[33] for example, the question was whether back-pay awarded by the National Labor Relations Board was to be treated as "wages" under the Social Security Act.[34] "Wages" was defined under that Act as "all remuneration for employment"; "employment" was defined as "any service, of whatever nature, performed within the United States by an employee for his employer." [35] The Social Security Board, after hearing in accordance with the statute, held that the back-pay award did not constitute wages under the statute. In appropriate statutory proceedings to review this order, the district court sustained the Board's decision, the court of appeals reversed the district court, and the Supreme Court affirmed the court of appeals. Mr. Justice Reed was at some pains to explain why the principle of the *Hearst Publications* case and *Gray v. Powell* did not require acceptance of the administrative interpretation. He conceded that the Social Security Act, and the other acts, were comparable in that "the administrators . . . were given power to reach preliminary conclusions as to coverage in the application of the respective acts." [36] So too he noted that "Each act contains a standardized phrase that Board findings supported by substantial evidence shall be conclusive." And finally "The Social Security Board and the Treasury were compelled to decide administratively, whether or not to treat 'back-pay' as wages; and their expert judgment is entitled, as we have said, to great weight." [37] Nevertheless, "Administrative

might have been based on an erroneous interpretation of the statutory standard requiring prior "bona fide operation as a common carrier,"—to wit, that the certificate should properly be limited to the particular articles carried before the statute, even though there was a holding out or a general undertaking to transport other articles whenever the opportunity appeared. Because of these doubts, the Commission's order was set aside with indications that the same order might subsequently be sustained if supported by findings consistent with the Court's interpretation of the statutory standards. Mr. Justice Jackson, for himself and Mr. Justice Frankfurter, dissented, partly on the ground that the decision was inconsistent with the principle of *Gray v. Powell*. *Id.* at 490. *Cf.* Interstate Commerce Comm'n v. Parker, 326 U.S. 60, 65 Sup. Ct. 1490, 89 L. Ed. 2051 (1945).

33. 327 U.S. 358, 66 Sup. Ct. 637, 90 L. Ed. 718 (1946).

34. 49 STAT. 620, 42 U.S.C.A. § 301 (1943).

35. Social Security Act § 210, 42 U.S.C.A. § 409 (1943).

36. 327 U.S. at 368.

37. Mr. Justice Reed also noted that: "The validity of regulations is specifically reserved for judicial determination by the Social Security Act Amendments of 1939, § 205(g)." 327 U.S. at 368. But the section as a whole does not appear to provide a different standard of review from that applied in *Gray v. Powell*, and I do not understand Mr. Justice Reed as so suggesting.

determinations must have a basis in law and must be within the granted authority"; and "the Board's interpretation of this statute to exclude back pay goes beyond the boundaries of administrative routine and the statutory limits." [38] In terms of the wisdom of the result the Court was doubtless fortified by the recommendation of the Social Security Board itself that the statute be amended so as to include back-pay awards under the National Labor Relations Act and similar state statutes.[39] But Mr. Justice Reed hardly attempted to show that there was no rational basis in the statute for the Board's conclusion. In a concurring opinion, Mr. Justice Frankfurter, apparently bothered by the question, undertook—in my judgment quite unsuccessfully—to establish that "it is a plain disregard of the law for the Social Security Board not to include such payments among the employee's wages." [40]

It may be suggested, however, that the *Nierotko* decision indicates that the Court is not so likely to be impressed by an administrative interpretation which is reached only because the statutory language is thought to require it, even though the result, in the agency's own judgment, ill-comports with the statutory pattern and objectives. To the extent that this is an appropriate qualification on the rational basis rule, would it not be more accurate to say that when conflicting interpretations of a statutory provision are permissible under the language itself, and the agency charged with administration chooses the one which in its judgment will best accord with statutory policy, the court will accept that construction if there appears to be a rational basis for the administrative choice? But if this is what the principle really means, why should it not be generally applicable to responsible administrative interpretations irrespective of whether they involve specific applications of broad statutory terms by orders issued in particular proceedings? Or is there something more implicit in the rational basis rule than the resolution of statutory ambiguity by reliance upon administrative appreciation of practical consequences? And if there is something more, is it fairly described by saying: "When Congress establishes an administrative agency and lays down general standards for it

38. 327 U.S. at 369.

39. *Id.* at 370.

40. *Id.* at 371. In order to establish his proposition that "wages" under the Social Security Act, as a matter of law, and beyond all reasonable doubt, included back-pay awards. Mr. Justice Frankfurter relied upon the propositions that, "When the employer is liable for back pay, he is so liable because under the circumstances, though he has illegally discharged the employee, he still absorbs his time" [citing Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177, 61 Sup. Ct. 845, 85 L. Ed. 1271 (1941)], and that this is fundamentally the same as "the ordinary situation of employment in a 'stand-by capacity'" [citing United States v. Local 807, 315 U.S. 521, 62 Sup. Ct. 642, 86 L. Ed. 1004 (1942)]. This strikes me as a tour de force which, aside from blithely ignoring the fact that the ordinary situation of employment in a stand-by capacity involves an obligation to remain available for work, also relies upon a rather doubtful interpretation of one statutory phrase—"payment of wages by a bona fide employer to a bona fide employee" in the Federal Anti-Racketeering Act—to establish that a somewhat similar interpretation of a different phrase in a different statute is clearly required beyond all peradventure. *Cf.* dissent of Chief Justice Stone, 315 U.S. at 539.

to follow, the agency has the function of filling in the interstices which have been deliberately left open"? [41] Before considering the validity of this suggestion I would like to turn for a moment to administrative interpretations embodied in general regulations.

II

In *Fishgold v. Sullivan Corporation*,[42] Mr. Justice Douglas in rejecting, on behalf of the Court, an administrative interpretation by the Director of Selective Service, said: "But his rulings are not made in adversary proceedings and are not entitled to the weight which is accorded interpretations by administrative agencies entrusted with the responsibility of making *inter partes* decisions." [43] In support of this statement Mr. Justice Douglas refers to *Skidmore v. Swift & Co.*,[44] and particularly to a part of the opinion where Mr. Justice Jackson, speaking of administrative interpretations under the Fair Labor Standards Act, said: "The rulings of this Administrator are not reached as a result of hearing adversary proceedings in which he finds facts from evidence and reaches conclusions of law from findings of fact. They are not of course conclusive. . . ." [45] It is interesting to note, however, that in the *Skidmore* opinion, Mr. Justice Jackson went on to say: "The fact that the Administrator's policies and standards are not reached by trial in adversary form does not mean that they are not entitled to respect. This Court has long given considerable and in some cases decisive weight to Treasury Decisions and interpretative regulations of the Treasury and of other bodies that were not of adversary origin." [46] These statements reflect an awareness of some delicate shades of meaning with respect to the weight of administrative decisions. Interpretations issued as general statements are said not to be entitled to as much weight as those evolved in adversary proceedings. But there is also the suggestion that general Treasury interpretations are of considerable and "sometimes decisive weight." Does this mean that there are distinctions to be drawn between regulations, and that some interpretative regulations are entitled to the same weight as interpretations in adversary proceedings?

The distinction between different types of Treasury Regulations which stands out most sharply and has the closest bearing on the problem discussed above, is the distinction between regulations issued only under the general grant of authority to "prescribe and publish all needful rules and regulations for the enforcement of this title," [47] and regulations issued under particular

41. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 106 (1944).
42. 328 U.S. 275, 66 Sup. Ct. 1105, 90 L. Ed. 1230 (1946).
43. 328 U.S. at 290.
44. 323 U.S. 134, 65 Sup. Ct. 161, 89 L. Ed. 124 (1944).
45. 323 U.S. at 139.
46. *Id.* at 140.
47. INT. REV. CODE §§ 3791(a), 62.

statutory provisions which require such regulations for their implementation.[48] An example of the latter is the depletions section of the Internal Revenue Code, which, after providing for "a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case" goes on to provide "such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary."[49] In *Douglas v. Commissioner*,[50] speaking of this section, Mr. Justice Reed said: "As Congress obviously could not foresee the multifarious circumstances which would involve questions of depletion, it delegated to the Commissioner the duty of making the regulations." [51]

The *Douglas* case itself is complicated by the fact that re-enactment of the statute after issuance of the regulations is used as an argument in support of their validity. Nevertheless, it is noteworthy that Mr. Justice Reed is careful to say, not that re-enactment indicates Congressional adoption of the regulations, but rather that it "evidences that subsections 23(m)-10(b) and (c) [the regulations involved] are within the rulemaking authority which was intended to be granted the Commissioner." [52] Thus he treats the regulations in a manner consistent with the usual treatment of the validity of so-called quasi-legislative rules of administrative agencies,[53] recognizing an area of discretion which may permit a valid change in the regulations even after re-enactment of the statute has been used as one of the grounds for sustaining them.[54] If this is a fair statement of the nature of the depletion regulations,

48. See Davis, *Adminstrative Rules—Interpretative, Legislative, and Retroactive*, 57 YALE L.J. 919, 928-34 (1948); Alvord, *Treasury Regulations and the Wilshire Oil Case*, 40 COL. L. REV. 252 (1940); Surrey, *The Scope and Effect of Treasury Regulations Under the Income, Estate, and Gift Taxes*, 88 U. OF PA. L. REV. 556, 558 (1940).

49. INT. REV. CODE § 23(m).

50. 322 U.S. 275, 64 Sup. Ct. 988, 88 L. Ed. 1271 (1944).

51. 322 U.S. at 281.

52. *Id.* at 281.

53. The dissenting opinion of Mr. Justice Rutledge, for himself and Mr. Justice Murphy, is also consistent with this view, even though it would hold the regulation invalid.

I am not suggesting that the distinction between interpretative and legislative regulations under the Internal Revenue Code is crystal clear either in definition or in effect. *Cf.* Textile Mills Securities Corp. v. Comm'r, 314 U.S. 326, 62 Sup. Ct. 272, 86 L. Ed. 249 (1941), where the opinion of Mr. Justice Douglas indicates that regulations issued only under the general authority of section 62 or section 3791 interpreting a broad statutory phrase may be treated with practically the same respect as regulations issued to implement a section which explicitly requires their issuance. Under the Administrative Procedure Act, which makes such a distinction necessary for the purposes of section 4, it seems reasonable to conclude that legislative regulations are those which are required to put a statutory provision into operation, while interpretative regulations, whatever their weight as guides to meaning, are not essential to the application of the statutory provision. Under this view the regulations involved in the *Textile Mills* case would be interpretative, but those in the *Douglas* case legislative.

54. In this connection compare Gillespie-Roger-Pyatt Co. v. Bowles, 144 F.2d 361 (Emergency Ct. App. 1944), when the court in sustaining a price regulation also accepted as valid rather specific administrative standards for price-fixing which had been evolved by the Administrator and which had been called to the attention of appropriate committees of Congress while extension of the Emergency Price Control Act was under consideration. But note also that this did not deter the Administrator from making significant changes in those pricing standards when the end of the war

it may also be noted that Congress might have chosen to delegate to administrative authority the responsibility for determining "a reasonable allowance for depletion and depreciation of improvement, according to the peculiar conditions in each case," by providing for hearings and determinations in particular cases, rather than by general regulation. In tax administration the multitude of cases and the time factor may make the particular order approach impracticable, but that does not suggest an essential difference in the two types of delegation, either from the standpoint of delegation of discretionary authority or the standard of judicial review.

Another example which serves to illustrate the point that I have in mind is *Addison v. Holly Hill Fruit Products Inc.*,[55] which concerned a regulation issued by the Administrator under the Fair Labor Standards Act to effectuate the exemption provided for in that Act with respect to employees "within the area of production (as defined by the Administrator), engaged in . . . canning of agricultural . . . commodites for market." [56] The Court, by a closely divided vote, held that the regulation was invalid insofar as it made one of the determining factors of the exemption the number of employees engaged in a particular plant, as distinguished from "drawing the geographic lines." [57] But although the Court was divided on the question whether inclusion of this particular factor was within the Administrator's authority, it is clear that the entire Court, with the possible exception of Mr. Justice Roberts, agreed that the Administrator had been granted room for the exercise of discretion in determining the exact meaning to be attributed to the term "area of production." [58] Thus Mr. Justice Frankfurter speaking for the Court said:

> "The textual meaning of 'area of production' is thus reinforced by its context: 'area' calls for delimitation of territory in relation to the complicated economic factors that operate between agricultural labor conditions and the market of enterprises concerned with agricultural commodities and more or less near their production. The phrase is the most apt designation of a zone within which economic influences may be deemed to operate and outside of which they lose their force. In view, however, of the variety of agricultural conditions and industries throughout the country, the bounds of these areas could not be defined by Congress itself. Neither was it deemed

in Europe brought a significant change in economic conditions. See ECKERT, PROBLEMS IN PRICE CONTROL: PRICING STANDARDS (Hist. Reps. in War Adm'n 1947). Thus the specific standards were regarded by the Administrator, not so much as interpretation of the statute, as an exercise of discretionary authority to formulate more specific standards for his own guidance, within the broad framework of the delegation.

55. 322 U.S. 607, 64 Sup. Ct. 1215, 88 L. Ed. 1488 (1944).

56. Fair Labor Standards Act § 13(a)(10), 29 U.S.C.A. § 213(a)(10) (1947).

57. 322 U.S. at 616.

58. Mr. Justice Rutledge, in his dissenting opinion, says: "It follows necessarily that the Administrator's power is discretionary and the important questions are to what extent and in what manner may his discretion work." 322 U.S. at 629. Mr. Justice Roberts, however, says: "I construe the word 'define,' in this context, to mean 'ascertain the facts and announce the result of such ascertainment.'" 322 U.S. at 624. It is also noteworthy that although Mr. Justice Frankfurter and Mr. Justice Rutledge agree that there is an area of discretion and disagree as to what the bounds of that discretion are, they have no difficulty in isolating the particular issue of statutory interpretation which the Court is called upon to determine, by exercise of its own independent judgment.

> wise to leave such economic determination to the contingencies and inevitable diversities of litigation. And so Congress left the boundary-making to the experienced and informed judgment of the Administrator. Thereby Congress gave the Administrator appropriate discretion to assess all the factors relevant to the subject matter, that is, the fixing of minimum wages and maximum hours." [59]

Again there appears no compelling reason which should prevent Congress from delegating the same scope of authority, with the same elements of judgment or discretion, to the Administrator, to be exercised however after the manner involved in *Gray v. Powell,* by passing on individual applications for exemptions, with only the general standard "area of production" to guide his deliberations.[60]

Although these two methods of delegating authority to make more specific general statutory provisions have in general been treated as alternatives, there is no reason why, in an appropriate case, they should not be combined so as to supplement one another in the effectuation of the statutory objective. One of the most obvious examples of at least the possibility of such a combination may be found in the work of the Federal Trade Commission under the Federal Trade Commission Act itself. The only substantive provision of the statute is that which states: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful." [61] Immediately following this provision the statute continues: "The Commission is hereby empowered and directed to prevent persons . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." The principal means provided for carrying out this responsibility are the familiar cease-and-desist orders of the Commission issued after complaint and opportunity for hearing. The statute further provides, however, that "The Commission shall also have power . . . to make rules and regulations for the purpose of carrying out the provisions" of various sections, including the section forbidding unfair methods of competition and directing the Commission to prevent them.[62] Apparently pursuant to this grant of authority, the Commission has issued regulations, in the form of trade practice conference rules, which define practices in particular industries deemed by the Commission to be unlawful under the statutes which it administers.[63]

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59. 322 U.S. at 614.

60. In view of this analysis it would also seem appropriate to classify the regulations involved in the *Addison* case as legislative rather than interpretative for the purposes of section 4 of the Administrative Procedure Act. They meet the test suggested above in that their issuance was required for the operation of the exemption provision. Furthermore, they involve that element of discretion which was apparently the main reason for the hearing procedure embodied in section 4. This is a retraction of a previous ill considered suggestion. See Nathanson, *Some Comments on the Administrative Procedure Act,* 41 ILL. L. REV. 368, 383 n.39 (1946).

61. Federal Trade Commission Act § 5, 15 U.S.C.A. § 45 (1941).

62. *Id.* § 6(g), 15 U.S.C.A. § 46(g) (1941).

63. See Trade Practice Conference Procedure, 16 CODE FED. REGS. § 2.28 (1949); and, for example, Trade Practice Conference Rules for Southern Hardware Jobbers, 16 *id.* §§ 18.1-18.9.

It is common knowledge that the Supreme Court evidenced a chilling attitude toward the Commission's early efforts to breathe vitality into the phrase "unfair methods of competition." Although the legislative history of the statute indicated that the meaning of the phrase was to be developed by the Commission in the light of its continual study of, and experience with, the problem of maintaining both fair and vigorous competition free from the practices which tend toward monopoly,[64] the Court was nonetheless emphatic in asserting that the ultimate meaning of the phrase was a question of law to be determined by the courts; and the actual practice left no doubt that this meant the independent judgment of the Court.[65] In recent years the Court has more explicitly recognized that the statutory words "unfair methods of competition" are not to be taken as synonomous with the common law concept of unfair competition, and has also been more inclined to emphasize the weight to be accorded to the Commission's judgment as to what constitutes an unfair method of competition.[66] There has, however, as yet been no explicit adoption, in review of a Commission order, of the principle that the order should be sustained if "it has a rational basis in fact and is not forbidden by law." Yet if there is place for the application of this principle in the field of statutory interpretation, the Federal Trade Commission Act would seem to be as appropriate as any. The Commission must exercise an "experienced and informed judgment" with respect to many "complicated economic factors" as Mr. Justice Frankfurter said of the Administrator in the *Addison* case; it must give more specific meaning to a general statutory term in the light of a "variety of conditions and industries throughout the country." It was doubtless because of this lawmaking aspect of the Commission's functions, so clearly illustrated by, but by no means confined to, the trade practice conference rules, that Mr. Justice Sutherland said in *Humphrey's Ex'r (Rathbun) v. United States:* [67] "In administering the provisions of the statute in respect of 'unfair methods of competition'—that is to say in filling in and administering the details embodied by that general standard—the commission acts in part quasi-legislatively and in part quasi-judicially." The fact that the Commission also acts in part quasi-judicially —that trade practice conference rules defining unfair methods of competition do not have the force of law except as they are applied by the Commission in particular adversary proceedings—only adds to the appropriateness of aplying the standard of review suggested in *Gray v. Powell* and its successors.[68]

64. See HENDERSON, THE FEDERAL TRADE COMMISSION, c. 1 (1924).

65. See, for example, the opinions of Mr. Justice McReynolds in Federal Trade Comm'n v. Gratz, 253 U.S. 421, 40 Sup. Ct. 572, 64 L. Ed. 993 (1920); 2nd Federal Trade Comm'n v. Sinclair Refining Co., 261 U.S. 463, 43 Sup. Ct. 450, 67 L. Ed. 747 (1923).

66. Federal Trade Comm'n v. R. F. Keppel & Bro., 291 U.S. 304, 314, 54 Sup. Ct. 423, 78 L. Ed. 814 (1934); Federal Trade Comm'n v. Cement Institute, 333 U.S. 683, 720, 68 Sup. Ct. 793, 92 L. Ed. 1010 (1948).

67. 295 U.S. 602, 628, 55 Sup. Ct. 869, 79 L. Ed. 1611 (1935).

68. The view suggested above is, I believe, inconsistent with a recent suggestion

It may be suggested, however, that the Federal Trade Commission Act and comparable statutes assume a rule of conduct which is at least sufficiently definite to justify a finding of violation of law with respect to conduct occurring before the particular type of activity has been administratively defined as a violation, either by prior decision or regulation; and that therefore the area of discretion must be narrower, and the standard of review stricter, than in the ordinary case of the clearly legislative regulation which operates entirely prospectively and creates for the first time the possibility of violation. But the line between prospective and retroactive legal effect is not so sharp that it neatly separates quasi-legislative from quasi-judicial administrative action, or interpretative from legislative regulations. Governmental action in terms wholly prospective may attach significant and unforeseen consequences to past conduct; action in terms retrospective may be practically significant only as it lays down a rule for future conduct. A finding of violation under the Federal Trade Commission Act, for example, carries with it only the future inhibitions of a cease-and-desist order; a finding of an unfair labor practice under the National Labor Relations Act may carry with it, in addition, a substantial burden in back-pay awards.[69] The weight of these consequences, and the extent to which they could be reasonably foreseen, are in the first instances matters of legislative judgment in laying down the substantive standard and in providing the range of administrative weapons for its effectuation; in the second instance, matters of administrative judgment, in the exercise of discretion to pick and choose from the armory provided; and finally a matter of judicial determina-

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that section 5 of the Federal Trade Commission Act, properly interpreted, gives a private right of action under federal law, irrespective of Commission action. See Bunn, *The National Law of Unfair Competition*, 62 HARV. L. REV. 987 (1949). Such a double-barreled enforcement of section 5, with cases arising in the courts independently of the Commission, would produce the same kind of conflicts between judicial decisions and original administrative decisions which helped to make the *Dobson* rule so difficult to apply in the field of tax administration. Substantially the same question was presented to the Court with respect to the interpretation of the Interstate Commerce Act when it conferred upon the Interstate Commerce Commission powers comparable to those of the Federal Trade Commission, and was resolved against concurrent jurisdiction for substantially the same reasons as those suggested above. Texas & Pacific Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 441, 27 Sup. Ct. 350, 51 L. Ed. 553 (1907). There was, as a matter of fact, more statutory support for the notion of concurrent jurisdiction in the Interstate Commerce Act at the time of the *Abilene* case, than there is now in the Federal Trade Commission Act.

It might be suggested that there is already an element of concurrent jurisdiction insofar as the Federal Trade Commission treats unfair methods of competition as including violations of the Sherman Act, but even in this limited area, as Mr. Justice Black's opinion in the *Cement* case points out, the Federal Trade Commission is not concerned with exactly the same question as would be presented in a Sherman Act proceeding. 333 U.S. at 708-09. See Rahl, *Conspiracy and the Anti-trust Laws*, 44 ILL. L. REV. 743, 761-62 (1950).

69. Unfair labor practices are more specifically defined under the National Labor Relations Act, 29 U.S.C.A. §§ 151, 158 (Supp. 1949), than are unfair methods of competition under the Federal Trade Commission. Nevertheless, there is undoubtedly a body of principle with respect to such practices developed by the Board within the area of discretion left open to it. The recent decision of the Court in Colgate-Palmolive Peet Co. v. National Labor Relations Board, 70 Sup. Ct. 166 (1949), indicates, of course, one of the limits of such discretion.

tion insofar as the question is presented as to whether the particular weapon was indeed within the armory provided and whether there was a rational basis for the choice which the Administrator made.

All three aspects of the problem were dramatically illustrated in the now famous *Chenery* cases,[70] which presented for review an order of the Securities and Exchange Commission under the Public Utility Holding Company Act of 1935. The statute authorized the Commission to determine, in the first instance, whether a voluntary plan of reorganization submitted for the purposes of complying with the integration and simplification requirements of the statute, was "fair and equitable." [71] The statute also provided for the submission of such a plan "In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers. . . ." [72] Finally, the statute required the approval of the Commission for the issuance of securities pursuant to such a plan, such approval to be withheld if the Commission found that the issuance would be "detrimental to the public interest or the interest of investors or consumers" or would "result in an unfair or inequitable distribution of voting power." [73]

The *Chenery* case had its inception when the Commission refused to approve a proposed voluntary plan of reorganization unless securities purchased by the management while the plan was under consideration were denied participation, except to the extent of cash in the amount of the purchase price plus interest at 4%. This order the Court first refused to sustain on the ground that it apparently rested upon the Commission's interpretation and application of judicial decisions regarding the fiduciary obligations of the corporate management—decisions which the Court found inadequate to sustain the Commission's position.[74] Nevertheless, Mr. Justice Frankfurter, writing for the majority, was equally explicit in recognizing that "In evolving standards of fairness and equity, the Commission is not bound by settled judicial precedents"; and that "Congress certainly did not mean to preclude the formulation by the Commission of standards expressing a more sensitive regard for what is right and what is wrong than those prevalent at the time the Public Utility Holding Company Act of 1935 became law." [75] Upon remand of the proceeding the Commission reissued substantially the same order, but reformulated its opinion in terms of the particular standards and objectives of the Public Utility Hold-

70. Securities & Exchange Comm'n v. Chenery Corp., 318 U.S. 80, 63 Sup. Ct. 454, 87 L. Ed. 626 (1943); Securities & Exchange Comm'n v. Chenery Corp., 332 U.S. 194, 67 Sup. Ct. 1575, 91 L. Ed. 1995 (1947), 1 VAND. L. REV. 118.
71. Public Holding Company Act § 11(e), 15 U.S.C.A. § 79k(e) (1941).
72. *Ibid.*
73. *Id.* §§ 6, 7, 15 U.S.C.A. §§ 79f and 79g (1941).
74. Securities & Exchange Comm'n v. Chenery Corp., 318 U.S. 80, 63 Sup. Ct. 454, 87 L. Ed. 626 (1943).
75. 318 U.S. at 89.

ing Company Act and its own knowledge and experience gained in the administration of this and similar statutes. Upon review the Supreme Court this time sustained the Commission's action, Mr. Justice Jackson dissenting in an opinion in which Mr. Justice Frankfurter joined.[76]

The grounds upon which Mr. Justice Murphy rested the opinion of the Court are simple and plain enough. The Commission's conclusion rested "squarely in that area where administrative judgments are entitled to the greatest amount of weight by appellate courts." It was "the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts." It was, in short, "an allowable judgment which we cannot disturb." [77] To Mr. Justice Jackson, on the other hand, the Commission's action was "not conceivably a discharge of the Commission's duty to determine whether a proposed plan of reorganization would be 'fair and equitable.'" This was so because it had "nothing to do with the corporate structure, or the classes and amounts of stock, or voting rights or dividend preferences," that is, "the impersonal financial or legal factors of the plan." [78] Rather it was a "personal deprivation denying particular persons the right to continue to own their stock and to exercise its privileges." Neither was the order "one merely to regulate the future use of property." Instead, "It literally takes valuable property away from its lawful owners for the benefit of other private parties without full compensation. . . ." [79] For present purposes, the most significant distinction suggested by Mr. Justice Jackson is that between general regulations, applicable to future conduct, and individual orders issued after such conduct. The issuance of such a prior regulation would apparently have presented for Mr. Justice Jackson quite a different question, for he says:

76. Securities & Exchange Comm'n v. Chenery Corp. 332 U.S. 194, 67 Sup. Ct. 1575, 91 L. Ed. 1995 (1947).

77. 332 U.S. at 209.

78. *Id.* at 211. In suggesting that the Commission's determination did not fall within the scope of authority delegated to determine whether a plan is "fair and equitable" because it was concerned with the securities of particular people rather than impersonal classes of securities, Mr. Justice Jackson skates on extremely thin ice. Judicial determinations of whether a particular plan was fair and equitable have not infrequently distinguished between different claimants of the same general class on account of the way they had acquired their claims or conducted themselves in relation to the reorganization. *Cf.* Taylor v. Standard Gas & Electric Co., 306 U.S. 307, 59 Sup. Ct. 543, 83 L. Ed. 669 (1939); American Ins. Co. v. Avon Park, 311 U.S. 138, 61 Sup. Ct. 157, 85 L. Ed. 91 (1940); First National Bank of Herkimer v. Poland Union, 109 F.2d 54 (2d Cir. 1940). The Securities and Exchange Commission had relied upon such cases in its first opinion, which the Court had rejected as too legalistic. Mr. Justice Jackson's dissent suggests that the legalistic analysis was at least pertinent to the problem of the statutory limits on the Commission's discretion. With respect to that particular problem, the Court could hardly hold that the Commission's power to refuse to approve a plan as fair and equitable on account of the circumstances of its formulation was less than that traditionally exercised by a court of equity, without also throwing such questions open for independent examination by the court in the subsequent judicial proceedings, an alternative which the Court unanimously rejected in Securities and Exchange Comm'n v. Central Illinois Securities Corp., 69 Sup. Ct. 1377 (1949).

79. 332 U.S. at 211.

"Whether, as matter of policy, corporate managers during reorganization should be prohibited from buying or selling its stock, is not a question for us to decide. But it is for us to decide whether, so long as no law or regulation prohibits them from buying, their purchases may be forfeited, or not, in the discretion of the Commission." [80]

But was the distinction in the *Chenery* case between prospective and retrospective action really as simple as Mr. Justice Jackson apparently assumes? Technically at least, the Commission's order looked entirely to the future, first in refusing to allow the original plan to go into effect and then in approving the amended plan. The order did, of course, attach significance to past acts, but in this respect it did not differ from many types of administrative action which involve a large amount of administrative discretion and which also seriously limit private rights, hopes or expectations—the granting, renewal or revocation of licenses, for example. The ultimate issue was whether denial of the expectation of those who purchased securities without warning that they would be classified differently from other holders of the same securities, was reasonably in furtherance of those statutory objectives implied by the standards "fair and equitable" or "detrimental to the public interest and the interest of investors." The form and timing of the Commission's action was relevant in this connection—both insofar as it imposed individual hardship that might have been avoided and insofar as it amounted to locking the barn after the horse was stolen—but these were at most factors to be weighed in determining whether there was indeed a rational basis for the Commission's judgment.[81] However that ultimate question may be resolved, it seems clear that the standard of review which the court was called upon to apply was essentially the same whether the Commission proceeded to attack the problem by a series of individual orders in particular situations, or by the isuance of a general regulation to be subsequently applied to individual cases.

Entirely apart then from its controversial aspects, the *Chenery* cases illustrate how Congress may, for the purpose of effectuating a delegation of authority to implement broad statutory standards, provide an administrative agency with a choice of either the general regulation or particular order approach, or a combination of both. Whichever method the agency chooses, the same fundamental elements of administrative discretion are present, and the same fundamental standards of judicial review must be applied—whether the agency has acted within the scope of the delegation and whether there was a rational basis for the exercise of its judgment.[82] Similarly when the agency is

80. *Id.* at 216.

81. In this connection see Jaffe, *Administrative Findings or The Ameer in America*, 34 CORNELL L.Q. 473, 485-91 (1949); Notes, 62 HARV. L. REV. 478 (1949), 56 HARV. L. REV. 1002 (1943).

82. Another example of this problem of choice among alternative methods may be found in National Broadcasting Co. v. United States, 319 U.S. 190, 63 Sup. Ct. 997, 87 L. Ed. 1344 (1943), where the Court considered the validity of the chain

authorized to act only by individual order, whether it be an exemption order, as in *Gray v. Powell* or a cease-and-desist order under the Federal Trade Commission Act, the same area of discretion may be present and the same general standard of judicial review be applicable. This is not to say—as indeed the *Chenery* case well illustrates—that exactly the same factors press equally for consideration no matter which method is involved. Individual orders may be particularly susceptible to attack, either because they come without previous warning, or because they are inconsistent with other orders in comparable situations. General regulations on the other hand, may be vulnerable to the charge that they are too rigid and do not allow enough play for significant individual differences. But these are exactly the considerations which the Court must evaluate whenever it has to apply the rational-basis rule—trying as best it can to avoid both usurpation of administrative authority and abnegation of judicial responsibility.

III

If the foregoing analysis is sound, it becomes readily apparent that the provisions of the Administrative Procedure Act would, at the most, require a restatement of the principle under discussion. In this connection particular emphasis has been placed upon the opening sentence of section 10(e) of the Act which reads: "So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions and determine the meaning or applicability of the terms of any agency action." [83] To the extent that the rational-basis rule means only that when two conflicting interpretations of a statutory provision are permissible under the language and relevant legislative history, the court will

broadcasting regulations promulgated by the Federal Communications Commission. The Commission, in effect, established the rules for its own guidance in granting, renewing and revoking licenses. How such regulations would fit into the Administrative Procedure Act is also a nice question. As an original proposition, it would have seemed to me that they were general "statements of policy" within the meaning of, and therefor explicitly excepted from, section 4 of the Act, but in the light of the decision of the Court in Columbia Broadcasting System v. United States, 316 U.S. 407, 62 Sup. Ct. 1194, 86 L. Ed. 1563 (1942), holding them subject to review in advance of specific application, the opposite result is indicated. But it is even more surprising that the Court held in the *National Broadcasting Co.* case that the validity of the regulations must be determined on the record of the Commission's hearing. This seems unsound because there was nothing in the Federal Communications Act or any other applicable principle of law requiring the Commission to hold a hearing before issuing the regulations; the hearing was a discretionary procedure adopted by the Commission for its own guidance. Similarly the type of hearing now provided for in Section 4 of the Administrative Procedure Act is not intended to provide the basis for judicial review of the validity of regulations, any more than congressional committee hearings provide the record for judicial review of the validity of legislation, even though matter presented at such hearings may be relevant to the determination of validity. The decisions cited by Mr. Justice Frankfurter on this point in the *National Broadcasting Co.* case (319 U.S. at 227) are inapposite because they involved judicial review of orders before the issuance of which an administrative hearing was required.

83. 60 STAT. 243 (1946), 5 U.S.C.A. § 1009(e) (Supp. 1949).

give decisive weight to a rational administrative judgment as to which interpretation will best effectuate the statutory objectives, there is no conflict at all with the quoted language of the Act. Despite the decisive weight given to the administrative judgment with respect to evaluation of practical consequences, the court itself, under this view, takes full responsibility for the ultimate determination with respect to the meaning of the statute. From the broader standpoint of statutory interpretation in general, the significance of such reliance upon administrative judgment lies in finding another avenue of escape from the futility of a metaphysical search for a nonexistent legislative intent. When language is ambiguous and legislative history fragmentary and inconclusive, an administrative judgment based upon a reasoned examination of the problem in the light of both the particular facts and the broad statutory objectives is likely to provide the most reliable guide to the effectuation of those objectives. If acceptance of this judgment must be reconciled with a theory of legislative intention, it might be said that the legislature presumably intended the statute to achieve its apparent objectives to the fullest extent practicable within the limits clearly defined, and that the best judges of practicability are those to whom is entrusted the primary responsibility for administration.[84]

But, as has been suggested, the rational-basis rule of judicial review has a more distinctive function to perform in recognition of an administrative judgment which is essentially legislative or discretionary in character. When administrative action involves the exercise of delegated authority to implement broad statutory standards, whether by general regnlation as in the *Addison* case, or by specific order, as in *Gray v. Powell,* the area of administrative judgment is no more aptly described as statutory interpretation, than a similar exercise of judgment in the grant or denial of a license or the establishment of a reasonable rate for the future.[85] Such an exercise of judgment is hardly a determination of law within the meaning of the Administrative Procedure Act; and even if it were, it would clearly be within the scope of the exception provided in the introductory clause of section 10 for "agency action

84. Mr. Justice Frankfurter has recently objected to the use of the term "legislative intent." Frankfurter, *Some Reflections on the Reading of Statutes,* 47 COL. L. REV. 526, 538-39 (1947). But the analysis suggested fits as well into his formulation: "Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government. . . . That is what the judge must seek and effectuate. . . ."

85. It may be suggested that administrative action in applying broad statutory terms to particular situations is essentially no different from judicial action in the application of broad statutes, such as the anti-trust laws, for example. This only emphasizes that there is an element of legislation in judicial action but it does not mean that the legislature when it delegates some of its power to administrative authorities as distinguished from courts thereby invests the delegated power with all the attributes of the judicial function. This is well illustrated by comparing the modern functions of public utility commissions in determining the reasonableness of rates, either for the past or for the future, with judicial enforcement of the traditional common law obligation of public utilities to charge reasonable rates.

. . . by law committed to agency discretion." [86] There is, of course, always an underlying question of statutory interpretation with respect to whether, and how much, discretion has in fact been delegated. That underlying question can only be determined in the future, as in the past, by painstaking examination of the particular legislation, using all the available guides to meaning, including the administrative judgment as to the practical consequences involved. To those inclined to fear that acceptance of this view might lead to unbecoming judicial abdication, it may be some comfort to note that even those Justices who have been most insistent upon the rational-basis rule have never been at a loss for methods of correction when the Administrator has, in their view, strayed from the path of reason or beyond the bounds of his authority.

86. The exact language is: "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion." I can find nothing in the legislative history to suggest that this exception does not mean what it says. Mr. Dickinson appears to find such evidence in the fact that the proviso included in the draft bill prepared by the minority of the Acheson committee was not embodied in the Act—to wit: "Provided, however, that upon such review due weight shall be accorded the experience, technical competence, specialized knowledge, and legislative policy of the agency involved, as well as the discretionary authority conferred upon it." Dickinson, *supra* note 8 at 585-86. Mr. Dickinson overlooks the fact that the suggestions prepared by the minority of the Acheson committee called for review of "findings, inferences, or conclusions of fact." The specific inclusion of "inferences" made the qualification with respect to technical competence particularly appropriate. See REP. ATT'Y GEN. COMM. AD. PROC. 246-47 (1947). The separate statement of the views of the minority members leaves no doubt that they were interested in spelling out their conception of the substantial evidence rule, so as to assure a real review of the facts as distinguished from the law, by including specifically subordinate inferences of fact, as well as ultimate findings, qualified however, by appropriate respect for experience, technical competence and specialized knowledge. See *Id.* at 211. The attempt to spell all this out was finally abandoned, except for inclusion of the reference to "the whole record."