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ADMINISTRATIVE LAW PROBLEMS IN THE UNEMPLOYMENT INSURANCE PROGRAM

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"A good government," Albert Einstein said recently, "not only gives its citizens a maximum amount of liberty and political rights but also provides for a certain amount of economic security."[1] Our Constitution provides for political rights and liberties but not for economic security. Unlike foreign federal constitutions it neither provides for it directly nor delegates social legislation to the states; nor does the Constitution expressly prohibit this type of law. As, however, the Constitution authorizes the states to exercise powers not reserved to the central government,[2] it may be deduced that unemployment relief legislation is within the competence of the states, at least if it stays within the confines of other provisions limiting state power, such as the Contract Clause of Article I, Section 10, and the Fourteenth Amendment.[3] Inasmuch as these limitations, however, do not appear to be relevant for our discussion it can be stated plainly that the states have legislative jurisdiction pertinent to unemployment compensation.

Yet many of the states either cannot or do not want to act on matters of social welfare. The reasons for this inertia have been exposed convincingly by Senator Neuberger[4] and need not be explored here. Suffice it to say that what is true now was true in the 1930's: some of the states had workable unemployment relief laws but many others approached the problem feebly and reluctantly. It was, as is so often the case, the Federal Government to whom everybody looked.[5]

The Congress might have tried to enact a federal unemployment compensation law. No doubt, a federal workmen's compensation statute could be enacted today,[6] and one might be inclined to hold

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1. N.Y. Times, Dec. 12, 1954, §1, p. 34, col. 1.
2. U.S. CONST. AMEND. X.
3. The procedural impact, if any, of the Fourteenth Amendment is discussed *infra*, pp. 444-45.
4. Neuberger, *The Decay of State Governments*, 207 HARPER'S MAGAZINE 34 (Oct. 1953).
5. For a good survey of the history of American unemployment compensation see Witte, *Development of Unemployment Compensation*, 55 YALE L.J. 21 (1945); RIESENFELD AND MAXWELL, MODERN SOCIAL LEGISLATION 461-65 (1950). See also Larson and Murray, *The Development of Unemployment Insurance in the United States*, *supra* p. 181.
6. See the discussions in Miller, *The Quest for a Federal Workmen's Compensation Law for Railroad Employees*, 18 LAW & CONTEMP. PROB. 188 (1953); Parker, *FELA or Uniform Compensation for All Workers?*, 18 *id.* at 208.

likewise in favor of a federal unemployment law. Yet, despite a present-day tendency of the Supreme Court to leave it to Congress to determine for itself what is within the federal orbit,[7] doubts cannot be completely dispelled. Can the regulation of payments for unemployed be classified as a regulation of "commerce" by any stretch of the imagination? Wages, hours, prohibition or limitation of child labor or home work, collective bargaining, the insistence on peaceful labor relations, the regulation even of industrial safety and accidents—all these things do affect production and sale and hence the commerce of the nation. Measures to *prevent* unemployment would be "commerce" to be sure. But to put on organized relief, under whatever name, those already unemployed has a rather remote relation to any customary meaning of this word and the tenuousness of the connection between unemployment relief and commerce would not be appreciably eliminated by the fact that unemployment agencies also endeavor to find new jobs for the people on the rolls.

Furthermore, aside from these constitutional considerations, there could be raised the policy argument that such a law, restricted to relations "affecting," at least, interstate or foreign commerce, would not give the necessary relief to those whose work or unemployment does not so affect commerce. While the scope of the Commerce Clause, and hence of the agency applying it, has at times been construed very broadly,[8] at other and more recent times the law-enforcing agency has been held to have authority to restrict its own "jurisdiction" to very narrow confines.[9] This authority, if similarly conceded to a federal unemployment compensation board, would make the uniform federal law something less than desirable. Whole segments of the population could be reduced to poverty if our hypothetical administrator should find it inexpedient in "effectuating the policy of the act" to pay compensation to certain groups of unemployed workers.

No further discussion of these arguments in favor of or against both the constitutionality and desirability of a federal law need be made, because no such general law exists or has been seriously proposed at this time. Instead of enacting and administering a federal law or of leaving the matter completely to the states, our constitutional wis-

7. For a dramatic narration of this development see Stern, *The Commerce Clause and the National Economy 1933-46*, 59 HARV. L. REV. 645, 946 (1946).

8. *E.g.*, Kirschbaum Co. v. Walling, 316 U.S. 517 (1942) (janitor of building whose tenants were engaged in interstate commerce held subject to federal Wage and Hour Law); NLRB v. Baltimore Transit Co., 140 F.2d 51 (4th Cir. 1944), *cert. denied*, 321 U.S. 795 (1944) (local streetcar line employees).

9. NLRB v. Denver Building & Construction Trades Council, 341 U.S. 675, 684 (1951); Haleston Drug Stores v. NLRB, 187 F.2d 418 (9th Cir. 1951); NLRB Press Releases of July 1 and 14, 1954, 23 U.S.L. WEEK 1008, 2042 (1954); PARKER, ADMINISTRATIVE LAW 263 (1952).

dom has found a solution that accomplishes the desirable uniformity of a federal law and avoids limitations that might arise from the Commerce Clause: the technique of a grant-in-aid statute.

Briefly, our federal law provides that every employer, as defined and delineated in the law, must pay a federal unemployment tax, which is administered and collected by the Bureau of Internal Revenue. Each state then gets a share of this revenue if the state complies with certain minimum conditions, which fact must be certified by the Secretary of Labor.[10] The proper use by the states of the money collected by the Federal Government is assured by a procedure under which the Secretary of Labor, after notice and opportunity for hearing to the respective state agency, is authorized to stop further payment to the state.[11]

This form of federal lawmaking has been upheld as constitutional. In a decision destined to become a landmark in American constitutional history, Justice Cardozo for the majority of the Court ruled that the Social Security Act of 1935, including its provisions pertaining to the administration of the unemployment tax, was valid. The conditional grant-in-aid is a valid exercise of the federal "power to lay and collect taxes" and it violates neither the Fifth nor the Tenth Amendment.[12]

Federally assured unemployment compensation is here to stay. This, however, does not mean that we have a federal unemployment compensation law. Unlike, say, the Federal Employers' Liability Act,[13] which is a federal statute enacted under the Commerce Clause and providing for federal law in regard to injuries of railroad workers, the Social Security Act and the Internal Revenue Code did not create a federal, substantive, unemployment relief law. The FELA may be enforced in a state court;[14] but in adjudging rights and duties under that law, the courts apply federal law, and the Supreme Court has seen to it that there has been uniformity of interpretation of at least the more important questions of the law.[15] Not so in our field of dis-

10. INT. REV. CODE OF 1954 §§ 3301-3308 (the Federal Unemployment Tax Act); Social Security Act, c. 3, 42 U.S.C.A. §§ 501-503 (1952). The wisdom of dividing the federal administrative authorities created by these two statutes among the Treasury, Labor, and Health, Education and Welfare Departments can be doubted.

11. INT REV. CODE OF 1954 §§ 3303-3305; 42 U.S.C.A. §§ 502, 503 (1952).

12. Steward Machine Co. v. Davis, 301 U.S. 548 (1937)

13. 35 STAT. 65 (1908), as amended, 36 STAT. 291 (1910), 53 STAT. 1404 (1939), 45 U.S.C.A. §§ 51-60 (1954).

14. Notwithstanding the fact that its provisions may be enforced in the federal district courts. 45 U.S.C.A. § 56 (1954).

15. See Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359, 37 CORNELL L.Q. 799 (1952); Ennis, *An Analysis of Judicial Interpretation and Application of Certain Aspects of the Federal Employers' Liability Act*, 18 LAW & CONTEMP. PROB. 350 (1953); Richter and Forer, *Federal Employers' Liability Act*, 12 F.R.D. 13 (1952).

cussion. The federal statute does not delegate enforcement of unemployment relief to state authorities, judicial or administrative, which then would be confronted with the task of applying federal and not state law, wherefore uniformity could be insisted upon as matter of (federal) law. Rather, the unemployment laws that are on the federal statute books are mere *Rahmengesetze,* as the Germans call it—"frame laws" which the states may fill in, not with mere administrative detail intended to concretize already existing law, but indeed both to *make and* concretize the general norms necessary to carry out an unemployment relief program. In short, the states are *the makers* of the necessary statutes *as well as the enforcers* of the statutes. No "federal question" in our accustomed sense authorizing individuals to seek redress in court under federal law arises. If a state chooses to enact no law providing for unemployment compensation, then there is no unemployment compensation in that state and the national government has no legal means to do anything about it. This situation, needless to say, is not very likely to occur because in such a case the employers would nevertheless be forced to pay the federal unemployment tax.[16] Political pressure would certainly see to the enactment of the necessary statute. The federal law leaves to the states the political choice to have or not to have federal unemployment relief, and the choice has been made in the affirmative in every American jurisdiction.

If a state does comply with the federal act, it is the statutory duty of the Secretary of Labor to so certify and, upon his certification, of the Secretary of the Treasury to make the necessary funds available to the state.[17] These federal agencies are vested with no political discretion that would authorize them to withhold funds despite state compliance. In the unlikely case that a state does not wish to avail itself of the federal funds, no funds will be alloted to it and no further federal administrative measures need to be taken.

If, however, the state merely purports to, but does not actually comply with every one of the conditions laid down in the law,[18] the Secretary of Labor must notify the state that payments from the federal offices will no longer be forthcoming until the state changes its ways. Such a decision of the Secretary of Labor must be preceded

16. INT. REV. CODE OF 1954 §§ 3301, 3306 levies the unemployment tax on "every employer" who (after December 31, 1954) employs more than three persons, without regard to whether his state has an unemployment compensation law. This was upheld in Steward Machine Co. v. Davis, 301 U.S. 548 (1937).

17. INT. REV. CODE OF 1954 § 3304; Social Security Act, 42 U.S.C.A. § 503 (1952).

18. Such as INT. REV. CODE OF 1954 §§ 3303-3305; Social Security Act, 42 U.S.C.A. §§ 502, 503 (1952).

by "reasonable notice and an opportunity for hearing the State agency . . . ."[19] No further procedural safeguard is set forth in the act. Particularly, the making of the Labor Secretary's administrative decision is probably not subject to the procedure of the Administrative Procedure Act, because the adjudicatory procedure of that act is restricted to cases "required by statute to be determined on the record after opportunity for an agency hearing."[20] The statute (the Social Security Act) on the other hand, requires opportunity for hearing, but it does not require that the decision be made upon the record, *i.e.*, the record of the hearing.[21] As a matter of fact, no record need be kept at all, so far as the Social Security Act goes.[22] The procedure that the Department of Labor actually follows is apparently quite informal and in any event not set forth in the Code of Federal Regulations.[23]

It may be added that the Social Security Act neither provides for nor excludes judicial review of the Secretary's decision adverse to the state involved. From the silence of the law it could be deduced that judicial review is available, an argument that could be fortified by a reference to Section 10 of the Administrative Procedure Act.[24] Despite the fact that the APA's hearing provisions might not be applicable here, as has been indicated above, the APA as such is, at least by its general language. Section 2 includes in its purview any "agency" not specifically excluded and I can see no part of or amendment to the APA that would specifically exclude the Secretary of Labor or state-federal relation procedures. Thus one could interpret the law so as to reach without particular strain the result that a state agency against which the Secretary of Labor has reached an adverse decision may seek judicial review. But, as Professor Davis aptly demonstrated, statutes do not necessarily mean what they say.[25]

19. 42 U.S.C.A. § 503 (b) (1952).
20. Administrative Procedure Act §5, first sentence.
21. For a discussion of this type of hearing in general see ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 41-43 (1947); DAVIS, ADMINISTRATIVE LAW 413, 425-29 (1951); PARKER, ADMINISTRATIVE LAW 207-92, 215-16, 221, 231 (1952).
22. The absence of judicial review provisions, see *infra* at notes 24-28, strengthens the argument that the federal decision is not one to be made upon the record. See the literature cited *supra* note 21.
23. A letter of the Department of Labor assured me of the informality of this procedure if any should ever be entertained. The failure to have and publish procedural rules on this matter contrary to APA § 3 and the Federal Register Act, 49 STAT. 500 (1935), 44 U.S.C.A. § 301 (1954 Supp.), has remained unexplained. For a good analysis of the present method of publishing regulations, see Newman, *Government and Ignorance*, 63 HARV. L. REV. 929 (1950).
24. APA § 10 purports to recognize judicial review except if precluded by statute or if involving a matter committed to agency discretion. But see Davis, *Unreviewable Administrative Action*, 15 F.R.D. 411 (1954), where it is demonstrated convincingly that the statute cannot strictly be interpreted to mean what it says.
25. Davis, *supra* note 24, at 433.

After all, it seems to have never been doubted that the President—certainly a governmental authority who is neither the Congress nor a court[26]—is not an "agency" despite the definition of Section 2.[27] And there are several reasons why a decision denying further unemployment funds to a state might be regarded as so "final" as to preclude court review.[28] Be all this as it may, no decision of any court ever seems to have dealt with this problem by either allowing or rejecting judicial review.

In any event, however, one thing is clear: in whatever mode the federal-state relationship is worked out and however strictly or leniently the federal supervisory authority is exercised, as far as the individual claimant is concerned the law that governs his unemployment compensation claim is state law and not federal law. So far as he is concerned, no "federal question" arises. The FELA, to allude once more to the above-mentioned example, makes it mandatory that certain of its phases be construed not merely uniformly but indeed in accordance with federal law as laid down by the Supreme Court; and if a state through its courts disobeys this mandate, the individual concerned may address himself to the Federal Government, that is, to the Supreme Court.[29] Now the Social Security Act, too, must be administered in accordance with certain federally prescribed principles, as we have seen; but if this mandate is violated by a state through its administrative agencies or judicial review courts, the individual has no further legal redress. He may "inform" the Department of Labor or of Health, Education, and Welfare, but this has no more legal effect than to write one's congressman. The Federal Government may or may not act upon the individual's petition;[30] and if it does, the ensuing state-federal administrative procedure conducted by the Department of Labor does not give individuals standing to partake nor will its outcome affect their rights as already adjudicated by the state.[31]

Thus, aside from federal territories and districts, we have forty-eight

26. APA § 2(a) declares that the Act is applicable—at least some of its provisions—to "each authority . . . of the Government . . . other than Congress, the courts or the governments of the possessions" etc.

27. PARKER, ADMINISTRATIVE LAW 71 (1952).

28. Arguments against judicial review could center around the Federal Government's sovereign position: in making grants and giving aid it need not subject itself to the control of the judiciary. Compare the situation under the Renegotiation Acts, 50 U.S.C.A. Appendix §§ 1191 (e) (11), 1193(e), 1218(b) (1951) where, however, court review is *verbatim* excluded.

29. See note 15, *supra*.

30. One of the statutorily ordained reasons for intervention by the Secretary of Labor is "a denial, in substantial number of cases, of unemployment compensation to individuals entitled thereto under such [*i.e.* the state's] law." 42 U.S.C.A. § 503 (b) (1) (1952).

31. The absence of published procedural regulation, see note 23 *supra*, adds weight to the proposition that individuals have no procedural standing in the Labor Department's hearing against a state, if ever one should take place.

state laws applied and enforced by the states and, as far as employers and employees are concerned, *only by the states.* This does not mean that the law of unemployment compensation is not fairly uniform throughout the nation.[32] It is, very much so, which obviously indicates that the peculiar way of federal supervision by the grant-in-aid method has proved efficacious. The legal situation does mean, however, that we do not here deal with one body of federal administrative law, but rather with forty-eight state administrative agencies of different composition and power.

The federal law requires that the agency be manned by personnel appointed on a merit basis (but it makes it clear that the Federal Government must not otherwise exercise authority in regard to the selection, tenure, and compensation of the individual state officials); that the agency's "method of administration" be "reasonably calculated" to insure full unemployment compensation when due to a claimant; and that these payments be made solely through the state's public (or other federally approved) agencies.[33] A further provision of the Social Security Act decrees that there must be an "opportunity for a fair hearing" to claimants,[34] which we shall treat later.

Thus we have a divergent system of administration of the same social principle, which is effectuated through the same federal tax. Such a multifarious way of law enforcement may be wasteful, but it is apparently inevitable in a federal system of government.

For a rough survey of these administrative organizations suffice it to note that in all the American jurisdictions the claims for unemployment "compensation"—a psychologically understandable, well-meant euphemism for what actually is not compensation at all, but relief, plain and simple, albeit on an organized level somewhat above that of the soup kitchen of Dickens's days—are to be commenced in the public employment offices of the states or in the local federal offices in the case of territories, possessions and the District of Columbia. A completely informal investigative procedure then takes place with no notice or hearing to all possible parties required. A simple determination whether the claimant is covered by the law and whether he has a right to receive compensation, as well as the amount of his claim, is usually made by the deputy administrator of the agency, who will refer the matter to higher authority if a dispute or a more complex

32. Uniformity of construction has been held to be a governing principle. Arnold College v. Danaher, 131 Conn. 503, 41 A.2d 89 (1945). *But cf.* Unemployment Comp. Comm'n v. National Life Ins. Co., 219 N.C. 576, 14 S.E.2d 689 (1941) (state legislature not required to conform to "national ideology" in every respect).

33. 42 U.S.C.A. § 503(a) (1) and (2) (1952).

34. *Id.* § 503 (a) (3).

question is involved.[35] In this case, or if the claimant or anybody else who has standing as a party to seek review[36] is dissatisfied, the case goes to what is usually called the appeal board, which may be conceived as the center of administrative lawmaking from a lawyer's point of view, in that it is typically the organization to which the federal mandate respecting a "fair hearing" is directed. It exists to assure the aggrieved party "a fair, simple, non-legalistic hearing before an impartial, sympathetic, non-legalistic tribunal."[37] Against the decisions of this body there lies now in most of the jurisdictions a second, final administrative appeal to a second appeal body. Not everywhere, however, is this second appeal recognized as an unqualified right. And in some of these jurisdictions the deputy commissioner has the same right to a second appeal. The scope of this right to a second appeal is not alike everywhere. In many states it exists only under certain conditions, *e.g.,* if decision of the (first) appeal body was not unanimous, and it is of course open to the deputy commissioner only if he was overruled by the appeal board below.[38]

This second, final administrative appeal board is either an independent review body usually consisting of three members or, in some states, the agency itself. Like the first appeal body, it may affirm, modify, remand or set aside the decision. Its proceedings again are characterized by a great degree of informality.[39]

Against final decisions of the administrative appeal board, or of the second appeal authority if the law provides for one, there exists everywhere judicial review in the appropriate state court. Perchance the federal district court may be the review tribunal if there is a diversity of citizenship, but this will rarely occur in view of the three thousand dollar requirement. Even if the federal court can be appealed to, however, it must apply the state law, as a vicarious state tribunal so to speak, and no federal principle comes into play.

We shall briefly investigate the various typical administrative-legal problems that may arise in connection with the above-sketched procedure leading to a grant or denial of unemployment compensation. This procedure is no longer a purely investigatory one such as would be entertained to find out whether a given "pauper" is worthy to

35. As gleaned from the statutes; Department of Labor and (former) Federal Security Agency bulletins and tables comparing the state laws and procedures; correspondence with the Department of Labor; Silverstone, *The Administration of Unemployment Compensation,* 55 YALE L.J. 205 (1945).

36. It is doubtful whether a wife or other dependent could seek party standing in her own right.

37. Silverstone, *supra* note 35, at 209.

38. See note 35 *supra.*

39. FED. SECURITY AGENCY, PRINCIPLES UNDERLYING BENEFIT APPEAL PROCEDURES (1947).

receive some food, clothes, or cash. If unemployment compensation is to be conceived as a part of a social security system, this must mean that discretion in the official who administers the benefits must be confined to reasonably narrow limits. The payment of "relief" is not anymore a gratuity bestowed by a benevolent government to meet an emergency but rather an act of complying with statutory duty, pursuant to ascertainable, pre-determined legal standards. Unemployment compensation claims procedure—though not all of its phases—can thus be termed a "quasi-judicial" procedure. It is governed by procedural due process of law.

The right that claims be determined by standards of due process is embodied in the federal frame-law: "Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for employment compensation are denied."[40] This requirement of a fair opportunity to be heard may be equated with a requirement of due process.

We may ask ourselves whether this due-process requirement is a constitutional must—whether a state that gives a person whose claim is denied something less than a fair opportunity to be heard thereby violates the Fourteenth Amendment. No doubt, the answer must be in the negative. The Federal Government is free to change the law so as to cancel all grant-in-aid. The states are free not to accept the aid and in so rejecting federal aid either have no unemployment relief laws at all or laws that apply lower substantive and procedural standards than required under the Social Security Act. In short, the state could grant unemployment compensation on such terms as it sees fit, notwithstanding the fact that in falling below the federally prescribed standards it would lose the federal aid. The federal law, as a condition of the grant, must be made part of the state statute; but if that condition is broken, no right to complain arises in favor of the claimant. The Secretary of Labor's means of enforcing the condition of the federal aid inures to the claimants' benefit only economically—in that the national government thereby sees to it that its policy be carried out—but not procedurally, so as to give them standing in court or agency.

It is true, at the present time the federal constitutional law including the due-process mandate is on the state statute books everywhere. It could be argued, therefore, that once the "fair opportunity" clause is a provision in the pertinent statute, it has thereby become a right whose violation would contravene the Due Process Clause of the Constitution. This, however, does not seem to be the law at this stage of our consti-

40. 42 U.S.C.A. § 503 (a) (3) (1952).

tutional history. Unquestionably the statute must be administered so as not to violate the Equal Protection Clause[41] and possibly other provisions of the Constitution; but as to the due process protection of Amendment XIV, the trend is not to conceive as protecting "life, liberty or property" those procedural rights which, merely created by statute, need not exist at all.[42]

On the other hand, it could be argued that the unemployment laws, federally supervised as they are, have become so integrated in our social system that their benefits can be regarded as vested rights to be denied only upon due process of law. This line of reasoning would be in analogy to—and not essentially weaker than many an analogy the courts have drawn—our constitutional holding that while we are not compelled to let any immigrants enter the United States, yet if we do, we may deprive them of the right to reside here only in accordance with the principle of due process of law.[43] But rulings of this kind are based on federal law. Unemployment compensation, though federally inspired, is grounded in state law.

At any rate, the law as it is at this time can be summarized as follows: (1) The "opportunity for a fair hearing" clause is in the state laws by federal mandate; (2) the federal mandate is enforced in a way not accessible to the individual parties to unemployment compensation procedures; (3) yet the fair hearing requirement is in fact common to all the state statutes; and (4) though its enforcement is left to the states and their administrative and judicial agencies, the preferable opinion, based on statutory construction rules applying to uniform laws in general and greatly strengthened in particular by the common federal source of the laws, holds that these laws, including the fair hearing requirement, be interpreted uniformly.[44]

Thus, even without constitutional necessity, the various unemployment compensation laws do provide for what we can safely classify as due process. In investigating this phase of our social law, we be-

41. AMEND. XIV, § 1, last clause.

42. *E.g.*, United States v. Nugent, 346 U.S. 1 (1953) (no due process necessary to investigate draftee's conscientious objector status); U.S. *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950) (exclusion of nonresident alien without due process of law); Hobby v. Hodges, 215 F.2d 745, 758 (10th Cir. 1954) ("It is for Congress alone to say how the rights which it creates shall be enforced . . . . It may withhold all remedy. . . ."); Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676 (9th Cir. 1949), *cert. denied*, 338 U.S. 860 (1949) (statutory requirement of "due process" to precede enactment of regulation not a constitutional requirement); Spokane Hotel Co. v. Younger, 113 Wash. 359, 194 Pac. 595 (1920) (semble). According to the State Department practice, a passport may be refused without due process. See Parker, *The Right to Go Abroad: To Have and to Hold a Passport*, 40 VA. L. REV. 853 (1954).

43. Wong Yang Sung v. McGrath, 339 U.S. 33, as modified, 339 U.S. 908 (1950); Japanese Immigrant Case, 189 U.S. 86 (1903).

44. Arnolds College v. Danaher, 131 Conn. 503, 41 A.2d 89 (1945).

come immediately aware of the scarcity of litigation on this point.[45] This may be ascribed to a variety of causes, the chief of which is probably the fact that unemployed persons have no money to go to court, and since under our system of procedure the losing party generally need not reimburse the winner for his attorney's fee, it is often hard for such party to find a lawyer who is willing to undertake judicial review litigation where even if he wins he must seek his compensation from whatever the unemployed will recover. Other factors are: the great simplicity and informality of the average compensation hearing which unlike its distant relative in administrative and welfare law, workmen's compensaton, is not "deceptively simple" and yet "litigiously prolific";[46] the smallness of the sum involved, which may often give rise to the classical American exclamation, "forget about it!"; the fact that fate and occasional wars and quasi-wars have saved us from another depression, so that unemployment compensation claims, quite unlike many workmen's compensation claims, are now usually of an ephemeral importance to the claimant; and finally, again in view of the relative smallness of the amounts, the parties will be reluctant to litigate a mere procedural issue such as due process. A victim of an accident may well find it worth his while to exhaust every procedural possibility to convince a tribunal that his accident arose in the course of and out of his work, so as to entitle him to what may be a lifetime annuity. Hence, there is hardly a National Reporter without a number of workmen's compensation cases, but several months may easily elapse between the report of two unemployment compensation cases.

We have already gleaned from the grant-in-aid statute and the laws enacted thereunder that the claimant must be given a "hearing" before his claim is ultimately denied. In itself, this may not mean that the "hearing" must be oral. According to a widely accepted belief —a myth, unless witnesses are to be examined—there can be no due process without such a hearing. The Supreme Court has not squarely decided the matter in general, although the *WJR* decision ruled that at least not in every situation of administrative or even judicial procedure the "hearing" must be by word of mouth.[47] Unemployed claimants, however, usually have no money to have briefs and replies written on their behalf. It could therefore be convincingly asserted

45. This may in turn serve as an explanation for the paucity of cases documenting this study.

46. Cardillo v. Liberty Mut. Ins. Co., 330 U.S. 469, 479 (1947).

47. Federal Communications Comm'n v. WJR, The Goodwill Station, 337 U.S. 265, 274, 277 (1949). And see Albanese v. United States, 75 Sup. Ct. 211 (1954) ("I would not be helped by oral repetition of the respective contentions"); NLRB v. Clausen, 188 F.2d 439 (3d Cir. 1951), *cert. denied*, 342 U.S. 868 (1951); GELLHORN AND BYSE, ADMINISTRATIVE LAW 1107-09 (1954).

that whatever the law on the adequacy of written proceedings might be otherwise, such proceedings would not be "fair" so far as unemployed claimants are concerned. Be this as it may, the laws all do provide for oral hearings as a result of administrative appeal, that is, before the appeal board, and where provided for, also before the second appellate tribunal.[48]

Any hearing to be "fair" must be preceded by adequate, that is timely, notice. From the nature of the issue essentially involved it seems to follow that no noteworthy disputes in the unemployment compensation have arisen on this point or on the related one whether and to what extent the notice must describe with particularity the subject matter of the hearing.[49]

The tribunal before which the hearing is to be had, must be "impartial." So much and no more does the law require. There need be no separation of functions between the organ that prosecutes the charges (*e.g.*, charges which if found true would terminate the receipt of further compensation) or resists the claim on the one hand and the one who decides on the other. The complex provisions and procedural safeguards of Sections 5, 7 and 8 of the Federal Administrative Procedure Act do not apply. Similar provisions of state administrative procedure acts, however, could be applicable if the state so legislates. Actually, the few existing state administrative procedure acts do not usually provide in the federal manner for independent trial examiners and separation of functions within an agency; nor does the Model State Administrative Procedure Act, whose Section 10 merely stipulates that, if the majority of the agency officials who are to make the final decision have not "heard or read" the evidence, any adverse decision shall be preceded by a proposed decision to be served on the party with opportunity for exceptions.[50] Only Indiana makes the separation of function of "prosecution" and adjudication mandatory.[51]

48. Four jurisdictions have only one administrative appeal. See note 35, *supra*.

49. For a general discussion see DAVIS, ADMINISTRATIVE LAW 278 (1951) ("The most important characteristic of pleadings in the administrative process is their unimportance"); GELLHORN AND BYSE. ADMINISTRATIVE LAW 722-897 (1954); PARKER. ADMINISTRATIVE LAW 45-48, 216-19 (1952). Administrative Procedure Act § 5 (a) requires timely notice of the time, place and nature of a quasi-judicial hearing as well as of legal authority, jurisdiction, and matters of fact and law asserted. For the most recent administrative procedure act see §§ 10, 11 of the Massachusetts Act of June 10, 1954, Gen. Laws c. 30 A. Its list of exemptions does not include the unemployment compensation agencies. *Id.* § 1 (2).

50. For surveys of state administrative procedure acts and the Model Act, see Harris, *Administrative Practice and Procedure: Comparative State Legislation*, 6 OKLA. L. REV. 29 (1953) (very good compilation); Schwartz, *The Model State Administrative Procedure Act—Analysis and Critique*, 7 RUTGERS L. REV. 431 (1953); Note, 4 ADM. L. BULL. 131 (1952).

51. IND. STAT. ANN. § 63-3020 (Burns 1951). The payment of unemployment

Aside from statutory refinement, "impartial" has merely the old-fashioned meaning of "unbiased" and "not interested in the outcome of the dispute." The agency itself may very well be the hearing tribunal.[52] This is no longer subject to any doubt, even though the agency may be "interested" in the outcome in that it is the organization which administers the funds in which the petitioner claims a share. But this interest is not a personal, pecuniary one. It is simply the result of the fact that public officials are charged with and hence "interested" in the proper execution of the law. In short, an agency and its officials are no more "interested" in the enforcement of unemployment law than a criminal court in the prevention of crimes.[53]

It must be observed, moreover, that the fair hearing opportunity before an impartial tribunal is preserved if it is given but once—in our field of study usually before the appellate body.[54] It is not, and need not be, present in the initial stage which, as we pointed out above, simply consists in checking the petitioner's claim and rendering an informal decision. The decision may be adverse even though it is not preceded by a due-process hearing. This latter kind of hearing takes place before the appellate body and unless a second appeal is possible, as a matter of theory, at least, the constitutional due-process requirement, where it exists, will be satisfied even if no fair hearing at all takes place administratively, but merely a court review *de novo* instead.[55]

The right to be represented by counsel exists apparently everywhere, but actually only a small fraction of the cases are tried by lawyers.[56] Due process may in a given situation require that a party be advised as to his rights to be represented by counsel or indeed that counsel be appointed for him, as where the party cannot speak English.[57] Investigation discloses no case along these lines in the unemployment compensation field, and the problem lacks the importance it may have in, say, deportation proceedings.

An irksome problem in every kind of administrative procedure is

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benefits is expressly included in the adjudication provisions of the act. *Id.* § 63-3002.

52. *E.g.,* Idaho Mut. Ben. Ass'n v. Robison, 65 Idaho 793, 154 P.2d 156 (1944). In Connecticut the Commissioner is the (only) administrative appellate authority, and in many states the second appeal is heard by the Commissioner or Commission. *Supra,* note 35.

53. See FTC v. Cement Institute, 333 U.S. 683 (1948).

54. Bourjois, Inc. v. Chapman, 301 U.S. 183 (1937); Hagar v. Reclamation District, 111 U.S. 701 (1884); HART, AN INTRODUCTION TO ADMINISTRATIVE LAW 475 (1950).

55. See the authorities, *supra* note 54. And see Application of Murra, 178 F.2d 670 (7th Cir. 1949).

56. Silverstone, *supra* note 35, at 209.

57. U.S. *ex rel.* Castro-Louzan v. Zimmerman, 94 F. Supp. 22 (E.D. Pa. 1950).

the question as to the kind of evidence on which the agency may rely. Unlike the basic due-process requirement, outlined above, there is no federal requirement as to what rules of evidence, liberal or strict, the states should direct their agencies to follow. Hence, unless there is a state statute dealing with this problem, the state unemployment agency will follow what may be called the common law of administrative-legal evidence of its state; or the agency and the review court will build up their own rules of evidence which may differ on one or the other point from the law that pertains to other administrative agencies of the state.

Statutes regulating the rules of evidence in regard to unemployment compensation but not as to other administrative adjudication are infrequent.[58] However, there are laws, notably administrative procedure acts, dealing with administrative-legal rules of evidence and of course such a state administrative procedure act may specifically exempt from its provision proceedings to be entertained before the unemployment agencies.[59] No state administrative procedure act unqualifiedly forces the agencies to follow the age-old court rules of evidence, which were developed to protect supposedly naive jurors from confusing fact with fiction.[60]

It must, however, be regarded as the better legal policy to apply liberal rather than strict rules of evidence. In court a rule that sounds liberal for the plaintiff may be oppressive for the defendant. But unemployment compensation procedures are by their very nature non-adversary.[61] They are entertained not to determine which of two or more parties is "right" but to find out whether a certain person is truly "unemployed," as he claims, and if so, whether he is entitled to relief. All evidence should, therefore, be admissible whether oral or written, whether hearsay or direct, and be given weight in accordance with its credibility. This is now the usually accepted and preferable rule.[62] Holdings to the contrary, if persisted in by agencies

58. See Geegan v. Unemployment Comp. Comm'n, 45 Del. 513, 76 A.2d 116 (1950) (statute permits hearings without following common law or *statutory* rules of evidence).

59. See the surveys listed, *supra* note 50. For the rather vague federal rule see Administrative Procedure Act § 7 (c) (exclusion of irrelevant evidence; reliable, probative, and substantial evidence required). A now pending Oregon administrative procedure bill exempts from its provisions proceedings before the Industrial Accident Commission. But ORE. REV. STAT. § 657.605 created the Unemployment Compensation Commission by declaring that it is constituted by the members of the Industrial Accident Commission. It is not clear whether the bill also means to exempt unemployment proceedings.

60. Harris, *supra* note 50, at 45-49. The pending Oregon bill, *supra* note 59, would practically compel agencies to use court rules of evidence.

61. Idaho Mut. Ben. Ass'n v. Robison, 65 Idaho 793, 154 P.2d 156, 160 (1944); Employment Stab. Comm'n v. Lewis, 157 P.2d 38 (Cal. App. 1945).

62. Barr v. Unemployment Comp. Bd. of Rev., 172 Pa. Super. 389, 93 A.2d 877 (1953); Phillips v. Unemployment Comp. Bd. of Rev., 152 Pa. Super. 75,

or reviewing courts, ought to be overruled by statute. In a Washington case the agency's investigator testified that the parties (the employer and his former employee) had admitted an employment relationship. At the reopened hearing the employer testified denying his former admission. The commission found in favor of the employment relation and therefore of the claimant. Upon the employer's appeal, the court reversed the agency,[63] holding that the commissioner's conclusion was not one which "a reasonable man acting reasonably" would have reached.[64] The court's reasoning would be fair enough if credibility had been the issue, especially in view of the comparative novelty of the conceptions of administrative law. Nevertheless, the judgment whether a state commissioner—presumably a reasonable man—acted reasonably, *i.e.,* believed this or that piece of evidence, should be left to the agency itself. There is no magic faculty in a court that enables it to discern the facts, by reviewing a record or even by hearing witnesses *de novo,* more accurately than a commissioner who has heard and seen the evidence.

As has been noted already, the decision of the appellate body which follows the informal determination of the official conducting the original, investigatory proceeding, is in most states subject to a second appeal. (In view of the fact that the first appellate body does not truly entertain an appeal in the technical sense, but rather conducts the fair and impartial hearing which the claimant is entitled to, the term "second appeal," though frequently used, is inaccurate. This "second" appeal is an administrative, within-agency appeal, and the "first" appeal no real appeal at all.) As far as this administrative remedy exists it is usually entertained in the same fashion as the so-called first or original appeal. The case is heard again and the same rules of evidence apply. Under some laws, however, the scope of this second hearing is limited somewhat in the fashion of a review of the record.[65]

Must an aggrieved party seek this second hearing before he may seek judicial review? Under the well-known federal exhaustion of remedies doctrine,[66] the answer must be in the affirmative. A case

30 A.2d 718 (1943); Todd Shipyards Corp. v. Texas Employment Comm'n. 245 S.W.2d 371 (Tex. Civ. App. 1952). And see Acosta v. Landon, 125 F. Supp. 434, 439 (S.D. Cal. 1954) (hearsay evidence should have been admitted by deportation authorities). *But see* Leggerini v. Department of Unempl. Comp., 15 Wash.2d 618, 131 P.2d 729 (1942). In Geegan v. Unemployment Comm'n, 45 Del. 513, 76 A.2d 116 (1950), the court ruled that the agency must follow the judicial rules of evidence, including the exclusion of hearsay, unless it first promulgates (statutorily authorized) rules to the contrary!

63. Leggerini v. Department of Unempl. Comp. *supra* note 62.

64. *Id.* at 731.

65. PRINCIPLES UNDERLYING BENEFIT APPEAL PROCEDURES, *supra* note 39.

66. Macauley v. Waterman S.S. Corp., 327 U.S. 540 (1946); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938); Texas & Pacific Ry. v. Abilene

is not ripe for judicial review if there are still administrative remedies available.[67] The Administrative Procedure Act has expressed the same thought, albeit in a somewhat involved and complex fashion: agency action shall be final, *i.e.*, ripe for judicial review, even though a petition for reconsideration or administrative appeal may yet be permissible, unless, however, the petition for reconsideration, etc., shall have a suspensive effect. This is expressed by the phrase "unless . . . the action meanwhile shall be inoperative." These words are inadequate insofar as negative orders are concerned. An agency decision that *denies* an application for, say, a license or unemployment compensation, cannot well be called "operative" or "inoperative."[68] Yet here, too, the states are following the federal rule—the exhaustion rule of administrative law must govern. It would be senseless to provide for a second appeal, if the parties concerned may at their option disregard it and apply to the courts directly.

On the other hand, if an appeal was legally possible but was "disallowed" by the appeal body, the aggrieved party need not prosecute an obviously useless appeal but may seek judicial review from the initial appellate decision, this being the "final" decision.[69]

If the unemployment compensation case has been finally disposed of by the agency and is thus ripe for review, the question of standing to seek review naturally becomes of paramount importance. To solve this problem by general principle has as yet not been possible, although at some future date no doubt administrative law will have become so settled as to lend itself to precise restatement or codification. Until that time we must satisfy ourselves with such empty phrases as "adversely affected or aggrieved party" or "person suffering legal wrong"[70] if we feel that we must make a generally applicable statement. There is at this time no case or legal writing that has been able to explain to any degree or precision who is aggrieved, etc., and who is not.[71]

However, the problem of standing to seek review is not as complicated in our unemployment compensation field. Unquestionably, if

Cotton Oil Co., 204 U.S. 426 (1907). State law has not completely adopted the exhaustion doctrine everywhere. See, *e.g.*, Ward v. Keenan, 3 N.J. 298, 70 A.2d 77 (1949), 25 N.Y.U.L.Q. REV. 401 (1950). See also Parker, *Administrative Law in Arkansas*, 4 ARK. L. REV. 107, 121, 123 (1950); Note, 35 IOWA L. REV. 79, 85 (1949).

67. Levers v. Anderson, 326 U.S. 219, 222-23 (1945).

68. ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 104 (1947); DAVIS, ADMINISTRATIVE LAW 193 (1951); PARKER, ADMINISTRATIVE LAW 256 (1952).

69. Unemployment Comp. Comm'n v. Chenault, 295 Ky. 562, 174 S.W.2d 767 (1943).

70. Administrative Procedure Act. § 10.

71. See the cases and controversies in GELLHORN AND BYSE, ADMINISTRATIVE LAW 204 ff., especially 221-26 (1954).

there is to be judicial review at all, as it actually exists everywhere, the claimant himself must have standing to seek it. The commissioner or commission likewise must be accorded the right to seek review of the action of its (impartial and hence independent) appellate body.[72] The only person whose standing is subject to doubt and diversified treatment is the claimant's former employer. There is no basis for affording him any procedural rights unless the law, as in many states, provides for pooled funds with merit rating for employers whereby his contribution to the state fund from which compensation is paid depends in part on his record in having a large turn-over, etc.[73] Even where there is such a merit rating, however, it is doubtful whether the employer's interest in the final outcome of a claim petition is great enough to afford him standing even during the administrative appellate procedure, much less in court. "His interest in any particular case is practically indeterminable."[74] The preferable and now prevailing view would not burden the court-review procedure with the employer's presence as a party.[75]

Before further exploring the field of judicial review, we may briefly pause to consider the position of the substantive law that the agency is to apply. This question addresses itself to the substantive law of unemployment compensation, which is outside the scope of this study and for which the reader may turn to other articles in this symposium. Two topics, however, may be briefly touched upon here because of their close connection with our consideration of administrative-legal technique: uniformity and incidental questions.

The various state unemployment compensation laws are not uniform. Consequently, the agencies applying those laws by making individual decisions, and the courts reviewing the decisions, cannot be expected always to follow uniform principles. That is true even as far as the federal minimum standards in general and the fair-hearing requirement in particular are concerned. While every state must give an opportunity for a fair hearing, some may go further and, for instance through a state administrative procedure act, add a variety of requirements, such as separation of functions within the agency so that the official who prosecutes or defends is in some measure separated

72. *E.g.*, Unemployment Comp. Comm'n v. Barlow, 191 Miss. 156, 1 So.2d 241 (1941). And see Cuny v. Annunzio, 411 Ill. 613, 104 N.E.2d 780 (1952) (agency must be made party in review proceedings).

73. See Andrews and Miller, *Experience Rating and Employment Stability*, 7 NAT'L TAX. J. 193. (1954).

74. Pennock, *Unemployment Compensation and Judicial Review*, 88 U. OF PA. L. REV. 187, 140-43 (1939); Cloe, *Disputed Claims Procedure Under the New York Unemployment Insurance Act*, 39 COL. L. REV. 1151, 1177 (1939).

75. Erickson v. General Motors Corp., 276 P.2d 376, 379 (Kan. 1954). *But see* Jones v. Appeal Bd. of Michigan, 332 Mich. 691, 52 N.W.2d 555 (1952); Leggerini v. Department of Unempl. Comp., 15 Wash.2d 618, 131 P.2d 729 (1942).

from the one who decides, hearing before trial examiners, establishments of a formal record, etc. Still, when it comes to the application of basic principles and in the absence of precise state law[76] it is desirable that there be uniformity of decisional law. This thought has found judicial expression,[77] but has not yet played a dominant role in the construction of the enabling statutes.

The agency, like any administrative agency, has but a limited jurisdiction, namely, to decide unemployment compensation claims. Yet this jurisdiction extends of necessity to incidental questions whose decision is relevant in reaching a decision on the main problem. The problem of *Vorfragen* ("pre-questions") has so far found scant attention in this country, yet it exists as matter of inner necessity. Labor agencies have to decide about the mutinousness of conduct or the contractual validity of a reinstatement offer as a pre-question to an unfair labor practice problem.[78] And any agency that handles money benefits whose size may depend on the presence of "dependents" must decide, incidentally to the main question granting or denying an application for benefits or increased benefits, whether the applicants' marriage is valid,[79] whether there was a valid divorce, and so forth.[80] The agency decision is of course not one invalidating a marriage or a divorce or adoption. To do this the agency is not authorized and hence has no jurisdiction. The agency merely decides *pro tanto*, as it were, merely for the purpose of determining the lawfulness of a claim, that such and such a person was or was not married or had children. The law on this question, not at all confined to administrative agencies, has developed in a somewhat semi-conscious fashion. Perhaps some writer will raise it from dogmatic slumber some day.[81]

Turning our attention now further to judicial review, the basic question must first be answered whether judicial review is, and whether it must be, available. As to "is," the answer is uniformly yes. Even where the statute was silent on this point, it was interpreted so as not to exclude judicial review.[82] But *must* the law, by statute or decision provide for judicial review? The federal law makes due process

76. Or of judge-made law on this point.
77. Arnold College v. Danaher, 131 Conn. 503, 41 A.2d 89 (1945).
78. Southern S.S. Co. v. NLRB, 316 U.S. 31 (1942), NLRB v. Litchfield Mfg. Co., 154 F.2d 739, 742 (8th Cir. 1946)
79. LePell v. United States, 177 F.2d 1013 (10th Cir. 1949); Freeman S.S. Co. v. Pillsbury, 172 F.2d 321 (9th Cir. 1949).
80. Drew v. Hobby, 123 F. Supp. 245 (S.D.N.Y. 1954); *In re* File No. VP—395375, 19 U.S.L. WEEK 2165 (Board of Immigr. App. Oct. 3, 1950) (foreign legitimation); T.R. Miller Mill Co. v. Johns, 75 So.2d 675, 681, 682 (Ala. 1954) (concurring opinion) (unemployment agency ought to have decided whether applicant violated contract).
81. So far, see PARKER, ADMINISTRATIVE LAW 125, 127-29 (1952).
82. Bodinson Mfg. Co. v. Employment Comm'n, 17 Cal.2d 321, 109 P.2d 935 (1941).

mandatory and the states have adopted the standard. If a state provides for an opportunity for a fair hearing before an impartial, albeit administrative tribunal, that is all the federal law requires.[83] The idea that due process can exist only where there is court review[84] cannot easily be founded in logic. If the agency is "impartial" then it fulfills the most essential criterion of a court. It is true, by being specialized an agency may fall into rigid patterns; it may become "tough" or, conversely, "easy" on claimants. The same, however, is quite often true of courts as well. Who could deny that the supreme courts of some states are more conservative than others in questions of workmen's compensation law, *e.g.*, on the question of recovery for horseplay and aggression, or that some states are "liberal" while others are not in the field of personal injury law to such an extent that shopping for a forum known for jumbo verdicts has become a much-discussed problem? "Due process is not necessarily judicial process."[85]

Yet not all problems of legal administration can be decided with a purely academic approach alone. While it is no doubt the correct legal interpretation that the requirement of due process, or at any rate of a fair hearing, does not necessitate judicial review, it might yet be deemed the preferable choice to have court review. This is not a question of legal interpretation but rather a policy choice; and it has been made already in that, as we pointed out, there is indeed judicial review everywhere in our field, notwithstanding the fact that the actual cases where redress to the courts is being sought on a problem of unemployment compensation law are relatively few.

The mode of review, as in other fields of administrative law, may either be a procedure de novo or a review of the record. The former is infrequent.[86] Its availability may cause an unwarranted and deplorable delay in getting the needed relief to the claimant, if the commissioner is the party seeking review. It should not exist in a field that calls for swift and simple decisions. In addition to this policy argument the point was raised that a review de novo vests the court with an administrative function which under the separation of powers doctrine as embodied in the state constitutions it must not exercise.[87] This argument, however, fails to convince. So long as nobody, particularly not the various constitutions, declares certain matters, including unemployment claims, expressly to be "administrative"

83. *Supra* note 40.
84. See, *e.g.*, Idaho Mut. Ben. Ass'n v. Robinson, 65 Idaho 793, 154 P.2d 156 (1944). *But see* Reetz v. Michigan, 188 U.S. 505 (1903).
85. Reetz v. Michigan, 188 U.S. 505, 507 (1903).
86. *E.g.*, Chrysler Corp. v. California Unempl. Stab. Comm'n, 253 P.2d 68 (Cal. App. 1953); Deshler Broom Factory v. Kinney, 140 Neb. 889, 891, 2 N.W.2d 332, 333-34 (1942).
87. Silverstone, *supra* note 35, at 212, 214, citing cases from Connecticut.

our field is no more "typically administrative" than is workmen's compensation (which in five states is administered by the judiciary)[88] or, as a matter of fact, the adjudication of any other claim.[89] The adjudication of unemployment compensation is no more "inherently" administrative than the decision about a child's custody is "inherently" judicial. However, while there should be no constitutional objection, the institution of de novo review is, at least in the field of our discussion, not useful and it may at times be harmful.

The majority of states follow the well-known federal rule of confining judicial review to a review of the record.[90] Under this rule, findings of the agency will be followed if supported by substantial evidence; and its ruling will be affirmed if it is grounded in law. If the law lends itself to two or more constructions, the federal rule at times will leave the construction to the agency under what we might call the *Hearst* rule.[91] This doctrine is partly grounded in the idea that administrative agencies are composed of experts best equipped to decide legal problems peculiarly falling within their scope. At other times, or concurrently with this, the federal rule is based on the rather problematic idea of mixed questions of law and fact whose answer, because of the preponderance of the "fact" element, must be bindingly given by the fact-finder, *i.e.*, the agency.[92] At yet other times, however, the agency's construction of the law did not find the approval of the Court.[93] In such cases the decision was overruled as not being grounded in a "correct" interpretation although objectively speaking the administrative decision was not more untenable than in the *Hearst*[94] and related cases. Thus the above-stated federal rule must be qualified. The review courts often but not invariably will leave it to the agency to choose between several interpretations of the law.

88. U.S. BUREAU OF LABOR STANDARDS BULL. No. 125, STATE WORKMEN'S COMPENSATION LAWS 42 (1950 with supplements).

89. Such as of veterans or for pensions.

90. *E.g.*, Moore v. Commissioner of Empl. Sec., 273 S.W.2d 703 (Tenn. 1954); Idaho Mut. Ben. Ass'n v. Robison, 65 Idaho 793, 154 P.2d 156 (1944); Industrial Comm'n v. Wilbanks, 274 P.2d 99 (Colo. 1954); Wolfe v. Unemployment Comm'n, 232 Iowa 1254, 7 N.W.2d 799 (1943); Craig v. State Labor Comm'r, 154 Kan. 690, 121 P.2d 203 (1942); Burgin v. Mid-Continent Petroleum Corp., 188 Okla. 645, 112 P.2d 802 (1941); Johnson v. Pratt, 200 S.C. 315, 20 S.E.2d 865 (1942); Appeal of Farwest Taxi Service, Inc., 9 Wash.2d 134, 114 P.2d 164 (1941). The federal rule was most lucidly expressed in Unemployment Comp. Comm'n of Alaska v. Aragon, 329 U.S. 143, 153 (1946), and in Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938), and rewritten and, to an uncertain degree, changed in Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

91. NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944); Gray v. Powell, 314 U.S. 402 (1941); SEC v. Chenery Corp., 332 U.S. 194 (1947); O'Leary v. Brown-Pacific-Maxon Inc., 340 U.S. 504 (1951).

92. See the cases, *supra* note 91.

93. *E.g.*, Social Security Board v. Nierotko, 327 U.S. 358 (1946); Trust of Bingham v. Commissioner, 325 U.S. 365 (1945).

94. *Supra* note 91.

This amounts to saying that the agency construction will be followed by the federal courts if they agree with it or, more subtly perhaps, if they do not disagree with it. The Supreme Court is still the supreme law interpreter in the field of administrative law, but refrains from exercising its authority unless it strongly feels a necessity for interference.

The state courts have adopted this rule or set of principles in various shades which could only be analyzed in a state-by-state fashion. To undertake this would go considerably beyond the scope of this study. In passing, however, we may note that in some states, notably New Jersey, a mixed rule is followed. The courts are not to retry the administrative cases de novo, but will re-examine the record in a somewhat more thorough fashion than the pure substantial-evidence rule would permit.[95] Under this theory there is no room for the *Hearst* doctrine. If there is a question of law, the court will decide it as supreme authority. If there is a question that is—if the illogical picture must be employed—a mixed question of fact and law, the New Jersey and other courts will not necessarily give the agency the benefit of doubt and accede to the way the latter has resolved the problem. Thus it can happen under this theory of judicial review that a finding of an agency though obviously made within the scope of its peculiar competence, and even upheld by a prior supreme court, as "entirely reasonable and appropriate" be set aside by a new supreme court as "counter to common experience of mankind."[96]

It is easy in an article to draw neat lines between de novo review, review of the record, pure substantial evidence rule, or *Hearst* doctrine. For each of them there can be cited a few cases; but of none of them could it be said that it is clearly and unequivocally being followed in this or that jurisdiction. The *Hearst* rule, as we have seen, is not a true rule of law, but rather the semantics of the Supreme Court if it wishes to follow the reasoning of an administrative agency. The substantial evidence rule, where adopted, may at times be either broadened or, on the other hand, reduced to mere lip service by calling a legal problem a question of fact[97] or by saying that the

95. For a recent survey of New Jersey administrative law see Moran, *Administrative Law,* 9 RUTGERS L. REV. 40 (1954). And see Lakewood Express Service, Inc. v. Board of Pub. Util. Commissioners, *infra* note 96.

96. Lakewood Express Service, Inc. v. Board of Pub. Util. Commissioners, 137 N.J.L. 440, 60 A.2d 298 (1948), *reversed,* 1 N.J. 45, 61 A.2d 730 (1948). The Commission had found that seven-passenger sedans were not reasonably safe for bus transportation, a finding, one might think that, if anybody, a public utilities commission is competent to make. It was first unanimously upheld, but a brand-new court held otherwise on rehearing. I think of no example that would serve better to reduce to the absurd the doctrine of judicial infallibility.

97. *E.g.,* Brook's Inc. v. Claywell, 215 Ark. 913, 224 S.W.2d 37 (1949) (question whether corporation president was employed so as to establish the work-

evidence was not substantial enough, and so forth.[98] The picture is a many-colored one, more than a restatement of generalities can reveal. Each state, as well as the Federal Government, has its own law of judicial review that is not quite like that of any other. And within each jurisdiction the law oscillates between principles. The situation of administrative law in this country is thus not unlike the one of Continental private law at the time of Savigny, the founder of the Historical School of Law. The time is not yet ripe for codification or restatement.

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men's compensation commission's jurisdiction is one of "fact" to be determined by agency); State *ex rel.* Standard Oil Co. v. Review Board, 230 Ind.. 1, 101 N.E.2d 60 (1951), 101 U. OF PA. L. REV. 284 ("good cause" for leaving employment so as to entitle to unemployment compensation not further defined in statute, hence it arms the Board with too wide a discretion. The last-mentioned decision patently overlooks that there is a body of case law defining the phrase "good cause" common to all unemployment compensation laws). And see Claims of Foscarinis, 132 N.Y.S.2d 323 (Sup. Ct. 1954) (re-enactment doctrine upheld in unemployment compensation matter).

98. As in Leggerini v. Department of Unempl. Comp., *supra* note 62, despite the fact that Washington professes to follow the substantial-evidence rule. See Appeal of Farwest Taxi Service, Inc., 9 Wash.2d 134, 114 P.2d 164 (1941).