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Cover Page Footnote

This paper is a revised part of a study entitled Development of Judicial Review of Administrative Action in New York, submitted in partial satisfaction of the requirements for the degree of Doctor of Juridical Science at New York University School of Law. The first century of the development of juridical review of administrative action in New York was treated by the author in Mandamus and Certiorari in New York: From the Revolution to 1880: A Chapter in Legal History, 32 Fordham L. Rev. 681 (1964). Subsequent installments will deal with Certiorari and Substantial Evidence and Administrative Construction of Statutory Provisions. * Member of the New York Bar.

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DEVELOPMENT OF SCOPE OF REVIEW IN JUDICIAL REVIEW OF ADMINISTRATIVE ACTION: MANDAMUS AND REVIEW OF DISCRETION†

*HAROLD WEINTRAUB**

THE articulated major premise of judicial review of administrative action from its virtual beginnings on the English side of the Atlantic has been the supremacy of the courts to examine the actions of inferior bodies and tribunals to assure that they adhere to the law.[1] The fundamental principle of judicial review was established early in the history of our own nation by Chief Justice John Marshall,[2] and was voiced even earlier by New York's leading jurist, Chancellor (then Supreme Court Justice) James Kent.[3]

In its beginnings in New York, judicial review of administrative action was largely concerned with the narrow question of jurisdiction, which had been traditionally governed by certiorari proceedings. An official duty to act, in the nature of a ministerial capacity, under specified conditions as prescribed by law, was made subject to a writ of mandamus. Subject to minor variations, this state of affairs continued well past the middle of the nineteenth century when the scope of review upon certiorari was enlarged to provide for broader judicial examination of administrative actions of a judicial nature.[4] Later the best improvisations in the field of common-law certiorari review were codified into the Code of Civil Procedure,[5] providing specific statutory standards for scope of review, and these remained virtually unchanged[6] until the advent of the Civil Practice Law and Rules.[7]

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* Member of the New York Bar.

1. Bagg's Case, 11 Co. 93b, 77 Eng. Rep. 1271 (K.B. 1615); Bonham's Case, 8 Co. 107a, 77 Eng. Rep. 638 (C.P. 1610).
2. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
3. People v. Sessions of Chenango, 2 Cai. Cas. 319 (N.Y. Sup. Ct. 1799).
4. People ex rel. Cook v. Board of Police, 39 N.Y. 506 (1868).
5. N.Y. Sess. Laws 1880, ch. 16, § 2140.
6. N.Y. Sess. Laws 1937, ch. 526, §§ 1296(6), (7); N.Y. Sess. Laws 1920, ch. 925, § 1304.
7. N.Y. Civ. Prac. Law & R. 7803.

For mandamus, the rule for review remained, at the end of the nineteenth century, in the same state as it was when imported from the mother country. It functioned in a narrow and limited orbit. The Code of Civil Procedure did not follow certiorari in prescribing broad avenues of judicial authority as a basis for the scope of review by mandamus.[8] Although mandamus remained free and unfettered, from a lack of statutory prescription, to respond to the needs and demands placed upon it by the rapid changes taking place at the turn of the century, this potential was not utilized for a considerable period.

Under the judicial interpretations placed upon it in the decades following adoption of the Code in 1880, mandamus continued to be narrowly confined to use where a duty was claimed to be lodged by law in a certain body or officer to perform a particular action in a prescribed manner without any element of choice, discretion or judgment. In one situation, *People ex rel. Wooster v. Maher*,[9] which is characteristic of the disinclination of the courts to mandate administrative action where any possible basis for the exercise of discretion could be spelled out, a mandamus was refused. Although the language of the applicable statute was couched in peremptory terms,[10] the court held, nevertheless, that it was the intent behind the statute which was to govern the disposition of the application and not the plain terminology of it. The intent was to be ascertained from the scope of the authority granted, the character of the agency or officer and the nature of the particular duty to be performed. The facts in the *Wooster* case show to what lengths the courts of that period would go to avoid placing administrative action, except the obviously ministerial, under judicial scrutiny and restraint. The mandamus was brought against the Mayor of the City of Albany to compel him to cause removal of a house porch encroaching more than thirteen feet into a street. General term[11] affirmed the issuance of a

8. N.Y. Sess. Laws 1880, ch. 16, §§ 2067-90.

9. 141 N.Y. 330, 36 N.E. 396 (1894).

10. "If any building now erected, or hereafter to be erected shall stand upon or project beyond the range of the street, the city engineer shall, upon receipt of written directions from the mayor, send written notice thereof to the owner or person erecting or maintaining the same who shall, within ten days after the receipt of such notice remove the said buildings to the range of the street laid down by the city engineer, and in case of neglect or refusal of said owner or person erecting the same to comply with said notice, the city engineer shall cause said removal to be made, and return the expense thereof to the board of contract and apportionment, to the end that said expense may be assessed and collected, and the board of contract and apportionment are hereby empowered to assess said expense upon the property of such owner in the manner prescribed by this act." N.Y. Sess. Laws 1888, ch. 398, tit. 13, § 10.

11. 64 Hun 408, 19 N.Y. Supp. 758 (3d Dep't 1892).

peremptory mandamus against the mayor by special term, which had directed him to take legal proceedings for the removal of the encroachment. It was the view of the lower courts that there was a clear, mandatory duty imposed upon the mayor to act in such circumstances.

The court of appeals, consulting the factors relating to legislative intent referred to above, recognized that "the court is not permitted to substitute its judgment for that of the officer or body clothed by the law with power to decide."[12] It ruled that the order requested by petitioner actually involved a question of the mayor's exercise of discretion and reversed the order which had awarded a peremptory mandamus. Despite the monitory language of the statute, the court decided that this was an area where larger circumstances governed the mandatory power apparently given to the mayor in the statute.[13] Perhaps full cognizance of all the circumstances impinging upon the problem would allow "shall" to be interpreted to mean "may."[14] The court acknowledged that it is sometimes difficult to determine whether the performance of an act by a government official is in its essential nature peremptory or discretionary, mandatory or directory. However, the absence of an individual interest or right in this particular case on the part of the relator may have contributed to the result ultimately reached by the court. Here was a sphere where discretion rather than absolute rule was considered to be the most desirable policy because a mandatory power might not always serve the public weal. An atmosphere of restraint pervaded this opinion, which sought and found sanction in the statute and its legislative history to allow room for the mayor to exercise "judgment and discretion."[15] An apparent rule of law was transformed by the court into a matter of ostensible legislative policy, intended to allow broader scope to the mayor to exercise his discretion in dealing with problems arising under the statute.

As the foregoing case amply demonstrates, the court of appeals, at the turn of the century, showed a strong reluctance, except in the plainest instances, to intrude itself into the affairs of government by means of mandamus. Administrative action involving exercise of judgment or in pursuance of authority to exercise discretion was immune to

12. 141 N.Y. at 337, 36 N.E. at 397; cf. Ciminera v. Sahm, 4 N.Y.2d 400, 151 N.E.2d 832, 176 N.Y.S.2d 257 (1958); Walsh v. LaGuardia, 269 N.Y. 437, 199 N.E. 652 (1936); People ex rel. Pumpyansky v. Keating, 168 N.Y. 390, 61 N.E. 637 (1901). See also Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892) (regarding principle that the spirit of the law should prevail over the letter of the law).

13. 141 N.Y. at 339, 36 N.E. at 398.

14. See Dr. Bloom Dentist, Inc. v. Cruise, 259 N.Y. 358, 182 N.E. 16 (1932).

15. 141 N.Y. at 339, 36 N.E. at 398.

judicial review unless the relator could show that the action was of a judicial nature, thereby rendering it subject to review by certiorari. The label of judicial action, which had been loosely applied by the courts in the latter part of the nineteenth century in order to preclude judicial review by mandamus,[16] was again employed, but this time in reverse fashion; there was now a sparing use in order to narrow the cases which could be made subject to review by certiorari. This development ultimately led to revision of the long standing rule in mandamus actions, which had confined its authority to ministerial duties alone, in order to allow for some review of the exercise of administrative judgment or discretion. The alteration in the rule culminated from a rather involved series of cases.

The standard rule in mandamus review, of confining itself to ordering ministerial action, was reiterated in a leading case, *People ex rel. Harris v. Commissioners of the Land Office*,[17] involving a claim for reimbursement against state officials for the failure of title to lands acquired upon a state tax sale. Under law, in such cases, it was the duty of the land commissioners to pay back the original purchase money and interest. They refused to do so in this instance, despite a state comptroller's holding which cancelled the original tax sale. Defendant land commissioners countered by claiming that they were acting judicially in denying relator's claim and, therefore, his remedy was not by mandamus.

The office of mandamus to compel performance only of a purely ministerial duty was set forth by the court[18] in conjunction with an admonition that it is never issued to compel the discharge of a duty involving the exercise of judgment or discretion. Any departure from this apparently salutary rule would result in the court's substituting its judgment or discretion for that of duly constituted officials. In such a case, *i.e.*, where the decision of a question of fact or the exercise of discretion in deciding whether an act should be done or not is involved, the duty was regarded as judicial, and mandamus cannot lie to compel its performance.[19]

The court then proceeded to analyze the question to be determined by the commissioners as one involving whether a refund to relator was

16. Weintraub, Mandamus and Certiorari in New York From the Revolution to 1880: A Chapter in Legal History, 32 Fordham L. Rev. 681, 703-05 (1964).

17. 149 N.Y. 26, 43 N.E. 418 (1896).

18. "When the law requires a public officer to do a specified act, in a specified way, upon a conceded state of facts, without regard to his own judgment as to the propriety of the act and with no power to exercise discretion, the duty is ministerial in character and performance may be compelled by mandamus, if there is no other remedy." Id. at 31, 43 N.E. at 419.

19. Id. at 33, 43 N.E. at 419-20.

to be approved, disregarding, however, the decision on the facts previously made by the state comptroller. The court ruled that in examining and weighing the evidence and then making a determination, the defendants had acted in a judicial manner, *i.e.*, "involving the exercise of judgment upon questions of both fact and law."[20] It concluded by stating that "even if their decision was clearly wrong some other remedy must be adopted, for this writ [of mandamus] does not lie for the correction of errors."[21] The orders of special term[22] and general term[23] were reversed.

There is something to be said in behalf of the court's analysis of the problem in the *Harris* case because some degree of judgment and discretion was necessary in the performance of the land commissioners' duties in order to avoid payment of fraudulent claims. But the net effect of the decision was to close the judicial doors completely to relief by mandamus in all cases where the slightest degree of discretion could be conjured to exist. The sole recourse which remained available to a suitor was to attempt to secure review by certiorari. The courts, having by decision enlarged the domain of official action considered to be judicial in nature, thereby encouraged the belief that suitable review could be secured by writ of certiorari.[24]

Such was the procedure followed by a civil employee who had been removed by a public official after having submitted his defense in writing as authorized by law; in *People ex rel. Kennedy v. Brady*,[25] the employee brought certiorari to review his removal. The court of appeals dismissed the suit and ruled that "official acts, executive, legislative, administrative or ministerial in their nature or character, were never subject to review by certiorari. . . . [which is] issued only for the purpose of reviewing some judicial act."[26] The court pointed out that "he [the relator] was not entitled to be sworn or to introduce witnesses . . . . He was not entitled to a trial or a judicial hearing . . . ."[27]

In *Kennedy v. Brady* the court required the presence of additional factors as a prerequisite for determining that an administrative body has acted judicially where review by certiorari was sought. In addition to the deciding of facts and the exercising of discretion by an administrative tribunal, in order to qualify as an act of a judicial nature, it was

20. Id. at 32, 43 N.E. at 420.
21. Id. at 33, 43 N.E. at 420.
22. 12 Misc. 223, 33 N.Y. Supp. 1102 (Sup. Ct. 1895).
23. 90 Hun 525, 36 N.Y. Supp. 29 (3d Dep't 1895).
24. 149 N.Y. at 33, 43 N.E. at 420.
25. 166 N.Y. 44, 59 N.E. 701 (1901).
26. Id. at 47, 59 N.E. at 702.
27. Ibid.

necessary that witnesses be sworn as in a judicial-type hearing or trial.[28] Although these requirements appear reasonable and appropriate, the court had nonetheless sanctioned common-law certiorari review in other cases where auditors of local government bodies or local government bodies acting as auditors, had rejected a claim.[29] In those situations, none of the trappings of a trial-type proceeding was present but certiorari review was granted without question and without benefit of statutory authorization. In all likelihood, certiorari review was granted in such instances, despite the absence of a trial-type proceeding, because of the importance of the subject matter, and the absence of any other means of judicial review. Further, by long tradition, and before the distinction between certiorari and mandamus review was brought to a high degree of refinement, such action on claims had been made subject to certiorari review.

The confusion with regard to the mode of proceeding to secure judicial review of administrative action was compounded by the holding in another leading case at about this time, *People ex rel. Sims v. Collier*.[30] The defendant State Civil Service Commission had adopted resolutions placing relators in the competitive class of the civil service, and they brought mandamus to have the positions restored to the exempt classification. Access to certiorari relief having been extremely narrowed by the terms of *Kennedy v. Brady*, the only available means of securing judicial review of this civil service question appeared to rest with mandamus, which won the support of special term and the appellate division below.[31]

In the court of appeals, the difference between administrative action reviewable by mandamus and by certiorari was again measured off[32] and, dismissing the action, the court concluded that "whether competitive examinations for appointment to particular places are practicable or not, has been held to be a question of law, to be decided in the light of the facts and the evidence bearing upon the subject."[33] Apparently, in order to avoid review of the particular administrative determination here, the

28. Ibid.

29. See, e.g., People ex rel. McCabe v. Matthies, 179 N.Y. 242, 72 N.E. 103 (1904); People ex rel. Myers v. Barnes, 114 N.Y. 317, 20 N.E. 609 (1889). See also People ex rel. Central Park, No. & E.R.R.R. v. Willcox, 194 N.Y. 383, 87 N.E. 517 (1909).

30. 175 N.Y. 196, 67 N.E. 309 (1903). Review by mandamus was sanctioned by an earlier decision of the court of appeals, People ex rel. Mack v. Burt, 170 N.Y. 620, 63 N.E. 1121 (1902) (memorandum decision), affirming 65 App. Div. 157, 72 N.Y. Supp. 567 (1st Dep't 1901), where the use of certiorari to challenge a civil service classification was rejected because such an administrative act was held not to be a judicial determination.

31. People ex rel. Letts v. Collier, 78 App. Div. 620, 79 N.Y. Supp. 671 (2d Dep't 1903).

32. 175 N.Y. at 201-02, 67 N.E. at 311-12.

33. Id. at 204, 67 N.E. at 312.

definition of what constituted judicial action was again modified to include the mere exercise of judgment, thereby precluding consideration of the merits of this action brought in mandamus. The trial-type requirements lately added to the concept of judicial action by administrative bodies by the *Kennedy v. Brady* decision were totally ignored.

Although these fruitless efforts in search of a remedy failed to yield definitive guidance as to the requisite conditions for securing judicial review, there can be discerned a consistent disinclination by the court of appeals, as distinguished from the lower courts, to get involved in reviewing administrative determinations involving the exercise of discretion. There is evident, also, a consistent purpose to keep mandamus confined to its traditional, narrow function, *i.e.*, merely to enforce action of a purely ministerial, non-discretionary nature. In certiorari, if the statute authorized certiorari review, or if the circumstances upon which the relator's claim were pegged could be made to fit the undulating ring of what the court on that particular occasion considered to be judicial action, the broader scope of review authorized by the Code of Civil Procedure was at the disposal of the fortunate relator.[34]

How inordinately difficult it was to peg the ring for certiorari review is exemplified by a case which was closely patterned upon the facts of *Sims v. Collier*. Acting upon the categorical advice handed down in the latter case, on facts which were closely analogous, certiorari was brought, in *People ex rel. Schau v. McWilliams*,[35] to review and to set aside the action of the State Civil Service Commission, which had changed the classification of relator's position as Battalion Chief in the Buffalo Fire Department from exempt to competitive. As in *Sims v. Collier*, the appellate division had followed current precedent and sustained the certiorari (in *Sims v. Collier* the appellate division approved mandamus) on the ground that competitive examination for the position was not practicable.[36]

At the outset of the court of appeals decision, the now-familiar technique of exhaustively defining the nature of judicial action taken by an administrative body was followed in order to determine whether certiorari review should be granted in the instant case. It was made clear that "the fact that public officers or agents exercise judgment and discretion in the performance of their duties does not make their action judicial in character so as to subject it to review by certiorari."[37] Here was the

34. N.Y. Sess. Laws 1880, ch. 16, § 2140.

35. 185 N.Y. 92, 77 N.E. 785 (1906).

36. People ex rel. Schau v. Whittet, 100 App. Div. 176, 91 N.Y. Supp. 675 (4th Dep't 1905).

37. 185 N.Y. at 96, 77 N.E. at 786.

hint, in the opening passages of the opinion, which foreshadowed that the newly evolved rule of *Sims v. Collier* was slated for revision. The court then proceeded to elaborate why a complete turnabout from the latter decision was required, explaining that

> if the action of the civil service commission is to be reviewed by certiorari, there seems to be no escape from the conclusion that ultimately the classification of every officer or employee in the service of the state, or its political subdivisions, must be determined by this court . . . . It would cast upon the courts a burden which would not only be difficult for them to bear, but which they are by no means the officers best qualified to discharge. . . . [P]roper classification . . . [is related to] practical operation[s].[38]

It was evident that the newly acquired jurisdiction to review administrative determinations of civil service commissioners in classifying positions had to be declined because it was too burdensome, and the recently created rule of *Sims v. Collier* was accordingly disavowed in its very infancy. The hapless suitor was again cast adrift in unchartered waters where, if he sailed into the port of mandamus, he was enjoined to try certiorari and vice versa. What may sound like a parable, but is not, describes precisely what happened to the unsuccessful relators in *Kennedy v. Brady, Sims v. Collier* and *Schau v. McWilliams* when their cases reached the court of appeals.

Apparently aware of the unjust consequences of this sequence of lawsuits, the court observed that the relator's failure to secure relief by certiorari did not place his situation beyond all remedy. For "if the position be by statute or from its nature exempt from examination and the action of the commission be palpably illegal, the commission may be compelled to strike the position from the competitive or examination class,"[39] but this ray of hope is immediately tempered with the qualification that if "there is fair and reasonable ground for difference of opinion among intelligent and conscientious officials, the action of the commission should stand, even though the courts may differ from the commission as to the wisdom of the classification. The present case is of this character."[40] The court closes its opinion by openly acknowledging that it erred in *Sims v. Collier* because it did not realize to what extent it would be flooded with certiorari actions as a result of the broad sweep of that decision.[41] The order of the appellate division was reversed and the writ of certiorari was quashed.

38. Id. at 98-99, 77 N.E. at 787; cf. Lemir Realty Corp. v. Larkin, 11 N.Y.2d 20, 24, 181 N.E.2d 407, 409, 226 N.Y.S.2d 374, 376 (1962), to the same effect in regard to judicial review of the actions of "hundreds of . . . zoning boards in this State."

39. 185 N.Y. at 99, 77 N.E. at 787.

40. Ibid.

41. Id. at 101, 77 N.E. at 787-88. See also Simons v. McGuire, 204 N.Y. 253, 97 N.E. 526 (1912), where the court criticized Sims v. Collier.

Thenceforth, unless a clear-cut question of law was presented for its determination,[42] it was highly unlikely that the court of appeals would undertake review and intrude itself into matters of administration. If this analysis is correct, then the stand taken by the court of appeals did not represent a radical departure from the judicial attitude which had prevailed during the preceding century of judicial review. The scope of mandamus review up to that time had remained static and unchanged, charged only with requiring mere ministerial action. The *ad hoc* interpretations placed upon the varied activities of administrative bodies by the court, which in the main tended to attribute a judicial quality to administrative action brought up for review, tended to exclude or at least curtail any consideration of such activities in a mandamus action. At the same time, unless a trial-type hearing was prescribed by statute or a statute specifically authorized certiorari or certiorari had become a traditional mode of judicial review, a suitor had small chance to secure judicial review of an administrative determination by writ of certiorari.

However, the recital of the failures in the foregoing cases should not be construed as an effort to project a study in futility. Nor is it intended to serve as partial documentation for the statutory changes which eventually were effected by the adoption of article 78 in 1937.[43] This phase of judicial history is singularly instructive for the manner in which judicial review of administrative action involving discretion of a nonjudicial nature was choked off in almost all directions, with the result that some alternative remedy had to be improvised for meeting an obvious need. At this critical juncture, the common law demonstrated another revealing example of its capacity to infuse a well-established legal form with new concepts where existing remedies had failed to respond to urgent needs.[44]

Paradoxically, this responsibility fell to mandamus, which had heretofore been blocked off from any involvement with questions of judgment and discretion. In fact, the original and essential purpose of mandamus was antithetical to dealing with a situation where the flux and flexibility of judgment and discretion existed. However, the niceties of logic and of historical usage did not prevent mandamus from being drafted for the need of the moment; logic has invariably yielded to the "felt necessities of the time."[45]

Although *Schau v. McWilliams* arrested the development of certiorari as a writ to review administrative action involving the exercise of judg-

42. 185 N.Y. at 101, 77 N.E. at 787.

43. N.Y. Sess. Laws 1937, ch. 526, §§ 1283-1306.

44. Weintraub, English Origins of Judicial Review by Prerogative Writ: Certiorari and Mandamus, 9 N.Y.L.F. 478, 508 n.140 (1963).

45. Holmes, The Common Law 1 (1887).

ment or discretion, the case nevertheless imparted the impetus for diverting mandamus to that purpose. It is to be recalled that the opinion adverted to the possible extreme case where the action of a civil service commission was conceivably "palpably illegal," and, as a dictum, the court added that mandamus would be available to strike down such action. However, it immediately added the caveat that mere difference of opinion between courts and officials as to the wisdom of an administrative action, so long as it was fair and reasonable, could not justify judicial interference.[46] Although couched in negative terms, the groundwork had been laid to bring administrative judgment or discretion of a non-judicial nature under the mantle of judicial review.

The following year, 1907, presented a case, *People ex rel. Lodes v. Department of Health*,[47] where the random seed cast by the *Schau v. McWilliams* opinion acquired an additional cubit of growth, although here discretion was not the chief point in issue on the appeal. *Lodes* is another example whereby a major rule of law commences its existence in the form of dicta in a case concerned with other matters. Lodes, a milk distributor in New York City, vending his products from a store and by delivery wagons, had his milk permits revoked on the ground that he, his wife and his drivers had been convicted four times of selling adulterated milk. At special term[48] and in the appellate division[49] he was granted a peremptory mandamus on the ground that he was entitled to notice and hearing before such revocation was effected.

In the court of appeals it was held that the conduct of a milk business, like that of a liquor business, affecting as it does the public health, welfare and morals, allows the police power of the state to summarily revoke relator's permit without prior notice and hearing. The court also noted that the statute governing the board of health made no provision for a hearing and neither was there such a requirement in the general statutes. The court cited the decision in *Schau v. McWilliams* to point out that the board of health exercised administrative powers as distinguished from judicial powers, and for that additional reason it may proceed against a party without notice. "If, however, their action is arbitrary, tyrannical and unreasonable, or is based upon false information, the relator may have a remedy through mandamus to right the wrong which he has suffered."[50]

Here was a stray sentence, clothing an amorphous concept, which would

46. 185 N.Y. at 99, 77 N.E. at 787 (1906).
47. 189 N.Y. 187, 82 N.E. 187 (1907).
48. 51 Misc. 190, 100 N.Y. Supp. 788 (Sup. Ct. 1906).
49. 116 App. Div. 890, 102 N.Y. Supp. 1145 (2d Dep't 1907).
50. 189 N.Y. at 194, 82 N.E. at 189.

eventually be transformed into a governing principle of law. In the *Lodes* case the principle was applied to the limited extent that, although the peremptory mandamus granted to relator below was reversed by the court of appeals, he was given leave to apply for alternative mandamus to enable him to prove that the revocation of his milk license was unwarranted by the facts and should, therefore, be set aside.

Invoking a mere suggestion made in *Schau v. McWilliams*, the court here enlarged the boundaries of mandamus to encompass judicial review as a remedy for testing the validity of the action of the board of health on a question of judgment and discretion, *i.e.*, whether the facts showed that relator was or was not "a fit and proper person to engage in the sale and distribution of milk . . . ." If relator prevailed, he was entitled to be granted a peremptory mandamus directing the return of his milk permits.[51]

The theory tentatively postulated in *Lodes* was consolidated by another decision of the court of appeals made later that year, 1907.[52] Thus, in short order, the rule of absolute administrative discretion was virtually overthrown, and the right to obtain judicial review of administrative action involving the exercise of judgment or discretion of a non-judicial nature became clearly established in a broader sphere of action. In the latter case, *People ex rel. Empire City Trotting Club v. State Racing Comm'n*,[53] relator had been denied a license by respondent to conduct horse racing in the New York City area on the ground that the racing season dates had already been allocated to six other race tracks in that area. The relator was awarded a peremptory mandamus in the appellate division,[54] but the court of appeals took special pains to formulate its opinion in terms of the issues arising from the exercise of broad, discretionary power by respondent racing commission. The court observed that although mandamus did not normally lie to compel performance of a duty which involved the exercise of discretion, it now carved out the corollary requirement "that the action of the officer must not be capricious or arbitrary, and if such be the character of the reasons for refusing to act the writ will lie."[55] As authority for this proposition the court cited, among others, *Schau v. McWilliams*, and also quoted a portion of the *Lodes* opinion which has been set forth above.[56]

51. Ibid.

52. People ex rel. Empire City Trotting Club v. State Racing Comm'n, 190 N.Y. 31, 82 N.E. 723 (1907) (per curiam).

53. 190 N.Y. 31, 82 N.E. 723 (1907) (per curiam).

54. 120 App. Div. 484, 105 N.Y. Supp. 528 (2d Dep't 1907).

55. 190 N.Y. at 33-34, 82 N.E. at 723.

56. Id. at 34, 82 N.E. at 723; see note 50 supra and accompanying text.

The court considered the reason offered by respondent that the allotment of non-competitive racing dates is part of the proper regulation of racing, and that if relator's request were granted it would interfere with the racing conducted at other race tracks in the area. This line of reasoning was rejected. The court determined that the object of the statute investing regulatory power in the racing commission was to insure that horse racing in the state would be properly and honestly conducted, not to regulate or prevent competition between individual racing groups. The statute was silent with regard to the allocation of racing dates, and the assumption of respondent that it was confided with power to regulate competition was "in point of law . . . capricious and arbitrary."[57]

This decision clarified much that was left unsaid in *Shau v. McWilliams* and in *Lodes*. It made plain that the exercise of discretion by a governmental body was subject to review even if the action were of a non-judicial nature. Where the action taken was not within the range of choice legally available to the administrative body, the duty to act upon a legal basis in such matters of discretion would be enforced by the issuance of a writ of mandamus. The broad, discretionary power given to the racing commission did not blind the court to the fact that the exercise of such administrative power may sometimes be honestly misdirected or misconceived. Although the racing commission offered a plausible reason for the rejection of relator's request, the court, doing that which it was most qualified to do, examined the relevant statute to ascertain the purpose of the legislation and thereby established limits to respondent's discretion. It was thereby enabled to determine that the proffered reason was irrelevant to the purpose of the racing statute and, therefore, as a matter of law, arbitrary and capricious. This conclusion required that the determination of the racing commission be set aside.

Although the judiciary in New York had always demonstrated a deference to administrative judgment and had incorporated this attitude into the rule that mandamus would not lie to review the exercise of judgment or discretion, it now recognized that the logical extension of that rule would permit administrative bodies to operate without the control of law, or even in disregard of law. The "arbitrary and capricious" rule was accordingly evolved to accommodate a need for some legal oversight of administrative action involving discretion or judgment, but the court retained the salutary limitation expressed in *Schau v. McWilliams* that where

> there is fair and reasonable ground for difference of opinion among intelligent and conscientious officials, the action of the commission should stand, even though the courts may differ from the commission as to the wisdom of the classification.[58]

57. 190 N.Y. at 35, 82 N.E. at 724.

58. 185 N.Y. at 99, 77 N.E. at 787. In a subsequent case involving establishment of a 25-year age limitation for admission to a fire inspector's examination, the court of appeals

Although the terminology employed by the courts in disposing of questions similar to that considered in the foregoing cases has been modified in minor respects, the substance and the sense of the *Schau* pronouncement has remained the guiding rule upon judicial review. This means, also, that a practical distinction between administrative discretion exercised in establishment of rules and administrative discretion exercised in adjudication (of a non-statutory nature) has not been developed by judicial decision applying the "arbitrary-capricious-unreasonable" yardstick. It would appear that, as a delegate of legislative power, administrative action of the former type would be entitled to greater latitude than administrative adjudication, but judicial opinions neglected to draw any significant distinctions between them.[59]

Despite the clear ring of the *Empire City Trotting Club* opinion, laying it down as a rule that the exercise of administrative discretion was to be governed by a rule of law expressed in terms of "arbitrary and capricious" action, and embodied in the foregoing test of reasonableness, the hold of long habit and precedent was not easily discarded. In *People ex rel. New York & Queens County Gas Co. v. McCall*,[60] a crucial test arose as the result of an order made by the Public Service Commission of New York which directed a public utility to extend its gas lines to provide service to a new area in Queens County. A sizeable expenditure was involved. Disregarding, however, the rationale of the holdings in *Schau*, *Lodes* and *Empire City Trotting Club*, the appellate division formulated its own estimate of the desirability of the prescribed extension, and it concluded that the PSC order should be set aside. Although the order was nominally reviewed by certiorari, in essence, it concerned questions of discretion and judgment, and was not a determination involving illegality, jurisdiction, statutory interpretation and application, or the

stated: "In the absence of some express limitation the action of the commission in fixing such tests must stand, unless it is so clearly irrelevant and unreasonable as to be palpably indefensible and improper. If any fair, reasonable argument may be made to sustain the action the courts should not interfere, even though they may differ from the commission as to its advisability." People ex rel. Moriarty v. Creelman, 206 N.Y. 570, 576, 100 N.E. 446, 448 (1912). The foregoing quotations from Schau v. McWilliams and Moriarty v. Creelman admirably summarize the meaning to be attributed to "arbitrary, capricious and unreasonable," from both the negative and positive standpoints.

59. See People ex rel. Republican & Journal Co. v. Wiggins, 199 N.Y. 382, 385, 92 N.E. 789, 790 (1910), for perceptive comment on the problem and "difficulty of applying logical and practical distinctions to the many forms of official action which lie between those that are essentially and clearly judicial, and others that are as distinctly legislative, administrative or ministerial; a difficulty which is constantly being augmented by the modern tendency of legislatures to delegate all kinds of governmental action to various boards and commissions."

60. 171 App. Div. 580, 157 N.Y. Supp. 707 (1st Dep't), rev'd, 219 N.Y. 84, 113 N.E. 795 (1916), aff'd, 245 U.S. 345 (1917).

weight or competency of evidence as contemplated by section 2140 of the Code of Civil Procedure for certiorari review.[61] Orders of the PSC were made reviewable by certiorari pursuant to statute because of the importance of the matters involved and the size of the financial stakes, and not because trial-type hearings were held. The PSC order in *McCall* became the testing ground of the viability of the newly developed rule of reasonableness.

In reversing, the court of appeals delivered a spirited defense of the functions performed by administrative bodies "dealing with the complex problems presented by the activities of these great corporations."[62] Without specifically acknowledging its antecedents, the court reiterated a vital principle from *Schau v. McWilliams* in pointing out that the appellate division did not have the power to examine the PSC order from the standpoint of whether it was wise or expedient, "but only that it was unreasonable if it was an unlawful, arbitrary or capricious exercise of power."[63] This is language borrowed directly from the holdings in the *Lodes* and *Empire City Trotting Club* cases. A decision of the United States Supreme Court was quoted to clarify the single issue actually presented for judicial determination in this particular case: " 'Power to make the order and not the mere expediency or wisdom of having made it, is the question.' "[64]

Although the administrative determination was sustained in *McCall*, the larger principle that administrative discretion was subject to judicial review received strong endorsement from the importance of the subject matter of the action, the distinction expounded by the court of appeals between reviewing the exercise of power and reviewing the exercise of discretion, and the fact that the result had been sustained upon Supreme Court review. The court of appeals strengthened the hand of administrative bodies upon judicial review by emphasizing that it was not the "rightness" but the "reasonableness" of the commission's actions which the courts were called upon to examine. The action taken by the administrative body, the court indicated, was to be sustained if it could conceivably be considered as a rational method of tackling the problem at

61. People ex rel. Central Park, No. & E.R.R.R. v. Willcox, 194 N.Y. 383, 87 N.E. 517 (1909). See 1 Benjamin, Administrative Adjudication in the State of New York 344-46 (1942).

62. People ex rel. New York & Queens Gas Co. v. McCall, 219 N.Y. 84, 88, 113 N.E. 795, 796 (1916), aff'd, 245 U.S. 345 (1917).

63. 219 N.Y. at 89, 113 N.E. at 796.

64. Id. at 88-89, 113 N.E. at 796, quoting ICC v. Illinois Cent. R.R., 215 U.S. 452, 470 (1910). In adapting the quoted statement to the case at hand, the court of appeals was emphasizing the limited, classical function of certiorari to review the question of jurisdiction alone. See Weintraub, supra note 16, at 721.

hand, notwithstanding any difference of opinion which the reviewing court might harbor in regard thereto.[65] This attitude marked no new departure in the law by the judicial branch, except for the more explicit sanction which *McCall* gave to administrative action based upon a reasonable premise. But it was also stated that administrative discretion was reversible if it was exercised in an illegal manner so that it fell afoul of the "arbitrary-capricious-unreasonable" requirement.[66]

Illegality, as a term for defining unreasonable action, presents an attractive simplicity, standing by itself. Clothed, as it must be, with the paraphernalia of administrative action, and exercised in a factual context pursuant to statutory authority which ostensibly sanctions the action taken, it is somewhat less than easy to isolate the point of departure from legality. For example, in the City of New York broad powers were available under the city charter to control the activities of junk dealers.[67] The Commissioner of Licenses was authorized by city ordinance to require junk dealers to submit applications on forms prescribed by him, to pay a fee and be bonded, and to impose further requirements as authorized by the ordinance; the term "junk dealer" included a person operating a junk boat in the harbor of the city.[68]

A party who had operated a junk boat for several years submitted an application to the license commissioner to operate a junk boat. The commissioner denied the license because the applicant did not have a junk shop license and a place of business for that purpose, and also because there was neither room nor need for further junk boat licenses.[69] Upon this, a mandamus was sought by the applicant, in *Picone v. Commissioner of Licenses*,[70] to compel issuance of a junk boat license to him, alleging that the action of the commissioner was "arbitrary, tyrannical and unreasonable" insofar as the reasons assigned for the denial of the license were concerned.[71] The commissioner defended his action as a proper exercise of discretion because of the many complaints of theft committed in the city harbor which were alleged to emanate from junk boats, and because more than one hundred such licenses were outstanding. The commissioner further added his opinion that it was a mistake to grant such licenses altogether.[72]

65. 219 N.Y. at 91, 113 N.E. at 797.

66. Id. at 90, 91, 113 N.E. at 797.

67. N.Y.C. Charter § 51 (now N.Y.C. Charter § 436).

68. N.Y.C. Admin. Code § B32-113.0(4).

69. Picone v. Commissioner of Licenses, 214 App. Div. 724, 209 N.Y. Supp. 904 (2d Dep't) (memorandum decision), rev'd, 241 N.Y. 157, 149 N.E. 336 (1925).

70. 241 N.Y. 157, 149 N.E. 336 (1925).

71. Id. at 160, 149 N.E. at 337.

72. Ibid. See also Sausser v. Department of Health, 242 N.Y. 66, 150 N.E. 603 (1926).

Of course, the commissioner did not help his case by offering his personal views as to the desirability of issuing junk boat licenses, however much he is to be commended for his candor. The local ordinance provided for the issuance of such licenses and there was no provision therein limiting the number of junk boats to be licensed.[73] This led the court to rule that a licensing officer may not arbitrarily impose numerical limitations not contained in the licensing statute. Although the court termed the commissioner's action an "abuse of discretion," found for the relator on all other disputed points and directed that a license issue to him, it added a notable statement of the limitations upon the exercise of discretion which has now become familiar: "Laws are made by the law-making power and not by administrative officers acting solely on their own ideas of sound public policy, however excellent such ideas may be."[74] This statement is not unlike the criticism of the State Racing Commisssion delivered in the *Empire City Trotting Club* case where the commission sought to regulate the economics of horse racing by allocating non-competitive dates.[75] It was ruled *ultra vires* there, just as the license commissioner's private views on the desirability of allowing junk boats to operate in New York harbor were overruled in the *Picone* case.

The exercise of licensing power within a context of general authority to regulate an activity has continued to trouble the courts, if "trouble" may be construed as the reflex description of sharp divisions within the court of appeals, and between the appellate division and the court of appeals where the exercise of broad licensing powers has been litigated. In two cases of more recent vintage, the extent of the powers confided to the discretion of the License Commissioner of the City of New York were again brought into sharp focus.

In the first of these cases, *Bologno v. O'Connell*, the lower court, whose order was affirmed by the appellate division,[76] had granted an application made by petitioner for an order directing the commissioner to issue a junk shop license to him. The commissioner's ground of denial was that the junk shop was to be located in an area of vacant land which was in a predominately residential district. The court of appeals formulated the sole issue on appeal to be whether such an administrative limitation was "within the ambit of legislatively delegated discretion."[77]

73. N.Y.C. Admin. Code § B32-113.0(4).

74. 241 N.Y. at 162, 149 N.E. at 338. For a strikingly similar judicial criticism, see People ex rel. Osterhout v. Perry, 13 Barb. 206, 209 (N.Y. Sup. Ct. 1852). See also Small v. Moss, 279 N.Y. 288, 299, 18 N.E.2d 281, 285 (1938); People ex rel. Cosby v. Robinson, 114 App. Div. 656, 126 N.Y. Supp. 546 (1st Dep't 1910).

75. See notes 56 & 57 supra and accompanying text.

76. 7 App. Div. 2d 749, 181 N.Y.S.2d 765 (2d Dep't 1958) (memorandum decision), aff'd, 7 N.Y.2d 155, 164 N.E.2d 389, 196 N.Y.S.2d 90 (1959).

77. 7 N.Y.2d 155, 158, 164 N.E.2d 389, 390, 196 N.Y.S.2d 90, 92 (1959).

As in *Picone*, the numerous conditions and restrictions relevant to the business of conducting a junk shop were noted. The court conceded that any effort to lay out the bounds of the commissioner's area of discretion in meticulous detail would frustrate his chances to cope with the myriad circumstances which could conceivably arise. Moreover, the court stated that it is not necessary, in license legislation, to " 'prescribe a specific rule of action.' "[78]

Nevertheless, "administrative *discretion* must be guided by an express or clearly implied standard, policy or purpose."[79] Under well-established principles of administrative law, once this field of discretion is ascertained, the court will not "interfere with a reasonable determination [made] within this sphere of discretion . . . ."[80]

In order to determine whether the field of the commissioner's discretion encompassed the protection of the residential nature of the area from intrusion by a junk shop, the court had recourse to the history and purpose of junk shop regulation. It discovered that the legislation was grounded primarily on the prevention of the distribution of stolen goods.[81] The fact that, under the New York City Charter, the City Planning Commission had full responsibility for planning and safeguarding the proper uses of land in the city was cited as additional evidence that a general power to control the locale of a junk shop was not intended to be confided to the license commissioner. Other legal uses in the area allowed fertilizer manufacturing, a crematory and a slaughter house, further negating a need for power by the commissioner to control the location of a junk shop in that area.[82]

Although the commissioner was armed with a broad discretion to cope with problems arising in the field of activity assigned to him, he nonetheless did not possess a general and unlimited discretion in regard to junk shops and their operation.[83] Where the ground of denial of a junk shop license rested on a matter or matters lying outside his sphere of responsibility and authority, denial of a license was equivalent to an arbitrary exercise of power. Liberal as the courts have been in recognizing the arsenal of power which a licensing agency requires in order to meet variegated and unforeseen conditions in its special sphere of activity, the agency cannot arrogate powers to itself which are unrelated to the administration of its functional responsibilities. When it relies upon such

78. Id. at 159, 164 N.E.2d at 391, 196 N.Y.S.2d at 93, quoting Marburg v. Cole, 286 N.Y. 202, 212, 36 N.E.2d 113, 117 (1941).

79. 7 N.Y.2d at 159, 164 N.E.2d at 391, 196 N.Y.S.2d at 93.

80. Ibid; Small v. Moss, 277 N.Y. 501, 507, 14 N.E.2d 808, 810 (1938).

81. 7 N.Y.2d at 159-60, 164 N.E.2d at 391-92, 196 N.Y.S.2d at 93.

82. Id. at 160, 164 N.E.2d at 392, 196 N.Y.S.2d at 94.

83. Id. at 158, 164 N.E.2d at 391, 196 N.Y.S.2d at 92.

arrogated power, the agency leaves the precincts of relevancy to its functions and the action becomes an arbitrary and illegal assumption of power never intended to be conferred by the legislature. In *Bologno* the dissent rightly pointed out, however, that the majority opinion was itself in conflict with a recent holding of the court where the residential character of an area was accepted as a basis for denying a bowling alley license, albeit specific authorization in the statute for allowing the license commissioner to consider this factor was absent.[84]

The holding in *Bologno* can best be summarized by stating that the "locale" of a junk shop is not integrally related to the functions confided to the license commissioner and, therefore, was not intended to be a matter over which he was implicitly given jurisdiction to exercise his discretion. In *Rosenberg v. Moss*,[85] cited in the *Bologno* dissent,[86] the establishment of a bowling alley would have tended to bring large numbers of strangers to the area. Such an invasion of a private, residential area may be considered an ancillary problem, emanating from the issuance of a bowling alley license, and consequently to lie within the ambit of the commissioner's responsibility and authority. At best, however, the question is a close one, demonstrating that general licensing powers function within a trackless area which can never be wholly mapped out in advance by legislative definition or by piecemeal judicial decision after the act.

In a case companion to *Bologno*, *Barton Trucking Corp. v. O'Connell*,[87] the field of the license commissioner's power and discretion was again exposed to close scrutiny. This case is noteworthy for the comprehensive opinions written in all of the reviewing courts, viz., special term, the appellate division and the court of appeals.

A license as a public cartman, *i.e.*, a trucking license to operate within the City of New York, had been denied to the petitioner corporation by the Commissioner of Licenses on the ground that the corporation treasurer had been convicted of extortion in 1937 in connection with garment trucking racketeering. The trucking activities to be licensed here were intended to be carried on in the garment district of New York. Special term was of the belief that implicit in the licensing setup was the necessary requirement that the applicant be a "fit and proper person" to engage

84. Id. at 164, 164 N.E.2d at 394, 196 N.Y.S.2d at 97 (dissenting opinion), citing Rosenberg v. Moss, 296 N.Y. 595, 68 N.E.2d 880 (1946) (memorandum decision); cf. People ex rel. Sprenger v. Department of Health, 226 N.Y. 209, 123 N.E. 379 (1919) (per curiam).

85. 296 N.Y. 595, 68 N.E.2d 880 (1946) (memorandum decision).

86. 7 N.Y.2d at 164, 164 N.E.2d at 394, 196 N.Y.S.2d at 97 (dissenting opinion).

87. 7 N.Y.2d 299, 165 N.E.2d 163, 197 N.Y.S.2d 138 (1959).

in the business; it therefore sustained the action of the commissioner as "sound and salutary" in view of the criminal record aforesaid.[88]

In reversing, the unanimous appellate division ruled that the commissioner was without power to deny the license on this ground because the bare statute was entirely silent regarding such qualifications for public cartmen.[89] In addition, the absence of any standards in the statute to guide the commissioner in exercising such an assumed discretion as to a prior criminal record was also fatal to the administrative determination here. The court conceded that a license may be denied even where standards are not clearly spelled out if the use of the license would violate the law or would infringe upon public policy. The spare provisions of this statute did not tend to sustain the commissioner's action on either of these special exceptions to the rule requiring specific standards to support the denial herein, although a remand was ordered to allow further proof to be adduced in this respect.[90] The appellate division regarded the purpose of the licensing here of public cartmen to be confined to identification, collection of revenue and control over fees charged to the public.[91] Therefore, the commissioner had no power to impose a requirement and exercise a discretion in regard to character qualifications.

Relying in large part upon a much-cited and oft-quoted nineteenth century case, *People ex rel. Schwab v. Grant*,[92] the court of appeals ruled, in reversing on appeal, that standards need not be expressly spelled out where power is delegated to an administrative body if such power is implicitly delegated in light of the statutory purpose.[93] Entering upon a search for this statutory purpose, the opinion cited the general licensing provisions of the New York City Charter,[94] the provisions of the old Brooklyn City Charter relating to public cartmen,[95] and to *City of Brooklyn v. Breslin*,[96] a case decided thereunder.[97] The court also considered the *Picone* case and several other licensing cases where a statutory implication was discerned that a license could be denied to a person who was found not to be fit and proper.[98] In further support of the action of the com-

88. 10 Misc. 2d 717, 718, 173 N.Y.S.2d 464, 466 (Sup. Ct. 1958).
89. 7 App. Div. 2d 36, 38, 180 N.Y.S.2d 686, 689 (1st Dep't 1958).
90. Id. at 42, 180 N.Y.S.2d at 693.
91. Id. at 40, 180 N.Y.S.2d at 691.
92. 126 N.Y. 473, 27 N.E. 964 (1891).
93. 7 N.Y.2d 299, 307, 165 N.E.2d 163, 166-67, 197 N.Y.S.2d 138, 143 (1959).
94. Id. at 307-08, 165 N.E.2d at 167, 197 N.Y.S.2d at 147.
95. Id. at 311-12, 165 N.E.2d at 169, 197 N.Y.S.2d at 147.
96. 57 N.Y. 591 (1874).
97. 7 N.Y.2d at 311-12, 165 N.E.2d at 169, 197 N.Y.S.2d at 147.
98. Id. at 309-10, 165 N.E.2d at 168, 197 N.Y.S.2d at 145-46, citing De Stasio v.

missioner, another well-cited case, *Larkin Co. v. Schwab*,[99] was enlisted to show that judicial interference is justified "only when it is clearly shown that refusal is based solely upon grounds which as matter of law may not control . . . [his] discretion . . . ."[100] Actually, this quotation begged the question at issue because it did not set limits upon the area of discretion or expound a guiding concept for ascertaining the elements which the commissioner can properly consider in discharging his responsibilities effectively and in the best public interest. In sum, a rule for evaluating the validity of administrative action based upon considerations of character was not spelled out in the statute, and such guidance was needed to determine the validity of the action taken in the *Barton* case.

Concluding, however, that the character of an applicant for a license to conduct a public carting business was a proper subject of administrative concern and inquiry, the court readily disposed of the two remaining questions raised in the adverse decision of the appellate division. *Marburg v. Cole*[101] was cited to obviate the need for " 'definite, comprehensive' " standards, and, therefore, the nature and locale of this conviction precluded "as a matter of law that the Commissioner acted arbitrarily or capriciously in refusing to issue the licenses."[102] Evidently, the court was quite sensitive to the importance of *Schwab v. Grant*,[103] for it is quoted from towards the end of the *Barton* decision as follows:

> In the government of the affairs of a great municipality many powers must necessarily be confided to the discretion of its administrative officers, and it can be productive only of mischief in the treatment of such questions to substitute the discretion of strangers to the power in place of that of the officers best acquainted with the necessities of the case and to whom the legislature has specially confided their exercise.[104]

The foregoing quotation supplied the rationale for the decision in the *Barton* case, and of other decisions where the exercise of broad discretion

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Fielding, 295 N.Y. 903, 68 N.E.2d 23 (1946) (memorandum decision); Arroyo v. Moss, 295 N.Y. 754, 65 N.E.2d 570 (1946) (memorandum decision).

99. 242 N.Y. 330, 151 N.E. 637 (1926).

100. Id. at 335, 151 N.E. at 639.

101. 286 N.Y. 202, 36 N.E.2d 113 (1941).

102. 7 N.Y.2d at 312, 313, 165 N.E.2d at 170, 197 N.Y.S.2d at 148, 149. But see Ciccio v. O'Connell, 17 App. Div. 2d 771, 232 N.Y.S.2d 236 (1st Dep't 1962) (memorandum decision), where petitioner's convictions in 1932 for petty larceny and attempted forgery were cited by the license commissioner to preclude his securing a keymaker's license needed for his job as chief engineer in a hotel. The court ruled that although the prior convictions were somewhat relevant, they were too remote in time—over thirty years with an unblemished record—to constitute a valid basis for the denial of the license.

103. 126 N.Y. 473, 27 N.E. 964 (1891).

104. 7 N.Y.2d at 314, 165 N.E.2d at 171, 197 N.Y.S.2d at 150, quoting from 126 N.Y. at 482, 27 N.E. at 967.

by an administrative official had been sustained by the courts in the name of a definite legislative purpose, but which actually lacked the specifics of statutory authorization.[105] Once the proposition is framed in the terms set forth in *Schwab v. Grant*, the precise issues of power, authority and discretion tend to become blurred and the impact of judicial review is softened as generalized case law principles are invoked by copious quotation to support the decision of the court.

However, a further word needs to be said about the heavy reliance placed upon *People ex rel. Schwab v. Grant*. In that case the relator's bond and license to act as an auctioneer were disapproved by the Mayor of the City of New York. The court of appeals fell back upon legislative history and the exercise of police powers to support the authority for licensing auctioneers, and wielded the concept of such a license as a "privilege" to ward off relator's argument that he had a "right" to a license.[106] The court buttressed this stand with the statement that

> No one, we think, could reasonably claim that the exercise of the discretion of the mayor with respect to the subject of granting such licenses, could be subjected to supervision or control. . . . The practice of nearly a century in this state has taught us that there is little to fear from an abuse of this power . . . .[107]

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105. E.g., Playboy Club, Inc. v. O'Connell, 18 App. Div. 2d 339, 239 N.Y.S.2d 262 (1st Dep't 1963), aff'd mem. 14 N.Y.2d 503, 197 N.E.2d 622, 248 N.Y.S.2d 226 remittitur amended mem. 14 N.Y.2d 648, 198 N.E.2d 602, 249 N.Y.S.2d 433 (1964), where the License Commissioner of the City of New York was upheld in denying a cabaret license to petitioner under statutory standards requiring an applicant to be "a fit and proper person" and the premises to be a "safe and proper place . . . ." 18 App. Div. 2d at 341, 239 N.Y.S.2d at 265. But see Playboy Club, Inc. v. Hostetter, 19 App. Div. 2d 822, 243 N.Y.S.2d 566 (1st Dep't 1963) (memorandum decision), aff'd mem. 14 N.Y.2d 933, 200 N.E.2d 868, 252 N.Y.S.2d 328 (1964), where the court found, upon petitioner's application for a liquor license, an absence of relevancy between a one-time "key" or admission charge and respondent's general statutory responsibility for promoting conditions favorable to temperance and, therefore, directed issuance of the license.

106. 126 N.Y. at 481-82, 27 N.E. at 967. The use of the concept of "privilege" as a measuring rod upon judicial review still persists. See Fink v. Cole, 1 N.Y.2d 48, 133 N.E.2d 691, 150 N.Y.S.2d 175 (1956) (horse racing license). For the distinction between the classification of several types of interests, see Hecht v. Monaghan, 307 N.Y. 461, 121 N.E.2d 421 (1954).

107. 126 N.Y. at 482, 27 N.E. at 967. The rule of absolute discretion framed in Schwab v. Grant has become progressively narrowed with the passage of years. In large measure, Schau, Lodes and Empire City Trotting Club were primarily responsible for the change. At present, small pockets of administrative activity remain impervious to judicial scrutiny. Hines v. State Bd. of Parole, 293 N.Y. 254, 56 N.E.2d 572 (1944); Berger v. Walch, 291 N.Y. 220, 52 N.E.2d 105 (1943); Sheridan v. McElligott, 278 N.Y. 59, 15 N.E.2d 393 (1938); Bullock v. Cooley, 225 N.Y. 566, 122 N.E. 630 (1919). But see Board of Educ. v. Allen, 6 N.Y.2d 127, 160 N.E.2d 60, 188 N.Y.S.2d 515 (1959); Guardian Life Ins. Co. v. Bohlinger, 308 N.Y. 174, 124 N.E.2d 110 (1954).

The judicial attitude which is reflected in the foregoing quotation was the accepted and established rule at the turn of the nineteenth century in regard to judicial review of administrative discretion by mandamus; there was no judicial review possible. The court itself acknowledged: "Whether any remedy is afforded by the law for an abuse of such discretion it is not now necessary to inquire, as that question cannot be presented on an application for a mandamus."[108] When the additional fact is added that no reason was offered by the mayor at any point for refusing to issue the license, the luster of the otherwise incisive language in the opinion is dulled insofar as useful guidance in connection with contemporary judicial review is concerned. The holding represents an accurate statement of the law of its time, but the rationale became outmoded more than fifty years ago. Therefore, the use of its terminology for present-day authority is ill advised because the concept behind the earlier holding bears no resemblance to contemporary concepts of administrative law in the area of review of discretion. The residual value of *Schwab v. Grant* is now largely historical.

Barton is instructive also for the light it throws on the changed judicial attitude regarding the need for spelling out standards in legislation as a necessary condition to the valid exercise of administrative discretion under a general grant of power. As noted above, *Barton* utilized *Marburg v. Cole*[109] to supersede *Small v. Moss*[110] and *Seignious v. Rice*,[111] and thereby whittled down former judicial insistence upon specific legislative standards as a condition to the valid delegation of power to exercise administrative discretion. Henceforth, according to *Barton*, legislative standards need not be explicit but discretionary power can be deduced from legislative history, related cases and statutes, and the purpose and intent of the statute itself. A new rule of relevance to support the exercise of discretionary power, despite absence of specific statutory authority, has been forged out of these elements. The trend towards acquiescence in broad delegations of authority to administrative bodies and discovering, upon judicial review, a wide assortment of powers spreading umbrella-like over the administrative terrain, continues to receive judicial approval.[112]

108. 126 N.Y. at 482, 27 N.E. at 967.

109. 286 N.Y. 202, 36 N.E.2d 113 (1941).

110. 279 N.Y. 288, 18 N.E.2d 281 (1938).

111. 273 N.Y. 44, 6 N.E.2d 91 (1936). See also Packer Collegiate Institute v. University of the State of N.Y., 298 N.Y. 184, 81 N.E.2d 80 (1948); Lyons v. Prince, 281 N.Y. 557, 24 N.E.2d 466 (1939); Levine v. O'Connell, 275 App. Div. 217, 88 N.Y.S.2d 672 (1st Dep't 1949), aff'd mem. 300 N.Y. 658, 91 N.E.2d 322 (1950).

112. Chiropractic Ass'n, Inc. v. Hilleboe, 12 N.Y.2d 109, 187 N.E.2d 756, 237 N.Y.S.2d 289 (1962); National Psychological Ass'n for Psychoanalysis, Inc. v. University of the State

A recent case on administrative discretion, *Lemir Realty Corp. v. Larkin*,[113] decided by the court of appeals, indicates that in matters of discretion an attitude of judicial restraint in deference to administrative judgment continues to predominate. The high court in that case announced: "The courts do not sit to supervise the discretionary acts of the hundreds of town boards and town zoning boards in this State."[114] It was emphasized that courts were without "original jurisdiction" in proceedings brought to review the refusal of a town board to grant a special exception for the construction of a gasoline service station. The legislature had conferred that function of government upon the local body. "Reasonableness" remains the ultimate test in article 78 review of the exercise of discretion, and the courts can only consider whether the reasons given for the action taken "were lawful ones or such as reasonable minds could act on."[115] The town board had given five reasons for denying the petitioner's application, but each of these reasons was rejected by the court at special term.[116] In the court of appeals, the test of reasonableness was taken to mean that unless patently invalid as reasons, *i.e.*, to outrage common sense,[117] they must be accepted by the reviewing court, else "the Judges have taken over the duties and powers of the board."[118] This is a rather pointed expression of how strong the tide is running against more than limited judicial inquiry into exercise of administrative discretion.

A distinctive feature of *Lemir Realty* and the case it largely relied upon, *Larkin Co. v. Schwab*,[119] is the fact that in both instances the

of N.Y., 8 N.Y.2d 197, 168 N.E.2d 649, 203 N.Y.S.2d 821, appeal dismissed per curiam, 365 U.S. 298 (1961); City of Utica v. Water Pollution Control Bd., 5 N.Y.2d 164, 156 N.E.2d 301, 182 N.Y.S.2d 584 (1959); cf. Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167 (1962); Kent v. Dulles, 357 U.S. 116, 129 (1958). "Deliberate ambiguity [in the drafting of legislation] is a device for delegating authority to administrators and judges." Newman, A Legal Look at Congress and the State Legislatures, in Legal Institutions Today and Tomorrow 67, 75 (Paulsen ed. 1959). Accord, Darweger v. Staats, 267 N.Y. 290, 306, 196 N.E. 61, 66 (1935). For a view contrary to the current trend, see Friendly, The Federal Administrative Agencies 21-22, 166-67 (1962). Paradoxically, as additional areas of administrative action have been brought within judicial purview, a useful tool for testing and evaluating the exercise of such administrative discretion has been blunted by the wider delgations of power to administrative bodies. The courts are virtually helpless to enter into these areas of administrative discretion because the broad grants of power can conveniently withstand judicial probing of legislative aim and purpose.

113. 11 N.Y.2d 20, 181 N.E.2d 407, 226 N.Y.S.2d 374 (1962).
114. Id. at 24, 181 N.E.2d at 409, 226 N.Y.S.2d at 376.
115. Id. at 25, 181 N.E.2d at 409, 226 N.Y.S.2d at 377.
116. 195 N.Y.S.2d 232 (Sup. Ct. 1959).
117. 11 N.Y.2d at 25, 181 N.E.2d at 409, 226 N.Y.S.2d at 376.
118. Ibid.
119. 242 N.Y. 330, 151 N.E. 637 (1926).

discretion to act rested with a legislative body which exercised administrative powers in the specific instances under review. Although action by a legislative body is now held subject to judicial review in such instances,[120] it appears that the courts tend to show more deference and yield much greater scope for the exercise of such discretion than would normally be accorded to similar action by a strictly administrative body.[121] For this reason the great reliance placed upon the *Larkin Co. v. Schwab* holding in dealing with matters of administrative discretion is not wholly warranted. Just as the court of appeals in *Barton*[122] fortified itself by copious quotations from *Schwab v. Grant*,[123] the decision in *Lemir Realty* is likewise founded upon persuasive excerpts from *Larkin Co. v. Schwab*.[124] This is an established technique of common law judicature, but the technique should be used carefully and selectively. Reliance upon historically outmoded cases such as *Schwab v. Grant* introduces an eccentric element into the development of a body of administrative law seeking to cope with rapid changes. Reliance upon excerpts from outmoded case law authorities, *e.g.*, *Schwab v. Grant*, only perverts the value of case law citations.[125]

A prime example of the dangers inherent in the tendency to premise a decision upon a cogent, but inapposite, quotation is found in *Stracquadanio v. Department of Health*.[126] There, an oft-quoted judicial test for determining the validity of administrative exercise of discretionary power is stated to be "limited to a determination whether the record discloses circumstances which leave no possible scope for the reasonable exercise of that discretion in the manner of which the appellant complains."[127] Superficially, the quotation seems to accurately reflect the rule of reasonableness which the courts have applied as the test for the valid exercise of administrative discretion in recent decades. In point

120. See Rothstein v. County Operating Corp., 6 N.Y.2d 728, 158 N.E.2d 507, 185 N.Y.S.2d 813 (1959) (memorandum decision); Mastrangelo v. State Council of Parks, 22 App. Div. 2d 947, — N.Y.S.2d — (2d Dep't 1964) (memorandum decision); Shell Oil Co. v. Farrington, 19 App. Div. 2d 555, 241 N.Y.S.2d 152 (2d Dep't 1963) (memorandum decision). For cases exemplifying the earlier rule of legislative immunity from judicial review on questions of judgment or discretion, see Neddo v. Schrade, 270 N.Y. 97, 200 N.E. 657 (1936) (certiorari); Ciresi v. Newcomb, 244 App. Div. 760, 279 N.Y. Supp. 269 (4th Dep't 1935) (per curiam) (mandamus). Cf. People ex rel. Baird v. Board of Supervisors, 138 N.Y. 95, 33 N.E. 827 (1893).

121. Cf. Seignious v. Rice, 273 N.Y. 44, 6 N.E.2d 91 (1936).

122. 7 N.Y.2d 299, 165 N.E.2d 163, 197 N.Y.S.2d 138 (1959).

123. 126 N.Y. 473, 27 N.E. 964 (1891).

124. 242 N.Y. 330, 151 N.E. 637 (1926).

125. See Snyder v. Massachusetts, 291 U.S. 97, 114 (1934) (Cardozo, J.).

126. 285 N.Y. 93, 32 N.E.2d 806 (1941).

127. Id. at 96, 32 N.E.2d at 808.

of fact, the quotation has no substantial relevance to the decision which was reached in the *Stracquadanio* case. Of greater significance is the fact that the major part of the quotation originated under circumstances which were not concerned with the question of reasonableness in the exercise of administrative discretion of an adjudicatory nature. The major point at issue hinged on the reasonableness of a classification made by the Department of Health and embodied in a regulation issued by it.

In *Stracquadanio* the petitioner and others, similarly situated, were aggrieved by defendant's denial of a permit to deliver milk in New York City as independent milk dealers. Such permits were issued pursuant to previously issued regulations. Because the first two categories of the regulations issued by defendant patently precluded issuance of a permit to petitioner and seemed to be based upon a reasonable classification, he sought a Class C permit. This type of permit required prior activity as an independent, individual milk distributor in the city before June 1, 1939, under which petitioner failed to qualify by reason of the cut-off date. The lower court had refused his application for mandamus,[128] and in the court of appeals he attacked the regulation as a violation of the state and federal constitutions.[129]

It was shown by defendant that the distribution of milk required the exercise of police power; that serious problems of inspection are presented where depots are not used; unsanitary practices creep in where marginal distributors seek to gain a foothold in the highly competitive milk business. Clearly, the question presented to the court revolved more about the rule-making power to issue the Class C regulation than about defendant's exercise of discretion in denying the permit in petitioner's particular case. Nevertheless, a former Attorney General of the State of New York has noted that the foregoing quotation has been cited extensively as the leading test for evaluating the reasonableness of the exercise of administrative discretion.[130] However, the inapposite quotation is not the only incongruity in *Stracquadanio*, for there is also the unwarranted technique whereby the quoted formula was transformed into the standard description for testing reasonableness of exercise of administrative discretion upon judicial review. The case to which the quotation owes its origin is *Durr v. Paragon Trading Corp.*[131] The *Durr*

128. 20 N.Y.S.2d 964 (Sup. Ct. 1940), aff'd per curiam, 259 App. Div. 994, 20 N.Y.S.2d 965 (1st Dep't 1940).

129. 285 N.Y. at 95, 32 N.E.2d at 807.

130. Goldstein, Judicial Review of Administrative Action Through Article 78 of the Civil Practice Act (1937-1951), 2 Syracuse L. Rev. 199, 204-05 (1951). See also Rockower v. State Liquor Authority, 4 N.Y.2d 128, 131, 149 N.E.2d 512, 514, 173 N.Y.S.2d 5, 8 (1958).

131. 270 N.Y. 464, 1 N.E.2d 967 (1936).

case involved an application for mandamus to compel defendant to permit petitioner to inspect books and records of defendant corporation in an effort to establish claims of waste and mismanagement. The application was granted at special term.

In the court of appeals where defendant corporation was the appellant, it maintained that its affidavits of denial and its pleaded defenses should have precluded issuance of the peremptory mandamus by the lower court until the truth of petitioner's allegations was established upon a trial of the issues. The appeal accordingly resolved itself into a question of whether the lower court was justified in exercising its judicial discretion by issuing a mandamus in petitioner's behalf without affording defendant an opportunity to sustain its denials and defenses. The court of appeals observed that mandamus issues only for enforcement of a clear, legal right (viz., stockholders have a right to inspect the corporate books for a proper purpose), after which the court must determine whether it will, in the exercise of sound judicial discretion, grant or withhold the order. Then follows the notable sentence which ultimately found its way into *Stracquadanio* as a definition of judicial abuse of discretion under certain conditions: "Denial of an application for the order [of mandamus] constitutes an abuse of discretion, as matter of law, in those rare cases, only, where the circumstances leave no possible scope for the reasonable exercise of discretion in such manner . . . ."[132]

The court of appeals thereby expressed a rule to govern the judicial review of the exercise of discretion by a court; it was not designed to serve as a guide upon judicial review of administrative discretion. The vice of applying a test for the exercise of judicial discretion to the infinitely more complex field of administrative discretion is that the factors to be considered in judging the validity of the action in these respective instances are largely dissimilar.[133] First, *Durr* involved a matter of private right between private parties where no question of public law was involved. Second, the posture of the pleadings in this private litigation, to a large extent, governed the disposition of the ultimate decision reached by the court. Another decisive distinction must be the continuing responsibility which devolves upon an administrative body acting within a specified statutory scheme; certainly, the narrow, legal questions involved in a private suit cannot be normally assimilated to the magnitude and ramifications of the former. Public policy often dictates differing distinctions in the treatment of public and private legal questions, and, in recognition of these distinctions, the court retains a

132. Id. at 469, 1 N.E.2d at 969.

133. See Kramer, The Place and Function of Judicial Review in the Administrative Process, 28 Fordham L. Rev. 1, 78 (1959).

discretion in public law matters involving the prerogative writs which is not normally available in private litigation. It follows, therefore, that there was no true analogy in applying the same yardstick for measuring the reasonableness of judicial discretion in issuing mandamus in private litigation as contrasted with the broad public considerations, including statutory purposes and powers, which are necessarily involved in reviewing an administrative act of discretion. *Durr* was a narrow holding, on the pleadings, in a private case dealing solely with an act of judicial discretion; the propriety of administrative action was entirely foreign to the case.

Although *Small v. Moss*[134] and *Coombs v. Edwards*,[135] which followed *Durr*, did deal with mandamus involving administrative bodies, the foregoing quotation was invoked solely to express the test for review in the court of appeals of judicial discretion exercised below, and not administrative discretion. Its subtle transition from the judicial to the administrative sphere came, without acknowledgment of the disparate origin, in *Schwab v. McElligott*,[136] a case involving a fireman's claim to a disability pension. The respondent had moved to dismiss the mandamus-type application before answering, and consequently the court treated petitioner's allegations of fact as true for the purpose of reviewing, on appeal, the granting of a motion to dismiss. In this posture of the case, the factual circumstances surrounding the denial of petitioner's pension were not before the court, thereby entirely removing the question of respondent's reasonableness of action from the case. Nonetheless, the quotation from *Durr* was adopted to serve as the main prop for the opinion despite the fact that the quotation purports to state a rule for reviewing "the exercise of a discretionary power vested in an administrative officer or body . . . ."[137]

Surprisingly, the next following case, *Pruzan v. Valentine*,[138] used the quotation for its original purpose, *i.e.*, to test the exercise of judicial discretion below.[139] Then follows *Stracquadanio*, and the quotation is transformed into a formula which takes its place as one of the authoritative standards for measuring, upon judicial review, the reasonableness of the exercise of administrative discretion. The *Stracquadanio* quotation, standing by itself, certainly appears to offer a workable formula for

134. 277 N.Y. 501, 513, 14 N.E.2d 808, 813 (1938).
135. 280 N.Y. 361, 364, 21 N.E.2d 353, 354 (1939).
136. 282 N.Y. 182, 26 N.E.2d 10 (1940).
137. Id. at 186, 26 N.E.2d at 12.
138. 282 N.Y. 498, 27 N.E.2d 25 (1940).
139. Id. at 501, 27 N.E.2d at 26.

evaluating reasonableness and is, in fact, extensively cited for that purpose, but it can claim no merit by reason of legitimate origin.[140]

Civil service matters have long provided a prolific source for insight into the anatomy of administrative reasonableness as viewed by the courts.[141] In the specialized field of preparing examinations for prospective public employees or promotion examinations for civil service employees, the courts have generally exhibited reluctance to interfere with this type of administrative discretion. Where the question of proper subject matter for an examination given to accountants was raised in *Pollak v. Conway*,[142] the court's decision indicated that civil service authorities will be accorded a wide range of choice. It explained the reason for this as follows:

> The argument, one way or the other, seems to us to present an administrative and not a judicial question. Even if we were strongly persuaded that the petitioner is right about what the scope and content of the examination should be . . . we would not be justified in interfering with an administrative determination based on a different view of what kind of examination would be better.
>
> To reach the conclusion that the commission was wrong in framing this kind of an examination for this kind of a position in the sense in which a court could interfere, we would have to say that the decision to give this examination was arbitrary and capricious which is fairly close to saying no reasonable man would have regarded this examination as appropriate. . . .
>
> This case is a fairly good illustration of the problem at the bottom of judicial review of administrative acts. Even if the scope of judicial power were very broad—much broader than we have yet thought admissible in this State—the court would exercise the power very sparingly.
>
> This is not because of a sense of self-abnegation or undue restraint in respect of judicial power. It is because judges are not technically equipped to be administrators, and a judicially administered government would be a creaking and cumbersome affair. . . . The success of judicial review has rested more on the implications of its existence and availability than upon an explicit exercise of power.[143]

The trend toward viewing debatable questions of judgment and discretion which arise in the field of civil service administration as "an

140. Cf. Traynor, Comment on Courts and Lawmaking, in Legal Institutions Today and Tomorrow 48, 52 (Paulsen ed. 1959): "Every basic precedent was thus once made up out of whole cloth woven by a judge."

141. Among the early cases of this century, see People ex rel. Moriarty v. Creelman, 206 N.Y. 570, 100 N.E. 446 (1912); Simons v. McGuire, 204 N.Y. 253, 97 N.E. 526 (1912); People ex rel. Schau v. McWilliams, 185 N.Y. 92, 77 N.E. 785 (1906); People ex rel. Sims v. Collier, 175 N.Y. 196, 67 N.E. 309 (1903); People ex rel. Mack v. Burt, 170 N.Y. 620, 63 N.E. 1121 (1902) (memorandum decision).

142. 276 App. Div. 435, 95 N.Y.S.2d 553 (3d Dep't), motion for leave to appeal denied, 301 N.Y. 816, 93 N.E.2d 81 (1950).

143. 276 App. Div. at 437-38, 95 N.Y.S.2d at 555-56.

administrative and not a judicial question" has been consistently followed since *Schau v. McWilliams*.[144]

In the main, absent a showing of bad faith,[145] departure from the statutory or constitutional requirements,[146] or arbitrary action,[147] the courts have refused to interfere with the discretion exercised in this field of specialization.[148] A threshold showing, in most instances, of administrative action resting on some reasonable foundation suffices to limit further judicial inquiry.[149] This test applies to every sphere of administrative activity subject to judicial review under CPLR 7803(3). The "reasonableness" test, whether stated in terms of rationality or relevancy,[150] now pervades the entire area of judicial review of administrative discretion. An example taken from the closely controlled field of liquor regulation will illustrate how far the rule of reasonableness can be stretched so long as it exhibits a tolerable degree of relevancy.

In *Wager v. State Liquor Authority*,[151] the court of appeals reversed special term[152] and the appellate division[153] and sustained disapproval of the renewal of a liquor salesman's license on the basis of questionable relationships. The State Liquor Authority alleged that the intermingling

144. 185 N.Y. 92, 77 N.E. 785 (1906).

145. O'Reilly v. Grumet, 308 N.Y. 351, 126 N.E.2d 275 (1955) (dictum); Turel v. Delaney, 285 N.Y. 16, 32 N.E.2d 774 (1941); McCanless v. Brieant, 19 App. Div. 2d 736, 242 N.Y.S.2d 841 (2d Dep't 1963) (memorandum decision) (semble).

146. Shpritzer v. Lang, 17 App. Div. 2d 285, 234 N.Y.S.2d 285 (1st Dep't 1962), aff'd mem. 13 N.Y.2d 744, 191 N.E.2d 919, 241 N.Y.S.2d 869 (1963).

147. Acosta v. Lang, 13 N.Y.2d 1079, 196 N.E.2d 60, 246 N.Y.S.2d 404 (1963); Gruner v. McNamara, 298 N.Y. 395, 83 N.E.2d 850 (1949) (per curiam).

148. Wirzberger v. Watson, 305 N.Y. 507, 114 N.E.2d 15 (1953); Blumenthal v. Morton, 273 App. Div. 497, 78 N.Y.S.2d 302 (1st Dep't), aff'd mem. 298 N.Y. 563, 81 N.E.2d 102 (1948).

149. Albano v. Hammond, 268 N.Y. 104, 196 N.E. 759 (1935); Kayfield Constr. Corp. v. Morris, 15 App. Div. 2d 373, 378, 225 N.Y.S.2d 507, 517 (1st Dep't 1962); Freymann v. Weaver, 8 App. Div. 2d 704, 185 N.Y.S.2d 597 (1st Dep't 1959) (memorandum decision); Delicati v. Schechter, 3 App. Div. 2d 19, 24, 157 N.Y.S.2d 715, 720-21 (1st Dep't 1956).

150. Friedman v. Weaver, 3 N.Y.2d 123, 143 N.E.2d 803, 164 N.Y.S.2d 404 (1957); Fink v. Cole, 1 N.Y.2d 48, 53, 133 N.E.2d 691, 694, 150 N.Y.S.2d 175, 179 (1956); King v. O'Connell, 280 App. Div. 852, 113 N.Y.S.2d 329 (3d Dep't 1952) (memorandum decision); Campo Corp. v. Feinberg, 279 App. Div. 302, 110 N.Y.S.2d 250 (3d Dep't 1952); cf. New York Univ. v. Temporary State Housing Rent Comm'n, 304 N.Y. 124, 106 N.E.2d 44 (1952); Playboy Club, Inc. v. Hostetter, 19 App. Div. 2d 822, 243 N.Y.S.2d 566 (1st Dep't 1963) (memorandum decision), aff'd mem. 14 N.Y.2d 933, 200 N.E.2d 868, 252 N.Y.S.2d 328 (1964); Ciccio v. O'Connell, 17 App. Div. 2d 771, 232 N.Y.S.2d 236 (1st Dep't 1962) (memorandum decision).

151. 4 N.Y.2d 465, 151 N.E.2d 869, 176 N.Y.S.2d 311 (1958) (per curiam).

152. 151 N.Y.S.2d 274 (Sup. Ct. 1956).

153. 3 App. Div. 2d 934, 163 N.Y.S.2d 1020 (2d Dep't 1957) (memorandum decision).

of petitioner's other activities as owner of a vending machine company and two automobile agencies with his liquor-selling work was incompatible with his responsibilities under the law and not conducive to proper regulation and control. There was no record of a violation of any provision of law, any rule of the State Liquor Authority or of any misconduct on the part of the petitioner. Nevertheless, the court viewed the liquor authority's disapproval of renewal of petitioner's solicitor permit as a permissible act of discretion falling "within the compass of its discretionary power."[154]

It is plain that the administrative agency will be accorded the necessary discretionary power to keep its house in order, *i.e.*, to be allowed, within the realm of reasonable possibility, to pursue appropriate action. This is sanctioned by the courts irrespective of whether the basis is derived from explicit statutory provision or from powers regarded as implicit in the nature of the functions to be performed by the agency under legislative mandate. Although the exercise of authority derived from implicit power may bring administrative discretion to the perimeter of impermissible action, it need only have a ring of plausible relevancy in order to be sustained.[155]

The prevailing judicial attitude of self-restraint, of not weighing or deciding but only examining for legal error, should not be viewed as an abdication of responsibility. In circumstances where a stronger line had to be taken, the courts have demonstrated that they can respond to the needs of the community or the individual. In *Shakespeare Workshop v. Moses*,[156] a case which attracted considerable public attention, respondent New York City Park Commissioner refused to issue a park permit to petitioner to present Shakespeare's plays in Central Park free of charge. The ground of denial was petitioner's refusal to impose an admission charge for the performances. The appellate division reversed dismissal of the petition below, holding that respondent's insistence upon an admission charge was not a "rational basis" for denying the permit. Although the park commissioner exercises a "wide discretion" in the issuance of park permits, no useful park purpose was served by an admission charge and, therefore, such a requirement was "arbitrary,

154. 4 N.Y.2d at 468, 151 N.E.2d at 870, 176 N.Y.S.2d at 313; accord, Graziani v. Rohan, 10 App. Div. 2d 154, 198 N.Y.S.2d 383 (1st Dep't), aff'd mem. 8 N.Y.2d 967, 169 N.E.2d 8, 204 N.Y.S.2d 346 (1960).

155. See Monachino v. New York State Liquor Authority, 6 App. Div. 2d 378, 178 N.Y.S.2d 22 (4th Dep't 1958) (per curiam); cf. United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960).

156. 8 App. Div. 2d 343, 187 N.Y.S.2d 683 (1st Dep't 1959). See Schwartz, Administrative Law, 1959 Survey of N.Y. Law, 34 N.Y.U.L. Rev. 1374, 1382-83 (1959).

capricious and unreasonable."[157] What is especially interesting in this decision is that the appellate division could have washed its hands of the entire matter by imposing the "clear, legal right" requirement[158] upon petitioner and terminated the litigation on the basis of that well-established requirement.

In other areas of administrative judgment and discretion, the courts have been equally sensitive to changed conditions and new trends. Despite long administrative practice, approved by appellate courts, of providing separate civil service lists for each sex, an eligible on a principal's list for elementary schools brought suit in *Lichtenstein v. Jansen*[159] to set aside the establishment of two separate lists based on sex. In an exhaustive opinion which overruled prior legal precedents and rejected the reasons advanced by top New York City school officials, the two-list practice was stricken as arbitrary and capricious. Even in the closely regulated field of liquor control, the courts have not hesitated to step in and set aside administrative action which had no factual support,[160] or where it was determined that the State Liquor Authority had failed to consider all relevant factors.[161]

Throughout the cases which have been examined above, there existed a difference of opinion as to the propriety of an administrative act of judgment or discretion with regard to a problem which the administrator faced and decided initially. This conflict arose because the legislature gave to the administrator the responsibility for solving the problem in light of a legislatively declared policy. When the administrator acted, it represented an act of government as truly legitimate as that of the governor, the legislature or the judiciary, each acting within its own sphere of assigned legal competence.

In discussing the administrative function in such a context, the United States Supreme Court has stated:

It is the [Federal Power] Commission's judgment on which Congress has placed its reliance for control of licenses. . . . When the court decided that the license should

157. 8 App. Div. 2d at 347, 187 N.Y.S.2d at 687.

158. Pruzan v. Valentine, 282 N.Y. 498, 27 N.E.2d 25 (1940).

159. 4 App. Div. 2d 465, 167 N.Y.S.2d 31 (1st Dep't 1957), aff'd mem. 5 N.Y.2d 995, 157 N.E.2d 728, 184 N.Y.S.2d 857 (1959).

160. Camperlengo v. State Liquor Authority, 16 App. Div. 2d 342, 228 N.Y.S.2d 115 (1st Dep't 1962); Wanetick v. State Liquor Authority, 8 App. Div. 2d 706, 185 N.Y.S.2d 690 (1st Dep't 1959) (memorandum decision); cf. Rockower v. State Liquor Authority, 4 N.Y.2d 128, 149 N.E.2d 512, 173 N.Y.S.2d 5 (1958). See also Winkler v. State Liquor Authority, 3 App. Div. 2d 1011, 164 N.Y.S.2d 456 (1st Dep't 1957) (memorandum decision), aff'd mem. 4 N.Y.2d 856, 150 N.E.2d 246, 173 N.Y.S.2d 822 (1958).

161. Williamson v. New York State Liquor Authority, 14 N.Y.2d 360, 200 N.E.2d 565, 251 N.Y.S.2d 669 (1964).

issue without the conditions, it usurped an administrative function. . . . [because] the Commission is plainly made the guardian of the public domain.[162]

Mr. Justice Douglas, erstwhile law professor and top echelon administrator who has served in high judicial office since 1939, is eminently qualified to elucidate the role of the administrative agency in balanced perspective. He said, in 1959:

Today the administrative agency is supreme in state and federal governments. . . . The administrative agency fulfills an essential role in a government that promises to be no less dependent on it in the future than in the past. . . . The administrative agencies will continue to be important referees in the clash of private versus public interests. They will continue to be the repositories of a vast discretion which it is necessary to lodge somewhere.[163]

A leading New York jurist, Judge Francis Bergan, now sitting in the court of appeals, has also recognized the pervasive power and authority which has been increasingly delegated to the administrative agency. He has essayed the task of identifying some of the factors which impinge upon the judicial mind engaged in the process of reviewing administrative action.

There exists on the judicial side of the work a certain detachment from the heat of the quarrel, an objectivity that neither contestant is expected to feel but which both sides expect the judge to have. This allows the judge to see patiently the administrative action complained of in the light of historic and of future power and the effect of that power on the community and the laws of the community; and it implies that the judge has the insight to see that even if he would do the administrator's work differently he would not necessarily undo it in the case at hand.

The process of judicial review involves the judge projecting himself into the place of the administrator and learning that there are admissible viewpoints in the administrator's work which may be quite different from some that the judge thinks of as important; and admissible policies and decisions to which the judge, had he full freedom of action, might not subscribe but which he deems necessary to sustain on review.[164]

There is no talisman to penetrate to the ultimate answer, as Judge Bergan, sounding a clear warning in the same opinion, points out.

Satisfactory definitive terms to give sure footing to the tread of future cases have never been formulated. No one has been able clearly to mark out in advance the

162. FPC v. Idaho Power Co., 344 U.S. 17, 20, 23 (1952). See also BeeLine, Inc. v. Feinberg, 7 App. Div. 2d 814, 815, 180 N.Y.S.2d 840, 843 (3d Dep't 1958) (memorandum decision); Vivana Realty Corp. v. Abrams, 5 App. Div. 2d 466, 172 N.Y.S.2d 14 (1st Dep't 1958).

163. Douglas, Legal Institutions in America, in Legal Institutions Today and Tomorrow, 274-75 (Paulsen ed. 1959).

164. Commercial Pictures Corp. v. Board of Regents, 280 App. Div. 260, 263-64, 114 N.Y.S.2d 561, 564 (3d Dep't 1952), aff'd, 305 N.Y. 336, 113 N.E.2d 502 (1953), rev'd on constitutional grounds per curiam, 346 U.S. 587 (1954).

exact point where a judge will interfere, and separate it from the area in which he will not interfere, with what the administrator has done.[165]

The recent revision of New York practice and procedure, resulting in the adoption of the Civil Practice Law and Rules,[166] likewise offers little comfort in providing clear-cut answers to deep-rooted problems arising from judicial review of administrative action involving discretion.[167]

"Discretion," from earliest days, has engaged the attention of centuries of judges and jurists;[168] the quest has failed to yield a formula meet for all times and all seasons. The persistence and intractability of the problem has been summed up best by Dean Roscoe Pound who stated: "Almost all of the problems of jurisprudence come down to a fundamental one of rule and discretion . . . ."[169] Dean Pound's observation implies that law and discretion stand in opposition, which contains more than a grain of truth. By tradition and technique, the courts have gravitated towards establishing a definite rule, while administrative agencies have sought the protection of discretion to meet new, unanticipated problems; the exercise of that discretion is the visible expression of legislative policy which committed power to the agency to grapple with complex, fluctuating conditions. The rigidity of legal precedents and the limitations imposed by court procedures render judicial tribunals unsuitable for such tasks.

The increased diversion of power and authority to administrative agencies, accompanied by broad grants of discretion, does not necessarily lead to "administrative absolutism." The foregoing discussion shows that where the factors singled out as the basis for the exercise of discretion by the agency are not authorized by law, explicitly or by implication, are remote or are not relevant or rational, or where agency action is not supported by any evidence, or where agency procedure has not conformed to current standards of fairness, or where changed conditions have impaired the validity of agency policy and discretion, the

165. 280 App. Div. at 262, 114 N.Y.S.2d at 563.

166. N.Y. Sess. Laws 1962, ch. 308.

167. "While acknowledging the advisability of substituting an entirely new statute, the advisory committee considers such a task beyond the scope of its authority; accordingly, it has left the underlying law dealing with the prerogative writs intact, restricting its efforts to a simplification and clarification of present provisions." Second Preliminary Report of the Advisory Committee on Practice and Procedure, N.Y. Leg. Doc. No. 13, p. 395 (1958).

168. "[N]otwithstanding the words of the commission give authority to the commissioners to do according to their discretions, yet their proceedings ought to be limited and bound with the rule of reason and law. . . . and not to do according to their wills and private affections . . . ." Rooke's Case, 5 Co. 99b, 100a, 77 Eng. Rep. 209, 210 (C.P. 1599). See also Weintraub, English Origins of Judicial Review by Prerogative Writ: Certiorari and Mandamus, 9 N.Y.L.F. 478, 500 (1963).

169. Pound, An Introduction to the Philosophy of Law 111 (1922).

courts have intervened to set aside the exercise of agency discretion as arbitrary, capricious or unreasonable. A serious consideration frequently arises from court intervention because the rule enunciated by the court enters into the administrative scheme as a fixed, unchanged factor. The agency, on the other hand, is always free to shift emphasis from one factor to another as changing conditions may warrant.[170]

In the end, however, agency discretion is constantly brought back to the rule of law by judicial oversight. It stands to the credit of the judiciary that this intervention has been moderated by a high degree of judicial statesmanship because, as Chief Judge Desmond emphasized in *Lemir Realty*,[171] "original jurisdiction" belongs to the agency. Both agency and court have separate and distinct "jurisdictions" to administer in contemporary government. As problems increasingly bring these "jurisdictions" into closer working propinquity, resulting in greater skill and increased understanding, many of the difficulties which beset the uses of discretion will be clarified and resolved.

170. Dickinson, Administrative Justice and the Supremacy of Law 130-49 (1959 reprint). See also Alamac Estates, Inc. v. McGoldrick, 2 N.Y.2d 87, 138 N.E.2d 231, 156 N.Y.S.2d 853 (1956); Larkin Co. v. Schwab, 242 N.Y. 330, 151 N.E. 637 (1926); People ex rel. Schau v. McWilliams, 185 N.Y. 92, 99, 77 N.E. 785, 787 (1906).

171. Lemir Realty Corp. v. Larkin, 11 N.Y.2d 20, 24, 181 N.E.2d 407, 409, 226 N.Y.S.2d 374, 376 (1962). See also Cooper, Administrative Justice and the Role of Discretion, 47 Yale L.J. 577, 600 (1938).