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## AN ANSWER TO REGULATION CRITICS — CONTROL OF ADMINISTRATIVE AGENCIES

James C. Thomas\*

### I. INTRODUCTION

How often have arguments been heard that federal administrative agencies represent an encroachment by the Federal Government upon our inherent rights to free enterprise and private property? How often have we heard that each time another regulation is imposed upon us, we are one step closer to socialism? Are these questions useful in arriving at some understanding of administrative law? When first introduced to this field of law, students with conservative political views have such questions in mind. Before they can grasp an understanding of this area of public law it is necessary, and in fact imperative, that their political views be brought under control. But this problem is not limited to students; it is shared by many practicing attorneys.

By allowing political philosophy to control the mind, one's ability to analyze true legal problems is diminished. In attacking a particular administrative agency how successful will one be by contending that the enacting statute violates our separation of powers concept, or that it infringes upon our rights to private property? With the development of administrative law, such attacks have become more political than legal. As political philosophy, such belongs in a political science discussion; it has no place in the determination of our legal rights. Our question is: "what is the law;" not "what the law ought to be."

After all political clouds are removed, the true problems of administrative law emerge. With this as a central theme, perhaps this paper is addressed to a limited audience, but even so, it should serve a useful purpose. Until quite recently, this writer would have been found in this limited audience where political

ideology outweighs legal determination. After carefully analyzing this field of law, it was easy to see that individuals, appearing before agencies, could not be effectively represented unless this cloud was removed. An individual, ordered to appear before the Federal Trade Commission, does not care what his attorney's political views are; he wants his constitutional rights protected. A person in business seeking advice of counsel, wants assurance that he does not violate various regulations. He also seeks assurance that arbitrary, capricious or unreasonable regulations are not being promulgated. These are the true administrative law problems, and the question is how these problems can effectively be handled.

Dividing this paper into three main headings, the following will be discussed: Background to Regulations; A Regulated Economy; and An Answer to Regulation Critics.

## II. BACKGROUND TO REGULATIONS

### A. Absolute property concept

While even today we hear advocated the "absolute right to property concept," we have never had such a doctrine in our system of jurisprudence. Regulations imposed upon property can be traced to the common law<sup>1</sup> and even to the American Colonies.<sup>2</sup> As our legal system emerged from the ratification of the Constitution, there was a strong belief in the freedom from interference with private property. The early case of *Dartmouth College v. Woodward*<sup>3</sup> has been cited many times in support of arguments against any regulations being imposed on private property. Chief Justice Marshall, speaking for the Court, declared that corporate charters were contracts and thus protected under the Constitution's obligation clause.<sup>4</sup> States were stripped of the power to regulate and restrain these creatures of their legislative will.

Since early corporate charters were issued by legislature, the effect of *Dartmouth College v. Woodward* was robbed by reservation of the power to alter, amend or repeal in each charter issued.<sup>5</sup>

<sup>1</sup> 8 Anne c. 19 (1710). An early copyright statute imposed regulations on prices that could be charged for books. Section IV of the Act provided: "That if any bookseller or printer shall charge a price for a book which shall be conceived by any person to be too high and unreasonable, it shall be lawful for any person to make complaint thereof . . ." See also: 2 BLACKSTONE, COMMENTARIES \*154; Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355 (1954).

<sup>2</sup> Goebel, *King's Law and Local Custom in Seventeenth Century New England*, 31 COLUM. L. REV. 416, 444 (1931). Families were assigned "from 1 to 10 acres, for purposes of tillage, a portion of the produce to be deposited in the common stock."

<sup>3</sup> 17 U.S. (4 Wheat.) 463 (1818).

<sup>4</sup> U.S. CONST. art. 1, § 10.

<sup>5</sup> See 1 ROSES'S NOTES ON U.S. REPTS. 958; 2 WARREN, HISTORY OF HARVARD LAW SCHOOL ch. 31. OKLA. CONST. art. IX, § 47 provides: "The Legislature shall have power to alter, amend, annul, revoke, or repeal any charter of incorporation or franchise . . ."

Another early case, *Fletcher v. Peck*,<sup>6</sup> is also cited in support of the absolute right to property. In that case, the Court ruled that a state legislature was without power to revoke a grant of property regularly made for consideration.

Even if *Dartmouth College* and *Fletcher v. Peck* could be construed as supporting an absolute freedom from interference, the tide turned in 1837 with the decision rendered in *Charles River Bridge v. Warren Bridge*.<sup>7</sup> When this case was decided, Roger Taney had replaced John Marshall as Chief Justice which might have influenced the decision that issuance of a franchise, by the Massachusetts legislature, for a second bridge did not violate an earlier franchise issued to the Charles River Bridge. Viewing the decision in retrospect, we could conclude that "public policy" demanded its outcome. What would be the effect of an opposite decision in developing the community and its economy? With this case, we are moving away from the idea of freedom from interference where "public interest" demands a deviation.

While this "public interest" would encourage and support government regulations, the area of our economy regulated was, at first, very narrow. The federal government was reluctant in imposing any form of regulation on private business until the latter part of the nineteenth century. Early regulations were imposed to correct abuse of power exercised by railroads; later regulations were imposed on industry to encourage development of certain areas of commerce.

#### *B. Abuses resulting in regulations*

Historical accounts of the development of railroad and industrial empires demonstrate the need for some form of governmental regulations. In the early part of the nineteenth century there were strict laws imposed on corporations. Stockholders were held liable for corporate debts and corporations were strictly limited to the purposes specified in charters issued by legislature. Levi Lincoln, Governor of Massachusetts, recommended a relaxation of duties imposed upon corporations,<sup>8</sup> observing that these bodies had accumulated much capital but because of strict corporate laws, this capital was being diverted to other states.

More liberal laws of incorporation were favored by those who recognized such liberalism as a benefit to economic growth. Governor Lincoln thought that charters should be granted sparingly and that the business must have a beneficial purpose. In fact, he would veto charters where they were not for a needed enterprise. Certain factions voiced fear that corporations, after accumulating enough capital, would control the government—its courts and

<sup>6</sup> 10 U.S. (6 Cranch) 328 (1810).

<sup>7</sup> 36 U.S. (11 Pet.) 496 (1837).

<sup>8</sup> For a general discussion of early corporations development see 2 WARREN, HISTORY OF HARVARD LAW SCHOOL, ch. 31.

its legislatures. The desire, however, to encourage business, as a means of economic development out-weighed any fear of potential power from accumulated capital.

Especially where railroads were concerned, courts gave industry favored treatment. In 1834, Chief Justice Shaw announced that it was the incontestable right of the state to appropriate property for public use in cases of railroads since they were "public works."<sup>9</sup> Then, in *Worcester v. Western R.R.*,<sup>10</sup> Shaw held that railroads were exempt from a town tax on the ground that they were "public works." This desire to encourage business clearly affected Shaw's decisions; and this same desire affected decisions rendered by other courts.<sup>11</sup> Even today, we find states giving favored treatment to entice corporations to establish plants within their boundaries.

Corporations continued to grow and in 1839, they were given the right to take a national scope. In that year, the Supreme Court handed down its decision in *Bank of Augusta v. Earle*<sup>12</sup> which established the "artificial being of a corporation." The corporations, for business purposes, had been granted citizenship. No longer would they be required to seek legal remedy in the state of incorporation. They could now file suit to protect their rights in any state where jurisdiction was established. This, perhaps, is the most important opinion that can be cited to show how power of corporations was expanded to a national scale. Without it, we would have natural — territorial limitations upon corporations.

Daniel Webster in support of the *Bank of Augusta* decision argued that it was necessary for development of our national commercial system. Opposing this view, Ingersoll spoke of the danger of increasing corporate power. He stated that corporations would eliminate the Federal Constitution and the states. Corporations would become the sovereign; states would become the subjects.<sup>13</sup>

From this power came abuse, first in the railroad industry and then in other large corporate empires. Men who pioneered railroad and industrial empires did not, at all times, remain within legal boundaries, nor did they keep in mind the welfare of the general public. Cornelius Vanderbilt was reported once to have said: "What do I care about the law? Hain't I got the power?"<sup>14</sup> His son, William, later said: "The public be damned."<sup>15</sup>

<sup>9</sup> Wellington, *Petitioners*, 33 Mass. 87 102-103 (1834) as cited in Levy, *Chief Justice Shaw and The Formative Period of American Railroad Law*, 51 COLUM. L. REV. 327 (1951).

<sup>10</sup> 45 Mass. 564 (1842).

<sup>11</sup> See Reid, *Henry Brannon and Marmaduke Dent: The Shapers of West Virginia Law*, 65 W. VA. L. REV. 19 (1963).

<sup>12</sup> 38 U.S. (13 Pet.) 277 (1839).

<sup>13</sup> For a discussion of the effect of *Bank of Augusta v. Earle* on corporate law, see 2 WARREN, *op. cit. supra* note 8, ch. 31.

<sup>14</sup> Vanderbilt was alleged to have also written the following letter: "Gentlemen: You have undertaken to cheat me. I will not sue you, for law takes too long. I will ruin you." JOSEPHSON, *THE ROBBER BARONS* 15 (1934).

Through corruption, discrimination, unlawful acts and sometimes physical violence, railroad lines increased from 35,085 miles in 1865 to 254,037 in 1916; and gross railroad revenue increased from 300 million dollars in 1865 to over 4 billion dollars in 1917.<sup>16</sup> During this same period, Rockefeller's interest in oil spread and became strong enough to force rebates from railroads.<sup>17</sup> In the now famous *Standard Oil Co. of N. J.* case, Justice Harlan described conditions of the business world in 1890, which aroused Congress to pass the Sherman Act.<sup>18</sup> He stated:

"All who recall the condition of the country in 1890 will remember that there was everywhere, among the people generally, a deep feeling of unrest. The Nation had been rid of human slavery . . . but the conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people, namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessities of life. Such a danger was thought to be then imminent, and all felt that it must be met firmly and by such statutory regulations as would adequately protect the people against oppression and wrong."<sup>19</sup>

Congressional debates on the Sherman Act include repeated descriptions of economic conditions that led to governmental intervention and regulations. An example of language found in the Congressional Record follows:

"Certainly there is no subject likely to engage the attention of the present Congress in which the people of this country are more deeply interested than in the subject of trusts and combinations. These evils have grown within the last few years to an enormous magnitude; enormous also in their numbers. They cover nearly all the great branches of trade and of production in which our country is interested. They grow out of the present tendency of economic affairs throughout the world. It is a sad thought to the philanthropist that the present system of production and of exchange is having that tendency which is sure at some not very distant day to crush out all small men, all small capitalists, all small enterprises. This is being

<sup>15</sup> STOVER, AMERICAN RAILROADS 111 (1961).

<sup>16</sup> STOVER, *op. cit. supra* note 15 at 104-105.

<sup>17</sup> JOSEPHSON, *op. cit. supra* note 14 at 113. This covers the growth of Standard.

<sup>18</sup> 221 U.S. 1 (1911). Standard Oil of New Jersey was declared to be a monopoly and was ordered to divest itself of certain interests. The Court also established the "rule of reason" and it was this that caused Justice Harlan to dissent.

<sup>19</sup> *Id.* at 83-84.

done now. We find everywhere over our land the wrecks of small independent enterprises thrown in our pathway."<sup>20</sup>

With this background, a reluctant federal government begins to impose regulations and controls on American industry. This is not to imply that *laissez-faire* was the order of the day before the advent of federal control in our economy, for states had long attempted to exercise effective regulations. It would, here, be appropriate to review these early controls.

### C. Early regulations

1. *State.* As noted above, states attempted to control and regulate industry, particularly railroads; however, as we shall see, these controls were ineffective. In the formative years of railroads, legislatures expressly reserved rate-fixing powers within the charters.<sup>21</sup> Railroad Commissions or regulatory bodies were established in Rhode Island, 1839; New Hampshire, 1844; Connecticut, 1853; Vermont, 1855; and Maine, 1858,<sup>22</sup> but it was in the mid-western states where we witness the great conflict between the railroad interest and the granger movement.<sup>23</sup> From the first Grange, founded in Minnesota in 1867, there was a strong movement by 1875 with 20,000 local Granges and 800,000 members.<sup>24</sup> Mainly due to this force, states began to impose regulations on railroads.

In *Munn v. Illinois*,<sup>25</sup> the Supreme Court affirmed a state statute that fixed maximum rates to be charged for the storage of grain in elevators owned by railroad interests. The Court held that private property, when affected with a public interest, ceased to be *juris privati* only. Property becomes clothed with a public interest when used in a manner to make it of public consequences, thus affecting the community at large. By devoting property to a use in which the public has an interest, one, in effect, grants to the public an interest in that use, and must submit to controls and regulations necessary for public interest.

Justice Field, with Justice Strong concurring, wrote a vigorous dissent in which he stated that: "The principle upon which the opinion of the majority proceeds is, in my judgment, subversive of the rights of private property, heretofore believed to be pro-

<sup>20</sup> 21 CONG. REC. 2598 (1890) (remarks of Senator George); Senator George made his observation while objecting to the passage of the Sherman Act. He did not believe that Congress had any constitutional power to pass an antitrust bill.

<sup>21</sup> Levy, *supra* note 9 at 343-344. "The chief issue of debate," says Levy, "was whether there should be government ownership or private ownership under strict government regulation; the right of the legislature to intervene in the economy was not questioned."

<sup>22</sup> STOVER, *op. cit. supra* note at 15 at 125.

<sup>23</sup> STOVER, *op. cit. supra* note 15 at 127. The granger movement was started by Oliver H. Kelley when he founded The National Grange of The Patrons of Husbandry in 1867.

<sup>24</sup> STOVER, *op. cit. supra* note 15 at 127.

<sup>25</sup> 94 U.S. 113 (1877).

tected by constitutional guaranties against legislative interference."<sup>26</sup> Continuing with his dissent, Justice Field stated:

"The declaration of the Constitution of 1870, that private buildings used for private purposes shall be deemed public institutions, does not make them so. The receipt and storage of grain in a building erected by private means for that purpose does not constitute the building a public warehouse. There is no magic in the language, though used by a constitutional convention, which can change a private business into a public one, or alter the character of the building in which the business is transacted. A tailor's or a shoemaker's shop would still retain its private character, even though the assembled wisdom of the State should declare, by organic act or legislative ordinance, that such a place was a public workshop, and that the workmen were public tailors or public shoemakers. One might as well attempt to change the nature of colors, by giving them a new designation. The defendants were no more public warehousemen, as justly observed by counsel, than the merchant who sells his merchandise to the public is a public merchant, or the blacksmith who shoes horses for the public is a public blacksmith; and it was a strange notion that by calling them so they would be brought under legislative control."<sup>27</sup>

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If this be sound law, if there be no protection, either in the principles upon which our republican government is founded, or in the prohibitions of the Constitution against such invasion of private rights, all property and all business in the State are held at the mercy of a majority of its legislature. The public has no greater interest in the use of buildings for the storage of grain than it has in the use of buildings for the residences of families."<sup>28</sup>

The *Munn* case, simply stated, holds that private property, "affected with a public interest," is subject to state control and regulations. In the earlier years of railroads this same "public interest" had been justification for the special consideration claimed and received by them.<sup>29</sup> Subsequent to the Fourteenth Amendment, railroads characterized themselves as "private enterprises" in order to escape state regulations.<sup>30</sup>

State regulatory power was extended in *Peik v. Chicago & N. W. Ry. Co.*,<sup>31</sup> when the Court upheld a state's right to regulate fare and freight rates on railroads even though such regulations

<sup>26</sup> *Id.* at 136.

<sup>27</sup> *Id.* at 138.

<sup>28</sup> *Id.* at 140.

<sup>29</sup> Levy, *supra* note 9 at 327.

<sup>30</sup> *Ibid.*

<sup>31</sup> 94 U.S. 164 (1877).



affected interstate commerce. As to the effect of a state statute regulating interstate commerce, the Court said:

"The law is confined to State commerce, or such inter-state commerce as directly affects the people of Wisconsin. Until Congress acts in reference to the relations of this company to inter-state commerce, it is certainly within the power of Wisconsin to regulate its fares . . . , so far as they are of domestic concern. With the people of Wisconsin this company has domestic relations. Incidentally, these may reach beyond the State. But certainly, until Congress undertakes to legislate for those who are without the State, Wisconsin may provide for those within, even though it may indirectly affect those without."<sup>32</sup>

For some eleven years, states, under the *Peik* case, were held to have power to regulate businesses even though such might affect interstate commerce. During this time, Congress was being urged to take action.<sup>33</sup> Voices were being raised that "railroad regulation" was too big a problem for states,<sup>34</sup> but even so, Congress refused to take any positive action until 1887. Perhaps the first step toward entry of federal controls into the economy would have been further delayed except for the Supreme Court's change of views.

It is difficult, if not impossible, to say whether the Court had a mere change of heart or whether it heard the public cry for federal regulation of railroads. Whatever the reason, the Court, in *Wabash, St. L. & P. Ry. v. Illinois*<sup>35</sup> decided that "railroad regulation" was too big a problem for states. Illinois had passed a statute designed to prevent unjust discrimination and extortion in freight rates charged by the different railroads in the state.<sup>36</sup> Holding the statute to be unconstitutional, the Court stated:

"Of the justice or propriety of the principle which lies at the foundation of the Illinois statute it is not the province of this court to speak. As restricted to a transportation which begins and ends within the limits of the State, it may be very just and equitable, and it certainly is the province of the State legislature to determine that question. But when it is at-

<sup>32</sup> *Id.* at 177-178.

<sup>33</sup> STOVER, *op. cit. supra* note 15 at 126. In 1872 Congress investigated the railroad industry and found many abuses, but it took no positive action.

<sup>34</sup> STOVER, *op. cit. supra* note 15 at 130.

<sup>35</sup> 118 U.S. 557 (1886). Cases have since shown that other problems are too big for states. In *State v. Standard Oil Co.*, 49 Ohio St. 137, 30 N.E. 279 (1892), a quo warranto proceeding was commenced against Standard of Ohio for the purpose of breaking up the oil trust. While the state court ruled the trust to be illegal, the power of the monopoly continued until the federal antitrust laws were applied in *Standard Oil of N.J. v. United States*, 221 U.S. 1 (1911).

<sup>36</sup> *Id.* at 562. For violation of statute a penalty of \$5,000 could be imposed; also a private person injured had the right to recover treble damages.

tempted to apply to transportation through an entire series of States a principle of this kind, and each one of the States shall attempt to establish its own rates of transportation, its own methods to prevent discrimination in rates, or to permit it, the deleterious influence upon the freedom of commerce among the States and upon the transit of goods through those States cannot be over estimated. That this species of regulation is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations, we think is clear from what has already been said. And if it be a regulation of commerce, as we think we have demonstrated it is, and as the Illinois court concedes it to be, it must be of that national character, and the regulation can only appropriately exist by general rules and principles, which demand that *it should be done by the Congress of the United States under the commerce clause of the Constitution.*<sup>37</sup>

After this decision, we either would have no regulations on interstate railroads or would have national regulations applying uniformly to all railroads. It should be remembered that the granger movement had become a powerful political force and their demands for control of railroads could not be ignored.

2. *Federal.* In 1887, Congress, making its first entry into the regulation of economy arena, passed the Interstate Commerce Act, which applied to all common carriers transporting passengers or property by railroad or water.<sup>38</sup> There was nothing bold about the Act. In fact, it showed how timid and reluctant the national government was in exercising any control or regulation over our economy. But the Act did represent federal regulation and it is this factor that makes it so important. Just as a small child, the federal government had taken its first step, and with this step, our nation was destined for a regulated economy.

### III. A REGULATED ECONOMY

We now live in a complex society. Wagon trails have been replaced by freeways; wagons, as early modes of transportation, have been replaced by railroads, powerful automobiles, and supersonic jets. Time required to travel across our great nation has been reduced from months to a matter of a few hours. Geographical frontiers, such as the old wild west, have been replaced by scientific frontiers. As our society advances and becomes more complex, there must be advancement and changes in our economy.

Economies have changed in this country as they have around the world. These changes, accomplished in some countries by

<sup>37</sup> *Id.* at 577 [Emphasis added].

<sup>38</sup> 24 Stat. 379 (1887). There was no effective enforcement procedure for the Commission's cease and desist orders; thus, the violator could disregard any order with impunity until the Commission had gone through delaying court proceedings.

revolutions, were attained in the United States by regulations. "Faced with the increased tempo of life and the increased complexities of our economy, there are presented only two possible alternatives. One is the establishment of proper regulation in the public interest . . . . The other course open is government ownership and operation of the instruments of production, transportation and public service. You call it socialism, or you can go a few steps beyond and have communism."<sup>39</sup> Richard B. McEntire, who delivered these words, continued by saying:

"Proper regulation is the keystone to the maintenance of a free economy liberated from the threat of government ownership. And I firmly believe that those who urge that we eliminate substantially all regulation and return to the *laissez-faire* theory of a century ago, are unwittingly but surely playing into the hands of those groups that are seeking to overthrow our system of free enterprise."<sup>40</sup>

It was not federal control and regulations that eliminated or at least de-emphasized *laissez-faire*, for long before this advent, states freely regulated their economy. Speaking of Massachusetts, Levy points out that: "The rights of property, though adequately protected, were ranked second to the rights of the Commonwealth. To Chief Justice Shaw the concept of the 'Common-Wealth' meant a working partnership between government, people, and capital to build and grow together for the greater good of the community."<sup>41</sup> Whether one can agree with this philosophy—working partnership—is immaterial. To advocate the elimination of all controls is useless and idle thinking. We have regulations and there is little likelihood that they will be reduced. Instead, such regulations are being increased as our economy becomes more complex.

### A. Federal

Once Congress had created the first federal regulatory agency, it would become easier to establish others. It was like breaking the four-minute mile. The question would not be whether regulations should be imposed; it would be how could such regulations be made effective?

<sup>39</sup> Richard B. McEntire, *A Regulator Looks at Regulation*, an address delivered before the National Association of Securities Administrators, Jacksonville, Florida, on October 2, 1947 and excerpted in GELLHORN & BYSE, *ADMINISTRATIVE LAW* 8 (4th ed. 1960). When the F.T.C. Act was before Congress, some Congressmen favored strict controls on corporations. Mr. Morgan of Oklahoma stated: "If necessary for the public welfare we should authorize the Commission to regulate the prices at which large industrial corporations shall dispose of their products." Such was justified, thought Mr. Morgan, because of their size. "They are in every legitimate sense of the word quasi-public corporations, and we should by law declare them to be such." 51 CONG. REC. 1866, 1870-71 (1914).

<sup>40</sup> GELLHORN & BYSE, *op. cit. supra* note 39 at 9.

<sup>41</sup> Levy, *supra* note 9 at 348.

In 1890, the Sherman Antitrust Act<sup>42</sup> was enacted for the purpose of ridding the country of trusts and combinations. It provided that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade is illegal;<sup>43</sup> and every person who shall monopolize or attempt to monopolize shall be deemed guilty of a misdemeanor.<sup>44</sup> Though its purpose and directive was clearly stated, the Sherman Act was not, at first, effective.<sup>45</sup> To supplement the Act, Congress passed the Clayton Act<sup>46</sup> and the Federal Trade Commission Act.<sup>47</sup> While these bills were being debated, there were charges and counter charges as to why the Sherman Act had failed.<sup>48</sup>

Unlike most other agencies, the Federal Trade Commission Act cuts across all phases of our economy subject to certain exceptions enumerated in the Act.<sup>49</sup> In broad terms, it declares that unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce are unlawful.<sup>50</sup> The Commission was given power to gather and compile information, and to investigate organization, business, conduct, practices and management of any corporation engaged in commerce.<sup>51</sup> Upon resolution of both houses of Congress, the Commission may be directed to carry out certain investigations.<sup>52</sup> Federal Trade Commission investigations preceded and influenced the Congressional passage of the Federal Power Act, Securities Act, Securities Exchange Act, Public Utility Holding Company Act and the Natural Gas Act.<sup>53</sup>

<sup>42</sup> 26 Stat. 209 (1890) (Sherman Antitrust Act).

<sup>43</sup> Sherman Act § 1.

<sup>44</sup> Sherman Act § 2.

<sup>45</sup> While the statute states that "every contract . . . in restraint of trade is illegal," the Supreme Court, in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911) and *United States v. American Tobacco Co.*, 221 U.S. 106 (1911), construed this to mean "unreasonable restraint." Viewing these decisions on the floor of Congress, Mr. Murdock stated that while the Court used harsh language, it was reluctant to issue strong decrees. 51 CONG. REC. 9873, 8976 (1914).

<sup>46</sup> 38 Stat. 730 (1914).

<sup>47</sup> 38 Stat. 717 (1914).

<sup>48</sup> House debates: 51 CONG. REC. 1866, 8840 (1914); Senate debates: 51 CONG. REC. 11081, 11237 (1914).

<sup>49</sup> F.T.C. Act § 5(a) (6), 38 Stat. 717 (1914) as amended 15 U.S.C. §§ 41-58 (1958); See also *FTC v. Motion Picture Advertising Co.*, 344 U.S. 392, 404, 405 (1952) where the Court compares the authority given to the F.T.C. with that given to the I.C.C.: "[T]he Interstate Commerce Act dealt with governmental regulations . . . of a limited sector of the economy . . . . On the other hand, the Federal Trade Commission Act gave an administrative agency authority over . . . restrictions upon the whole domain of economic enterprise engaged in interstate commerce."

<sup>50</sup> F.T.C. Act § 5 (a)(1).

<sup>51</sup> F.T.C. Act § 6(a).

<sup>52</sup> F.T.C. Act § 6(a). For cases concerning this power see, *FTC v. National Biscuit Co.*, 18 F.Supp. 667 (S.D.N.Y. 1937) and *FTC v. American Tobacco Co.*, 264 U.S. 298 (1924) where the tobacco industry was being investigated.

<sup>53</sup> See Davis, *The Influence of the Federal Trade Commission's Investigations*, 14 GEO. WASH. L. REV. 21 (1945).

The Federal Power Commission was established as an independent regulatory agency in 1930,<sup>54</sup> with power to regulate an important area of our economy. Its jurisdiction extends over the transmission and sale of electric energy,<sup>55</sup> the transportation and sale of natural gas,<sup>56</sup> and the public utility and natural gas companies engaged in interstate commerce.

There is no need to cite the many federal agencies that now effectively regulate certain segments of our economy, but perhaps a few should be mentioned. Civil aviation is effectively controlled by the Civil Aeronautics Board<sup>57</sup> and the Federal Aviation Agency.<sup>58</sup> Regulation of interstate and foreign commerce in communication by wire and radio is exercised by the Federal Communications Commission.<sup>59</sup> The general public is protected from fraudulent sales of securities by the Securities and Exchange Commission.<sup>60</sup> And workers are protected against unfair labor practices by the National Labor Relations Board.<sup>61</sup>

We could continue with this enumeration; however, the point has clearly been made—we live in a regulated economy. Since 1887, when Congress took its first regulatory step, meaning has been given to the words: "The Congress shall have Power To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."<sup>62</sup> Our daily lives are greatly affected by federal regulations through minimum wage laws, food quality controls, and false advertising prohibitions. If a segment of our economy can be found without some federal control involved, one can perhaps find a state control.

### B. State

States were exercising regulations and controls over our economy long before the federal government entered the field. Through their so-called "police powers," states may enact laws reasonable and necessary for the comfort, safety, health and welfare of the general public. Under this power, forty-eight states have enacted blue sky laws;<sup>63</sup> and forty-four states have enacted fair trade laws.<sup>64</sup> Rather than attempting a broad general survey of state controls,

<sup>54</sup> 46 Stat. 797 (1930); prior to this time there had been a Power Commission with jurisdiction limited to the licensing of hydroelectric projects on Government lands and navigable waters. It was made up of the Secretaries of War, Agriculture, and Interior.

<sup>55</sup> 49 Stat. 838 (1935) (citations show only original enactment).

<sup>56</sup> 52 Stat. 821 (1938).

<sup>57</sup> 52 Stat. 973 (1938).

<sup>58</sup> 72 Stat. 731 (1958).

<sup>59</sup> 48 Stat. 1064 (1934).

<sup>60</sup> 48 Stat. 881 (1934).

<sup>61</sup> 49 Stat. 449 (1935).

<sup>62</sup> U. S. CONST. art. 1, § 8.

<sup>63</sup> 1 LOSS, SECURITIES REGULATION, 30 (1961). Only Delaware and Nevada have no such laws. For official citations of these statutes see: 3 LOSS, SECURITIES REGULATION, app. B.

it might be more satisfactory to limit the discussion to a single state. For this limited review, the State of Oklahoma has been selected.

By the time Oklahoma joined the Union in 1907, regulations were nothing new, and rebates, unlawful discrimination and abuse of power by railroads and giant industrial firms were being discussed openly.<sup>65</sup> This may account for the fact that thirty-four distinct offices, boards, commissions, and departments were either created or provided for in the State Constitution.<sup>66</sup> The Constitution specifically creates the office of Chief Inspector of Mines;<sup>67</sup> Department of Labor;<sup>68</sup> Insurance Department;<sup>69</sup> Commissioner of Charities and Corrections;<sup>70</sup> and the Board of Agriculture.<sup>71</sup> While these agencies were created by the Constitution, the Legislature was given power to establish the scope of duties or was given power to amend, alter and add to the duties specified in the basic law. In creating the Corporation Commission<sup>72</sup> and the Alcoholic Beverage Control Board,<sup>73</sup> the Constitution specified duties, restrictions, powers and procedure in great detail.

Singling out the Corporation Commission for a closer examination it is apparent that the drafters of the Oklahoma Constitution were influenced by economic conditions then present. Railroads

<sup>64</sup> 2 C.C.H. TRADE REG. REP. ¶ 6017. Of these 44 states, 21 have held the non-signer provision to be unconstitutional; 4 states held the fair trade law, in general to be unconstitutional. See 2 C.C.H. TRADE REG. REP. ¶ 6401.

<sup>65</sup> Governor LaFollette of Wisconsin reported that an investigation of railroads in his state disclosed that rebates and unlawful discrimination amounted to \$7,000,000 with every major line guilty of these practices. STOVER *op. cit. supra* note 15 at 137.

<sup>66</sup> *State Administrative Agencies, Constitutionally Prescribed Powers and Duties*, 5 OKLAHOMA STATE LEGISLATIVE COUNCIL (1953). The number 34 includes all the regular state offices such as Governor, Attorney General, etc.; however, many of the administrative agencies were established through the Constitution.

<sup>67</sup> OKLA. CONST. art. VI, § 25. Qualifications of person elected are specified but duties, compensation etc., are to be defined by the legislature. See 45 OKLA. STAT. §§ 1-406 (1961) and 74 OKLA. STAT. § 251 (1961).

<sup>68</sup> OKLA. CONST. art. VI, § 20. Commissioner to be elected by the people and his duties prescribed by law; art. VI, § 21 provides that the Legislature shall create a Board of Arbitration and Conciliation. See 40 OKLA. STAT. §§ 1-311 (1961).

<sup>69</sup> OKLA. CONST. art. VI, § 22. Charged with duty of enforcing all insurance laws; art. VI, § 23 provides that the Insurance Commissioner shall be an elected official. See 36 OKLA. STAT. §§ 301-348.1 (1961).

<sup>70</sup> OKLA. CONST. art. VI, § 27, Commissioner elected; § 28 powers and duties specified (investigate prisons, jails, hospitals, etc.) (power to issue summons, etc.); § 30 Legislature shall have power to alter, amend, or add to duties of Commissioner. See 74 OKLA. STAT. §§ 171-186 (1961).

<sup>71</sup> OKLA. CONST. art. VI, § 31. A five member board is elected, all of whom shall be farmers. The board has jurisdiction over all matters affecting animal industry and animal quarantine regulations. See 2 OKLA. STAT. §§ 1-11 (1961).

<sup>72</sup> OKLA. CONST. art. IX, §§ 15-35.

<sup>73</sup> OKLA. CONST. art. XXVII, §§ 1-11. This was by amendment passed on April 7, 1959. Prior to this time there was prohibition in Oklahoma under OKLA. CONST. art. I, § 7.

could not consolidate without written approval;<sup>74</sup> passes for free transportation could not be issued except to certain specified persons;<sup>75</sup> the Commissioners, as elected officials, could have no direct or indirect interest in any railroad, canal, steam boat, pipe line, etc.<sup>76</sup> The "powers and duties" section provided that: "The Commission shall have the power and authority and be charged with the duty of supervising, regulating and controlling all transportation and transmission companies doing business in this State . . . ."<sup>77</sup> Included within this power was the right to promulgate rules and regulations, examine books and records, prescribe and fix rates, etc. Procedural safeguards were provided and included publication of proposed rulings, hearings, and right to appeal.

Where such detailed regulations are placed in the Constitution, the delegation question is eliminated and there is little room for undue influence to work against legislators. At the same time, however, a desirable flexibility is eliminated since certain changes could be made only by constitutional amendment. To partially offset this limitation on change, the Constitution provided that after the second Monday in January, 1909, the Legislature may from time to time, alter, amend, revise, or repeal sections 18-34.<sup>78</sup>

In areas where the Oklahoma Constitution did not create the agency, it directed the Legislature to do so. "The Legislature shall create a Board of Health,<sup>79</sup> Board of Dentistry,<sup>80</sup> Board of Pharmacy,<sup>81</sup> and Pure Food Commission,<sup>82</sup> and prescribe the duties of each."<sup>83</sup> Monopolies, destruction of competition for the purpose of creating a monopoly, and discrimination between different purchasers are prohibited by the Constitution.<sup>84</sup> The Legislature is directed to define such practices and to enact laws to punish persons so engaged.<sup>85</sup> Perhaps the broadest constitutional control device is the provision that empowers the Legislature to alter, amend,

<sup>74</sup> OKLA. CONST. art. IX, § 9. One of the early complaints regarding railroads was that large lines, through unfair methods of competition, were swallowing the smaller lines.

<sup>75</sup> OKLA. CONST. art IX, § 13. "All sections of the country complained about the influence railroads exercised over public officials through the universal practice of granting free passes to congressmen, judges, sheriffs, assessors, and even town officials." STOVER, *op. cit. supra* note 15 at 123.

<sup>76</sup> OKLA. CONST. art. IX, § 16.

<sup>77</sup> OKLA. CONST. art. IX, § 18.

<sup>78</sup> OKLA. CONST. art. IX, § 35. See 17 OKLA. STAT. §§ 1-189 (1961) and 18 OKLA. STAT. §§ 438.1-438.34 (1961), especially 438.32 where the statute expressly provided that the constitution was being, herein, amended.

<sup>79</sup> 63 OKLA. STAT. §§ 1-46.6 (1961).

<sup>80</sup> 59 OKLA. STAT. § 327.7 (1961).

<sup>81</sup> 59 OKLA. STAT. § 353.1 (1961).

<sup>82</sup> 63 OKLA. STAT. §§ 1.2, 251 (1961).

<sup>83</sup> OKLA. CONST. art. V, § 39.

<sup>84</sup> OKLA. CONST. art. IX, § 45.

<sup>85</sup> OKLA. CONST. art. V, § 44. See 79 OKLA. STAT. §§ 1-36 (1961) (monopolies, combinations, etc., declared illegal) (worded after Sherman Antitrust Act); 79 OKLA. STAT. §§ 81-87 (1961) which prohibits unfair discrimination or unfair competition.

annul, revoke or repeal any charter of incorporation whenever, in its opinion, it may be injurious to the citizens of the State.<sup>86</sup>

Other controls placed upon the state's economy by the Legislature, through its "police powers," include the following: Unfair Sales Act,<sup>87</sup> Fair Trade Act,<sup>88</sup> Barbers' Unfair Trade Act,<sup>89</sup> Blue Sky Laws,<sup>90</sup> and the Watchmaking Act.<sup>91</sup> This is by no means a complete list of controls and regulations but enough has been said to show that even within a state, we live in a regulated economy.

### C. City and County

Cities, towns and counties also exercise control and regulations over certain important segments of our economy. Zoning ordinances are the best example of controls exercised by municipal corporations. Under this authority, one's use of property is restricted. He cannot build a factory on a residential site nor can he construct an apartment house in an area zoned for single unit dwellings. Even where one is allowed to construct a house, building, apartment or factory, certain building specifications must be satisfied. The structure might be required to be a certain number of feet from the street, and the floor might have to be a certain distance off the ground. An inspector must approve the wiring and plumbing, and if such work does not meet certain specifications, the contractor will be forced to correct the deficiency.

Where does a city obtain the power and authority to exercise these controls? Such might be derived from legislative delegation<sup>92</sup> or arise directly from the state constitution.<sup>93</sup> Generally this power

<sup>86</sup> OKLA. CONST. art. IX, § 47.

<sup>87</sup> 15 OKLA. STAT. §§ 598.1-599.18 (1961). "Sales below cost with intent and purpose of impairing and preventing fair competition . . . are prohibited . . ." Section 598.3 was upheld in *Safeway Stores v. Retail Grocers Ass'n*, 322 P.2d 179 (Okla. 1957), *aff'd* 360 U.S. 334 (1959) and *Adwon v. Oklahoma Retail Grocers Ass'n*, 204 Okla. 199, 228 P.2d 376 (1951).

<sup>88</sup> 78 OKLA. STAT. §§ 41-45 (1961). Non-signer portion of act held unconstitutional as an improper delegation of legislative power and as violative of due process.

<sup>89</sup> 59 OKLA. STAT. §§ 61-105 (1961).

<sup>90</sup> 71 OKLA. STAT. §§ 1-504 (1961). Oklahoma blue sky laws were first enacted in 1919 and the first Commission consisted of the Bank Commissioners, the Secretary of State, and the State Auditor. After numerous amendments, Oklahoma adopted the Uniform Securities Act in 1959, 71 OKLA. STAT. §§ 1-504 (1961).

<sup>91</sup> 59 OKLA. STAT. §§ 771-782 (1961) was held unconstitutional in *State v. Wood*, 207 Okla. 193, 248 P.2d 612 (1952). Even though it was held unconstitutional and void in 1952, it was brought forward in the 1961 statute.

<sup>92</sup> Foster, *The Delegation of Legislative Power to Administrative Officers*, 7 ILL. L. REV. 397, 398 (1913). "Such a delegation to municipalities of a power that is clearly legislative in its nature commonly goes unchallenged in the courts, and when any comment is made it is referred to as an exception to the general rule prohibiting the delegation of such power."

<sup>93</sup> OKLA. CONST. art IX, § 18. This section specified duties of the Corporation Commission. Within it, there is a proviso that "nothing in this



is derived from legislative delegation; however, we need not be too concerned with the source. It suffices to recognize the presence of this power to control and regulate the affairs of local citizens.

No matter where one looks — be it city, state, or federal government — controls and regulations will be found. *WE LIVE IN A REGULATED ECONOMY AND NO LONGER IS THERE A FRONTIER TO WHICH ONE MIGHT ESCAPE.*

#### IV. AN ANSWER TO REGULATION CRITICS

##### A. *Early attacks against administrative agencies*

Early regulatory statutes brought cries that the country was heading toward socialism, and that our cherished system of free enterprise was being eliminated. With the imposition of each new regulation and with the creation of each new agency, the cry of socialism grew louder. Even today, there are those, including lawyers, who voice this opinion.<sup>93a</sup>

In *Adwon v. Oklahoma Retail Grocers Ass'n.*,<sup>94</sup> the Unfair Sales Act was attacked on the ground that it conflicted with "freedom of enterprise." To this attack the court replied: "We are not impressed . . ."<sup>95</sup> This same court had earlier held the precedent Unfair Sales Act unconstitutional.<sup>96</sup> But in so doing the court

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section shall impair the rights which have heretofore been, or may hereafter be, conferred by law upon the authorities of any city . . . to prescribe rules, regulations, or rates of charges to be observed by any public service (operating under a franchise granted by such city)." Under the section specifying limitations on the Legislature, there is provided the following: "The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law authorizing: . . . Regulating the affairs of counties, cities, towns, wards, or school districts; . . ." OKLA. CONST. art. V, § 46. These constitutional provisions have been construed to mean that citizens of a city may govern themselves as to *matters purely local in nature*. See *City of Ardmore v. Excise Board*, 155 Okla. 126, 8 P.2d 2 (1932). Powers primarily subject to state control may be held by a municipality; however, such are subject to the control of the legislature. *City of Claremore v. Oklahoma Tax Comm'n*, 197 Okla. 223, 169 P.2d 299 (1946).

<sup>93a</sup> See Dutton, *The Supreme Court's Natural Gas Act*, 1 TULSA L.J. 31, 32 (1964). Reviewing *Northern Natural Gas Co. v. Kansas*, 372 U.S. 84 (1963), Mr. Dutton commented: "The decision provides the basis for centralizing all regulation of gas production in the Federal Power Commission. Such a centralization will facilitate the *socialization* of the gas industry by giving the federal government management of the essential means of production." He continued by saying that: "Congress should act immediately to repel this latest judicial invasion of its constitutionally delegated authority. If it fails to do so, the system of checks and balances which protects all liberty from governmental tyranny will suffer a critical, if not killing, blow." The *Northern Natural Gas* case is also discussed in Meyers, *Federal Preemption and State Conservation*, 77 HARV. L. REV. 689 (1964). In this case, it appeared that the jurisdictional question was argued as if there was a clear cut division. There isn't. It is impossible to separate the jurisdiction of federal regulatory agencies from the broad regulatory policy.

<sup>94</sup> 204 Okla. 199, 228 P.2d 376 (1951).

<sup>95</sup> *Id.* at 200, 228 P.2d at 378.

<sup>96</sup> *Englebrecht v. Day*, 201 Okla. 585, 208 P.2d 538 (1949).

pointed out that it was not attacking the general control policy involved.<sup>97</sup> Reviewing unfair sales acts, the court stated:

“Some of the earlier acts in some of the states were held to be unconstitutional as restrictive of the right of the individual to sell his property at whatever price he could agree upon with his purchaser. Other acts were declared unconstitutional because the business regulated was not affected with the public interest, such as operating public utilities. But since the decision in *Nebbia v. People of State of N.Y.* . . . , it is generally recognized that there is no closed class or category of business affected with the public interest and the function of courts under the Fifth and Fourteenth Amendments to the Federal Constitution is to determine in each case whether under the circumstances the regulation is a reasonable exertion of governmental regulations, or is arbitrary or discriminating and that the phrase ‘affected with a public interest’ as used in decisions upholding public regulation of business affected with the public interest means only that an industry for adequate reason is subject to control for the public good.”<sup>98</sup>

The Supreme Court, in *Nebbia v. New York*,<sup>99</sup> stated that: “So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose.”<sup>100</sup> This broad statement could be construed to mean that all reasonable regulations in the public interest would be upheld. When is a regulation reasonable? In the *Nebbia*<sup>101</sup> case, the Court stated that requirements of “due process” have not been met where laws are found to be “arbitrary.” Thus, we might say that a “reasonable regulation” is one that is not arbitrary. Then, what does “arbitrary” mean? In its broadest terms, an arbitrary decision would be one not governed by any fixed rules or standards.

Another attack, illegal delegation of legislative power, has never had much force where a federal agency was involved,<sup>102</sup> although it has been reasonably successful against state regulatory

<sup>97</sup> *Ibid.* Speaking of the 1941 Oklahoma Unfair Sales Act, the court stated that the defect in this act was merely in its wording—sales below cost “with the intent, or effect, of inducing the purchase of other merchandise.” 15 OKLA. STAT. § 593 (1941) [Emphasis added]. The Act was redrafted to read “Sales below cost with intent and purpose . . . .” 15 OKLA. STAT. § 598.3 (1961).

<sup>98</sup> 201 Okla. at 588, 208 P.2d at 541.

<sup>99</sup> 291 U.S. 502 (1933). This case concerned a milk control statute.

<sup>100</sup> *Id.* at 537.

<sup>101</sup> 291 U.S. 502 (1933).

<sup>102</sup> *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). These are the only two cases where Congress was held to have improperly delegated legislative power.

legislation.<sup>103</sup> When courts say that there must be a standard to support legislative delegation, one should not be so naive to think that this standard must be precise. Such standards are sufficiently definite and precise if Congress, the courts, and the general public can ascertain whether the administrative agency has conformed to them.<sup>104</sup> This logomachy could be construed to mean that a statute will be upheld unless some compelling reason for striking it down is shown. To understand what courts are doing when a statute is found to be an "improper delegation of legislative power," or when "lack of due process" is found, one must look deeper than the bare judicial decision.

Decisions rendered in administrative law cases are not determined by application of any simple formula. Each represents a conflict between "public interest" and "private interest," and unless this is recognized and accepted, one cannot adequately understand the subtleties found in this area of the law. Where one's mind is controlled by political philosophy, it is difficult to grasp the thin line that separates public from private interest. What we, as individuals, think about administrative agencies is immaterial; the courts recognize such agencies as serving a useful public function. With this recognition, courts have developed the rule that one's administrative remedies must first be exhausted before judicial review will be granted.<sup>105</sup> Further, administrative officers have been granted absolute immunity against liability where the act involved was performed in the line of duty.<sup>106</sup>

On the other side of the scales rests "private interest," which is still considered important in this Country and weighed heavily by courts in reaching administrative law decisions. Are courts influenced by policy arguments which weigh this public and private interest? Admittedly, they deny this and contend that policy matters are the concern of legislature.<sup>107</sup> But one need only to examine the cases to be otherwise convinced. How else can the court's reasoning in *N.L.R.B. v. Tex-O-Kan*<sup>108</sup> be explained?

The *Tex-O-Kan* case involved an order issued by the N.L.R.B. requiring an employer to (1) cease interference with union organ-

<sup>103</sup> *American Home Prod. Corp. v. Homsey*, 361 P.2d 297 (Okla. 1961); *Bell Telephone Co. v. Driscoll*, 343 Pa. 109, 21 A.2d 912 (1941); *Chapel v. Commonwealth*, 197 Va. 406, 89 S.E.2d 337 (1955).

<sup>104</sup> *Yakus v. United States*, 321 U.S. 414 (1944).

<sup>105</sup> See SCHWARTZ, AN INTRODUCTION TO AMERICAN ADMINISTRATIVE LAW 180-82 (2d ed. 1962).

<sup>106</sup> See *Barr v. Matteo*, 360 U.S. 564 (1959); see also *Wheeldin v. Wheeler*, 373 U.S. 647 (1963).

<sup>107</sup> See *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 493 (1947), where Justice Jackson recognized the policy argument that unionization of foremen causes bad relations between management and labor since the foreman's loyalty is divided. To this argument Justice Jackson stated: "However we might appraise the force of these arguments as a policy matter, we are not authorized to base decision of a question of law upon them. They concern the wisdom of the legislation . . . ."

<sup>108</sup> 122 F.2d 433 (5th Cir. 1941).

ization, and (2) reinstate twenty-nine employees and indemnify them for loss of pay. In upholding the first part of this order, the court said: "a cease and desist order on this point costs no money and only warns to observe a right which already existed; evidence short of demonstration may easily justify such an order."<sup>109</sup> But, said the court: "Orders for reinstatement of employees with back pay are somewhat different. They may impoverish or break an employer . . ." <sup>110</sup> State courts are also equally influenced by the balancing of public and private interest.<sup>111</sup>

### B. Control of administrative agencies

Professor Schwartz, while considering the question of what is administrative law, stated:

"The heavy emphasis today is upon the administrative process itself—upon the procedures which the administration must follow in exercising its powers of delegated legislation and adjudication. In this respect, administrative law, as we are using that term, relates more to procedure and remedies than to substantive law . . . . Administrative law in our sense is the law controlling the administration, and not the law produced by the administration."<sup>112</sup>

Students of administrative law should be concerned with both the procedural and substantive aspects of this field. The main difficulty with critics of regulatory statutes and administrative agencies is that they stop short of the substantive law. They look only at procedure and all that is visible to them are naked government regulations on private enterprise. The only way for such critics to understand the true nature of these regulations is to examine substantive laws. This is important, for regulation critics are in-

<sup>109</sup> *Id.* at 438.

<sup>110</sup> *Ibid.*

<sup>111</sup> *State v. Wood*, 207 Okla. 193, 248 P.2d 612 (1952) involved the State's Watchmaking Act of 1945, 59 OKLA. STAT. §§ 771-782 (1961), which required a person entering the business to take examination and to serve an apprenticeship for four years. The defendant violated statute and the state sought an injunction to restrain this violation. The Statute was held unconstitutional for lack of due process on the ground that a person has the right to earn a living in his chosen field of work. But in *Taylor v. State*, 291 P.2d 1003 (Okla. 1955) the defendant was enjoined from holding himself out as a doctor. His contention that he was being deprived of property without due process was ignored. The first case was not affected with a public interest while the second was. It could be argued that the first statute did not fall under police powers. It could also be considered as a situation where private interest out-weighed public interest. Other cases involving this question: *Oklahoma City v. Johnson*, 183 Okla. 430, 82 P.2d 1057 (1938) involving regulation fixing operating hours of barber shops. Compare *American Home Prod. Co. v. Homsey*, 361 P.2d 297 (Okla. 1961), holding non-signer provision of the Oklahoma Fair Trade Law unconstitutional with *Herrin v. Arnold*, 183 Okla. 392, 82 P.2d 977 (1938) where court upheld a delegation of power to fix prices by the State Board of Barber Examiners.

<sup>112</sup> SCHWARTZ, *op. cit. supra* note 105 at 6.

effective when they argue that a statute is unconstitutional because it is regulatory.<sup>113</sup> On the other hand, a critic can be extremely effective if he accepts the agency and then seeks reasonable controls that can be applied against regulatory bodies.

1. *Are controls needed?* Need for controls was clearly recognized by the Supreme Court when it discussed the lack of procedural safeguards in *Schechter Poultry Corp. v. U. S.*<sup>114</sup> Control has played an important role in deciding the outcome of cases with emphasis being placed on administrative hearings and opportunity to be heard; availability of judicial review, and legislative supervision.<sup>115</sup> Courts have not looked too kindly toward legislative power being delegated to private persons<sup>116</sup> or groups and boards comprised of interested members of the regulated industry.<sup>117</sup>

Independent regulatory agencies are equally subject to judicial and legislative control. Such measures are imperative to avoid arbitrary and capricious administrative decisions, and the Supreme Court has implied that such control will be exercised by courts. In *Kent v. Dulles*,<sup>118</sup> we are told that the Court will give closer scrutiny to a case involving our basic liberties. In *SEC v. Chenery*, the Court stated that administrative decisions must be judged on grounds disclosed in the record.<sup>119</sup> The Court further stated that an orderly functioning of judicial review requires administrative agencies to clearly disclose the grounds upon which its decisions are based.<sup>120</sup> It is this clarity, says the Court, that will vindicate the administrative process.<sup>121</sup>

<sup>113</sup> Clients are not interested in a lawyer's political philosophy, they desire to be represented.

<sup>114</sup> *Supra* note 102.

<sup>115</sup> In *Boehl v. Sabre Jet Room*, 349 P.2d 585, 590 (Alaska 1960) the court in upholding an ABC Board regulation, stated that: "The grant of general rule-making power was necessary in order that the legislative objective would not be frustrated." It then continued by recognizing the possibility of abuse, arbitrariness and capriciousness but then added that the exercise of the board's powers is hedged about by substantial safeguards. By way of controls, the board must conduct public hearings; there is ample opportunity for judicial review; and finally, there is legislative supervision.

<sup>116</sup> *American Home Prod. Co. v. Homsey*, 361 P.2d 297 (Okla. 1961), improper delegation under the Oklahoma Fair Trade Act.

<sup>117</sup> *State Board of Dry Cleaners v. Thrift-D-Lux*, 40 Cal.2d 436, 254 P.2d 29 (1953); *Chapel v. Commonwealth*, 197 Va. 406, 89 S.E.2d 337 (1955).

<sup>118</sup> 357 U.S. 116 (1958). "Liberty", through the right to travel, was involved in this case.

<sup>119</sup> 318 U.S. 80, 87 (1942). This was the first *Chenery* case where the court set aside an order issued by the S.E.C. which had been based on an erroneous interpretation of a legal principle. See also *SEC v. Chenery*, 332 U.S. 194 (1947).

<sup>120</sup> 318 U.S. 80, 94 (1942).

<sup>121</sup> *Ibid.* The court was here quoting from *Phelps Dodge Corp. v. NLRB* 313 U.S. 177, 197 (1940). In the *Phelps Dodge* case, the Board had ordered certain employees reinstated and be made whole for their loss of pay, by paying a sum equal to what they normally would have earned less earnings received from other sources during the particular period of time. The court

Recognizing the conflict between government regulation and preservation of private interest, the need for controls becomes clear. There must be a balancing of these interests and it is this which creates the real problem.<sup>122</sup> Control measures allow courts to protect private interests from over-zealous agencies, and at the same time, such measures justify courts in affirming the existence of regulations in the public interest. Unchained administrative power invites arbitrariness, and as stated by Justice Day—"there is no place in our constitutional system for the exercise of arbitrary power."<sup>123</sup> Arbitrary power and the Constitution are antagonistic and incompatible forces; one or the other must perish whenever they are brought into conflict.<sup>124</sup> Responsibility is placed upon courts to be watchful and to assure the public that arbitrary power will be the force to perish. *This is judicial control.*

2. *Are administrative agencies being effectively controlled?* Having decided that controls are needed, we must now determine if there are, at the present time, adequate controls. Congress has not exclusively left this problem with the courts. In fact, it has been very active in the area and has enacted a number of bills designed to either control or to curtail certain agency activity. Most important among the control measures enacted by Congress is the Administrative Procedure Act.<sup>125</sup> This Act has been viewed as a Congressional directive for courts to assume more responsibility for the reasonableness and fairness of agency decisions.<sup>126</sup> Many states have enacted similar acts for the purpose of controlling agency action,<sup>127</sup> and both Congress and State Legislatures are active in studying and improving the administrative process.<sup>128</sup>

While not within the scope of this paper to review the federal and state administrative procedure acts, an examination should be made of the provisions most important for effective control. Reference is made to the public information sections, for without ade-

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added a further deduction of amounts which the workers "failed without excuse to earn." Workers were thus required to mitigate damages. This was countered by the Board's contention that a doctrine of mitigation of damages would complicate the administrative process. In upholding the lower court, the Supreme Court stated at page 198 that: "the advantages of a simple rule must be balanced against the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment."

<sup>122</sup> For a good discussion of the balancing of interest, see *Oklahoma Press v. Walling*, 327 U.S. 186 (1946) especially at pp. 203, 204 and 213.

<sup>123</sup> *Garfield v. Goldsby* 211 U.S. 249, 262 (1908) quoted by Justice Southerland in *Jones v. SEC*, 298 U.S. 1, 24 (1935).

<sup>124</sup> *Jones v. SEC*, *supra* note 123 at 24.

<sup>125</sup> 60 Stat. 237 (1946), 5 U.S.C. §§ 1001-1011 (1958).

<sup>126</sup> *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490 (1950).

<sup>127</sup> Harris, *Administrative Practice and Procedure: Comparative State Legislation*, 6 OKLA. L. REV. 29 (1953).

<sup>128</sup> Bills: H.R. 7200, 88th Cong., 1st Sess. (1963). Creation of an Administrative Conference; H.R. 7202, 7203, 88th Cong., 1st Sess. (1963). Designed to promote the fair and efficient operation of certain administrative agencies—all were sponsored by Mr. Harris in June, 1963; S. 1663, 88th Cong.,

quate information, one cannot expect to control, in any manner, the functions of agencies.

At the present time, it would be safe to say that the public is not given sufficient information. Under section 3(c) of the federal Administrative Procedure Act, it is much too easy for an agency to withhold information.<sup>129</sup> The effect of this condition can best be shown by a little story told by Senator Dirksen.

"There was a farmer out in my State and he found to his dismay a year or so ago that his acreage allotment had been cut by the county committee. He went before the local committee and protested and showed them his figures. After considering the matter the committee gave him back his acreage allotment but the next thing the farmer knew his acreage allotment was reduced again. He made another trip to the county committee and he asked why. He was told that the Committee had received evidence against him. He asked what that was so he could properly meet it and he was told that under section 3 of the Administrative Procedure Act that information could be withheld from him. . . . The farmer asked how he should meet the case against him if he did not know what it is but he received no other answer."<sup>130</sup>

How can this farmer be convinced that federal agencies are not arbitrary? After witnessing such incidents, how are regulation critics convinced that administrative agencies perform a useful purpose? Neither the farmer nor the critic will be convinced unless there is free access to information held by agencies. Hopefully, Congress will soon enact legislation to correct the situation involving the public's right to information.<sup>131</sup> One bill, S. 1663, now pending would amend section 3(c) of the Administrative Procedure Act as follows:

"Every agency shall, in accordance with published rule stating the time, place, and procedure to be followed, make its records promptly available except those particular records . . . which are (1) specifically exempt from disclosure by statute,

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1st Sess. (1963) would rewrite the Administrative Procedure Act. Oklahoma adopted an Administrative Procedure Act in 1963, 75 OKLA. STAT. §§ 301-325 (Supp. 1963). It is general in nature.

<sup>129</sup> Administrative Procedure Act § 3 (c). "Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found."

<sup>130</sup> 109 CONG. REC. 9387, 9389 (daily ed. June 4, 1963). Senator Dirksen was speaking in support of the public information bill.

<sup>131</sup> S. 1664, 88th Cong., 1st Sess. (1963) established an administrative conference. It was passed by the Senate on October 30, 1963 and was sent to the House Judiciary Committee. Senate Hearings were held on October 18, 1963 on S. 1666, 88th Cong., 1st Sess. (1963) which involved the right to information.

(2) specifically required by executive order to be kept secret for the protection of the national defense, and (3) the internal memorandums of the members and employees of an agency relating to the consideration and disposition of adjudicatory and rule making matters . . . ."<sup>132</sup>

Burden of determining whether information should be kept secret because of national defense would be placed on the executive. This provides public control since the President, who would be responsible, is an elected official. Agencies would no longer have discretion to determine if certain records should be given secrecy; rather, Congress would have to provide a specific exemption from disclosure. This body, like the President, can be reached by the ballot, thus assuring public control.

The current cry for public information is nothing new. It can be traced back to the early days of James Madison and his contemporary, Thomas Jefferson, *but* these historic men do not deserve credit for the current move. Members of the newspaper profession, recognizing the need for public information, began the attack on secrecy in local, state and federal government. Newspapers across the land were reporting the difficulties in gaining admission to meetings of the city council, school board and county commission. A domestic Freedom of Information Committee was established, and in 1950, this committee retained the services of Harold Cross<sup>133</sup> to make a study of news suppression.<sup>134</sup>

Upon completion of his study in 1953, Dr. Cross made a detailed report to the American Society of Newspaper Editors. Prefacing the report were these words:

"Public business is the public's business. The people have the right to know. Freedom of information is their just heritage. Without that the citizens of a democracy have but changed their kings.

The people are citizens, taxpayers, inhabitants, electors, newsmen, authors, research workers, teachers, students, all persons, each of us.

It is not enough merely to recognize philosophically or to pay lip service to the important political justification for freedom of information. It is not enough that by virtue of official grace and incentives some information . . . does somehow become available . . . .

Citizens of a self-governing society must have the legal right to examine and investigate the conduct of its affairs, subject

<sup>132</sup> This bill is presently resting in Senate Judiciary and has not been reported out.

<sup>133</sup> Harold Cross was a newspaper lawyer and was counsel for the New York Herald Tribune. He also lectured at Columbia University on libel and other laws affecting journalism. He died in 1959.

<sup>134</sup> See Cross, *THE PEOPLE'S RIGHT TO KNOW* (1953), a report to the American Society of Newspaper Editors.



only to those limitations imposed by the most urgent public necessity. To that end they must have the right to simple, speedy enforcement procedure geared to cope with the dynamic expansion of government activity.

These rights must be elevated to a position of the highest sanction if the people are to enter into full enjoyment of their right to know. Freedom of information is the very foundation for all these freedoms that the First Amendment of our Constitution was intended to guarantee.<sup>135</sup>

Five years after the Cross report Congress enacted an amendment to the so-called "housekeeping" statute. It provided that the "housekeeping" statute did not authorize withholding information from the public or limiting the availability of records to the public.<sup>136</sup> While an important step forward, this amendment had a very limited scope. It did not provide that agencies must make full public disclosure; it merely provided that this particular statute could not be relied upon to suppress information. There are, however, other means of suppression, especially under section 3(c) of the Administrative Procedure Act.<sup>137</sup>

There is an urgent and immediate need for strong legislation requiring free access to public information, and to accomplish such legislation, regulation critics could perform valuable services. Rather than attacking all forms of regulations as unconstitutional government interference, regulation critics would prove much more effective if their efforts were exerted toward the passage of a strong public information bill. As long as administrative agencies are allowed to operate under a cloak of secrecy, there will be an opportunity for abuse of power. Critics will continue accusing agencies of rendering arbitrary decisions and the public will be left thinking that perhaps the critic is right. What other reason would an agency have in suppressing information?

Of course, one can think of rational reasons why agencies might not favor free disclosure. Their interest is to effectively administer the functions delegated to them by Congress. To accomplish this, it is necessary to avoid any undue interference, and perhaps free disclosure could be viewed as undue interference. This,

<sup>135</sup> *Supra* note 134 at XIII-XIV. U. S. CONST. amend. I. "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

<sup>136</sup> The "housekeeping" statute is found at 5 U.S.C. § 22 (1958), amended by 72 Stat. 547 (1958). In paying tribute to the late H. L. Cross, James S. Pope stated: "I'll even say Congress would not have amended the misused housekeeping statute (were it not for the Cross Report)." See Cross, *THE PEOPLE'S RIGHT TO KNOW* 1 (2d Supp. 1959). In *Touhy v. Ragen*, 340 U.S. 462 (1951) the court upheld agency (attorney general) power to issue a regulation concerning the authority of subordinate officials to disclose evidence. The regulation in question had been promulgated under the authority of 5 U.S.C. § 22 (1958), before amendment.

<sup>137</sup> See *supra* note 129 and accompanying text.

however, is fallacious reasoning, for no agency should have the discretion to suppress public information.<sup>138</sup>

3. *What are states doing to control agencies?* Many states have gone much further than the federal government in controlling agencies through their administrative procedure acts.<sup>139</sup> These acts amount to a reaffirmation of the "checks and balance" system which plays an important part in the very foundation of our legal system. Belief in the competency and fairness of individual office holders has never been enough to assure the general public against arbitrary and capricious decisions. Such assurance comes from controls—executive, legislative and judicial. The executive and legislature are prompted to take action in accordance with the public interest. Closely aligned with public interest is public opinion and for the people to arrive at an intelligent conclusion, the need for public information again becomes manifest.

A common feature of all administrative procedure acts is the requirement that all rules and regulations be published or filed with the Secretary of State. Some states require that prior to promulgation, there must be a review of rules by the state attorney general.<sup>140</sup> A special committee or legislative interim committee might be established to approve proposed rules.<sup>141</sup> Another control method would be the submission to the legislature of all rules promulgated. In such cases the rules may be disapproved and voided by legislative resolution.<sup>142</sup>

Perhaps the most effective control of agencies comes from individuals affected by particular promulgated rules and regulations. Such control is possible only if rules in effect and proposed rules are published. Persons interested are generally allowed to present their views, and in some cases a public hearing may be held on a proposed rule before it is promulgated.<sup>143</sup> In Oklahoma, an oral hearing must be held on any proposed rule if request is made in writing by twenty-five persons.<sup>144</sup>

<sup>138</sup> Using the term "public information" is intended to distinguish information affecting the general public and that dealing strictly with internal matters.

<sup>139</sup> Harris, *supra* note 127.

<sup>140</sup> Harris, *supra* note 127 at 37.

<sup>141</sup> Connecticut has an Interim Legislative Review Committee to review all regulations. The committee may hold public hearings and may disapprove a regulation. Conn. Public Acts 1963, No. 559 at 768 amending CONN. GEN. STAT. ANN. § 4-49 (1958).

<sup>142</sup> NEB. REV. STAT. § 84-904 (1943); VA. CODE ANN. § 9-6.9(d) (1950). Rules may be rejected, changed, altered, amended, or modified; CONN. GEN. STAT. ANN. § 4-49 (1958). See also, *supra* note 141; 75 OKLA. STAT. § 308 (Supp. 1963).

<sup>143</sup> STATE MODEL ACT § 2; 75 OKLA. STAT. § 303 (Supp. 1963). For discussion of Oklahoma's new act, see Merrill, *Oklahoma's New Administrative Procedure Act*, 17 OKLA. L. REV. 1 (1964).

<sup>144</sup> 75 OKLA. STAT. § 303 (Supp. 1963). Oral hearing must also be held if requested by a governmental subdivision or agency, or by a trade association having at least twenty five members.

Making information available, upon which individuals can decide whether to present views or to contest a particular ruling, is assured by an effective sanction. Rules not properly filed or published according to statutory provisions are void and of no force or effect.<sup>145</sup> Virginia has a provision that administrative agencies must publish rules in pamphlet form—with no more than one supplement—and furnish a copy to any person who requests it. If such pamphlets become unavailable for public distribution for more than sixty consecutive days, the rules shall not be enforced or enforceable.<sup>146</sup>

Oklahoma administrative agencies face an interesting test concerning the effect of not complying with requirements to file their rules and regulations with the Secretary of State. In 1961, the Oklahoma Legislature passed a rule-making statute requiring every agency to file its rules and regulations.<sup>147</sup> If not filed prior to the effective date of the statute, January 2, 1962, such rules are declared void and of no effect.<sup>148</sup> As of December 10, 1963, nearly two years after the effective date of the statute, only thirty out of 193 state agencies had filed their rules.<sup>149</sup>

It is too early to speculate on how the Oklahoma court will handle this dilemma; however, there has been one trial court decision rendered. Judge Clarence Mills granted a temporary order halting all proceedings of the State Banking Department, but later, he changed the order to apply only to certain specified proceedings before the agency.<sup>150</sup> Constitutionality of the rule-making statute was upheld in *State v. Freeman*,<sup>151</sup> where the court noted that rules and regulations, not filed in accordance with statutory requirements, were void. With this decision on the books, it might take legislative action to correct the possible chaotic condition.<sup>152</sup>

Whatever the solution might be, the Oklahoma court is presented with an opportunity to speak out in favor of free access to public information. A strong stand should be taken, for the answer to regulation critics is control of administrative agencies. To properly control such agencies, one must be properly informed.

<sup>145</sup> STATE MODEL ACT § 3; KAN. GEN. STAT. § 77-413 (1949); 75 OKLA. STAT. § 252 (1961).

<sup>146</sup> VA. CODE ANN. § 9-6.7 (1950).

<sup>147</sup> 75 OKLA. STAT. § 251 (1961).

<sup>148</sup> 75 OKLA. STAT. § 252 (1961).

<sup>149</sup> The Tulsa Tribune, Dec. 10, 1963, p. 20, Col. 3.

<sup>150</sup> *Ibid.*

<sup>151</sup> 370 P.2d 307 (Okla. 1962). The State filed an application seeking writ prohibiting members of the Corporation Commission from complying with the statute. It was held that rules of general application, to be valid, must first be filed.

<sup>152</sup> Unless a special legislative session is called, Oklahoma's Legislature will not convene again until 1965.