The fiction that where there has been a statutory reenactment the legislature is deemed to have adopted administrative construction, is in the main a useful tool to taxpayers and the Government alike. Its usefulness, however, depends entirely upon the realization that a fiction, and nothing else, is involved. Over a period of years there was uncritical acceptance by courts of that fiction with the not unexpected result that some day a reexamination of the place of administrative construction in the field of statutory interpretation would have to be made. That day came when the *Reynolds Tobacco* case[10] was decided. Since then the Court has had occasion to amplify its views on the limitations of the binding effect of administrative construction. The Court is groping to enunciate a coherent philosophy but at the present writing there is much yet to be heard from it before the problems it has itself raised will be answered.

Mr. Paul poses a suggestion that a "feasible remedy to prevent possible abuse of the regulatory power might be to require public hearings in the future upon all proposed interpretative or legislative regulations to be issued under new sections of the statute."[11] He also suggests that the Board of Tax Appeals should within a certain time pass upon the validity and reasonableness of any retroactive amendment to the regulations.[12] These are challenging suggestions but one may be permitted to venture a doubt as to whether they will be of much help. The ogre of an anti-taxpayer departmentalized viewpoint is itself fictional.

LEO A. DIAMOND*

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**An Introduction to Administrative Law.** By James Hart. New York: F. S. Crofts & Co., 1940. Pp. xviii, 621. $5.00.

This work is an "introduction" to administrative law. Its avowed purpose "is not so much to present a complete picture as it is to open up some of the problems that constantly recur."[1] The strength of the work lies in the fact that the student who does a minimum[2] amount of reading will be able to "talk like a lawyer"[3] when confronted with a problem in administrative law.

Moreover, the lawyer who must make a snap judgment as to whether a client has been rightfully removed from a civil service job or as to whether a tax assessment is res judicata may be glad he studied Hart's book rather than some of the other recent casebooks in the field, which though not avowedly introductory, include no material on these subjects. The basic question which the book raises in my mind, however, is whether a work on administrative law can justify itself if it merely instructs the reader in the arts of glib manipulation of concepts and broad use of generalization.

A few examples will illustrate the pitfalls which, to my mind, are common. We are informed that "*discretionary* rules are said to have the force and effect of law provided they are not *ultra vires* or made under an unconstitutional delegation. *Interpretive* reg-

[10] Helvering v. Reynolds Tobacco Co., 306 U.S. 110 (1939). [11] Pp. 466–67. [12] P. 468.

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[1] P. 153.

[2] Cf. Davison, Review of Sears, Cases and Materials on Administrative Law, 6 Univ. Chi. L. Rev. 521, 523 (1939): "This case book contains more purely administrative material than do others available. Yet it does not present a realistic cross section of administrative activity because of lack of adequate space. This reviewer feels that a volume of about 3,500 pages would be necessary to achieve such a realistic presentation."

[3] With apologies to Professor J. W. Moore.

ulations, on the other hand, embody findings of law (statutory interpretation) and hence are subject to judicial determination that they are erroneous even when their issuance is authorized by statute."[4] Elsewhere in the book it appears that if the procedure below has been "administrative adjudication" it is "a general rule that the courts will reverse administrative findings for errors of law."[5] At best, the good student who reads these passages will feel surprise, irritation and confusion at the ways of the lawyer who finds some compelling reason to distinguish processes because they are assigned different labels; at worst he will become a lawyer who accepts the gospel and ignores cases like *SEC v. Associated Gas & Electric Co.*[6] It is true that some refreshing doubt is afforded by quotations from the view of Dickinson that the distinction between law and fact is not too clear and is a matter of "policy," and the view of Landis that the primary criterion in determining scope of review should be the expertness of the reviewing tribunal in the subject matter of the determination; not the form in which the question arose.

But no justification can be seen for placing part of the discussion of "jurisdictional facts" two hundred pages away from this discussion of law and fact.[7] A determination of fact is apparently labeled "jurisdictional" (and hence reviewable de novo) if its solution would affect a "group of persons" rather than one or a few. This consideration is apparently the important practical consideration in determining whether that which is admittedly a fact is jurisdictional, just as expertness is the important practical consideration in determining whether a question is one of fact or law. To make any such analysis appears needlessly confusing. In terms of its consequences with respect to the scope of review we can say either that whether Benson was engaged in interstate commerce presents a question of jurisdictional fact or that whether Benson was engaged in interstate commerce presents a question of law. Parallel questions of policy are involved in either event. In general, then, the problem of scope of review deserves one unified non-conceptual treatment. Such a treatment should emphasize both the importance of the relative expertness of judge and of administrator, and the importance of the breadth of the administrative determination; it is equally important to consider at the same point any other factors (viz., statutory language of delegation, confidence in the tribunal, burden of litigation which a wide scope of review will impose on the courts, existence of well-settled common law or administrative meaning which has been relied upon) which may determine the scope of review in a particular case. It is even more important to inquire (as the author never does in any systematic way) with respect to the nature and limits of administrative and judicial expertness; the conditions under which a court is not justified in reversing an administrative body on the ground that it has ignored a well-settled common law meaning;[8] the circumstances in which an administrative body is regarded as trustworthy, etc.

The same deprecation of practical problems and stress on concepts is found throughout the book. For the "facts" which the courts have employed in order to distinguish an "official" relation from a "contractual" relation the reader is referred[9] to the section on public officers in volume twenty-two of Ruling Case Law.

Apparently the facts (and any implications of policy that might be found by exam-

[4] P. 154. [5] P. 373. [6] 99 F. (2d) 795 (C.C.A. 2d 1938). [7] P. 146.

[8] Compare almost any recent tax case which involves interpretation of the language of future interests.

[9] P. 24.

ining the facts) are unimportant. "While there are other criteria that may be of use in distinguishing an office from an employment," the author says, "the most important means of distinction is that while an employment is created by contract, an office finds its source and limitations in some act of governmental power."[10] This being an adequate determination of what an office is for the purpose of determining whether it constitutes an impairment of the obligation of contract to abolish or alter an "office," it follows that we need not inquire what an office is when the issue is whether one office is incompatible with another.[11]

A last outstanding example of inadequate conceptualism is afforded by the author's bland observation that notice and hearing are not necessary in the case of processes resembling "law making" because "it is never possible *to prove by evidence* the wisdom or the injustice of a universal proposition."[12] This assertion may assume (a) that particular propositions can always be proved in a sense in which it is impossible to prove general propositions (imagine proving that X is negligent!); (b) that general propositions, i.e., rules of law, are never settled in particular cases. By erecting a false issue the statement thus begs the real, practical issue—how, in most cases, can a large number of persons be effectively heard on matters relevant to an inquiry which precedes settling of a general rule? Once this question is asked, *Bi-Metallic Investment Co. v. Board of Equalization*[13] is no longer obviously correct. It would have been practical, it may be argued, to hear a *representative* of the taxpayers. But this argument assumes the existence of a modicum of taxpayer organization. This in turn raises one of the really live inquiries of the day—to what extent is it necessary for the government to promote private representative organizations which will assure a fair hearing to all interests on questions affecting numbers of people? If such promotion is not attempted, can there be anything but government by pressure groups which is in a basic sense "unfair"?[14]

It would not be fair to ignore the cases in which the author lapses into functionalism. He discusses briefly in his introduction[15] various unsettling ideas that should have appeared in the section on judicial review. The treatment of de facto officers and the discussion of removal of officers are excellent. An attempt is made[16] to find a clue to the extent of administrative power in the subject matter with which the administrator is concerned—but no attempt is made to correlate the criteria erected with the cases save in the chapters dealing with licensing and "summary" powers. The efforts to consider subject matter are interesting, but one still wishes that some editor of a casebook on administrative law would make a thorough-going break with tradition, and show by appropriate material how and why there has arisen the peculiar trichotomy of legislative, judicial and administrative jurisdiction and procedure in the handling of particular concrete problems. In any case in which the institutional solution of a particular prob-

[10] P. 25. [11] Pp. 60 et seq. [12] P. 265. [13] 239 U.S. 441 (1915).

[14] Cf., e.g., the difficulties in administering the industry committee procedure under the Fair Labor Standards Act, arising from the fact that unions have obtained little success in organizing Southern workers. Union officers are the only "representatives" of labor available for placement on industry committees; yet the interests of their constituents may be opposed to the interests of Southern labor. The problem has been solved by the pious assumption that a union has a duty "to represent employees throughout the industry."

See, e.g., Administrator's Findings in the Matter of the Recommendations of Industry Committee Number 3 for Minimum Wage Rates in the Hosiery Industry, at 103 (1939).

[15] Pp. 5–6. [16] Pp. 137 et seq.

lem is not obviously unreasonable, one will not expect the doctrines of delegation of powers[17] and of procedural due process to offer any serious obstacles to institutional longevity.

ELROY D. GOLDING*

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**Rival Unionism in the United States.** By Walter Galenson. New York: American Council of Public Affairs,. 1940. Pp. 317. $3.25.

The courts have frequently been confronted with the impact of a new social or economic force upon a structure of law which has been erected with materials of another day. The customary reaction of courts has been to attempt to interpret such new forces in the light of legal principles which had already been developed and accepted. This process of envelopment of new forces with existing legal principles suffices only when the accepted legal principles are based upon considerations which continue to be sound in forming a basis for the adjustment of new social or economic relationships.

The development of the law in the field of labor relationships is no exception. The focal point at which the modern concept of labor relationships impinged upon the existing structure of law was inevitably to be found in a struggle between rival unions, whereby the interests of employers and the public were directly affected.

It can hardly be said that the American courts have reached a unanimity of opinion concerning the relative rights and duties of participants in a struggle between organized employees and their employer. Even more confusion still exists in the determination of such rights and duties when the conflict arises between a labor union and an employer who employs few or no persons belonging to the labor union. But in both instances the courts are concerned solely with the adjustment of the interests of labor organizations and the employers with whom the particular dispute exists.

A natural development therefrom is the acute situation where the employer does not contest the rights of organized labor, but where two bona fide labor unions are engaged in a struggle between themselves for the right to represent the workers of a particular employer.

The author has shown a full appreciation of this problem. After a brief summary of the history and causes of rival unionism, the author describes the customary weapons used by rival unions in their attempt to gain their objects. There then follows a comprehensive and almost amusing description of the methods used by the courts in attempting to apply ancient formulae to this problem. Once again, some courts have brought forth the concept that an otherwise lawful act may become unlawful when committed by more than one person. By the use of terms of "conspiracy," many courts have satisfied themselves that certain conduct of labor unions was unlawful, even though the same act by an individual would be unobjectionable.

The courts have also attempted to weigh the rights of the participants by other accepted standards. They have sought to determine the existence or non-existence of malice. They have sought to accept the legality of the object, providing the means used is legal. They have attempted in some respects to apply rules relating to the inducement of breach of contract. Probably the most successful instrument now in use has

[17] See Sunshine Anthracite Co. v. Adkins, 310 U.S. 381 (1940).

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