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A POWERLESS JUDICIARY? THE NORTH CAROLINA COURTS' PERCEPTIONS OF REVIEW OF ADMINISTRATIVE ACTION

CHARLES MARKHAM*

The acts of administrative or executive officers are not to be set at naught by recourse to the courts. Nor are courts charged with the duty or vested with the authority to supervise administrative and executive agencies of our government. However, a court of competent jurisdiction may determine in a proper proceeding whether a public official has acted capriciously or arbitrarily or in bad faith or in disregard of the law. *Pue v. Hood, Comr. of Banks* And it may compel action in good faith in accord with the law. But when the jurisdiction of a court is properly invoked to review the action of a public official to determine whether he, in choosing one of two or more courses of action, abused his discretion, the court may not direct any particular course of action. It only decides whether the action of the public official was contrary to law or so patently in bad faith as to evidence arbitrary abuse of his right of choice. If the officer acted within the law and in good faith in the exercise of his best judgment, the court must decline to interfere even though it is convinced the official chose the wrong course of action. The right to err is one of the rights—and perhaps one of the weaknesses—of our democratic form of government. In any event, we operate under the philosophy of the separation of powers, and the courts were not created or vested with authority to act as supervisory agencies to control and direct the action of executive and administrative agencies or officials. So long as officers act in good faith and in accord with the law, the courts are powerless to act—and rightly so.

Barnhill, C.J., in *Burton v. City of Reidsville*¹

Twenty-five years have passed since the late Chief Justice Barnhill described (as succinctly as any member of the Supreme Court of North

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1. 243 N.C. 405, 407-08, 90 S.E.2d 700, 702-03 (1956).

Carolina has ever done²) a widely perceived tradition of judicial restraint toward administrative action. Even as he wrote, the provisions for Judicial Review of Decisions of Certain Administrative Agencies, enacted in 1953,³ lay as yet uninterpreted in the North Carolina General Statutes⁴ although the General Assembly for the first time had provided comprehensive means by which certain administrative acts could indeed be "set at nought" on the suit of aggrieved persons.⁵ The coverage and scope of the judicial review statute (and of the Administrative Procedure Act, enacted in 1974,⁶ which generally incorporated its provisions) are limited, however. For example, judicial review under the Administrative Procedure Act applies only to a "final agency decision in a contested case"⁷ and "agencies" do not include local government bodies.⁸ Thus, those responsible for perhaps the great majority of administrative decisions made, or actions proposed, in North Carolina remain free from substantial threats of judicial interference with their conduct.⁹

2. On March 25, 1966, on the occasion of the presentation to the North Carolina Supreme Court of a portrait of the late Chief Justice M.V. Barnhill, his former colleague on the court, United States Senator Sam J. Ervin, Jr., said:

It is fitting that our tribute to Chief Justice Maurice Victor Barnhill should be simple, and direct, as befits the man, for in his lifetime he shunned rhetoric and hyperbole as he abhorred publicity and sham. Gifted with a precise, highly developed intellect, he used it in his life as in the law, to pare away the irrelevant, the non-essential and the valueless to reveal swiftly and meaningfully the hard core of truth

He possessed a remarkable ability to express himself clearly and understandingly [*sic*] in an opinion

266 N.C. 792, 800 (1966).

3. 1953 N.C. Sess. Laws, ch. 1094. The law became effective July 1, 1953.

4. N.C. GEN. STAT. §§ 143-306 to -316 (Supp. 1955), *repealed*, 1973 N.C. Sess. Laws, ch. 1331, § 2.

5. As early as 1937, a practicing attorney, Ralph M. Hoyt, addressing a meeting of the North Carolina State Bar, noted that with limited exceptions there was no right of judicial review of administrative action and called for a "fairly uniform, just and scientific method of judicial review for all these administrative activities. It is certainly an orderly and lawyer-like thing to do and we all know that occasions do, and will in the future, arise when the lack of adequate review results in serious injustice." Hoyt, *Shaping Judicial Review of Administrative Tribunals*, 16 N.C. L. REV. 1, 4-5 (1937). The General Assembly was not to heed Hoyt's plea for 16 years. On the inadequacy of judicial review procedures prior to 1953, see also Note, *Administrative Law—Evidence Before North Carolina Tribunals*, 19 N.C.L. REV. 568, 576 (1941); *A Survey of Statutory Changes in North Carolina: Administrative Law, Administrative Procedure and Judicial Review*, 19 N.C.L. REV. 435, 435-36 (1941); REPORT OF THE SPECIAL COMMISSION TO STUDY PRACTICES AND PROCEDURES BEFORE STATE ADMINISTRATIVE AGENCIES 20-24 (1953).

6. 1973 N.C. Sess. Laws, ch. 1331, § 1. Although enacted in 1974, the Act appears in the 1973 Session Laws.

7. N.C. GEN. STAT. § 150A-43 (1978).

8. *Id.* § 150A-2(1). There was no specific provision excluding local government bodies from the 1953 statute, however.

9. In 1971, Professor Hanft referred to Professor Davis' estimate (1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 1.02 (1958)) that the average state has more than 100 agencies with powers of adjudication or rule-making or both, but the number of administrative agencies created by municipalities and other units of local government in the United States may be "in the tens of thousands." Hanft, *Some Aspects of Evidence in Adjudication by Administrative Agencies in North*

The supreme court continues to express and enforce the conventional wisdom about the role of the courts as proclaimed by Chief Justice Barnhill.¹⁰ Yet in the last twenty-five years we have experienced a proliferation of statutes¹¹ providing state and local agencies with the authority to initiate or permit intrusions upon the lives, daily affairs, and property rights of citizens, markedly accelerating the trend of the third of a century preceding *Burton*.¹² Within the past decade the United States Supreme Court has frequently moved to limit access to the federal courts (or to limit the right to hearings reviewable by the

Carolina, 49 N.C.L. REV. 635, 638-39 (1971). "At best, only an insignificant fraction of all administrative acts will or can ever be reviewed by the courts, or even be the subject of a request for judicial review." Kramer, *The Place and Function of Judicial Review in the Administrative Process*, 28 FORDHAM L. REV. 1, 6 (1959).

10. See, e.g., *Painter v. Wake County Bd. of Educ.*, 288 N.C. 165, 176, 180-81, 217 S.E.2d 650, 657, 659-60 (1975); *Singleton v. Stewart*, 280 N.C. 460, 466, 186 S.E.2d 400, 404 (1972); *Sykes v. Belk*, 278 N.C. 106, 123, 179 S.E.2d 439, 449-50 (1971); *Redevelopment Comm'n v. Grimes*, 277 N.C. 634, 643, 178 S.E.2d 345, 350-51 (1971); *General Elec. Co. v. Turner*, 275 N.C. 493, 497, 168 S.E.2d 385, 388 (1969). Indeed, after the preparation of the first draft of this article, the Supreme Court of North Carolina, in *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, included in its opinion the excerpt from *Burton v. City of Reidsville* quoted at the beginning of this article. 300 N.C. 381, 403, 269 S.E.2d 547, 563 (1980).

11. E.g., North Carolina Minimum Wage Act, 1959 N.C. Sess. Laws, ch. 475; Water Safety Act, 1959 N.C. Sess. Laws, ch. 1064, § 1; North Carolina Pesticide Control Law of 1971, 1971 N.C. Sess. Laws, ch. 832, § 1; Water and Air Resources Management and Pollution Control Act of 1971, 1971 N.C. Sess. Laws, ch. 1167, § 2; North Carolina Environmental Policy Act of 1971, 1971 N.C. Sess. Laws, ch. 1203, § 1; Occupational Safety and Health Act of North Carolina, 1973 N.C. Sess. Laws, ch. 295, § 1, ch. 476, § 128; Sedimentation Pollution Control Act of 1973, 1973 N.C. Sess. Laws, ch. 392, § 1; Coastal Area Management Act of 1974, 1973 N.C. Sess. Laws, ch. 1284, § 1; Land Policy Act of 1974, 1973 N.C. Sess. Laws, ch. 1306, § 1; Equal Employment Practices Act, 1977 N.C. Sess. Laws, ch. 726, § 1; North Carolina Balanced Growth Policy Act, 1979 N.C. Sess. Laws, ch. 412, § 1.

12. E.g., Zoning Act, 1923 N.C. Sess. Laws, ch. 250, § 1; The North Carolina Workmen's Compensation Act, 1929 N.C. Sess. Laws, ch. 120, § 1; Housing Authorities Law, 1935 N.C. Sess. Laws, ch. 456, § 1; Unemployment Compensation Law, 1936 Ex. Sess., ch. 1, § 1; Maximum Hour Law, 1937 N.C. Sess. Laws, ch. 409, § 1; Model Airport Zoning Act, 1941 N.C. Sess. Laws, ch. 250; Urban Redevelopment Law, 1951 N.C. Sess. Laws, ch. 1095, § 1.

In his address to the North Carolina State Bar in 1937, Hoyt was moved to say:

The serious thing about this avalanche of regulatory activity is not, of course, its effect on the practicing attorney, who must increasingly shift his attention from the common law courts to the boards and commissions, but the tendency to place the rights, privileges and even the liberties of the citizen in the hands of non-judicial bodies, politically appointed and often politically controlled.

Hoyt counted 46 state administrative agencies functioning in North Carolina in 1937. See Hoyt, *supra* note 5, at 1-2. By 1973, Professor Daye found more than 100 agencies listed in the *North Carolina Manual*. Daye, *North Carolina's New Administrative Procedure Act: An Interpretive Analysis*, 53 N.C.L. REV. 833, 836 (1975).

In 1965, Professor Cooper referred to the "strange neglect" of state administrative agencies, in marked contrast to the "incandescent glare of investigation and debate, which since 1941 has been focused on the functions of federal administrative agencies. The personal privileges and property rights of most persons are more frequently and vitally affected by the rules and orders of state agencies than by the actions of federal agencies." 1 F. COOPER, *STATE ADMINISTRATIVE LAW* 1 (1965). The neglect referred to by Professor Cooper persisted for at least another decade. In fact, said Professor Schotland, "the situation has gotten worse." See Schotland, *Judicial Review of State Administrative Action*, 26 ADM. L. REV. 93, 94 (1974).

courts) for relief against administrative conduct,¹³ underscoring the need for the judiciaries of the states to take a broader view of their powers¹⁴ if citizens are to sustain their faith that governmental institutions are just and responsive.¹⁵

13. See, e.g., *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976) & *Warth v. Seldin*, 422 U.S. 490 (1975) (standing); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) (limiting the power of the courts to impose procedural requirements on administrative agencies beyond those minimally required by statute); *Board of Curators v. Horowitz*, 435 U.S. 78 (1978), *Bishop v. Wood*, 426 U.S. 341 (1976), & *Mathews v. Eldridge*, 424 U.S. 319 (1976) (due process right to evidentiary hearing); *Stump v. Sparkman*, 435 U.S. 349 (1978) (judicial immunity).

14. See, e.g., Justice Stevens' opinion for the Court in *Bishop v. Wood*.

The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, *can best be corrected in other ways*. The [d]ue [p]rocess [c]lause of the [f]ourteenth [a]mendment is not a guarantee against incorrect or ill-advised personnel decisions.

426 U.S. at 349-50 (emphasis added).

In *Paul v. Davis*, respondent was left to his remedies under state defamation law rather than under the Constitution. 424 U.S. 693 (1976).

Williams v. Greene, 36 N.C. App. 80, 243 S.E.2d 156 (1978), reflects a commendable willingness by the court to broaden state remedies. There North Carolina joined a number of other states in holding that actions against state officers under 42 U.S.C. § 1983 would be entertained in the state court.

15. Justice Brennan, dissenting in *Paul v. Davis*, said: "I have always thought that one of this Court's most important roles is to provide a formidable bulwark against governmental violations of the constitutional safeguards securing in our free society the legitimate expectations of every person to innate human dignity and sense of worth." 424 U.S. 693, 734-35 (1976).

Other judges and commentators have emphasized the importance of responding to citizens' expectations, and of increasing citizen participation in and understanding of decisions that affect one's life and affairs. See, e.g., Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 586 (1972):

We have recently seen enough evidence of what happens when a substantial number of people come to believe that major decisions have been made without their consent. If the social fabric is to survive, the politics of manipulation and delegation simply must be replaced by a politics of informed consent.

Professor Kramer stated:

The existence of judicial review is a constant reminder to the official that excessive actions risk judicial inquiry and reversal. It is a constant source of assurance and security to the individual citizen that he has this method of vindicating his rights against the state before an independent tribunal [P]roperly limited and exercised, judicial review is an actual source of strength to the administrative process. Public confidence in government is increased

Kramer, *supra* note 9, at 9.

Michelman, *Formal and Associational Aims in Procedural Due Process*, in DUE PROCESS, NOMOS XVIII 128 (J. Pennock & J. Chapman eds. 1977) observed:

One familiar notion of due process is that of an obligation on the part of those who make decisions about the concerns of other individuals to engage in explanatory procedures—procedures in which agents state reasons for their decisions and affected individuals are allowed to examine and contest the proffered reasons. . . . [A] participatory opportunity may also be psychologically important to the individual: to have played a part in, to have made one's apt contribution to, decisions which are about oneself may be counted important even though the decision, as it turns out, is the most unfavorable one imaginable and one's efforts have not proved influential.

For these reasons—and for the further reasons that the appellate courts of North Carolina, as recently as *State ex rel. Commissioner of Insurance v. North Carolina Rate Bureau*¹⁶ and for several years theretofore, have displayed an uncharacteristic willingness to “control and direct” the operations of at least one state officer and agency (the Commissioner and Department of Insurance),¹⁷ and have on some occasions liberally interpreted the Administrative Procedure Act in ways congenial to the interests of complaining parties¹⁸—it is appropriate now to determine whether there is a valid legal and philosophical basis for the limited view of judicial power expressed by Chief Justice Barnhill, and whether these largely self-imposed restrictions on the authority of the courts are still observed. If so, the question remains whether such limitations are suitable for a society far more complex than that in which they developed and flourished.¹⁹ It is appropriate also to examine the forms for seeking, and the availability and scope of judicial review under present North Carolina case and statutory law, and to consider whether the law is adequate for the times.

It is my conviction that the courts of North Carolina have never been, are not, and need not be (to borrow from Richard M. Nixon's Vietnam War rhetoric) the “pitiful, helpless giants” imagined in the reveries of Chief Justice Barnhill and of kindred spirits who came before and after him to the supreme court of this state. To employ a

To the extent that the federal courts find themselves constitutionally incapable of affording such guarantees to a disaffected individual, the state courts provide, as they must, the only alternative.

16. 41 N.C. App. 310, 255 S.E.2d 557 (1979), *aff'd in part & rev'd in part*, 300 N.C. 381, 269 S.E.2d 547 (1980).

17. See *State ex rel. Comm'r of Ins. v. North Carolina Auto. Rate Admin. Office*, 294 N.C. 60, 241 S.E.2d 324 (1978); *State ex rel. Comm'r of Ins. v. North Carolina Auto. Rate Admin. Office*, 293 N.C. 365, 239 S.E.2d 48 (1977); *State ex rel. Comm'r of Ins. v. North Carolina Fire Ins. Rating Bureau*, 292 N.C. 471, 234 S.E.2d 720 (1977); *State ex rel. Comm'r of Ins. v. North Carolina Fire Ins. Rating Bureau*, 292 N.C. 70, 231 S.E.2d 882 (1977); *State ex rel. Comm'r of Ins. v. North Carolina Auto. Rate Admin. Office*, 292 N.C. 1, 231 S.E.2d 867 (1977); *State ex rel. Comm'r of Ins. v. North Carolina Fire Ins. Rating Bureau*, 291 N.C. 55, 229 S.E.2d 268 (1976); *State ex rel. Comm'r of Ins. v. North Carolina Auto. Rate Admin. Office*, 287 N.C. 192, 214 S.E.2d 98 (1975); *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 44 N.C. App. 191, 261 S.E.2d 671 (1979), *modified & aff'd*, 300 N.C. 485, 269 S.E.2d 602 (1980); *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 44 N.C. App. 75, 259 S.E.2d 926 (1979), *modified & aff'd*, 300 N.C. 474, 269 S.E.2d 595 (1980); *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 43 N.C. App. 715, 259 S.E.2d 922 (1979); *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 40 N.C. App. 85, 252 S.E.2d 811 (1979); *North Carolina Auto. Rate Admin. Office v. Ingram*, 35 N.C. App. 578, 242 S.E.2d 205 (1978); *Occidental Life Ins. Co. v. Ingram*, 34 N.C. App. 619, 240 S.E.2d 460 (1977); *American Guar. & Liab. Ins. Co. v. Ingram*, 32 N.C. App. 552, 233 S.E.2d 398 (1977).

18. See, e.g., *Coastal Ready-Mix Concrete Co. v. Board of Comm'rs*, 299 N.C. 620, 265 S.E.2d 379 (1980); *In re Rogers*, 297 N.C. 48, 253 S.E.2d 912 (1979); *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 233 S.E.2d 538 (1977); *Humble Oil & Ref. Co. v. Board of Aldermen*, 284 N.C. 458, 202 S.E.2d 129 (1974); *Jarrell v. Board of Adjustment*, 258 N.C. 476, 128 S.E.2d 879 (1963).

19. See text accompanying notes 163-81 *infra*.

Biblical²⁰ metaphor, while we cannot expect and assuredly would not want our courts to be neighborly Samaritans, they must not be Priests and Levites content to "pass by on the other side" when the rights and interests of citizens—individual, corporate, or collectively—are threatened, jeopardized, or invaded by governmental action.²¹

A Prefatory Note

For purposes of this article, the term "administrative action" and similar expressions include conduct of, or action taken by, the governing bodies of counties, cities, and towns, even when they act in a legislative capacity. Our law is clear that such entities are administrative agencies of the state.²² Moreover, in this state, the common law governing what are popularly known as administrative agencies—bodies either operating independently of, or attached to, the executive department—is largely derived, as we shall see, from decisions made by our courts in nineteenth century cases involving locally elected (often legislative) officials, and arising before the development of the modern administrative state. It was not until 1950 that the phrase "Administrative Law" first appeared in the Analytical Index found in the official reports of the Supreme Court of North Carolina.²³ The primary concern here is with judicial review of so-called "discretionary action"—

20. Luke 10: 25-37 (King James).

21. As a result of widespread criticism of the administrative process during the New Deal era, in 1939 President Roosevelt established the Attorney General's Committee on Administrative Procedure, whose recommendations in its 1941 Report were reflected to some extent in the Federal Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 551-59, 701-06 (1976)). For background on this legislation, see S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 29-30 (1979). What the Committee said about public expectations from judicial review of administrative action in the federal courts 40 years ago is no less appropriate for North Carolina today:

First, we expect judicial review to *check*—not to *supplant*—administrative action We may expect judicial review to continue its historic function as a brake on excursion by the administrative body beyond its lawfully delegated authority and on the excessive assumption of power by the executive We may expect judicial review, in the performance of this function of control, to speak the final word on interpretation of law, both constitutional and statutory Judicial review may also be expected to require from the administrative branch fair consideration in its adjudications Finally, judicial review may be expected to check extremes of arbitrariness or incompetence in administrative adjudications

ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, FINAL REPORT 75-79 (1941).

22. Great Am. Ins. Co. v. Johnson, 257 N.C. 367, 371, 126 S.E.2d 92, 95 (1962); Deloatch v. Beamon, 252 N.C. 754, 757, 114 S.E.2d 711, 713-14 (1960); Smith v. City of Winston-Salem, 247 N.C. 349, 354, 100 S.E.2d 835, 838-39 (1957); Southern Ry. v. Mecklenburg County, 231 N.C. 148, 150, 56 S.E.2d 438, 439-40 (1949); Bridges v. City of Charlotte, 221 N.C. 472, 479, 20 S.E.2d 825, 830 (1942); Town of Saluda v. Polk County, 207 N.C. 180, 186, 176 S.E. 298, 301-02 (1934); Cabe v. Board of Aldermen, 185 N.C. 158, 160, 116 S.E. 419, 420 (1923); Board of Trustees v. Webb, 155 N.C. 379, 383-84, 71 S.E. 520, 521-22 (1911); Lilly v. Taylor, 88 N.C. 489, 493-95 (1883).

23. 230 N.C. 796 (1950) (Analytical Index to North Carolina Reports). The term "Administrative Law and Procedure" first appeared in the previous year at 229 N.C. 837. The term "Administrative Law" was first included as a title in the *Fifth Decennial Digest* (1947) of the West Key Reporter System. B. SCHWARTZ, ADMINISTRATIVE LAW § 7, at 19 (1976).

that is, as Chief Justice Barnhill suggested above, situations where a public official or agency is confronted with a choice between two or more courses of action. As the supreme court said in *North Carolina State Highway Commission v. Young*,²⁴ "It is hard to see how any administrative body can function without exercising discretion . . ."²⁵ In general, actions involving damages sought from governmental bodies or officials—as in the case of eminent domain proceedings, negligence, or nuisance, and the related issues of governmental or officer immunity—are beyond the scope of the discussion here; nor are we concerned with the exercise of prosecutorial discretion in criminal law enforcement.

The reader should be aware that the author's interest in and views on the subject of judicial review of discretionary administrative action developed from his participation as a party, counsel, and research assistant in cases where such review was sought (sometimes unsuccessfully). Some of these cases are cited and discussed herein.

24. 200 N.C. 603, 607, 158 S.E. 91, 93-94 (1931).

25. "The exercise of adequate discretion for dealing with the problems of a complex society and the simultaneous provision of sufficient safeguards against the abuse of discretion are the two clearest needs of modern democratic government." Fuchs, *An Approach to Administrative Law*, 18 N.C.L. REV. 183, 194 (1940). Emphasizing that "[c]ontrol of discretion is crucial to effective judicial review," Professor Schwartz states:

Review of discretion is an essential feature of a system which purports to be governed by the rule of law. "Law has reached its finest moments," Justice Douglas has affirmed, "when it has freed man from the unlimited discretion of some ruler, some . . . official, some bureaucrat Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions."

B. SCHWARTZ, *supra* note 23 § 216, at 607. See also 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* 208 (2d ed. 1978); L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 26 (1965): "[I]t is precisely the role of judicial review to curb and correct administrative distortion" Professor Jaffe further says:

The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid

. . . . [T]he availability of judicial review is, in our system and under our tradition, the necessary premise of legal validity.

. . . . [T]here is in our society a profound, tradition-taught reliance on the courts as the ultimate guardian and assurance of the limits set upon executive power by the constitutions and legislatures.

Id. at 320-21.

Thus, while provision of discretionary powers to administrative officers and agencies may be necessary to the efficient functioning of government, it seems widely recognized, except possibly to adherents of *Burton v. City of Reidsville*, that the corollary must be an "activist" point of view among the judiciary. Most state courts seem to acknowledge this principle. As Cooper points out:

Where provisions for judicial review permit the courts to exercise a large measure of superintending control over the agency, the courts are more easily persuaded that a broad measure of discretion should be sustained, for the courts feel confident that if unfair procedures be imposed, or arbitrary decisions made, they could be corrected on appeal to the courts.

1 F. COOPER, *supra* note 12, at 81.

I. CONSTITUTIONAL AND STATUTORY PROVISIONS LIMITING THE JUDICIARY OF NORTH CAROLINA

Under the Constitution of North Carolina,²⁶ all political power is derived from the people and the sovereign power of the people is supreme. It has been described as axiomatic that a law enacted through their chosen representatives in the General Assembly "may not be set aside by the courts unless it contravenes some prohibition or mandate of the [c]onstitution by which the people of the State have elected to be limited and restrained, or unless it violates some provision of the granted powers contained in the Constitution of the United States."²⁷ Under the North Carolina Constitution, the legislative, executive, and supreme judicial powers of the state "shall be forever separate and distinct from each other."²⁸ The supreme court's jurisdiction is "to review upon appeal any decision of the courts below, upon any matter of law or legal inference."²⁹ It is well settled that the limitation to consideration of "matters of law or legal inference" does not apply where the appeal is from the granting or denial of preliminary injunctive relief; in that case the reviewing court is free to make its own findings of fact.³⁰ The constitution authorizes the General Assembly to provide for the appellate jurisdiction of the court of appeals,³¹ and the statute limits review to "matters of law or legal inference."³² With certain statutory exceptions (for example, appeals from the Utilities Commission or the Industrial Commission which are heard initially in the court of appeals³³), the superior court is normally the court where judicial review of administrative action is first sought.³⁴

II. DISCRETIONARY ACTION: DEVELOPMENT AND APPLICATION OF THE "POWERLESS JUDICIARY" THEORY

From the beginning, the North Carolina courts have displayed a robust confidence in their capacity to curb governmental excesses—provided there were clear violations of constitutional or statutory authority presented to them. Justice Clarkson twice proudly mentioned the

26. N.C. CONST. art. I, § 2. The constitution is found in volume 4A N.C. GEN. STAT. (1970).

27. *State v. Warren*, 211 N.C. 75, 80, 189 S.E. 108, 111 (1937) (Devin, J., dissenting).

28. N.C. CONST. art. I, § 6.

29. *Id.* art. IV, § 12(1).

30. *See Saff Bros., Inc. v. Bank of N.C.*, 289 N.C. 198, 204, 221 S.E.2d 273, 276-77 (1976); *Pruitt v. Williams*, 288 N.C. 368, 373, 218 S.E.2d 348, 351-52 (1975); *Register v. Griffin*, 6 N.C. App. 572, 574, 170 S.E.2d 520, 521-22 (1969); *Cablevision of Winston-Salem, Inc. v. City of Winston-Salem*, 3 N.C. App. 252, 258, 164 S.E.2d 737, 740-41 (1968).

31. N.C. CONST. art. IV, § 12(2).

32. N.C. GEN. STAT. § 7A-26 (1969).

33. *Id.* § 7A-29 (Supp. 1979).

34. *Id.* §§ 7A-245, -247, -250 (1969).

claim³⁵ that in 1787 "this state was the first in the United States to declare an act of the General Assembly unconstitutional."³⁶ In 1817, the supreme court held void on both substantive and procedural grounds an ordinance of the Town Commissioners of Fayetteville directing the constable to seize and sell all hogs found running at large in the streets.³⁷ The court said:

The laws of the land . . . allow to every person the opportunity of defending his property before it is condemned, and in no case leave it to the mercy of a mere ministerial officer to seize it at will, *which seizure is to be lawful or not, according to his own will and pleasure. The ordinance, therefore, on that account, was unauthorized and consequently void.* And as to the other question, that seems equally clear. By the mode of proceeding directed by the ordinance, the owner of the property seized had no opportunity allowed him of appealing to the county court of Cumberland, and on that account, also, the ordinance was void.³⁸

In an early case involving another type of administrative body, a school board was found to have acted *ultra vires* in employing a teacher beyond the time when the board's term expired.³⁹ In 1844 the supreme court held that the justices of the Court of Pleas and Quarter Sessions of Guilford County did not have the "arbitrary discretion" to refuse to issue any retail liquor licenses because an act of the General Assembly had authorized them to be granted to persons who met the character and other requirements specified in the statute.⁴⁰

However, by the mid-nineteenth century the supreme court had accepted, along with other familiar concepts of administrative law embedded deep in our legal history,⁴¹ the principles of judicial deference to the executive branch when acting within the scope of its powers,⁴² to the independence of local officers,⁴³ and to the superior knowledge of

35. The justice was referring to *Bayard v. Singleton*, 1 N.C. (1 Mart.) 5 (1787). See also *Trustees of the Univ. of N.C. v. Foy*, 5 N.C. (1 Mur.) 58 (1805); *Robinson v. Barfield*, 6 N.C. (2 Mur.) 391 (1818). *Bayard v. Singleton* preceded by 16 years the decision of the United States Supreme Court in *Marbury v. Madison*, 5 U.S. 137 (1803).

36. *Glenn v. Board of Educ.*, 210 N.C. 525, 530, 187 S.E. 781, 784 (1936); *Hill v. Board of Comm'rs*, 209 N.C. 4, 6, 182 S.E. 709, 710 (1935) (Clarkson, J., dissenting).

37. *Shaw v. Kennedy*, 4 N.C. (Term) 591 (1817). See also *State v. Moore*, 46 N.C. (1 Jones) 276 (1854) (liquor license granted by county court without written recommendation of town commissioners held invalid); *Commissioners of the Town of Asheville v. Means*, 29 N.C. (7 Ired.) 406 (1846) (tax imposed by town commissioners held invalid).

38. *Shaw v. Kennedy*, 4 N.C. (Term) 591, 592 (1817) (emphasis added).

39. *Taylor v. School Comm.* No. 17, 50 N.C. (5 Jones) 98 (1857).

40. *Attorney Gen. ex rel. Gillespie v. Justices of Guilford County*, 27 N.C. (5 Ired.) 315, 321 (1844).

41. For example, due process requirement of notice and opportunity to be heard: *Jennings v. Stafford*, 23 N.C. (1 Ired.) 404 (1841); *Hamilton v. Adams*, 6 N.C. (2 Mur.) 161 (1812). Delegation doctrine: *Thompson v. Floyd*, 47 N.C. (2 Jones) 313, 315-16 (1855).

42. See *Ex parte Moore*, 64 N.C. 802, 807 (1870).

43. See *Nixon v. Harrell*, 50 N.C. (5 Jones) 76 (1857).

local bodies about conditions in their communities.⁴⁴ In 1833, in *Hoke v. Henderson*,⁴⁵ the court, through Chief Justice Ruffin, issued a classic opinion restricting the power of the General Assembly to abolish an office it had created. While this point was overruled seventy years later,⁴⁶ Chief Justice Ruffin's observation that a court cannot question the "sound discretion" of the legislature,⁴⁷ and his discourse upon the relationship of the judicial and lawmaking branches, have been echoed⁴⁸ in North Carolina jurisprudence almost to this day:

It is the province of the [c]ourt to expound their [the legislature's] words so as to attain to the meaning; and to that end consequences and policy may be looked to. But when its meaning is discovered, the act as really intended, is obligatory upon the mind, the will and the conscience of the [j]udge, however mischievous the policy, harsh and oppressive in its enactments on individuals, or tyrannous on the citizens generally. Those are political considerations, fit to be weighed by and to influence the legislators; but if disregarded by them, their responsibility is to their constituents, not to the courts of justice. To a [c]ourt, the impolicy, the injustice, the unreasonableness, the severity, the cruelty of a statute by themselves merely, are and ought to be urged in vain. The judicial function is not adequate to the application of those principles, and is not conferred for that purpose

The question is, whether [the] legislative intention . . . is valid and efficacious, as being within the powers of the [l]egislature in the constitutions of the country; or is null, as being contrary to and inconsistent with the provisions of those instruments. To the determination of this question, the judicial function is competent. It involves no collateral considerations of abstract justice or political expediency Legislative representatives may order and enact what to them may seem meet and useful, upon all subjects and in all methods, except those on which their action is restrained by the [c]onstitution⁴⁹

44. See *Atkinson v. Foreman*, 6 N.C. (2 Mur.) 55, 58 (1811).

45. 15 N.C. (4 Dev.) 1 (1833).

46. *Mial v. Ellington*, 134 N.C. 131, 46 S.E. 961 (1903). Referring to the holding in *Hoke v. Henderson* that an office created by the General Assembly was property, Chief Justice Clark, in his *History of the Supreme Court of North Carolina*, wrote that the *Hoke* decision "gave infinite trouble till, after seventy years, it was overruled During its existence as authority no case ever caused more inconvenience in the administration of our State Government than this." 177 N.C. 617, 622-23 (1919).

47. *Hoke v. Henderson*, 15 N.C. (4 Dev.) 1, 20 (1833).

48. See, e.g., *Martin v. North Carolina Hous. Corp.*, 277 N.C. 29, 41, 175 S.E.2d 665, 671 (1970); *Keziah v. Seaboard Air Line Ry.*, 272 N.C. 299, 310, 158 S.E.2d 539, 547 (1968); *Clark's Greenville, Inc. v. West*, 268 N.C. 527, 531, 151 S.E.2d 5, 8 (1966). But see *In re Certificate of Need for Aston Park Hospital, Inc.*, 282 N.C. 542, 193 S.E.2d 729 (1973), noted in Comment, *Hospital Regulation After Aston Park: Substantive Due Process in North Carolina*, 52 N.C.L. REV. 763 (1974).

49. *Hoke v. Henderson*, 15 N.C. (4 Dev.) 1, 6-7 (1833).

Six years later the court said:

The interpreters of a law have not the right to judge of its policy, and when they undertake to find out the policy contemplated by the makers of the law there is a great danger of mistaking their own opinions on that subject, for the opinions of those who had alone the right to judge of matters of policy.⁵⁰

These few traces of judicial conservatism concerning actions of the executive and legislative branches (except where clear violations of legal authority were shown) are insufficient to justify the conclusion that the view expressed by Chief Justice Barnhill in *Burton v. City of Reidsville*⁵¹ has significant historic roots antedating adoption of the North Carolina Constitution of 1868. There was no substantial body of law governing the conduct of administrative agencies—even in the broad sense of the phrase used here—during the first 100 years of our state's existence.⁵² It is to the post-Civil War period that we must turn to find a common law foundation for the principle of judicial impotence.

A. *Brodnax v. Groom: The Beginning*

If there is any case from which the theory of a powerless judiciary in North Carolina can be traced, it is *Brodnax v. Groom*,⁵³ decided in 1870 by a unanimous supreme court under Chief Justice Richmond M. Pearson, whose doctrine of judicial restraint was still being cited, with an erroneously attributed quotation, nearly 100 years later.⁵⁴

In *Brodnax*, plaintiffs brought a taxpayers' action against the Rockingham County Commissioners to challenge the validity of a statute authorizing the Commissioners to levy a tax for repairing and building bridges. Among the grounds raised for objection was the constitutional provision⁵⁵ requiring a vote of the majority of qualified voters for the levy or collection of any tax "except for the necessary expenses" of the county. The tax involved had not been so approved, and plaintiffs con-

50. *Roberts v. Cannon*, 20 N.C. (3 & 4 Dev. & Bat.) 398, 409-10 (1839).

51. See quote in text accompanying note 1 *supra*.

52. Justice Adams listed some of "the influences which shaped the decisions of the [s]upreme [c]ourt" beginning in 1818 and through its first half-century. He made no reference to any theories or doctrines of judicial restraint vis-a-vis other branches of government, under separation of powers or otherwise. Adams, *Evolution of Law in North Carolina*, 2 N.C.L. REV. 133 (1924). The highest North Carolina court prior to 1818 was a court of conference, consisting of the superior court judges and known as the "Supreme Court" beginning in 1805. The Supreme Court of North Carolina was created by a legislative enactment in November, 1818, which went into effect January 1, 1819. The court had no constitutional status and existed at the will of the General Assembly until adoption of the Constitution of 1868. Stacy, *Brief Review of the Supreme Court of North Carolina*, 4 N.C.L. REV. 115, 115 (1926). See also Clark, *History of the Supreme Court of North Carolina*, 177 N.C. 617, 620 (1919); *State v. Furmage*, 250 N.C. 616, 624-25, 109 S.E.2d 563, 569 (1959).

53. 64 N.C. 244 (1870).

54. *Clark's Greenville, Inc. v. West*, 268 N.C. 527, 531, 151 S.E.2d 5, 8 (1966). See note & text accompanying note 60 *infra*.

55. N.C. CONST. of 1868 art. VII, § 7.

tended that repairing and building bridges was not a necessary expense. The court advanced what appears to be an ineptly phrased suggestion that county commissioners, *rather than courts*, were entitled to interpret the words "necessary expenses" found in the constitution,⁵⁶ an observation subsequently clarified by the supreme court on numerous occasions.⁵⁷ Chief Justice Pearson—disavowing the court's capacity for determining which bridges needed repairs, whether the bridges should have stone pillars rather than wooden posts, and the like—concluded:

In short, this [c]ourt is not capable of controlling *the exercise* of power on the part of the General Assembly, or of the county authorities, and it cannot assume to do so, without putting itself in antagonism as well to the General Assembly, as to the county authorities, and *erecting a despotism of five men*; which is opposed to the fundamental principles of our government and the usages of all times past.

For the exercise of powers conferred by the [c]onstitution the people must rely upon the honesty of the members of the General Assembly and of the persons elected to fill places of trust in the several counties.

This [c]ourt has no power, and is not capable if it had the power, of controlling the exercise of power conferred by the [c]onstitution upon the legislative department of the government or upon the county authorities.⁵⁸

Brodnax lingers on in a substantial body of supreme court opinions⁵⁹ whose authors have relied on it erroneously as authority for what is, aside from total abstention, the narrowest conceivable view of judicial power to control administrative and executive officers' discretion: that the courts will not interfere with their acts "unless so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion,"⁶⁰

56. "Who is to decide what are the necessary expenses of a county? The County Commissioners, to whom are confided the trust of regulating all county matters." *Brodnax v. Groom*, 64 N.C. 244, 249 (1870).

57. "The courts determine whether a given project is a necessary expense of the municipality, but the governing authorities of the municipality determine in their discretion whether such given project is necessary or needed in the designated locality." *Green v. Kitchin*, 229 N.C. 450, 458, 50 S.E.2d 545, 550 (1948), *quoting* *Starmount Co. v. Town of Hamilton Lakes*, 205 N.C. 514, 520, 171 S.E. 909, 912 (1933). *See also* *Purser v. Ledbetter*, 227 N.C. 1, 4, 40 S.E.2d 702, 705 (1946); *Starmount Co. v. Town of Hamilton Lakes*, 205 N.C. 514, 520, 171 S.E. 909, 912 (1933), *citing* *Henderson v. City of Wilmington*, 191 N.C. 269, 132 S.E. 25 (1926); *Storm v. Town of Wrightsville Beach*, 189 N.C. 679, 128 S.E. 17 (1925); *Fawcett v. Town of Mt. Airy*, 134 N.C. 125, 45 S.E. 1029 (1903).

58. 64 N.C. 244, 250 (1873).

59. *See, e.g.*, *Messer v. Smathers*, 213 N.C. 183, 189, 195 S.E. 376, 379 (1938); *Crabtree v. Board of Educ.*, 199 N.C. 645, 650, 155 S.E. 550, 553 (1930); *Hayes v. Benton*, 193 N.C. 379, 383, 137 S.E. 169, 170 (1927); *Carlyle v. State Highway Comm'n*, 193 N.C. 36, 60, 136 S.E. 612, 626 (1927) (Stacy, C.J., dissenting); *Newton v. State Highway Comm'n*, 192 N.C. 54, 60, 133 S.E. 522, 525 (1926); *Lassiter v. Board of Comm'rs*, 188 N.C. 379, 383, 124 S.E. 738, 740 (1924); *Parks v. Board of County Comm'rs*, 186 N.C. 490, 498, 120 S.E. 46, 50 (1923); *Lee v. Town of Waynesville*, 184 N.C. 565, 568, 115 S.E. 51, 53 (1922); *Dula v. Board of School Trustees*, 177 N.C. 426, 431, 99 S.E. 193, 195 (1919); *Newton v. School Comm.*, 158 N.C. 186, 188, 73 S.E. 886, 887 (1912).

60. The phrase quoted in the text and in the cases cited in note 59 *supra* does not appear in

and similar ornate phrases typical of the rhetoric of the turn-of-the-century era during which they were crafted. Never mind that in *Brodnax* Chief Justice Pearson made no reference whatever to “oppressive” or “manifest” abuse; never mind that some might view the true source of “despotism” not as the justices of the supreme court, but the administrator whose fiat goes unrestrained by a reluctant judiciary. *Brodnax* is the wellspring for at least one of three identifiable streams of judicial thought on this subject in North Carolina—streams that meander in their separate beds, merge awhile, branch off at unexpected places, and join again, leaving their tributaries to flow on, in other directions. The aimless judicial wanderings of a century leave the legal navigator no fixed point of reference and no sure course through the thickets.

B. *The Clearly Unreasonable, Oppressive, and Manifest Abuse of Discretion Test*

This grandiose standard first crept into the jurisprudence of North Carolina with the direct imprimatur of the supreme court in 1908 in the case of *Rosenthal v. City of Goldsboro*,⁶¹ where the plaintiff, Eva Rosenthal, sought unsuccessfully to restrain the city from cutting down shade trees along her sidewalk. The city contended that their roots obstructed

Brodnax; nor was *Brodnax* cited as authority for it prior to the supreme court's opinion in *Rosenthal v. City of Goldsboro*, 149 N.C. 128, 134, 62 S.E. 905, 908 (1908). Indeed, in *State v. Hill*, Justice Douglas observed that the *Brodnax* court's “half-humorous and half-sarcastic” language about wooden posts and stone pillars on the bridges involved “was surely never intended to apply to the constitutional rights of the citizen which are *not* held at the pleasure of a board of aldermen, or even of a [l]egislature.” 126 N.C. 1140, 1147, 36 S.E. 326, 328 (1900) (emphasis the court's). In *Rosenthal*, the court relied extensively on *Tate v. City of Greensboro*, 114 N.C. 392, 19 S.E. 767 (1894). The *Tate* court, however, did not even refer to *Brodnax*; it did cite and quote from *Chase v. City of Oshkosh*, where the Supreme Court of Wisconsin said with respect to local decisions as to street improvements, “Courts can interfere only in cases of fraud or oppression, constituting manifest abuse of discretion.” 81 Wis. 313, 313, 51 N.W. 560, 561 (1892). Thus, for the 38 years prior to *Rosenthal*, the Supreme Court of North Carolina had not considered *Brodnax* as authority for anything beyond the principle that local authorities generally have discretion beyond the reach of the courts as to the location and construction of necessary public works. For 38 years it had passed up the opportunity to read into *Brodnax* a rule that the courts were *powerless to interfere* unless that discretion were “clearly unreasonably, oppressively and manifestly” abused. The court did not begin to cite *Brodnax* for that rule until the *Rosenthal* court invented it—without any discernible basis for doing so, or for using *Brodnax* as authority for such a rule. The *Rosenthal* court, moreover, rephrased and enlarged upon the *Chase* rule, using it as second to *Brodnax* in a “three-string” citation. The third citation, to Smith, *Municipal Corporations* § 1311, as in the case of *Brodnax*, did not include the “oppressive and manifest abuse” phrase.

It appears that *Brodnax* acquired its assumed authenticity on this point, and the flavor and aroma of *Chase* as well, by its close proximity to *Chase* in the *Rosenthal* opinion—by osmosis, as it were. The conclusion, as suggested in the text discussion of *Rosenthal infra*, is that cheese was not the only import from Wisconsin enjoyed by North Carolinians in and after 1908, when *Rosenthal* was decided. One is impelled to wonder how often a structure of bad law is erected by sheer judicial rote on such flimsy foundations as the distortions of *Brodnax* and *Chase* by Justice Hoke in his *Rosenthal* opinion.

61. 149 N.C. 128, 62 S.E. 905 (1908).

and threatened the safety of the city sewerage system. Justice Hoke wrote for the court:

[I]t may now be considered as established with us, that our courts will always be most reluctant to interfere with these municipal governments in the exercise of discretionary powers, conferred upon them for the public weal, and *will never do so unless their action should be so clearly unreasonable as to amount to an oppressive and manifest abuse of their discretion*. This position is, we think, supported by the better reason, and is in accord with the decided weight of authority.⁶²

The only North Carolina case cited for this "decided weight of authority," however, was *Brodnax v. Groom*, which, of course, directly stands for no such proposition.⁶³

Nevertheless, the *Rosenthal* rule has been quoted, almost exactly as stated, in at least ten cases which deal with subject matters far afield from the fact situation there involved.⁶⁴ The *Rosenthal* progeny themselves have been cited for the same general standard in at least forty-six additional cases in the North Carolina courts,⁶⁵ so that the contagion of *Brodnax*, and of the *Rosenthal* court's erroneous reliance on it, has spread unchecked into numerous areas of North Carolina administrative law. The endless variations on the basic *Rosenthal* theme, describing the type of conduct required for a court to bestir itself to intervene, include administrative actions inflicting "palpable oppression";⁶⁶ those "manifestly unreasonable and oppressive";⁶⁷ "manifestly fraudulent";⁶⁸

62. *Id.* at 134, 62 S.E. at 908 (emphasis added).

63. See note 60 *supra*.

64. *In re Appeal of Parker*, 214 N.C. 51, 55, 197 S.E. 706, 709 (1938) (city's refusal to permit erection of wall on corner lot); *Hayes v. Benton*, 193 N.C. 379, 383-84, 137 S.E. 169, 170 (1927) (school board's refusal to provide bus transportation for a crippled child); *Harden v. City of Raleigh*, 192 N.C. 395, 397-98, 135 S.E. 151, 152-53 (1926) (city's refusal to issue permit for erection of filling station); *Parks v. Board of County Comm'rs*, 186 N.C. 490, 498, 120 S.E. 46, 50 (1923) (relocation of highway); *Lee v. Town of Waynesville*, 184 N.C. 565, 568, 115 S.E. 51, 53 (1922) (widening of streets); *Dula v. Board of School Trustees*, 177 N.C. 426, 431, 99 S.E. 193, 195 (1919) (action to compel continuation beyond term of school closed during influenza epidemic); *Newton v. School Comm.*, 158 N.C. 186, 188, 73 S.E. 886, 887 (1912) (selection of school site); *State v. Staples*, 157 N.C. 637, 638, 73 S.E. 112, 112-13 (1911) (validity of ordinance regulating billboards); *Jones v. Town of N. Wilkesboro*, 150 N.C. 646, 650, 64 S.E. 866, 868 (1909) (selection by municipality of unsafe watershed as source of water supply; *Rosenthal* distinguished); *Board of Educ. v. Commissioners of Cherokee County*, 150 N.C. 116, 125, 63 S.E. 724, 728 (1909) (alleged failure to maintain statutory four-month term for public schools).

65. These cases are too numerous to permit citation. The computation was made by reference to the appropriate volumes of *Shepard's North Carolina Citations*.

66. *State v. Lawing*, 164 N.C. 492, 494, 80 S.E. 69, 70 (1913) (validity of ordinance establishing a fire district and barring erection and repair of wooden structures therein).

67. *State v. Stowe*, 190 N.C. 79, 81, 128 S.E. 481, 482 (1925) (validity of ordinance regulating the keeping of cows in city limits).

68. *Long v. Commissioners of Richmond County*, 76 N.C. 273, 279 (1877) (injunction against collection of tax levied to pay for courthouse repairs).

“[in] palpable abuse of discretion”;⁶⁹ in “malicious or wanton disregard of . . . rights”;⁷⁰ acts executed “dishonestly, or so extravagantly or recklessly as to amount to an abuse of . . . authority”;⁷¹ and those established as constituting “fraud, corruption and oppression,”⁷² “oppression or bad faith,”⁷³ “fraud or oppression constituting a manifest abuse of discretion,”⁷⁴ or “manifest abuse of power.”⁷⁵

Not the least of the difficulties created by this imposing litany of wrongdoing is the suggestion that official culprits must be caught either red-handed on Main Street with much of the city treasury in their hands, or subjecting citizens to the rack and screw, before a North Carolina court need move to restrain them. Attorneys perusing the volumes of *Strong's North Carolina Index* or the annotations to the *North Carolina General Statutes*, and coming upon such gems of judicial insight, can easily persuade themselves that clients seeking to test some governmental decision or threatened act will bear an impossible burden of proof. Trial judges with similar research habits will question their authority to deal with any form of discretionary administrative or executive action that is one whit short of outrageous. Appellate courts will continue to find it tempting to stitch together a few *Brodnax-Rosenthal* aphorisms rather than wrestle with the fundamental issues and factual backgrounds involved in the cases before them—should the litigant be bold enough to pursue the matter that far.

The fact is that the extreme view of *Rosenthal*, solemnly enunciated in the supreme court opinions as recently as 1966,⁷⁶ sharply conflicts with a somewhat more moderate tradition that developed contemporaneously with the case law flowing from *Brodnax* and *Rosenthal*. The standard—“whether a public official has acted capriciously or arbitrarily or in bad faith or in disregard of law”⁷⁷—is that referred to in the introductory quote from Chief Justice Barnhill in *Burton*, citing his

69. *Mullen v. Town of Louisburg*, 225 N.C. 53, 60, 33 S.E.2d 484, 488-89 (1945) (sale of municipal property).

70. *Newton v. School Comm.*, 158 N.C. 186, 188, 73 S.E. 886, 887 (1912) (selection of school site).

71. *Commissioners of Yancey County v. Road Comm'rs*, 165 N.C. 632, 636, 81 S.E. 1001, 1003 (1914) (validity of statute authorizing appointment of road commissioners).

72. *Davenport v. Commissioners of Pitt County*, 163 N.C. 147, 149, 79 S.E. 423, 424 (1913) (replacing a public ferry with a bridge).

73. *Cameron v. State Highway Comm'n*, 188 N.C. 84, 88, 123 S.E. 465, 467 (1924) (routing of a highway).

74. *Sanders v. Atlantic Coast Line Ry.*, 216 N.C. 312, 315, 4 S.E.2d 902, 904 (1939) (closing of streets).

75. *Board of Educ. v. Board of Comm'rs*, 150 N.C. 116, 125, 63 S.E. 724, 728 (1909) (manner of levying taxes to support four-month school term).

76. *Clark's of Greenville, Inc. v. West*, 268 N.C. 527, 531, 151 S.E.2d 5, 8 (1966) (the last case in which the supreme court has cited both *Brodnax* and *Rosenthal*).

77. *Burton v. City of Reidsville*, 243 N.C. 405, 407, 90 S.E.2d 700, 702 (1956).

own opinion in *Pue v. Hood*.⁷⁸ Even that test, as stated, is subject to challenge, among other grounds, on the basis of its completeness, accuracy, clarity, and social and legal utility.

C. *The Capricious, Arbitrary, Bad Faith, or Disregard of Law Test*

Chief Justice Barnhill's statement in *Burton* is derived from his 1942 opinion in *Pue v. Hood* and from his 1945 opinion in *Jarrell v. Snow*.⁷⁹ In *Pue* he said: "When an officer acts capriciously, in bad faith, or disregard of law, and such actions affect personal or property rights, the courts will not hesitate to afford prompt and adequate relief."⁸⁰ In *Jarrell*, the Barnhill opinion stated:

If the statute under which defendants acted is valid, they acted in the exercise of a discretionary power in adopting the ordinance. It is not the function of the [c]ourt to reverse or direct the reversal of decisions made by administrative officers in the exercise of discretionary powers

Nor will review of their decisions, once made, be compelled by judicial mandate.⁸¹

The test emerging in *Burton* from these two opinions is free of the verbal embroidery found in *Brodnax*, *Rosenthal*, and their lineal and collateral heirs, and indeed reflects earlier opinions of the court imposing more realistic restraints on official action. Administrative officers had long been cautioned to avoid "abuse of power to the public injury"⁸² and "capricious and arbitrary"⁸³ exercise of their powers, and to exercise their "limited legal discretion"⁸⁴ and "sound judgment and discretion."⁸⁵

There are at least five major flaws, however, in the formulation found in the excerpt from *Burton* quoted at the beginning of this article:

(1) The supreme court, before and after *Burton*, has indicated that courts might well "interfere" even though the administrators' conduct under challenge is not specifically alleged to be arbitrary, capricious, in

78. 222 N.C. 310, 22 S.E.2d 896 (1942).

79. 225 N.C. 430, 35 S.E.2d 273 (1945). *Jarrell* also discussed, in a particularly unfortunate contribution to North Carolina administrative law, equity's lack of power to deal with enforcement of an invalid ordinance. See text accompanying notes 265-71.

80. 222 N.C. 310, 315, 22 S.E.2d 896, 900 (1942).

81. 225 N.C. 430, 433, 35 S.E.2d 273, 274 (1945).

82. *Campbell v. Wolfenden*, 74 N.C. 103, 104 (1876).

83. *McIntyre v. Murphy*, 177 N.C. 300, 302, 98 S.E. 820, 821 (1919).

84. *State v. Vanhook*, 182 N.C. 831, 834, 109 S.E. 65, 67 (1921); *Board of Comm'rs v. Smith*, 110 N.C. 417, 419, 14 S.E. 972, 973 (1892); *Muller & Co. v. Commissioners of Buncombe County*, 89 N.C. 171, 178 (1883). Cf. *Smith v. School Trustees*, 141 N.C. 143, 160, 53 S.E. 524, 530 (1906) ("[t]he discretion conferred upon the defendants . . . must be used as directed and required by the [c]onstitution . . .").

85. *Hightower v. City of Raleigh*, 150 N.C. 569, 572, 65 S.E. 279, 281 (1909).

bad faith, or in disregard of law.⁸⁶ Apparently the court is not, in its own view, "powerless to act" beyond Chief Justice Barnhill's carefully defined limits.

(2) Presumably realizing that to concede the existence in our administrative law of a concept known as "abuse of discretion" would have undermined his position that courts cannot control administrative discretion, Chief Justice Barnhill chose to ignore the phrase as such, although it had long been clear that this term is synonymous with "arbitrary" and "capricious."⁸⁷

(3) He seemed to limit "arbitrary abuse of [the public official's] right of choice" to conduct "patently in bad faith." Conduct that is "arbitrary" may well include conduct that is in "bad faith," but it may also include other proscribed acts of a different nature and scope.⁸⁸

(4) In perpetuating the *Pue* court's use of the disjunctive "or disregard of law" in the references to "capricious," "arbitrary," or "bad faith" action, the author of *Burton* overlooked the principle dating at least to 1817⁸⁹ that such action *in itself* is illegal. As *unlawful* conduct, *arbitrary* conduct is within the courts' constitutional powers to remedy and within their scope of review. To imply that an act in excess of constitutional or statutory authority is "in disregard of law," while conduct that is "arbitrary" somehow is not, is merely to reinforce the perception of judicial impotence in face of the latter, in certain circumstances.⁹⁰

86. See *Jones v. Town of N. Wilkesboro*, 150 N.C. 646, 64 S.E. 866 (1909). Cf. *Barbour v. Carteret County*, 255 N.C. 177, 182, 120 S.E.2d 448, 451 (1961) (complaint alleging waste of public funds held sufficient to withstand demurrer as stating a "bad faith" cause of action although no personal wrongdoing alleged).

87. See 2 F. COOPER, *supra* note 12, at 761. See also *North Carolina State Highway Comm'n v. Young*, 200 N.C. 603, 607, 158 S.E. 91, 93 (1931), where the court said: "[T]he discretion must not be whimsical, or capricious, or arbitrary, or despotic. That *such abuse of discretion* may avoid or nullify an act is elementary." (Emphasis added). See also *Attorney General ex rel. Gillespie v. Justices of Guilford County*, 27 N.C. (5 Ired.) 315, 321 (1844). To add to the confusion about the relationship between these terms, the court in *Clark's Greenville, Inc. v. West* suggested that acts "manifestly unreasonable and oppressive" and acts in excess of "delegated or constitutional authority" are the same. 268 N.C. 527, 531, 151 S.E.2d 5, 8 (1966).

88. See *In re Housing Auth.*, 235 N.C. 463, 468, 70 S.E.2d 500, 503 (1952), and the definitions of "arbitrary" and "capricious" contained therein. The court said: "'Arbitrary' and 'capricious' in many respects are synonymous terms. When applied to discretionary acts, they ordinarily denote abuse of discretion, though *they do not signify nor necessarily imply bad faith*." (Emphasis added). Professor Jaffe suggests that a rationale imposing only a "good faith" test on administrative action "raises a serious question of excessive delegation of power." L. JAFFE, *supra* note 25, at 182.

89. *Shaw v. Kennedy*, 4 N.C. (Term) 591, 592 (1817).

90. If the reviewing court is confined to errors of law or legal inference in matters other than appeal from a decision granting or denying a preliminary injunction (see text accompanying notes 29 & 32 *supra*), and if arbitrary conduct is not *per se* in disregard of law, it appears that in a given case, the finding of fact of a lower court that an administrator's conduct was not arbitrary, would ordinarily be binding on the reviewing court. The lower court's findings are conclusive if based on any competent evidence, even if there was evidence to the contrary. See cases collected in 1

(5) The suggestion that good faith, honest error, or mistake is a justifiable excuse for administrative conduct, or that bad faith is a necessary element to be proved in challenging it as "arbitrary," is not uniformly supported in supreme court opinions.⁹¹

What emerges as most troublesome about *Burton*, and the relatively simple phrases employed therein, is that seldom has the supreme court attempted to define, in the context of administrative law, what the terms "arbitrary," "capricious," and "abuse of discretion" mean. Thus, we know scarcely more about the proper interpretation and application of these standards than we do about extravagantly phrased concepts such as "palpable oppression."

D. *The Reasonableness Test*

The supreme court has explained these terms indirectly through commentary beyond cryptic expressions⁹² such as those found in *Pue*

STRONG'S NORTH CAROLINA INDEX, *Appeal and Error* § 57.2 (3d ed. 1976). Thus, Chief Justice Barnhill's use of the disjunctive in *Pue* and *Burton*, suggesting that arbitrary conduct is something other than conduct in disregard of law, apparently would drastically limit the appellate court's scope of review in many cases. Perhaps that was what was intended. What better syllogism could one use to fashion a "hands off" theory of judicial review in administrative law than one in which it is assumed as a basic premise that arbitrary conduct—doubtless the most common charge made in challenges to administrative action—is an allegation of *fact* and not a matter of *law*? The inevitable conclusion would be that a negative finding as to arbitrariness in a lower court is beyond the reach of the reviewing court. (The scope of review problem is eliminated, of course, if one accepts the court's suggestion in *Clark's Greenville, Inc. v. West* that arbitrary conduct, no matter what synonyms may be used, is per se in excess of legal authority. This is consistent with *Shaw v. Kennedy*, but not with *Burton v. City of Reidsville*).

91. See *Bazemore v. Board of Elections*, 254 N.C. 398, 406, 119 S.E.2d 637, 644 (1961): "We do not intimate that the registrar . . . or the Board of Elections have in any way acted in bad faith. But it is our opinion that the literacy test as administered by them is unreasonable and beyond the intent of the statute." See also *Southern Ry. v. City of Greensboro*, 247 N.C. 321, 329-30, 101 S.E.2d 347, 355 (1957); *In re Housing Auth.*, 235 N.C. 463, 468, 70 S.E.2d 500, 503 (1952); *Attorney Gen. ex rel. Gillespie v. Justices of Guilford County*, 27 N.C. (5 Ired.) 315, 330-31 (1844); *Bizzell v. Board of Aldermen*, 192 N.C. 348, 358, 135 S.E. 50, 55 (1926), where the court said: "There is no question as to the good faith of the mayor or board of aldermen of Goldsboro—men of character. The ordinances are far-reaching, and the law does not permit the enjoyment of one's property to depend upon the arbitrary or despotic will of officials, *however well-meaning* . . ." (Emphasis added). An administrative officer should not be permitted the luxury of claiming that he was mistaken. As Justice Ervin said: "Few laws would be observed if ignorance of the law were an acceptable excuse." *State ex rel. Atkins v. Fortner*, 236 N.C. 264, 271, 72 S.E.2d 594, 598 (1952).

92. In *Attorney Gen. ex rel. Gillespie v. Justices of Guilford County*, 27 N.C. (5 Ired.) 315, 320-21 (1844), the court said:

The claim of the justices of an unlimited and uncontrollable [*sic*] power to grant or refuse a license, is founded on the idea that the act confers on them a discretion; and then they hold that discretion, in its nature, is the liberty of those to whom it is confined of acting according to their personal pleasure. It is to be noted that the part of the act which relates to retailers has not the word "discretion" in it. But for the present we will assume it to be meant; and such is our opinion. Yet it remains to be considered what kind of discretion is conferred—a partial, absolute, and arbitrary personal discretion to refuse *all* applications, or a legal, regulated, and reasonable discretion to grant the applications of such persons as the [l]egislature declares fit to possess the privilege, as far as the necessity or convenience of the public require

and *Burton*. Recently it stated:

Agency decisions have been found arbitrary and capricious, *inter alia*, when such decisions are "whimsical" because they indicate a lack of fair and careful consideration; when they fail to indicate "any course of reasoning and the exercise of judgment," . . . or when they impose or omit procedural requirements that result in manifest unfairness in the circumstances "The ultimate purpose of rulemaking review is to insure 'reasoned decisionmaking'" ⁹³

In an earlier effort at a more complete and precise definition, the court recognized an important dimension in evaluating administrative action—the reasonableness or unreasonableness of the conduct involved⁹⁴—a dimension ignored by both the *Pue* and *Burton* courts (although not by the court in *Rosenthal*). And in an opinion that preceded *Pue* and *Jarrell* by only one year and four years respectively, the court said:

While it is a well recognized principle of law with us that the courts will not ordinarily interfere with the discretionary powers conferred on municipal corporations for the public welfare, still when the actions of

such places as accommodations allowed by the [l]egislature, and beyond *that* to refuse them? The very stating of the questions furnishes their proper answer. The law abhors absolute power and arbitrary discretion, and never admits them but from overruling necessity. And there is no arbitrary power that would be felt to be more unreasonably despotic and galling than that under which a small body of inferior court magistracy should undertake, upon their mere will, without any plain mandate from the lawmaking power, to set up their taste and habits as to meat, drink, or apparel as the standard for regulating those of the people at large. (Emphasis the court's).

Aesop's *Fables* ("The Wolf and the Lamb") illustrate arbitrary conduct as well as anything in the literature of the law:

A Wolf came upon a Lamb straying from the flock, and felt some compunction about taking the life of so helpless a creature without some plausible excuse; so he cast about for a grievance and said at last, "Last year, sirrah, you, grossly insulted me." "That is impossible, sir," bleated the Lamb, "for I wasn't born then." "Well," retorted the Wolf, "you feed in my pastures." "That cannot be," replied the Lamb, "for I have never yet tasted grass." "You drink from my spring, then," continued the Wolf. "Indeed, sir," said the poor Lamb, "I have never yet drunk anything but my mother's milk." "Well, anyhow," said the Wolf, "I'm not going without my dinner:" and he sprang upon the Lamb and devoured it without more ado.

93. State *ex rel.* Comm'r of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 420, 269 S.E.2d 547, 573 (1980).

94. The court said:

"Arbitrary" means fixed or done capriciously or at pleasure. An act is arbitrary when it is done without adequate determining principle; *not done according to reason or judgment*, but depending upon the will alone,—absolute in power, tyrannical, despotic, *nonrational*,—implying either a lack of understanding of or a disregard for the fundamental nature of things. See Funk & Wagnall's New Standard Dictionary; 3 Words and Phrases, Permanent Edition, pp. 874 and 875; 6 C.J.S. p. 145.

"Capricious" means freakish, fickle, or arbitrary. An act is capricious when it is done *without reason*, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles. See Funk & Wagnall's New Standard Dictionary, 6 Words and Phrases, Permanent Edition, p. 124; 12 C.J.S. p. 1137.

In re Housing Auth., 235 N.C. 463, 468, 70 S.E.2d 500, 503 (1952) (emphasis added).

Three times in *Attorney General ex rel. Gillespie v. Justices of Guilford County* the court emphasized the *unreasonable* conduct of the county court in refusing to give anyone in the community a retail liquor license. 27 N.C. (5 Ired.) 315, 324, 327, 328 (1844).

such corporations become *so unreasonable as to manifest an abuse of such discretion*, the courts will furnish relief to one aggrieved thereby. The discretion vested in municipal corporations is not entirely without limitation. It must be exercised at least in good faith and be free from ulterior motives. It is not consonant with our conception of municipal government that there should be no limitation upon the discretion granted municipalities, and that no remedy is left to him who may be injured by an abuse thereof.⁹⁵

That the reasonableness of an ordinance is a proper subject for judicial review was early acknowledged by the court.⁹⁶ The court has held that the North Carolina Constitution does not preclude the legislature from making classifications and distinctions in a statute unless they are "arbitrary and unjustifiable upon any reasonable view."⁹⁷ It is well settled that in any governmental exercise of the police power, the statute, ordinance, or regulation must meet the reasonableness test.⁹⁸ In 1943,

95. *Efird v. Commissioners of Forsyth County*, 219 N.C. 96, 106, 12 S.E.2d 889, 896 (1941) (emphasis added).

96. *See State v. Tenant*, 110 N.C. 609, 612, 14 S.E. 387, 388 (1892); *Barger v. Smith*, 156 N.C. 323, 324, 72 S.E. 376, 377 (1911); *Bizzell v. Board of Aldermen*, 192 N.C. 348, 356, 135 S.E. 50, 54 (1926), *citing* *Small v. Councilmen of Edenton*, 146 N.C. 527, 530, 60 S.E. 413, 414-15 (1908), and stating: "Any unreasonable restraint or oppressive exaction upon the use of property . . . is contrary to the fundamental law of the land." 192 N.C. at 358, 135 S.E. at 55.

97. *Motley v. Board of Barber Examiners*, 228 N.C. 337, 342, 45 S.E.2d 550, 553 (1947).

98. *In re Certificate of Need for Aston Park Hospital, Inc.*, 282 N.C. 542, 193 S.E.2d 729 (1973) (statute requiring a certificate of need for construction of a private hospital found unreasonable and unconstitutional); *State v. Vestal*, 281 N.C. 517, 522, 189 S.E.2d 152, 156 (1972) (ordinance requiring fence along boundaries of auto wrecking yards held invalid); *Horton v. Gullledge*, 277 N.C. 353, 177 S.E.2d 885 (1970) (held invalid housing code provision calling for demolition of a dwelling house unfit for habitation without compensation to owner, where cost of repairs would exceed 60% of the value of the house); *Stroupe v. Eller*, 262 N.C. 573, 138 S.E.2d 240 (1964) (ordinance providing for fluoridation of water supply; complaint lacking necessary allegations of unreasonableness, etc. dismissed for failure to state cause of action); *State v. Byrd*, 259 N.C. 141, 130 S.E.2d 55 (1963) (ordinance prohibiting sale of ice cream products from any mobile unit on any street or alley held invalid); *State v. Hales*, 256 N.C. 27, 122 S.E.2d 768 (1961) (anti-shoplifting statute, providing that concealment of merchandise on store premises is prima facie evidence of wilful concealment, held valid as bearing a real and substantial relationship to the evil the statute sought to suppress); *Helms v. City of Charlotte*, 255 N.C. 647, 122 S.E.2d 817 (1961) (stating the general rule that zoning ordinance is valid if its provisions are not arbitrary, unreasonable, and confiscatory; on facts, held ordinance in this case would be confiscatory if lots had no reasonable value for residential use); *State v. Warren*, 252 N.C. 690, 694, 697, 114 S.E.2d 660, 664, 666-67 (1960) (statute regulating real estate brokers held to have "rational, real and substantial" relation to the purposes for which the police power is exercised if occupation is one clothed with a substantial public interest; burden on the pursuit of the occupation held not arbitrary and unreasonable); *Little Pep Delmonico Restaurant, Inc. v. City of Charlotte*, 252 N.C. 324, 113 S.E.2d 422 (1960) (affirmed lower court ruling that ordinance prohibiting maintenance of business signs over sidewalks in a designated area in the city contained an unreasonable classification); *City of Winston-Salem v. Southern Ry.*, 248 N.C. 637, 105 S.E.2d 37 (1958) (unreasonable exercise of police power involved in ordinance requiring railroad to construct and repair overpasses and street crossings at its own expense); *Roller v. Allen*, 245 N.C. 516, 96 S.E.2d 851 (1957) (statute requiring license to engage in business of ceramic tile contracting held invalid as unreasonably obstructing the right of persons to engage in ordinary and harmless occupation); *State v. Towery*, 239 N.C. 274, 79 S.E.2d 513 (1954) (held no arbitrary and unreasonable exercise of the police power was involved in classification and selection of businesses to be closed on Sunday).

prior to both *Jarrell* and *Burton*, even Justice Barnhill, writing for the court, conceded that the unreasonableness of a school board's administrative rule is a judicial question that the courts have a right to review; the board in question was the final authority, he said, "so long as it acts in good faith and refrains from adopting regulations which are clearly arbitrary and unreasonable."⁹⁹ In *Corporation Commission v. Railroad*,¹⁰⁰ a 1905 case, it was said that the Commission's powers could not be "unreasonably exercised"¹⁰¹ and its orders were subject to judicial review for such a determination. In 1923, a municipality was found to have reasonably exercised its discretion in condemning land for the use of a railroad.¹⁰² In a more recent case, the court stated that it is the function of the court in proper instances to determine whether an administrative authority acted arbitrarily, unreasonably, or *unjustly*.¹⁰³

In *Bazemore v. Bertie County Board of Elections*,¹⁰⁴ the court held that a constitutionally sound literacy test required for voting was unreasonable as applied to a prospective voter. The voter was required to write a section or sections of the North Carolina Constitution from the dictation of another.

Bazemore and many of the above cases demonstrate that our courts are perfectly capable of identifying and proscribing unreasonable conduct, without deeming themselves barred from affording relief because the conduct is not presented to them in a gaudy package of "gross and palpable error."

Yet so broad is the spectrum between administrative actions that might be characterized as "unjust" on the one hand, and as "clearly unreasonable, oppressive, and constituting a gross and manifest abuse of discretion" on the other, that not even one possessed of clairvoyant powers could readily foretell, in light of the confusion in the administrative law of North Carolina documented under the three tests above,

99. *Coggins v. Board of Educ.*, 223 N.C. 763, 769, 28 S.E.2d 527, 531 (1944) (high school fraternities). See Note, *Administrative Law—Power of Board of Education to Abolish Fraternities*, 22 N.C.L. REV. 246 (1944). Justice Barnhill observed that even complaints raising "essentially political questions," as in *Coggins*, may be subject to judicial scrutiny of the reasonableness of the rule about which the complaint is raised.

100. 139 N.C. 126, 51 S.E. 793 (1905).

101. *Id.* at 131, 51 S.E. at 795. See also Nichols, *Judicial Review of the North Carolina Corporation Commission*, 2 N.C.L. REV. 69, 77 (1924), where the author observed:

The powers and duties committed to the jurisdiction of the Commission are exclusive and cannot be exercised or accomplished by the courts of the state. But, acting upon their own independent judgment, the courts can and will set aside the Commission's order when such order is beyond its constitutional powers or when it is unreasonable . . . (Emphasis added).

102. *Hartsfield v. City of New Bern*, 186 N.C. 136, 119 S.E. 15 (1923).

103. *Lithium Corp. of Am., Inc. v. Town of Bessemer City*, 261 N.C. 532, 536, 135 S.E.2d 574, 577 (1964) (applying the provisions of an annexation statute).

104. 254 N.C. 398, 119 S.E.2d 637 (1961).

what answer the courts might provide in a given case. An example drawn from a case decided in 1979 by the supreme court (with necessary factual variations) will serve to illustrate the problem.

E. *Campbell v. First Baptist Church*¹⁰⁵

In March, 1972, the Redevelopment Commission of the City of Durham (hereinafter referred to as Commission), acting under the state Urban Redevelopment Law,¹⁰⁶ acquired in a condemnation a parcel of land in the downtown urban renewal project area containing approximately 53,000 square feet. The price paid by the Commission, as determined by the condemnation jury, was \$164,300.00 (\$3.09 per square foot). About 9,000 square feet of the tract was used for widening of two intersecting streets under the urban renewal plan, and the remainder (44,614 square feet) was conveyed to the adjacent First Baptist Church (hereinafter referred to as Church) in an "exchange" which had been approved before the Commission had even acquired the land conveyed. In the "exchange," the Church gave up a strip of land of 2,803 square feet to the rear of its property and received in return \$1,885.17 in cash, plus the 44,614-square foot tract. The disposal price for the larger tract under the "exchange" was \$.35 per square foot, about eleven per cent of the price paid by the Commission to acquire it. Although the transaction was approved by the City Council of Durham and was advertised in the local newspaper prior to execution of the deeds, the court of appeals, in a decision affirmed by the supreme court, held in a taxpayers' action that the conveyance to the Church was void for failure to comply with North Carolina General Statutes section 160-464(e)(4), which requires public notice prior to Commission approval of a disposition agreement and transfer at a price agreed upon by a committee of three professional real estate appraisers.

The trial court—which held that the land value assigned in the exchange was reasonable and that the municipal bodies' actions in approving it were not "arbitrary, capricious and whimsical"—had before it evidence suggesting first, that the appraiser on whom the Commission relied had mistakenly assumed that the larger tract was zoned for residential purposes and that the Church tract was zoned for commercial purposes; second, that the appraiser had not followed the procedures and methods of appraisal made mandatory by guidelines of the

105. 39 N.C. App. 117, 250 S.E.2d 68 (1978), *aff'd*, 298 N.C. 476, 259 S.E.2d 558 (1979). All statements included in the discussion of *Campbell* without citations to a footnote are based upon the record before and the opinions of the court of appeals and the supreme court, or upon the author's personal knowledge derived from his participation throughout the case as research assistant to counsel for the plaintiff Campbell.

106. Then N.C. GEN. STAT. §§ 160-454 to -474.2 (1972); now N.C. GEN. STAT. §§ 160A-500 to -526 (1976 & Supp. 1979).

United States Department of Housing and Urban Development for dispositions of urban renewal property to non-profit organizations; and finally, that no one in an official capacity had paid any heed to a ruling of the condemnation court that the original owners of the larger tract were to receive a price based on the value of the land for commercial use.

The plaintiff's evidence showed that the land, if appraised by proper methods, was worth at least \$105,000.00 instead of the \$15,614.93 (\$.35 per square foot) assigned it in the "exchange." Thus, the Church realized a substantial "windfall."¹⁰⁷

Let us assume that in a transaction identical to that involved in *Campbell v. First Baptist Church*, the municipal authorities had, in fact, complied with all statutory procedures, and that the committee of appraisers had reached the same conclusion as to the land value involved (\$.35 per square foot) as did the one appraiser who testified in *Campbell*.¹⁰⁸

On these facts, the questions arise: Would the trial or appellate courts, considering a transaction that was not "patently in bad faith" and not "in excess of constitutional or statutory authority" (that is, not "in disregard of law" as Chief Justice Barnhill seemed to limit it in *Burton*¹⁰⁹), feel themselves powerless to recoup for the taxpayers the sum of at least \$89,000.00 and possibly as much as \$149,000.00? On what case law might they rely and what standards might they apply in deciding whether or not to interfere with these purely discretionary actions of an appointed administrative body and an elected city council? If one could phrase a practical standard to which the courts might turn in such cases, should it be one that will free them hereafter from the ancient strait-jackets designed and tailored by Justices Ruffin, Pearson, Hoke, and later Barnhill?

Our search for the answers to these questions will establish the compelling need for the Supreme Court of North Carolina to lift the administrative law of our state from the quagmire in which it is engulfed.

In this hypothetical controversy, either side could discover significant support in North Carolina case law for their respective contentions that

107. The plaintiff's complaint had attacked the transaction (1) as a violation of the establishment clause of the first amendment to the United States Constitution, (2) as arbitrary and capricious, and (3) upon statutory grounds. The plaintiff ultimately prevailed on statutory violations and neither court found it necessary to discuss the alternative grounds.

108. Let us assume further that the agreement for an "exchange" involved the Commission and a non-profit corporation other than a church so that the first amendment issue would have been eliminated from the case. Further, assume that there were no allegations or proof of corruption or bad faith in the sense of personal advantage enuring to the benefit of anyone who participated in the decision.

109. See introductory quote & text accompanying note 89 *supra*.

the court should nullify the "exchange" or that it has no power or duty to interfere.

A plaintiff representing the taxpayers of the municipality could establish that corruption, moral turpitude, malice, fraud, or bad faith need not be shown to warrant judicial intervention.¹¹⁰ With respect to dispositions of public land, it would be possible to construct the following theory in our fictional plaintiff's behalf: The Redevelopment Commission and the City of Durham, under the Urban Redevelopment Law, were invested with the power to dispose of Commission property; however, they were not delegated the authority to sell the land in question at less than a fair and adequate price.¹¹¹

It also appears that "bad faith" in an appropriate case can be equated with a waste of public property without allegation of personal wrongdoing, and that disregard of duty to the public by squandering of public funds is actionable conduct. *Barbour v. Carteret County*,¹¹² involving construction of a public hospital, supports judicial intervention in the case assumed. There, plaintiffs alleged that the defendant com-

110. See *In re Housing Auth.*, 235 N.C. 467, 468, 70 S.E.2d 500, 502 (1952); *Jones v. Town of N. Wilkesboro*, 150 N.C. 646, 650, 64 S.E. 866, 868 (1909).

111. See *Vaughan v. Commissioners of Forsyth County*, 118 N.C. 636, 24 S.E. 425 (1896), where the county commissioners voted to execute a deed of trust to a vacant lot, formerly the site of the courthouse, as security for \$50,000 in notes to be issued to raise funds for a new courthouse elsewhere. On the ground that the right to sell land does not imply a right to encumber it by a mortgage, the supreme court held that it was error for the lower court to deny an injunction against the transfer. In drawing an analogy to disposition of land under a power of attorney, the court cited authority to the effect that one acting in behalf of a principal with power to sell "is to receive for the benefit of the principal a fair and adequate price for the land." *Id.* at 641, 24 S.E. at 425.

In *Bowles v. Fayetteville Graded Schools*, 211 N.C. 36, 188 S.E. 615 (1936), the public body defendant, a chartered school district governed by a board of 11 trustees, acquired a vacant lot on foreclosure of a deed of trust. The lot was worth "considerably more than \$3,500." *Id.* at 37, 188 S.E. at 616. The chairman of the board's property committee notified the trustees "that he had an offer for the property, and the property committee was instructed to investigate the legality of private sale and to consider any offers for the property not less than \$3,500, 'with power to act.'" *Id.* at 38-39, 188 S.E. at 616. A real estate dealer was told by the property committee chairman that if he could sell the land for \$3,960 (the dealer's appraisal), he would be allowed a commission. The dealer secured from the plaintiff Bowles an offer to buy at that price, only to discover that the property had been sold to one of the defendants, Harrison, for \$3,500.

Bowles obtained a judgment in superior court nullifying the contract of sale, the court proceeding on the theory that this was not an attempted "control [of] any exercise of discretion" under the *Brodnax* rule, nor a matter of actual fraud, corruption, or moral turpitude. It was a matter of constructive fraud in that it was a "breach of legal or equitable duty, trust or confidence, . . . [tending] to the injury of another or to the bringing about of an undue and unconscientious advantage." *Id.* at 38, 188 S.E. at 617. The trial court also held that the trustees had improperly delegated to the property committee their responsibility, and the committee in turn had improperly delegated the same to the chairman, constituting an abdication of trust. Although the lower court was not satisfied that certain statutory provisions for a public notice and sale covered the transaction, the supreme court upheld the trial court judgment, and went on to conclude that the delegation to the chairman to execute a contract for the sale of the property in a manner contrary to the method set out in the statute was invalid.

112. 255 N.C. 177, 120 S.E.2d 448 (1961).

missioners had agreed (without having the property appraised) to pay \$75,000.00 for a tract of land—a sum “more than twice what said property should be reasonably worth; [that] is excessive, and as such is an unwarranted waste of the taxable revenue of Carteret County.”¹¹³ The supreme court held: “Such conduct does not comport with the duty which public officials owe those they represent. It manifests bad faith, not bona fide action. It suffices to justify court action to prevent misuse of public funds.”¹¹⁴

On the other hand, the defendant public bodies could well argue—and the court with more than adequate authority would be free to accept their view—that the transfer could not be judicially nullified even if the price of approximately \$15,000.00 for land worth \$105,000.00 or more were inadequate. The “name of the game” in the urban renewal program is disposition of land at prices less than its cost to the municipality, and the challenged transaction is not unusual in that respect.¹¹⁵ Courts which have shown a willingness to tolerate decisions of a public body even where there were implications of fraud lurking in the background, or implications of conduct bordering on personal impropriety,¹¹⁶ *a fortiori* would not be likely to regard a disposition to a non-profit charitable or educational institution as beyond the pale. Most

113. *Id.* at 182, 120 S.E.2d at 451-52. The factual allegations of the complaint were admitted by demurrer and were held sufficient to state a cause of action.

114. *Id.* The *Barbour* court also said:

County commissioners, in approving the design, the method of construction, the site for a public building, and the amount to be paid for the site, are performing duties inherent to their offices, expressly conferred by the [l]egislature. G.S. 153-9(8), (9). Courts have no right to pass on the wisdom with which they act. Courts cannot substitute their judgment for that of the county officials honestly and fairly exercised. For a court to enjoin the proposed expenditure, there must be allegation and proof that the county officials acted in wanton disregard of public good. (Citations omitted).

Id. at 181, 120 S.E.2d at 451.

The *Barbour* decision is consistent with the lower court's suggestion in *Bowles* that “constructive fraud,” as defined by the *Bowles* court, provides substantial grounds to set aside such a transaction. See note 111 *supra*.

115. “[O]ne of the functions of urban renewal was to absorb a writedown in the land costs. It was to sell it for less than they paid for it.” Record at 270, *Campbell v. First Baptist Church*, 298 N.C. 476, 259 S.E.2d 558 (1979) (testimony of Raymond Green). See generally *Redevelopment Comm'n v. Security Nat'l Bank*, 252 N.C. 595, 114 S.E.2d 688 (1960).

116. See *Kistler v. Board of Educ.*, 233 N.C. 400, 64 S.E.2d 403 (1951) (allegation that a member of board of education owned property in the vicinity of a site selected by the board for a school held insufficient to support a finding of bad faith, in the absence of allegation that the member exercised an improper or corrupt influence over the other members); *White v. Lane*, 153 N.C. 14, 68 S.E. 895 (1910) (clerk of court who owned land in drainage district appointed the drainage commissioners; plaintiff challenged issue of bonds by the commissioners on grounds of conflict of interest; court would not entertain the action because it was a collateral attack on the judgment of the clerk); *Mitchell v. Board of Comm'rs*, 74 N.C. 487 (1875) (plaintiffs unsuccessfully sought to enjoin collection of taxes necessary to pay allegedly fraudulent, false, and unaudited claims against the township; defendants had allowed expenses to accumulate for years instead of levying taxes annually to pay them, but had issued certificates from time to time to creditors, who were paid at less than the certificates' face value).

importantly, the decisions of local instrumentalities as to policy have been left undisturbed, even when the courts have found the policy to be "bad" or when the action was challenged as "unwise" and "indiscreet."¹¹⁷

Indeed, the hypothetical case posed appears to fit the classic mold of Chief Justice Barnhill's rule in *Burton v. City of Reidsville*.¹¹⁸ An isolated sale of one tract of urban renewal land is a decision fundamentally like many others which the courts of this state have traditionally found to involve questions of policy, and thus to be discretionary and within the competence and exclusive powers of local bodies to make, and ordinarily subject only to the penalty of public retribution at the ballot box¹¹⁹—the location, closing, grading, widening, and repair of streets;¹²⁰ design, construction, and repair of public buildings;¹²¹ selection of sites for schools, jails, and other public structures;¹²² the award of municipal contracts;¹²³ and the selection of highway or street routes.¹²⁴

Would the exceptions for an "oppressive and manifest abuse of dis-

117. *Id.* at 489. See also *Long v. Commissioners of Richmond County*, 76 N.C. 273, 279 (1877).

118. See text accompanying note 78 *supra*.

119. Justice Barnhill once said for the court: "If the local board is acting contrary to the wishes of a majority of the citizens it serves, the remedy is at the ballot box. The suggestion that such remedy may come too late is not sufficient to justify judicial interference." *Mullen v. Town of Louisburg*, 225 N.C. 53, 61, 33 S.E.2d 484, 489 (1945). (The issue in *Mullen* concerned a proposed sale of diesel engines used in a municipally-owned electric lighting plant, and proposed issuance of an electric franchise to the Carolina Power & Light Company. Plaintiffs unsuccessfully sought to restrain the sale). Justice Barnhill commended to the citizenry the virtues of the exercise of popular suffrage as a means of remedying governmental error. The case of *Greensboro-High Point Airport Auth. v. Johnson*, 226 N.C. 1, 36 S.E.2d 803 (1946) was decided but 10 months later. There the court acknowledged that the legislature has the power to authorize and had authorized the creation of quasi-municipal bodies *beyond the control of the municipal governing body*. 226 N.C. at 9-10, 13, 36 S.E.2d at 809, 811. So much for the "ballot box" cure for administrative excess.

120. *Klingenberg v. City of Raleigh*, 212 N.C. 549, 194 S.E. 297 (1937); *Lee v. Town of Waynesville*, 184 N.C. 565, 120 S.E. 46 (1923); *Crotts v. City of Winston-Salem*, 170 N.C. 24, 86 S.E. 792 (1915); *Hoyle v. City of Hickory*, 164 N.C. 79, 80 S.E. 254 (1913); *Crowell v. City of Monroe*, 152 N.C. 399, 67 S.E. 989 (1910); *Trotter v. Town of Franklin*, 146 N.C. 554, 60 S.E. 509 (1908); *City of Durham v. Rigsbee*, 141 N.C. 128, 53 S.E. 531 (1906); *Tate v. City of Greensboro*, 114 N.C. 392, 19 S.E. 767 (1894).

121. *Dilday v. Beaufort County Bd. of Educ.*, 267 N.C. 438, 448, 148 S.E.2d 513, 519-20 (1966); *Lenoir County v. Crabtree*, 158 N.C. 357, 74 S.E. 105 (1912); *Hightower v. City of Raleigh*, 150 N.C. 569, 65 S.E. 279 (1909); *Ward v. Commissioners of Beaufort County*, 146 N.C. 534, 60 S.E. 418 (1908); *Vaughan v. Board of Comm'rs*, 117 N.C. 429, 23 S.E. 354 (1895).

122. *Painter v. Wake County Bd. of Educ.*, 288 N.C. 165, 176, 217 S.E.2d 650, 657 (1975); *Singleton v. Stewart*, 280 N.C. 460, 466, 186 S.E.2d 400, 404 (1977); *Philbrook v. Chapel Hill Housing Auth.*, 269 N.C. 598, 153 S.E.2d 153 (1967); *Pharr v. Garibaldi*, 252 N.C. 803, 115 S.E.2d 18 (1960); *Moore v. Board of Educ.*, 212 N.C. 499, 193 S.E. 732 (1937); *Davenport v. Commissioners of Pitt County*, 163 N.C. 147, 79 S.E. 423 (1913); *Griffin v. Southern Ry.*, 150 N.C. 312, 64 S.E. 16 (1909); *Burwell v. Board of Comm'rs*, 93 N.C. 73 (1885).

123. *Mullen v. Town of Louisburg*, 225 N.C. 53, 33 S.E.2d 484 (1945).

124. *Cameron v. State Highway Comm'n*, 188 N.C. 84, 123 S.E. 465 (1924).

cretion" or for "arbitrary" and "capricious" conduct apply in such a case so that the court could properly nullify the land transfer?

The *Rosenthal* test would provide scant opportunity for the court to intervene, if for no other reason than that the transfer of public property worth \$105,000.00 for some \$15,000.00 is hardly "oppressive." In a community of 95,000 people with a multi-million dollar municipal budget, even a waste of \$89,000.00 to \$90,000.00 in public funds involves infinitesimal fiscal damage to the public; the plaintiff's personal stake as a taxpayer could not be more than a few dollars.

Burton v. City of Reidsville and the "arbitrary" or "capricious" standard would be no more helpful. In *Campbell*, one would be hard put to say that the transaction was "arbitrary" *as our courts have defined that term*. It may have been utterly foolish, but it was not "absolute in power, tyrannic, despotic."¹²⁵ It was not "done without adequate determining principle."¹²⁶ The record was clear, at least from the comments of the Mayor of Durham when the Council approved it, that the municipal purpose was to "accommodate the church,"¹²⁷ and except for first amendment considerations, perhaps that was a desirable objective. At a time of downtown decay, the community presumably would benefit from encouraging inner-city institutions to remain there rather than fleeing to the suburbs, as many have.

The conveyance to the Church in *Campbell* was clearly not "capricious" in the sense that it was precipitate or whimsical.¹²⁸ It was the result of a plan conceived more than two years before the tract ultimately conveyed to the Church was even acquired by the Commission. It was the product of the deliberate judgment of both the Commission and the City Council in public meetings. At the latter meeting, vigorous opposition was expressed both by the public and members of the Council.¹²⁹

We cannot know, of course, how a given court, confronted with two substantial but conflicting lines of authority, would rule on the hypothetical case presented. The assumption here is that the conveyance would be upheld under *Burton* on the theory that it was neither arbitrary, capricious, in bad faith, nor in disregard of law, but rather was a proper exercise of discretion conferred by a valid statute.

But the fact remains that the transaction posed was simply wrong-headed. It was based substantially on the mistakes of the Commission's real estate appraiser—mistakes that were ignored in the Redevel-

125. *In re Housing Auth.*, 235 N.C. 467, 468, 70 S.E.2d 500, 503 (1952).

126. *Id.*

127. Record at 152, *Campbell v. First Baptist Church*, 298 N.C. 476, 259 S.E.2d 558 (1979).

128. *In re Housing Auth.*, 235 N.C. 467, 468, 70 S.E.2d 500, 503 (1952).

129. JJ MINUTES OF THE CITY COUNCIL OF DURHAM 570 (Oct. 16, 1972).

opment Commission bureaucracy, whose decision in turn was accepted unquestioningly by the appointed members of the Commission and by the elected officials on the City Council. These mistakes, and their result, were not costly in the total scheme of things to the public or to the individual citizen. The *Campbell* case, and the adaptation of its facts presented here, are hardly of great importance in the law.

What is significant about *Campbell* is that it illustrates the *process* by which public decisions, great or small, are made. In other cases where no citizen so bold or stubborn as Mr. Campbell steps forward to mount a challenge, administrative and executive-level mistakes of material fact, misunderstanding of policy, or erroneous interpretations of law and legal powers may have a profound adverse impact on the public good and devastating consequences to the rights of individual citizens.¹³⁰

Are we to assume that decisions emerging from such a process—particularly those made by officials who do not face the electorate, and from whose fiat there is no recourse at the ballot box—are forever to be immune from judicial scrutiny unless the affected citizen, seeking to vindicate his own or a public right, can unerringly point to a constitutional violation, a breach of a statutory warrant of power, a corrupt motive, a wanton waste of public funds, or conduct which violates some nebulous (and seldom applied) standard of “arbitrary,” “capricious,” or “abusive of discretion”? Are we to assume that the inferior courts, under proper guidance from the Supreme Court of North Carolina, will not someday be emboldened, in every case before them where official conduct is challenged, to recall and to act in the spirit of the words of “the great and affectionately remembered [Justice] Brogden”?¹³¹

130. In *Mitchell v. Barfield*, 232 N.C. 325, 59 S.E.2d 810 (1950), plaintiffs sought and obtained a mandamus compelling the issuance of a building permit for construction of a hotel, as permitted in an “A” residence zone of the city of Durham. The City Council had caused the permit to be withheld because it concluded, *without any basis in fact*, that the plaintiffs intended to use the proposed building as a nursing home, infirmary, or hospital, and not as the hotel indicated in their application for a permit. The supreme court affirmed the order granting mandamus.

In *Baker v. Varser*, 240 N.C. 260, 269, 82 S.E.2d 90, 96-97 (1954), the supreme court held, contrary to the Board of Law Examiners’ interpretation of its own Rule 5, that the word “residence” as used therein means “domicile” rather than actual physical presence. Under the Board’s interpretation, a North Carolina domiciliary who worked and lived in another state would have been denied admission to the bar examination. One can only speculate how many persons, in the 55 years since administrative bodies emerged and regulatory statutes burgeoned, have been similarly victimized by “good faith” bureaucratic error—but, unlike the Mitchells and Baker, were dissuaded from pursuing a legal determination of their rights by *Brodnax-Rosenthal-Burton* displays of judicial rodomontade. (Baker won the battle, but lost the war because he failed to prove that he had been domiciled in North Carolina. He did succeed in persuading the court to correct the Board’s interpretation of its own rules, no mean achievement).

131. Justice Seawell, writing for the court in *Hill v. Moseley*, 220 N.C. 485, 488, 17 S.E.2d 676, 678 (1941).

[T]he eye of the law sinks deep into the situation and dealings between the parties to discover the heart of the transaction. *The law moves along straight lines to ascertain, establish and enforce fundamental justice between men* and does not dissipate its energies in fencing with legal fictions, boxing with legal shadows, and wrestling with legal puppets.¹³²

Do our public officials, as Chief Justice Barnhill suggested, indeed have a constitutional "right to err"? The established law of our state is that they do not, and insofar as it has been applied to officials subject to the popular will in an election, *a fortiori* it must be applied to those who are under no such restraint.

III. A RESTATEMENT OF THE LAW OF JUDICIAL POWERS AND RESPONSIBILITIES: THE RULE OF *BURTON V. CITY OF REIDSVILLE* REVISITED

I suggest that in an appropriate case a future supreme court could, and should, accurately state the law of North Carolina as follows:

The policy of the courts is to review administrative decisions to insure that the rights of the parties affected are protected.¹³³ The acts of public officers, whether elected or appointed, in the exercise of powers delegated under the constitution or by statute, are subject to the control of the courts, even in matters purely discretionary, when the courts' jurisdiction is properly invoked, in those instances where

- (1) such officials engage in conduct or action that is
 - (a) unreasonable¹³⁴ and either
 - (i) is substantially injurious to the public good¹³⁵ or
 - (ii) constitutes a deprivation of the legal rights of any

132. *Ashley Home Corp. v. Creech*, 205 N.C. 55, 63-64, 169 S.E.2d 794, 799 (1933) (emphasis added).

133. See N.C. CONST. art. I, § 18.

134. *In re Application of Ellis*, 277 N.C. 419, 178 S.E.2d 77 (1970) (refusal of special use permit without any standards, rules, or regulations uniformly applicable); *Horton v. Gulledge*, 277 N.C. 353, 362-63, 177 S.E.2d 885, 891-92 (1970) (order of demolition of dilapidated house without compensation); *Lithium Corp. of Amer. v. Town of Bessemer City*, 261 N.C. 532, 539, 135 S.E.2d 574, 579 (1964) (annexation of area partly occupied by petitioner "not within the reasonable intent and application of the statute"); *Little Pep Delmonico Restaurant, Inc. v. City of Charlotte*, 252 N.C. 324, 113 S.E.2d 422 (1960) (unreasonable classification in ordinance prohibiting maintenance of business signs over sidewalks in designated areas of city); *In re Housing Auth.*, 235 N.C. 463, 70 S.E.2d 500 (1952) (attempted condemnation of portion of college campus as site for public housing project when other sites were available); *Bizzell v. Board of Aldermen*, 192 N.C. 348, 135 S.E. 50 (1926) (unreasonable restraint on conduct of lawful business in ordinance requiring permission of aldermen to operate a filling station within the city limits); *Attorney General ex rel. Gillespie v. Justices of Guilford County*, 27 N.C. (5 Ired.) 315, 324, 327, 328 (1844) (unreasonable refusal of licensing authorities to issue retail liquor licenses to anyone, although authorized to do so in accordance with requirements of statute).

135. See *Barbour v. Carteret County*, 255 N.C. 177, 120 S.E.2d 448 (1961); *Bowles v. Fayetteville Graded Schools*, 211 N.C. 36, 188 S.E. 615 (1936); *Jones v. Town of N. Wilkesboro*, 150 N.C. 646, 64 S.E. 866 (1909); *Vaughan v. Commissioners of Forsyth County*, 118 N.C. 636, 24 S.E. 425 (1896).

person;¹³⁶ or

(b) in bad faith; or

(c) in disregard of law.¹³⁷

Conduct or action, whether allegedly based on constitutional, statutory, or other authority, is unreasonable unless it bears a real, substantial, and rational relationship to the end sought by the authority.¹³⁸

Except as otherwise provided by statute, limitations upon the powers of the judiciary to control or to restrain official conduct or action to situations where the same is "arbitrary," "capricious," or representing an "abuse of discretion," or is "so clearly unreasonable as to constitute a gross and manifest abuse of discretion," and words of similar import, are hereby expressly revoked; and the decisions of this court inconsistent with the rule herein stated are expressly overruled for the reason that unreasonable conduct or action as here defined is per se arbitrary, capricious, and constitutes an abuse of discretion, etc.

The foregoing proposed opinion would break no new ground in the law of North Carolina because it is thoroughly documented by, and clearly within the parameters of, standing decisions of the North Carolina Supreme Court, some of them of ancient origin. Beyond doubt or cavil, the re-affirmation by the supreme court of such rules would better enable our courts to fulfill their responsibility to "enforce fundamental justice." It would free the judiciary either from the temptation to "rubber stamp" an administrative decision by dismissing a challenge to it as merely an unreachable "matter of discretion," or from the usually difficult, if not impossible, task of fitting the factual background of a case into arcane determinations of what is "arbitrary" or "capricious." It would clarify and simplify our law in a manner consistent with the demands of modern society, one far removed from the day when decisions of the Rockingham Commissioners about the repair of a bridge,¹³⁹ or of the town fathers of Goldsboro about Mrs. Rosenthal's shade trees,¹⁴⁰ gave birth to legal principles and shibboleths that no longer seem relevant.

136. See *In re Application of Ellis*, 277 N.C. 419, 178 S.E.2d 77 (1970); *Horton v. Gullledge*, 277 N.C. 353, 362-63, 177 S.E.2d 885, 891-92 (1970); *Helms v. City of Charlotte*, 255 N.C. 647, 122 S.E.2d 817 (1961); *State v. Brown*, 250 N.C. 54, 108 S.E.2d 74 (1959); *City of Winston-Salem v. Southern Ry.*, 248 N.C. 637, 105 S.E.2d 37 (1958); *Roller v. Allen*, 245 N.C. 516, 96 S.E.2d 851 (1957); *State v. Ballance*, 229 N.C. 764, 51 S.E.2d 731 (1949); *Pue v. Hood*, 222 N.C. 310, 22 S.E.2d 896 (1942).

137. *Burton v. City of Reidsville*, 243 N.C. 405, 90 S.E.2d 700 (1956).

138. *GI Surplus Store, Inc. v. Hunter*, 257 N.C. 206, 210, 125 S.E.2d 764, 767 (1962); *State v. Warren*, 252 N.C. 690, 694, 114 S.E.2d 660, 664-65 (1960); *State v. Whitaker*, 228 N.C. 352, 360, 45 S.E.2d 860, 866 (1947); *Calcutt v. McGeachy*, 213 N.C. 1, 7, 195 S.E. 49, 52-53 (1938), citing *Reed v. Howerton Eng'r. Co.*, 188 N.C. 39, 123 S.E. 479 (1924); *Town of Shelby v. Cleveland Mill & Power Co.*, 155 N.C. 196, 71 S.E. 218 (1911); *City of Durham v. Eno Cotton Mills*, 141 N.C. 615, 54 S.E. 453 (1906).

139. See text accompanying notes 53-58 *supra*.

140. See text accompanying notes 61-62 *supra*.

Finally, from the standpoint of sound and efficient public administration, an indication from the courts that they will no longer tolerate, at any level of government, human error of a particularly egregious sort resulting in an unreasonable course of conduct, would surely lead to more careful, responsive, and perhaps more humane conduct of governmental affairs.¹⁴¹

It would be no answer to the proposed "rule of reason,"¹⁴² as a substitute for 100 years of mumbo-jumbo in this area of North Carolina administrative law, to suggest, as some might, that the courts would soon be flooded with the imagined grievances of countless citizens better vented at the polls; that exercise of closer supervision of administrative conduct by the judiciary would violate hallowed constitutional traditions of the separation of powers; or that judges being human, the adoption of a new standard would lead to subjective, if not whimsical, restraints upon the elected representatives of the people, and thus to the

141. Assume that City *X*, located in County *Y*, needed a new city hall and County *Y* a new courthouse. *X* and *Y* each spent \$10 million for these new structures, located two blocks apart. A joint city-county building could have been erected at savings of at least \$1 million and possibly a great deal more—not to mention avoiding the continuing duplication of operating and maintenance costs. The governing bodies of both refused to consider the idea, proposed by a member of the City Council, before construction of either building began. It is arguable, under *Barbour v. Carteret County*, 255 N.C. 177, 120 S.E.2d 448 (1961), that this was a "wanton disregard of the public good." Few would disagree that it would have been eminently reasonable at least to consider the proposal. On these facts, taxpayers should have had a cause of action to challenge the proposed expenditure, and they would have under the proposed "rule of reason"—just as would the hypothetical plaintiff on the facts adapted from *Campbell*. In a situation to the author's personal knowledge not unlike that described, a plaintiff representing the residents of the City and County of Durham sought a federal court injunction to stop the disbursement of revenue sharing funds earmarked for a new city hall and courthouse on the ground that the official bodies had not filed environmental statements. Plaintiff lost, but it was a worthy effort to vindicate the public interest. See *Carolina Action v. Simon*, 389 F. Supp. 1244 (M.D.N.C.), *aff'd per curiam*, 522 F.2d 295 (4th Cir. 1975). In a North Carolina court applying the *Burton* rule, one doubts that the plaintiff would have been taken seriously. But this is the kind of public decisionmaking to which our courts must begin to pay heed when the issue is appropriately presented.

142. See text accompanying notes 133-38 *supra*. Professor Schwartz confirms that the test for determining what is arbitrary, capricious, or abusive of discretion is "a test of reasonableness." Thus, "abuse of discretion is the rubric for discretion exercised unreasonably." Such a test has not been changed by broad statutory grants of power or by statutory provisions for judicial review, either in federal or state administrative law. B. SCHWARTZ, *supra* note 23 § 217, at 609-10. Benjamin states that the test for abuse of discretion is essentially that of the rationality of the administrative determination. R. BENJAMIN, *ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK* 346 (1942). The late Raymond B. Mallard, the first chief judge of the North Carolina Court of Appeals, referred to the "inherent power of the court, absent legislative enactment and constitutional limitation (1) to determine and apply the 'right reason of the thing'; (2) to determine whether the 'right reason of the thing' has been heretofore misconceived and declared; and (3) if so, to overrule it." Mallard, *Inherent Power of the Courts of North Carolina*, 10 WAKE FOREST L. REV. 1, 4 (1974). "Litigants attempting to persuade a reviewing court that the balance struck by an agency among relevant factors is 'arbitrary and capricious' must be prepared to persuade the court that the agency's decision has *no rational basis whatsoever*." S. BREYER & R. STEWART, *supra* note 21, at 289 (emphasis added).

“despotism” of which Chief Justice Pearson wrote of yore.¹⁴³

To some of the above-stated conflicting considerations, let us now turn.

One need not search at length in the official reports of the Supreme Court of North Carolina for cases where the court seems to have produced unreasonable, if not unjust, results by adhering to the narrow philosophical strictures of their predecessors in *Brodnax*, *Rosenthal*, or *Burton*, rather than to the broader rule which was available to them and is urged here. Three examples will suffice.

In 1960 the Housing Authority of the City of Wilson (hereinafter referred to as Housing Authority) brought proceedings to condemn a tract of land owned by Wooten, Yelverton, and their wives, for erection of a low-income housing project. The owners resisted the condemnation on the ground that ninety per cent of the property within the project area was vacant, and neither their land nor the project area as a whole included any unsafe dwellings; that more than 1,200 unsafe dwellings in the city were located in other areas; that there were other suitable sites in the city, including areas adjacent to and on all sides of other such projects where unsafe buildings existed. These and other allegations in respondents' amended answer were stricken by the clerk of court and his action was affirmed by the trial court. In *Housing Authority of Wilson v. Wooten*,¹⁴⁴ the supreme court affirmed on the ground that the record before it (consisting entirely of the pleadings) did not sustain the respondents' contention that the Housing Authority had acted “arbitrarily and capriciously amounting to a manifest abuse of discretion.”¹⁴⁵

Conceding that the respondents' pleadings may have been faulty, that generally site selection is a matter within the discretion of the Housing Authority, and that the Housing Authority had the option to choose the respondents' tract in preference to one or more other sites, one may still question *whether it made sense*—a mere synonym for what is reasonable or rational—for a public body to take private land for public use against the owners' will when other options less damaging to respondents were apparently available. Perhaps the Housing Authority could have been persuaded to amend the project boundaries to avoid the use of the respondents' property. The issue seems to go far beyond whether a desirable home may be taken without affecting the public character of the condemnation proceeding. Under a rule of law which permitted, encouraged, or suggested an allegation of *unreasonable* conduct, rather than of conduct arbitrary, capricious, and abusive of dis-

143. See text accompanying note 58 *supra*.

144. 257 N.C. 358, 126 S.E.2d 101 (1962).

145. *Id.* at 367, 126 S.E.2d at 107.

cretion, respondents might have had the opportunity to produce evidence that other sites would be more beneficial to the public than their own tract. Under the decision of the court, they were not afforded that chance, although the issue as thus redefined would not have been substantially different from that raised in any other case where an attempted exercise of the police power is challenged on grounds of reasonableness.¹⁴⁶

In *Pharr v. Garibaldi*,¹⁴⁷ plaintiff, who resided in a residentially-zoned area within one mile of the corporate limits of Raleigh and in close proximity to Camp Polk prison, sought to enjoin members of the State Prison Commission and the Director of Prisons from further maintenance and operation of the prison as a "minimum security prison" and from the construction of buildings for the enlargement thereof. He further sought removal of the buildings theretofore constructed as being in violation of the city zoning ordinance. The complaint alleged that the prison was in a thickly inhabited area, and part of it lay in a residential zone within one mile of the corporate limits. There were approximately 500 residences within a one mile radius of the prison. A public school with 473 pupils and a college attended by 750 young ladies were located nearby.

Plaintiff further alleged that the prison was a "minimum security" facility and that the prison inmates were not closely confined or guarded, but were given considerable freedom. They roamed the neighborhood at will, went on the property and into the homes of residents of the area, and threatened the lives and safety of these residents. It was further alleged that escapees and discharged inhabitants of the prison had committed serious crimes in the area, and that the operation constituted a continuing nuisance. After adoption of a zoning ordinance, the defendants began to enlarge the prison by erecting additional buildings of a non-residential character within the residential district.

Defendants demurred to the complaint, which sought a permanent injunction, on the grounds that the court had no jurisdiction to control the discretion of a state agency engaged in the performance of a governmental function, that the state was the real party in interest, and that the defendants were not subject to suit for the cause alleged.

The superior court overruled the demurrer and issued a temporary restraining order pending final determination of the action. Defendants appealed. The chief justice stayed the execution of the restraining

146. See cases cited in notes 98, 138 *supra*. Housing authorities, as in *Wooten*, were created under the police power of the state. *Wells v. Housing Auth.*, 213 N.C. 744, 747-48, 197 S.E. 693, 695-96 (1938).

147. 252 N.C. 803, 115 S.E.2d 18 (1960).

order, and the supreme court issued a writ of certiorari for review of the order. In the supreme court, the defendants contended that there was no allegation in the complaint of irreparable or special damage to the plaintiff or that the defendants "acted unlawfully or in palpable abuse of their discretion."

Aside from the issues of whether plaintiff had pleaded specifically any incident directly affecting him or his family, whether the state was immune from suit while acting in a governmental capacity, and whether a jail is a nuisance or not, let us examine the implications of the case from the standpoint of the individual defendants' immunity and liability. As the *Pharr* court notes, citing *Schloss v. State Highway & Public Works Commission*:¹⁴⁸

When public officers whose duty it is to supervise and direct a [s]tate agency attempt to . . . invade or threaten to invade the personal or property rights of a citizen *in disregard of law*, they are not relieved from responsibility by the immunity of the [s]tate from suit, even though they act or assume to act under the authority and pursuant to the directions of the [s]tate.¹⁴⁹

The court in *Pharr* focused on the issue of whether the facts alleged, if true, were sufficient to show that the plaintiff's rights had been "invaded or threatened by *unlawful conduct* on the part of the defendants."¹⁵⁰

On the facts alleged, it seems arguably *unreasonable* under the circumstances and conditions described for the defendants to operate or to enlarge a prison, or to permit it to be so operated. The allegations, if proved, clearly could support a conclusion that operation or enlargement of the prison as described was injurious to the public good, as well as to the individual plaintiff. Should not the plaintiff at least have been permitted to prove such a case at trial? That would have been the result under the proposed "rule of reason."

The court, however, relying on *Burton v. City of Reidsville*, concluded that it had no power to substitute its discretion for that of the defendants, "and, in the absence of fraud, manifest abuse of discretion or conduct in excess of lawful authority, the court has no power to intervene."¹⁵¹ So much for any cause of action against the defendants individually, because there was no allegation of fraud or of arbitrary conduct "in such manner as to constitute a manifest abuse of discretion."¹⁵² The allegations otherwise were found deficient with respect to the conduct of the defendants or their personal responsibility for the

148. 230 N.C. 489, 53 S.E.2d 517 (1949).

149. 252 N.C. at 809, 115 S.E.2d at 23.

150. *Id.*

151. *Id.* at 811-12, 115 S.E.2d at 25.

152. *Id.* at 812, 115 S.E.2d at 25.

acts alleged.¹⁵³ For these and other reasons discussed in the opinion, the supreme court vacated the interlocutory restraining order and sustained the defendants' demurrer.

In *Hayes v. Benton*,¹⁵⁴ plaintiffs were two school girls, aged six and sixteen. The latter had been crippled since infancy and was unable to walk to school or to attend without transportation. During the school year 1926, the county school board provided bus transportation for certain students. One bus passed by the home of the plaintiffs and they rode it to school until November 8, 1926. On that date the principal, under the direction of the school board, dismissed the children from school, allegedly for wrongfully using the bus. The excuse given was that the children lived *within* two and one-half miles of the school building by some fifty yards, and the board's rule provided only for transportation of students who lived *more than* two and one-half miles from the building.

Plaintiffs brought an action for mandamus to compel the defendants to furnish them bus transportation to school. Defendants denied the material allegations of the complaint, made a motion to dismiss for failure to state a cause of action in that there was no allegation of bad faith or any plain duty imposed upon them for which mandamus would lie, and alleged further that they had acted within a "reasonable and legal discretion vested in them under the law."¹⁵⁵

The court, applying the principles applicable to the function of mandamus, held that "in the absence of abuse the discretion exercised by

153. In *Pharr*, the court pointed to the absence of allegations of personal responsibility of the Prison Commissioners and Director. It was not shown that the Commission adopted "any policy, rule or regulation" permitting prisoners to roam about the neighborhood, that the Commission failed to use all means at its disposal to punish such violations of the rules or to prevent recurrences of such violations, or that it failed to discipline subordinates who were overly permissive or negligent in regulating inmate conduct. In *State ex rel. Avery County v. Braswell*, 215 N.C. 270, 275, 1 S.E.2d 864, 867-68 (1939), more than 20 years before *Pharr*, the North Carolina Supreme Court suggested that public officials are to be held to the same standard of diligence in the performance of the duties of their office as prudent and careful private citizens exercise in conducting their own affairs. By analogy to the doctrine of *res ipsa loquitur* in the law of torts, we may inquire how the alleged acts could have occurred unless *someone* in official capacity had been ignoring his, her, or their duty. One reading *Pharr* may well inquire, "Who was in charge there?" Further, why should plaintiff have been compelled to specify in his complaint the precise ways in which the individuals failed to perform their duties? It was obvious that someone had done so. If the defendants in fact had made every effort to curb inmate violations or to discipline lax subordinates, this could have been appropriately raised as a matter of defense. The vice of the *Burton* philosophy, as particularly exemplified in *Pharr*, is that non-elected government officials, as a result of such engrained judicial attitudes, may have come to feel no sense of responsibility whatever for the harmful consequences of their conduct. An even more destructive result from the *laissez-faire* attitude of the courts—particularly through resort to technical niceties in the pleadings to thwart citizens seeking to hold public officials accountable—is to foster public disillusionment with the processes of government.

154. 193 N.C. 379, 137 S.E. 169 (1927).

155. *Id.* at 381, 137 S.E. at 170.

the board in fixing the dividing line”¹⁵⁶ for free transportation to school, the line “cannot be set aside or controlled by the courts; . . . the rule made by the county board of education was authorized by law and the discretion of the board in determining the line of separation is not subject to the control of the courts.”¹⁵⁷

This result, which would have given pause even to Charles Dickens’ Mr. Bumble,¹⁵⁸ was challenged by the moving dissent¹⁵⁹ of Justice Clarkson, in which he presaged the theme here: *The board’s action did not make sense*. Undoubtedly, under a “rule of reason” the court would have made short shrift of it.

When confronted with a full record in an action involving governmental conduct that allegedly damages the public or a private interest, a jurist in this state should feel free, in Justice Brogden’s phrase, to sink his or her eye “deep into the situation . . . to discover the heart of the transaction”¹⁶⁰ and should be comfortable in applying a simple test: *Is what has been done, threatened, or proposed here consistent with reason, justice, and common sense?* If he or she should find that it is not, the

156. *Id.* at 382, 137 S.E. at 170.

157. *Id.* at 382-83, 137 S.E. at 171.

158. Mr. Bumble is justly famous for replying, when informed that “the law supposes” his wife acts under his direction, “If the law supposes that, the law is a ass—a idiot.” 1 C. DICKENS, *THE WORKS OF CHARLES DICKENS* 110 (Collier’s unabridged ed. 1870).

159. Law has many definitions. Blackstone says: “Law is a rule of civil conduct prescribed by the supreme power.” “Law,” according to an ancient maxim, “is good sense, and what is contrary to good sense is not good law.” “Law is the enforcement of justice among men.” “Law is a mode of human action respecting society, and must be governed by the same rules of equity which govern every private action.”

There is nothing in the record to show that there was no room in the bus; in fact, Ruth had been, up to 8 November, 1926, taken to school in the bus. We have this picture: A little cripple child sitting by the roadside appealing to be taken with her more fortunate companions, who are not afflicted, to school. With room in the bus, defendants, board of education, command that it shall pass her by. Of all entitled to the benefits of the school, it should be this cripple. We can find nothing in the school law that gives any right to defendants to refuse a cripple, where there is room in the bus, to be taken to and from school. The bad example to the other children, as they see this cripple passed by, with room in the bus, is contrary to all sense of humanity and justice. I think she has a clear right. We hear now as of old the cry that drove Her to the manger “because there was no room for them in the inn.”

It is admitted in the case that the father of the little cripple girl is unable to furnish transportation, and there is no other public school in the county to send her to. The father is a farmer of limited means, with a wife and nine children to support, and desires to educate his children. This little cripple, “whom the finger of God has touched,” is unable to enjoy the sports and play of other children, but she can be educated, and the light of knowledge will help her bear the burden of affliction. But, with room in the bus, defendants pass her by and plead discretion. The humiliation—this cripple, naturally sensitive, being dismissed from school solely because she could not walk but rode in the bus. The principal of the school and the local school committee are willing, but the central body, the board of education, commands dismissal of the cripple.

“Law is considered the perfection of reason and founded on justice and common sense.” In this case there is no reason, justice or common sense in the conduct of the defendants, board of education, in regard to this cripple.

Hayes v. Benton, 193 N.C. at 384-85, 137 S.E. at 171.

160. *Ashley Horne Corp. v. Creech*, 205 N.C. 55, 63, 169 S.E. 794, 799 (1933).

court should be empowered to act appropriately.¹⁶¹ We expect even lay jurors to apply such standards to some of the issues before them and there is no reason, in the field of administrative law, why judges—equipped by training, experience, and (one would hope) instinct¹⁶² to seek and proclaim a reasonable result—must be dispatched in pursuit of a will-of-the-wisp, searching the record for a scent of wilfulness here, a trace of whimsical conduct there, and a whiff of abused discretion somewhere else.

It must be remembered that *Brodnax*, *Rosenthal*, and even the early cases undergirding *Burton* and the philosophy of Chief Justice Barnhill (who was born nearly 100 years ago¹⁶³), were decided in a day when local governmental problems and challenges were uncomplicated. The persons acting to meet them were highly visible in most communities and, for the most part, were elected officials directly accountable to the people. The theory of a “powerless judiciary”—one that would not substitute its judgment for that of administrative bodies and officials¹⁶⁴—was firmly implanted in our jurisprudence by *Rosenthal* in 1908, when apparently the only state administrative agencies to have become involved in litigation were the Railroad Commission and the Corporation Commission.¹⁶⁵ Until 1909, which brought *Hightower v. City of Raleigh*,¹⁶⁶ involving an appointed subordinate body, few, if any, cases reaching the supreme court concerned units or officers of local government other than county, town, and township commissioners and boards of aldermen,¹⁶⁷ school, road, and drainage district com-

161. The constitutional courts are the acknowledged architects and guarantors of the integrity of the legal system The statute under which an agency operates is not the whole law applicable to its operation[.] An agency is not an island entire of itself. It is one of the many rooms in the magnificent mansion of the law. The very subordination of the agency to judicial jurisdiction is intended to proclaim the premise that each agency is to be brought into harmony with the totality of the law, the law as it is found in the statute at hand, the statute book at large, the principles and conceptions of the “common law,” and the ultimate guarantees associated with the Constitution.

L. JAFFE, *supra* note 25, at 327.

162. “Some contend that over many years and after many cases, a judge develops a disciplined instinct for right, a kind of ‘finely honed’ expertise in generalism, in fundamental concepts of fairness, due process and plain common sense which must ultimately govern in even the most complex of factual disputes.” Kaufman, *Judicial Review of Agency Action: A Judge’s Unburdening*, 45 N.Y.U.L. REV. 201, 208 (1970).

163. See 266 N.C. 792, 792 (1966).

164. See *In re Appeal of Parker*, 214 N.C. 51, 55, 197 S.E. 706, 709 (1938).

165. See, e.g., *State ex. rel. R.R. Comm’n v. Tel. Co.*, 113 N.C. 213, 18 S.E. 389 (1893); *Corp. Comm’n v. Seaboard Air Line Ry.*, 127 N.C. 283, 37 S.E. 266 (1900).

166. 150 N.C. 569, 65 S.E. 279 (1909).

167. See, e.g., *City of Durham v. Rigsbee*, 141 N.C. 128, 53 S.E. 531 (1906) (landowner challenged necessity or desirability, from public interest, of condemning his land for street widening purposes); *Board of Comm’rs v. Smith*, 110 N.C. 417, 14 S.E. 972 (1892) (town commissioners held entitled to a review by certiorari of a county commissioners’ decision to grant Smith a liquor license).

missioners;¹⁶⁸ election officials, sheriffs, and tax collectors.¹⁶⁹ The days of highway, workers' and unemployment compensation commissioners; planning and zoning boards; housing, urban redevelopment, and airport authorities; welfare and social services boards; and other proconsuls of the welfare state funded substantially by federal largesse, lay in the distant future.

Governmental action that may damage someone—or, indeed, all of us—is no longer a matter of changing the grade of a street, assessing and collecting a tax, providing or withholding a license for the sale of spirituous liquors, authorizing erection of a telephone line, or operating a sewage disposal plant or municipal abattoir too close to the refined nostrils of the townspeople. It is no longer sufficient to say that the courts must restrain themselves because garden-variety miscreants can be removed at the next election. “You may throw the rascals out” is no consolation when the rascals on whom must rest the initial responsibility for injurious public policy, and its faulty or mindless execution, are secure in their civil service jobs, even in the unlikely event that they can be identified.

The scope of possible public and private injury from irrational governmental policies and decisions has expanded enormously. An urban renewal program, poorly conceived and administered, can lay waste to a city's heart, disrupt hundreds or thousands of homes and businesses, and, by haphazard relocation policies and inadequate planning for replacement housing, create new slums where none existed before—a stateside, peacetime perversion of the Vietnam War technique of “saving the villages by destroying them.” Easy tolerance of unlimited commercial development, at the expense of carefully considered master plans, can destroy sound residential neighborhoods within a city and accelerate downtown decline (particularly when accompanied by relentless physical destruction, under urban renewal, of central business districts). When the spreading fingers of expressways interlock with open-handed developmental policies fostered in the suburbs, the result may be an eroded inner city tax base rendering local government less

168. *See, e.g.*, *Sanderlin v. Luken*, 152 N.C. 738, 68 S.E. 225 (1910) (action challenging validity of 1909 statute creating drainage districts); *Pickler v. Board of Educ.*, 149 N.C. 221, 62 S.E. 902 (1908) (challenge to decision of school board to erect a new school, rather than repair the existing school or move it to another site); *Smith v. Board of Trustees*, 141 N.C. 143, 53 S.E. 524 (1906) (action to restrain school district officials from issuing bonds and levying a tax under an act of the General Assembly); *McArthur v. McEachin*, 64 N.C. 480 (1870) (injunction will not lie against opening of a public road).

169. *McDonald v. Teague*, 119 N.C. 604, 26 S.E. 158 (1896) (injunction against tax collector to restrain sale of property for nonpayment of taxes denied); *Bynum v. Board of County Comm'rs*, 101 N.C. 412, 8 S.E. 136 (1888) (injunction to restrain commissioners from declaring the result of an election denied); *Nixon v. Harrell*, 50 N.C. (5 Jones) 76 (1857) (court without power to set aside execution for abuses of a sheriff in executing its commands).

capable of meeting its responsibility for crime and disease control, education, and other social services—as well as the ordinary amenities every citizen has a right to expect from his government. Site selection of public housing projects, schools, highways, and other public works has lasting impact on orderly community development. Thoughtless local administrators, having been indulged by their elected supervisors over the years, may continue to destroy, in the name of “progress,” much of the nation’s heritage of historic buildings and to deprive us of the visual and psychic values arising from a community sense of America’s past.¹⁷⁰ Exclusionary zoning policies may confine the poor to ghettos with all the attendant social costs. Lax inspection policies and enforcement of building codes may hasten the deterioration of a community’s housing stock. Environmental controls may jeopardize economic development, or the lack of them may place an acceptable quality of life beyond the reach of many of the citizenry.

These matters are, of course, “political,” and the methods of breaking this vicious circle of mutually supportive and destructive phenomena are “discretionary” with the governing body of a municipality or its subordinate and affiliate units. But equally political and discretionary are decisions to enact ordinances regulating the conduct of legitimate businesses which, if unreasonable, our courts have not hesitated to strike down—without mention of “the right to err” or “separation of powers.”¹⁷¹ Why should unreasonable conduct be immune to challenge in the courts when *an entire community* suffers irreparable harm, perhaps for decades, from a bureaucrat’s myopia or an alderman’s intransigence?

The supreme court observed more than forty years ago: “Every public officer . . . is bound . . . to bring to the discharge of his duties that prudence, caution and attention which careful men usually exercise in

170. See generally *Historic Preservation Symposium*, 11 N.C. CENT. L.J. (1980). For a discussion of urban problems of the kind discussed in text, see Daye, *The Race, Class and Housing Conundrum: A Rationale and Proposal for a Legislative Policy of Suburban Inclusion*, 9 N.C. CENT. L.J. 37, 38-40 (1977), and sources cited therein.

171. See, e.g., *State v. Byrd*, 259 N.C. 141, 130 S.E.2d 55 (1968); *Bizzell v. Board of Aldermen*, 192 N.C. 348, 135 S.E. 50 (1926); *State v. Tenant*, 110 N.C. 609, 14 S.E. 387 (1892).

The separation of powers doctrine in North Carolina may well preclude the judiciary from exercising administrative functions, but a court is clearly not exercising an administrative function when it determines “whether an agency acted upon authority which could be conferred upon it constitutionally, acted within its statutory authority, acted arbitrarily or capriciously, or in disregard of law, and whether it based its decision on insufficient or incompetent evidence, or committed other errors of law.” Note, *Administrative Law—Judicial Review and Separation of Powers*, 45 N.C.L. REV. 467, 470 (1967). The author of the note concluded that the decision in *In re Varner*, 266 N.C. 409, 146 S.E.2d 401 (1966), a school reassignment case, “seems inconsistent with” the constitutional requirement of separate and distinct governmental functions and with the court’s statement in *Burton v. City of Reidsville* that “courts were not created or vested with authority to act as supervisory agencies to control and direct the action of executive and administrative agencies or officials.” *Id.* at 472.

the management of their own affairs.”¹⁷² In matters of large import, where the future course of a city may be significantly altered for the worse by administrative error, *who but the courts* can best hold an appointive public officer to this standard?¹⁷³ Of what value is the theory of “checks and balances” if the courts refuse to examine *that* side of the “separation of powers” coin?¹⁷⁴

172. *State ex rel. Avery County v. Braswell*, 215 N.C. 270, 274, 1 S.E.2d 864, 867 (1939).

173. The guarantee of legality by an organ independent of the executive is one of the profoundest, most pervasive premises of our system. Indeed I would venture to say that it is the very condition which makes possible, which makes so acceptable, the wide freedom of our administrative system, and gives it its remarkable vitality and flexibility. It is, of course, true that the agencies make positive contributions to the riches and *ambiance* of our life, which quite clearly the courts could not make. It is also true that the good public servant is devoted to the law. But I feel that in the context these considerations are peripheral. They have to do with the spirit in which judicial review should be exercised but not with the question whether there shall be review. It is clear that the country looks, and looks with good reason, not to the agencies, but to the courts for its ultimate protection against executive abuse

L. JAFFE, *supra* note 25, at 324.

174. In light of his comments about the “separation of powers” doctrine in *Burton*, 243 N.C. at 408, 90 S.E.2d at 703, Justice Barnhill’s earlier comment in *State v. Scoggins* is of interest:

[C]ourts do not let a case turn on a constitutional question when it may be decided on other grounds. This is a sound rule when rightly applied. It is bottomed on the philosophy of equality between the legislative, executive, and judicial branches of our government and *the system of checks and balances provided by our fundamental law*. While we have cited the rule in cases involving municipal ordinances, *strictly speaking, it applies only to Acts of the General Assembly—a co-ordinate branch of the government*. (Emphasis added).

236 N.C. 1, 6, 72 S.E.2d 97, 101 (1952).

Thus expressed, Justice Barnhill’s own limitation would, if carried to its logical end, free the courts from their reluctance to control and direct the action of local legislative, executive, and administrative agencies and officials because they are not, by the Barnhill standard, members of a “co-ordinate branch of the government.” In any event, the “separation of powers” doctrine seems outmoded inasmuch as rulemaking and quasi-judicial powers have routinely been conferred upon and are exercised by executive agencies—standard practice in administrative law and procedure under the delegation doctrine or otherwise. *See, e.g., Cox v. City of Kinston*, 217 N.C. 391, 394-95, 8 S.E.2d 252, 256 (1940). *But see State ex rel. Lanier v. Vines*, 274 N.C. 486, 164 S.E.2d 161 (1968), holding that the General Assembly could not confer upon the Commissioner of Insurance the judicial power of varying, in his discretion, the amount of a civil penalty in a given case. Such a power was not within the constitutional authorization as being “‘reasonably necessary as an incident to the accomplishment of the purpose for which’ the Department of Insurance was created.” 274 N.C. at 496-97, 164 S.E.2d at 168. But granting the Commissioner judicial power to revoke a license was held constitutional in *Vines* as a reasonably necessary incident to the departmental purpose. *See* N.C. CONST. of 1970, art. IV, § 3.

For discussions of the relationship between the separation of powers doctrine and administrative law, *see* Fuchs, *supra* note 25, at 186-94; I F. COOPER, *supra* note 12, at 15-29; L. JAFFE, *supra* note 25, at 28-33; B. SCHWARTZ, *supra* note 23 § 11, at 31-33; Strong, *Judicial Review: A Tri-Dimensional Concept of Administrative-Constitutional Law*, 69 W. VA. L. REV. 111 (1967); Parker, *The Historic Basis of Administrative Law: Separation of Powers and Judicial Supremacy*, 12 RUTGERS L. REV. 449 (1958).

The doctrine of separation of powers is now perceived as permitting a “‘blending’ of disparate powers,” I F. COOPER, *supra* note 12, at 1-2, but even if a major purpose of the doctrine initially was to avoid autocracy or despotism (*see* J. Madison, THE FEDERALIST NOS. 48, 51) (1788); Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., *dissenting*); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593 (1952) (Frankfurter, J., *concurring*); L. JAFFE, *supra* note 25, at 32) by creating “checks and balances” and allocating powers and functions among the respective branches of government, that purpose is poorly served by expressions of judicial timidity and self-effacement such as those of Chief Justice Barnhill in *Burton v. City of Reidsville*. In a given case

Moreover, it is no longer acceptable in a turbulent, industrialized, urban society to feast on the legal fruits of a quiet, rural past, as the supreme court did in *Clark's Greenville, Inc. v. West*,¹⁷⁵ when it noted that the "motives, wisdom or expediency"¹⁷⁶ of a local legislative body (the city council) are "not questions for the court,"¹⁷⁷ and that "orderly government could not survive"¹⁷⁸ the license of displeased or disgruntled citizens challenging the validity of "any legislative enactment merely by alleging bad faith and conspiracy on the part of the body which passed it."¹⁷⁹ We should carefully re-examine, in the light of changing circumstances, any theory under which courts may automatically slam their doors on the grievances, real or imagined, of those who have already found legislative and executive halls barred to them. If, as the supreme court earlier indicated in *Barbour v. Carteret County*,¹⁸⁰ wanton disregard for the public good *is* bad faith, it is possible to predict that someday in a society that has placed on local officialdom burdens ever increasing in their complexity and difficulty, orderly government may demand that the courts review the judgments of local administrators to prevent substantial injury to the public weal from policies unwise in their conception, and negligent or worse in their execution. The test of reasonableness presented here will afford a discerning judge that opportunity.

The supreme court should take an early opportunity to clarify, once

(e.g., *Hayes v. Benton*, 193 N.C. 379, 137 S.E. 169 (1927)), such restraint may become merely a craven and callous abdication of judicial responsibility. Those of the "powerless judiciary" school often seem content to permit exercise, if not usurpation, of judicial or legislative powers by the executive, but have too seldom been bold, in this state, to assert the judiciary's role as a "check" or "balance."

As Professor Fuchs suggested 40 years ago:

"[U]nder our system of government, no agency should be permitted to exercise a degree of power, in relation to small matters or large, which renders it unduly dangerous to human freedom. Governmental authority with respect to any subject must be divided, or its exercise checked upon, in such a way as to minimize the danger of abuse."

Fuchs, *supra* note 25, at 194. It seems obvious that only a judiciary constantly alert to transgressions of power by legislative and administrative officials—and consistently willing to intervene to protect citizens' rights and interests—will truly preserve and advance the separation of powers theory even as it was originally perceived. Otherwise, as in *Burton* and its progeny, the theory becomes a shield rather than a sword, and the judiciary cannot be the balancing force the Founders intended it to be. Cooper observes, "[T]he real thrust of the separation of powers doctrine, as now applied in the state courts, is that there must remain, either in the legislature or the courts, *effective power to correct any abuses resulting from the grant of combined powers to a single agency.*" (Emphasis added). 1 F. COOPER, *supra* note 12, at 23.

175. 268 N.C. 527, 151 S.E.2d 5 (1966).

176. *Id.* at 531, 151 S.E.2d at 8. The decision is sharply criticized on this point in Pollitt & Strong, *Constitutional Law—1967 Survey of North Carolina Case Law*, 45 N.C.L. REV. 816, 888-91 (1967).

177. 268 N.C. at 531, 151 S.E.2d at 8.

178. *Id.* at 531, 151 S.E.2d at 9.

179. *Id.*

180. 255 N.C. 177, 120 S.E.2d 448 (1961).

and for all, the North Carolina courts' role in responding to citizens' suits for redress of wrongs to the public or to private individuals arising from discretionary acts of our elected and, particularly, our appointed officials.

In an often quoted comment, Justice Brogden wrote: "The law is . . . designed to march with the advancing battalions of life and progress and to safeguard and interpret the changing needs of a commonwealth" ¹⁸¹

His thought was repeated a few years later in a dissent written by a member of the court who had ascended to the supreme bench only four months previously:

I conceive it to be the duty of the [c]ourt to interpret the law, within the limitations of the [c]onstitution, with a view to meeting present conditions and present needs *The decisions of the [c]ourt should be mileposts marking the progress of the law, and not hitching posts, beyond which the law may not go.* ¹⁸²

The author of the dissent was Justice Maurice Victor Barnhill.

IV. FORM AND AVAILABILITY OF JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

In *Burton v. City of Reidsville*, Chief Justice Barnhill, discussing the powers of the judiciary (as quoted at the beginning of this article), included the obvious qualifying phrase "when the jurisdiction of a court is properly invoked" ¹⁸³ a caveat also appearing in the "Restatement of the Law of Judicial Powers and Responsibilities" proposed above. ¹⁸⁴ The basic powers of a court to act in cases involving discretionary administrative action may never be clarified as proposed. Whether they are or not, in cases to which neither the Administrative Procedure Act nor some other statute applies, an aggrieved person may still confront an equally "seamless web" in North Carolina law in determining how he or she is to challenge the governmental decision involved. What kind of review, if any, is available, and in what form must the action be brought? Part IV is designed to summarize the vari-

181. *Walker v. Town of Faison*, 202 N.C. 694, 696, 163 S.E. 875, 876 (1932). In *Klingenberg v. City of Raleigh*, Justice Clarkson, dissenting, wrote in a similar vein:

Time marches on, and so must the law. Old rules, born of another day, must constantly be scrutinized in the light of a changing world The oasis where we pause for the night is not the end of the pilgrimage; the Holy City which we seek always lies ahead. The unquestioning acceptance of the rules of the past is not an unmixed blessing. A formal logic which reasons from precedent alone sometimes insulates the mind against the overwhelming logic of reality.

212 N.C. 549, 556-57, 194 S.E. 297, 301-02 (1937).

182. *Palmer v. Haywood County*, 212 N.C. 284, 289, 193 S.E. 668, 674 (1937) (emphasis added).

183. 243 N.C. 405, 407, 90 S.E.2d 700, 702. See quote accompanying note 1 *supra*.

184. See text accompanying notes 133-39 *supra*.

ous statutory provisions that may be applicable, and to illustrate our law's confusion in situations where no statute applies.

A. *Administrative Procedure Act*

The Administrative Procedure Act¹⁸⁵ affords a right to judicial review to a person "aggrieved by a final agency decision in a contested case . . . who has exhausted all administrative remedies made available to him by statute or agency rule, unless adequate procedure for judicial review is provided by some other statute, in which case the review shall be under such other statute."¹⁸⁶ Any administrative action not made reviewable under Article 4 of the statute (Judicial Review) is reviewable through "any judicial remedy available . . . under the law."¹⁸⁷

The Administrative Procedure Act does not apply, and therefore Article 4 does not apply:

1. Where a statute makes specific provisions to the contrary.¹⁸⁸
2. To the Employment Security Commission, the Industrial Commission, the Occupational Health and Safety Review Board, the Department of Correction, the Commission of Youth Services, and the Utilities Commission.¹⁸⁹ Articles 2 and 3 (Rule-making and Administrative Hearings) do not apply either to the Department of Transportation in motor vehicle rulemaking or administrative hearings, or to the Department of Revenue.¹⁹⁰ Only Article 4 (Judicial Review) applies to the University of North Carolina and its affiliated boards, agencies, and institutions.¹⁹¹
3. To agencies in the legislative or judicial branches of the state government.¹⁹²

185. N.C. GEN. STAT. §§ 150A-1 to -64 (1978).

186. *Id.* § 150A-43. Judicial review is also obtainable under §§ 150A-16 and -17, relating to administrative rules. Judicial review of rulemaking is beyond the scope of this article. Professor Daye has observed that "one of the major shortcomings" of the North Carolina Administrative Procedure Act is the provision requiring resort to the judicial review provisions of another statute if one is available and "adequate." This, he says, has a "serious adverse effect on uniformity." Daye, *supra* note 12, at 899. Professor Cooper says that this approach "drastically [reduces] the applicability and effectiveness of the administrative review act" in those states which have adopted such an approach. 2 F. COOPER, *supra* note 12, at 608.

187. N.C. GEN. STAT. § 150A-43 (1978).

188. *Id.* § 150A-1(a).

189. *Id.* Professor Daye states, "No logical basis for the exemption of the Industrial and Utilities Commissions is apparent." He suggests that the exemptions for the Occupational Health and Safety Review Board and the Employment Security Commission may have been based on the extensive federal regulatory relationship and those for the Departments of Motor Vehicles and Revenue on the sheer volume of licenses involved and the limited utility of Administrative Procedure Act procedures in most cases. Daye, *supra* note 12, at 841.

190. N.C. GEN. STAT. § 150A-1(a) (1978).

191. *Id.*

192. *Id.* § 150A-2(1).

4. To counties, cities, towns, villages, other municipal corporations or political subdivisions of the state or any agencies of such subdivisions; county or city boards of education; other local public districts, units, or bodies of any kind; or private corporations created by act of the General Assembly. They are not included as "agencies" within the meaning of the statute.¹⁹³

Where the judicial review provisions of the Act apply, the form of the action is by a petition for review filed in the Superior Court of Wake County, except where the original determination in the matter was made by a local agency or local board and appealed to the state board. Then the petition may be filed in the superior court of the county where the original determination was made.¹⁹⁴

B. *Cases Outside The Scope of the Administrative Procedure Act*

1. *Organic Statutes*

Many administrative agency procedures for judicial review are set forth in the statute creating the agency, program, or activity (including those specifically exempted from the Administrative Procedure Act).¹⁹⁵ In other cases such procedures may be found in the Administrative Code.¹⁹⁶

193. *Id.* The prior statute, N.C. GEN. STAT. §§ 143-306 to -316, did not include a specific exemption for local bodies.

194. *Id.* § 150A-45.

195. *Organic statute provides for review under the Administrative Procedure Act:* See, e.g., North Carolina Consumer Finance Act, N.C. GEN. STAT. § 53-188 (1975); Health Maintenance Organization Act, *id.* § 57B-19(b) (Supp. 1979); Private Protective Services Act, *id.* § 74C-12; Board of Boiler Rules and Bureau of Boiler Inspection Act, *id.* § 95-69.2 (1975); Occupational Health and Safety Act, *id.* § 95-141; Coastal Area Management Act, *id.* § 113A-123(a) (1978).

Other forms of review: From various decisions of the Commissioner of Insurance, petition to the Superior Court of Wake County or to the court of appeals, *id.* §§ 58-9.3, -9.4, -54.8, -54.10, -241.41 (1975); from final decisions of the Utilities Commission, review in the court of appeals, *id.* § 7A-29 (Supp. 1979); from decisions under the Model Airport Zoning Act, petition to the superior court, *id.* § 63-34 (1975); from decisions under the N.C. Securities Act, petition to the superior court, *id.* § 78A-48 (Supp. 1979); from final workers' compensation decisions of the Industrial Commission, review in the court of appeals, *id.* § 97-86; from decisions of the Employment Security Commission, appeal to the superior court, *id.* § 96-15(i). Although not technically judicial review of an administrative decision, but rather review of proposed action affecting an individual, petitions of the county Department of Social Services under the Protection of the Abused, Neglected or Exploited Disabled Adult Act are heard in the district court. *Id.* § 108-106.1 (1978). Appeals under the Family Food Assistance Program are heard by petition to the superior court. *Id.* § 108-109. Petitions under the annexation statutes are heard in superior court. *Id.* §§ 160A-38, -50 (1976).

196. See N.C. GEN. STAT. § 150A-63 (1978 & Supp. 1979). On May 6, 1980, the court of appeals judicially noticed that the administrative regulations required under the statute had not been published; that over 18,000 pages of regulations existed but were available only by inspection in the Attorney General's office; and that the regulations which had been codified were not indexed by corresponding statutory references. *Orange County v. Department of Transp.*, 46 N.C. App. 350, 377, 265 S.E.2d 890, 914 (1980).

2. *Declaratory Judgment Act*

The Uniform Declaratory Judgment Act¹⁹⁷ has been used successfully to attack the validity of a statute or ordinance.¹⁹⁸ However, the Act does not authorize the adjudication of abstract or theoretical questions; a genuine controversy must presently exist between the parties.¹⁹⁹ Thus, efforts to use the Act as a means of testing the validity of a statute or ordinance have failed where the complaining party did not show a direct and adverse effect upon himself.²⁰⁰

The Declaratory Judgment Act has been used in other controversies involving public bodies: validity of a municipal contract,²⁰¹ dedication of land to the public as a street,²⁰² determination whether land acquisition by condemnation was a fee or an easement,²⁰³ authority of the State Board of Health to create a sanitary district,²⁰⁴ and determination whether a city acquired by deed a fee in park land, or a fee upon special limitation.²⁰⁵

On the other hand, the liability for a tax and the validity of a taxing statute are not appropriate for determination by declaratory judgment.²⁰⁶

For many years the supreme court did not clarify whether the Declaratory Judgment Act was a suitable vehicle for challenging a zoning ordinance. In *Shuford v. Town of Waynesville*,²⁰⁷ *Penny v. City of Durham*,²⁰⁸ and *Zoppi v. City of Wilmington*,²⁰⁹ such actions appear to have been brought under the Act, but the court did not discuss the issue in these cases, and presumably no challenge was made to the form of the action. In *Eastern Carolina Taste-Freez, Inc. v. City of Raleigh*,²¹⁰ the court indicated that it remained an open question whether one who had not violated an ordinance could use the Act to have it determined that

197. N.C. GEN. STAT. §§ 1-253 to -267 (1969 & Supp. 1979). See Van Hecke, *The North Carolina Declaratory Judgment Act*, 10 N.C.L. REV. 1 (1931).

198. See, e.g., *Carolina-Virginia Coastal Highway v. Coastal Turnpike Auth.*, 237 N.C. 52, 74 S.E.2d 310 (1953) (statute); *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E.2d 35 (1972) (ordinance).

199. *City of Raleigh v. Norfolk So. Ry.*, 275 N.C. 454, 168 S.E.2d 389 (1969); *Angell v. City of Raleigh*, 267 N.C. 387, 148 S.E.2d 233 (1966).

200. *Adams v. North Carolina Dept. of Natural & Econ. Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978); *City of Greensboro v. Wall*, 247 N.C. 516, 101 S.E.2d 413 (1958).

201. *North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ.*, 278 N.C. 633, 180 S.E.2d 818 (1971); *Carolina Power & Light Co. v. Iseley*, 203 N.C. 811, 167 S.E. 56 (1933).

202. *Town of Farmville v. A.C. Monk & Co.*, 250 N.C. 171, 108 S.E.2d 479 (1959).

203. *Town of Morganton v. Hutton & Bourbonnais Co.*, 247 N.C. 666, 101 S.E.2d 679 (1958).

204. *Deal v. Elon Sanitary Dist.*, 245 N.C. 74, 95 S.E.2d 362 (1956).

205. *Charlotte Park & Recreation Comm'n v. Barringer*, 242 N.C. 311, 88 S.E.2d 114 (1955).

206. *Great Am. Ins. Co. v. Gold*, 254 N.C. 168, 118 S.E.2d 792 (1961).

207. 214 N.C. 135, 198 S.E. 585 (1938).

208. 249 N.C. 596, 107 S.E.2d 72 (1959).

209. 273 N.C. 430, 160 S.E.2d 325 (1968).

210. 256 N.C. 208, 212, 123 S.E.2d 632, 635 (1962).

an action *proposed* was valid. In *In re Markham*, the court suggested by dictum that seeking a declaratory judgment would be an appropriate procedure.²¹¹ The question was not resolved until 1972 in *Blades v. City of Raleigh*,²¹² where the court specifically held that a suit to determine the validity of a zoning ordinance is a proper case for declaratory judgment.

The form for the action is a complaint and may include a prayer for temporary or permanent injunctive relief if appropriate.²¹³

3. *Certiorari*

The writ of certiorari is authorized by North Carolina General Statutes section 1-269 "as heretofore in use."²¹⁴ In *Russ v. Board of Education*,²¹⁵ the court reviewed the board's action removing a school superintendent: "It is well settled in this jurisdiction that [certiorari] is the appropriate process to review the proceedings of inferior courts and of bodies and officers exercising judicial or [quasi]-judicial functions in cases where no appeal is provided by law."²¹⁶ The rule that certiorari is available where the law provides no appeal has been observed in North Carolina since 1803.²¹⁷ Certiorari does not lie to review the exercise of legislative, executive, and ministerial powers.²¹⁸ Thus, it is not the proper remedy, for example, where a public official has been dismissed as an executive matter rather than after hearing.²¹⁹

The writ issues in the discretion of the court, upon petition and affidavit showing a *prima facie* case on the merits, when a "substantial wrong" has been committed in a lower tribunal.²²⁰ The court may review errors of law appearing on the face of the record, errors of procedure, and "all questions of jurisdiction, power, and authority of the

211. 259 N.C. 566, 131 S.E.2d 329 (1963).

212. 280 N.C. 531, 187 S.E.2d 35 (1972). See also *Taylor v. City of Raleigh*, 290 N.C. 608, 620, 227 S.E.2d 576, 583 (1976).

213. See, e.g., *Walker v. City of Charlotte*, 268 N.C. 345, 150 S.E.2d 493 (1966) (complainant sought to have ordinances declared unconstitutional and asked for a perpetual injunction against their enforcement). The plaintiff in *Campbell v. First Baptist Church* sought both declaratory and injunctive relief. Record at 17. The complaint need not make specific reference to the Declaratory Judgment Act because the facts alleged determine the nature of the relief to be granted. *Langdon v. Hurdle*, 15 N.C. App. 158, 189 S.E.2d 517 (1972).

214. N.C. GEN. STAT. § 1-269 (1969).

215. 232 N.C. 128, 59 S.E.2d 589 (1950).

216. *Id.* at 130, 59 S.E.2d at 591. See also *Maines v. City of Greensboro*, 300 N.C. 126, 133, 265 S.E.2d 155, 160 (1980).

217. *Reardon v. Guy*, 3 N.C. (2 Hayw.) 245 (1803).

218. *In re Markham*, 259 N.C. 566, 569, 131 S.E.2d 329, 332 (1963).

219. *Foust v. City of Greensboro*, 47 N.C. App. 159, 266 S.E.2d 835 (1980); *Bratcher v. Winters*, 269 N.C. 636, 641, 153 S.E.2d 375, 378-79 (1967).

220. *Pue v. Hood*, 222 N.C. 310, 312, 22 S.E.2d 896, 898 (1942); *State v. Tripp*, 168 N.C. 150, 154-55, 83 S.E. 630, 632 (1914).

inferior tribunal to do the action complained of”²²¹

The writ is not a proper remedy where another remedy is available.²²²

In addition to section 1-269,²²³ certiorari may be authorized in the organic statute of an agency. For example, section 160A-388(e)²²⁴ provides with respect to a board of adjustment: “Every decision of the board shall be subject to review by the superior court by proceedings in the nature of certiorari.”

Functionally, the petition for review by certiorari is akin to the petition for review filed under the judicial review provisions of the Administrative Procedure Act: review under the Act is also limited to the record below and no new evidence may be presented to the reviewing court.²²⁵

4. *The Wrong Remedy Syndrome: Mandamus, Mandatory Injunction, Injunction*

The law of North Carolina relating to the use of certiorari is reasonably clear, although an apparently exasperated Chief Justice Stacy, dissenting in *Belk's Department Store, Inc. v. Guilford County*,²²⁶ chided his colleagues as follows:

There is no difference in principle between an unlawful exemption and an excessive assessment. The one results in a discrimination in favor of the landowner; the other in a discrimination against him. We hear the one (*Odd Fellows v. Swain*, 217 N.C., 632, 9 S.E.[2d], 365) and decline to hear the other. We told the plaintiff in *Hooker v. Pitt County* . . . that his remedy was by application for a [certiorari]. The present petitioner applies for a [certiorari] and we tell him his application will not lie.²²⁷

Chief Justice Stacy was referring to what is described here as the “wrong remedy” syndrome. On rare occasions, the supreme court has treated an improvidently chosen pleading as a petition for writ of certiorari, and proceeded to review the case.²²⁸ But where the complainant

221. *Chambers v. Zoning Bd. of Adjustment*, 250 N.C. 194, 199, 108 S.E.2d 211, 214-15 (1959); *Belk's Dept. Store, Inc. v. Guilford County*, 222 N.C. 441, 445, 23 S.E.2d 897, 901 (1943); *Pue v. Hood*, 222 N.C. 310, 312-13, 22 S.E.2d 896, 898-99 (1942); *State v. King*, 222 N.C. 137, 140, 22 S.E.2d 241, 242-43 (1942).

222. *Watson v. Shields*, 67 N.C. 235 (1872); *Petty v. Jones*, 23 N.C. (1 Ired.) 408 (1841). Cf. *Sanford v. Southern Oil Co.*, 244 N.C. 388, 93 S.E.2d 560 (1956).

223. N.C. GEN. STAT. § 1-269 (1969).

224. *Id.* § 160A-388(e) (1976).

225. *Id.* § 150A-50 (1978 & Supp. 1980). The Act lists two exceptions to this rule: (1) where no record was made at the hearing or (2) the record is inadequate. In such cases the judge in his discretion may hear all or part of the matter de novo.

226. 222 N.C. 441, 23 S.E.2d 897 (1943).

227. *Id.* at 454, 23 S.E.2d at 906.

228. See *Baker v. Varser*, 239 N.C. 180, 189, 79 S.E.2d 757, 764 (1954) (plaintiff brought ac-

has sought the wrong remedy, whether by certiorari or otherwise, the more usual and long-standing practice²²⁹ is for the court to inform the litigant why his form of action was inappropriate and leave him to try another, if he can.

Mandamus, mandatory injunction, and injunction are remedies peculiarly subject to the wrong remedy syndrome. In cases involving challenges to official conduct or action, inconsistent opinions of the supreme court have created an impenetrable jungle that only the most intrepid legal explorer will dare to enter. On such a safari, he will do well to discard his compass and maps and dismiss his bearers and guides, for he may find them useless.

tion for mandamus, which was held not to lie under the circumstances; complaint was treated as petition for certiorari). *Cf.* *Pue v. Hood*, 222 N.C. 310, 312-13, 22 S.E.2d 896, 898-99 (1942) (complaint regarding the failure of defendant to issue a certificate of incorporation for a proposed bank was dismissed on demurrer for failure to state a cause of action; on appeal, plaintiffs "argue[d] and insist[ed]" that they sought a writ of certiorari for a review of the action; the court agreed to "consider the appeal on their theory of the purpose and intent of the action," finally concluding that certiorari would not lie to review action taken in accord with the statute absent a showing of capriciousness, bad faith, or disregard of law. *Id.* at 315, 22 S.E.2d at 900).

229. In *State v. Kirkpatrick*, 179 N.C. 747, 103 S.E. 65 (1920), defendant was convicted of selling milk without a permit in violation of an ordinance. On his appeal, the court suggested that he was not entitled to raise the validity of the ordinance on two of the constitutional grounds he cited (lack of a right of appeal from the decision of the licensing body and creation of a monopoly through the municipal power to revoke a permit once granted), because he had "taken the law into his own hands." A proper remedy, the court said, would have been to apply for a permit, and if refused, to have sought a mandamus. *Quaere*, if his application for the permit had been refused, would not the only ground for mandamus have been his clear right to the permit? How could he have tested the *validity of the ordinance* in such a proceeding, where the sole issue presumably would have been an arbitrary refusal to grant the permit? If he had applied for and had been *granted* the permit, he would have been back at "Square One" as far as determining the validity of the ordinance was involved. He would have obtained his permit, but not a resolution of the question whether a permit could be required constitutionally. The court also recommended raising the constitutional question in defense to an indictment for selling milk following a wrongful refusal of his application, or in an action for damages. The logic of the former and the efficacy of the latter were subjects on which Chief Justice Clark offered no enlightenment. Inasmuch as the matter before the court was a criminal proceeding anyway, it is difficult to see why Mr. Kirkpatrick would have been in any better posture under the court's second option: He would still have "taken the law into his own hands" by selling milk without a permit. Similarly, should he have won damages for a wrongful refusal to issue him the license, presumably he would have had the money in hand, but again, no answer as to the constitutionality of the ordinance. Chief Justice Clark's advice in *Kirkpatrick* surely must rank among the least useful ever proffered by the court. On the court's historic penchant for turning the errant litigant away with a "pat on the back" in the form of suggested alternative remedies for his grievance, *see also*, *Jones v. Commissioners of Franklin*, 88 N.C. 56 (1883) (register of deeds whose claim for a fifteen-cent fee was rejected by the county commissioners has remedy by civil action, not appeal); *Cohen Co. v. Commissioners of Goldsboro*, 77 N.C. 2 (1877) (remedy for injury resulting from operation of unlawful ordinance is action for damages, not injunction); *McArthur v. McEachin*, 64 N.C. 454 (1870) (remedy against county commissioners, acting in exercise of their authority to lay off public roads and build bridges, is not a civil action, but appeal or certiorari; Justice Dick's opinion undoubtedly escaped the attention of Chief Justice Pearson, for the ink was barely dry on the latter's opinion six months earlier in *Brodnax v. Groom* that the courts would have no truck with such matters); *Solicitor ex rel. Marvill Mills v. Columbus Mills*, 40 N.C. (5 Ired. Eq.) 244 (1848) (relief against commissioners appointed to lay off county seat is by quo warranto or mandamus, not injunction).

The writ of mandamus ordinarily lies to compel the performance of a clear legal duty (stated another way, one of a ministerial, rather than a discretionary, character), and will be issued in behalf of one who has a specific legal right to such performance and is without any other legal remedy. So, in essence, we were informed in *Jarrell v. Snow*.²³⁰ Mandamus is an exercise of original jurisdiction and may not be used as a substitute for appeal. So we were informed in *Baker v. Varser*.²³¹ Mandamus is not a proper instrument to review or reverse an administrative board which has taken final action on a matter within its jurisdiction. Where the statute provides no appeal, the proper method of review is by certiorari if there has been error of law prejudicial to a party, or the board has exceeded its authority, mistaken its power, or abused its discretion. So we were authoritatively informed in *Warren v. Maxwell*,²³² citing *Pue v. Hood*.²³³ In all four decisions, Justices Barnhill, Winborne, Devin, and Denny sat in the majority.

Along the path of the decade between *Pue*, *Jarrell*, and *Warren*, (all prior to 1946) and *Baker* (in 1954), however, we were directed to a sharp fork in the way—the 1952 case of *Hamlet Hospital and Training School for Nurses, Inc. v. Joint Committee on Standardization*.²³⁴ There we learned that mandamus indeed *will* lie to review discretionary acts when it appears that the discretion has been abused, as where the action complained of has been arbitrary and capricious. For this proposition we were referred to *Pue v. Hood*, apparently the all-purpose administrative law citation in our jurisprudence.

Somewhat farther along the road, in the 1956 case of *Wilson Realty Co. v. City and County Planning Board*,²³⁵ a guidepost pointed us back to *Pue v. Hood*. In *Wilson Realty Co.* we were told again on the authority of *Pue* that mandamus is not used to correct action, however erroneous it may be; therefore, it is not used as certiorari is, to serve the purpose of a writ of error or appeal. Certiorari involves the review of a performed judicial duty; mandamus compels an unperformed legal duty.

In each of the foregoing cases, the complainant wanted something that a governmental body had denied him—Pue, a certificate from the Commissioner of Banks; Warren, an order from the State Board of Tax Assessment listing certain abandoned railroad property in a manner

230. 225 N.C. 430, 432, 35 S.E.2d 272, 274 (1945).

231. 239 N.C. 180, 189, 79 S.E.2d 757, 764 (1954).

232. 223 N.C. 604, 608, 27 S.E.2d 721, 724 (1943).

233. 222 N.C. 310, 316, 22 S.E.2d 896, 900 (1942). Professor Jaffe found the *Pue* opinion "ambiguous . . . [J]umbled together is language which points at the same time to the formal procedure and to the lack of 'property' right." L. JAFFE, *supra* note 25, at 171.

234. 234 N.C. 673, 681, 68 S.E.2d 862, 868 (1952).

235. 243 N.C. 648, 655-56, 92 S.E.2d 82, 87 (1956).

making it subject to county taxes, instead of listing it as "scrap"; Jarrell, a ruling from the County Commissioners rescinding their request for his wine license; Hamlet Hospital, a certificate of accreditation; Baker, admission to the bar examination; Wilson Realty Company, approval of a proposed subdivision plat. In all save the *Hamlet Hospital* case, the supreme court's response was, in effect, "Sorry, wrong remedy." It is difficult to understand why a government agency, finally denying a benefit to which one is arguably entitled under the law, may not simultaneously be avoiding its legal duty to provide the benefit. In either event, the court is usually being asked to determine whether there *is* an entitlement, and in principle, the title of a complainant's pleadings should make no difference. The practical difference is that if the word is "certiorari," the complainant is bound by the record he has made below, and if the word is "mandamus," he is not.²³⁶

Such tangled lines of authority are equally evident in the relationship between mandamus and mandatory injunction.²³⁷

In *Harris v. Board of Education*,²³⁸ plaintiff had been elected by a school committee to be principal of a school, but the school board disapproved the election. Plaintiff brought an action for mandamus seeking to compel the board to approve the election. The supreme court (Barnhill, J.) held: "The court below will not and cannot undertake to control the discretionary power of the defendants The allegation that the defendants acted 'wrongfully, unlawfully, unjustly, arbitrarily and without just cause or reason' is not sufficient to support an application for a writ of *mandamus*."²³⁹

The plaintiff's adequate (and presumably "right") remedy, the court suggested, was an action for damages, or he may "obtain a mandatory injunction compelling the defendants to proceed to act upon the election," upon proper pleadings and a finding that the "action of the

236. Professors Gellhorn, Byse, and Strauss state:

The litigant who endeavors to utilize the prerogative writs may have a frustrating experience. For whether one agrees that an "imaginary system cunningly planned for the evil purpose of thwarting justice and maximizing fruitless litigation would copy the major features of the extraordinary remedies," 3 K. Davis, *Admin. Law Treatise* 388 (1958), the fact certainly is that the writs have come to us heavily weighted with technicalities which sometimes obstruct the efficient and rational administration of justice.

W. GELLHORN, C. BYSE, & P. STRAUSS, *ADMINISTRATIVE LAW, CASES AND COMMENTS* 923 (7th ed. 1979).

237. The role of the judiciary in controlling the exercise of governmental power should not depend upon the accident of the form or method of judicial review. This is not to say that the relief sought—affirmative rather than negative or declaratory—may not be a relevant consideration in determining whether, and to what extent, a court should intervene. But it should make no difference whether the method of seeking affirmative relief is mandamus, mandatory injunction or a statutory review proceeding.

Id. at 927.

238. 216 N.C. 147, 4 S.E.2d 328 (1939).

239. *Id.* at 150, 4 S.E.2d at 330.

county authorities was in fact arbitrary and capricious and actuated by selfish and personal motives.”²⁴⁰ Justice Barnhill drew a clear distinction between mandamus and mandatory injunction.

Yet, in *Board of Managers v. City of Wilmington*,²⁴¹ again in *St. George v. Hanson*,²⁴² and again in *Ponder v. Joslin*,²⁴³ the court stated: “A mandatory injunction, when issued to compel a board or public official to perform a duty imposed by law, is identical in its function and purpose with that of a writ of mandamus.”²⁴⁴ In all three cases, the *Harris* opinion, illustrating a marked difference between the two writs, was cited as authority for the rule that they are identical! In *Fremont City Board of Education v. Wayne County Board of Education*,²⁴⁵ the court spoke of the remedies of mandamus and injunction:

Whether defendant should be required by the legal writ of mandamus to terminate the enrollment of the named children in the schools administered by it or prohibited by the equitable writ of injunction from continuing to admit to its schools residents of another school administrative area need not now be decided. *The same result can be accomplished by either writ.* . . . The [s]uperior [c]ourt has authority to issue either writ. An injured party is not now compelled to ponder whether he should apply to a court of law or a court of equity for relief.²⁴⁶

This dictum undoubtedly compelled counsel for the plaintiff in *Baker v. Varser*²⁴⁷ to ponder the vagaries of fate, because in that case the assumed distinction between mandamus and injunction had been of crucial significance.

Baker was denied the opportunity to sit for the 1953 North Carolina Bar Examination on the ground that he was not a bona fide resident of the state. On the eve of the examination, he obtained a mandamus compelling the Board of Law Examiners to admit him to the examination. The issue before the court on appeal was whether the trial judge was within his jurisdiction to issue the writ of mandamus while vacationing outside his district. The court held that he had no such jurisdiction. It was clear, however, that the trial judge did have jurisdiction to

240. *Id.* at 151, 4 S.E.2d at 331.

241. 235 N.C. 597, 601, 70 S.E.2d 833, 836 (1952).

242. 239 N.C. 259, 263, 7 S.E.2d 885, 888 (1954).

243. 262 N.C. 496, 504, 138 S.E.2d 143, 149 (1964).

244. To the same effect is *Sutton v. Figgatt*, 280 N.C. 89, 92, 185 S.E.2d 97, 99 (1971), holding that “there is no practical difference” between the two. The court stated: “In a case involving the exercise of discretion, mandamus lies to compel action by a public official but not to dictate his decision *unless there has been a clear abuse of discretion.*” 280 N.C. at 93, 185 S.E.2d at 99 (emphasis added). This, of course, is plainly at variance with what the court was saying (*most* of the time) in the period between 1942 and 1954. See text accompanying notes 230-34 *supra*.

245. 259 N.C. 280, 130 S.E.2d 408 (1963).

246. *Id.* at 282, 130 S.E.2d at 409-10 (emphasis added).

247. 239 N.C. 180, 79 S.E.2d 757 (1954).

grant an injunction—wherever he was.²⁴⁸ Justice Winborne wrote: “It is contended, however, that under the provisions of G.S. 1-493 judges of the [s]uperior [c]ourt have jurisdiction to grant injunctions and restraining orders in all civil actions and proceedings. True enough! But we are here dealing with *mandamus*, and not with injunctions or restraining orders.”²⁴⁹

In the absence of specific statutory forms of review, injunction appears to be the action used most often to test the validity of governmental action. This is possibly because of the limitations of declaratory judgment, certiorari, and mandamus, as described; or because an appellate court, on review of the granting or denial of a preliminary injunction, is entitled to review the evidence and make its own findings of fact.²⁵⁰ This offers a significant advantage to the appellant because otherwise, findings of the lower tribunal that are supported by any competent evidence are binding on appeal.²⁵¹ The traditional equity requirements—a showing of irreparable injury and inadequacy of the remedies at law—apply in injunction suits involving public acts no less than in private disputes.²⁵²

But for the unwary there are pitfalls in seeking the remedy of injunction against a public body or officer. From well-established rules about the scope of such injunctive power in North Carolina, there are sometimes substantial deviations in the supreme court decisions and sometimes even opinions in direct conflict with each other. While this may be merely frustrating to the attorney seeking to cast an action in proper form, it places the party himself at the risk of becoming yet another victim of the wrong remedy syndrome. The attorney may make what appears to be an informed judgment in this regard, only to find that when the case is decided by the supreme court, this was merely a bad guess, or, as Chief Justice Stacy tactfully described it, an “infelicitous . . . selection of remedy.”²⁵³

a. *Restraining the enforcement of an ordinance on grounds of unconstitutionality.* Through Chief Justice Clark in *Turner v. City of New Bern*, the supreme court said:

248. See N.C. GEN. STAT. § 1-493 (1969).

249. *Baker v. Varser*, 239 N.C. at 188, 79 S.E.2d at 763.

250. See note 30 & accompanying text *supra*.

251. See note 90 *supra*.

252. See *Fox v. Board of Comm'rs*, 244 N.C. 497, 94 S.E.2d 482 (1956). In cases of administrative bodies subject to the judicial review provisions of the Administrative Procedure Act or some other statute, the complainant seeking an injunction would be required to overcome the possible objection that his remedy at law is adequate. See *Elmore v. Lanier*, 270 N.C. 674, 678, 155 S.E.2d 114, 116-17 (1967). One may not enjoin a condemnation proceeding by the Highway Commission because the grounds for the injunction could be raised as a defense in the condemnation. *State Highway Comm'n v. Thornton*, 271 N.C. 227, 156 S.E.2d 248 (1967).

253. *Watkins v. Iseley*, 209 N.C. 256, 258, 183 S.E. 365, 366 (1936).

It has been so often and fully settled that an injunction will not lie against the enforcement of an ordinance that we might well have been content to rest the decision in this case entirely upon that proposition, *which has always been asserted and never denied by any decision in this state.*²⁵⁴

Justice Hoke, without any citation to North Carolina cases, stated in a concurring opinion:

I concur in the decision upholding the validity of the ordinance in question, and for reasons so well stated in the principal opinion; but I do not assent to the position that the validity of a municipal ordinance may never be tested by injunction proceedings. On the contrary, the authoritative cases are to the effect that when it appears that a law or ordinance is unconstitutional, and that an injunction against its enforcement is required for the adequate protection of property rights or the rights of persons against injuries otherwise irremediable, the writ is available in the equitable powers of the court.²⁵⁵

Within fifteen months, the supreme court in *Dixie Poster Advertising Co. v. City of Asheville*²⁵⁶ specifically adopted the rule proposed in Justice Hoke's above concurring opinion. The case involved an ordinance imposing a privilege tax on the use of billboards, which allegedly was oppressive, prohibitive, confiscatory, and, therefore, invalid. The court remanded the case for findings necessary to determine whether the plaintiff brought himself within the exception stated.

The exception that invasions of personal or property rights will afford an opportunity to use injunction to test the validity of an ordinance has been reaffirmed many times by the supreme court,²⁵⁷ although it insists upon a showing that the rights be directly and imminently affected by the ordinance in question,²⁵⁸ and that the injury be irreparable.²⁵⁹ In *Loose-Wiles Biscuit Co. v. Town of Sanford*,²⁶⁰ which involved a license tax on sellers of bakery products, the court recognized the principle of *Dixie Poster*, but said that the plaintiff had an

254. 187 N.C. 541, 549, 122 S.E. 469, 474 (1924) (emphasis added).

255. *Id.*

256. 189 N.C. 737, 128 S.E. 149 (1925).

257. Undoubtedly it is the well established general rule that the constitutionality of an Act cannot be challenged in a suit to enjoin its enforcement. . . . However, the exception to the rule is as well established as the rule itself. . . . An Act will be declared unconstitutional and its enforcement will be enjoined when it clearly appears that property or fundamental human rights are denied in violation of constitutional guarantees. (Emphasis added).

Roller v. Allen, 245 N.C. 516, 518, 96 S.E.2d 851, 854 (1957). See also *S.S. Kresge Co. v. Tomlinson*, 275 N.C. 1, 8, 165 S.E.2d 236, 240 (1969); *Orange Speedway, Inc. v. Clayton*, 247 N.C. 528, 530, 101 S.E.2d 406, 408 (1957).

258. *Nicholson v. State Educ. Assistance Auth.*, 275 N.C. 439, 447, 168 S.E.2d 401, 406 (1969); *Charles Stores Co. v. Tucker*, 263 N.C. 710, 717, 140 S.E.2d 370, 375 (1965); *Fox v. Board of Comm'rs*, 244 N.C. 497, 501, 94 S.E.2d 482, 486 (1956).

259. *Loose-Wiles Biscuit Co. v. Town of Sanford*, 200 N.C. 467, 157 S.E. 432 (1931).

260. *Id.*

adequate remedy at law—suing to recover the tax. Paying the tax with a subsequent right to recover could hardly be regarded as an irreparable injury to the business. Inasmuch as paying the tax and suing to recover was also an option in *Dixie Poster*, the only way to reconcile the two cases is to conclude that the injury possibly to be suffered in the billboard tax case was far greater than in the bakery products tax case.

Under the *Dixie Poster* rule, even criminal prosecutions may be enjoined to protect personal and property rights,²⁶¹ as well as ordinances violative of the fourteenth amendment to the United States Constitution.²⁶² These decisions were made in the fall term of 1939, some fifteen years after *Dixie Poster*. The following term, the court held that enforcement of an ordinance imposing a privilege or license tax for use of a city street by motor trucks could be restrained.²⁶³

Such was the state of the law when Justice Barnhill wrote opinions for the court in *Suddreth v. City of Charlotte*²⁶⁴ and *Jarrell v. Snow*.²⁶⁵ *Suddreth* involved an injunction to restrain enforcement of an ordinance requiring taxicab owners to provide a depot for their vehicles rather than parking them on the street. *Jarrell* was an action for a "mandatory order" to compel the Surry County Commissioners to rescind an order for surrender of the plaintiff's "Off Premises" wine license. In the former, the court's opinion said: "But the appellee insists that injunctive relief is not the proper remedy. We agree. Ordinarily, injunction does not lie to restrain the enforcement of an alleged invalid ordinance."²⁶⁶ In *Jarrell*, however, the opinion stated:

Ordinarily equity will not interfere with the enforcement of a municipal ordinance, since, if valid, plaintiff cannot complain, and, if not, its invalidity may be attacked in an action at law

Nor will equity interfere to test the validity of an allegedly unlawful or invalid ordinance enforceable only by indictment

The constitutionality of an Act or ordinance will not be determined in a suit to enjoin its enforcement. Nor will we decide the question of its unconstitutionality prior to an attempt to enforce it.²⁶⁷

The italicized statement in *Jarrell* was unequivocal, and both the *Suddreth* and *Jarrell* opinions totally ignored the exception engrafted by *Dixie Poster*. To this extent, the rule of the two cases is far out of line with opinions of the court issued long before and after them.²⁶⁸

261. *McCormick v. Proctor*, 217 N.C. 23, 6 S.E.2d 870 (1940).

262. *Clinard v. City of Winston-Salem*, 217 N.C. 119, 6 S.E.2d 867 (1940) (involving a racially segregated zoning ordinance).

263. *Kenny Co. v. Town of Brevard*, 217 N.C. 269, 7 S.E.2d 542 (1940).

264. 223 N.C. 630, 27 S.E.2d 650 (1943).

265. 225 N.C. 430, 35 S.E.2d 273 (1945).

266. 223 N.C. at 634, 27 S.E.2d at 654.

267. 225 N.C. at 432-33, 35 S.E.2d at 274 (emphasis added).

268. See cases cited in notes 256-57, 261-63 *supra*.

Jarrell v. Snow has nevertheless been cited occasionally²⁶⁹ without any direct reference to the explicit qualification approved in *Dixie Poster Advertising Co. v. City of Asheville*²⁷⁰ and the cases following it.

In view of such judicial imprecision, it is small wonder that there is, all too often, an "infelicitous"²⁷¹ choice of remedy, as Chief Justice Stacy put it. He was less polite, but more to the point, when he dissented in *Green v. Kitchen*:

If this court is not going to follow its own established precedents, or the law as it is written . . . how is the practitioner to know what he can safely advise in legal matters, or the disquietude necessarily engendered thereby to be allayed? Confidence as well as logic must buttress the [c]ourt's decisions.²⁷²

b. *Restraining allegedly ultra vires acts of a governmental body.* At least since 1906 it has been clear under the rule of *Merrimon v. Paving Co.*²⁷³ that a citizen in his own behalf and on behalf of all other taxpayers may maintain an action to enjoin the governing body of a municipal corporation from "transcending their lawful powers or violating their legal duties in any mode which will injuriously affect the taxpayers—such as making an unauthorized appropriation of the corporate funds, or an illegal or wrongful disposition of the corporate property . . ."²⁷⁴ Thus, taxpayers' suits have been used to enjoin the sale of a municipal building without complying with statutory requirements for notice and voter approval;²⁷⁵ the award of a paving contract where it was alleged that municipal authorities, as a personal favor, accepted a bid for street paving higher than that submitted by another responsible bidder;²⁷⁶ the purchase of additional land and the issuance of bonds for school purposes without legislative authority;²⁷⁷ the payment of illegal disbursements through salaries to unauthorized persons;²⁷⁸ the purchase of machinery for a town's water and sewer system without competitive bidding after notice and advertisement;²⁷⁹ and abandonment of a public park and its conversion to a parking lot, an allegedly

269. See, e.g., *D & W., Inc. v. City of Charlotte*, 268 N.C. 577, 584, 151 S.E.2d 241, 246 (1966); *Hyde County v. Bridgman*, 238 N.C. 247, 249, 77 S.E.2d 628, 630 (1953); *Horner v. Chamber of Commerce*, 231 N.C. 440, 446, 57 S.E.2d 789, 793 (1950).

270. 189 N.C. 737, 128 S.E. 149 (1925).

271. *Watkins v. Iseley*, 209 N.C. 256, 258, 183 S.E. 365, 366 (1936).

272. 229 N.C. 450, 462, 50 S.E.2d 545, 553 (1948).

273. 142 N.C. 539, 55 S.E. 366 (1906). The case of *Campbell v. First Baptist Church*, 39 N.C. App. 117, 250 S.E.2d 68 (1978), *aff'd*, 298 N.C. 476, 259 S.E.2d 558 (1979) was brought under the *Merrimon* rule. *Bagwell v. Town of Brevard*, 267 N.C. 604, 148 S.E.2d 635 (1966), on which both appellate courts relied in *Campbell*, also involved an ultra vires disposition of municipal property.

274. 142 N.C. at 545, 55 S.E. at 367.

275. *Carstarphen v. Town of Plymouth*, 180 N.C. 26, 103 S.E. 899 (1920).

276. *Murphy v. City of Greensboro*, 190 N.C. 268, 129 S.E. 614 (1925).

277. *Robertson v. Board of Educ.*, 192 N.C. 765, 135 S.E. 863 (1926).

278. *Freeman v. Commissioners of Madison*, 217 N.C. 209, 7 S.E.2d 354 (1940).

279. *Raynor v. Commissioners for the Town of Louisburg*, 220 N.C. 348, 17 S.E.2d 495 (1941).

unauthorized use.²⁸⁰ A plaintiff as a taxpayer has standing, for example, to bring an action of injunction to test the authority of a city and county to issue proposed bonds allegedly in excess of constitutional authority,²⁸¹ and to challenge the constitutionality of a contract between a county and a municipality to contribute funds for the construction of an airport without submitting the question to a vote of the people.²⁸²

In view of the line of authority both preceding and following it, one has difficulty discovering any basis for the decision in *Turner v. City of Reidsville*,²⁸³ holding in part that the taxpayers had no standing to challenge on constitutional grounds the validity of a statute enlarging the power of a city to condemn lands, because they did not own an interest in any of the land sought to be condemned. For that reason they could not restrain the city from proceeding with condemnation. There is no apparent distinction between *Turner*, where the city was purchasing property allegedly without constitutional authority, and *Robertson v. Board of Education*,²⁸⁴ where the board was restrained from purchasing additional land for schools without "legislative authority." As taxpayers, both plaintiffs should have been permitted to challenge the invalid expenditure of public funds.

C. *The Wrong Remedy Syndrome: In re Markham*²⁸⁵ As a Practical Example

In re Markham (in which the author served as co-counsel for petitioner) offers insight into the difficulties a practitioner may encounter wandering through the maze of North Carolina statutory and case law in search of an appropriate means of obtaining judicial review of an apparently invalid municipal act—in that case, a zoning ordinance. Although the supreme court has refined at least one of the options²⁸⁶ since

280. *Wishart v. City of Lumberton*, 254 N.C. 94, 118 S.E.2d 35 (1961). *Wishart* was relied on to support taxpayer standing in *Shaw v. City of Asheville*, 269 N.C. 90, 152 S.E.2d 139 (1967), a suit to enjoin performance of a cablevision contract. See also *Kornegay v. City of Raleigh*, 269 N.C. 155, 152 S.E.2d 186 (1967) (suit to enjoin performance of obligations under a cablevision license which allegedly would damage the taxpayers through repairs made necessary to streets by construction work); *Kloster v. Council of Gov'ts*, 36 N.C. App. 421, 245 S.E.2d 180 (1978) (taxpayer standing upheld in suit to contest ultra vires construction of office building by areawide planning body).

281. *Wilson v. City of High Point*, 238 N.C. 14, 76 S.E.2d 546 (1953).

282. *Yokley v. Clark*, 262 N.C. 218, 136 S.E.2d 564 (1964).

283. 224 N.C. 42, 29 S.E.2d 211 (1944).

284. 192 N.C. 765, 766, 135 S.E. 863, 864 (1926).

285. 259 N.C. 566, 131 S.E.2d 329 (1963). Discussion in the text regarding *In re Markham* which is not documented by footnotes is based on the author's personal knowledge as co-counsel for petitioner.

286. Use of declaratory judgment as a means of challenging the validity of a zoning ordinance. See *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E.2d 35 (1972).

it decided *In re Markham*, the case is analyzed here, not in an effort to reargue the matter, but to illustrate some of the problems under study.

In 1960, Markham owned land in the City of Durham that was zoned for residential use. There was evidence that the land had no value for such purposes because it was surrounded on three sides by commercial development, including a shopping center. The United States Supreme Court had ruled in *Nectow v. City of Cambridge*²⁸⁷ that a similar residential zone was unconstitutional under the fourteenth amendment because it was confiscatory.

A real estate agent, representing an undisclosed principal, approached Markham expressing a possible interest in a long-term lease. The principal wanted to construct and operate a bowling alley on the property. The offer to rent, if such it was, was subject to Markham's obtaining an amendment to the zoning ordinance permitting such use. She applied to the City Planning and Zoning Commission for such an amendment, but the Commission voted to recommend to the City Council that her request be denied. She asked for and was granted a rehearing. In the meantime, the question arose: In light of the "all fours" opinion of the United States Supreme Court in *Nectow* seemingly entitling her to the zoning change, what was petitioner's remedy under the circumstances?

Using declaratory judgment to test the constitutionality of the ordinance was a risky approach because the Supreme Court of North Carolina had not yet specified that such was an appropriate form of relief. As noted, that question was not settled until twelve years later, and even while *In re Markham* was pending, a court opinion seemed to indicate the question remained open.²⁸⁸ In any event, in view of the conditional nature of the offer to rent, there was room for doubt whether there was an "actual controversy."

Under *Spur Distributing Co. v. City of Burlington*,²⁸⁹ it would have been an idle effort to apply to the building inspector for a permit to construct a bowling alley on the property, even if petitioner had known who the prospective developer was and had been prepared to meet the developer's specifications. In *Spur*, it was held that mandamus would not lie to compel issuance of a permit to construct a building which the applicant knew would be a direct violation of the municipal zoning ordinance; one cannot compel an administrative officer to violate the law. Appeal from the building inspector's denial of a permit to the Board of Adjustment would have been fruitless because under *In re*

287. 277 U.S. 183 (1928).

288. *Eastern Carolina Tastee-Freez, Inc. v. City of Raleigh*, 256 N.C. 208, 212, 123 S.E.2d 632, 635 (1962).

289. 216 N.C. 32, 3 S.E.2d 427 (1939).

O'Neal,²⁹⁰ and cases cited therein, the power to amend a zoning ordinance may not be delegated to the Board of Adjustment.

Even if it were practical for the petitioner to build a bowling alley in violation of the ordinance and to await criminal prosecution, *State v. Roberson*²⁹¹ suggested that an attack on the constitutionality of the ordinance could not have been made in defense to the criminal prosecution.

In view of the emphatic language of the opinion in *Turner v. City of New Bern*²⁹² and the equally persuasive observations of Justice Barnhill in *Jarrell*,²⁹³ an injunction against enforcement of the ordinance apparently would not have been granted. Even under the exception in *Dixie Poster* and the line of cases following,²⁹⁴ it might have been difficult for the petitioner to show imminent or irreparable injury because she had no binding agreement with the prospective tenant.

Under the circumstances, with no means of appeal provided by law, counsel concluded that certiorari was the appropriate remedy, on the theory that in such circumstances the City Council, which would make the ultimate decision, would be acting in a quasi-judicial, rather than a legislative, capacity. There was authority from other jurisdictions to support this view.²⁹⁵ Further, in *Board of Commissioners v. Smith*,²⁹⁶ the North Carolina Supreme Court had held—in a case where the Orange County Commissioners had granted a license to sell liquor to one Smith—that a writ of certiorari from the lower court was the proper method of reviewing the County Commissioners' action. A board of county commissioners appeared no more, no less, a legislative body than a city council.

Accordingly, the petitioner "built a record" before the Planning and Zoning Commission and before the City Council. After the Council denied the requested zoning change, she obtained a writ of certiorari from the superior court. On appeal by the City of Durham, the supreme court held, in essence, that the City Council was a legislative body and that certiorari did not lie as a means of obtaining review of its

290. 243 N.C. 714, 92 S.E.2d 189 (1956).

291. 198 N.C. 70, 150 S.E. 674 (1929).

292. 187 N.C. 541, 549, 122 S.E. 469, 474 (1924).

293. 225 N.C. 430, 433, 35 S.E.2d 272, 274 (1945). See text accompanying note 267 *supra*.

294. See notes 257, 259 *supra*.

295. 10 AM. JUR. *Certiorari* § 10 n.4 (1937), citing *Jarman v. Board of Review*, 345 Ill. 248, 178 N.E. 91 (1931); 62 C.J.S. *Municipal Corporations* § 112 (1949 & Supp. 1980); *Gates v. Bloomfield*, 243 Iowa 1, 50 N.W.2d 578 (1951). The theory that a city council decision on a rezoning request, as distinguished from original enactment of the ordinance, is administrative (*i.e.* quasi-judicial) rather than legislative, was advanced in Brough, *Flexibility Without Arbitrariness in the Zoning System: Observations on North Carolina Special Exception and Zoning Amendment Cases*, 53 N.C.L. REV. 925, 946 (1975). The petitioner in *In re Markham* had unsuccessfully presented this argument to the court.

296. 110 N.C. 417, 14 S.E. 972 (1892).

decision. The court never reached the merits of the case, and at the conclusion of its opinion offered this none-too-helpful advice: "The real controversy would seem to be whether the zoning ordinance now in effect is invalid as to petitioner's property. Appropriate procedures are available for a judicial determination thereof."²⁹⁷

The court cited cases suggesting that either injunction or declaratory judgment would have been a "felicitous" choice of a remedy; but the matter had become moot. The prospective bowling alley entrepreneur had long since departed the field of battle.

D. *The Wrong Remedy Syndrome—Is There a Cure?*

From the foregoing analysis and from personal experience as described, my conclusion is that statutory changes are urgently needed to bring to the citizens and to the Bar of North Carolina one *reliable, clear, and systematic* form of judicial review of decisions and actions of local government bodies.²⁹⁸ Litigants and advocates alike have wandered too long in a procedural wilderness.

The simplest way to dispense with the uncertainty regarding the

297. *In re Markham*, 259 N.C. at 573, 131 S.E.2d at 335. The court's opinion in *In re Markham* was written by Justice Bobbitt. Four years later, Justice Bobbitt wrote: "[W]e are of the opinion, and so decide that upon the facts alleged, plaintiff may not institute and maintain an action to enjoin Guilford County from enforcement of zoning regulations on the ground that, as applied to plaintiff's property, they are unreasonable and arbitrary." *Michael v. Guilford County*, 269 N.C. 515, 520, 153 S.E.2d 106, 110 (1967). Justice Bobbitt's reasoning in *Michael* was that by proceeding before the Board of Adjustment, the landowner would have had an adequate remedy at law (certiorari). Since *Michael* seems squarely inconsistent with *In re Markham*, the law on the availability of injunction to challenge a zoning ordinance is just as confusing as it was 20 years ago when the writer first had occasion to consider the problem. In light of *In re Markham* one wonders whether counsel for plaintiff in *Michael* was equally mystified. There seems to be no practical difference between an action attacking the validity of a zoning ordinance and one to restrain its enforcement. For discussion of the use of certiorari in zoning matters, see L. JAFFE, *supra* note 25, at 169-70.

298. For discussion of the approaches of other states (e.g., New York, Illinois, California), see B. SCHWARTZ, *supra* note 23 § 188, at 538-48; L. JAFFE, *supra* note 25, at 159-64. Professor Schwartz points out that state reforms of nonstatutory review have centered on the review provisions of the Revised Model State Administrative Procedure Act, which, however, does not accomplish full reform. It leaves local agencies untouched, does not abolish the prerogative writs of mandamus, certiorari, and prohibition, and limits the review provision to review of contested cases. B. SCHWARTZ, *ADMINISTRATIVE LAW: A CASEBOOK* 636-37 (1977). As suggested in the text, these are deficiencies in the North Carolina Administrative Procedure Act as well.

An ideal system of nonstatutory review would abolish the prerogative writs, in both their common law and statutory form and provide for review of all reviewable administrative action by a simple petition for review filed in the appropriate court of general jurisdiction. There is, as an English judge notes, an "urgent need to sweep away the technical differences in the procedures for applying for the various kinds of prerogative orders of certiorari, mandamus or prohibition. . . . It is our failure to do so which chiefly bedevils the further development of a rational system of judicial review. . . ." *There is no valid reason why there should not be one remedy for review of all administrative acts.* *Id.* at 637 (emphasis added).

proper form of action would be to make appropriate amendments to the Administrative Procedure Act as follows:

An additional third paragraph of North Carolina General Statutes section 150A-1(a) (Scope and [P]olicy)²⁹⁹ would read:

Article 4 of this Chapter, governing judicial review of local agency decisions, shall apply to counties, towns, villages, other municipal corporations or political subdivisions of the State and any agencies of such subdivisions, including the legislative bodies thereof; county or city boards of education; and other local public districts, units, or bodies of any kind; and private corporations created by act of the General Assembly, but the same are specifically exempted from the remaining provisions of this Chapter.

Two additional definitions in section 150A-2 (Definitions)³⁰⁰ (with appropriate renumbering of the remaining subsections) would read:

- (2) "Local agency" means counties, cities, towns, villages, other municipal corporations or political subdivisions of the State and agencies of such subdivisions, including the legislative bodies thereof; county or city boards of education; other local public districts, units or bodies of any kind; and private corporations created by act of the General Assembly.
- (3) "Local agency decision" means any action taken by a local agency, by whatever name, which affects or determines the legal rights, duties, or privileges of any person, firm, corporation, or group of persons of common interest.

The following change should be made in section 150A-2(6):³⁰¹

"Person aggrieved" means any person, firm, corporation, or group of persons of common interest who are directly or indirectly affected substantially in their person, property, or public office or employment by an agency *or local agency* decision.

North Carolina General Statutes section 150A-43³⁰² would be amended to read as follows:

Any person who is aggrieved by a final agency decision in a contested case *or by a local agency decision*, and who has exhausted all administrative remedies made available to him by statute or agency *or local agency rule*, is entitled to judicial review of such decision under this Article, unless adequate procedure for judicial review is provided by some other statute, in which case the review shall be under such other statute. Nothing in this Chapter shall prevent any person from invoking any judicial remedy available to him under the law to test the validity of *any action* not made reviewable under this Article.

The addition of the words "or local agency" after the word "agency"

299. N.C. GEN. STAT. § 150A-1(a) (1978).

300. *Id.* § 150A-2.

301. *Id.* § 150A-2(6).

302. *Id.* § 150A-43.

in section 150A-44³⁰³ and sections 150A-46 through 150A-52,³⁰⁴ would be required to conform these sections to the changes described above.

Section 150A-45³⁰⁵ would be amended as follows:

In order to obtain judicial review of a final agency decision under this Chapter, the person seeking review must file a petition in the Superior Court of Wake County; except that where the original determination in the matter was made by a local agency or local board and appealed to the State board, the petition may be filed in the superior court of the county where the original determination was made. *In order to obtain judicial review of a local agency decision under this Chapter, the person seeking review must file a petition in the superior court of the county where the decision was made.* Such petition may be filed at any time after final decision

The proposed statutory amendments take into account the fact that most local governmental bodies and the decisionmaking processes they employ do not lend themselves to formal rulemaking and administrative hearing procedures. Thus, they would be exempt from Articles 2³⁰⁶ and 3³⁰⁷ of the Act, just as the University of North Carolina is exempt.³⁰⁸

It is also recognized that local agency actions of the kind likely to be judicially challenged are not often taken upon a formal record—for example, proceedings leading to an action of a city council. Under section 150A-50 as it presently appears, the judge “in his discretion may hear all or part of the matter de novo” in those cases where “no record was made of the administrative proceeding or the record is inadequate.”³⁰⁹ In view of section 150A-50, if the petition contained sufficient allegations to suggest that the complaining person had stated a cause of action entitling him to the relief sought, the absence of a formal record would present no problem to a judge who was persuaded that justice required a trial de novo. Issues of standing to sue would be resolved by reference to the statutory requirement of an “aggrieved” person.³¹⁰ The statutory definition itself limits this category to those “directly or indirectly affected substantially” and one can assume that frivolous or trivial claims would be summarily dismissed by the court.

Section 150A-46 reads: “The petition shall explicitly state what ex-

303. *Id.* § 150A-44.

304. *Id.* §§ 150A-46 to -52.

305. *Id.* § 150A-45.

306. *Id.* §§ 150A-9 to -17 (rulemaking).

307. *Id.* §§ 150A-23 to -37 (administrative hearings).

308. *Id.* § 150A-1(a).

309. *Id.* § 150A-50.

310. *Id.* § 150A-43. See text accompanying note 301 *supra*. See also *Orange County v. North Carolina Dep't of Transp.*, 46 N.C. App. 350, 360-61, 265 S.E.2d 890 (1980), for a discussion of the meaning of “aggrieved person” under the Administrative Procedure Act.

ceptions are taken to the decision or procedure of the agency and what relief the petitioner seeks.”³¹¹ The relief sought under the procedure proposed here would take the form of relief presently sought by declaratory judgment, certiorari, mandamus, mandatory injunction, or injunction, or some combination thereof, but no longer would the drafter of the complainant’s pleadings be required to indulge in sheer guesswork as to whether the label on his pleadings and his theory of the case were apt.³¹² Prolonged controversies over whether certiorari or mandamus should lie, or whether injunction is available or not, would be at an end. The complaining party could achieve what justice demands and what he has too often in this state been denied—a prompt adjudication of his claim on its merits.

V. SCOPE OF REVIEW OF ADMINISTRATIVE ACTION

Criticisms have often been made of the phenomenon which permits an administrative body to serve in the triple capacity of complainant, prosecutor, and judge As a result of this combination of roles, its final adjudication often lacks that stamp of impartiality and of disinterested justice which alone can give it weight and authority. This anomaly in procedure makes it vitally necessary that in reviewing administrative decisions courts zealously examine the record with a view to protecting the fundamental rights of the parties, lest the rule against arbitrariness and oppressiveness become a mere shibboleth. An appeal being denied, a review by certiorari or other prerogative writ must not be permitted to degenerate into a mock ceremony. The least that the courts can do is to hold high the torch of “fair play” which the highest court of our land has made the guiding light to administrative justice. *Morgan v. United States*, 304 U.S. 1, 58 S. Ct. 999, 82 L. Ed. 1129.

Ervin, J. in *Russ v. Board of Education*,³¹³ quoting *State v. Board of Education*.³¹⁴

The discussion in Parts II and III above forms the basis for the conclusion that the North Carolina Supreme Court should frame a “rule of reason”³¹⁵ that would significantly affect the common law *scope of judi-*

311. N.C. GEN. STAT. § 150A-46 (1978).

312. Justice Seawell’s words (in another context) are of significance here.

Doctrinal distinctions may not be pressed too far. To be helpful in administration and to lend themselves in aid of justice, they must be kept close to the realities. *After all, it is the factual situation out of which the legal consequences flow, not the formal aspect of the technical label which we conveniently apply.*

Butler v. Carolina Power & Light Co., 218 N.C. 116, 121, 10 S.E.2d 603, 606 (1940) (emphasis added).

313. 232 N.C. 128, 131-32, 59 S.E.2d 589, 592 (1950).

314. 213 Minn. 550, 7 N.W.2d 544 (1942).

315. See text accompanying notes 133-138 *supra*.

cial review on questions of law. Such a rule would permit the courts greater flexibility in deciding challenges to discretionary actions by administrative bodies—including the governing bodies of counties, cities, towns, and other agencies not subject to the provisions of judicial review in the Administrative Procedure Act.³¹⁶

Part IV included the recommendation that by statute such local agencies be brought under Article 4 of the Administrative Procedure Act (Judicial Review).³¹⁷

If the “rule of reason” recommendation should take effect, consistency would require the amendment of section 150A-51³¹⁸ as follows:

§ 150A-51. Scope of review; power of court in disposing of case.—The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the agency findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedure; or
- (4) Affected by other error of law; or
- (5) Unsupported by substantial evidence admissible under G.S. 150A-29(a) or G.S. 150A-30 in view of the entire record as submitted; or
- (6) *Unreasonable and are substantially injurious to the public good, or constitute a deprivation of the legal rights of any person; or*
- (7) *Made in bad faith.*

If both recommendations were accepted, section 150A-51 should be further amended as follows:

§ 150A-51. Scope of review; power of court in disposing of case.—The court may affirm the decision of the agency *or local agency* or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the agency *or local agency* findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency *or local agency*; or
- (3) Made upon unlawful procedure; or
- (4) Affected by other error of law; or
- (5) Unsupported by substantial evidence admissible under G.S.

316. See text accompanying notes 188-90, 192-93 *supra*.

317. N.C. GEN. STAT. § 150A-43 to -52 (1978).

318. *Id.* § 150A-51.

150A-29(a) or G.S. 150A-30 in view of the entire record as submitted; or

- (6) Unreasonable and are substantially injurious to the public good, or constitute a deprivation of the legal rights of any person; or
- (7) Made in bad faith.

If the court reverses or modifies the decision of the agency, the judge shall set out in writing, which writing shall become a part of the record, the reasons for such reversal or modification.

Part V is primarily concerned, however, with the *scope of judicial review of facts*³¹⁹ in North Carolina cases involving challenges to administrative actions.

More than 100 years ago, Justice Rodman commented on the code provision³²⁰ requiring a judge sitting without a jury to make findings of facts and conclusions of law and to state them separately: "It is difficult to conceive that the law of North Carolina ever intended to confer on a single judge the vast and dangerous power of deciding all questions of fact so arising without responsibility and liability to review or correction, even in cases of plain and evident mistake."³²¹

Nevertheless, a court reviewing the decision of a lower court sitting without a jury is bound by the findings of fact of the lower court if there is any evidence to support them, unless the reviewing court is considering appeal from a ruling on a preliminary injunction.³²² Otherwise, the appellate court is confined to consideration of errors of law.³²³ If no findings of fact are made, the case should be remanded because the court cannot perform its appellate function in such a situation.³²⁴ If there is no evidence to support the findings below, the deci-

319. This question of scope of review is of crucial importance. Upon it hinges both the efficiency of the administrative process and the judicial ability to protect individuals against agency abuses of power.

If the scope of review is too broad, agencies are turned into little more than media for the transmission of cases to the courts. That would destroy the values of agencies created to secure the benefit of special knowledge acquired through continuous administration in complicated fields. At the same time, the scope of judicial inquiry must not be so restricted that it prevents full inquiry into the question of legality. If that question cannot be properly explored by the judge the right to review becomes meaningless.

B. SCHWARTZ, *supra* note 23 § 204, at 579 (citations omitted).

320. This section is now included in Rules of Civil Procedure, Rule 52(a)(1), N.C. GEN. STAT. § 1A-1 (1969).

321. *Foushee v. Pattershall*, 67 N.C. 453, 455 (1872).

322. *See* note 90 *supra*.

323. *Id.* *See* B. SCHWARTZ, *supra* note 23 § 209, at 589, indicating that in early cases reviewing agency action, the United States Supreme Court accepted administrative findings of fact as conclusive.

324. *See* *Morehead v. Harris*, 255 N.C. 130, 120 S.E.2d 425 (1961); *Jamison v. City of Charlotte*, 239 N.C. 423, 79 S.E.2d 797 (1954); *Jones v. Murdock*, 20 N.C. App. 746, 203 S.E.2d 102 (1974).

sion will be set aside.³²⁵ These general principles apply when the administrative action involved is that of a local governing body not traditionally thought of as an administrative body, and where the validity of such action is raised in a court in the first instance (for example, attack on a municipal ordinance by declaratory judgment).

In a true administrative law setting where an administrative body has made findings of fact and has stated conclusions in reaching its decision, it may generally be said that a court's *scope of review of the facts found* may range from scrutiny of the record (1) to determine whether there is "any competent evidence" to support the facts found, in which case the court is bound by the administrative findings; (2) to a determination whether there is "substantial evidence in the record as a whole" to support the administrative findings, in which case the findings are also conclusive on the court; and (3) to a determination that the administrative findings are "clearly erroneous," in which case the court will reverse or modify the decision, notwithstanding that the administrative findings of fact may have support in the evidence.³²⁶ The

325. See cases collected in 1 STRONG'S N.C. INDEX *Appeal and Error* § 57.5 (3d ed. 1976). "Findings not so supported [by evidence] are arbitrary and unauthorized." B. SCHWARTZ, *supra* note 23 § 209, at 591, citing REPORT OF THE ATTORNEY GENERAL'S COMMITTEE 88 (1941). When it was contended that an enforcement order of the Interstate Commerce Commission "was rendered without any evidence whatever to support it, the consideration of such a question involves not an issue of fact, but one of law which it is the duty of the courts to examine and decide." *Florida East Coast Ry. v. United States*, 234 U.S. 167, 185 (1914).

326. The range referred to, from "narrow" to "broad" review, and the court's powers under the various circumstances described, are well recognized in federal and state administrative law although there are differences of opinion as to whether the "clearly erroneous" standard is distinct from the "substantial evidence—whole record" test. See generally B. SCHWARTZ, *supra* note 23 § 210, at 593-95, § 213, at 599-600, § 214, at 601-03; 2 F. COOPER, *supra* note 12, at 707-10, 725-27; K. DAVIS, *ADMINISTRATIVE LAW, CASES—TEXT—PROBLEMS* 79-80 (6th ed. 1977); S. BREYER & R. STEWART, *supra* note 21, at 184-85.

For the three standards generally employed in North Carolina judicial review of the sufficiency of evidence supporting administrative decisions, see the discussion in *In re Rogers*, 297 N.C. 48, 60, 253 S.E.2d 912, 920 (1979).

Following the decision of the United States Supreme Court in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), there has been great confusion in federal court opinions and much debate among commentators about the interrelationship under the Federal Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 551-59, 701-06 (1976)), between the "arbitrary and capricious" standard and the "clearly erroneous" standard for scope of review of informal rulemaking, and where they fit into the spectrum with relation to the statutory "substantial evidence" standard for determinations made on a record. S. BREYER & R. STEWART, *supra* note 21, at 195-96, 282 n.77; K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* §§ 29.00, 29.01 (1976 and Supp. 1980). No effort is made here to enter, let alone resolve this controversy because, mercifully, there is no North Carolina counterpart to this particular seamless web.

The statement in the text is the writer's preference as the most logical progression of possible judicial options in "fact" review, taking into account his view, described in text, that arbitrary and capricious (i.e. unreasonable) conduct is unlawful per se.

The "arbitrary and capricious" standard is one distinct from that involved in review of the facts, and of the evidence on which the administrative agency based its findings of fact, to determine whether the evidence supports the findings. In all events a reviewing court should search the

Revised Model State Administrative Procedure Act adopts the "clearly erroneous" standard.³²⁷ Complicating any analysis of scope of review is the determination of the appropriate role of the court where there are involved "mixed questions of fact and law."³²⁸

Where there is no statutory provision for scope of review of administrative action, the "any competent evidence" rule applies in North Carolina.³²⁹ The Administrative Procedure Act set out above specifically adopts the "substantial evidence" or "whole record" standard.³³⁰ Some agencies specifically exempted from the Administrative Procedure Act are subject to scope of review provisions in their organic statutes.³³¹

record to discover whether the administrative conduct was arbitrary or whether there were other infirmities in the decision as a matter of law (unconstitutional, violative of statute, irregular procedure, ultra vires, etc.). See Kaufman, *supra* note 162, at 208. All are "salient aspects" of the court's review of agency decisions. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850 (D.C. Cir. 1970) (Leventhal, J.), *cert. denied*, 403 U.S. 923 (1971). The *Greater Boston* opinion is said to have initiated, at least in the United States Court of Appeals for the District of Columbia, a new era of "hard look" and reasoned decisionmaking in review of administrative action. See W. GELLHORN, C. BYSE, & P. STRAUSS, *supra* note 236, at 343-44; S. BREYER & R. STEWART, *supra* note 21, at 291-92, 303-06.

The Leventhal opinion in *Greater Boston* is one of classic dimensions in its field. It is recommended reading for all members of the North Carolina judiciary who continue to cite and to follow *Burton v. City of Reidsville*. See also Judge Leventhal's concurring opinion in *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1 (D.C. Cir. 1976), *cert. denied*, 426 U.S. 941 (1976).

327. Section 15(g) of the Revised Model State Administrative Procedure Act (1961) provides: The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are . . .

(5) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record . . .

B. SCHWARTZ, *supra* note 23, App. B, at 688.

328. The so-called law-fact distinction, and judicial review of "constitutional" and "jurisdictional" facts are subjects beyond the scope of this article. This omission is certainly not attributable to a lack of judicial or scholarly comment upon these subjects; the literature abounds with such discussions. The writer believes these matters to be of relatively little significance in North Carolina administrative law. For discussion of jurisdictional fact and constitutional fact in North Carolina, see Hanft, *supra* note 9, at 677-80, and for discussion of the law-fact distinction, see Daye, *supra* note 12, at 915.

329. *Maines v. City of Greensboro*, 300 N.C. 126, 133, 265 S.E.2d 155 (1980); *Eakley v. City of Raleigh*, 252 N.C. 683, 687, 114 S.E.2d 777, 781 (1960). Cf. *In re Rogers*, 297 N.C. 48, 253 S.E.2d 912 (1979).

330. N.C. GEN. STAT. § 150A-51(5) (1978). See text accompanying note 317 *supra*.

331. *E.g.*, *Employment Security Commission* (N.C. GEN. STAT. § 96-15(i) (Supp. 1979) ("[T]he findings of the Commission as to the facts, if there is evidence to support it [*sic*], and in the absence of fraud, shall be conclusive, and the jurisdiction of [the] court shall be confined to questions of law."); *Department of Corrections*, (N.C. GEN. STAT. § 148-113 (1978)) (The court's review is limited to a determination of whether there was a substantial basis to support the action or ruling of the Secretary, and whether there was violation of an inmate's federal or state constitutional rights).

Although a "standard for review" is not set out therein, the Workers' Compensation Act, N.C. GEN. STAT. § 97-86 (1979) provides: "The award of the Industrial Commission . . . shall be con-

Many organic statutes covering agencies, activities, or programs that are not excluded from the Administrative Procedure Act include scope of review provisions, and if the scope is broader than that afforded by the Act, the organic statute displaces the Act's scope of review provision.³³² On the other hand, if the scope of review provision of the Act is broader than that in an organic statute, the scope in the organic statute is not deemed an "adequate procedure for judicial review" and the "substantial evidence" or "whole record" test applies.³³³

A. *Campbell v. First Baptist Church (Revisited)*

The deficiencies of the "any competent evidence" standard in an administrative law setting are demonstrable by further reference to *Campbell*. The trial court found as a fact that the "agreed value of the land conveyed to the Church was reasonable" and was based on "the reports of apparently competent appraisers." There was "competent" evidence to support a thirty-five cent per square foot value—the direct testimony of the appraiser (mistaken though he was). Appellate courts reviewing such a land valuation issue might consider themselves under no duty to "zealously examine the record," and theoretically could let the transaction stand because they are "bound" by the trial court's finding. Applying the "whole record" test, however, they could easily reach the opposite result because the entire record would reveal the deficiencies in the appraiser's judgment.

The fact that such disparate consequences could ensue illustrates the importance of the statutory changes proposed here. These changes would bring actions of all local government entities under a "substantial evidence" standard of judicial review.

Under the 1970 North Carolina Constitution, the General Assembly has the authority³³⁴ to institute such a reform, and our changing society would seem to demand it. Our law of at least 100 years standing³³⁵ is that an appellate court is bound by the trial court's findings of fact if those facts are supported by any competent evidence. Other than the

clusive and binding as to all questions of fact" This has become, in some respects, a meaningless provision. If the reviewing court does not agree with the Industrial Commission's award, apparently it simply labels the question, usually whether an injury "arose out of and in the course of" employment, a mixed question of law and fact, and asserts its judicial prerogative to find errors in the determination of fact that was supposedly binding. *See, e.g., Perry v. Bakeries Co.*, 262 N.C. 272, 136 S.E.2d 643 (1964); *Vause v. Equipment Co.*, 233 N.C. 88, 63 S.E.2d 173 (1951); *Perley v. Paving Co.*, 228 N.C. 479, 46 S.E.2d 298 (1948).

332. *Blackwell v. Granville County Dep't of Social Servs.*, 39 N.C. App. 437, 439, 250 S.E.2d 695, 697 (1979).

333. *Accord, Jarrell v. Board of Adjustment*, 258 N.C. 476, 128 S.E.2d 879 (1963). *See discussion accompanying notes 339-48 infra.*

334. N.C. CONST. of 1970, art. IV, § 12.

335. *Simonton v. Chipley*, 64 N.C. 152 (1870); *Branton v. O'Briant*, 93 N.C. 99, 103 (1885).

presumed "expertise" of an administrative body or agency—a presumption in which we should not be as eager to indulge if the case involves local governmental bodies as we are, say, if the case involves the Utilities Commission³³⁶—no rational basis exists for continued application of a standard developed in ordinary civil litigation to the review of a governmental decision. The "any competent evidence" rule developed in a constitutional³³⁷ and case law context in which no one even had good reason to know what an "administrative agency" was, or to foresee that a host of public officers would emerge who know no practical limitation on their powers but those a court may choose to impose.

B. *The Sleeping Giant Awakens*

Supreme court decisions arising under the statutory scope of review provisions reflect increasingly liberal interpretations of the "substantial evidence" standard. There is room for optimism that lower courts, in time, will be encouraged to fulfill their duty to subject the record before them to the thorough scrutiny that alone can make possible "fair play" and "administrative justice."³³⁸

In *Jarrell v. Board of Adjustment*,³³⁹ the supreme court markedly expanded the standard of statutory scope of review now found in North Carolina General Statutes section 150A-51.³⁴⁰ In a display of judicial insight and flexibility unusual in a court that had historically looked with jaundiced eye upon litigation as a means of curbing bureaucratic

336. While it is doubtless true that in many areas involving a high decree of technical competence in dealing with extremely complicated factual situations, conscientious agency officials develop an expertise which deserves (and receives) the highest respect of the courts, yet there are other areas—and this is probably more true in state than in federal agencies—where the problem of ascertaining facts is little more than that of resolving conflicts in testimony concerning an easily understood factual situation, and where the true facts could be ascertained more accurately by experienced judges than by administrative officials without the benefit of legal education or of the professional discipline that strengthens and fortifies the bench and bar.

2 F. COOPER, *supra* note 12, at 723-24. It is well recognized that deference to administrative "expertise" is a major justification for a narrow scope of judicial review just as it is for administrative, rather than judicial, fact-finding, as Cooper suggests. See B. SCHWARTZ, *supra* note 23 § 204, at 579-80, § 208, at 588; L. JAFFE, *supra* note 25, at 576-85. "It is, as a federal judge once put it . . . much easier to abdicate than analyze. Agency expertise is not enough to justify abdication of review power over facts." B. SCHWARTZ, *supra* note 23 § 209, at 589. "Expertness has been oversold in this country." Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436, 471 (1954). The author calls for a re-examination of the "administrative expertise" slogan and for greater reliance on the judiciary's "expertise" in synthesis and in social perspectives. *Id.* at 471-75.

337. N.C. CONST. of 1868, art. IV, § 10.

338. *Russ v. Board of Educ.*, 232 N.C. 128, 132, 59 S.E.2d 589, 592 (1950). See text accompanying note 313 *supra*.

339. 258 N.C. 476, 128 S.E.2d 879 (1963).

340. N.C. GEN. STAT. § 150A-51 (1978).

excesses, the *Jarrell* opinion significantly advanced the obvious legislative purpose—to rescue the citizenry from the thrall of discretionary administrative decisions that were supported only by scintillae of evidence, but nonetheless had been permitted to stand.

In order to rent her house as a two-family residence, Mrs. Jarrell applied for a permit to make certain alterations and to add a bathroom to her house in High Point. She claimed that it had been rented as a two-family residence almost continuously for 25 years. The building inspector granted the permit, but upon receipt of affidavits contending that the house had been occupied as a one-family residence in recent years, he withdrew his approval on the ground that when a non-conforming use has been discontinued, it may not be re-established. He contended, therefore, that the permit could not be issued under the zoning ordinance. Mrs. Jarrell appealed to the Board of Adjustment which, both on the basis of affidavits containing hearsay and on the basis of unsworn statements made at the hearing, found that at the time of the enactment of the zoning ordinance the building was used as a one-family home. The Board concluded that it was therefore without power to grant a non-conforming use. The superior court, reviewing the record, found the evidence “sufficient to support”³⁴¹ the Board’s findings, and sustained them. Even though the Board could have found the facts either way because of the conflicting evidence, the court reasoned that the Board’s findings were not arbitrary, oppressive, or abusive of its discretion, and therefore were conclusive.

The supreme court ruled that the organic statute providing for review of a board of adjustment decision “by proceedings in the nature of certiorari”³⁴² was an “adequate procedure for judicial review” only if the organic statute provided a scope of review equal to that required by the judicial review statute.³⁴³ (Both section 150A-43 of the Administrative Procedure Act³⁴⁴ and the corresponding provision of the predecessor statute considered in *Jarrell* indicate that judicial review may be afforded thereunder unless the review procedure provided in an organic statute is adequate.) Because the findings of fact in *Jarrell* were based on hearsay in affidavits and unsworn testimony—and thus on evidence neither competent nor substantial—the court vacated the superior court judgment and remanded the case for “a determination, on competent and substantial evidence, of petitioner’s asserted rights.”³⁴⁵

Under *Jarrell*, it appears that the scope of review applicable in any case where judicial review is provided by statute must be *at least* as

341. 258 N.C. 476, 479, 128 S.E.2d 879, 882 (1963).

342. N.C. GEN. STAT. § 160-178 (1964), *repealed*, 1971 N.C. Sess. Laws, ch. 698, § 2.

343. *Id.* § 150A-51(5) (1978) (then § 143-315).

344. *Id.* § 150A-43 (formerly § 143-307).

345. 258 N.C. 476, 481, 128 S.E.2d 879, 884 (1963).

extensive as that now provided by section 150A-51, and on review of facts, the decision is subject to the reach of the courts if substantial rights have been prejudiced because agency findings, inferences, conclusions or decisions are "[u]nsupported by substantial evidence admissible under G.S. 150A-29(a)³⁴⁶ or G.S. 150A-30³⁴⁷ in view of the entire record as submitted."³⁴⁸

In *Humble Oil and Refining Co. v. Board of Aldermen*,³⁴⁹ the court, interpreting the same statute as that considered in *Jarrell*, extended the principle of *Jarrell* to the governing boards of municipalities when acting in a quasi-judicial capacity.

Recently the court has taken the rule of *Jarrell* and *Humble* one step farther. In *Coastal Ready-Mix Concrete Co., Inc. v. Board of Commissioners*,³⁵⁰ the court stated that even though the decision of the Nags Head Commissioners "or any town board is exempted from the scope of review posited by the North Carolina Administrative Procedure Act" by virtue of the exemption for local government bodies found in Section 150A-2(1),³⁵¹

[W]e cannot believe that our legislature intended that persons subject to [a] zoning decision of a town board would be denied judicial review of the standard and scope we have come to expect under the North Carolina APA. Such a position would ignore a very long tradition in this State of significant judicial review of town zoning ordinances . . . and would contravene the sound logic of *Jarrell* . . . and *Humble Oil and Refining*. . . .

Thus, while the specific review provision of the North Carolina APA is not directly applicable, the principles that provision embodies are highly pertinent. Indeed, even *Humble Oil & Refining*, . . . the case which extended the then effective administrative review statutes to municipal zoning decisions, did so not by express reference to statutory provisions but *by derivation of certain general principles of judicial review*.³⁵²

The court proceeded to hold that both the superior court and the court of appeals had "erred in failing to apply appropriate judicial re-

346. N.C. GEN. STAT. § 150A-29(a) (1978) provides that "irrelevant, immaterial, and unduly repetitious evidence" is to be excluded. For a discussion of the rules of evidence in adjudications under the North Carolina Administrative Procedure Act, see Daye, *supra* note 12, at 879-83, 916-21.

347. N.C. GEN. STAT. § 150A-30 (1978) provides that "[o]fficial notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the agency."

348. *Id.* § 150A-51(5).

349. 284 N.C. 458, 202 S.E.2d 129 (1974). See Note, *Administrative Law—Due Process Standards for Quasi-Judicial Proceedings of Municipal and County Agencies*, 54 N.C.L. REV. 83 (1975).

350. 299 N.C. 620, 265 S.E.2d 379 (1980).

351. N.C. GEN. STAT. § 150A-2(1) (1978). See text accompanying note 193 *supra*.

352. 299 N.C. 620, 624-25, 265 S.E.2d 379, 382 (1980) (emphasis added).

view standards,”³⁵³ among other reasons because they failed to insure in this type of case that “decisions of town boards are supported by competent, material and substantial evidence in the whole record Both the superior court and the appellate courts are bound by *all* the standards of review noted above.”³⁵⁴

It appears that in *Coastal Ready-Mix Concrete* the court imposed a common law standard of review in local zoning cases that goes even beyond the Administrative Procedure Act standard, because the words “competent” and “material” do not appear in North Carolina General Statutes section 150A-51(5).

The landmark case interpreting the “substantial evidence” or “whole record” standard in North Carolina is *Thompson v. Wake County Board of Education*.³⁵⁵ Thompson, a career teacher, was dismissed by the school board for neglect of duty. Supporting the board’s conclusion that he had allowed his students to fight with each other (which constituted neglect of duty) was the testimony of a witness who saw two students fighting with each other: “Mr. Thompson saw the fight. He did not stop it. Mike and Eddie were fighting and Mr. Thompson called to Mike and as he turned around he said ‘beat the hell out of Eddie’ and Eddie hit and Mike turned around and bashed the mess out of Eddie.”³⁵⁶ Here is a classic situation where even a scintilla of evidence (“any competent evidence”)—testimony that the teacher encouraged students to “beat the hell” out of each other—might be found by an inattentive or lackadaisical court to support an administrative determination of neglect of duty.³⁵⁷

On the other hand, Thompson testified that he had said: “This is supposedly a class of exceptional students. *If you cannot act like gentlemen*—we are animals of the highest calibre—if you can’t settle your differences by using your brains, *just beat the hell out of each other*.”³⁵⁸ This, of course, casts the remark in an entirely different light. Thompson testified that after he made that remark, the boys exchanged no more blows. Also in the record was the testimony of an experienced

353. *Id.* at 626, 265 S.E.2d at 383.

354. *Id.* at 627, 265 S.E.2d at 383.

355. 292 N.C. 406, 233 S.E.2d 538 (1977).

356. *Id.* at 411, 233 S.E.2d at 541-42.

357. It is not often that an astute administrator is unable to find somewhere in the evidence a bit of testimony on which to hang a finding, however greatly the evidence may preponderate against it. In a workmen’s compensation case, for instance, if half a dozen physicians of high standing, supported by X-ray and laboratory findings, testify positively that a worker is not afflicted with an occupational disease, and a single physician of shady reputation and no scientific attainment ventures the opinion that the man does have such disease, the Commission’s finding of the existence of the disease cannot be disturbed; yet we all know it ought to be reversed.

Hoyt, *supra* note 5, at 6-7.

358. 292 N.C. 406, 412, 233 S.E.2d 538, 542 (1977) (emphasis added).

teacher who stated that from her observation Thompson had maintained good discipline.

The reviewing court, the Superior Court of Wake County, reversed the board's order and ordered that Thompson be reinstated as a career teacher, with back pay. The court of appeals reversed, reinstating the dismissal order.³⁵⁹

The court of appeals reasoned³⁶⁰ that the applicable rules of evidence were those set forth in a statute governing teacher dismissal proceedings.³⁶¹ Because the local board had adopted no rules under that statute, those adopted by the State Board of Education governed, and those rules permitted the local board in its discretion to admit "any evidence and . . . give probative effect to evidence that is of a kind commonly relied on by reasonably prudent men in the conduct of serious affairs."³⁶² In its discretion, the board was authorized to exclude "incompetent, irrelevant, immaterial and unduly repetitious evidence."³⁶³

The court of appeals examined the board resolution and the lower court order in light of the court of appeals' conclusion that the reviewing court could not exclude testimony from its consideration merely because it would otherwise violate a rule of evidence. Thus, the reviewing court was not limited to "substantial evidence in the record as a whole which is competent and material."³⁶⁴ On the issue of neglect of duty arising from the fighting incident described (which the lower court had found was a conclusion not supported by a finding based on competent evidence), the court of appeals reviewed all the testimony and concluded that there was competent evidence in the record viewed in its entirety to *support* the conclusion of law as to neglect of duty.³⁶⁵

The supreme court held that a reviewing court under the whole record rule must do more than search for evidence *supporting* the administrative determination. "[A] trial judge reviewing the school board decision must not only consider the *complete* testimony of *all* the witnesses," he must also consider the panel report of the Professional Review Committee, which in the Thompson case had absolved the teacher of all the charges against him, including the neglect of duty charge.³⁶⁶

Relying on the decision of the United States Supreme Court in *Uni-*

359. *Thompson v. Wake County Bd. of Educ.*, 31 N.C. App. 401, 230 S.E.2d 164 (1976).

360. *Id.* at 416, 230 S.E.2d at 172-73 (emphasis added).

361. N.C. GEN. STAT. § 115-142(j)(2) (1978).

362. 31 N.C. App. 401, 416, 230 S.E.2d 164, 173 (1976).

363. *Id.*

364. *Id.*

365. *Id.* at 425-26, 230 S.E.2d at 178.

366. *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 414, 233 S.E.2d 538, 543 (1977).

versal Camera Corp. v. NLRB,³⁶⁷ the court said:

The "whole record" test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*, *Universal Camera Corp.* On the other hand, the "whole record" rule requires the court, in determining the substantiality of evidence supporting the Board's decision, to take into account whatever in the record fairly detracts from the weight of the Board's evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the Board's result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn. *Universal Camera Corp.*³⁶⁸

Reversing the court of appeals, the supreme court upheld the superior court's judgment for the plaintiff Thompson, and ordered reinstatement and an award of back pay.

The supreme court concluded:

When the *whole record* is viewed, the evidence shows that Mr. Thompson ordinarily maintained good order and discipline at school activities. One may disagree strenuously with the methods he employed but on the whole they were designed to and did result in good order and effective discipline. All the evidence indicates that only one fighting outbreak occurred in Mr. Thompson's classroom during the 1973-74 school year. According to Mr. Thompson's testimony, he tried by his words to end the fight and was successful. Neither of the two students who testified directly contradict Mr. Thompson's *complete* statement on the occasion of the fight.

If a career teacher's ability to maintain good order and discipline at school is to be judged solely by *one* incident, the evidence of that incident should be clear. We hold the evidence that Mr. Thompson neglected his duty to maintain order and discipline was insubstantial in view of the entire record. While the [c]ourt of [a]ppeals laid down the correct standard of judicial review, that court failed to apply it, as Judge Clark in his dissent correctly noted.³⁶⁹

Very recently the court reached a similar result in a case³⁷⁰ involving revocation by the Department of Motor Vehicles of an epileptic's driver's license, holding that the entire record considered as a whole did not support the conclusion of the Department's Medical Review Board that the petitioner was afflicted with an uncontrollable seizure disorder which prevented him from exercising reasonable and ordinary control over a motor vehicle. The only evidence supporting the ad-

367. 340 U.S. 474 (1951).

368. *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977).

369. *Id.* at 415, 233 S.E.2d at 544.

370. *Chesnutt v. Peters*, 300 N.C. 359, 266 S.E.2d 623 (1980).

ministrative findings was that he had experienced a seizure once or twice a year and the seizures, with one exception, had occurred during his sleep. On this one occasion, petitioner had "blacked out" while driving and the car ran off the road. All other evidence showed that his seizures were controlled by medication, that he was able to lead a normal life, and that he was able to exercise reasonable and ordinary control over his automobile while driving. The court ruled that the Department had no power to deny or withhold the license.

In a case of extreme importance to applicants for admission to the North Carolina Bar, in the 1979 case of *In re Rogers*,³⁷¹ the supreme court held that the "whole record" test rather than the "any competent evidence" test is the proper scope of review standard for findings of the North Carolina Board of Law Examiners. Moreover, when a decision of the Board rests on specific contested facts, the Board must resolve the factual dispute by making specific findings. A mere recitation of the testimony heard by the Board will not suffice. Presumably the Board, in light of *Rogers*, has amended, or will amend, its apparent practice of informing applicants to whom it has denied admission to the examination, or admission by comity, merely that they have failed to satisfy the Board's requirements in some particular without ever revealing the facts supporting such a conclusion.³⁷²

Indeed, one of the salutary effects of the recent activist trend of the supreme court may be to force administrative bodies to improve their own procedures in order to assure fundamental fairness. That is no less worthy a goal, and no less useful a result of the recent cases, than affording supreme court guidance to the lower courts who may not yet fully recognize the broad scope of their power to review the factual record in many situations.

Such a trend, if it continues, and if it is accompanied by legislative action to extend the "substantial evidence" standard to administrative determinations at all levels of the bureaucracy in North Carolina, would mark a significant step toward imposing on the judiciary major responsibility for keeping "the government off the backs of the people."³⁷³ At such a step Chief Justice Barnhill would undoubtedly recoil, were he with us, but it has been said that there is nothing more powerful than an idea whose time has come.

371. 297 N.C. 48, 253 S.E.2d 912 (1979).

372. See, e.g., Record at 11, 12, *Markham v. Swails*, 29 N.C. App. 205, 223 S.E.2d 920 (1976), *pet. for disc. rev. denied*, 290 N.C. 309, 225 S.E.2d 829, *cert. denied*, 290 N.C. 551, 226 S.E.2d 510, *cert. denied*, 429 U.S. 940 (1976).

373. W. DOUGLAS, *THE COURT YEARS 1939-1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS* ix (1980).

VI. CONCLUSION

Enactment of the Administrative Procedure Act in 1974, and recent interpretations of its judicial review provisions by the Supreme Court of North Carolina, have brought us a new (and welcome) approach to judicial review in the administrative law of the state—one through which our citizens will be afforded, more than ever before, substantial protections against the invasions of their rights, individually and as members of the public, by an ever-expanding bureaucracy. These advances, however, are merely a beginning. The old common law requirements that government officials must have engaged in “arbitrary” and “capricious” conduct or in “oppressive and manifest abuse of discretion”—before a court will intervene to restrain them—are, in Lincoln’s phrase, “dogmas of a quiet past.” They are inadequate for a “stormy present” and an uncertain future, and must be abandoned. Government officers must no longer feel that there is no significant threat of judicial intervention through litigation brought by persons adversely affected by *unreasonable* conduct, however unintentional. They have no “right to err.” Where no statutory form of review of governmental action is provided, the law as to remedies available remains in a state of utter confusion, to the bewilderment of the Bar and to the frustration of citizens whose grievances cannot be resolved promptly because of judicial emphasis on procedural technicalities. Local government bodies must no longer be immune from the statutory procedures for judicial review applicable to state agencies. The General Assembly and the Supreme Court of North Carolina should diligently address themselves to these issues in the years ahead.