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The Right to Judicial Review of Administrative Agency Action: Nebraska's "Clearly Statutory" Rule: *Gretna Public School District No. 37 v. State Board of Education*, 201 Neb. 769, 272 N.W.2d 268 (1978)

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Note

The Right to Judicial Review of Administrative Agency Action: Nebraska's "Clearly Statutory" Rule

Gretna Public School District No. 37 v. State Board of Education, 201 Neb. 769, 272 N.W.2d 268 (1978).

> [I]n our system of remedies, an individual whose interest is acutely and immediately affected by an administrative action presumptively has a right to secure at some point a judicial determination of its validity.[1]

I. INTRODUCTION

The decisions of administrative agencies may have serious consequences for persons and institutions who must comply with agency rules and regulations. Legislative bodies have recognized this fact, and have provided for judicial review of certain agency actions.[2] Such legislation often results in laws which provide for judicial review of "final agency action," "contested cases" or similar terms used to encompass those agency actions which legislators feel should be subject to review.[3] In addition, statutes which authorize actions of specific agencies often specifically grant or deny the right of appeal from such actions.

Courts and commentators have long debated the proper treatment of statutes which grant agencies the authority to make certain determinations, where such statutes fail to either grant *or* deny the right of judicial review of those determinations.[4] The reactions of courts to this issue have ranged from statements that there is a presumption of a right to judicial review in the absence of statutory language to the contrary,[5] to statements that the right

1. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 336 (1965).
2. *See, e.g.*, 5 U.S.C. §§ 701-706; NEB. REV. STAT. §§ 84-910 to - 919 (Reissue 1976).
3. *See, e.g.*, 5 U.S.C. §§ 701-706; NEB. REV. STAT. §§ 84-910 to -919 (Reissue 1976).
4. *See* F. COOPER, STATE ADMINISTRATIVE LAW 672-79 (1965); K. DAVIS, ADMINISTRATIVE LAW TREATISE 941-95 (Supp. 1970); L. JAFFE, *supra* note 1, at 336-59; B. SCHWARTZ, ADMINISTRATIVE LAW 435-37 (1976).
5. *See* notes 48-62 & accompanying text *infra*.

to judicial review is statutory, and will be denied absent language granting such review.[6]

In *Gretna Public School District No. 37 v. State Board of Education*,[7] the Nebraska Supreme Court stated its view regarding the treatment of administrative agency statutes which do not clearly provide for a right of judicial review: "The right of appeal in this state is clearly statutory and unless the statute provides for an appeal from the decision of a quasi-judicial tribunal, such right does not exist."[8]

This note will examine the development and significance of the Nebraska "clearly statutory" rule. In addition, it will consider the views of other courts on this issue, and the wisdom of adopting a restrictive viewpoint regarding citizens' rights to challenge the actions of government agencies.

II. THE DECISION

A. Facts

In January, 1975, the Nebraska Commissioner of Education notified the Gretna Public School District No. 37, that its share of state school funds would be reduced because it had employed a teacher who did not possess a valid teaching certificate.[9] In May, 1976, the school district filed a petition before the State Board of Education for a declaratory ruling.[10] The State Board ruled that

6. *See* notes 78-90 & accompanying text *infra*
7. 201 Neb. 769, 272 N.W.2d 268 (1978).
8. *Id.* at 772, 272 N.W.2d at 269.
9. *Id.* at 770, 272 N.W.2d at 268. NEB. REV. STAT. §§ 79-1301 to - 1308.01 (Reissue 1976) govern the procedures for collection and disbursement of certain levies which are designated for school purposes. Section 79-1304(4) provides for a reduction of funds if a school employs a legally unqualified teacher.
10. NEB. REV. STAT. § 84-912 (Reissue 1976) provides that, upon petition by interested persons, state administrative agencies may issue declaratory rulings regarding the applicability of the rules or statutes enforceable by the agency. In light of the outcome of this case, a question arises as to whether the school district took the appropriate action at this stage. An examination of both the statutes regarding distribution of school funds and the Administrative Procedure Act indicate that the school's request for a declaratory ruling was indeed the action called for by the statute. The statutes regarding distribution of school funds contain no provisions for contesting actions of the Commissioner of Education regarding distribution of such funds, other than allowing school districts to seek a reappraisal of the school lands. *See generally* NEB. REV. STAT. §§ 79-1031 to -1307.01 (Reissue 1976). Presumably, one must then rely on the Administrative Procedure Act which prescribes methods for contesting action of Nebraska state agencies. When an agency applies a rule, one available action is to challenge the validity of the rule. NEB. REV. STAT. § 84-911 (Reissue 1976) provides that a person may challenge the *validity* of a rule by a petition for a declaratory *judgment* addressed to the district court of Lancaster County. The obvious alternative to challenging the validity of a

the action of the Commissioner was proper.[11]

The school district then filed a petition for appeal in Lancaster County District Court.[12] The petition was filed pursuant to a provision of the Nebraska Administrative Procedure Act, which grants an appeal to "any person aggrieved by a final decision in a contested case."[13] The district court determined that the penalty had been properly imposed but improperly computed, and the court reversed and remanded the order of the State Board.[14] The State Board then appealed to the Nebraska Supreme Court and the school district cross-appealed.[15]

B. Holding

The Nebraska Supreme Court's decision did not consider any of the substantive assignments of error regarding the action of the Commissioner. Instead, the court dismissed the case on the ground that there was no right of appeal from a declaratory ruling of an administrative agency.[16] In reaching that conclusion, the court first examined the declaratory ruling statute to determine whether appeals were provided from declaratory rulings.[17] The

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rule, is to challenge the *applicability* of the rule. NEB. REV. STAT. § 84-912 (Reissue 1976) provides that a person may challenge the *applicability* of a rule by a petition for a declaratory *ruling*, addressed to the agency. NEB. REV. STAT. § 84-913 (Reissue 1976) provides for notice and procedures for hearings by agencies in contested cases. In NEB. REV. STAT. 74-901(3) (Reissue 1976), "contested case" is defined as a proceeding where the parties' rights are required to be determined by a hearing. The statutes governing the distribution of school funds do not provide for a hearing on the question of the proper allocation of school funds, so an agency hearing as a "contested case" would not have been an available option for the school district.

Finally, the school district could have sought either an injunction under NEB. REV. STAT. § 25-1063 (Reissue 1975) to prevent the enforcement of the order, or a temporary restraining order under NEB. REV. STAT. §§ 25-1064(2) 1065 (Reissue 1975).

At this early stage in the matter, it seems the school district's decision to seek a declaratory ruling on the applicability of the rule was the action called for by statute, assuming that there was little question as to validity of the rule. The injunction method would have necessitated a hearing, the time and expense of which was probably not required in seeking a declaratory ruling, and a favorable declaratory ruling would have avoided the need to go through a district court proceeding.

11. 201 Neb. at 770, 272 N.W.2d at 269.
12. *Id.* at 771, 272 N.W.2d at 269.
13. NEB. REV. STAT. § 84-917 (Reissue 1976).
14. 201 Neb. at 771, 272 N.W.2d at 269.
15. *Id.*
16. *Id.*
17. NEB. REV. STAT. § 84-912 (Reissue 1976) states in pertinent part: "A declaratory ruling, if issued after argument and stated to be binding, is binding between the agency and the petitioner on the state of facts alleged unless it is

court determined that the legislature did not intend to provide for such appeals.[18] The court relied on the fact that the legislature had changed the wording of the Model State Administrative Procedure Act, which served as a pattern for the Nebraska Act.[19] Instead of providing that declaratory rulings would be subject to review in the manner provided for the review of contested cases,[20] the legislature determined that such rulings would be subject to review "in the manner provided in the code of civil procedure."[21] This factor, more than any other, is the technical basis for the decision, *i.e.*, that the school district had appealed the declaratory ruling in the manner provided for the appeal of contested cases,[22] rather than in the manner provided in the code of civil procedure.[23]

The court then examined the statute which provides for appeals of contested cases[24] to determine whether appeals from declaratory rulings were within the scope of that statute. In determining whether a declaratory ruling was a "contested case," the court recited the statutory definition of the term as a "proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing."[25] The court held that a declaratory ruling was not a contested case as that term was used in the Administrative Procedure Act.[26]

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altered or set aside by a court. Such a ruling is subject to review in the manner provided in the code of civil procedure."

18. 201 Neb. at 772, 272 N.W.2d at 269.
19. *Id.* at 771-772, 272 N.W.2d at 269.
20. MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 7 (1946 version).
21. *See* NEB. REV. STAT. § 84-917 (Reissue 1976).
22. *Id.*
23. *See* NEB. REV. STAT. § 84-912 (Reissue 1976). Brief for Appellant asserted that to appeal a declaratory ruling "in the manner provided in the code of civil procedure", the appeal must be a petition in error pursuant to NEB. REV. STAT. § 25-1901 (Reissue 1975). Brief for Appellant at 10-12, Gretna Pub. School Dist. No. 37 v. State Bd. of Educ., 201 Neb. 769, 272 N.W.2d 268 (1978). Brief for Appellee asserted that appeal by petition in error was not appropriate because the action of the Commissioner of Education was not the exercise of "judicial function", as required by NEB. REV. STAT. § 25-1901 (Reissue 1975). Brief for Appellee at 17, 18, Gretna Pub. School Dist. No. 37 v. State Bd. of Educ., 201 Neb. 769, 272 N.W.2d 268 (1978).
24. *See* NEB. REV. STAT. § 84-917 (Reissue 1976).
25. NEB. REV. STAT. § 84-901(3) (Reissue 1976).
26. 201 Neb. at 772, 272 N.W.2d at 269. *See* notes 29-30 & accompanying text *infra*. In addition to the fact that the declaratory ruling did not fit squarely into the terms of the statute defining "contested case", the concept of declaratory rulings in general does not imply an adversary situation. Rather, declaratory rulings are usually intended as a means by which one can obtain an opinion from an agency regarding the application of a given statute, rule or regulation. In *Gretna*, the school district sought the declaratory ruling *in reaction to* a decision by the agency. Further, since the statute which authorizes de-

After concluding that neither the declaratory ruling statute nor the appeal statute clearly provided for appeal of declaratory rulings, the court stated its rule of law regarding the right of appeal in Nebraska: "The right of appeal in this state is clearly statutory and unless the statute provides for an appeal from the decision of a quasi-judicial tribunal, such right does not exist."[27] A strict application of the "clearly statutory" rule led the court to decide that there was no right of appeal from a declaratory ruling of an administrative agency under the method of appeals of contested cases.[28]

III. ANALYSIS

A. Definition of "Contested Case" and the Effect of L.B. 137

In *Gretna*, the court gave no justification for holding that a declaratory ruling of an administrative agency was not a "contested case" within the meaning of the Administrative Procedure Act. However, since the term is defined as "a proceeding before an agency",[29] it seems apparent that the court was not willing to classify a declaratory ruling as a "proceeding." In addition, declaratory rulings probably would not meet the statutory "contested case" requirement that the proceeding be one in which the legal rights, duties, and privileges are required by law to be determined at an agency hearing.[30]

As a result of *Gretna*, the state school funds involved there were considered privileges within the meaning of the statute, and the outcome of the case was particularly anomalous in light of this fact. Furthermore, whether or not required by law, there was a hearing by the Board of Education to determine the rights of the school district in the matter. Thus, although the facts of the declaratory ruling in this case do not fit squarely into the statutory requirements for a "contested case," an argument can be made that the situation in which the school district found itself was the type of situation intended by the legislature to be deserving of judicial review. The question of whether a declaratory ruling is a "contested case" will no longer be a matter of discretion for the Nebraska courts, however, in light of the adoption of L.B. 137[31] by the

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claratory rulings provides for judicial review in a different manner than that provided for judicial review of contested cases, it is likely that the court recognized an intent by the Legislature to distinguish declaratory rulings from contested cases. *See* NEB. REV. STAT. §§ 84-912, -917. *See also* note 23 & accompanying text *supra*.

27. 201 Neb. at 772, 272 N.W.2d at 269.
28. *See* NEB. REV. STAT. § 84-917 (Reissue 1976).
29. NEB. REV. STAT. § 84-901(3) (Reissue 1976).
30. *Id.*
31. L.B. 137, 86th Leg., 1st Sess. (1979). The bill was introduced by Senator Her-

Nebraska Legislature.[32]

As a result of the passage of L.B. 137, the declaratory ruling statute currently provides that such rulings are subject to review "in the manner provided in sections 84-917 to 84-919, Reissue Revised Statutes of Nebraska, 1943, for the review of decisions in contested cases."[33] Consequently, declaratory rulings of Nebraska administrative agencies may now be appealed to the district courts, without having to meet "contested case" criteria, or the criteria for a petition in error.[34]

B. Evolution of Nebraska's "Clearly Statutory" Rule

The adoption of L.B. 137 has apparently settled the appealability of declaratory rulings in Nebraska. However, L.B. 137 does not address the broader rule enunciated by the court in *Gretna*.[35] As a result, to gain an understanding of the scope and potential meaning of this "clearly statutory" rule, it is necessary to examine the development of the rule in Nebraska.

The court in *Gretna* cites *Lydick v. Johns*,[36] a case in which an individual appealed a revocation of his driver's license by the Nebraska Director of Motor Vehicles.[37] Appellant's appeal bond was not approved by the State Auditor, as required by the statute,[38] and the resultant issue was whether this fact destroyed the appeal. The court ruled that the appeal was invalid because it failed to comply with the statute authorizing such appeals.[39] The court relied on the "clearly statutory" rule for its decision, but the rule was applied in a distinctly different situation than that involved in *Gretna*. It is clear that the rule as applied in *Lydick* was meant to apply to situations where the appeal is clearly provided for in the statute, but the appellant fails to comply with the statute's procedural requirements.[40] In other cases where the court has relied on

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bert Duis, 39th legislative district and was referred to the Committee on Government and Military Affairs before approval by the full legislature. Worksheet, April 2, 1979, 85th Leg., 1st Sess.

32. Worksheet, April 2, 1979, 85th Leg., 1st Sess.
33. L.B. 137, 86th Leg., 1st Sess. (1979). This language replaces the language in NEB. REV. STAT. § 84-912 (Reissue 1976) requiring appeals to be "in the manner provided in the code of civil procedure."
34. *See* NEB. REV. STAT. § 25-1901 (Reissue 1975).
35. *See* text accompanying note 8 *supra*.
36. 185 Neb. 717, 178 N.W.2d 581 (1970).
37. *Id.* at 718, 178 N.W.2d at 582.
38. *Id.*
39. *Id.* at 721, 178 N.W.2d at 583.
40. Indeed, the court in *Gretna* omitted the portion of the *Lydick* rule which puts the formula in context: "The right of appeal in this state is clearly statutory and, unless the statute provides for an appeal from the decision of a quasi-judicial tribunal, such right does not exist. *And if these statutes create such a right, the mode and manner of appeal is statutory and such jurisdiction can*

the "clearly statutory" rule, the rule has been used as a basis to reject an appeal which was not made in the correct manner,[41] rather than, as in *Gretna*, to deny the right of appeal altogether.

The application of the "clearly statutory" rule in *Gretna* could be read as merely consistent with its application in the previous Nebraska cases, *i.e.*, that the court in *Gretna* denied the appeal of the declaratory ruling merely because the appeal was not brought in the correct *manner*.[42] However, the language of the court is to the contrary. The "clearly statutory" rule is not applied to deny the appeal because of lack of compliance with the declaratory ruling statute.[43] Rather, the rule is applied to deny the appeal because the statute providing for appeals of contested cases before administrative agencies did not provide for an appeal of a declara-

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only be conferred in the manner provided by statute." 185 Neb. at 185, 178 N.W. at 582-83 (emphasis added).

41. Peck v. Donlevey, 185 Neb. 812, 172 N.W.2d 613 (1969) (appeal not permitted due to failure to file in correct court); Radil v. State, 182 Neb. 291, 154 N.W.2d 466 (1967) (appeal not permitted due to failure to serve a copy of the notice of appeal on defendant); Reiber v. Harris, 179 Neb. 582, 139 N.W.2d 353 (1966) (appeal not permitted due to failure to obtain approval of the county clerk). *Accord*, Brown v. City of Omaha, 179 Neb. 224, 137 N.W.2d 814 (1965); Drier v. Knowles Vans, Inc., 144 Neb. 619, 14 N.W.2d 222 (1944); Barney v. Platte Valley Pub. Power & Irr. Dist., 144 Neb. 230, 13 N.W.2d 120 (1944); Sommerville v. Board of Comm'rs, 116 Neb. 282, 216 N.W. 815 (1927), *aff'd*, 117 Neb. 507, 221 N.W. 433 (1928); County of Cedar v. McKinney Loan & Inv. Co., 1 Neb. (Unoff.) 411, 95 N.W. 605 (1901).

42. *See* NEB. REV. STAT. § 84-912 (Reissue 1976) and Brief for Appellant, *supra* note 23, at 10-12. Appellant argued that the declaratory ruling should have been appealed by a petition in error under NEB. REV. STAT. 25-1901 (Reissue 1976). The school district contended that a petition in error was only available if the agency's act was judicial in nature, and since the act of reducing the school funds was ministerial, and not judicial, a petition was not called for. This contention of the school district, however, was incorrect because the school district was not appealing the reduction in funds; it was appealing the declaratory ruling of the State Board of Education on a set of facts. Such a ruling would appear to be judicial in nature.

Under NEB. REV. STAT. § 25-1903 (Reissue 1975), in order to seek a reversal, vacation or modification of an order of a "tribunal, board or officer exercising judicial functions," one must file a petition in error with a district court, setting forth the errors complained of. The statute also provides for procedures of summons upon opposing parties, and sets time limits for return of summons.

If the appeal of the declaratory ruling was brought under the wrong statute and the case could have been decided on that basis, then technically there is no need for L.B. 137, which provides that declaratory rulings may now be appealed under the statue governing appeals in contested cases. It appears, however, that the court based its decision on a broader ground. *See* note 44 & accompanying text *infra*. If the court had decided the case on the narrow procedural ground and avoided reliance on the "clearly statutory" rule, there would have been less need for L.B. 137.

43. 201 Neb. at 172, 272 N.W.2d at 269.

tory ruling.[44] Since it appears possible that the court used the latter reason for its holding, rather than relying on the narrow procedural ground, a conclusion that the court intended to establish a broader rule of statutory interpretation gains validity. Thus, it is unfortunate that the court did not explain more fully its reasons for adopting the "clearly statutory" approach under these circumstances.

The broader interpretation of the "clearly statutory" rule, as suggested above, indicates that the Nebraska court has not merely applied a well-recognized precedent,[45] but has placed that precedent in an entirely different context in order to establish a new rule of Nebraska administrative law. Namely, that unless a statute expressly provides for a right of appeal of agency actions and therein names all possible denotations of such actions, then an administrative agency need not fear review of a specifically denoted action, as no right shall be recognized in the interpretation of general statutory language or law.

An alternative approach to the issue of whether a statute provides for judicial review of agency action would presume that all statutorily created agency actions were subject to judicial review, unless clearly denied by statute. Decisions have generally centered on the differing views on the wisdom of presuming that administrative action is reviewable.[46] The following discussion analyzes the view of the United States Supreme Court and other state courts on this issue.

C. The Presumption of a Right to Judicial Review

As stated above, the "clearly statutory" rule announced by the Nebraska Supreme Court in *Gretna* appears to be a subtle statement that judicial review of administrative agency actions will not be available absent a clear legislative statement providing for judicial review. In other words, a presumption seems to have been established against judicial review of agency decisions. This notion, however, is in direct conflict with the view of the United States Supreme Court and other federal courts.[47]

Stark v. Wickard[48] is a leading case on the effect of legislative silence on review. In this case, the relevant statute authorized the Secretary of Agriculture to fix milk prices.[49] A group of milk producers brought suit to enjoin the implementation of the Secre-

44. *Id.*
45. *See* note 40 *supra.*
46. *See* text accompanying notes 47-88 *infra.*
47. *See* notes 48-62 & accompanying text *infra.*
48. 321 U.S. 288 (1944).
49. *Id.* at 290-91.

tary's rules, and the government claimed that review was not provided for in the statute.[50] The statute in question was silent with regard to judicial review. The Court held that congressional silence did not indicate any legislative intent to preclude view. The Court stated: "[T]he silence of Congress as to judicial review is . . . not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction."[51] *Stark v. Wickard*, is probably the clearest explanation by the Supreme Court of the basic reasons underlying the presumption of review ability.[52] The opinion has prompted Professor Jaffe to conclude: "Congress, barring constitutional impediments, may indeed exclude judicial review. But judicial review is the rule. It rests on the Congressional grant of general jurisdiction to the Article III courts."[53] The basis of this presumption, according to the Court, was that Congress had entrusted to the courts the responsibility of determining the limits of statutory grants of authority.[54] The Court stated that "under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power."[55]

Accordingly, it appears the view of the Supreme Court is that the federal courts have been granted general jurisdiction to decide cases or controversies, and that if Congress wants to insulate certain agency actions from judicial review, it must clearly state that intention. Therefore, when the Court is faced with a statute which is vague or silent on the question of judicial review, the presumption of reviewability will be applied and the Court will rely on a general statutory grant of authority to support a policy of statutory construction.

The presumption of a right to judicial review of administrative action announced in *Stark v. Wickard* was recognized by Congress when it adopted the Administrative Procedure Act (APA).[56] This act provides for a broad right of judicial review of agency action,[57] except to the extent the statutes preclude judicial review of an agency's action or that final authority over certain actions is

50. *Id.*
51. *Id.* at 309.
52. *See* L. JAFFE, *supra* note 1, at 339-53, wherein Professor Jaffe provides a thorough historical analysis of the development, and reasons for, the presumption.
53. *Id.* at 346.
54. Stark v. Wickard, 321 U.S. 288, 310 (1944).
55. *Id.*
56. 5 U.S.C. §§ 701-06 (1970).
57. *Id.* § 702.

committed to agency discretion.[58] The Supreme Court has interpreted the APA as reinforcing earlier case law supporting the basic presumption of judicial review.[59] In the oft-cited case of *Abbott Laboratories v. Gardner*,[60] the Court clearly expressed its support for the presumption of a right to judicial review when it stated that "judicial review of a final agency action will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."[61] Cases following *Abbott* have included clear statements that judicial review of administrative action is the rule.[62]

The Nebraska court's "clearly statutory" rule of *Gretna*, therefore, seems to be at odds with the Supreme Court, regarding the presumption of judicial review. However a limiting factor on this presumption is the fact that it may be rebutted by a showing of legislative intent to deny judicial review.[63] Before the Court will restrict access to judicial review, there must be a showing of "clear and convincing evidence" of a legislative intent to deny such access.[64] In applying this presumption of review, many courts have interpreted statutes narrowly, only to find that they do not pre-

58. *Id.* § 701.
59. Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967).
60. 387 U.S. 136 (1967).
61. *Id.* at 140. To support this proposition the Court cited Rusk v. Cort, 369 U.S. 367 (1962); Leedom v. Kyne, 358 U.S. 184 (1958); Harmon v. Brucker, 355 U.S. 579 (1958); Brownell v. We Shung, 352 U.S. 180 (1956); Heikkila v. Barber, 345 U.S. 229 (1953); Board of Governors v. Agnew, 329 U.S. 441 (1947).
62. In Barlow v. Collins, 397 U.S. 159 (1966), the Court stated: "[J]udicial review of such administrative action is the rule, and nonreviewability an exception which must be demonstrated." *Id.* at 166. *See* National Automatic Laundry & Cleaning Council v. Schultz, 443 F.2d 689, 694-95 (D.C. Cir. 1971); Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 156-57 (1970). *Cf.* K. DAVIS, *supra* note 4, § 28.08 at 946-47 (Supp. 1970), where Professor Davis warns that the strong presumption of reviewability in the language of *Abbott Laboratories* should not be read literally and that some lower courts have not done so.
63. The Veterans Administration is an example of a federal administrative agency whose major functions are explicitly insulated from judicial review. *See* 38 U.S.C. § 211 (a) (1970). Although commentators have criticized this portion of the legislation, it is clear that Congress explicitly exempted certain discretionary functions of the V.A. from judicial review. *See, e.g.*, Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis*, 27 STAN. L. REV. 905 (1975). The constitutionality of the statute barring review of V.A. decisions regarding pension benefits was upheld in Holley v. United States, 352 F. Supp. 175 (E.D. Ohio 1972), *aff'd mem.*, 477 F.2d 600 (6th Cir. 1973). *See also* Barnhart v. Brinegar, 362 F. Supp. 464 (W.D. Mo. 1973) (statute denying judicial review of certain procedures of the Department of Transportation upheld.)
64. Rusk v. Cort, 369 U.S. at 379-80 (1962). *See generally* JAFFE, *supra* note 1, at 336-59. The Court has not ruled on whether there should be a constitutional right to judicial review of administrative actions. *See* notes 67-68 *infra*.

clude judicial review,[65] or have allowed review in the face of statutory language apparently precluding review.[66]

Legislatures may allow judicial review of agency actions, but with certain restrictions. In *Ortwein v. Schwab*,[67] the Court affirmed an Oregon decision holding that an appellate court filing fee of twenty-five dollars did not deny due process or equal protection as applied to indigents seeking judicial review of agency decisions reducing their welfare payments.[68]

Finally, it is generally recognized that even though judicial review is provided for in some acts and not in others, the presumption of review will still operate to allow review in those statutes which are silent on the issue.[69]

In determining whether there should be a presumption of a right to judicial review of administrative action, the state courts have used various methods of analysis.[70] State courts utilized these varying methods much more frequently before the *Abbott Laboratories*[71] decision. In these cases the issue of when review

65. *See, e.g.*, Kingsbrook Jewish Medical Center v. Richardson, 486 F.2d 663, 666-68 (2d Cir. 1973); Manges v. Camp, 474 F.2d 97, 101 (5th Cir. 1973); Berends v. Butz, 357 F. Supp. 143, 150-51 (D. Minn. 1973).

66. *See, e.g.*, Dickinson v. United States, 346 U.S. 389 (1953) (statutory clause that draft board decisions are "final" held to not bar judicial review where the board acts without evidence to support its finding); Heikkila v. Barber, 345 U.S. 229 (1953) (the finality clause in deportation statutes does not bar review of fair procedure and sufficiency evidence); Estep v. United States, 327 US. 114 (1945); Kessler v. Strecker, 307 U.S. 22 (1939).

67. 410 U.S. 656 (1973).

68. Three Justices (Justices Douglas, Brennan and Marshall) strongly dissented in *Ortwein*, on both due process and equal protection grounds, asserting that the majority had answered the much-debated question of whether due process does require some judicial review. 410 U.S. 656, 662 (Douglas, J., dissenting). *See also* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953). In discussing this issue which the Court "studiously has avoided," Justice Douglas stated: "Access to the courts before a person is deprived of valuable interests, at least with respect to questions of law, seems to me to be the essence of due process." Ortwein v. Schwab, 410 U.S. 656, 662 (1973) (Douglas, J., dissenting).

69. *See* Comment, *Reviewability of Administrative Action: The Elusive Search for a Pragmatic Standard*, 1974 DUKE L.J. 382, 384: "It seems reasonable to conclude, however, that in the absence of clear and convincing evidence of legislative intent to preclude judicial review, the modern day presumption of review has made the above reasoning [that legislative silence regarding judicial review barred review where other statutes conferred that right] obsolete."

70. *See* notes 72-74 & accompanying text *infra*.

71. Abbott Laboratories v. Gardner, 387 U.S. 136 (1967). *See* notes 59-61 & accompanying text *supra*. The *Abbott Laboratories* decision allowed judicial review of actions of the Commissioner of Food and Drugs; it provides one of the most clear explanations of the Court's viewpoint on the presumption of a

should be afforded often depended upon the character of the administrative action. If the action taken was primarily judicial in nature, then a presumption of the right to review arose.[72]

Other state courts, when faced with a statute that was silent on the question of judicial review, based their decisions on whether the agency action substantially affected property rights. If so, those courts were willing to grant review of the action involved.[73] Another view held that a basic right to review existed where the issue involved correction of arbitrary agency action, even where the statute did not expressly provide for judicial review.[74]

An analysis of numerous, more recent state court decisions on the issue of presumption of judicial review, reveals that the Nebraska "clearly statutory" rule not only conflicts with the viewpoint of the United States Supreme Court, but also with the views of many other state courts as well.[75] *Minnesota Public Interest Research Group v. Minnesota Environmental Quality Council*[76] pro-

right to judicial review. 387 U.S. 136, 139-41. The decision also provided guidance to lower courts regarding the issue of when agency action is "ripe" for judicial resolution. 387 U.S. 136, 148-153.

72. *See, e.g.*, Beckanstin v. Dougherty County Council of Architects, 215 Ga. 543, 111 S.E.2d 361 (1959); State ex rel. Richardson v. Board of Regents, 70 Nev. 144, 261 P.2d 515 (1953); Gray v. Board of County Comm'rs, 312 P.2d 959 (Okla. 1957). Many courts, complying with their own common law requirements or with statutes have had to decide whether an action is "judicial in nature" or "quasi-judicial." The Nebraska Supreme Court has stated that an act is not judicial in nature if the agency (in this case the decision in question was made by county commissioners) has no discretion or judgment to exercise in the matter. Kemerer v. State, 7 Neb. 130 (1878). In Mitchell v. Clay County, 69 Neb. 779, 96 N.W. 673 (1903), the Nebraska court stated: "[C]ounty commissioners act *quasi* judicially in passing upon claims . . . whenever such action involves the determination of questions of fact upon evidence or the exercise of discretion . . . . But whenever the course to be pursued . . . is fixed by law, they have no discretion and must follow the law, and their acts in so doing or endeavoring so to do are ministerial only." *Id.* at 783-84, 96 N.W.2d at 678 (emphasis in original). *See also* Snygg v. City of Scottsbluff Police Dept., 201 Neb. 16, 266 N.W.2d 76 (1978) (actions of the Equal Opportunity Commission in determining the rights of parties under the Fair Employment Act held to be quasi-judicial in nature); Scott v. State ex. rel Board of Nursing, 196 Neb. 681, 244 N.W.2d 683 (1976) (actions of the Board of Nursing in licensing nurses is legislative in nature).

73. *See, e.g., In re* St. Joseph Lead Co., 352 S.W.2d 656 (Mo. 1961); Brazosport Sav. & Loan Ass'n v. American Sav. & Loan Ass'n, 161 Tex. 543, 342 S.W.2d 747 (1961); Board of Ins. Comm'rs v. Title Ins. Ass'n, 153 Tex. 574, 272 S.W.2d 95 (1954).

74. *See, e.g.*, Morris v. Board of County Comm'rs, 150 Colo. 33, 370 P.2d 438 (1962).

75. *See, e.g.*, Klein v. Fair Employment Practices Comm'n, 31 Ill. App. 3d 473, 334 N.E.2d 370 (1975); Bowen v. Doyal, 259 La. 839, 253 So. 2d 200 (1971); Minnesota Pub. Interest Research Group v. Minnesota Environmental Quality Council, 306 Minn. 370, 237 N.W.2d 375 (1975); *In re* Senior Appeals Examiners, 60 N.J. 356, 290 A.2d 129 (1972).

76. 306 Minn. 370, 237 N.W.2d 375 (1975).

vides a clear example of a state court relying on *Abbott Laboratories* to support a presumption of judicial review of agency action. Faced with a statute which was silent on the question of required hearings or the appealability of certain decisions of the Environmental Quality Council the Minnesota Supreme Court concluded: "There is a presumption in favor of judicial review of agency decisions in the absence of statutory decisions to the contrary."[77]

In another recent case, the Wyoming Supreme Court adopted a viewpoint which could be classified as a "hybrid" of the presumption of review approach adopted by the Minnesota court, and the non-presumption approach of the Nebraska court. In *U.S. Steel Corp. v. Wyoming Environment Quality Council*[78] the court had to determine whether judicial review was available regarding agency action on a petition to promulgate a rule.[79] In announcing the rule which guided its analysis of the statute, the Wyoming court began its opinion with a precise statement of a rule identical in scope to the Nebraska "clearly statutory" rule. The court stated that "the right of judicial review of administrative decisions is entirely statutory, and . . . orders of an administrative agency are not reviewable unless made so by statute."[80] The court followed, however, with a series of citations to United States Supreme Court decisions which recognize a presumption of a right to judicial review.[81] In quoting the Court's language on this issue, the Wyoming court indicated that it would require specific statutory language precluding judicial review before such review would be denied. The court then examined the statute and concluded that the language precluded review.[82] However it is unclear from the opinion what approach the Wyoming court would pursue if a statute was silent on the question of judicial review of agency action, since the court's statement that the right of review is "entirely statutory" appears to conflict with its seeming adoption of the Supreme Court's pre-

77. *Id.* at 376, 237 N.W.2d at 379.
78. 575 P.2d 749 (Wyo. 1978).
79. *Id.* at 750-51. WYO. STAT. § 9-276.24 (1975 Cum. Supp.) provided that persons could petition agencies requesting the promulgation of a rule. The statute declared that agency action regarding such petitions "shall be final and not subject to review."
80. *Id.* at 750.
81. *Id.* The court cites from Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), to the effect that legislative intent to preclude judicial review must be made specifically manifest before judicial review will be denied. The court also cites Rusk v. Cort, 369 U.S. 367 (1962) for authority in stating: "Only upon a showing of clear and convincing evidence of contrary legislative intent should the courts restrict access to judicial review." 575 P.2d at 750.
82. *See* WYO. STAT. § 9-276.24 (1975 Cum. Supp.).

sumption of review.[83]

Although it is uncertain which approach the Wyoming court may follow, other states adhere to rules similar to the "clearly statutory" approach of the Nebraska court.[84] In *Pasch v. Wisconsin Department of Revenue*,[85] the Wisconsin Supreme Court analyzed the case in much the same manner as the Nebraska court in *Gretna*. The issue before the Wisconsin court in *Pasch* was whether there was a right to judicial review from an order of the state Tax Appeals Commission refusing to quash a tax assessment.[86] The court stated: "The right to appeal from an administrative agency's determination is statutory and does not exist except where expressly given and cannot be extended to cases not within the statute."[87] The court determined that no statute specifically allowed appeals from orders of the Tax Appeals Commission, and that such decisions could not be included under the statute which provided for appeals from decisions which "directly affect legal rights, duties or privileges."[88]

Thus, although many state courts have relied on the *Abbott Laboratories* decision in support of a presumption of a right to judicial review of agency action, Nebraska is not alone in its adherence to a rule which does not recognize such a presumption. The presumption of judicial review followed by the Supreme Court is a policy of statutory construction based upon a broad view of the authority granted to the federal courts by congress.[89] Consequently, it is doubtful that the actions of state courts in not recognizing a presumption of review, could be termed *unconstitutional*. Rather

83. 575 P.2d at 750.

84. *See, e.g.*, Bush v. City of Wichita, 223 Kan. 651, 576 P.2d 1071 (1978); State v. Washington State Personnel Bd., 82 Wash. 2d 396, 511 P.2d 52 (1973); Pasch v. Wisconsin Dep't of Revenue, 58 Wis. 2d 346, 206 N.W.2d 157 (1973).

85. 58 Wis. 2d 346, 206 N.W.2d 157 (1973).

86. *Id.* at 350-51, 206 N.W.2d at 159.

87. *Id.* at 353, 206 N.W.2d at 160.

88. *Id.* at 355-58, 206 N.W.2d at 160-63 (construing WIS. STAT. § 227.15 (1957)). Recall the analysis used by the Nebraska court in *Gretna* where the court held that an appeal from a declaratory ruling could not be included under the statute providing for appeals from "contested cases." *See* notes 24-27 & accompanying text *supra*. The Wisconsin court in *Pasch* recognized the general legislative directory of the statute authorizing appeals of agency action. The court, felt, however, that when the legislature used the term "decision" in the statute, it did not intend to provide for appeals of *any* agency decision. Therefore, the court felt compelled to draw the line at decisions which were "final," and to disallow appeals from decisions which were "interim steps" in the administrative process. The court then held that, since the taxpayer was appealing an order which determined that the commission had the authority to determine the merits, and not a decision on the merits, it was not a "decision" within the meaning of the statute.

89. *See* notes 51-56 & accompanying text *supra*.

the contrary position of such state courts reflects a more narrow view of the general grants of authority in their respective state statutes.

The justification for a restrictive rule logically rests on concerns for efficiency and the avoidance of delays in the administrative system. In *Pasch*, the Wisconsin court expressed concern that judicial review of proceedings would unduly delay such proceedings "for the purpose of reviewing mere procedural requirements or interlocutory directions."[90] Such practical concerns are well-founded, and certainly administrative procedures could only be rendered less effective if citizens had the right to appeal any action at any stage in a proceeding. A risk does exist, however, that a restrictive rule, based upon concerns for administrative efficiency, may be applied to deny judicial review of agency action which is not interlocutory, but final in effect. The *Gretna* decision provides an example where a restrictive viewpoint led to denial of review of a final agency action—action which may have had serious consequences for the appellant.[91]

A basic presumption of a right to judicial review from the actions of government agencies is the better approach to the problem faced when a statute is silent on the issue. An opposite rule can often lead to further confusion, as in the *Gretna* and *Pasch* cases, where courts must then determine whether a certain agency decision is a "contested case", involves "rights and duties", etc.

The general presumption of review is also a better alternative from the point of view of the legislature. When the legislature is faced with a judicial rule which requires clear legislative statements that actions are appealable, it must then decide whether to make such provisions in every administrative statute, or to create a general appeal statute for all agency actions. Such a statute, as stated above, may result in judicial confusion over definitional terms. On the other hand, if the legislature is aware of a judicial rule which requires clear statutory language that actions are *not* appealable, its job is much easier, and certain agency actions can be singled out for immunity from judicial review.

The recent action of the Nebraska legislature in response to *Gretna*,[92] illustrates the potential difficulties caused by a no-presumption-of-review attitude by the court. After the Nebraska

90. 58 Wis.2d 346, 354-55, 206 N.W.2d 157, 161.

91. In *Gretna*, the school district's funds were reduced by ten percent by the Commissioner of Education. 201 Neb. at 770, 272 N.W.2d at 268. Neither the opinion nor the briefs indicate how much money was involved. It is conceivable, however, that the reduction of funds could have forced the school to eliminate certain programs or dismiss personnel.

92. *See* notes 31-33 & accompanying text *supra*.

court held that a declaratory ruling was not a "contested case", the legislature changed the declaratory ruling statute to make it clear that such rulings could be appealed in the same manner as that provided for contested cases.[93] Thus, both declaratory rulings and contested cases may now be appealed to Nebraska courts. The question remains, however, whether other agency actions may be appealed. In light of the restrictive rule of the *Gretna* case, there may be other administrative agency actions for which judicial review is not provided by specific denotations, and the legislature now has the burden of affirmatively stating which agency acts are subject to judicial review.[94] As an alternative, state legislatures faced with a judicial rule which does not recognize a presumption of a right to review could consider repealing such a rule by statute, by providing that agency decisions are subject to review, except where expressly denied by statute.[95]

IV. CONCLUSION

Whether by design or merely by necessity, legislatures have delegated a great deal of authority to administrative agencies, and the discretionary actions of appointed government officials are of potentially great significance. Executive agencies have the authority to control many aspects of the activities of corporations, small businesses, labor organizations, educational institutions, and individuals. Although legislatures are constantly striving to improve their effectiveness in monitoring the actions of agencies, the size of many agencies and the volume of activity make thorough oversight practically impossible. Inadequate legislative oversight of administrative agencies can be partially offset by making such agencies subject to review by courts.

Indeed, democratic principles would seem to require that the rights and privileges of individuals and institutions be safeguarded

93. *Id.*

94. It seems clear that the great bulk of administrative agency action is now subject to judicial review in Nebraska. NEB. REV. STAT. § 84-917 (Reissue 1976) which provides for appeals of contested cases would encompass all agency decisions in which the appellant is entitled to an agency hearing; NEB. REV. STAT. § 84-911 (Reissue 1976) provides for a petition for declaratory judgments to a court to challenge the validity of a rule; and L.B. 137, 86th Leg., 1st Sess. (1979) provides for judicial review of declaratory rulings on a challenge to the applicability of a rule. Assuming, however, that the legislature would want to be certain that it had not unintentionally precluded judicial review of agency actions, it would be advisable that the legislature review the statutes governing specific state agencies. Such a review could discover any agency actions which are peculiar to specific agencies, and which possibly would not fit under the classes of "rule" or "contested case."

95. *See, e.g.*, 5 U.S.C. § 701(a)(i) (1976) which provides: "This chapter applies . . . except to the extent that—(1) statutes preclude judicial review . . . ."

from agency decisions which are not subject to review by some other branch of government. A logical extension from this viewpoint is a presumption of a right to judicial review of agency decisions, except where expressly precluded by statute.

The Nebraska "clearly statutory" rule, as stated in *Gretna*, and similar rules of other state courts, presumes that agency decisions are not subject to judicial review unless expressly provided by statute—a presumption which can only hinder efforts to curb the power of government agencies. A restrictive presumption may be supported by a policy of the courts to avoid delays and inefficiency in the administrative system, or it may be a conscious policy to narrow the general grants of authority under which courts operate. However, the application of this presumption may often result in an unfair denial of the opportunity to challenge allegedly arbitrary or incorrect agency action. The policy of the Supreme Court—that Congress has granted the federal courts broad authority to decide cases and controversies, and the courts will presume judicial review unless Congress clearly denies review—is preferable to the "clearly statutory" approach. It is more practical because it causes less pressures on the legislature to meet the court's policies of statutory construction. Moreover, it is more respective of the rights of individuals because it is a policy which presumes that individuals have an opportunity to challenge government actions which affect their rights and privileges. Few would condone a contrary policy which presumes that individuals *cannot* challenge government action. However the "clearly statutory" rule in *Gretna* reflects such a restrictive policy, a policy which is in conflict with the basic purpose of having courts of law.

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