If dissenters are to be permitted to intervene at the outset of a receivership proceeding and to object to specific orders as soon as they are made, there can be no doubt as to the adequacy of their remedies within the reorganization itself. Intervention at the start will militate against any such cavalier disposition of minority rights as frequently characterizes the prevailing equity procedure. The management group will be checked at every turn, for dissenters will be able to contest and obtain a hearing upon the particular receiver appointed, the representation of creditors, the conduct of the proceeding in general, the amount of the upset price, and the provisions of the plan—all before judicial inertia will have rendered any protest in vain. The result of this liberalization of the intervention requirements will be to secure to interested parties the right to participate in the formation of a plan, a particularly valuable right since it affords the only method whereby creditors can insure themselves an adequate participation in the reorganized corporation. Nor is the right to object to specific orders an abstract privilege devoid of any practical value. For instance, the objector may contest the upset price on the theory that the evaluation of corporate assets is entirely too low, and even though his plea is not accepted in the trial court, the reviewing tribunal may send the case back for a re-evaluation and resultant increase in pro rata participation for all creditors concerned. Indeed, the very fact that the corporation is presumably to continue as a going concern will enable its creditors to obtain a greater realization on outstanding claims than could ordinarily be had in bankruptcy or other forced liquidation of the company.

APPEALABILITY OF ADMINISTRATIVE ORDERS

Legislative attempts to inhibit judicial control over administrative action have been directed principally at endowing administrative findings with a greater measure of finality; but the possibility of completely insulating some types of orders from judicial scrutiny has for the most part been ignored. While draftsmen have generally made no conscious effort to avail themselves of this device, in certain situations courts have refused to allow an appeal to be taken, even from orders clearly reversible under the applicable formula for review. It is the purpose of this Comment to examine the characteristics of "appealable orders" with a view toward determining the desirability and

feasibility of more painstaking statutory delineation of the orders from which appeals may be prosecuted.\textsuperscript{2}

The evolution of the rules governing appealability has of course been conditioned to some extent by the available methods of attacking administrative orders. Congress has provided two broad procedures: the statutory injunction and the direct appeal. Typical of the first method is the provision vesting the United States district courts with jurisdiction "to enjoin, annul, set aside or suspend in whole or in part any order of the Interstate Commerce Commission."\textsuperscript{3} The second type of review is more in the nature of an appeal from a lower court. Statutes in which it is incorporated usually provide that a direct appeal may be taken to the appropriate United States circuit court of appeals by filing a transcript of the record of the administrative proceeding. This procedure has been increasingly employed in recent years, and it is at present applicable to the decisions of the Federal Trade Commission,\textsuperscript{4} the Securities and Exchange Commission,\textsuperscript{5} and the National Labor Relations Board.\textsuperscript{6} But these statutory provisions have had a limited, and at best hap hazard, effect on appealability, for when the statutory remedy is either non-existent or inadequate, courts have often issued general equity injunctions or extraordinary process against the individual administrators.\textsuperscript{7} And in certain cases, the person to whom an order is directed may obtain a review by refusing to obey, for the administrative agency will then be forced to resort

\textsuperscript{2} The discussion is confined almost exclusively to orders of the independent federal administrative agencies.

\textsuperscript{3} This jurisdiction was first conferred upon the Commerce Court by the Commerce Court Act [36 Stat. 539 (1910)], and, upon the abolition of that court, was transferred to the district courts. 38 Stat. 219 (1913), 28 U. S. C. §41 (28) (1934); see 2 Sharpe man, The Interstate Commerce Commission (1931) 389. For a compilation of the administrative agencies whose decisions are subject to a similar review by statutory injunction, see Alexander, Statutory Injunctions Under the Federal Alcohol Administration Act (1937) 6 Brooklyn L. Rev. 302, 304. Compensation orders under the Longshoremen's and Harborworkers' Compensation Act are subjected to mandatory as well as prohibitive injunctions. 44 Stat. 1436 (1927), 33 U. S. C. 921 (b) (1934).


\textsuperscript{6} 49 Stat. 455 (1935), 29 U. S. C. A. §160 (f) (Supp. 1937). Other agencies with statutes providing for a similar appeal include the Federal Power Commission, the Bituminous Coal Commission, the Communications Commission under its radio licensing function, the Secretary of Agriculture in respect to his regulation of unlawful practice among packers, and the Federal Reserve Board and the Interstate Commerce Commission in connection with their regulatory duties under the Clayton Act. See Alexander, supra note 3, at 315.

to the courts for enforcement; but, if this procedure is adopted, the recalcitrant frequently exposes himself to penalties.

Since the statutory provisions normally indicate inconclusively the kind of orders which may be appealed, courts have been able to exert an almost completely unfettered discretion in placing limitations on appealability. The nature of the criteria that have been developed is as diverse as the administrative process; collectively they represent an amalgam of restrictions appropriate to the judicial, legislative and executive aspects of administrative action. Thus the rule that appeals may be taken only from the final orders of a court has its counterpart in administrative adjudications. But, unlike the typical court action, the informal multiple-party administrative proceeding affects divergent groups, and restrictions have been developed to define those whose interest is sufficient to prosecute appeals from administrative orders. While these doctrines are adapted to administrative orders which can be likened to judicial decisions, the rules and regulations promulgated by administrative agencies bear a closer resemblance to statutes than to court decisions. Prob-

8. The orders of the Federal Trade Commission and the National Labor Relations Board, for example, have no effect of themselves until affirmed and enforced by the appropriate circuit court of appeals. See McFarland, Judicial Control of the Federal Trade Commission and the Interstate Commerce Commission (1933) 74-77, 179-181; National Labor Relations Bd. v. Jones & Laughlin S. Corp., 301 U. S. 1, 47 (1937). And see notes 63, 70, infra, for cases where such a review was obtained. This method of review, of course, is available only to those persons against whom the order is directed. As to them, this procedure does not enlarge the scope of appealable orders, for orders which need enforcement in the courts are almost always open to attack in direct proceedings brought by the aggrieved party. But cf. notes 62, 63, 70, infra.


10. The decisions of the Radio Commission from which an appeal could be taken, however, were expressly enumerated in the statute. 44 Stat. 1169 (1927), as amended in 46 Stat. 844 (1930). They included the denial of an application for a station license, the denial of an application for a construction permit, and the denial of an application for the renewal or modification of an existing station license. In the 1930 amendment, the provision for appeal from a denial of a construction permit was inadvertently omitted. Thereafter, the question of appealability under the statute turned upon whether an application of a construction permit would be construed to fit into the other categories. Goss v. Federal Radio Comm., 67 F. (2d) 507 (App. D. C. 1933); cf. Pote v. Federal Radio Comm., 67 F. (2d) 509 (App. D. C. 1933). These provisions, with the provision for appeal from a denial of a construction permit reinserted, have been substantially re-enacted in respect to decisions of the Federal Communications Commission in its control over radio. 48 Stat. 1093, 47 U. S. C. § 402 (b) (1934). See Comment (1936) 49 Harv. L. Rev. 1333, 1341-1343. The effect of the varying statutory wordings is discussed p. 773, infra.

11. As in the case of attacks upon the constitutionality of statutes, the plaintiff must first show that his rights are prejudicially affected or at least imminently threatened by the administrative action. See Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 324 (1936); Comment (1936) 45 Yale L. J. 649; Comment (1937) 46 Yale L. J. 647.
ably for this reason the doctrine that legislation may be attacked only in a case or controversy has been imported into the field of administrative orders. Still other restrictions on appealability are peculiarly apposite to the investigatory or police activities of administrative agencies, for attempts may be made to contest a refusal, after investigation, to institute regulatory proceedings. And superimposed upon the limitations peculiar to "legislative, judicial and executive" orders are several doctrines applicable to orders that do not fit into these neat but narrow categories.

I.

The restrictions on appealability may be divided into two groups: first, those that define the stage at which administrative action may be challenged; second, those that preclude attacks entirely. The theme that runs through the first series of limitations is the necessity that an administrative determination be couched in the form of an unequivocal order, and that it threaten imminent injury.

This policy finds perhaps its principal expression in the doctrine that general orders, rules, and regulations are not appealable directly, but can only be attacked collaterally when a special order is entered applying them to a particular individual or when some punitive action is about to be or has been instituted for failure to comply. It is usually said that a general regulation amounts to nothing more than public notice of an administrative interpretation of statutory powers, or that it constitutes an exercise of a quasi-legislative function and as such is subject only to the same types of attack as a statute. Whatever the doctrinal basis of the "case or controversy" requirement, some limitation of this kind is necessary if administrative agencies are not to be swamped by indiscriminate appeals.

Even when a direction is issued to a particular person, it can be appealed only if it is framed in language that is peremptory enough to threaten im-

12. See Freund, Administrative Powers over Persons and Property (1923) 285. Such a decision may be analogized to a refusal of a grand jury to prefer an indictment, or of police or prosecuting officers to press charges.


minent injury. In *Brooklyn Eastern District Terminal v. United States*\(^{17}\)
the Interstate Commerce Commission entered a general order requiring inter-
state carriers to report their excess income and to pay one half of it to the
commission's secretary,\(^{18}\) but the Terminal did not comply in the belief that
it was not in the common carrier category. After a hearing, the commission
entered findings, made a report contrary to the Terminal's contention, but
issued no formal order; instead it simply "requested" payment. Since the
court felt that the "requests" were not orders at all, but only admonitions
that would not be followed by penalties, it refused to take jurisdiction over
a suit to enjoin the enforcement of the decision. Similarly, when a director
of the Securities and Exchange Commission informed a registrant by letter
that its petition for amendment of certain accounting requirements was denied,
the court, impressed by the informality of the whole transaction, denied appeal
on the ground that the director's letter was not an order of the commission.\(^{19}\)
And a passage in a commission report notifying a carrier that it would be
expected to write its investment account down to a specified amount has not
been regarded as a mandate sufficient to form the basis of an appeal.\(^{20}\)

Though all the formality requirements are complied with, an appeal may
not be taken from an order that will have no immediate effect but will merely
form the basis of subsequent proceedings. Thus, in *United States v. Los
Angeles Railroad Company*,\(^{21}\) a final report on the valuation of a carrier's
property filed by the commission in accordance with the Valuation Act\(^{22}\) was
held to be immune from either a statutory or general equity injunction, even
though it was called an order, and even though the carrier alleged that the
commission had acted in excess of its powers and in violation of the constitu-
tion. The court pointed out that this so-called order did not "command
the carrier to do or to refrain from doing anything . . . grant or with-
hold any liability, civil or criminal . . . change the carrier's existing or
future status or condition . . . determine any right or obligation," that
it was, in short, merely the formal record of conclusions reached after a
study of data collected in the exercise of the commission's function of in-

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\(^{17}\) 28 F. (2d) 634 (S. D. N. Y. 1927).

\(^{18}\) The order was directed to all carriers who had accepted the provisions of Sec-
in connection with their "recapture" from Federal control.

\(^{19}\) Third Avenue Ry. v. Securities and Exchange Comm., 85 F. (2d) 914 (C. C. A.
2d, 1936); cf. Minneapolis & St. L. R. R. v. Peoria Ry., 270 U. S. 580 (1926) (telegram
explaining effect of previous orders); Ames Baldwin Wyoming Co. v. National Labor
Relations Bd., 73 F. (2d) 489 (C. C. A. 4th, 1934).

F. (2d) 401 (N. D. Ga. 1930). The report was viewed as an attempt by the commission
to secure the desired action without issuing a command. *Id.* at 527, 528. Cf. Great No.
Ry. v. United States, 277 U. S. 172 (1928).


vestigation. And since the report was to have only *prima facie* effect in actions brought thereafter before the commission or before a court under the Act to Regulate Commerce, it could be adequately contested subsequently. Similarly, orders of the I. C. C. which determine that a shipper is entitled to damages by way of reparation for overcharges by a carrier are not subject to attack by statutory injunction, for the carrier may rebut the *prima facie* effect of those orders in the subsequent law action for recovery of the damages thus awarded. But while reparation orders will generally be immediately followed by the shipper's legal proceedings, valuation orders may not be put in issue in a subsequent action for many years, and the carrier's credit may meanwhile be injured. In the *Los Angeles Railroad* case the court refused to heed this argument.

The requirement that an order operate as a mandate has been applied to deny appealability to some types of interlocutory orders. Thus, a document termed an order which reopened, after three years, proceedings to value a carrier's property was held not to be appealable by statutory injunction because it was merely a direction that evidence be taken and not an affirmative order. And assignment of a cause for further hearing upon an issue of

23. United States v. Los Angeles R. R., 273 U. S. 299, 309-310 (1927). See, in general, Tollefson, *Judicial Review of the Decisions of the Interstate Commerce Commission* (1937) 5 GEO. WASH. L. REV. 503. In Delaware & Hudson Co. v. United States, 266 U. S. 438 (1925), a bill to set aside a tentative valuation of the plaintiff's railroad properties was dismissed because said valuation was "no more than an ex parte appraisement without probative effect." An added factor in this case was the fact that protests, as provided for by the statute, had been made to the commission and were to be considered before the valuation became final. See discussion of the requirement of exhaustion of administrative remedies, p. 775, *infra*; cf. *Brooklyn East Dist. Terminal v. United States*, 28 F. (2d) 634, at 635 (S. D. N. Y. 1927). See also note 129, *infra*.

24. 37 Stat. 703 (1913), 49 U. S. C. § 19a (i) and (j) (1934).

25. United States v. Los Angeles R.R., 273 U. S. 299, at 312 (1927), construed recently in United States v. Griffin, 58 Sup. Ct. 601, at 605 (1938). Thus, neither the statutory nor the general equity injunction is available when there is any adequate legal remedy. The contention that the commission might be misled by its own erroneous valuation and subsequently apply it to the carrier's injury in making rates, in determining the propriety of an issue of securities, or in fixing divisions of joint rates was also held to present no grounds for general equity jurisdiction. But an order denying the carrier permission to issue securities could probably not be attacked in the courts. See note 133, *infra*.


28. New York, O. & W. Ry. v. United States, 14 F. (2d) 830 (S. D. N. Y. 1926). Jurisdiction was denied in spite of allegations of a complete lack of lawful power in the commission to make the order attacked and in spite of the court's indications that the allegations might be justified. Appeal might also have been denied on the ground that even a final valuation is not an appealable order. See note 23, *supra*.  

*[1938]*
reparation has been held to have no characteristics of an order but to be simply notice of a hearing which the carrier might attend or not as it saw fit.\textsuperscript{29} But an order of the Federal Power Commission directing the appellants to appear for hearings has recently been held to be appealable because its language was that of an order commanding definite action, and a refusal to obey would therefore be followed by penalties.\textsuperscript{30}

Even when an interlocutory "order" is framed in peremptory terms, appeals are usually denied on the basis of the general rule that appeals may be had only from orders finally disposing of the proceedings.\textsuperscript{31} The roots of this doctrine are in some respects similar to the policy behind the final judgment rule in court proceedings:\textsuperscript{32} appellate courts realize that their energies would be devoted largely to a consideration of trivial questions if appeals were allowed from preliminary orders.\textsuperscript{33} More important, perhaps, is the danger that promiscuous appeals from interlocutory rulings would gravely interfere with administrative efficiency.\textsuperscript{34}

But the final order rule is not inflexible, for interlocutory and procedural rulings of an administrative agency, like those of a court,\textsuperscript{35} may be made ap-

\textsuperscript{29} United States v. Illinois Cent. R. R., 244 U. S. 82 (1917) (petitioner claimed commission lacked jurisdiction). The court might also have been refused to take jurisdiction on the ground that, even if a decision were ultimately made contrary to the carrier's contentions, it would still have adequate remedy in its defense to the subsequent damages action. See note 26, \textit{supra}.

\textsuperscript{30} Metropolitan Edison Co. v. Federal Power Comm., C. C. A. 3d, (1938) 5 U. S. L. Week 645. See note 37, \textit{infra}. The order was issued in connection with an investigation by the commission to supply a state utilities commission with certain requested information. It was claimed that the federal commission had no power to conduct an investigation for this purpose.

\textsuperscript{31} This rule may of course be used as an alternative ground for decision in cases involving non-peremptory "orders."

\textsuperscript{32} See Crick, \textit{The Final Judgment Rule as a Basis for Appeal} (1932) 41 \textit{Yale L. J} 539.


It is said, in addition, that general principles of comity dictate that administrative tribunals should have full opportunity to correct any errors in their proceeding before their actions are subjected to judicial scrutiny. United States v. Illinois Cent. R. R., 291 U. S. 457 (1933); United States \textit{ex rel. Western Union Tel. Co. v. Interstate Comm. Comm.}, 279 Fed. 316 (App. D. C. 1922); WGN v. Federal Radio Comm., 68 F. (2d) 432 (App. D. C. 1933).

\textsuperscript{35} For cases in which interlocutory orders of administrative bodies were analogized to those of courts, see note 38, \textit{infra}.
pealable by statute. In the absence of a specific provision permitting appeal from interlocutory orders there is the possibility that general appeal provisions will be construed to allow appeals from non-final orders. While appeals from interlocutory orders are clearly precluded when the statute declares that appeals may be taken from final orders, a more difficult problem of interpretation is presented under the typical provision for an appeal from “an order of the Commission.” In Jones v. Securities and Exchange Commission it was held that “order” referred only to final determinations, namely, orders refusing to permit registration statements to become effective and stop orders suspending the effectiveness of such registration. A statutory appeal from a denial by a trial examiner of a motion to withdraw a registration statement was therefore not allowed. When appeal provisions are more specific, there are even stronger grounds for refusing to permit interlocutory challenges. For example, the provision in the statute allowing appeals from cease and desist orders of the Federal Trade Commission has been held to exclude an appeal from a denial of a motion to dismiss a complaint. On similar

36. Apparently Congress may specifically make any administrative order appealable to the courts. The cases in which statutory provisions for appeal to the Supreme Court from administrative decisions have been declared unconstitutional are concerned with the type of review rather than appealability. Thus, in Federal Radio Comm. v. General Electric Co., 281 U. S. 464 (1930), appeal was denied because the nature of the review exercised by the District of Columbia Court of Appeals made it simply a superior, revising agency in the same branch of the government as the commission. When the act was amended to make that court’s function a judicial one, the Supreme Court granted certiorari. Federal Radio Comm. v. Nelson Bros. Bond and Mort. Co., 289 U. S. 265 (1933). Cf. Comm’r of Int. Rev. v. Liberty Bank & Trust Co., 59 F. (2d) 320 (C. C. A. 6th, 1932).

37. A provision that “no proceeding to review any order of the commission shall be brought by any person unless such person shall have made application to the commission for a rehearing thereon” has recently been interpreted to imply the right to a review of any order, final or interlocutory, by which a person is aggrieved if he makes the necessary application for rehearing. Metropolitan Edison Co. v. Federal Power Comm., C. C. A. 3d, (1938) 5 U. S. L. Week 645.

38. Generally the phrases “an order” and “any order” have been interpreted as allowing appeals only from final orders. The analogy that interlocutory orders of a court are appealable only under special statutory provisions has frequently been resorted to. Securities and Exchange Comm. v. Andrews, 88 F. (2d) 441 (C. C. A. 2d, 1937); In re Deseret Mortgage Co., 78 Utah 393, 3 P. (2d) 267 (1931); see Citizens Passenger Ry. v. Public Serv. Comm., 271 Pa. 39, 47, 49, 114 Atl. 642, 645 (1921); cf. 5 PAUL AND MERRITT, FEDERAL INCOME TAXATION (1934) § 44.20. See, also, cases cited in Comment (1935) 35 Col. L. Rev. 230, 240, n. 59, 60.


40. These were the only decisions of the Commission referred to as “orders” in the 1933 Act. But the denial of a request for confidential treatment of information filed with this commission, although not referred to as an “order” in the 1934 act, has recently been held to be an appealable order under the act. American Sumatra Tobacco Corp. v. Securities and Exchange Comm., 93 F. (2d) 235 (App. D. C. 1937). See p. 760, infra.

grounds appeals from certification orders of the NLRB will probably be held to be precluded by the provision that the certification of representatives and the record of the investigation prior thereto are to be included in the transcript of the entire record on appeal from an unfair labor practice order.\footnote{42}

Though non-final orders are almost always immune from appeal, difficulties may arise in determining what orders fit into the interlocutory category. Indeed the same order may be final as to one party, and interlocutory as to another. Thus an employer may not appeal from or enjoin certification of bargaining agents by the New York State Labor Relations Board, for selection of representatives is regarded as a preliminary determination of fact which cannot be challenged until an order is issued commanding an employer to cease and desist from unfair labor practices.\footnote{43} At the same time it has been indicated that, if the election were conducted only to settle a dispute as to representation between rival unions, certification might be a final deter-

\footnote{42. § 9(d), 49 Stat. 453 (1935), 29 U. S. C. A. § 159(d) (Supp. 1937), Bendix Products Corp. v. Beman, 14 F. Supp. 58, 66 (N. D. Ill. 1936). This claim finds support in the fact that the appeal provision of the Act comes in the section on unfair labor practices and seems to refer only to cease and desist orders and to orders denying relief from alleged unfair labor practices. § 10(f), 49 Stat. 455 (1935), 29 U. S. C. A. § 160(f) (Supp. 1937). This argument is similar to the basis of the decision in the cases cited note 41, supra. But see Joel v. Rosseter, 15 F. Supp. 914 (N. D. Cal. 1936) \textit{seem}.

The Act is clearly designed to preclude any appeal from an order that an election be held. Orders of the first National Labor Relations Board that an election be held by secret ballot were formerly appealable under the statute. 48 Stat. 1183, 15 U. S. C. § 702b (1934), Guide Lamp Corp. v. National Labor Relations Bd., 76 F. (2d) 370 (C. C. A. 7th, 1935). As a result, the board's actions were exposed to long delays pending the outcome of such appeals. See \textit{Sen. Rep. No. 573, 74th Cong., 1st Sess. (1935) 14; Hearings before Senate Committee on Education and Labor, 74th Cong., 1st Sess. (1935) 49-50.}

\footnote{43. In \textit{re} Wallach's, Inc., N. Y. Sup. Ct., N. Y. L. J., Jan. 17, 1938, p. 252, col. 6, \textit{aff'd, sub nom.} Wallach's, Inc. v. Boland, 2 N. Y. Supp. (2d) 179 (App. Div. 1st Dep't 1938). The court also held that an order that an election be held is not appealable. As a further basis for its decision, the Appellate Division stated that the delay caused by judicial review of the numerous intermediate steps in a controversy between employer and employee would tend to defeat the statute's avowed purpose of encouraging collective bargaining. The Court of Appeals has unanimously affirmed this decision. N. Y. Times, March 19, 1938, p. 9, col. 6.

If the employer wished to appeal when no unfair labor practice proceeding was being considered, he could refuse to bargain collectively with the certified representatives. After the filing of a complaint by the certified unions, a cease and desist order would be issued, and he might prosecute an appeal from that order. This is apparently also true where the NLRB is involved. See Feller, \textit{supra} note 9, at 671. See note 42, \textit{supra}.}
mination appealable by the defeated union. In a pending suit it is being urged that a similar differentiation should be made under the National Labor Relations Act.

Despite the inclination of the courts to refuse to allow an appeal before a final order has been issued, it may be possible to attack administrative proceedings at an early stage by invocation of the general equity injunction. But in view of the long settled rule of judicial administration that administrative remedies must be exhausted before judicial relief will be granted, such an attack will be successful only if the court is willing to find that resort to the administrative body would be futile or that subsection of the petitioner to the administrative process would work "irreparable injury." Thus, while notice of a decision of the National Labor Relations Board to hold a hearing on an unfair labor practice is not appealable, injunctions were issued against such hearings by Federal district courts on no more substantial allegations of irreparable injury than that the administrative investigation would stir up feeling among the employees, would cause inconvenience by taking them from their work, and would impair the good will of the employer. Especially in view of the provisions in the Act allowing an appeal from final decisions to the circuit court of appeal and negating the jurisdiction of the district courts, these decisions were of doubtful validity. And they have been disapproved by the recent Supreme Court holding in Myers.

45. The case is now before the Third Circuit. N. Y. Times, Dec. 18, 1937, p. 14, col. 4. Though it seems clear that the employer cannot appeal, it is there being maintained that a losing union is entitled to appeal from a certification order. See notes 42 and 43, supra. The usual reason for appeals by employer or defeated union would be to contest the propriety of the unit in which the election was held.
46. Extraordinary remedies have also been employed as a device for circumventing the final order rule in court proceedings. See Crick, supra note 32, at 554.
47. For general discussions of this rule, see Comment (1927) 27 Col. L. Rev. 450; Alpert, supra note 7, at 394 et seq. The rule is applicable both where the administrative proceedings are in an interlocutory stage and where no such proceedings have been begun. An example of the latter situation is the requirement that, before a shipper can recover from a carrier for unreasonable and excessive freight rates exacted from him, he must first apply to the I. C. C. and have it decide whether the rates were in fact unreasonable and excessive. See note 137, infra. See, in general, Miller, The Necessity for Preliminary Resort to the Interstate Commerce Commission (1932) 1 Geo. Wash. L. Rev. 49. In such a case the problem is strictly not one of appealability.
48. See Comment (1935) 35 Col. L. Rev. 230, 233 et seq. Problems may arise also in determining whether petitions for rehearing, or appeals to higher boards, or appeals from a division to the entire board must be taken in order to "exhaust" administrative remedies. Id. at 240-244. See, e.g., note 23 supra.
49. See notes 29 and 42, supra.
51. See note 6, supra.
that the rule requiring exhaustion of administrative remedies cannot be avoided by an allegation that the mere holding of the hearing would work irreparable damage. But some of the earlier lower court decisions granted injunctions on the ground that the act was unconstitutional, while the contention in the Myers case was that the Board lacked jurisdiction. An argument may perhaps still be made therefore that the Myers case does not preclude an injunction where the constitutionality of the whole act is in issue. It is difficult to see, however, how the substantive grounds of the action affect the quantum of injury occasioned by the holding of a hearing.

While the Myers case will help to delineate the irreparable injury concept, a preponderant area of uncertainty still remains. Since generalizations are obviously futile, one illustration of the elasticity of the concept should suffice. In Federal Trade Commission v. Claire Furnace Company the court refused to enjoin the enforcement of a subpoena duces tecum on the ground that the corporate plaintiff had adequate opportunity to contest the validity of the act. Cf. Chamber of Comm. v. Federal Trade Comm., 280 Fed. 45 (C. C. A. 8th, 1922).

The language of the case may be treated as of such limited application: "So to hold would . . . in effect substitute the District Court for the Board as the tribunal to hear and determine what Congress declared the Board exclusively should hear and determine in the first instance . . . That rule [exhaustion of administrative remedies requirement] has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over the subject matter." 58 Sup. Ct. at 463-464 (Jan. 31, 1938). The court uses language capable of a broader interpretation, however, in its initial statement of the question for decision. Id. at 460.

Allowing such attacks when the constitutionality of the entire act is in question would not be so serious a hindrance to administrative action, however, as when the attacks are upon the administrative body's jurisdiction, or the constitutionality of a particular administrative action, for these latter questions may recur all during the agency's life while constitutionality need be definitively settled only once. For a discussion of the differentiation in treatment of these problems in connection with the exhaustion of administrative remedies requirement, see Comment (1935) 35 Col. L. Rev. 230, 234-236, 246, n. 85; cf. (1931) 2 Air L. Rev. 502, 503. Still an early attack in this fashion upon a statute's validity may be undesirable because it calls for an abstract opinion rather than one upon the statute in actual operation. White v. Johnson, 282 U. S. 367 (1931).

For a general discussion of irreparable injury in constitutional cases, see Comment (1936) 46 Yale L. J. 255. For an example of what is considered injury sufficient to avoid the exhaustion requirement, see Pacific Tel. & Tel. Co. v. Kuykendall, 265 U. S. 196 (1924).

274 U. S. 160 (1927).
of such an order by disobeying it and defending a mandamus suit brought by the commission, even though it would thereby expose itself to civil liability of $100 per day by way of forfeiture beginning thirty days after notice of default.\textsuperscript{59} In a later case, however, a temporary injunction against a similar order was granted because disobedience would expose the individual plaintiffs to the severer sanctions of criminal prosecution and possible fine and imprisonment.\textsuperscript{60}

When it cannot plausibly be asserted that irreparable injury is threatened, one device for contesting interlocutory orders remains. If the commission finds it necessary to secure testimony or documents from a party whose conduct is being investigated, he may obtain a review by refusing to obey the subpoena.\textsuperscript{61} The commission will then be forced to bring a mandamus action, and the defendant may claim that the whole proceedings are beyond the powers of the commission. Thus in the \textit{Jones} case, the Supreme Court denied certiorari on the question of the appealability of the commission's refusal to allow withdrawal of a registration statement,\textsuperscript{62} but decided in favor of Jones in a mandamus suit brought by the Commission to compel testimony in the registration proceeding.\textsuperscript{63} Similarly the NLRB may be constrained to subpoena the books of an employer in order to determine whether he is engaged in interstate commerce.\textsuperscript{64} Realizing that this practice would probably open the gates to premature attacks on jurisdiction,\textsuperscript{65} the NLRB has resorted to the device of subpoenaing the books of carriers to secure the necessary evidence;\textsuperscript{66} but satisfactory information can be obtained in this manner only in a lim-

\textsuperscript{59} The \textit{Claire Furnace} decision was subsequently followed in a case where notice of default had already been served. Federal Trade Comm. v. Maynard Coal Co., 22 F. (2d) 873 (App. D. C. 1927).

\textsuperscript{60} Federal Trade Comm. v. Millers' Nat. Federation, 23 F. (2d) 963 (App. D. C. 1927). For a suggestion that a similar argument might have been made in the \textit{Claire Furnace} case, see Handler, \textit{The Constitutionality of Investigations by the Federal Trade Commission: I} (1928) 28 Col. L. Rev. 703, 714 et seq. Four years later a permanent injunction was denied. Federal Trade Comm. v. Millers' Nat. Federation, 47 F. (2d) 428 (App. D. C. 1931). These cases, of course, are concerned with the question of when legal remedies are adequate; but the problem of when administrative remedies are adequate is obviously similar.

\textsuperscript{61} In general, all orders which have to be enforced by the courts may be contested by resisting the administrative agency's enforcement suits. See note 8, supra.


\textsuperscript{64} See Bradley Lumber Co. v. National Labor Relations Bd., 84 F. (2d) 97, 100 (C. C. A. 5th, 1936).

\textsuperscript{65} Notice of a hearing is generally not an appealable order, even when lack of jurisdiction is asserted. See notes 28, 29, supra. But cf. notes 30, 37, supra.

\textsuperscript{66} See Remington Rand, Inc. v. Lind, 16 F. Supp. 665, 670 (W. D. N. Y. 1936) (suit by employer to enjoin board proceedings; contention that this practice, by depriving employer of opportunity to defend subpoena enforcement suit, made remedy at law inadequate).
ited number of cases. Passive resistance as a method of securing review is likely to be confined almost exclusively to agencies such as the SEC and the NLRB, since penalties for disobedience of their subpoenas do not attach until the court orders compliance. On the other hand, in the case of tribunals such as the Federal Trade Commission, refusal to obey a subpoena of itself subjects the contumacious witness to penalties, if the subpoena is eventually upheld. Nevertheless, recalcitrancy of this nature has been employed at an early stage of the proceedings as a method of challenging the power of the Federal Trade Commission to conduct a particular fact-finding investigation.

II.

The rules thus far discussed merely delay attacks on administrative action; equally important are the doctrines that outlaw appeals entirely. Limitations of this sort may be divided into three broad categories: first, those applicable to orders granting or denying a privilege to undertake a course of conduct, second, those applicable to orders directing or refusing to direct the discontinuance of a practice, and, third, those applicable to both these types of orders.

**Licensing Orders.** Appeals may be taken from denials of a license or privilege, except in the rare instances when the licensing power of the administrative agency can be exercised with "unqualified," "free," or "pure" discretion. "Purely discretionary" is commonly contrasted with "quasi-judicial," but the antithesis is of small aid in giving content to this elusive concept. Quasi-judicial action can only be defined as action which affects property rights in a fashion sufficiently vital as to require notice and hearing, "purely discretionary" as that which may be taken without notice and hearing.


71. This distinction is couched by Freund in terms of enabling and directing powers. Freund, op. cit. supra note 12, at 59-64.

72. Id., at §§ 49, 55, 146, 155. See Williamsport Wire Rope Co. v. United States, 277 U. S. 551, 559 (1928); Smith v. Foster, 15 F. (2d) 115, 117 (S. D. N. Y. 1926).

73. See Interstate Comm. Comm. v. Louisville & N. R.R., 227 U. S. 88, 91 (1913); Chicago Junction Case, 264 U. S. 258, 264 (1924); Feller, op. cit. supra note 9, at 659 et seq. For a suggestion that a denial of a license may infringe upon the applicant's property rights in the form of his right to work, see Dickinson, op. cit. supra
Because of the vagueness of these concepts, the statutes setting up the administrative agencies may sometimes exercise considerable influence. Thus, if the statute omits mention of a hearing, or grants one only at the option of the administrative body, courts may be reluctant to allow an appeal, because to do so might at the same time necessitate a declaration that the statute is void for failure to guarantee a hearing.\textsuperscript{74} And the chances of evading the requirement of a hearing will be enhanced if the agency's licensing power is to be exercised according to "its discretion" or "its judgment,"\textsuperscript{75} and if that discretion is to be employed without reference to any standard, or with reference to a general standard—such as the public interest—which does not submit to evidentiary determination.\textsuperscript{76}

Even these equivocal statements convey an erroneous impression of certainty, for these flexible doctrines have been refracted through the diverse remedial processes of the 48 states,\textsuperscript{77} and the result has been a confusion clearly unparalleled by any of the other doctrines governing appealability. But while the doctrine has already become distended in its impact on the orders of state licensing boards, it is still in an amorphous stage of development in its relation to the licensing orders of the federal administrative agencies. The explanation of this contrast is probably the vastly wider range of state licensing activities and the comparatively recent employment of the licensing power to implement the activities of the federal regulatory agencies.\textsuperscript{78} With the increasing resort to the licensing power by federal agencies, amplification of the "pure discretion" doctrine may be anticipated.

The issue was squarely raised for the first time in a recent case involving the confidential information provisions of the Securities and Exchange Act.\textsuperscript{79} Section 12(b) of the Act requires a corporation whose securities are sold on national exchanges to file a report containing certain information con-

\textsuperscript{33} Where revocation of an existing license is involved, there is a stronger argument in terms of property rights. See (1926) 24 Mich. L. Rev. 846.

\textsuperscript{74} See Bratton v. Chandler, 260 U. S. 110 (1922). Where no hearing is provided for, the court may imply such a provision in order to preserve the statute's constitutionality. Comment (1931) 80 U. of Pa. L. Rev. 96, 99.


\textsuperscript{76} Id., at § 34. But cf. Tollefson, \textit{Judicial Review of the Decisions of the Federal Trade Commission} (1927) 4 Wis. L. Rev. 257, 272 \textit{et seq.} Questions may arise whether such grants of discretion are not improper delegations of legislative power. See (1928) 54 A. L. R. 1104; (1934) 92 A. L. R. 400.

\textsuperscript{77} For a study of remedies against administrative action in New York, see Comment (1933) 33 Col. L. Rev. 105. This study indicates the uncertainty and local peculiarities of the doctrines now under discussion. Id., at 110 \textit{et seq.}


cerning its corporate structure. Under Section 24(b) the corporation may file written objection to the public disclosure of any information, and "the Commission is authorized to hear objections in any such case where it deems it advisable." The Commission "may . . . make available to the public the information . . . only when in its judgment a disclosure of such information is in the public interest." After holding a hearing, the Commission refused to grant the request of the American Sumatra Tobacco Company for confidential treatment. When the company attempted to appeal, the Commission contended that only orders which must be preceded by notice and hearing are appealable, and that since no hearing was required, no appeal could be taken. The court, however, declared that "property rights" such as were here involved could not be destroyed without notice and hearing, and that it would construe Section 12 as merely authorizing the Commission to dispense with a hearing when confidential treatment was granted.

While the decision does not determine whether appeals can be taken when notice and hearing are not necessary, it helps to indicate when licensing orders must be preceded by hearing. There is some doubt, however, that the decision will be sustained, for there have been holdings that hearing and appeal need not be provided when, as here, a statute makes a special exception from a general requirement or when the permission may be classified as a privilege.

Even if the court had held that no hearing were necessary, it is by no means clear that the order would be immune from attack. Indeed, the commission merely contended that the provision for statutory appeals was applicable only to orders issued after hearing; it expressly conceded that a general equity

81. 48 STAT. 901, 15 U. S. C. § 78x(b) (1934) (italics supplied). This is not strictly a licensing provision, but is virtually equivalent to one, in that it provides in essence for the grant or denial of permission to withhold information from the public.
82. Congress specifically rejected a provision for a hearing in this section. See Comment (1938) 47 YALE L. J. 790, 796, n. 46.
83. See Comment (1938) 47 YALE L. J. 790, 796.
85. See Comment, (1934) 34 COL. L. Rv. 332, 339, n. 47, and cases cited. On the necessity of notice and hearing in administrative proceedings in general, see, also, Comment (1931) 80 U. OF PA. L. Rv. 96.
86. The statute provides that appeals may be taken from an order "issued by the Commission in a proceeding . . . to which such person is a party," that a transcript of the record of such proceeding be certified, and that "findings of fact, if supported by substantial evidence, shall be final." 48 STAT. 901, 15 U.S.C.A. § 78y(a) (1934). The commission's argument was that the wording of the provision indicated that the only decisions appealable thereunder were those which had to be preceded by a hearing so that its findings would be supported by evidence contained in a record. But see
injunction could be secured to prevent the publication of the information. But it is doubtful whether the commission's contention can be maintained. Since a decision that no hearing was necessary would indicate that no substantial property rights were affected, it might be difficult to show irreparable injury for the purposes of securing equity jurisdiction. This objection might be avoided in the more typical license cases, where the legal remedy of mandamus is usually invoked. But though administrative action could be contested in this manner, it would rarely be overturned, because of the doctrinal difficulty that mandamus will not lie to coerce administrative discretion to reach a particular decision.

When a license is granted, property rights are not impinged upon so directly as when one is denied; grants of permission are therefore more likely to be held exercises of "pure discretion" than are denials. Thus, though the court in the Sumatra case felt constrained to find that the statute guaranteed a hearing when confidential treatment was refused, it conceded without hesitation that the Commission might dispense with hearings when confidential treatment was granted.

While the problem of whether an attack may be made on a grant of a privilege has normally not been posed in terms of "pure discretion," similar results are reached by resort to the doctrine that only interested and affected parties may appeal. In statutory injunction suits this doctrine finds its source in the general equity principle of irreparable injury, in statutory appeals,
the statutes themselves generally provide that appeals may be maintained only by "aggrieved" parties.92

As in the case of a denial of a license, the provisions for notice and the conduct of a hearing may be influential in determining sufficiency of interest. Thus, if the statute requires that notice of an application for a permission be sent to specified parties, a persuasive argument can be made that the right to notice implies the right to appeal.93 On the other hand, the customary provisions for a hearing are couched in general terms, and cannot be deemed to confer on any one a right to appeal. But the actual conduct of the hearing may be of importance, for one who does not take part in a hearing may find it difficult to assert that his interest is sufficient to entitle him to appeal. Thus by specific statutory provision the decisions of the Securities and Exchange Commission are appealable only by those who have attained the status of parties before the Commission.94 Similarly, before an appeal may be taken from a decision of the Communications Commission, some effort at least must have been made to participate in the administrative hearing.95 On the other hand, under the statutory injunction procedure, an appeal may be maintained even though the appellant did not take part in the hearings.96

While failure to appear at the hearing may be fatal, participation does not of itself bestow the right to appeal, for an administrative hearing is said to be more in the nature of an investigation than of a trial.97 Thus, though the Supreme Court said in the Chicago Junction case98 that the very granting of intervention to the complainants by the Interstate Commerce Commission indicated that they had sufficient interest to challenge the order involved,99 the commission's practice of allowing liberal intervention100 has made it

92. See, e.g., statutes cited in notes 5 and 6, supra.
93. FREUND, op. cit. supra note 12, § 55. See Miller v. United States, 277 Fed. 95 (S. D. N. Y. 1921), discussed in note 107, infra.
94. See note 86, supra.
98. 264 U. S. 258 (1924).
99. "The intervention must be preceded by an order of the Commission granting leave; and leave can be granted only to one showing interest. No case has been found in which either this Court, or any lower court, has denied to one who was a party to the proceedings before the Commission the right to challenge the order entered therein." Id., at 268. The court emphasized the distinction between parties who are allowed to intervene and those who are allowed to be heard. Id., at 268, n. 11; see McLean Lumber Co. v. United States, 237 Fed. 460, 467-468 (E. D. Tenn. 1916).
necessary to require an independent showing of interest.\textsuperscript{101} And even when a party petitioned the Radio Commission for a rehearing on a grant of a license, it was indicated that he did not automatically obtain the right to appeal from an affirmance of the grant.\textsuperscript{102}

Since participation in the hearing normally does not determine the right of appeal, most of the cases have been decided in terms of sufficiency of interest. Attempts to prosecute appeals from grants of permission have been made by two broad classes of persons: competitors of the licensee and representatives of the public. Generally a competitor cannot maintain an appeal simply by showing that he will be injured by the incidence of increased competition.\textsuperscript{103} He must go further and show that the order has deprived him of a chance to compete on an equal basis with the licensee, or that it has otherwise interfered with his operations. Thus, in the \textit{Chicago Junction} case, an order of the Interstate Commerce Commission permitting a single carrier to obtain control of certain terminal railroads that had been used impartially by all carriers entering Chicago was held to involve an injury to the competing lines which was more than a mere increase in competition.\textsuperscript{104} But an order of a state securities commission allowing the registration of certain certificates does not deprive the registrant’s competitors of any rights; hence they cannot appeal as parties aggrieved thereby.\textsuperscript{105} A similar holding with respect to decisions of the Securities and Exchange Commission may be anticipated. When the Communications Commission grants a license to a radio station, a competitor may appeal as a party aggrieved if substantial interference in the broadcasting channel of his already established station may result, or if his present application for a license to set up a station of his own is thereby foreclosed; but prior informal inquiry as to the possibility of obtaining a license or a mere expectancy of applying for one in the future does not make him sufficiently interested.\textsuperscript{106}


\textsuperscript{103} Pennsylvania R.R. \textit{v.} United States, 40 F. (2d) 921 (W. D. Pa. 1930); see Chicago Junction Case, 264 U. S. 258, 271 (1924) (Sutherland, J., dissenting); cf. Note (1937) 109 A. L. R. 1259. But cf. Groner, J., dissenting in Sykes \textit{v.} Jenny Wren Co., 78 F. (2d) 729, 734 (App. D. C. 1935). See Comment (1933) 33 \textit{Col. L. Rev.} 105, 106, n. 4, for New York cases where competitors of the successful applicant for administrative permission were held to have enough of an interest to maintain an appeal. See also \textit{N. Y. INSURANCE LAW} (1925) \S S 91(6), 143(13) for provisions expressly granting the right to all other certificate-holders to appeal from a decision of the commissioner of insurance granting a certificate of authority.

\textsuperscript{104} See note 99, supra, for a further ground for this decision.

\textsuperscript{105} In \textit{re} Deseret Mortuary Co., 78 Utah 393, 3 P. (2d) 267 (1931); but cf. Clarksburg-Columbus Short Route Bridge Co. \textit{v.} Woodring, 89 F. (2d) 788 (App. D. C. 1937).

Among those who may seek to champion the interests of the public are the stockholders of the applicant company who oppose the authorized extension of the company's facilities, officials of the states in which the company operates, the consumers upon whom the authorized actions may have a direct effect, or organizations which represent the general public.

Since the administrative body itself is generally regarded as the guardian of the public interest, such appellants must show some actual invasion of their independent legal rights. In In re Deseret Mortuary Company, for example, the Utah Supreme Court held that the alleged desire of the Chamber of Commerce to keep unworthy securities from being placed before the public was insufficient to allow it to appeal as a "person aggrieved" by an administrative decision allowing the registration of a company's securities.


107. See Venner v. Michigan Cent. R.R., 271 U. S. 127 (1926). The language indicates vaguely that a minority stockholder might have successfully challenged an I. C. C. order permitting the issuance of new securities by the carrier corporation had he chosen the right forum. But in Miller v. United States, 277 Fed. 95 (S. D. N. Y. 1921), it was indicated that only the authorities of the states through which the carrier passes can enjoin such a permissive order. The statute specifically provides for notice to such officials. See also (1937) 47 YALE L. J. 289, 292, n. 19.


109. Cf. Home Furniture Co. v. United States, 271 U. S. 456 (1926); McLean Lumber Co. v. United States, 237 Fed. 460 (E. D. Tenn. 1916) (shipper attacking a rate order). Two hundred railroads have recently filed a petition in the District of Columbia Court of Appeals to review orders of the Bituminous Coal Commission fixing minimum prices for coal. They complain as parties aggrieved insofar as the orders affect the price of locomotive fuel. This is among the first cases to come up on appeal from the decisions of this commission. (1938) 5 U. S. L. WEEK 624. A stay of these price orders has been granted pending determination of the suits. (1938) 5 U. S. L. WEEK 673. Cf. Blackman v. Mellon, Sec'y of Treasury, 5 F (2d) 987 (E. D. N. Y. 1924).


111. United States v. Merchants and Manufacturers Traffic Ass'n, 242 U. S. 178 (1916); Edward Hines Yellow Pine Trustees v. United States, 263 U. S. 143 (1923); Alexander Sprunt & Son v. United States, 281 U. S. 249 (1930); Pulitzer Publishing Co. v. Federal Communications Comm., 94 F. (2d) 249 (App. D. C. 1937). In the case of the awarding of government contracts to the lowest responsible bidder, taxpayers have been allowed to challenge by mandamus the contracting board's award. See (1938) 47 YALE L. J. 833, n. 10.

112. 78 Utah 393, 3 P. (2d) 267 (1931).

113. The court indicated also that, when registration is denied, the only persons interested for the sake of appeal are those who have given notice that they intend to sell the securities, i.e., those who are interested as issuers, dealers, or salesmen thereof. Id. at 400, 3 P. (2d) at 269.
"Directing" Orders. While an order that a certain practice be discontinued is quasi-judicial and appealable, it is by no means clear that an appeal may be taken from a refusal to institute proceedings or from a refusal to issue such an order.\textsuperscript{114} Appeals of this type are governed by doctrines similar to those applied to orders granting licenses, for a refusal to take action is somewhat in the nature of a "purely discretionary act." And since the administrative agency itself is often regarded as the guardian of the public interest, there may be a reluctance to allow appeals by private parties.\textsuperscript{115}

The right to prosecute an appeal, then, may depend on the incidence of a refusal to issue an order on private rights. Sometimes the statutory provisions for appeal may help to indicate whether the proceeding is essentially public or private. Thus a competitor or a consumer probably cannot appeal from a refusal of the Federal Trade Commission to issue a cease and desist order,\textsuperscript{116} for the proceedings are regarded as being conducted principally in the public interest.\textsuperscript{117} On the other hand, while proceedings under the National Labor Relations Act are also tinged with a strong public interest,\textsuperscript{118} the union which prefers charges has a vital interest,\textsuperscript{119} and the National Labor Relations


\textsuperscript{115} \textit{Cf.} cases cited in note 111, \textit{supra}.

\textsuperscript{116} The appeal provisions mention only cease and desist orders; appeals from refusals to order are therefore probably precluded. 38 STAT. 720 (1914), 15 U. S. C. § 45 (1934), Chamber of Commerce v. Federal Trade Comm., 260 Fed. 45 (C. C. A. 8th, 1922); see note 41, \textit{supra}. Moreover, only the party who is required to cease and desist by the commission's order can appeal from it under the statute. Wholesal Grocers' Ass'n v. Federal Trade Comm., 277 Fed. 657 (C. C. A. 5th, 1922).

\textsuperscript{117} See \textit{Henderson, THE FEDERAL TRADE COMMISSION} (1924) 49; \textit{Freund, op. cit. supra} note 12, at 168. For similar reasons mandamus would probably not lie to compel the commission to hold a hearing on an alleged unfair trade practice even though its refusal to institute proceedings were based on an erroneous belief that it was without jurisdiction. Furthermore, the language of the act is so phrased as to leave it clearly to the commission's discretion to prosecute or not, and it is said that mandamus cannot be used to coerce administrative discretion. \textit{Id.}, at 139. See note 59, \textit{supra}. But, while decisions of the Interstate Commerce Commission refusing to entertain proceedings are also not subject to statutory review, mandamus will lie to force the commission to do so when its refusal is the result of error in respect to its jurisdiction. See cases cited in note 147, \textit{infra}. Those cases, however, are more like two-party suits in which the commission acts solely as judge, while individual complainants have no such control over the prosecution of cases before the Federal Trade Commission.

\textsuperscript{118} \textit{Cf.} Comment (1936) 22 \textit{WASH. U. L. Q. Rev.} 81, 88, n. 32; Comment (1935) 35 Col. L. Rev. 1098, 1112, n. 100.

\textsuperscript{119} The board has thus far acted only in response to petitions for investigation and certification of representatives filed by employees. See Comment (1938) 32 ILL. L. REV. 568, 597.
Act specifically provides that an appeal may be taken from a "final order of the Board granting or denying in whole or in part the relief sought."\(^{120}\)

**Negative Orders.** Appeals from a diverse group of orders are precluded by the unique doctrine known as the negative order rule. This doctrine has been applied almost exclusively to decisions of the Interstate Commerce Commission and is apparently confined to agencies whose decisions are subject to a similar type of review.\(^{121}\) In the leading case of *Proctor and Gamble Company v. United States*\(^{122}\) it was held that, where a shipper had complained to the commission as to the reasonableness of certain charges and had been denied relief after a hearing, he might not thereafter petition the Commerce Court to set aside the commission's "negative" order and to enjoin future collection of these charges. The first basis for distinguishing such an order, according to the court, was that the express language of the Act gave the Commerce Court jurisdiction over suits brought for the enforcement of the commission's orders and over those brought to enjoin or annul such orders.\(^{123}\) The juxtaposition of the enforcement provision and the injunction provision was seized upon as indicating that only orders which require enforcement are subject to review.\(^{124}\) This interpretation of the statute has at most a purposive plausibility;\(^{125}\) and, in the *Chicago Junction* case, it was held that orders which grant a privilege may be enjoined or set aside, even though they also need no further enforcement.\(^{126}\) The court further said that the real basis of the negative order doctrine was the second ground of the decision in the *Proctor and Gamble* case: the desire to carry out the Act's policy of placing

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121. The decisions of the Interstate Commerce Commission are subject to the review procedure provided by the Urgent Deficiencies Act. See note 3, *supra*. United States v. Corrick, 298 U. S. 435 (1936) (decision of the Secretary of Agriculture under the Packers and Stockyards Act); Inghram v. Union Stock Yards Co., 5 F. Supp. 486 (D. Neb. 1933) (same); see American Tel. & Tel. Co. v. United States, 14 F. Supp. 121, 127 (S. D. N. Y. 1936) (Federal Communications Commission); Comment (1934) 34 COL. L. REV. 908, 916. The agencies whose decisions are subject to the identical review procedure are collected in United States v. Griffin, 58 Sup. Ct. 601, at 606 (1938).

122. 225 U. S. 282 (1912).

123. COMMERCE COURT ACT, c. 309, §§ 1 and 2, 36 STAT. 539 (1910). The Commerce Court's jurisdiction as expressed in these provisions was later transferred to the district courts. See note 3, *supra*.


125. See Comment (1934) 34 COL. L. REV. 908, 909.

126. 264 U. S. 258 (1924). See Brooklyn East. Dist. Terminal v. United States, 28 F. (2d) 634, 636 (S. D. N. Y. 1927). The problem in connection with this type of order is to decide what party has sufficient interest to attack them. See p. 781 et seq., *supra*. The ground of distinction used by the court was that such orders grant rather than deny relief.
the resolution of technical problems in expert hands. But it is difficult to see how it would constitute more of a usurpation of administrative discretion for the courts to review this type of decision than one involving affirmative action. And in any case administrative discretion could better be preserved inviolate by a more scrupulous limitation of the scope of review than by such haphazard restrictions on appealability.

Possibly because of the inadequacy of the conventional explanation for the negative order doctrine, the Supreme Court has recently advanced another justification. The review procedure provided by the Commerce Court Act and its successor, the Urgent Deficiencies Act, is peculiar in that the original hearing is before a three-judge court, an appeal lies directly to the Supreme Court, and priority is accorded both in the trial court and on appeal. In United States v. Griffin these peculiarities were held to indicate that the orders appealable in that manner were those whose importance and effect were so widespread that it was desirable to "guard against ill-considered action by a single judge" and yet "avert the delays ordinarily incident to litigation." The Supreme Court seemed to feel that, since negative orders are refusals to change the existing status, they are not sufficiently important to be thus appealable. But the use of the affirmative or negative test as the criterion for determining what orders are of wide public interest seems only slightly related to the facts.

It is doubtful whether the negative order doctrine can be explained satisfactorily on the basis of the type of action to which it has been held to apply — or on any other basis — for it has been extended to cover a wide gamut of situations. Thus it has been applied where the commission denied a shipper's application for reduction in rates, where the commission declined to increase a carrier's allowance for railway mail compensation, and where the commission refused to grant a carrier a certificate.

128. 58 Sup. Ct. 601 (1938).
129. Id., at 604-605. The court also relied upon the first ground for the Proctor & Gamble decision to justify the negative order rule. See note 124, supra. The order under attack was a refusal to increase the compensation to be paid to a railroad by the government for carrying the mail, and the court indicated that even an affirmative order involving such a problem would not have the requisite public importance to be subject to review by statutory injunction. Other orders which the court indicated were lacking in the necessary public interest were those determining the amount due to a railroad on the government's guaranty of income for the period following the relinquishment of federal control, and valuation orders under the Valuation Act. See notes 21 and 22, supra.
of public convenience and necessity to extend its lines. Resort has been had to the negative order doctrine most frequently in cases where shippers have applied to the commission for an award of reparation from a carrier, but an alternative ground for these decisions has been indicated. In *Standard Oil Company v. United States* the Supreme Court pointed out that in reparation suits such as that in issue, the shipper has a choice of resort to the courts or to the commission, and therefore, when denied relief by the latter, he may be precluded from suing in the courts under the election of remedies doctrine. This rationale does not fit all reparation suits, for whenever a rate, rule or practice is attacked as unreasonable or unjustly discriminatory, and the exercise of administrative judgment upon an intricate fact situation is required, the shipper has no choice; he must make primary resort to the commission.

The explanation of these decisions may be a desire of the courts to relieve themselves of a severe burden, for there are a large number of such suits by shippers, and there has been a tendency toward the development of a "reparation racket." But while this policy is probably justifiable, it results in granting the right of appeal to one side alone in an action that is essentially similar to a two-party suit in the courts.

The uncertain doctrinal base of the negative order rule is reflected in judicial attempts to determine whether particular orders fit within the negative order category. The courts have developed the doctrine that orders negative in form are subject to review by statutory injunction if they are affirmative in substance. In the *Intermountain Rate* cases, the Supreme Court interpreted the Interstate Commerce Act as giving to carriers the positive right to petition the commission for relief from the long and short haul clause, so that refusal to grant relief is not negative but affirmative "since it refuses that which the statute in affirmative terms declares shall be granted if only the conditions which the statute provides are found to

to a legislature's failure to pass a statute as justification for the refusal to exert judicial compulsion upon it. See Comment (1934) 34 Col. L. Rev. 908, 911.


137. Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U. S. 426 (1907); Miller, loc. cit. supra note 47.

138. INTERSTATE COMMERCE COMMISSION, 45TH ANNUAL REPORT (1931) 93-94.

139. See Miller, op. cit. supra note 47, at 79, n. 129.

140. 234 U. S. 476 (1914).
Again, where the commission dismissed a carrier's petition attacking divisions of joint rates voluntarily enforced by a group of carriers, the court held that the dismissal really constituted an affirmative order that those divisions be continued in force and was therefore enjoinable. Since this argument could have been made with equal force in the Proctor and Gamble case, the negative order doctrine seems to have been freely manipulated by the courts in taking or refusing jurisdiction over statutory injunction suits.

Even when an order is concededly negative, there is a possibility that review may be obtained by methods other than the statutory injunction. But whenever the issue has been squarely raised, the negative order doctrine has been extended to preclude resort to other remedies. The reasons given for such holdings are that the statute limits the court's jurisdiction to "affirmative" orders and that mandamus, certiorari, or mandatory injunction will not lie to coerce administrative discretion or to act as a substitute for writ of error or appeal. Despite the strong language of the courts, the possibility still remains that a decision of the commission which exceeds the bounds of "mere error" may be subjected to some one of these extraordinary methods of review; for mandamus has been granted to compel the commission to hold a hearing on the merits of a case when it has erroneously decided that it has no jurisdiction. And there have been other indications that the


143. In that case, the charges that were being attacked were in accordance with a set of rules drawn up by a committee of the National Association of Railroad Commissioners and approved by the Commission, though their enforcement was not imperatively prescribed by that body. Thus, the dismissal of the complaint might have been held to be an affirmative order that the complainant continue to pay the charges in question. Similar arguments could be made in most of the negative order cases.

144. See Comment (1934) 34 Col. L. Rev. 908, 915.

