Chapter 15

Validity of Rules and Regulations

1. Logical Criteria

LOGICALLY, the questions to be examined by the courts, in determining the validity of a rule or regulation adopted by an administrative agency, should depend on the type of regulation involved. In the case of a legislative regulation (i. e., one promulgated pursuant to a delegation of legislative power, the violation of which involves statutory sanctions) the queries would be: first, whether the regulation related to the subject matter on which power to legislate had been delegated; second, whether the regulation conformed to the standards prescribed in the delegatory statute; and third, whether the regulation was invalid on constitutional grounds, such as due process. The approach should be somewhat different, from a purely logical viewpoint, when an interpretative regulation is challenged. In such cases, the inquiry would be fundamentally a question as to whether the ruling correctly interpreted the statute, and involved with this issue would be a question as to whether the challenged ruling amounted to an attempt to exercise legislative powers which had not been delegated. If this were the case, the ruling involved would be held invalid as going beyond the sphere of interpretation and into that of legislation.

But in a field so surcharged with delicate questions of policy, and the balancing of competing claims and divergent governmental theories, the law cannot live on logic. The approach must be realistically pragmatic. While the decisions are ordinarily couched in maxims that set forth general "tests" as to the validity of regulations, yet these formal

criteria often express the result of a judgment rather than the means by which that judgment was reached. In interpreting and evaluating the decisions, the circumstances under which the rule was announced require as careful consideration as the rule itself. The general rules laid down in the decisions, like the maxims of equity, are not to be overlooked but still are not to be taken as touchstones to the decision of any particular case.

These general rules for the most part do not specifically recognize the distinction which logically should be made between legislative regulations and interpretative regulations. This is in part due to the traditional reluctance of many courts to admit that legislative functions may be delegated—any type of agency lawmaking is said, euphemistically, to be merely "administrative"—and is in part a result of the difficulty of differentiating between legislative and interpretative regulations. In many cases, where an agency has been granted some legislative powers, it is often a matter of conjecture whether a particular regulation was intended to be an exercise of such delegated legislative authority or merely an exercise of the agency's broad implicit power to interpret, for purposes of its administrative activity, the statute under which it operates. However, despite the lack of formal acknowledgment of the fundamental difference between legislative and interpretative regulations, there is a practical recognition of this difference running through the cases.[1] A dictum or general rule laid down by the court in a case dealing with an interpretative regulation will often receive but lip service in a case involving a legislative regulation. The fundamental logical difference between these two types of rules or regulations must therefore be borne in

[1] There are, however, some cases where a seemingly illogical result was reached by treating as legislative an interpretative regulation, or vice versa. F. P. Lee, "Legislative and Interpretative Regulations," 29 GEO. L. J. 1 (1940).

mind in examining the general rules as laid down by the courts.

2. General Tests of Validity

(a) *Exceeding authority conferred.* It is often said that a regulation is invalid if it exceeds the authority conferred by statute. This truism affords but a limited source of guidance, for of course the difficult question, always, is the determination of the outermost limits of the delegated authority. The rule has but little independent force except in cases where a power has been delegated to make legislative rules within a plainly limited sphere and subject to defined standards, and where the rule adopted exceeds this sphere or is contrary to the standards.[2] The rule may also be applied to cases where there has been no delegation of legislative power, and where a regulation issued as an administrative interpretation of the statute is found to go beyond the sphere of interpretation and into the forbidden realm of legislative regulation.[3] In other types of cases, this general criterion is merely the characterization of a result arrived at by some more specific course of reasoning.

(b) *Conflict with statute.* In many cases, the conclusion that a regulation is invalid as exceeding the authority conferred on the agency by statute is premised on the fact that there is a conflict between the challenged rule or regulation, on the one side, and, on the other, provisions of the governing statute or the standard laid down therein as a guide to the exercise of the agency's rule-making powers. A good example of the application of this general principle to a legislative regulation is *Addison v. Holly Hill Fruit Prod-*

[2] E.g., Illinois Cent. R. Co. v. McKendree, 203 U. S. 514, 27 S. Ct. 153 (1906).

[3] E.g., Work, Secretary of the Interior v. United States *ex rel.* Mosier, 261 U. S. 352, 43 S. Ct. 389 (1923).

ucts, Inc.,[4] where power had been delegated to an agency to define the "area of production" within a statutory provision exempting from the requirement of certain overtime wage payments individuals employed in the "area of production" in the canning or packing of agricultural commodities. Under the statute, the administrator was given legislative power to define the "area of production"; and he adopted a definition which excluded from the exemption canneries which employed more than a certain number of persons. Here, the general standard as laid down by Congress related to the geographical contiguity between the cannery and the growing areas; and the administrative agency's regulation was based on a policy completely at odds with this standard.

In cases where an interpretative regulation is thus in conflict with the court's interpretation of the statute, the conclusion of invalidity could be premised, in succinct terms, on the basis that the agency's interpretation of the legal meaning of the statute was wrong. Where this is so, the courts frequently invalidate an erroneous agency interpretation by saying that the regulation in question is invalid as being in conflict with the statute. Thus in *Helvering, Commissioner of Internal Revenue v. Sabine Transportation Co.*,[5] the court declared in setting aside the challenged regulations that they "in the teeth of the unambiguous mandate of the statute, are contradictory of its plain terms." [6]

(c) *Extending or modifying statute.* In some cases, the conflict between the regulation and the statute appears because the regulation seeks to extend or modify the statute.

[4] 322 U. S. 607, 64 S. Ct. 1215 (1944).

[5] 318 U. S. 306, 311–312, 63 S. Ct. 569 (1943).

[6] For similar cases, see M. E. Blatt Co. v. United States, 305 U. S. 267, 59 S. Ct. 186 (1938); Koshland v. Helvering, Commissioner of Internal Revenue, 298 U. S. 441, 56 S. Ct. 767 (1936); Watts v. United States (C.C.A. 2d 1936), 82 F. (2d) 266; United States v. Standard Brewery, Inc., 251 U. S. 210, 40 S. Ct. 139 (1920).

The cases above discussed [7] as typical of the trend of many agencies to extend beyond allowable limits the policy of the governing statute, present examples of regulations held invalid on this ground. In many instances, interpretative regulations which carry interpretation to a point of legislation, have been thus held invalid. As the court said in *Merritt v. Welsh*,[8] "If experience shows that Congress acted under a mistaken impression, that does not authorize the Treasury Department . . . to make new laws which they imagine Congress would have made had it been properly informed." This principle has been applied frequently. Thus, where a statute permitted duty-free importation of animals brought into this country for breeding purposes, and the customs officials undertook by regulation to limit the privilege to cases where the animals were of superior stock, adapted to improving the breed, this regulatory modification of the governing statute was held invalid.[9] A similar result was reached where a statutory authorization permitting the cutting of timber on public lands for "domestic uses," was sought to be limited by regulations so as to exclude the cutting of timber for certain domestic purposes deemed undesirable;[10] and again where an agency attempted by a general regulation to revoke outstanding permits without recourse to the statutory proceedings prescribed as a condition of the revocation of permits.[11] Not infrequently, regulations under the internal revenue laws have been held invalid as being attempts to add supplementary legislative provi-

[7] Ch. 12, ns. 18–32.

[8] Merritt v. Welsh, 104 U. S. 694, 704 (1881).

[9] Morrill v. Jones, 106 U. S. 466, 1 S. Ct. 423 (1883).

[10] United States v. United Verde Copper Co., 196 U. S. 207, 25 S. Ct. 222 (1905).

[11] Campbell, Federal Prohibition Administrator v. Galeno Chemical Co., 281 U. S. 599, 50 S. Ct. 412 (1930).

sions.[12] A regulation improperly restricting or narrowing a statute, or an agency's jurisdiction thereunder, would similarly be invalid.[13]

(d) *No reasonable relationship to statutory purpose.* In some cases the general policy of the regulation seems unrelated to the general policy of the statute, but neither direct conflict with the statute nor any clear extension of the statutory command can be shown. In such cases, at least if convinced that the challenged regulation produces burdensome and inequitable results, the courts may set it aside as bearing no reasonable relationship to the purpose of the governing statute and producing a result which is out of harmony with the statute and hence unreasonable.[14] For example, where a statute authorized a state agency to make certain regulations to prevent a waste of oil reserves, and it was shown that certain proration orders issued under such authority were not effective to prevent waste but did produce untoward effects in compelling pipe-line owners to furnish a market to producers who had no pipe lines, the regulation was held invalid on these broad grounds.[15] On a similar basis, regulations which attempt too rigidly to limit the degree of proof which will be required in various administrative proceedings, or to impose arbitrary tests where the statutory requirement is more flexible, may be held invalid.[16] Again, a regulation is said to have no reasonable relationship

[12] E.g., Helvering, Commissioner of Internal Revenue v. Credit Alliance Corp., 316 U. S. 107, 62 S. Ct. 989 (1942); Taft v. Helvering, Commissioner of Internal Revenue, 311 U. S. 195, 61 S. Ct. 244 (1940).

[13] Spiller v. Atchison, T. & S. F. Ry. Co., 253 U. S. 117, 40 S. Ct. 466 (1920).

[14] For statements of the rule, see dicta in Manhattan General Equipment Co. v. Commissioner of Internal Revenue, 297 U. S. 129, 56 S. Ct. 397 (1936); Fawcus Machine Co. v. United States, 282 U. S. 375, 51 S. Ct. 144 (1931).

[15] Thompson v. Consolidated Gas Utilities Corp., 300 U. S. 55, 57 S. Ct. 364 (1937).

[16] United States v. George, 228 U. S. 14, 33 S. Ct. 412 (1913); Lynch, Executrix v. Tilden Produce Co., 265 U. S. 315, 44 S. Ct. 488 (1924); Miller v. United States, 294 U. S. 435, 55 S. Ct. 440 (1935).

to the statute when it attempts to include what had, by apparent inadvertency, been omitted by the statute from the legislative scheme.[17]

(e) *Unreasonable and arbitrary regulations; violation of due process.* Where excess of authority cannot be predicated on the grounds that a regulation is in conflict with the statute, or improperly extends or modifies the statute, or has no reasonable relationship to the purpose of the statute (all of these being obviously closely related grounds), then a conclusion of invalidity must ordinarily be premised on the grounds that the challenged regulation is so unreasonable and arbitrary as to be unconstitutional.

As it is sometimes put, the regulation is invalid if it goes beyond what the legislature could authorize.[18] If the regulation, had it been enacted as a statute by the legislature, would have been held unconstitutional on any of the grounds on which statutory enactments may be attacked, then the regulation must fall. A regulation which amounts to a deprival of property without due process,[19] or is unreasonably discriminatory [20] may be set aside on this basis. Or the court may by judicial construction limit the scope of a regulation on the grounds that it would be invalid unless so limited.[21]

3. Factors Underlying Decision

These general tests offer at best a basis for argument as to the validity or invalidity of a challenged regulation. Does the regulation conflict with the statute by altering its meaning; or

[17] Iselin v. United States, 270 U. S. 245, 46 S. Ct. 248 (1926).

[18] Utah Power & Light Co. v. United States, 243 U. S. 389, 37 S. Ct. 387 (1917).

[19] International Ry. Co. v. Davidson, 257 U. S. 506, 42 S. Ct. 179 (1922).

[20] Chicago, R. I. & P. Ry. Co. v. United States, 284 U. S. 80, 52 S. Ct. 87 (1931).

[21] Goldsmith v. United States Board of Tax Appeals, 270 U. S. 117, 46 S. Ct. 215 (1926); M. Kraus & Bros., Inc. v. United States, 327 U. S. 614, 66 S. Ct. 705 (1946).

does it merely interpret and clarify an ambiguous statutory phrase? This question cannot be answered on a rhetorical basis; it often involves subtle judgments on deep-seated policy questions. Does the regulation "extend" the statute, or does it merely specify an application of the general legislative purpose which was implicit in the general language used by the legislature? This inquiry likewise is not purely logical; the answer depends largely on a judgment as to how broad a discretion should be vested in administrative agencies to implement vague statutory language. Is there a reasonable relationship between the terms of the regulation and the general statutory purpose? Appraisals of reasonableness are never based on logic.

In all but the plainest cases, the application of these general tests is at best highly debatable. The general tests do little more than define the actual issue which must be argued. Decision of this issue is to a large extent dependent on the particular factual details and social implications of each case. But there are some basic points of view which are ordinarily followed.

Implicit in many of the decisions cited above is a recognition of the doctrine that the scope of a particular agency's regulatory power must be determined by the character of the statute involved, and by the consequent practical need for giving a large degree of freedom of action to the administrative authorities. This principle was clearly enunciated in *United States v. Antikamnia Chemical Company*.[22]

The statute involved in that case required that medicinal preparations should bear a label stating "the quantity or proportion of . . . acetanilid, or any derivative or preparation of any such substances contained therein." The manufacturer of certain pills which contained acetphenetidin, a derivative of acetanilid, marketed them with a label which

[22] 231 U. S. 654, 662, 666, 34 S. Ct. 222 (1914).

stated the quantity and proportion of acetphenetidin contained. The manufacturer claimed that this constituted compliance with the statute, and that a regulation which further required him to specify on the label that the acetphenetidin was a derivative of acetanilid was invalid as extending the statutory requirement. The issue therefore was whether or not the regulation added to the law in providing that the label must state not only the name of the derivative (which the statute required) but also the name of the substance from which it was derived (as to which the statute was silent). In holding the regulation valid, the court pointed out that the purpose of the law was to warn the public of the presence of deleterious drugs in medicinal preparations; that a statement of the name of the derivative unaccompanied by an explanation of the substance from which it was derived would not accomplish this purpose, because while the public generally had some notion of the possible deleterious effects of acetanilid and would be warned by information that the medicine contained a derivative of acetanilid, yet the consumer would not be so warned if the label stated merely the name of the derivative and did not explain that it was a derivative of acetanilid. The extent of an agency's regulatory power, said the court "must be determined by the purpose of the Act and the difficulties its execution might encounter."

This practical doctrine of expediency is, then, a fundamental factor underlying judicial determination of the validity of administrative rules and regulations. Where the purpose of the statute is to vest broad discretionary powers in an agency, and where successful execution of the agency's task of administration so requires, a broad measure of autonomy will be accorded the agency; and there will be a tendency to view its regulations as in harmony with the statute and reasonable. Where, on the other hand, the statute does

not disclose a purpose of any such broad grant of power to the agency, and where no need can be readily seen for the extensive implementation of the statute through the medium of regulations, the courts will be more ready to discover a conflict between the statute and the regulation, or to hold that the regulation attempts to enlarge the statute, or is unreasonable.

A second factor is essentially historical. During the decade of 1930–1940, roughly, there developed (particularly in the federal courts, although the same trend can be seen in the decisions of many state courts) a much more wholehearted acceptance of administrative tribunals as respected and independent agencies of justice than had theretofore generally existed. This recognition of agencies as an integral part of the judicial system has led the courts to accord a more hospitable reception to challenged administrative regulations. Regulations which might have been held invalid in an earlier era are now likely to be upheld.

These two factors are interrelated. Recent statutes often pertain to fields of social control wherein the need for administrative discretion is obvious; and in such cases of course it is customary for the statute to lay down only broad standards, leaving significant details to be worked out through administrative rules and regulations of the agencies. Given this type of statute, and a judicial atmosphere of friendliness to the theory of administrative regulation, a challenged rule or regulation is quite likely to be held valid, unless plainly at odds with the statute or subject to clear constitutional infirmities.

The practical effect of these two factors can be seen by examining variant case situations.

Where a statute creates or recognizes private rights, and the purpose or effect of the regulation is to limit or restrict such rights, the courts were strongly inclined, until a few

years ago at least, to find the regulations invalid.[23] This attitude is still seen in the cases, but its rigor is considerably diminished, as may be illustrated by *National Broadcasting Co., Inc. v. United States*,[24] where the court in holding valid regulations which put many restrictions on the rights of radio broadcasting companies to effect intercompany affiliations, disposed of the claim that the regulations were arbitrary by saying that it did not have the technical competence to pass upon the wisdom of the regulations.[25]

Regulations promulgated by agencies whose task is the conduct of public business have always received a more kindly reception than those that control or regulate the carrying on of private business, for in such fields as the preservation of public health, the administration of the postal system, and the regulation of the currency, the courts have long been ready to concede the need for broad administrative discretion. As the philosophy of committing broad powers to administrative agencies in the regulation of private business is coming to gain wider acceptance, this differentiation is becoming less noticeable.

The field of tax regulations could be made a separate study, so great are the number of cases passing on the validity of regulations issued under taxing statutes. For many years, it was in this field particularly that the courts were likely to hold regulations invalid. Any attempt to enlarge ever so minutely the plain requirement of the statute was held invalid. Partly this represented the philosophy that ambiguities

[23] E.g., Campbell, Federal Prohibition Administrator v. Galeno Chemical Co., *et al.*, 281 U. S. 599, 50 S. Ct. 412 (1930); Goldsmith v. United States Board of Tax Appeals, 270 U. S. 117, 46 S. Ct. 215 (1926).

[24] 319 U. S. 190, 63 S. Ct. 997 (1943).

[25] With this decision may be compared the opinion in the earlier case of Waite *et al.* v. Macy *et al.*, 246 U. S. 606, 608–609, 38 S. Ct. 395 (1918), where the court in invalidating regulations which would have excluded certain types of tea from import, said, "No doubt it is true that this Court cannot displace the judgment of the board in any matter within its jurisdiction, but it is equally true that the board cannot enlarge the powers given to it by statute."

in taxing statutes should be construed in favor of the taxpayer; and partly it resulted from the fact that the courts could see no need for relying on administrative discretion in this field. Tax statutes involved typical legalistic problems; and there was little in the nature of the problems involved to lead the courts to defer to the expert knowledge of an administrative body. But as the complexity and technicality of tax statutes has developed to a point where the study of them is almost a separate science, and as the style of draftsmanship of the tax statutes has changed so that the question of taxability often depends on a matter of technical judgment rather than on a juristic interpretation of legalistic language, there has been a corresponding change in the attitude of the courts.[26]

But despite the hospitable reception which the courts now give challenged rules of administrative agencies, and despite the fact that statutes are now frequently so drawn as to make it clear that a wide measure of discretion must be allowed in the making of implemental regulations, still a regulation cannot stand which is plainly at odds with the legislative purpose, or plainly involves a usurpation of power, or is indubitably arbitrary and unreasonable.

[26] Dobson v. Commissioner of Internal Revenue, 320 U. S. 489, 64 S. Ct. 239 (1943).