

PART TWO

**UNDERLYING CONSTITUTIONAL
QUESTIONS**

CHAPTER 3

Delegation and Combination of Powers

A. EFFECT OF SEPARATION OF POWERS DOCTRINE ON DELEGATION TO ADMINISTRATIVE AGENCIES OF LEGISLATIVE AND JUDICIAL POWERS

THE vitality of the nineteenth-century belief in the principle of separation of powers accounts for much of the bitterness with which the development of administrative tribunals has been assailed. An offshoot of the theory that governmental powers must be separated is the rule against delegation of powers. Since the creation of each new administrative tribunal vested with regulatory powers involves a delegation of some measure of legislative power or judicial power (or both) and with it a further encroachment on the principle that the powers of government must be separated and channeled in the three constitutionally created departments of government, it was inevitable that the law of administrative tribunals should involve at the outset a collision with these time-honored shibboleths.¹

Much of the difficulty is today of little more than historical interest. But since the doctrine still retains some vitality, in modified form, and for the further reason that the ghosts of many old decisions (long overruled *sub silen-*

¹ There is no fixed or unvarying constitutional requirement prescribing the separation of the powers of government or proscribing delegations of power. The Federal Constitution does not require the several states to observe in their internal organization the limitations imposed by the separation of powers doctrine. *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 552, 28 S. Ct. 178 (1908). Neither the provision of Article IV, Section 4, of the Constitution, providing that the United States shall guarantee to every state a republican form of government, nor the provisions of the Fourteenth Amendment, have been held to necessitate a rigid separation of powers. *Ohio ex rel. Bryant v. Akron Metropolitan Park District*, 281 U. S. 74, 79-80, 50 S. Ct. 228 (1930); *Reetz v. Michigan*, 188 U. S. 505, 507, 23 S. Ct. 390 (1903). As to agencies created by state law, the question is primarily whether a delega-

tio) still haunt the books, a brief examination of the problem is essential.

1. Validity of Delegations

If judicial power be conceived of as the sort of power which a court exercises (for example, applying the general rule of a statute to particular factual situations), and similarly if legislative power be conceived as the sort of power which a legislature exercises (for example, determining what types of conduct shall be prohibited), then it must be conceded that both judicial and legislative powers may be delegated to administrative tribunals. There is no generical distinction between the function of a workmen's compensation commission in adjudicating a claim of an injured employee and that of a court in adjudicating a claim under some other statute imposing liability without fault. There was no change of function when the Board of Tax Appeals became the Tax Court.² Similarly, the policy-framing functions of the legislature in determining, for example, that switchboard operators employed in a public telephone exchange which has less than five hundred stations³ should be exempted from the overtime provisions of the Fair Labor Standards Act⁴ are not of a different genre than the policy-framing responsibility of the administrator who determined

tion of power is improper under the terms of the state constitution; and this is a question of state law. *Neblett v. Carpenter*, 305 U. S. 297, 59 S. Ct. 170 (1938); *Pacific States Box & Basket Co. v. White*, 296 U. S. 176, 186, 56 S. Ct. 159 (1935). The federal courts will, however, sometimes inquire as to whether a delegation of power under a state statute is so vague and general as to permit the agency to exercise an untrammelled discretion in a manner that might be discriminatory or oppressive. See *Yick Wo v. Hopkins*, 118 U. S. 356, 6 S. Ct. 1064 (1886). And see Jaffe, "An Essay on Delegation of Legislative Power: 1," 47 *COL. L. REV.* 359 (1947); Jefferson, *The Supreme Court and State Separation and Delegation of Powers*, 44 *COL. L. REV.* 1 (1944).

² 56 Stat. 957, 26 U.S.C. § 1100.

³ Act of June 25, 1938, 29 U.S.C. §§ 201-219.

⁴ This specific exemption in Section 13 of the Fair Labor Standards Act was added by the amendment of August 9, 1939, 29 U.S.C. § 213 (53 Stat. 1266).

that professional workers who earned over \$325 monthly⁵ should be exempted from the same statute.

Yet many courts have avoided candid recognition of the nature of such delegated powers. This has been accomplished by the convenient formula of describing such delegated powers as being only "quasi-judicial," or "quasi-legislative"—the "quasi" meaning, apparently, "not quite." These distinctions between "judicial" and "quasi-judicial," between "legislative" and "quasi-legislative" should be considered convenient fictions.

Refusal to recognize the fiction and insistence on the making of some logical distinction based on the nature of the delegable powers leads to inextricable difficulties. For example, the Wisconsin Court in an early case⁶ held that the function of a workmen's compensation commission was only quasi-judicial, since the commission merely "found the facts" on which the law operated; but when a few years later the state legislature bestowed upon another administrative agency the responsibility for finding as a fact whether or not illegal stock sales were made in bad faith, the court found that here the proposed function was purely judicial, and that the statute was hence void.⁷ Again, the New York Court in 1908⁸ said that the power to fix utility rates was only quasi-legislative, and for the reason that such powers had historically been delegated by the legislatures in various instances. But the next year it was argued before the same court that since a commission fixing rates was exercising only quasi-legislative powers, the courts could not on writ of

⁵ Sec. 13 of the act created an exemption for such individuals as might be defined as "professional" employees by the Administrator, and thus empowered the Administrator to decide what the exemption should be. Earlier, the regulations had fixed \$200 as the monthly salary requirement.

⁶ *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209 (1911).

⁷ *Klein v. Barry*, 182 Wis. 255, 196 N. W. 457 (1923).

⁸ *Trustees of Village of Saratoga Springs v. Saratoga Gas, Elec. Light & Power Co.*, 191 N. Y. 123, 83 N. E. 693 (1908).

certiorari review the commission's determination. And then the court, refusing to follow the logical implications of its earlier decision, decided that the power of the commission was not quasi-legislative but rather quasi-judicial, and hence reviewable.⁹ In some types of cases, the courts disagreed as to whether certain types of function were "purely" judicial or only "quasi" judicial. For example, the grant of a power to remove a public officer was held by some courts to be purely judicial¹⁰ and by others to be only quasi-judicial.¹¹ In other instances, powers which were originally held to be purely judicial and hence nondelegable were later held to be only quasi-judicial, and a proper subject for delegation to administrative tribunals.¹² Logic has retreated in the face of practical necessities. Not infrequently, the members of a court have been in disagreement as to whether a given power was "purely" or only "quasi" legislative or judicial.¹³ Demonstration that the distinction cannot be predicated on logical grounds can be found in the many cases discussing delegation of the power to punish for contempt.¹⁴

But the fact that the appellative "quasi" affords no logical distinction between those governmental powers which may be delegated to administrative tribunals and those which

⁹ *People ex rel. Central Park, North & East River R. Co. v. Willcox*, 194 N. Y. 383, 87 N. E. 517 (1909).

¹⁰ *Dullam v. Willson*, 53 Mich. 392, 19 N. W. 112 (1884).

¹¹ *State ex rel. Attorney-General v. Hawkins*, 44 Ohio St. 98, 5 N. E. 228 (1886).

¹² Pound, *ADMINISTRATIVE LAW* (1942) 32, discussing the statutes which empowered administrative boards to apportion the use of the water rights in a stream between conflicting claimants. In 1870, a pioneer statute of this character was declared unconstitutional as a delegation of purely judicial powers customarily exercised by courts of equity in suits to "adjudicate a stream." Two or three decades later, when such statutes became more common, the courts agreed that such power was only quasi-judicial.

¹³ For example, compare the majority and dissenting opinions in *Field v. Clark*, 143 U. S. 649, 12 S. Ct. 495 (1892). See also *J. W. Hampton, Jr. & Co. v. United States*, 276 U. S. 394, 48 S. Ct. 348 (1928).

¹⁴ See 35 COL. L. REV. 578 (1935).

must be reserved to the legislatures and the courts, does not of course mean that any or all of such legislative and judicial powers may be delegated. Rather, it points out merely the simple truth that "The line has not been exactly drawn which separates those important subjects, which *must* be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."¹⁵ The principles against delegability of essential powers still retain vitality at least to the extent of invalidating delegations which would render one department of government subject to the control of another department or which would confer uncontrolled discretion on administrative agencies in matters affecting substantial property rights or rights of personal liberty.

2. Preserving Essential Independence of the Departments of Government

Essentially, the doctrine of separation of powers concerns little more than the "fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others."¹⁶ The exercise of powers by one agency or department of government which logically should be exercised by another is accordingly countenanced as a matter of practical necessity;¹⁷ and administrative agencies are permitted to exercise powers which logically belong to the courts, or to the legislature, so long as the independence of the courts or of the legislature is not impaired. But

¹⁵ *United States v. Grimaud*, 220 U. S. 506, 517, 31 S. Ct. 480 (1911).

¹⁶ *Humphrey's Executor v. United States*, 295 U. S. 602, 629, 55 S. Ct. 869 (1935).

¹⁷ Cf. Dean Henry M. Bates, "Trends in American Government," *Proceedings Annual Meeting*, 5 CALIFORNIA STATE BAR, 58, 67-68 (1932).

when an attempt is made to vest in an administrative agency, or when an administrative agency or executive officer claims, powers which could be exercised in such a way as to deprive the legislature or the courts of their constitutional prerogatives, then there has been a violation of the essential constitutional precept. The rule is well illustrated by the decisions in *Myers v. United States*^{17a} and in *Humphrey's Executor v. United States*.^{17b} In the former case, an attempt by Congress to deprive the President of his power of summary removal of a local postmaster was held unconstitutional. In the latter case, it was held that Congress could properly restrict the powers of the President in removing members of the Federal Trade Commission. Is not the reason for this distinction based upon the test suggested above? The local postmaster is a ministerial employee of the executive department of government. He performs few, if any, functions of a legislative or judicial character. Hence the purpose of Congress in seeking to limit the exclusive power of the chief executive officer to remove an executive assistant amounted to an attempt by the legislature to control the independence of the executive branch of the government; and this could not be sustained. The converse was true in the *Humphrey's* case. There, the Federal Trade Commission was charged with important responsibilities in formulating legislative policy in the field of unfair trade practices, and was charged with important responsibilities in adjudicating asserted violations of the law. As the court pointed out, in order to perform its duties properly, the commission was required to be free of executive control. In that case, therefore, an assertion by the chief executive of a power of arbitrary removal of a member of the commission, if sustained, would have vested in the executive department control over a crea-

^{17a} *Myers v. United States*, 272 U. S. 52, 47 S. Ct. 21 (1926).

^{17b} *Humphrey's Executor v. United States*, 295 U. S. 602, 55 S. Ct. 869 (1935).

ture of the legislative department, which was at the same time, and for certain purposes, a judicial agency.

The same type of situation exists in other cases where the separation-of-powers philosophy has been relied upon in invalidating legislation. In *Springer v. Government of the Philippine Islands*,^{17c} for example, the statute which was held invalid was designed so as to give the legislature control over a government corporation which had been chartered to perform purely executive functions.

To the extent suggested by such decisions, the doctrine of separation of powers retains vitality in the field of administrative law. An administrative agency, it seems safe to say, may not validly be granted powers which would permit it to displace the courts, or the legislature, or the executive, in matters constitutionally committed to these departments. Nor may an agency controlled by one department be given powers which would permit that department to control the others.¹⁸

3. Precluding the Vesting of Administrative Duties in the Courts

The doctrine of separation of powers still retains vitality, in at least a negative aspect, in connection with the rule that courts (at least, the federal constitutional courts) will not undertake the discharge of any nonjudicial duties. This rule has been applied not only in cases where courts have refused to revise determinations of administrative tribunals on the grounds that such revisory duties, though sanctioned or im-

^{17c} *Springer v. Government of the Philippine Islands*, 277 U. S. 189, 48 S. Ct. 480 (1928).

¹⁸ An interesting application of this principle is found in *Kreutz v. Durning* (C.C.A. 2d 1934), 69 F. (2d) 802. There, the court reviewed a statute which vested in a legislative court the power to make a final and nonreviewable decision on certain questions of law concerning the imposition of import duties. In sustaining the statute, the court relied upon the fact that the legislative court was independent of the executive.

posed by statute, would impose nonjudicial powers on the courts,¹⁹ but also in cases where the court's refusal to review an agency's determination is based on the principle that the agency is exercising essentially administrative functions.²⁰ In cases involving technical competence, where the courts may feel that an administrative agency possesses superior qualifications to pass upon questions of interpretation and implementation of policies expressed generally in statutory law, the courts display some readiness to characterize as administrative, and hence beyond judicial review, functions which might on purely logical tests be deemed judicial. The doctrine of separation of powers can thus be relied upon occasionally as strengthening rather than weakening the powers of an administrative agency to dispose with finality of the problem at hand.

4. Preventing Uncontrolled Administrative Discretion

If it be conceded that legislative powers and judicial powers may be delegated to administrative tribunals—subject in some jurisdictions at least to the condition of attaching the pious appellative “quasi”—the problem of formulating a guide for determining the limits to be placed on the extent of permissible delegation is at once apparent. There can be no doubt that the Commissioner of Internal Revenue, for example, could not be vested with power to rewrite the federal tax laws, imposing such types of levies and at such rates as appeared to him best. But what distinction is to be drawn between this and the valid delegation of the power to determine whether or not an applicant shall be given

¹⁹ *Keller v. Potomac Electric Power Co.*, 261 U. S. 428, 43 S. Ct. 445 (1923). This problem is discussed more fully *infra*, Ch. 16, ns. 12 and 13, in connection with the discussion of review of administrative determinations, where it is noted that the state courts have been more willing to extend their powers in this direction than have the federal courts.

²⁰ *United States v. Los Angeles & Salt Lake R. R.*, 273 U. S. 299, 47 S. Ct. 413 (1927).

relief from the harshness, as applied to his situation, of the provisions of a statute imposing taxes on excess profits? ²¹ Similarly, it is inconceivable that the Tax Court could be given power to determine with finality the validity of a tax statute, but the Supreme Court has made it clear that it will not concern itself with the correctness of the decision of the Tax Court on certain "minor" issues of law said to have been improperly determined by that tribunal.²² Here again the question is presented of finding a basis for predicting the outer periphery of the delegable powers. It is of course quite possible to say, as many courts have observed during the last half century, that the one involves "pure" legislative or judicial power, which may not be entrusted to an administrative agency, while the other involves only "quasi" legislative or judicial power, which may be freely delegated.

But resort to this convenient fiction does not simplify the problem. The twin considerations of sound logic and mental honesty recommend saying, rather, that the *kind* of power which the Interstate Commerce Commission (to cite another example) exercised when it decided whether or not it should regulate the hours and working conditions of drivers employed by private carriers ²³ was the same kind of legislative power that Congress exercised when it decided whether or not there should be regulation of the hours and working conditions of drivers employed by common or contract carriers.²⁴ Similarly, the function of a workmen's compensation

²¹ Williamsport Wire Rope Co. v. United States, 277 U. S. 551, 48 S. Ct. 587 (1928).

²² Dobson v. Commissioner of Internal Revenue, 321 U. S. 231, 64 S. Ct. 495 (1944). See Paul, "Dobson v. Commissioner: The Strange Ways of Law and Fact," 57 HARV. L. REV. 753 (1944).

²³ Sec. 204 (a) (3) of the Motor Carrier Act of 1935, 49 Stat. 543; 49 U.S.C. § 304 placed upon the Commission the duty "To establish for private carriers of property by motor vehicle, *if need therefor is found* [italics inserted], reasonable requirements to promote safety of operation." In a proceeding entitled "Ex Parte No. MC-4," 1 I.C.C. Motor Carrier Cases 1 (1936), the Commission determined that such need existed.

²⁴ Motor Carrier Act of 1935, 49 Stat. 543, 49 U.S.C. § 304.

36 UNDERLYING CONSTITUTIONAL QUESTIONS

commission in determining whether an applicant for benefits was injured as a result of his wanton and willful negligence, is indistinguishable on logical grounds from the function exercised by a court in determining whether a guest passenger in an automobile was injured as a result of the wanton and willful negligence of the driver.

The true situation would appear to be that legislative and judicial powers may be delegated in certain instances, but not in others. Determination of the category into which a particular situation falls depends, apparently, in part on the subject matter involved and in part on the degree of control delegated. In some fields, administrative agencies may be vested with absolute and unreviewable legislative and judicial powers. In such cases, the agency is free to exercise uncontrolled discretion. In other fields, where rights of personal liberty or private property are more significantly involved, delegation is permitted only if reasonable limits and controls are imposed on the agency's discretion. Such control is ordinarily exercised by the creation of statutory standards to which the activities of the agency must conform. Thus, the question of determining the extent to which legislative and judicial powers may be delegated to administrative bodies resolves itself into a question as to what sort of standard the legislature must set up to limit administrative discretion. If not appropriately limited, the statute is invalid.²⁵

(a) *Various "tests" suggested by courts for determining sufficiency of standards devised to limit administrative discretion.* Implicitly recognizing that the principle against delegation of judicial or legislative powers to administrative agencies is nothing more than a proscription of the grant of

²⁵ Except of course in cases where constitutional limitations are nonexistent, and where legislative and judicial powers may be delegated to the uncontrolled discretion of the agency. These are separately discussed, *infra*.

unlimited discretionary powers to administrative agencies whose determinations affect substantial rights of person or property, the courts at various times have suggested a number of "tests" by which to determine whether the delegated discretionary powers have been sufficiently limited.

Thus, it is sometimes said that an administrative tribunal may not be given power to make the law, but may be given discretion as to the execution of the law. This criterion has in certain case situations the advantage of glib plausibility. Apparently originating in Justice Ranney's opinion in *Cincinnati, W. & Z. R. R. Co. v. Clinton Co. Commissioners*,^{25a} this phrase has been repeated in a very large number of cases.²⁶ But it cannot be accepted as an actual basis for decision. Thus, when Congress "made the law" by prohibiting interstate transportation of "hot" oil, but gave to an administrative officer discretion as to executing the law, the grant of unlimited discretion was invalidated, although it could well have been supported on the basis of this "test."²⁷

An alternative "true test" suggested in many decisions is that an administrative agency may not be vested with discretionary power to determine policies, but may be em-

^{25a} *Cincinnati, W. & Z. R. R. Co. v. Clinton Co. Commissioners*, 1 Ohio St. 88 (1852).

²⁶ It was frequently relied upon in decisions invalidating the delegation to an insurance commission of the power to prescribe a standard form of policy. E.g., *King v. Concordia Fire-Insurance Co.*, 140 Mich. 258, 103 N. W. 616 (1905); *Dowling v. Lancashire Ins. Co.*, 92 Wis. 63, 65 N. W. 738 (1896). The latter case was in effect overruled in *State ex rel. Wisconsin Inspection Bureau v. Whitman*, 196 Wis. 472, 220 N. W. 929 (1928), in an excellent opinion by Justice Rosenberry. A comment on administrative control of insurance policy forms by Professor Edwin W. Patterson appears in 25 COL. L. REV. 253 (1925). The cases on this particular point present an interesting history. Many early decisions invalidating delegation of administrative discretion to insurance commissioners cast a long shadow, both in the direction of legislative hesitancy to grant such powers and in the direction of judicial tendency to invalidate the delegation of discretionary powers in this particular field, by strong reliance on *stare decisis*, even though in other fields comparable grants of delegated discretion had been upheld.

²⁷ *Panama Refining Co. v. Ryan*, 293 U. S. 388, 55 S. Ct. 241 (1935).

38 UNDERLYING CONSTITUTIONAL QUESTIONS

powered only to determine the facts to which the legislative policy will apply.²⁸ But this test is obviously fallacious. Thus, to say that a public utility commission is merely finding a fact in determining what rate is reasonable, is to overlook entirely the fact that in such a field the commission has the same breadth of discretion as does the legislature. Where a statute²⁹ in terms provides that no employees engaged on certain contracts shall be employed more than eight hours a day, and an administrative agency can determine by regulation that such employees may legally be employed more than eight hours a day, providing they are compensated for overtime at rates to be prescribed by the head of the administrative agency,³⁰ it is absurd to say that the agency is performing only fact-finding functions, without policy-making responsibility.

In safer, less precise language, it is sometimes declared that the true general test is that administrative tribunals may validly be empowered only to fill in the details by making subordinate rules within prescribed limits. This suggestion has the security of vague ambiguity. To what must the administrative rule be subordinate? By what standards must the limits of its discretion be prescribed? Seemingly, the rule is little more than a restatement of the problem. It has been relied upon to sustain a grant of power to exempt certain shipments of food from the labeling and branding requirements of the Food and Drug Act,³¹ where the legislative principle to which the rule was subordinate was a mandatory requirement of labeling (and the rule was subordinate only

²⁸ This is mentioned in many cases sustaining the delegation to public utility commissions of power to fix rates. The "test" is referred to in some federal court decisions. See *Field v. Clark*, 143 U. S. 649, 12 S. Ct. 495 (1892); *Buttfield v. Stranahan*, 192 U. S. 470, 24 S. Ct. 349 (1904).

²⁹ The Walsh-Healey Public Contracts Act, 49 Stat. 2036, 41 U.S.C. §§ 35-46.

³⁰ Article 103 of Regulations 504, prescribed by the Secretary of Labor under the Walsh-Healey Public Contracts Act.

³¹ 34 Stat. 768, 21 U.S.C. § 2.

in that it eliminated the statutory requirement) and where the prescribed limit was "reasonable variations . . . tolerances and also exemptions as to small packages."³² It is elastic enough to permit the delegation of power to fix prices, subject to a "standard" empowering the administrative agency to fix such prices as are deemed by it to be "generally fair and equitable," in any situation where there "threatens" a rise in prices "inconsistent with the purposes of the Act," those purposes being stated in terms of broadest generality.³³ Administrative rules setting up a system whereby permits to graze sheep within government forest preserves might be obtained on certain conditions, including the payment of various fees, was deemed properly subordinate to a legislative purpose to "improve and protect" the forest preserves, and within the limits prescribed by a statutory grant of power to make regulations to insure the effectuation of "the objects of such reservation [the forest reserves], namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction."³⁴

Applying this last-mentioned rule to specific case situations, then, it appears that the "detail" which may be left to the agency may include such broad questions of legislative policy as whether there shall or shall not be regulation; that the "subordination" to the statute means only that the administrative law must not be directly contradictory to the statute; that the "limits" need be no tighter than those of "fairness" or "equity," which as is well known varies with the length of the chancellor's foot.

This is but another way of saying that there has been devised no general rule by which it is possible to determine

³² *United States v. Shreveport Grain & Elevator Co.*, 287 U. S. 77, 78, 53 S. Ct. 42 (1932).

³³ *Yakus v. United States*, 321 U. S. 414, 64 S. Ct. 660 (1944); *Bowles v. Willingham*, 321 U. S. 503, 64 S. Ct. 641 (1944).

³⁴ *United States v. Grimaud*, 220 U. S. 506, 507, 509, 31 S. Ct. 480 (1911).

the validity of any given proposed delegation of power. Any of the suggested rules aptly describe the results in certain cases; but none of them can be applied in all cases.³⁵ In no case do any of the rules account for the result; at best they are a description of results reached in certain cases. The considerations which actually motivate decision are less precise, and less legalistic.

(b) *Factors that motivate decision.* But what are the innominate, imponderable factors which do, in fact, motivate decision? They perhaps cannot be catalogued. Their nature and relative importance vary from one case to another. The basic reasoning of a decision vesting broad discretion in an agency to revoke, say, the charter of a bank, will be rejected by the court (even though it might logically be applied) where the charter to be revoked is a professional license to practice law or medicine. In the case of a revocation of a license to operate a saloon, still other factors will be involved. These subtle distinctions between logically analogous case situations must be kept in mind.

It must likewise be recognized that in this field judgment is somewhat temporal, reflecting to a degree contemporaneous economic and political thinking.³⁶ Then, too, courts must necessarily be concerned with matters of practical necessity.

Likewise, the attitude of the particular court must be taken into consideration. The admonitions found in some opinions, that these statutory tribunals must be recognized as coordinate agencies in the administration of law and justice, are not accorded universal acquiescence. Courts are not

³⁵ In cases involving the delegation of judicial power, the various general rules are all quite inappropriate.

³⁶ Cf. *Carter v. Carter Coal Co.*, 298 U. S. 238, 56 S. Ct. 855 (1936), invalidating the delegation of power to a majority of producers and mine workers to fix prices; and *Currin v. Wallace*, 306 U. S. 1, 59 S. Ct. 379 (1939), and *United States v. Rock Royal Co-Operative, Inc.*, 307 U. S. 533, 59 S. Ct. 993 (1939)—upholding a delegation of power to milk producers to decide whether an order should be put into effect.

equally receptive to this philosophy. By and large, state courts probably remain less willing to permit delegation of comparatively free discretionary powers than the federal courts.

Despite all these difficulties, it seems possible to describe the most important factors that influence the decision by the courts as to the adequacy of standards employed to limit administrative discretion, in fields where such a limit is constitutionally necessary.

1. In cases where delegation of broad discretionary powers is traditional, almost any standard will be accepted as sufficient. It is enough if the legislature, either expressly or by implication—and silence is sufficient implication—sets up a general standard of reasonableness. This, of course, is the same standard by which the legislature itself is controlled. Thus, the delegation of power to fix utility rates requires no standard more specific than the implied common-law requirement that the rates fixed must be reasonable.³⁷ Similarly, in the field of censorship, delegations are customarily sustained which place no definable limits on the discretion of the censors.³⁸ Again, in a recent case sustaining the delegation to an agency controlling certain lending activities of banks, the court pointed out that a less rigid standard was permissible in a field which is “one of the longest regulated and most closely supervised of public callings.”³⁹

2. A standard which is seemingly vague may always be shown to be, in fact, quite well defined when related to an established legal concept. Thus, the Federal Trade Commission may be granted considerable powers in determining

³⁷ *Trustees of Village of Saratoga Springs v. Saratoga Gas, Elec. Light & Power Co.*, 191 N. Y. 123, 83 N. E. 693 (1908); *cf. Rohrer v. Milk Control Board*, 322 Pa. 257, 186 Atl. 336 (1936).

³⁸ *Mutual Film Corp. v. Industrial Commission of Ohio*, 236 U. S. 230, 35 S. Ct. 387 (1915).

³⁹ *Fahey v. Mallonee*, 332 U. S. 245, 67 S. Ct. 1552 (1947).

what are unfair trade practices within a statutory prohibition; ⁴⁰ but the granting of a similar power to identify fair trade practices is invalid.⁴¹ The meaning of the former phrase is fairly deducible from a long line of cases, and the standard is therefore more restrictive than might appear. But in the latter case, the agency was in fact left at large to exercise a roving commission.

3. The degree of definiteness required in the standard varies with the extent to which the agency's determinations impinge importantly on rights of personal liberty, or substantial property rights. This general principle has many facets. In cases where the agency is the dispenser of favors which the government is free to grant or refuse, a very broad standard is sufficient; if, indeed, any is required.⁴² Where violations of an agency's rules may involve the imposition of criminal sanctions, *per contra*, an explicit standard is usually required.⁴³ In license cases, much less discretion may be delegated as to revocation of licenses to engage in a profession (where the revocation would presumably carry intensely disastrous personal consequences⁴⁴), or to carry on a substantial business,⁴⁵ than in cases where the license revoked permits one to engage in activity of a type which the legislature might entirely prohibit (such as running a

⁴⁰ *Sears, Roebuck & Co. v. Federal Trade Commission* (C.C.A. 7th 1919), 258 Fed. 307.

⁴¹ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, 55 S. Ct. 837 (1935).

⁴² *Cf.* Cases involving traffic regulations: *Smallwood v. District of Columbia* (App. D. C. 1927), 17 F. (2d) 210; *Wilson v. Eureka City*, 173 U. S. 32, 19 S. Ct. 317 (1899); tolls for the use of roads: *Rogge v. United States* (C.C.A. 9th 1942), 128 F. (2d) 800.

⁴³ *People v. Grant*, 242 App. Div. 310, 275 N. Y. S. 74 (1934); *United States v. Eaton*, 144 U. S. 677, 12 S. Ct. 764 (1892), where the statute was sustained by decision that violation of the administrative regulations was not subject to the criminal penalties that attended other violations of the statute; *cf. In re Kollock*, 165 U. S. 526, 17 S. Ct. 444 (1897).

⁴⁴ See 5 A. L. R. 94.

⁴⁵ *State ex rel. Makris v. Superior Court for Pierce County*, 113 Wash. 296, 193 Pac. 845 (1920); see 12 A. L. R. 1435.

poolroom⁴⁶ or a business which so immediately affects the general public welfare that close and continuous supervision is generally deemed desirable).⁴⁷

4. The extent to which the court conceives that there is a genuine need for *expertise* is probably a factor. In the case of the Interstate Commerce Commission, for example, the courts quite readily concede their incapacities to handle in a satisfactory manner the highly technical problems involved,⁴⁸ and in sustaining a broad grant of power to the Securities and Exchange Commission to order divestiture of holding companies, the court pointed out that its approval constituted "a reflection of the necessities of modern legislation dealing with complex economic and social problems."⁴⁹ But where the agency regulates the traffic on city streets⁵⁰ or determines the "area of production" of agricultural processing,⁵¹ the court may feel there is much less need for technical competence, and therefore less need of sustaining broad standards. The court may accordingly well insist on a fairly explicit standard, and in the absence thereof either invalidate the statute or disregard the agency's rulings.

5. Where there is ample provision for notice, hearing, and argument, and where it is thought these sufficiently guarantee a fair and intelligent disposition of the case by informed and impartial administrative action, broad standards are likely to be upheld.⁵²

⁴⁶ *State of Kansas v. Sherow*, 87 Kan. 235, 123 Pac. 866 (1912); *Mehlos v. City of Milwaukee*, 156 Wis. 591, 146 N. W. 882 (1914).

⁴⁷ *Engel v. O'Malley*, 219 U. S. 128, 31 S. Ct. 190 (1911); *People of State of New York ex rel. Lieberman v. Van De Carr*, 199 U. S. 552, 26 S. Ct. 144 (1905).

⁴⁸ *Shields v. Utah Idaho Cent. R. Co.*, 305 U. S. 177, 59 S. Ct. 160 (1938).

⁴⁹ *American Power & Light Co. v. Securities & Exchange Commission*, 329 U. S. 90, 105, 67 S. Ct. 133 (1946).

⁵⁰ *City of Shreveport v. Herndon*, 159 La. 113, 105 So. 244 (1925).

⁵¹ *Addison v. Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 64 S. Ct. 1215 (1944).

⁵² *Opp Cotton Mills, Inc. v. Administrator of Wage and Hour Division of Department of Labor*, 312 U. S. 126, 61 S. Ct. 524 (1941).

44 UNDERLYING CONSTITUTIONAL QUESTIONS

6. Where provisions for judicial review permit the court to exercise a large measure of superintending control over the agency, this reasoning is even more effective in persuading the courts to sustain statutes setting up a very vague standard.⁵³

7. In cases involving the exercise of judicial power by administrative agencies, the courts on the whole insist on a stricter standard than in cases where the agency's powers are principally legislative in nature. Since the judicial process is primarily one of applying a standard, it is natural that this requirement exists. Just as a court refuses to treat as a justiciable matter a controversy which cannot be determined by application of the so-called rules of law, so it insists that some rule or standard must be set up to guide the adjudicatory functions of an agency exercising judicial powers.⁵⁴ Then, too, the delegation of judicial powers to administrative agencies is always subject to attack on the grounds that the due process guaranties of the Constitution have been violated. In past years, courts have been by no means reluctant to discover a violation of due process, where judicial powers were delegated.

It is these considerations that form the basis of decision, and rightly so. The law of administrative tribunals could not live and grow upon a logical extension of philosophical doctrine. Its growth must be empiric, based on experience. Judicial recognition of practical necessities, indeed, is the most typical characteristic of this branch of the law.

Courts will therefore be little persuaded by an argument that a statute must be invalidated because it grants an administrative tribunal power to make law, rather than merely to

⁵³ *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209 (1911).

⁵⁴ Many of the cases holding the statutory standard to be unconstitutionally broad are cases involving the issuance and revocation of licenses, where the agency's powers are in many respects judicial in nature. Seemingly, a much more explicit standard is insisted on in such cases than in those where the agency promulgates legislative rules.

exercise discretion in its enforcement, or because there are no definitely specified limits to which administrative discretion is subordinate. Nor will the language employed by a court in striking down a statute giving a board unbridled discretion in deciding whether or not to issue a building permit be accepted as persuasive when it is sought to be applied to a statute giving a similar measure of discretion to another board which issues or revokes saloon and dance-hall licenses.

Not only is the decision in each case to be limited to the facts of the case, but the reasoning employed in one case will not be extended to another case where considerations of statesmanship recommended a different judgment.

(c) *Cases where constitutional limitations are nonexistent.* In some types of cases, the considerations above discussed recommend that delegation of virtually unlimited discretionary powers be sustained. Typically these are cases where the activities of the tribunal will not directly impinge on constitutionally recognized rights of property. Thus, where the administrative discretion is directed to such matters as granting licenses to dredge for rocks in state-owned waters,⁵⁵ or prohibiting fishing in certain areas,⁵⁶ or regulating the nontraffic uses of city streets,⁵⁷ there is no difficulty in sustaining unlimited grants of power. In such cases the result can easily be described by saying that there can be no invasion of private rights of person or property as a result of the rulings of the agencies.

But it would seem that the true principle of such cases goes further. In some types of cases, unlimited discretionary powers may be delegated even though the activities of the agency may impinge directly on private rights. In such cases, a broader explanation is required. The true reason is sug-

⁵⁵ *State ex rel. Port Royal Mining Co. v. Hagood*, 30 S. C. 519, 9 S. E. 686 (1889).

⁵⁶ *McMillan v. Sims*, 132 Wash. 265, 231 Pac. 943 (1925).

⁵⁷ *Wilson v. Eureka City*, 173 U. S. 32, 19 S. Ct. 317 (1899).

gested in the opinion of the Supreme Court in *United States v. Curtiss-Wright Export Corp.*^{57a} In that case the Court sustained the delegation to the President of unfettered discretion to prohibit shipment of munitions to certain foreign countries, conditioned upon his judgment as to whether such prohibition would contribute to the re-establishment of peace. The Court assigned as the reason for its decision, not that such prohibitions would not affect private rights—for of course they would—but rather that to avoid “perhaps serious embarrassment,” such legislation “must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.” The Court pointed out that such delegations of power were traditional in matters pertaining to foreign relations, that the President possessed more expert knowledge than did Congress, and that practical necessities could not be met by a more restricted delegation.

Similarly, virtually unlimited discretion is frequently bestowed upon municipal corporations to adopt local ordinances. This cannot be explained on the theory that such ordinances will not substantially affect important private rights. It must be explained, if at all, on the basis that such delegations have been traditional and have proved expedient.⁵⁸

(d) *Problems of draftsmanship in formulating standards.* Obviously, effective administrative action may be expedited or hampered by the language adopted in the controlling statute as the standard by which its actions must be guided. Sometimes, as Dean Landis points out,⁵⁹ legislative draftsmen formulate too elaborate standards, under a misappre-

^{57a} *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 57 S. Ct. 216 (1936).

⁵⁸ See *Stoutenburgh v. Hennick*, 129 U. S. 141, 9 S. Ct. 256 (1889); *Brodine v. Inhabitants of Revere*, 182 Mass. 598, 66 N. E. 607 (1903); cf. 1 McQuillin on MUNICIPAL CORPORATIONS (1940) 422; Willis on CONSTITUTIONAL LAW (1936) 137-138.

⁵⁹ Landis, *THE ADMINISTRATIVE PROCESS* (1938) 55 *et seq.*

hension as to the clarity of the outlines of the problem at hand, and condition administrative action in such detail as to make it difficult to dispose effectively of pressing problems. On the other hand, the legislature may sometimes be tempted to evade responsibility by an ill-defined transfer to an administrative agency of the duty to provide, by such regulations "as the public interest may require," a determination of fundamental policy in a highly controversial field.⁶⁰

A standard which attempts to anticipate every possible situation is likely to defeat the whole purpose of delegation. On the other hand, one which reflects the empty generalities of "reasonableness" or "public interest"—criteria which would be supplied by implication in any event—tends to substitute a government by men for one of laws.

The tendency of the courts to sustain the delegation, however the standard be phrased, emphasizes the importance of wisely drafting the statutory standards. Relief from unsatisfactory administrative action must often come through the legislature, rather than the courts. It may be necessary, upon venturing into a new field of governmental regulation, to grant the agency wide powers. It must, perhaps, have some authority to experiment. But as experience defines the contours of the problem involved, opportunities may be afforded to redefine the standards which guide administrative action, terminating the agency's authority to perpetuate unsuccessful experiments.⁶¹ To the extent that it proves practicable or desirable for the legislature to specify standards that are

⁶⁰ E.g., at one stage the House of Representatives' version of the bill which later became the Public Utility Holding Company Act of 1935, after requiring the Securities and Exchange Commission to take action to confine each holding company to a single integrated system, at the same time authorized the Commission to exempt any holding company from this requirement if such exemption was found to be consistent with the public interest.

⁶¹ E.g., the discretion vested in the National Labor Relations Board by the Wagner Act of 1935 (49 Stat. 449, 29 U.S.C. § 151) to include any combination of employees in a single collective bargaining unit was drastically curtailed by the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C. Supp. § 141).

definite and capable of objective proof, the courts are enabled to assert a greater power of review over administrative action than they possess where the standards are cast in vague, subjective terminology.

5. Delegation of Powers by an Agency to Its Employees

The statute usually bestows authority upon a commission or the head of an agency, but these individuals cannot often perform personally the multifarious duties delegated to them. The Secretary of Agriculture, for example, is charged with the administration of more than seventy statutes. In this task, he is aided by a staff of several hundred assistants. There arises by clear necessity, in all the larger agencies, delegation of discretionary power within the personnel of the agency.

The governing statutes often recognize this situation, and make appropriate provision therefor. Failure to do so has sometimes produced untoward results. The courts have been quite ready to invalidate unauthorized attempts of agency heads to delegate to their subordinates powers vested by statute in the heads of the agency.⁶² Sometimes, to be sure, the problem is avoided by reliance on the presumption of regularity that attends official action, which as here applied means merely that it is hard to prove that the responsible official did not personally perform his duty.⁶³ And in many cases, the courts, appreciating the necessity of a limited degree

⁶² This problem is discussed more fully *infra*, in connection particularly with the use of assistants in formulating decisions in judicial determinations. Examples in other fields include: *Cudahy Packing Co., Ltd. v. Holland*, 315 U. S. 357, 62 S. Ct. 651 (1942)—denying the power of the Administrator of the Wage and Hour Division to delegate power to issue subpoenas; *State v. The Mayor and Common Council of Jersey City*, 24 N. J. L. 662 (1855)—commissioners appointed to assess cost of improvement could not delegate this duty to the city surveyor; *Dunn v. United States* (C.C.A. 5th 1917), 238 Fed. 508—denying the power of a court clerk to delegate the duty of selecting names for grand jury service; *School Dist. No. 4, Town of Sigel, Wood County v. Industrial Commission*, 194 Wis. 342, 216 N. W. 844 (1927)—school district could not delegate power to employ part-time janitor.

⁶³ *Hackley-Phelps-Bonnell Co. v. Cooley*, 173 Wis. 128, 179 N. W. 590 (1921). *United States ex rel. Petach v. Phelps* (C.C.A. 2d 1930), 40 F. (2d)

of such delegation, find authority therefor implicit in the statutory language.⁶⁴ Decision in each case depends on the court's judgment as to whether the nature of the particular power exercised is so important, requiring the exercise of judgment on matters of policy, as to preclude the likelihood that the legislature would have been willing to have the particular power exercised by any one other than the ultimate authority within the agency.

Regardless of the limits on delegation to agency employees to pass finally upon matters of importance, the fact remains that power to recommend the decision in any matter can be and ordinarily is so delegated. The distinction is more technical than practical. The higher officers are so little inclined to reverse the determination of their subordinates that the latter's recommendation often carries the weight to sway and determine final agency action in any close case, especially where the determination relates not to a general policy but to the decision of a particular individual case.⁶⁵

A great danger resulting from this necessary practice of delegating within the agency the powers of the agency heads is that decision is often made by an employee whose compelling personal interest is to make such a determination as he thinks will please his employer, in the hope of obtaining promotion. If the employee is impressed with a belief that the agency likes decisions which find an employer guilty of unfair labor practices, or a commercial concern guilty of unfair trade practices, or an employee entitled to receive workmen's compensation, then great strength of mind and

500. Sometimes, particularly where questions of jurisdiction are involved, the presumption will not be extended to administrative agencies: see e.g., *Blount v. Forbes*, 250 App. Div. 15, 293 N. Y. S. 319 (1937).

⁶⁴ *United States ex rel. French v. Weeks*, 259 U. S. 326, 42 S. Ct. 505 (1922); *Hannibal Bridge Co. v. United States*, 221 U. S. 194, 31 S. Ct. 603 (1911); *Plapao Laboratories, Inc. v. Farley* (App. D. C. 1937) 92 F. (2d) 228. For an analysis of the general problem, see Grundstein, "Subdelegation of Administrative Authority," 13 GEO. WASH. L. REV. 144 (1945).

⁶⁵ The Federal Administrative Procedure Act of 1946 recognizes this situation by setting up provisions whereby the decision of the hearing officer may stand (in the absence of an appeal) as the decision of the agency.

character is required to avoid the making of decisions which it is thought will please the officials who will pass upon the employee's personal advancement. The Federal Administrative Procedure Act, creating an independent status for many hearing officers, goes far toward alleviating this problem in many of the federal agencies.

Agency heads have the difficult problem of making free delegation as to matters where there is little need for close supervision by the agency heads—such as matters of internal management, disposition of routine matters, initiation of proceedings, disposition of matters by consent, executing binding stipulations of fact, et cetera—in order that they may devote more time and attention to reviewing the work of subordinates in matters affecting the rights of parties appearing before the agency. In the latter connection, while it is admittedly infeasible to attempt a review of every case, much might be accomplished by (1) careful formulation, for the guidance of agency employees, of instructions for the application of those policies which have been crystallized; (2) consideration by the agency heads of cases where the application of established policies is difficult or where policies have not been definitely formulated (with encouragement for the referral by agency employees of cases thought to fall within this category); and (3) the requirement of periodic and informative reports by those employees entrusted with power to make decisions.

B. EFFECT OF SEPARATION OF POWERS DOCTRINE ON COMBINATION OF LEGISLATIVE, JUDICIAL, AND EXECUTIVE FUNCTIONS WITHIN A SINGLE AGENCY

To the extent that the Constitution permits the delegation of judicial and legislative powers, there appears to be little impediment to the granting of both such powers to a single agency. Thus it occurs that frequently a single agency will

exercise legislative, executive, and judicial powers. It becomes lawmaker, prosecutor, and judge. The same agency legislates the rules that implement a general statute, then looks for violations of such rules, and (if it discovers a suspected violation) prosecutes a hearing at which it sits as judge to determine whether it has proved its allegations to its own satisfaction. Contrary though this may be to the ancient maxim that no man should be judge in his own cause, there seems to be (in the federal courts, at least) no constitutional impediment to such combination of powers within a single agency.

Yet it is this delegation of combinations of power, rather than the delegation of either legislative or judicial power alone to a single agency, which is at the bottom of much of the criticism to which the administrative agencies are subject.

Many of the agencies, and exponents of administrative absolutism, argue that such combination of functions is desirable, if not essential to the attainment of the best results.

They argue that if the prosecuting functions were divorced from the judicial, those charged with instituting prosecutions could be expected to inaugurate formal proceedings in every case where there might be the slightest suspicion of some infraction of rules. To this it can properly be replied that while theoretically such a possibility cannot be eliminated, yet no untoward results have been observed in cases where the prosecuting body is without adjudicatory functions, as in the case of the Wage and Hour Division of the Department of Labor, or in the Internal Revenue Department.

The argument has also been made that any separation of powers would interfere with informal settlement of cases and make it more difficult to achieve voluntary settlements. But experience has not indicated this to be the case. In many instances, the Department of Justice must appear before the courts to press its charges of violations of laws or regula-

52 UNDERLYING CONSTITUTIONAL QUESTIONS

tions, but it has experienced no great difficulty in reaching settlements.

The same advocates further point out—and it cannot be denied—that an agency is not a single person, and that the staff member who prosecutes a case is not usually the same staff member who decides whether a case has been proved. But this overlooks the friendly luncheon contacts between prosecutor and judge, whose offices may be in adjacent rooms, and likewise the *esprit de corps* which is so markedly a factor among employees of an administrative agency of this type. This argument also overlooks the fact that the administrative judge who adjudicates an issue must sometimes depend for promotion upon the agency heads who have decided that a prosecution should be instituted, and who may have supervised the prosecution of the case.

It is undoubtedly true that in some types of proceedings, administrative efficiency would be grossly impaired, without compensating advantages, by insistence on a rigid separation of functions. In some types of cases, adjudicatory functions are so closely related to other phases of the tribunal's work that separation of functions is not practical, nor indeed desirable. An example may be found in the field of rate making. A rate-making investigation ordinarily culminates in a hearing which has many of the characteristics of a judicial proceeding. Yet the prime purpose of such a hearing is not to determine justiciable questions of fact or law, but rather to gather information which will furnish a basis for the exercise of an informed judgment on matters which are fundamentally those of legislative policy.⁶⁶ Other types of agencies act through the exercise of a number of interrelated powers, and

⁶⁶ This is recognized in § 5 (c) of the Federal Administrative Procedure Act of 1946, excepting from the general requirements for separation of functions various rate-fixing proceedings. Cf. R. M. Benjamin, *ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK* (1942) 67, 68.

complete isolation of all adjudicatory functions would not present compensatory advantages.⁶⁷

The problem is not one which can be solved by any general formula. Distinctions must be made between agencies, and between different functions of the same agency. Where the element of administrative discretion is properly dominant—as in many cases of passing on license applications, or applications for benefits—fairness can ordinarily be achieved by an internal separation of functions within the agency. In license cases, for example, so long as the staff employees charged with discovering and presenting objections to the allowance of the application have nothing to do with the making of the ultimate decision, little harm is done. But on the other hand, in cases where the prime function of an agency is to police an important segment of business activity—as in the case of the Federal Trade Commission or the National Labor Relations Board, where the agency devotes all its energies to preventing a certain type of activity and where the judicial question to be determined by agency employees is whether the agency is justified in its suspicions that a particular person has engaged in such activity—then it is doubtful whether any internal separation of functions can be sufficient to assure the fairness and, equally important, the manifestations of fairness, which the public can properly demand. In such cases, the adjudicatory authority should not be subject to the direct or indirect control of the heads of the agency which initiates prosecutions.

Agencies are ordinarily created to meet an emergency situation, one presenting new problems which may at the outset require an experimental approach—where, perhaps, rules must be formulated only on the basis of experience

⁶⁷ See "Administrative Procedure in Government Agencies"—Report of the Attorney General's Committee on Administrative Procedure (1941) 58 *et seq.*

gained as a result of deciding cases for a while on an *ad hoc* basis. But in many cases where agencies were originally created to meet such emergency situations, and accordingly granted not only executive and legislative but judicial power as well, later experience has suggested a refinement of the early approach to the problem. On the basis of further studies, and in the light of experience, it has proved wise to create a special tribunal to exercise adjudicatory powers. Thus, adjudicatory functions of the Customs Bureau came after a time to be vested in a Customs Court. Similarly, the responsibilities of the Bureau of Internal Revenue in passing administratively on claims for refunds or objections to tax assessments were in later years vested in a separate Board of Tax Appeals which in due course became a Tax Court. The Court of Claims had similar origins.

These lessons of history teach that, in fields where administrative tribunals engage contentiously with the private parties appearing before them, it is in the interest of good government to eliminate combinations of prosecuting and judicial powers. The process is gradual. Change does not come overnight. But the highway of past experience points the way into the uncharted future.⁶⁸

⁶⁸ See statement of "Additional Views and Recommendations of Messrs. McFarland, Stason, and Vanderbilt" in "Administrative Procedure in Government Agencies"—Report of Attorney General's Committee on Administrative Procedure (1941) 203 *et seq.*