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IMPLIED LIMITATIONS ON REGULATORY POWERS IN ADMINISTRATIVE LAW

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I. THE TRADITIONAL DOCTRINE

LOOKING at administrative law through the distorting lenses of a conceptualist theory of the Constitution one has difficulty in admitting that the administrative function has developed into a coordinate fourth branch of the government which must be controlled directly by the Constitution and not by the "sterile refinements unrelated to affairs,"¹ by which the courts have connected verbally the exercise of the executive, judicial, and legislative functions with the constitutional text. It is only through such a direct confrontation of the problems of administrative law with the language and spirit of the Constitution that the administrative agencies can be made subject to the constitutional limitations upon which our system of government is founded, without losing the ability to fulfill their regulatory functions.² It is only through such an approach that administrative needs and constitutional abstractions can be built into a synthesis of concepts and principles, which will do for administrative law what the great decisions of Chief Justice Marshall's Supreme Court have done for the three traditional branches of the government.

In a preceding paper,³ the writer has endeavored to find in the adminis-

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¹ Mr. Justice Frankfurter, concurring, in *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 488 (1939). Cf., also, what Lord Brice, *The American Commonwealth* 375 (1912), has to say about the same problem.

² To the general aspects of this problem see McIlwain, *The Fundamental Law behind the Constitution of the United States*, in *The Constitution Reconsidered* 14 (1938); with respect to administrative law see Berle, *The Expansion of American Administrative Law*, 30 *Harv. L. Rev.* 430 (1917).

³ *Implied Regulatory Powers in Administrative Law*, 28 *Iowa L. Rev.* 575 (1943). In support of the general doctrine of implied powers in administrative law, *United States v. Bailey*,

trative function itself a positive standard for determining the content of powers of administrative agencies. Following the same approach, he will search in the present paper for a negative standard by which the scope of regulatory powers in administrative law can be delimited.

Here again, the discrepancy between political philosophy and legal theory on the one hand, and the actual solution of concrete problems by the courts on the other, is characteristic of the traditional point of view. We have seen in the paper referred to how the traditional doctrine, unwilling to admit that an administrative agency can have powers not expressly delegated but implied, can nevertheless not fail to realize that administrative agencies actually perform functions of this kind, and tries to reconcile theory and facts by a series of legalistic distinctions and conceptualist doctrines.⁴

With respect to the problem of implied limitations on regulatory powers the situation is somewhat similar. On the constitutional level, the reasoning takes as its point of departure the doctrine of the separation of powers and the principle that delegated powers cannot be delegated, and arrives at the conclusion that the legislature cannot delegate rule-making powers to administrative agencies. In the face of the obvious fact that such powers are actually delegated with the approval of the courts, the principle is interpreted so as to refer only to delegation unlimited as to subject matter and regulatory policy. Since, however, the absence of a defined subject matter would amount to a blanket delegation, nothing short of the surrender of the law-making function altogether could be considered unconstitutional. The practical importance of this requirement is, therefore, extremely limited; it was found lacking only once, in *Schechter v. United States*.⁵ The requirement of a defined policy in the form of a legislative standard has become practically obsolete since standards of extreme vagueness have been considered to meet the constitutional requirement.⁶ Hence, Elihu Root's much quoted statement of 1916 holds even

9 Pet. (U.S.) 238 (1835), and *Caha v. United States*, 152 U.S. 211, 218 (1894) may be quoted in addition to the decisions quoted in that paper. The idea that the power to interpret is implied in the power to administer is also clearly expressed in *United States ex rel. Hall v. Payne*, 254 U.S. 343 (1920): "He [the Secretary of Labor] could not administer or apply the Act without construing it, and its construction involved the exercise of judgment and discretion"; cf. also *Marbury v. Madison*, 1 Cranch (U.S.) 137, 177 (1803): "Those who apply the rule to particular cases, must of necessity expound and interpret that rule."

⁴ Loc. cit. 588 et seq.

⁵ 295 U.S. 495, especially at 551 (1935).

⁶ See, for instance, *United States v. Rock Royal Cooperative*, 307 U.S. 533, 574 (1939), and *Mr. Justice Roberts' dissenting opinion* at 603; *State ex rel. Wisconsin Inspection Bureau v.*

more true today: "Before these agencies the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight."⁷

Another and seemingly more effective method of limiting the regulatory powers of administrative agencies is the extension of judicial review under the due process clause. Yet judicial review, conceived as *trial de novo*, does not solve the problem of limiting the administrative function but rather eliminates it by doing away with the coordinate function altogether. Proposals for reform such as the Walter-Logan Bill and its planned successors are therefore widely recognized not as a contribution to the solution of the problem with which we are here concerned, but as an attempt to destroy the very conditions under which the problem could arise at all.

On the statutory level, the traditional canons of interpretation are applied to the language of the statute in order to ascertain whether the administrative agency has remained within the limits of the statutory standards or else has acted *ultra vires*. The courts have, however, not failed to recognize that there are cases of administrative rule-making, which even though remaining within the verbal limits of the statute, are nevertheless *ultra vires*. The courts have justified the invalidation of administrative rules of this kind by either straining the words of the statute as well as the canons of interpretation or by declaring the regulation arbitrary and unreasonable.⁸

It is with the latter category of administrative regulations that we propose to deal. The test of reasonableness, where the term does not refer to standards well defined and clearly understood, is obviously less a standard by which the scope of administrative rule-making power can be delimited, than the admission that such a standard cannot be found. The analysis of the cases invalidating administrative regulations which are not clearly in violation of the words of the statute will show that underlying these decisions is the inarticulate awareness of implied limitations which adminis-

Whitman, 196 Wis. 472, 220 N.W. 929 (1928). Cf. Cheadle, *The Delegation of Legislative Functions*, 27 Yale L. J. 892 (1918); Comer, *Legislative Functions of National Administrative Authorities* 124 (1927); Corwin, *The President, Office and Powers* 126 (1940); Hart, *The Ordinance Making Powers of the President of the United States* 149 (1925); Pennock, *Administration and the Rule of Law* 118 (1941); B. F. Wright, *The Growth of American Constitutional Law* 146 (1942); Landis, *The Administrative Process* 50, 66, 80 (1938).

⁷ 41 Rep. Am. Bar Assn. 368 (1916).

⁸ "A regulation to be valid must be reasonable and must be consistent with law." *International Ry. Corp. v. Davidson*, 257 U.S. 506, 514 (1922); *Manhattan General Equipment Co. v. Com'r of Internal Revenue*, 297 U.S. 129, 134 (1936); see especially *Interstate Commerce Com'n v. Illinois Central R.R.*, 215 U.S. 452, 470 (1910); *Nolan v. Morgan*, 69 F. 2d 471 (C.C.A. 7th 1934).

trative regulations are not allowed to overstep. These limitations follow from the very nature of the administrative function and its relation to the legislative branch. It will furthermore be shown that these implied limitations upon regulatory powers in administrative law have their counterpart in the three traditional branches of the government.⁹

II. INVALID REGULATIONS UNDER THE FAIR LABOR STANDARDS ACT

We take as our point of departure the Fair Labor Standards Act. This act, as pointed out before,¹⁰ constitutes a most serious and elaborate attempt to meet all possible constitutional requirements with respect to the scope of delegated regulatory powers and administrative procedure. Despite those unusual precautions, the act in practical operation has not avoided some of the difficulties which have befallen other administrative agencies. On the one hand, the act has refrained from delegating expressly to the administrator interpretative powers, believed to have been thus withheld, which are actually inherent in the administrative function. On the other hand, the act has delegated to the administrator apparently well defined rule-making powers, the exercise of which has posed the problem of the scope of regulatory powers in administrative law.

The act delegates to the administrator comprehensive rule-making powers only with respect to the determination of minimum wages.¹¹ The act also delegates to the administrator the power to issue regulations and orders prescribing the reports to be made by employers subject to the act¹² and exempting learners, apprentices, and handicapped workers from the minimum wage provisions.¹³ The act empowers finally the administrator in four isolated instances to define certain statutory terms. He may deter-

⁹ The doctrine, preoccupied with the pseudo-problems of constitutional theology, has paid scant attention to the problem of implied powers and limitations in administrative law. Ernst Freund was, however, already aware of the existence of the problem and the unsatisfactory state of its solution; in *Standards of American Legislation* 302 (1917), he stated: "The precise line of demarcation between matter to be determined by statute and matter to be left to regulation has not yet been satisfactorily settled"; see also Freund, *The Substitution of Rule for Discretion in Public Law*, 9 *Am. Pol. Sci. Rev.* 666, especially at 676 (1915). See also Hart, *The Exercise of Rule-Making Power*, in *Studies on Administrative Management in the Government of the United States* 34 (1937): "Possibly the policy or standard need not be expressed in the delegation of rule-making power, if it may be implied with sufficient certainty and clarity." Cf. also Carr, *Delegated Legislation* (29 1921); Comer, *loc. cit. supra*, note 6 at 134 et seq.; and particularly Landis, *loc. cit. supra*, note 6 at 83, 88.

¹⁰ *Loc. cit.* 577.

¹¹ 52 Stat. 1062, 1063, 1064, 1065 (1938), 29 U.S.C. §§ 205 c, 206, 208, 209 (1940).

¹² *Id.* at 1065, 29 U.S.C. § 208 d (1940).

¹³ *Id.* at 1065, 29 U.S.C. § 210 a (1940).

mine the reasonable cost of board, lodging, and other facilities;¹⁴ he may determine which industries are of a seasonal nature;¹⁵ he may define and delimit the terms "employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman";¹⁶ and he may finally determine "the area of production" within the meaning of Sections 7 (c) and 13 (a) (10).¹⁷

One of the characteristic features of the regulations interpreting the two last-mentioned groups of terms is the tendency to circumscribe the categories of employees exempt from the operation of the act by rigid, mathematical formulae. Thus the term "employee employed in a bona fide executive . . . capacity" is taken to mean any employee who, besides performing certain types of work,

is compensated for his services on a salary basis at not less than \$30 per week . . . , and whose hours of work of the same nature as that performed by nonexempt employees do not exceed 20 percent of the number of hours worked in the workweek by the non-exempt employees under his direction.¹⁸

The term "employee employed in a bona fide . . . administrative . . . capacity" is taken to mean any employee "who is compensated for his services on a salary or fee basis at a rate of not less than \$200 per month,"¹⁹ and who fulfills certain specific functions. The term "professional" must likewise meet the 20 per cent and salary tests, whereas the 20 per cent rule is the only numerical requirement for the terms "local retailing capacity" and "outside salesman."²⁰ Finally, any employee shall be regarded as employed in "the area of production" with regard to certain agricultural activities

if he performs those operations on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employees engaged in those operations in that establishment does not exceed ten.²¹

It is with respect to the numerical standards of these regulations that the reported cases show an as yet uncertain and inarticulate awareness of

¹⁴ Id. at 1061 (1938), 29 U.S.C. § 203 m (1940).

¹⁵ Id. at 1063 (1938), 29 U.S.C. § 207 b (3) (1940).

¹⁶ Id. at 1067 (1938), 29 U.S.C. § 213 a (1) (1940).

¹⁷ Id. at 1063 and 1067 (1938), 29 U.S.C. § 207 c and § 213 a (10) (1940).

¹⁸ Title 29, Chapter V, Code of Federal Regulations, Part 541.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Loc. cit. Part 536.

implied limitations on regulatory powers. In *Devoe v. Atlanta Paper Co.*²² the plaintiff was an employee who fulfilled all the functions required by the regulations for an executive, but did not receive the minimum salary laid down by the regulations. The court decided that the regulations were invalid in so far as the salary requirement was concerned. The argument follows the traditional lines marked by the canons of interpretation and the requirement of reasonableness. The court found that the requirement of a minimum salary has no reasonable connection with the fair and natural meaning of the term to be defined, not being a real incident to executive work.

In *Fleming v. Farmers Peanut Co.*²³ the definition by the administrator of the term "area of production" was at issue. The court approved of the substitution of the term "general vicinity" for the ten-mile limit as required in previous regulations.²⁴

The word area means a surface, a territory, a region; in this case the territory or region where farm and orchard products are raised. It may be of any extent, and hence the need of defining it. "Vicinity" is some advance because it means nearness, neighborhood, that distance in which producers are neighbors. This may be a greater distance in sparsely settled regions than in thickly populated ones.

The court, however, did not think that the inclusion of the numbers of workers in the definition was "a true execution of the power given to define." The argument is not developed beyond this, but from the citation of *Manhattan G. E. Co. v. Commissioner*²⁵ in support one can conclude that the court declared this part of the regulation invalid, as being inconsistent with law and unreasonable.

A somewhat more elaborate argumentation is applied in *Holly Hill Fruit Products v. Addison*,²⁶ decided by the same court. The court reaffirmed the invalidity of the particular section of the regulation because "the number of employees working together in the establishment had no relation to area of production," and furthermore stated:

²² 40 F. Supp. 284 (N.D. Georgia 1941). Accord, *Abram v. San Joaquin Cotton Oil Co.*, 49 F. Supp. 393, 404 (S.D. Cal. 1943).

²³ 128 F. 2d 404 (C.C.A. 5th 1942); accord, *Abram v. San Joaquin Cotton Oil Co.*, supra, note 22 at 403; *Shain v. Armour & Co.*, 50 F. Supp. 907, 913 (W.D. Ky. 1943).

²⁴ Of April 1939 and December 1940. See also, Annual Report, Wage and Hour Division, U.S. Dept. of Labor 83 (1942).

²⁵ 297 U.S. 129 (1936).

²⁶ 136 F. 2d 323, 325 (C.C.A. 5th 1943).

The administrator must define fairly and truly the area of production; but he cannot create such area or arbitrarily limit it within false and arbitrary boundaries.²⁷

Walling v. McCracken County Peach Growers Association,²⁸ invalidating the same regulation, starts with the principle that administrative rules must comply with the statutory standards and that there must be a rational connection between the declared policy of Congress and the regulation.

"Area of production" deals primarily with geographical territory and necessarily includes all employers within the geographical limits so set up. The Administrator exercised his authority unreasonably in restricting the exemption merely to those employers where the number of employees did not exceed ten even though such employers were within the geographical limits established by the Administrator.

Likewise, in *Clark v. Jacksonville Compress Co.*,²⁹ the court declared the requirements under consideration to have "no reasonable relation to a valid definition of 'area of production,' or to the congressional grant of authority. They are capricious, arbitrary, and void."

With regard to the exemption of employees "engaged in any retail or service establishment the greater part of whose selling or servicing is in

²⁷ See especially the concurring opinion of Judge Waller, *ibid.* at 326, who thinks that "area of production" refers to large geographical areas such as "the citrus belt," "the cotton belt" and the like.

"However, the Administrator has adopted no such broad concept of the term 'area of production' and, in fact, has generally disregarded what is, in fact, the area of production, but has converted the actual and factual area of production into an arbitrary creation of his own. The real question is whether the actual area of production is to be disregarded and the definition of the Administrator is to control rather than the intent of Congress not to handicap the farmer in the marketing of his produce. In short, whether the term 'area of production' is to control, or the bracketed phrase '[as defined by the Administrator]' is to control. To put it differently, can the Administrator be said to have defined the area of production of certain commodities when in truth and in fact he has *not* defined such area of production? Congress can see a rabbit run across a State line and declare it was a lion, and a lion it is, but can the Administrator do that? My thought is that the Administrator must define the area of production in fact and without regard to the number of employees, without regard to the location of a city, and without regard to any factor other than the area within which such fruits and vegetables are customarily, in the usual course of business, brought by the farmer to be marketed or processed. . . . In conclusion, it is my view that the *actual* area of production is the area that the Administrator must define. If he wishes to be technical, some of the factors that he might reasonably take into consideration are: (a) availability of other canning plants; (b) freedom of access by good roads; (c) the capacity of the canning plant to handle the produce; (d) the efficiency of the plant; (e) the quantity of produce raised in the area in relation to plant capacity; (g) and in the case of a cooperative cannery (as in the present case) the location of the members of the cooperative. There are many factors of far more relevancy or pertinency than the number of employees or the population of the town in which located, or the radius of an arbitrary circle."

²⁸ 50 F. Supp. 900, 905 (W.D. Ky. 1943).

²⁹ 45 F. Supp. 43, 46 (E.D. Texas 1941); see also, *Shain v. Armour & Co.*, *loc. cit. supra*, note 23.

intrastate commerce,"³⁰ *Wood v. Central Sand and Gravel Co.*³¹ lays down the principle that the determination must be made "upon all the facts shown in the record. Certain common sense considerations, however, are appropriately applied as criteria in all cases." Elaborating upon these considerations, *Stucker v. Roselle*³² said:

When a concern is engaged in both retail and wholesale business, which business is so intermingled as not to be subject to separate and independent classifications, it raises the question whether it is to be considered for the purposes of the Fair Labor Standards Act a retail concern or a wholesale concern. The Wage and Hour Division of the United States Department of Labor, for purposes of administration, has adopted the rule that an establishment may be considered a retail establishment if more than 50% of the dollar value of its total sales are retail sales, but that it will not be considered a retail establishment if more than 50% of the dollar value of its total sales are wholesale sales. Such a classification is not binding upon a Court in any given case which comes before it as the question can not always be decided by such an arbitrary measurement and necessarily depends upon the facts in each particular case.

Especially numerous are the statements in which courts have expressed their opposition to defining concepts such as "engaged in commerce" or "in interstate commerce" by mathematical standards and percentage rules. In *Kirschbaum Co. v. Walling*³³ the Supreme Court said:

To search for a dependable touchstone by which to determine whether employees are "engaged in commerce or in the production of goods for commerce" is as rewarding as an attempt to square the circle. The judicial task in marking out the extent to which Congress has exercised its constitutional power over commerce is not that of devising an abstract formula. Perhaps in no domain of public law are general propositions less helpful and indeed more mischievous than where boundaries must be drawn, under a federal enactment, between what it has taken over for administration by the central Government and what it has left to the States.

This negative standard is given a positive turn in *Walling v. Jacksonville Paper Co.*:³⁴

³⁰ 52 Stat. 1067 (1938), 29 U.S.C. § 213 a (2) (1940).

³¹ 33 F. Supp. 40, 46 (W.D. Tenn. 1940); accord with principle, *Collins v. Kidd*, 38 F. Supp. 634, 637 (E.D. Texas 1941).

³² 37 F. Supp. 864, 867 (W.D. Ky. 1941); cf. also, *Wideman v. Blanchard & Calhoun Realty Co.*, 50 F. Supp. 626, 628 (S.D. Ga. 1943).

³³ 316 U.S. 517, 520 (1942).

³⁴ 317 U.S. 564, 572 (1943). See also, *Burton v. Zimmerman*, 131 F. 2d 377 (C.C.A. 4th 1942); *Hanson v. Lagerstrom*, 133 F. 2d 120 (C.C.A. 8th 1943); *Walling v. American Stores Co.*, id. at 840, 845 (C.C.A. 3d 1943); *Brown v. Minngas Co.*, 51 F. Supp. 363, 369 (Minn. 1943); *Bartholome v. Baltimore Fire Patrol & Despatch Co. of Baltimore City*, 48 F. Supp. 98, 103 (Md. 1942); *Walling v. Goldblatt Bros.*, 128 F. 2d 778, 784 (C.C.A. 7th 1942); *Couch v. Ward*, 168 S.W. 2d 822, 825 (Ark. 1943). Note, 90 U. of Pa. L. Rev. 842 (1942) especially at 850.

If a substantial part of an employee's activities related to goods whose movement in the channels of interstate commerce was established by the test we have described, he is covered by the Act. Here as in other situations . . . the question of the Act's coverage depends on the special facts pertaining to the particular business.

These general principles are applied to concrete situations. Thus, the courts uniformly attribute little importance to the quantitative proportion of employer's intra- and interstate business.³⁵

Especially trenchant is the decision in *Walling v. Belo Corporation*³⁶ where the Supreme Court, in a five to four decision, invalidated the administrator's definition of "regular rate" within the meaning of Section 7 (a) (3) of the act,³⁷ by saying:

The problem presented by this case is difficult—difficult because we are asked to provide a rigid definition of "regular rate" when Congress has failed to provide one. Presumably, Congress refrained from attempting such a definition because the employment relationships to which the Act would apply were so various and unpredictable. And that which it was unwise for Congress to do, this Court should not do. When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an inflexible and artificial interpretation of the Act which finds no support in its text. . . .

The courts do not limit to regulations under the Fair Labor Standards Act their opposition against abstract, rigid standards of a numerical nature. There is rather a general tendency to invalidate such standards whenever the statutory terms to be defined do not lend themselves to defi-

³⁵ "The percentage of the employer's business intra-state as compared with that inter-state proves little." *Fleming v. Jacksonville Paper Co.*, 128 F. 2d 395, 397 (C.C.A. 5th 1942); *Walling v. Peoples Packing Co.*, 132 F. 2d 236, 240 (C.C.A. 10th 1942). "The character rather than the size of an activity is the controlling factor." *Davis v. Goodman Lumber Co.*, 133 F. 2d 52 (C.C.A. 4th 1943); *Wood v. Central Sand and Gravel Co.*, loc. cit. supra, note 31 at 44; *Walling v. Armbruster*, 51 F. Supp. 166, 170 (W.D. Ark. 1943); *Stucker v. Roselle*, loc. cit. supra, note 32; *Abadie v. Cudahy Packing Co. of Louisiana*, 37 F. Supp. 164 (E.D. La. 1941); *Samuels v. Houston*, 46 F. Supp. 364 (S.D. Ga. 1942); *Fleming v. Stillman*, 48 F. Supp. 609 (M.D. Tenn. 1943); *Zehring v. Brown Materials*, 48 F. Supp. 740, 745 (S.D. Cal. 1943); *Ouendag v. Gibson*, 49 F. Supp. 379 (W.D. Mich. 1943); *Walling v. Reuter*, 49 F. Supp. 485 (E.D. La. 1943); *Snyder v. Casale*, 49 F. Supp. 926 (S.D.N.Y. 1942).

The decision of the district court in *Collins v. Kidd*, 38 F. Supp. 634 (E.D. Texas 1941), based upon the administrator's percentage rule, was overruled for that reason by the circuit court, 132 F. 2d 79 (C.C.A. 5th 1942).

Cf. also, *Swift & Co. v. United States*, 196 U.S. 375, 398 (1905); *Galveston R.R. v. Texas*, 210 U.S. 217 (1908); *Savage v. Jones*, 225 U.S. 501 (1912); *United States v. Union Pacific R.R.*, 226 U.S. 61 (1912); *United States v. Reading Co.*, 226 U.S. 324 (1912); *Davis v. Virginia*, 236 U.S. 697 (1915); *Public Utilities Com'n v. Landon*, 249 U.S. 236 (1919); *Kelley v. Great Northern Ry. Co.*, 152 Fed. 211, 217 (C.C. 5th 1907).

³⁶ 316 U.S. 624, 634 (1942); see also, *Walling v. Emery Wholesale Corp.*, 49 F. Supp. 192, 197 (N.D. Ga. 1943).

³⁷ United States Dept. of Labor, Wage and Hour Division, Maximum Hours and Overtime Compensation, Interpretative Bulletin No. 4, July 1940.

nitions of this kind but need for the adequate limitation of their content to be confronted with the facts of the individual case. The definition by a percentage rule of the term "interstate commerce" under the National Labor Relations Act was condemned by the Supreme Court in the following words:³⁸

Whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution such as "interstate commerce," "due process," "equal protection." In maintaining the balance of the constitutional grants and limitations, it is inevitable that we should define their applications in the gradual process of inclusion and exclusion.

There is thus no point in the instant case in a demand for the drawing of a mathematical line. . . . It is plain that the provision cannot be applied by a mere reference to percentages and the fact that petitioner's sales in interstate and foreign commerce amounted to 37 per cent., and not to more than 50 per cent., of its production cannot be deemed controlling. . . .

The question of degree is constantly met in other relations.

The Court cites the functions of the Interstate Commerce Commission in determining whether there exists undue or unreasonable discrimination against interstate or foreign commerce; the definition of the term "interstate transportation or work so closely related to such transportation as to be practically a part of it" under the Federal Employers' Liability Act; the determination of "unfair methods of competition"³⁹ and "substantially lesser competition" under the Clayton Act. "Such questions," the Court concludes, "cannot be escaped by the adoption of any artificial rule."

The general principle of law was clearly stated by Mr. Justice Cardozo with regard to the concept of substantial performance:⁴⁰

³⁸ *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U.S. 453, 467 (1938).

³⁹ With regard to that phrase the Supreme Court said in *Federal Trade Com'n v. Raladam Co.* 283 U.S. 643, 648 (1931): "Undoubtedly the substituted phrase has a broader meaning but how much broader has not been determined. It belongs to that class of phrases which do not admit of precise definition, but the meaning and application of which must be arrived at by what this court elsewhere has called 'the gradual process of judicial inclusion and exclusion.' *Davidson v. New Orleans*, 96 U.S. 97, 104." With regard to damages cf. *Palmer v. Connecticut Ry. Co.*, 311 U.S. 544, 561 (1941).

⁴⁰ *Jacobs & Youngs v. Kent*, 230 N.Y. 239, 242 (1921). See also Mr. Justice Cardozo in *Gully v. First National Bank*, 299 U.S. 109, 117 (1936): "What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation." Cf. also, Mr. Justice Holmes in *Springer v. Philippine Islands*, 277 U.S. 189, 209 (1928), and Dickinson, *Administrative Justice and the Supremacy of Law in the United States* 136 note (1927).

Those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result will be troubled by a classification where the lines of division are so wavering and blurred. Something, doubtless, may be said on the score of consistency and certainty in favor of a stricter standard. The courts have balanced such considerations against those of equity and fairness, and found the latter to be the weightier. . . . Where the line is to be drawn between the important and the trivial cannot be settled by a formula.

III. LEGISLATIVE POLICY V. ADMINISTRATIVE CONVENIENCE

All these decisions have in common the reluctance to follow the administrator in limiting the coverage of the statute by mathematical formulae and especially percentage rules, where the act itself uses terms such as "greater part," "substantial," "area," and the like. Technically, the argument of these decisions follows the familiar lines of statutory interpretation. The courts declare that it would be "unreasonable," "arbitrary," or "impossible" to define the statutory terms by rigid, mathematical formulae.

From the point of view of statutory interpretation it might, however, be argued that it is not outright impossible to define terms such as "area of production," "local retailing," "bona fide executive," and the like by figures and percentages. If, for instance, Congress should have defined the constitutional term "interstate commerce" on the same percentage basis as the administrator under the Fair Labor Standards Act defines the identical statutory term, the courts would undoubtedly have approved of the statutory definition of the constitutional term. Why, then, are the courts hostile to similar definitions on the administrative level? The answer lies in the particular relationship between administrative regulation and congressional enactment. The clarification of this relationship, in turn, depends upon the answer to two questions:

1. What was the legislative policy under which the rule-making powers under consideration were delegated to the administrator? and
2. What function do the mathematical standards of these administrative regulations fulfill from the point of view of this legislative policy?

The delegation of regulatory powers to administrative agencies stems from "the inability of the legislature to formulate standards sufficiently definite for private guidance. This inability in turn may be due either to the inherent inapplicability of uniform standards to varying individual cases or to the temporary failure to discover such principles."⁴¹ The outstanding example of the latter alternative is the delegation of rate-making powers to administrative agencies. In this case, administrative agencies,

⁴¹ Freund, *Administrative Powers over Persons and Property* 29 (1928).

endowed with technical skill and scientific preparation which Congress does not possess, develop gradually, through the trial and error method not accessible to Congress, a definite or even rigid formula which will ultimately take the place of the legislative enactment and according to which future cases will uniformly be decided.

The specific rule-making powers⁴² of the administrator under the Fair Labor Standards Act are obviously not of this kind. If Congress did not feel able to determine in the statute itself concepts such as "area of production," "bona fide executive," or "local retailing capacity," it was not because it did not possess the expert knowledge and experience which would be at the command of the administrator. No such knowledge and experience is needed for the understanding of the terms under consideration, and when Congress left the definition of these concepts to the administrator, it did not do so with the expectation that the particular technical competency of the administrator would enable him to do what Congress was unable to do.⁴³

The implied inability of Congress to define these terms is rather the result of the very nature of the terms which in the majority of cases are applicable to individual situations without further definition but which in a number of marginal cases are inherently incapable of abstract, uniform determination. In these marginal cases the determination must be made "upon all the facts shown in the record,"⁴⁴ "upon the facts in each particular case."⁴⁵ Since, on the one hand, the nature of the terms to be defined makes abstract, uniform determination impossible and since, on the other hand, Congress is unable to give the individualized determination, on the basis of the particular case, which those terms require, Congress has delegated to the administrator the power to define these terms. For the administrative regulation, in contradistinction to the legislative enactment, is capable of flexibility in the light of changing circumstances and of adaptability to the individual case, which do justice to those terms.

The administrator, when defining these terms in regulations of mathematical rigidity, has acted counter to the legislative policy under which he received these regulatory powers. If Congress had thought that formulae

⁴² In contra-distinction to the general powers relative to the determination of minimum wages.

⁴³ *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 145 (1941), is not very clear in explaining this relationship.

⁴⁴ *Wood v. Central Sand and Gravel Co.*, loc. cit. supra, note 31.

⁴⁵ *Stucker v. Roselle*, loc. cit. supra, note 32.

of mathematical precision could solve the problem of defining the terms under consideration, Congress could have written such formulae into the statute. For legislation in abstract, general, rigid terms is the province of congressional rule-making, while legislation in flexible, concrete terms is the proper field of administrative rule-making.⁴⁶ By doing what Congress could have done but did not want to do, that is, to make abstract, general, inflexible regulations in mathematical terms, the administrator has neglected the implicit congressional mandate and overstepped the implied limitations to which the division of functions between Congress and administrative agencies subjects his regulatory powers. It is to this discrepancy between congressional intent and administrative regulation, between the proper delimitation of the spheres of congressional and administrative legislation and the actual extension of the latter, that the courts refer, when they declare regulations of this kind invalid as being "unreasonable" or "arbitrary."

This evaluation of the administrator's regulations is supported by the analysis of the functions which these mathematical standards are intended to fulfill according to the statements of the administrator himself and according to the decisions which affirm the validity of these regulations.

It is significant that the regulations as originally issued in November, 1938, met to a very high degree the test of flexibility and adaptability implied in the congressional delegation. It is only in the revised regulations issued in October and December, 1940, that we find the percentage rules and most of the mathematical requirements with which the courts are concerned. Thus, wherever the revised regulations as quoted above⁴⁷ apply the 20 percentage standard, the original regulations used "no substantial amount" as a test. The original regulations provided a salary test only for the definition of the terms "executive" and "administrative," whereas the revised regulations define also the term "professional" in a similar way.

The reasons for this trend toward rigidity have been candidly expressed in the Report and Recommendations, preceding the publication of the revised regulations. They lie exclusively in the realm of administrative convenience. The administrator recognizes⁴⁸ that the "no substantial

⁴⁶ See the writer's paper, *loc. cit. supra*, note 3 at 583 et seq.

⁴⁷ *Supra*, notes 18, 19, 20, 21.

⁴⁸ United States Dept. of Labor, Wage and Hour Division, "Executive, Administrative, Professional . . . Outside Salesman" Redefined. Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition 13 (1940).

amount" test was subject to particular criticism and that this test "has proved difficult of administration." The substitution of the percentage rule will, however, solve the administrative problem.

There is little doubt that any percentage that might be taken as an arithmetical equivalent of the word "substantial" must be somewhat arbitrary in nature and will cause some hardship. . . . Nevertheless, even if full weight is given to the difficulties that inhere in the choice of a quantitative measurement, this remains the most practical solution of a difficult problem.⁴⁹

This reference to administrative convenience as the motive behind the insertion of mathematical formulae into the act is borne out by a remark which Mrs. Clark, Representative of Connecticut, made at the Sixth National Conference on Labor Legislation:⁵⁰

Other minor questions, such as the definition of professional and administrative employees, and the attempts to build up tenuous borderline cases—for example, to determine whether a draftsman or a tracer or some kind of an outside engineer is a professional employee within the meaning of the act—these lead to a bogging down of the whole administrative machinery. At least that is the experience we have had.

That considerations of administrative convenience are to some extent even responsible for the choice of 20 per cent instead of another figure is evidenced by the administrator's statement⁵¹ that "there are, of course, any number of ways in which the word 'substantial' might be translated into numerical terms," and by the subsequent explanation as to why 20 per cent was chosen.

That the insertion of mathematical formulae and percentage rules into the regulations must have been motivated mainly by the desire to make the administration of the act easier by replacing flexible standards with rigid ones, is furthermore indicated by the paradoxical results to which the application of mathematical standards can easily lead. The analysis of the 20 per cent rule with respect to "bona fide executive" will show that this rule, as used in the regulations, leads to distinctions entirely irrelevant for the term to be defined.

It will be recalled that the regulations do not take the total amount of work performed by the employee claiming exemption as the basis for the calculation of the 20 per cent; they rather base the calculation of the 20 per cent on the number of hours worked by nonexempt employees under

⁴⁹ *Id.* at 14.

⁵⁰ Proceedings of the Sixth National Conference on Labor Legislation 58 (1940).

⁵¹ *Ibid.*; see also, at page 30 with regard to the salary test for the definition of the term "administrative."

the direction of the employee claiming exemption. Let us suppose then that an employee claiming exemption works sixty hours a week whereas a nonexempt employee under his direction works forty hours a week; that, furthermore, the employee claiming exemption would dedicate a little more than eight hours a week to functions performed by the nonexempt employees under his direction. In this case the employee claiming exemption, even though dedicating only 13.5 per cent of his total working hours to nonexecutive work, would not be classified as a "bona fide executive" under the regulations. Let us suppose, on the other hand, that an employee claiming exemption works thirty-six hours a week, that the nonexempt employees under his direction work forty-eight hours a week, and that he gives nine and one-half hours a week to nonexecutive work. In this case the nonexecutive work of the employee claiming exemption would amount to 19.8 per cent of the work performed by the nonexempt employees; he would therefore be considered a "bona fide executive" even though his nonexecutive work amounts to 26.4 per cent of his total work performed.

The character of the 20 per cent rule as a device for easy administration, rather than as an attempt to do justice to the term to be defined, becomes especially obvious when we confront this exclusively quantitative formula with that element in the statutory term which is qualitative *par excellence*, that is, the concept "bona fide." This concept is of a qualitative nature, referring to the honest intentions of the parties. A "bona fide executive" is an employee who exclusively or predominantly fulfills executive functions and does so actually, genuinely, and not by subterfuge or deceit. Congress wanted obviously to distinguish between employees honestly and genuinely performing executive functions and those doing so only apparently and by deception. With this ethical, qualitative distinction the 20 per cent rule has obviously no connection at all. Nobody would seriously maintain that an executive who remains below the 20 per cent limit is a bona fide executive whereas an employee who exceeds it somewhat must be classified as mala fide executive.⁵²

Yet the 20 per cent rule not only disregards completely the "bona fide" requirement; it also invites results contrary to the one which Congress intended to bring about by inserting the "bona fide" requirement into the statute. In other words, the percentage rule will facilitate and almost provoke evasions of the law which otherwise would not have been possible. It will be easy for an employee aiming at the benefits of the law

⁵² Cf. *McDonald v. Thompson*, 305 U.S. 263, 266 (1938).

to hold his nonexempt work artificially above the 20 per cent limit. On the other hand, it will be easy for an employer aiming at the evasion of the law to keep the nonexempt work of an employee artificially below the 20 per cent limit. The percentage rule, therefore, leads in practical application to the creation of a category of "mala fide executives," which Congress wanted to make impossible by delegating to the administrator the power to define and delimit the term "bona fide executive." A whole group of employees intended by the law to be either included in, or excluded from, its application can thus easily be brought into the opposite category.

The opinion that the inclusion of numerical tests in the regulations is due mainly to considerations of convenience in the administration of the act, is finally supported by the arguments upon which courts, confirming the validity of these regulations, base their decisions. In *Ralph Knight v. Mantel*⁵³ the court justifies the percentage rule in the administrator's definition of "bona fide executive" by the difficulties to which the interpretation of the term "substantial amount" (as laid down in the original regulations of 1938) had given rise.

It was recognized that the phrase had proved difficult of administration. It was for the purpose of removing or diminishing these difficulties that the percentage basis was substituted for the objectionable phrase.

The court continues by identifying itself with the arguments of the Report and Recommendations quoted above.⁵⁴

The selection of a percentage guide is not, in and of its nature, objectionable. Whatever percentage might have been selected would, obviously, have been somewhat arbitrary in the sense that, possibly or probably, some other percentage might have been selected and have been equally unobjectionable.

The court finds likewise in *Walling v. Sun Publishing Co.*⁵⁵ that the administrator's regulations "are justified by practical administrative considerations."⁵⁶

⁵³ 135 F. 2d 514, 517 (C.C.A. 8th 1943).

⁵⁴ Supra, note 48.

⁵⁵ 47 F. Supp. 180, 191 (W.D. Tenn. 1942).

⁵⁶ Accord without discussion: *Walling v. Emery Wholesale Corp.* loc. cit. supra, note 36; *Shain v. Armour & Co.*, loc. cit. supra, note 23; *Corey v. Detroit Steel Corp.*, 52 F. Supp. 138 (E.D. Mich. 1943); *Owin v. Liquid Carbonic Corp.*, 42 F. Supp. 774 (S.D. Texas 1941). The validity of the regulation was not at issue in *Wilkinson v. Noland*, 40 F. Supp. 1009 (E.D. Va. 1941); *Sauls v. Martin*, 45 F. Supp. 801 (W.D. S.C. 1942); *Jewel Tea Co. v. Williams*, 118 F. 2d 202 (C.C.A. 10th 1941); *Helena Glendale Ferry Co. v. Walling*, 132 F. 2d 616 (C.C.A. 8th 1942); *Mabee v. White Plains Pub. Co.*, 41 N.Y.S. 2d 534, 540 (1943).

In *Gordon v. Paducah Ice Mfg. Co.*, 41 F. Supp. 980, 988 (W.D. Ky. 1941), the court refused to invalidate the administrator's definition of "area of production" because "the record

There are, however, decisions which, with respect to the functions of the administrator as well as in fields of administrative law other than the administration of the Fair Labor Standards Act, oppose the tendency to subordinate the interpretation of substantive law to considerations of administrative convenience.⁵⁷ The Supreme Court, in *Cudahy Packing Co. v. Holland*,⁵⁸ denied the power of the administrator under the Fair Labor Standards Act to sub-delegate the subpoena powers delegated to him by the act, by saying:

He [the administrator] points to the wide range of duties imposed upon him, the vast extent of his territorial jurisdiction, and the large number of investigations required for the enforcement of the act. . . . Even though Congress has underestimated the burden which it has placed upon the Administrator, which is by no means clear, we think that the legislative record establishes that Congress has withheld from him authority to delegate the exercise of the subpoena power and that this precludes our restoring it by construction.

In *Stewart Dry Goods Co. v. Lewis*⁵⁹ the Supreme Court refuted the argument in favor of a gross sales tax of a certain type to the effect that it "is less complicated and more convenient of administration than an income tax. . . . The argument is in essence that it is difficult to be just and easy to be arbitrary." In *Lukens Steel Co. v. Perkins*⁶⁰ the court said with re-

in its present shape throws no light upon the history or origin of the Administrator's definition, nor does it disclose what facts were considered by the Administrator in giving this definition." In support of this same definition see *Silgaro v. Port Compress Co.*, 45 F. Supp. 88, 92 (S.D. Texas 1942). See also, with regard to the definition of "retail establishment," *Brown v. Minnegas Co.*, loc. cit. supra, note 34.

The dissenting opinion of Mr. Justice Holmes in *Louisville Gas Co. v. Coleman*, 277 U.S. 32, 41 (1928) could not be cited, despite the apparent conformity, in support of these decisions. Mr. Justice Holmes said: "When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark." The legislature is, however, subject only to the express and implied limitations of the Constitution, whereas the administrator's discretion is also circumscribed by the implied statutory limitations discussed in the text. His discretion in the choice of a numerical standard is limited by the explicit and implied policy of the delegating act. Cf. also, the concurring opinion in *Holly Hill Fruit Products v. Addison*, loc. cit. supra, note 26.

⁵⁷ This conflict between statutory purpose and administrative convenience, where the former prevails over the latter, must be distinguished from the conflict between judicial opinion and administrative convenience, where the latter prevails over the former; cf. *Haggard Co. v. Helvering*, 308 U.S. 389, 398 (1940).

⁵⁸ 315 U.S. 357, 363, 367 (1942).

⁵⁹ 294 U.S. 550, 559 (1935).

⁶⁰ 107 F. 2d 627, 633 (App. D.C. 1939).

spect to the interpretation by the Secretary of Labor of the Public Contracts Act:

Appellees contend that to attribute to the word locality a limited—i.e., its well settled—meaning would produce difficult and objectionable problems of administration. While this may be true, it constitutes no reason for disregarding the clearly expressed intention of Congress. Administrative convenience and public interest may, under some circumstances, coincide. But it is not always so. Governmental functions may involve a multiplicity of administrative details. It would no doubt be much more convenient for the Postmaster General if a few large centers could be used for the collection and distribution of mail. But in that case, as in the present, Congress has spoken in terms of governmental service to be performed on a basis of *localities* with all the administrative inconvenience which may follow the carrying out of its mandates.

Referring to its interpretation of the Social Security Act, in contrast to a regulation of the Social Security Board, the court said in *Kandel v. Social Security Board*.⁶¹

Apparently this result imposes serious practical difficulties of administration. . . . If the necessity of deciding such issues too greatly impedes the administration of the Act, Congress alone can give relief. . . .⁶²

IV. THE DOCTRINE OF IMPLIED LIMITATIONS ON REGULATORY POWERS

The foregoing discussion has led to four conclusions: (1) That administrative regulations of mathematical rigidity meet with wide disapproval by the courts; (2) That the functional relationship between statutory delegation and administrative regulation may require, in the latter, flexibility and adaptability to the particularities of the individual case; (3) That regulations of the rigid, general type owe their existence to considerations of administrative convenience; and (4) That there is a judicial trend against letting considerations of administrative convenience prevail over limitations which the statute, expressly or by implication, has placed upon administrative discretion.

These conclusions point toward the existence of implied limitations on regulatory powers in administrative law. These implied limitations have their roots in the same element to which the implied regulatory powers

⁶¹ 136 F. 2d 327 (C.C.A. 2d 1943).

⁶² Cf. also, *South v. Railroad Retirement Board*, 43 F. Supp. 911, 914 (N.D. Ga. 1942), with regard to the powers of the board: "In entrusting to the Board the determination of questions of fact, Congress did not mean to imply artificial tests." The much quoted case of *Lynch v. Tilden Co.*, 265 U.S. 315, 321 (1924), is not in point, for the administrative regulation is here clearly at variance with the express statutory delegation. The problem is, therefore, one of interpretation pure and simple. Cf. also, *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 198 (1941).

owe their existence,⁶³ that is, the administrative function itself. In the same way in which the power to interpret is the logical byproduct of the power to administer, the power to administer under an act of Congress precludes implicitly the power to do what Congress could have done but did not want to do. The administrative agency is, then, under a duty, the positive counterpart of this limitation, to execute the mandate of Congress whose explicit command must be read in the literal text of the statute and whose implicit injunctions must be sought in the particular purpose which Congress wishes to achieve through the delegation of regulatory powers. The administrative agency, in other words, must perform the particular administrative function, the performance of which is the implicit purpose of the delegation of regulatory powers.

How can this purpose be ascertained? The traditional answer, that it is the administrative function to "fill in the details"⁶⁴ of incomplete congressional legislation, has impeded rather than furthered the recognition of the problem and of its possible solution. This answer was correct when it was given, that is, when the traditional three branches of the government performed all governmental functions in relative separation and when, therefore, the assistance which the executive gave to the legislative branch in the performance of the latter's functions could be explained correctly in the traditional terms of the separation of powers.

The problem, in constitutional terms, lies, however, today in the development of a fourth branch of the government which, far from filling in mere details, has become, quantitatively as well as qualitatively, a coordinate partner of the three traditional branches. Quantitatively, administrative legislation exceeds by far enactments by Congress. Qualitatively, administrative regulations are genuine legislation, in many instances no more limited by statutory standards than congressional legislation is by constitutional standards. The attempt at limiting administrative regulative powers must therefore start with the recognition that a coordinate administrative function exists.

The second step toward a solution of our problem is the recognition of the source from which this coordinate administrative function derives. This source is congressional delegation, at the basis of which there may be one of two possible purposes. It is either that Congress does not wish to legislate even though it could, and so for whatever reason, such as time saving, political caution, and the like, delegates legislative powers to

⁶³ See the writer's paper, *loc. cit.* supra, note 3 at 608.

⁶⁴ *Wayman v. Southard*, 10 Wheat. (U.S.) 1, 43 (1825); see also *Comer*, *loc. cit.* supra, note 6 at 125.

an administrative agency, or that Congress did not legislate because it could not have legislated without putting in jeopardy the very purposes for which the law was enacted, and therefore delegated regulatory powers to administrative authorities. In the former type of delegation the administrative powers are limited only by the words of the statute, and expressed and implied limitations coincide.⁶⁵ Hence, no particular problem with respect to implied limitations can arise. It is therefore with the latter category alone that we are concerned.

Here Congress may delegate regulatory powers for three kinds of reasons. It may do so in order to have the facts determined upon which the application of the law depends in an individual case. This is what is meant by "execution of the laws" in the traditional meaning of the term and is part of the traditional executive function.⁶⁶

Secondly, Congress may delegate regulatory powers for the purpose of determining certain legislative standards, a determination which requires experimentation on the basis of scientific knowledge and technical skill; such trial and error method is beyond the reach of congressional action.⁶⁷

Thirdly, the purpose of congressional delegation may be to create flexible standards adaptable to the particular conditions of the individual case. Here again, Congress is incapable of discharging this particular function.

Under these three types of delegation the regulatory powers of the administrative agency are implicitly limited by the kind of administrative function it has to perform. One type of delegation allows only the exercise of regulatory powers of the executive type, the other only the exercise of regulatory powers of an experimental nature, the third only flexible administrative regulations. Consequently, under the executive type the administrative agency could not substitute its own standards for the statutory ones (which it would be allowed to do under the experimental and flexible types) without violating the implicit limitations which the statute pre-

⁶⁵ Cf. *supra*, note 62.

⁶⁶ Cf. *Locke's Appeal*, 72 Pa. 491 (1873); *Field v. Clark*, 143 U.S. 649 (1892); *Mutual Film Corp. v. Industrial Com'n*, 236 U.S. 230 (1915); *Hampton v. United States*, 276 U.S. 394 (1928).

⁶⁷ Cf. to this and the following categories, which are generally not distinguished, *United States v. Grimaud*, 220 U.S. 506, 516 (1911); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935); *Helvering v. Wilshire Oil Co.*, 308 U.S. 90, 101 (1939); *Gray v. Powell*, 314 U.S. 402, 412 (1941). See also, *Comer*, loc. cit. *supra*, note 6 at 16, 17, 271 et seq.; *Dickinson*, loc. cit. *supra*, note 40 at 14; *Freund*, loc. cit. *supra*, note 41 at 14 et seq., 97 et seq., 211 et seq.; *Hart*, loc. cit. *supra*, note 6 at 127, 257, and note 9 at 12 et seq.; *Hart*, *An Introduction to Administrative Law* 153 et seq. (1940); *Hart*, *Some Aspects of Delegated Rule-Making*, 25 Va. L. Rev. 810 (1939); *Pennock*, *Administration and the Rule of Law* 44 et seq. (1941).

scribes.⁶⁸ When only powers to regulate by trial and error are delegated, a regulation laying down at once a ready-made definite standard which was at the disposal of Congress, without experimentation or the use of technical skill or scientific expertness, would again overstep the implied limits which the statute has marked out. Finally, under the flexible type a regulation which replaces the rigid standard of the statute by another rigid one, would, as we have seen, find itself outside the implied limitations imposed by the statute.

These three types of administrative regulation, violative of statutory standards, have this in common, that they do what Congress could have done but did not want to do. The test according to which a doubtful case of violation must be determined is to be found in the administrative function which the regulations are supposed to fulfill in each particular case.⁶⁹ The nature of this function is revealed by the source of administrative power, that is, the statutory delegation.

We arrived at this conclusion by an empirical examination of a particular situation arising under the Fair Labor Standards Act and of the court decisions dealing with this situation and the problems underlying it. It can however be shown that these conclusions are only the special manifestation of a general principle of our constitutional system. In other words, the doctrine of implied limitations on regulatory powers in administrative law is only the special application of a general doctrine of implied limitations in constitutional law. In the same implicit way in which administrative powers are limited by the functions which the statute delegates, the respective powers of the federal and the state governments as well as the powers of the legislative, executive, and judicial branches of the federal government in relation to each other are limited by the functions which the Federal Constitution delegates to the federal government and its three traditional branches.

Every positive direction contains an implication against anything contrary to it, or which would frustrate or disappoint the purpose of that provision. The frame of the government; the grant of legislative power itself; the organization of the executive authority; the erection of the principal courts of justice, create implied limitations . . . as strong as though a negative was expressed in each instance.⁷⁰

⁶⁸ *Morrill v. Jones*, 106 U.S. 466 (1882), and *Lynch v. Tilden Co.*, loc. cit. supra, note 62, deal with this type of violation. Express and implied limitations coincide here.

⁶⁹ Cf. Freund, loc. cit. supra, note 41 at 91: "Delegated discretion is subject to unexpressed limitations which follow partly from the supremacy of the statute over its instrumentalities, and partly from the presumptive reservation of certain considerations for exclusive legislative control."

⁷⁰ *People v. Draper*, 15 N.Y. 532, 544 (1857).

According to Judge Cooley, "There is no difficulty in saying that any such act, which under pretext of exercising such power is usurping another, is opposed to the constitution and void."⁷¹

It follows by implication from the nature of the federal system which protects the federal government as well as the several state governments in their existence and in the proper discharge of their functions, that neither government may tax agencies of the other.⁷² It has even been suggested⁷³ that the express limitations which the Federal Constitution imposes upon the states are relatively less important than the limitations derived from implication. The constitutional principle of the supremacy of the federal government together with a grant of power to the federal government may impose an implied limitation upon the power of the states with regard to the matter delegated for regulation to the federal government. Whether such an implied limitation exists depends upon the nature of the power concerned. If the power granted to the federal government can be exercised only by one government within the same territory, such a limitation must be implied. As Chief Justice Marshall put it in *Sturges v. Crowninshield*.⁷⁴

Whenever . . . the nature of the power requires that it should be exercised exclusively by Congress, the subject is as completely taken from the state legislature as if they had been expressly forbidden to act on it.

Turning from the relations between federal and state governments to the relations among the three traditional branches of the government, we find that the very principle of the separation of powers is an implied limitation upon the powers of the three branches in relation to each other.⁷⁵ This limitation follows from the establishment by the Constitution of three branches of the government, each exercising a particular function of

⁷¹ 1 A Treatise on the Constitutional Limitations, 357, 358, cf. also 355 (8th ed. 1927). See also, Cooley in *People v. Salem*, 20 Mich. 452, 473 (1870): "It is conceded . . . that there are certain limitations upon this power, not prescribed in express terms by any constitutional provision, but inherent in the subject itself, which attend its exercise under all circumstances and which are as inflexible and absolute in their restraints as if directly imposed in the most positive of words." Marshall in *McCulloch v. Maryland*, 4 Wheat. (U.S.) 316, 407 (1819): "It was the intention of the Constitution that 'the minor ingredients which compose those objects [of our political life] be deduced from the nature of the objects themselves.'" Cf. also *Knox v. Lee*, 12 Wal. (U.S.) 457 (1871); Cooley, *The General Principles of Constitutional Law in the United States of America* 100 (1891); Carr, *The Supreme Court and Judicial Review* 96 (1942); Hart, loc. cit. supra, note 6 at 117, 130.

⁷² 1 Willoughby, *The Constitutional Law of the United States* 111 (1929); Dodd, *Implied Powers and Implied Limitations in Constitutional Law*, 29 Yale L.J. 140, 147 (1919).

⁷³ Dodd at 138, 160.

⁷⁴ 4 Wheat. U.S. 122 (1819).

⁷⁵ See also *Kilbourn v. Thompson*, 103 U.S. 168 (1880); Dodd, loc. cit. supra, note 72 at 148; Hart, loc. cit. supra, note 6 at 117, 130.

its own. It is from the nature of these functions that derive by implication the particular limitations by which the powers of the legislative, judicial, and executive branches of the government are circumscribed in their relation to each other.

The constitutional doctrine of implied limitations, manifesting itself as the doctrine of the "higher law" and in other natural law doctrines, was originally developed for the purpose of preventing a legislative absolutism which, unchecked, would encroach upon the liberties of the individual. Thus Judge Cooley wrote in the preface to the second edition of his *Constitutional Limitations*:⁷⁶

In this sympathy and faith, he had written of jury trials and the other safeguards to personal liberty, of liberty of the press, and of vested rights; and he had also endeavored to point out that there are on all sides definite limitations which circumscribe the legislative authority, independent of the specific restrictions which the people impose by their State constitutions.

Yet besides these implied limitations upon the legislative power, upon which attention has mainly been focused,⁷⁷ there exist less spectacular ones, which, growing out from the legislative function itself, are similar in nature to, and fulfill a similar function as, implied limitations in administrative law. In the same way in which an act of Congress delegates administrative powers to an administrative agency, the Constitution delegates legislative powers to Congress, and in the same way in which consequently the administrative agency can perform no other but administrative functions, the legislative department can exercise no other but legislative authority. When Congress has only delegated the power to make flexible, concrete regulations, the administrative agency cannot make abstract, rigid ones which under the circumstances would be administrative regulations in form only but not in substance and would actually encroach upon the powers of Congress. Likewise, Congress cannot, in the form of a statute, make rules which are alien to the legislative function and belong actually to the judiciary.

The assumption of judicial power by the legislature in such a case is unconstitutional, because, though not expressly forbidden, it is nevertheless inconsistent with the provisions which have conferred upon another department the power the legislature is seeking to exercise.⁷⁸

⁷⁶ Loc. cit. supra, note 71 at vii.

⁷⁷ See, for instance, Haines, *Judicial Review of Legislation in the United States and the Doctrine of Vested Rights and of Implied Limitations on Legislatures*, 2 Tex. L. Rev. 257, 387 (1924), 3 ibid. 1 (1924); Reeder, *Constitutional and Extra-Constitutional Restraints*, 61 U. of Pa. L. Rev. 441 (1913).

⁷⁸ Loc. cit. supra, note 71 at 356; see also ibid. 180 et seq. and Willoughby loc. cit. supra, note 72 at 41.

In *Schneiderman v. United States*,⁷⁹ for instance, the Supreme Court recognized the plenary powers of Congress over the jurisdiction of the federal courts. Once the power of the courts is established by act of Congress, the latter has, however, no power to

decree in the same breath that the judgment rendered shall have no conclusive effect. Limits it may place. But that is another matter from making an adjudication under Article III merely an advisory opinion or prima facie evidence of the fact or all the facts determined.

This limitation upon the powers of Congress is implied from the very nature of the legislative and judicial functions and their relation to each other. On the same grounds, Congress could not, even if the Due Process Clause were omitted from the Constitution, pass the property of one citizen over to somebody else while assuming that the latter was entitled to the property according to law.⁸⁰

Implied limitations, protecting the executive from encroachments by the legislative branch, are less obvious. This is so because the relation between the legislative and executive functions, with the latter charged with the execution of the acts of the former, makes for the subordination of the latter to the former. The inability of Congress to interfere with the removal power of the President offers, however, an example of implied limitations on the legislative power in its relation with the chief executive. In *Myers v. United States*⁸¹ the Supreme Court declared the Tenure of Office Act of 1867 unconstitutional as interfering with a presidential power which by its nature is executive and not legislative. In other words, the investment of the chief executive with the general executive functions, with the power to execute the laws, and with the power to remove as an incident of the power to appoint, limits by implication the power of Congress in this matter.

Conversely, the executive branch is limited in its relations with Congress by the constitutional distribution of functions. Since the legislature makes the laws and the executive branch executes them, the latter's discretion is limited by the words and policies of congressional enactments. In applying the acts of Congress to concrete cases, the executive branch must interpret the terms of the statute and in so far may even be allowed

⁷⁹ 63 S.Ct. 1355, 1357 (1943); cf. also *Gordon v. United States*, 117 U.S. 697 (1884); in re *Sanborn*, 148 U.S. 222 (1893).

⁸⁰ See *Cooley*, loc. cit. supra, note 71 at 357.

⁸¹ 272 U.S. 52 (1926), especially at 117, 161, 164.

to legislate.⁸² As noted before,⁸³ express and implied limitations coincide here.

As regards implied limitations on the executive branch in its relations with the judiciary, one can quote decisions where the Supreme Court has refused to entertain appeals against decisions of a district judge, the execution of which depended upon the discretion of the Secretary of the Treasury.⁸⁴ Such decisions, not being the autonomous and, in the absence of appeal, final disposition of the issue, are not recognized as judicial ones against which an appeal to the Supreme Court would lie. The encroachment of the executive upon the judicial process deprives the latter of its judicial character.

Finally, implied limitations upon the judiciary with regard to both the executive and legislative branches are at the foundation of the principle that the exercise of the discretionary powers of these two departments is not subject to judicial review. With regard to the executive branch, this principle was first laid down in *Marbury v. Madison*⁸⁵ relative to so-called political questions, and in *United States v. Eliason*⁸⁶ relative to executive rules and regulations. With respect to the legislative branch the principle is generally expressed in form of the requirement of judicial self-restraint or the prohibition of judicial legislation.⁸⁷

CONCLUSIONS

The investigation of implied regulatory powers and implied limitations on regulatory powers in administrative law has led to three conclusions whose importance reaches beyond the immediate purpose of this investigation:

1. The recognition of the administration function as a coordinate fourth branch of the government is indispensable for a solution of the problems with which the spread of administrative law confronts our legal system, if we want this solution to do justice both to the need of administrative agencies for clearly defined and effective powers and to the neces-

⁸² See the writer's paper, loc. cit. supra, note 3 at 583 et seq.

⁸³ See supra, notes 62, 68.

⁸⁴ *United States v. Ferreira*, 13 How. (U.S.) 40 (1851); *Hayburn's Case*, 2 Dall. (U.S.) 408 (1792).

⁸⁵ 1 Cranch (U.S.) 137 (1803).

⁸⁶ 16 Pet. (U.S.) 291 (1842).

⁸⁷ See *Cooley*, loc. cit. supra, note 71 at 345; *Willoughby*, loc. cit. supra, note 72 at 32; *Haines*, *The American Doctrine of Judicial Supremacy* 475 (1932); *McBain*, *The Living Constitution* 242 (1928).

sity of keeping these powers within constitutional limits and under legal controls.

2. The traditional constitutional concepts and principles must be marshalled to this task by freeing their creative potentialities, dormant in the original meaning and functions, from the legalistic adulterations and conceptualist refinements by which a stagnant constitutional doctrine has endeavored to make them permanently subservient to a particular political philosophy.

3. From an examination of the court decisions relative to administrative law in the light of the original constitutional principles and concepts, certain general principles of administrative law, fulfilling the functions under (1), can be developed. Thus the decisions reveal clearly that the power to administer carries implicitly the power to interpret or, in other words, that administrative and interpretative powers are co-extensive. That he who administers must interpret, can be considered a recognized principle of administrative law. The principle that the administrative power is implicitly limited by the delegated administrative function and that consequently administrative agencies cannot do what Congress could have done but did not want to do, is less clearly recognizable in the court decisions, but follows from the distribution of governmental powers on a functional basis, which is characteristic of the structure of the American government.

That other general principles of administrative law can be detected by the same method, further investigations will perhaps show.⁸⁸

⁸⁸ For other examples of implied powers and limitations in administrative law, see Gellhorn, *Administrative Law. Cases and Comments* 303, 309, 452 et seq. (1940). The relations between courts and administrative agencies are, for instance, controlled by the implied limitation imposed upon the courts to the effect that the exercise of administrative discretion is exempt from judicial review.