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STANDARDS—A SAFEGUARD FOR THE EXERCISE OF DELEGATED POWER

*Maurice H. Merrill**

There is a widely approved "doctrine that delegation of legislative or judicial power to administrative agencies must be limited by the imposition of legislatively prescribed standards,"¹ in order to be valid under state and national constitutions.² In the words of one of the most articulate of our modern judges, the administrator is not to be turned loose with "a roving commission to inquire into evils and upon discovery correct them."³

The doctrine has a twofold ancestry. On the one hand, it comes down in lineal descent from the ancient dogma, deduced from the universal distribution of powers, legislative, executive and judicial amongst three departments of government, that "legislative" power, constitutionally vested in the "legislative" branch, may not be transferred to unauthorized hands.⁴ Through the process of attempting to reconcile this by-product of our basic agency theory of government with the practical need for subdivision of authority, there evolved the "Ranney rule" that "power to make the law," necessarily involving "a discretion as to what it shall be," cannot be delegated, while to the "conferring authority or discretion as to the law's execution . . . under and in pursuance thereof, no valid objection can be made."⁵ As delegations multiplied and as their subjects became more complex, sophisticated judges realized how much that was done under them did, in fact, involve discretion respecting what should be the rules under which men must live. In time, this recognition bore fruit in statements that legislative power in fact may be delegated, so long as the original repository does not "abdicate or transfer to others its [essential] legislative function."⁶ A typical statement, modern and short, runs: "The Legislature may delegate

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1 See 1 F. COOPER, *STATE ADMINISTRATIVE LAW* 54 (1965).

2 See generally, L. JAFFE, *JUDICIARY CONTROL OF ADMINISTRATIVE ACTION* Ch. 2 (1965) for the history of the doctrine.

3 A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (concurring opinion).

4 See Cheadle, *The Delegation of Legislative Functions*, 27 *YALE L.J.* 892 (1918); Duff & Whiteside, *Delegata Potestas non Potest Delegari: A Maxim of American Constitutional Law*, 14 *CORNELL L.Q.* 168 (1929).

5 See *Cincinnati W. & Z. Ry. Co. v. Comm'rs of Clinton County*, 1 Ohio St. 66, 76 (1852).

6 See *Keeting v. Pub. Util. Dist.*, 49 Wash. 2d 761, 767, 306 P.2d 762, 766 (1957).

this [legislative] authority provided it states the purpose for doing so and sets up reasonable standards to guide the agency which is to administer it.”⁷

Upon this foundation, the doctrine of standards is an emanation from the constitution of the particular governmental entity, the legislature of which has attempted the delegation. Thus, no federal constitutional question is presented by a delegation made by a state legislature.⁸ With respect to that question, the decision of the state court interpreting the state constitution is final.⁹

The second derivation of the requirement of standards is from the constitutional guaranties against deprivations of life, liberty or property without due process of law. Through a long and familiar process of construction, these have become bulwarks against arbitrary impingement by government upon these enumerated interests.¹⁰ An analogue of this concept is the “rule of law.” If there is to be an effective rule of law, subordinate officials ought not to be turned loose to interfere at their own will with the lives, liberties and property of their fellow men. If these officials are to be given power, there must be adequate standards by which their will or their ingenuity, whatever one wishes to call it, may be guided and restrained.¹¹ As Mr. Justice Frankfurter reminded us:

⁷ See *Schutte v. Schmitt*, 162 Neb. 162, 166, 75 N.W.2d 656, 659 (1956).

⁸ *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608 (1937).

⁹ *Pacific States Box & Basket Co. v. White*, 296 U.S. 176 (1935).

¹⁰ See B. WRIGHT, *AMERICAN INTERPRETATIONS OF NATURAL LAW* 298-306 (1931).

¹¹ See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). “When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth ‘may be a government of laws and not of men.’ For,

Prohibition through words that fail to convey what is permitted and what is prohibited for want of appropriate objective standards, offends Due Process in two ways. First, it does not sufficiently apprise those bent on obedience of law of what may reasonably be foreseen to be found illicit by the law-enforcing authority, whether court or jury or administrative agency. Secondly, where licensing is rested, in the first instance, in an administrative agency, the available judicial review is in effect rendered inoperative. On the basis of such a portmanteau word as 'sacreligious', the judiciary has no standards with which to judge the validity of administrative action which necessarily involves, at least in large measure, subjective determinations. Thus, the administrative first step becomes the last step.¹²

If we accept this proposition that due process of law commands that delegation to administrators be made only under adequate guidance, it follows that there is a potential federal question respecting the propriety of every such state investiture. True, there may be found an occasional careless statement which could be interpreted otherwise.¹³ However, on examination, such a statement relates to the contention that the state constitution has been condemned. From 1886 on, the Supreme Court of the United States has entertained cases wherein the fourteenth amendment served as the vehicle for attack on the sufficiency of prescribed standards.¹⁴ It has struck down legislation which it has found wanting in this respect.¹⁵ We are not justified in assuming that a tool so frequently used has become obsolete.

Another argument for the obsolescence of the doctrine of standards, with respect to federal delegations, stresses the point that on only two occasions,¹⁶ now more than thirty years past, have

the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." *Id.* at 369-70.

¹² See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 532 (1952) (concurring opinion).

¹³ See *Highland Farms Dairy v. Agnew*, 300 U.S. 608 (1937).

¹⁴ *Douglas v. Noble*, 261 U.S. 165 (1923); *New York ex rel. Lieberman v. Van De Carr*, 199 U.S. 552 (1905).

¹⁵ *Staub v. City of Baxley*, 355 U.S. 313 (1958), citing a long list of other decisions at pages 322-24 in which ordinances requiring administrative permits for other exercises of civil rights were held invalid because the permit could be issued or withheld according to an unlimited administrative discretion, not geared to any legitimate public interest. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Saia v. New York*, 334 U.S. 558 (1948); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

¹⁶ *A. L. A. Schechter Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935).

such congressional grants been held to be too liberal.¹⁷ Indeed, one dissenting judge bitterly exclaimed that the majority had overruled the most significant decision.¹⁸ However, like many impatient statements of outvoted jurists, the assertion does not comport with apparent facts. In no instance has the court itself declared the abandonment of the *Panama-Schechter* principle. It has treated these two cases wherever it has had occasion to cite them as respected authorities. It has been careful to distinguish them upon appropriate occasion.¹⁹ In recent time, we have seen a statutory delegation read restrictively in order to avoid a possible collision with the doctrine of standards, with approving citation of the *Panama* decision.²⁰ Still more recently, the Court has sustained a federal delegation on the ground of the adequacy of the standards, while recognizing the substantiality of an attack upon the validity of the delegation through an invocation of the fifth amendment's due process clause.²¹ It seems evident that Mark Twain's comment that the reports of his demise were grossly exaggerated aptly may be applied to proclamations of impending funeral services for the doctrine of standards at either the state or federal levels or with respect to either the delegation or the due process theories.

This is the current state of decision. Still, it appropriately may be asked, what is the practical value of the doctrine of standards? Since it rests not upon specific constitutional texts, but upon judicial construction of very broad constitutional provisions, I suppose it may be proper to argue that this interpretation should be re-examined in the light of experience, to determine whether it is proper to continue the accepted reading. It is not a situation wherein it is proper to argue that a meaning envisioned clearly by the framers of constitutional language should not be departed from except by the legitimizing process of amendment. When the prototypes of our constitution were framed, the full potentialities of the adminis-

¹⁷ Such, to a greater or less degree, seems to be the burden of B. SCHWARTZ, *INTRODUCTION TO AMERICAN ADMINISTRATIVE LAW* 41 (1958); I K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 2.06 (1958); L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 69 (1965). See also Nutting, *Congressional Delegations Since the Schechter Case*, 14 *MISS. L.J.* 350, 367 (1942).

¹⁸ *Yakus v. United States*, 321 U.S. 414, 452 (1944) (dissenting opinion), says that it "leaves no doubt that the [Schechter] decision is now overruled."

¹⁹ See *Brannan v. Stark*, 342 U.S. 451 (1952); *Lichter v. United States*, 334 U.S. 742, 784 (1948); *Fahey v. Mallonee*, 332 U.S. 245, 249 (1947); *N.B.C. v. United States*, 319 U.S. 190, 226 (1943); *United States v. Rock Royal Co-op.*, 307 U.S. 533, 574 (1939); *Curriu v. Wallace*, 306 U.S. 1, 15 (1939).

²⁰ *Kent v. Dulles*, 357 U.S. 116, 129 (1958).

²¹ *Zemel v. Rusk*, 381 U.S. 1 (1965).

trative process were not fully appreciated. There *was* a definite concept of what we now call the "rule of law" and of the application of the separation of powers to insure its enforcement. As it was put by Bay, J., in one of the first full scale discussions, after independence, of the problems of administrative law, the doctrine was that "it was the province of the legislative branch of the government to make laws and create offices; but it was the province of the judiciary to construe them, when made, and keep the officers within the bounds of duty, when once appointed."²² However, the evolution of the concept of standards as an application of the constitutionally established "rule of law" was yet to be worked out. If it represents a useless and impeditive implication, the same judicial process that created it rightly may reject it. Let us then turn to a brief examination of its uses.

I suggest that the practical employment of the doctrine of standards embodies a number of useful functions. It furnishes guidance for administrators in the application of the statutes entrusted to their care. It affords safeguards against unwarranted enlargement of legislative grants. It focuses attention upon the public objectives of statutes. It limits the extension of discretion as to social policy beyond the approved legislative direction. Judicial enforcement of the requirement for standards improves legislative draftsmanship. The insistence upon the observation of standards impels exploration by the agencies as to the existence or absence of conditions justifying proposed action. Appropriate standards, of course, are an almost indispensable prerequisite to effective judicial review of administrative action. Let us review briefly examples of each of these functions.

The view has been expressed that standards do not contribute to the guidance of administrators.²³ However, the leading example cited in support of this verdict of futility seems to me to point the other way. The example is the well-publicized New Jersey act of a few years ago, forbidding strikes against public utility properties after seizure by the Governor, and requiring submission of "any and all disputes then existing between the public utilities and the employees" to a Board of Arbitration, selected *ad hoc*, with instructions merely to "arbitrate the matters submitted to it" and, having heard the matters, "to make written findings of fact and to promulgate a written decision and order upon the issue or issues."²⁴ The Supreme Court of New Jersey invalidated this provision as a

²² *Geter v. Comm'rs for Tobacco Inspection*, 1 Bay 354 (S.C. 1794).

²³ See 1 K. Davis, *Administrative Law Treatise* § 2.10 (1958).

²⁴ The summary is taken from the statutes as quoted in *State v. Traffic Telephone Workers' Fed'n*, 2 N.J. 335, 340, 66 A.2d 616, 618 (1949).

delegation without standards.²⁵ The act was upheld²⁶ when the legislature amended it to provide that the board's decision should be based up these enumerated factors:

- (1) The interests and welfare of the public.
- (2) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceedings, and the wages, hours and conditions of employment of employees doing the same, similar or comparable work or work requiring the same, similar or comparable skills and expenditure of energy and effort, giving consideration to such factors as are peculiar to the industry involved.
- (3) Comparison of wages, hours and conditions of employment as reflected in industries in general and in public utilities in particular throughout the nation and in the State of New Jersey.
- (4) The security and tenure of employment with due regard for the effect of technological changes thereon as well as the effect of any unique skills and attributes developed in the industry.
- (5) Such other factors not confined to the foregoing which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, arbitration or otherwise between the parties or in the industry.²⁷

So, far from being useless generalities, these enumerations focus the attention of the arbitrators upon the items which they are to weigh in the balance. Conversely, as was pointed out in the earlier decision, use of the language of arbitration, without more specific guidance, carried "the implication that the board will act . . . not according to established criteria but according to the ideas of justice or of expedience of the individual arbitrators."²⁸

It will not do to shrug off the significant difference in the legislative wording on the cynical assumption that the arbitrators would disregard the enacted source of their authority. The whole law of reversible error in respect to the instruction of jurors is based upon the common experience that jurors do take instructions seriously and do try to apply them. We have no warrant for assuming that administrators will be less regardful of *their* instructions.

A case in point is afforded by recent litigation in Washington.²⁹ A statute provided for the accreditation and approval of medical

²⁵ *Id.* at 335, 66 A.2d at 616.

²⁶ *New Jersey Bell Tel. Co. v. Communication Workers No. 55*, 5 N.J. 354, 75 A.2d 721 (1950).

²⁷ N.J. STAT. ANN. § 34:13B-27 (1949).

²⁸ *See State v. Traffic Telephone Workers Fed'n*, 2 N.J. 335, 354, 66 A.2d 616, 626 (1949).

²⁹ *Reagles v. Simpson*, — Wash. 2d —, 434 P.2d 559 (1967).

schools by the state board of medical examiners in accordance with the standards listed in the footnote.³⁰ In connection with a movement, unquestionably praiseworthy, for more closely knitting the medical physicians and the osteopathic physicians, it occurred to some of the proponents to organize a "medical school" that would give short term "refresher" instruction to licensed osteopaths, on the successful conclusion of which they would be awarded an M.D. degree. The "school" and its course apparently were "one-shot" projects, designed simply to bring osteopaths, already educated, into the medical fold. The school's application for accreditation as a medical school, as originally presented, was refused by the board on the ground that the school did not meet the statutory standards in several respects.³¹

Following a change in the personnel of the board, there was a rehearing which brought forth a bare majority favoring accreditation. The outcome we shall note hereafter. For our present purposes, the important matter is that the board in its original decision *did* read the standards set forth in the statute, and *did* undertake to give them effect as it understood them. Standards *do* serve as guides to administrators. As Professor Jaffe has observed, the doctrine of standards "has indeed positive virtue, since it assists administrator and court in minimizing arbitrary and discriminatory determina-

³⁰ WASH. REV. CODE § 18.71.055 (1961). "The board may accredit and approve any medical school provided that it: (1) Requires collegiate instruction which training shall include theoretical and laboratory courses in physics, biology, inorganic and organic chemistry; (2) Provides adequate instruction in the following subjects: Anatomy, biochemistry, microbiology and immunology, pathology, pharmacology, physiology, anaesthesiology, dermatology, gynecology, internal medicine, neurology, obstetrics, ophthalmology, orthopedic surgery, otolaryngology, pediatrics, physical medicine and rehabilitation, preventive medicine and public health, psychiatry, radiology, surgery and urology; (3) Provides clinical instruction in hospital wards and outpatient clinics under guidance. Approval may be withdrawn by the board at any time a medical school ceases to comply with one or more of the requirements of this section."

³¹ "The Board, on March 20, 1964, refused accreditation, basing that decision on the following conclusions: (1) In view of the complexities and technical nature of the subjects mentioned by RCW 18.71.055, it would not be possible to adequately instruct students in these subjects in the above mentioned twelve sessions consisting of approximately sixty actual hours. (2) It would not be possible to provide adequate clinical instruction in hospital wards and out patient clinics under guidance in the time permitted by the above mentioned curriculum. (3) The Board does not interpret the legislative intent as found in RCW 18.71.050 and .055 as permitting it to accredit as a medical school a school which provides only sixty actual hours of instruction on twelve consecutive Saturdays." *Reagles v. Simpson*, — Wash. 2d —, —, 434 P.2d 559, 562 (1967).

tions."³² While his encomium seems directed at the doctrine's usefulness in licensing activity only, there is no good reason to deny similar utility in other fields.³³

Another, perhaps related, result of the doctrine of standards is that it safeguards against the improper enlargement of legislatively granted authority. An attempt to substitute administrative convenience for individual consideration, by a broad rule generally limiting the amounts to be paid to parents for the support of Indian minors out of the minors' income, except upon express showing by the parents that larger distributions would be spent properly for the minors' interests, was thwarted in the *Work* case.³⁴ The statute had commanded payment to the parents, subject to the privilege to the Commissioner of Indian Affairs to withhold payments if he were satisfied that "the said interest of any minor is being misused or squandered."³⁵ The court properly characterized the administrative action in the following language:

The record shows that the Secretary enlarged this discretion vested in him and his subordinate into a power to lay down regulations, limiting in advance the amount to be paid to the parents to a certain monthly rate, and declaring that no use of the funds would be permitted which did not inure to the separate benefit of the minor. He was led to take this action, which was a departure from the previous practice of the Department during the decade immediately following the passage of the act, because of the sudden increase in the income of the minors resulting from the bonuses given for mineral leases. However desirable such regulations were, in view of the changed circumstances, we think they were in the nature of legislation beyond the power of the Secretary.³⁶

Another striking example of this effect of the doctrine of standards is afforded by judicial repulse of an attempt by an administrator to extend the standard of immorality to ban the portrayal of movies tending to support unorthodox economic and social ideas.³⁷ In another instance, an attempt to impose re-examination of a li-

³² L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 85 (1965).

³³ Compare the careful attention given to the standard of "public interest" in respect to unfair methods of competition by the Civil Aeronautics Board as reflected in *American Airlines, Inc. v. North American Airlines, Inc.*, 351 U.S. 79 (1956).

³⁴ *Work v. United States ex rel. Mosier*, 261 U.S. 352 (1923).

³⁵ Act of June 28, 1906, ch. 3572, § 4, 34 Stat. 539.

³⁶ See *Work v. United States ex rel. Mosier*, 261 U.S. 352, 359-60 (1923).

³⁷ *Schuman v. Pickert*, 277 Mich. 225, 269 N.W. 152 (1936). The example is not rendered less pertinent by the fact that the whole system of advance censorship imposed by the legislation under consideration might fall under today's interpretation of safeguards in favor of liberty of speech. That doctrine was not available at the time.

censed driver upon grounds not authorized by the statutory standard was judicially repelled.³⁸

Blending into the preceding function is the effect of standards in focusing attention upon the public objectives sought to be achieved by statutory regulation.³⁹ The court or the administrator thus may see whether the action taken or proposed has "a rational connection" with a proper public interest comprehended within the statute.⁴⁰ This focus may be liberating⁴¹ as well as confining⁴² in its effect upon administrative action.

Judicial recognition⁴³ and scholarly observation⁴⁴ alike attest to the usefulness of an adherence to the requirement of standards as a means to improved legislative drafting. If we make the legislatures advertent to the need for expressing standards with a certain clarity, they will at least attempt to conform to what they think the courts will exact of them. With some reason, we may hope that this process will lead them to develop more adequate listings of their goals and to improve their product by advertence to the numerous public "goods" amongst which government must choose in promoting the general welfare.⁴⁵

³⁸ *Carnegie v. Dep't of Public Safety*, 60 So. 2d 728 (Fla. 1952).

³⁹ See *Schwartz v. Bd. of Bar Examiners*, 353 U.S. 232, 239 (1957).

⁴⁰ Recent examples are afforded by *Guenther v. Morehead*, 272 F. Supp. 721 (S.D. Iowa 1967) (single wrongful negotiation of check not comprehended within statutory standard of "practice"); *DeHart v. Cotts*, 99 Ariz. 350, 409 P.2d 50 (1965) (rule-making authority "for the performance of its duties" does not give the examining and licensing board authority to prescribe substantive regulations for practice by chiropractors); *Oregon Newspaper Publishers Ass'n. v. Peterson*, 244 Ore. 116, 415 P.2d 21 (1966) (authority to regulate practice of pharmacy and sale of poisons and dangerous drugs does not extend to prohibiting advertising of "prescription drugs").

⁴¹ See *Transcontinental Bus. Sys., Inc. v. CAB*, 383 F.2d 466, 476-85 (5th Cir. 1967), with respect to the discussion of the standard of discriminatory rates and its variety of application in effect upon the traveling public.

⁴² *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949) (express statutory prohibition of exclusive rights of fishery); *Broadway, Laguna, Vallejo Ass'n v. Board of Permit Appeals*, ——— Cal. 2. ——— 427 P.2d 810, 59 Cal. Rptr. 146 (1967) (undue extension of terms "exceptional circumstances," "unnecessary hardship," and "practical difficulty"); *Transcontinental Bus System, Inc. v. CAB*, 383 F.2d 466, 484 (5th Cir. 1967), as to the failure of the standard in question to give the agency "license to resort to the full spectrum of broad social policy considerations which might rationally bear on the issue of whether the circumstances and conditions of service are substantially similar."

⁴³ See *Brannan v. Stark*, 342 U.S. 451, 465 n.16 (1952).

⁴⁴ See *Nutting, Congressional Delegations Since the Schechter Case*, 14 *Miss. L.J.* 350, 353 (1942).

⁴⁵ See *Reich, The Law of the Planned Society*, 75 *YALE L.J.* 1226, 1262 (1966).

From another standpoint, the requirement of standards may be regarded as a safeguard against administrative free-wheeling,⁴⁶ through imposing upon the agencies the duty to explore the situation confronting them to determine the existence or the absence of conditions justifying their proposed action.⁴⁷ The showing must be sufficiently in detail to enable the court to see that the agency has related its decisions to the statutory standard.⁴⁸

We who believe in the "rule of law" probably find the most satisfying proof of the usefulness of standards in the aid, the almost indispensable aid, which they afford the courts in the review of agency action. Legislative mandates which lack them in a sufficiently meaningful form should be invalid by virtue of that deficiency.⁴⁹ If the standards are minimally valid, the judicial insistence upon demonstrated agency advertence to all significant factors which might bear upon their proper implementation is a stimulus to better decision.⁵⁰ It has even been asserted that, under broad standards, a radical change in policy cannot "be justified without

⁴⁶ See WARE, PANIKKAR AND ROMEIN, *HISTORY OF MANKIND—THE TWENTIETH CENTURY* 805 (1966).

⁴⁷ *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941) (insistence that agency make specific indication that it has considered the statutory standard); *New England Elec. Sys. v. SEC*, 376 F.2d 107 (1st Cir. 1967) (need for particularization in applying standard). In *Securities and Exchange Com. v. New England Elec. System*, 88 S.Ct. 916 (1968), the Supreme Court reversed the First Circuit ruling, holding that the reviewing court had been unduly picayune in requiring a more comprehensive analysis of factors than had been engaged in by the agency. Personally, I concur with the First Circuit, and mourn the Supreme Court's position as an unwise limit on the effective policing of standards. However, a difference in opinion as to the proper exercise of a function in a particular instance does not detract from the significance of the function in general.

⁴⁸ See *Transcontinental Bus Sys. Inc. v. CAB*, 383 F.2d 466, 489 (5th Cir. 1967).

⁴⁹ *United Steelworkers v. Bagwell*, 383 F.2d 492 (4th Cir. 1967).

⁵⁰ "We do not agree that Congress limited ICC consideration under § 20a to an inquiry into fiscal manipulation. Even if Congress' primary concern was to prevent such manipulation, the broad terms 'public interest' and 'lawful object' negate the existence of a mandate to the ICC to close its eyes to facts indicating that the transaction may exceed limitations imposed by other relevant laws. Common sense and sound administrative policy point to the conclusion that such broad statutory standards require at least some degree of consideration of control and anticompetitive consequences when suggested by the circumstances surrounding a particular transaction. Both the ICC and this Court have read terms such as 'public interest' broadly, to require consideration of all important consequences including anticompetitive effects." *Denver & Rio Grande Western R.R. Co. v. United States*, 387 U.S. 485, 492 (1967).

any evidentiary basis or rational justification.”⁵¹ In other words, the administrative duty to explore all the facets of the situations arising under standards of wide-ranging possibilities is enforced as an adjunct to effective judicial review. Contrariwise, a clearly worded standard, reasonably explicit in its command, affords a most potent weapon against agency arbitrariness.⁵² Besides, there is the fortunately rare instance in which the agency, whether for good motives or bad, undertakes to ignore the legislative policy. In such instances, a well-drawn standard affords the best recourse against the attempted usurpation.⁵³

The doctrine of standards, then, should be cherished as one of our effective methods of building a sound system of administrative law. It seems to me that one of the reasons for the disrepute into which it has fallen is the failure of judges and of systematic writers to pay sufficient attention to the analysis of the grounds upon which standards may be sustained. The succeeding paragraphs constitute an attempt to present such an analysis. The cases may be classified, I believe, into the following categories.

(1) *Specific Prescriptions.*

In this category may be placed the standards which prescribe specific and objective tests against which the action taken is to be tried. A street vendor must be a citizen or have declared his intent so to become, must pay a specified fee, be resident within the city and be of good character.⁵⁴ A taxing statute, based on declared value of capital stock, leaves to the taxpayer the right to make the declaration for the first year; thereafter the sum is the original value as changed by specified capital adjustments laid down in the statute.⁵⁵ The legislature tells a licensing board that it may impose disciplinary sanctions upon one who “has been convicted in a court of competent jurisdiction, either within or without this state,

⁵¹ See *Transcontinental Bus Sys., Inc. v. CAB*, 383 F.2d 466, 491 (5th Cir. 1967); and cf. *NLRB v. Groendyke Transp., Inc.*, 372 F.2d 137 (10th Cir. 1967).

⁵² *Stammer v. Bd. of Regents*, 287 N.Y. 359, 39 N.E.2d 913 (1942) (prosecution of physician, who aided in a cure by unorthodox methods, on the alleged ground of treatment of disease by secret method, the statutory standard, although facts disclosed no secrecy, was employed).

⁵³ A recent example is afforded by *Reagles v. Simpson*, — Wash.2d —, 434 P.2d 559 (1967), in which new personnel on the agency apparently were oversold by enthusiasts for a particular change in policy. See also *Bd. of Trustees v. State, ex rel. Russell*, — Ind. —, 219 N.E.2d 886 (1966).

⁵⁴ *Hughes v. City of Detroit*, 217 Mich. 567, 187 N.W. 530 (1922).

⁵⁵ *Helvering v. Lerner Stores Corp.*, 314 U.S. 463 (1941).

of a crime. . . ."⁵⁶ Of this the Supreme Court of the United States has said:

As interpreted by the New York courts, the provision is extremely broad in that it includes convictions for any crime in any court of competent jurisdiction within or without New York State. This may be stringent and harsh but it is not vague. The professional standard is clear. The discretion left to enforcing officers is not one of defining the offense. It is merely that of matching the measure of the discipline to the specific case.⁵⁷

A statute prescribes substantive provisions which must be incorporated in all insurance policies issued within the state, leaving to the insurance commissioners the approval or disapproval of specific forms on the basis of whether they embrace the required substance.⁵⁸

In all these instances, discretion as to policy is completely non-existent. There is no room for administrative adventuring in respect thereto.

(2) *Reasonably Detailed Portraiture of Legislative Purpose.*

In the standards which it seems to me properly may be placed in this category, the administrator is given a substantial degree of freedom to determine what measures will accomplish the legislative objective. The objective itself, however, is so described that the words themselves afford little room for debate as to what the legislators sought to achieve. The administrator therefore should have no difficulty in framing his action to comply with that purpose. If for some reason he departs therefrom, judicial corrective action should present no great difficulty.

There are numerous examples in the reports. One is afforded by the frequently cited instance in which the Secretary of the Treasury was to prescribe "uniform standards of purity, quality and fitness for consumption of all kinds of teas imported into the United States. . . ."⁵⁹ The court had no difficulty in discerning "the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably so because of their inferior quality."⁶⁰ Boiled down, the dominant concept is that admissible tea shall be fit for human consumption, a not unmanageable idea, conformance to which certainly is as demonstrable as conformity to other standards which the legal process is accustomed to enforce.

⁵⁶ Barsky v. Bd. of Regents, 347 U.S. 442, 446 (1954).

⁵⁷ *Id.* at 448.

⁵⁸ New York Life Ins. Co. v. Hardison, 199 Mass. 190, 85 N.E. 410 (1908).

⁵⁹ Act of March 2, 1897, ch. 358, § 3, 29 Stat. 604, 605.

⁶⁰ Buttfield v. Stranahan, 192 U.S. 470, 496 (1904).

Other examples include the determination of whether a bridge constitutes an unreasonable obstruction to navigation;⁶¹ whether kerosene oil is safe, pure, luminous and free from objectionable substances,⁶² again a standard expressing an ultimate concern for the welfare of the consumer in respect to the very qualities which bear on the satisfactory use of the product; the fixation of a national marketing quota for tobacco adequate to maintain a specifically prescribed reserve supply, together with apportionment of that quota among tobacco raising states and among individual producers in the states, in accordance with their past productive history adjusted to allow for explicitly enumerated factors;⁶³ the prescription of rules for the control, direction, parking and general regulation of traffic and automobiles upon the campuses and streets of state institutions;⁶⁴ whether prospective trainers of guide dogs for the blind know the special problems of the blind, how to teach the blind, and are suited temperamentally and otherwise to train blind persons in the use of guide dogs;⁶⁵ whether certain forms of dentists' advertising is misleading;⁶⁶ prescription of regulations governing public beach use to provide for compliance with the terms, conditions and covenants by which the easements therefor were acquired.⁶⁷

In connection with this category, it should be noted that words which have achieved a generally well-defined meaning in the field wherein they are used do not become unconstitutionally ambiguous simply because it is shown that some authorities in the field give definitions somewhat variable in content.⁶⁸

In some instances, very imprecise standards, such as "public interest," are regarded as sufficiently objectified by reference to a sufficiently detailed specification of particular factors which are

⁶¹ *Union Bridge Co. v. United States*, 204 U.S. 364 (1907).

⁶² *Red "C" Oil Mfg. Co. v. Bd. of Agriculture*, 222 U.S. 380 (1912).

⁶³ *Mulford v. Smith*, 307 U.S. 38 (1939).

⁶⁴ *Cohen v. Mississippi State Univ.*, 256 F. Supp. 954 (N.D. Miss. 1966).

⁶⁵ *Eye Dog Foundation v. State Bd. of Guide Dogs for the Blind*, — Cal 2d —, 432 P.2d 717, 63 Cal. Rptr. 21 (1967) ("discretion is not uncontrolled and unguided if it calls for the exercise of judgment of a high order.").

⁶⁶ *Angelos v. State Bd. of Dental Examiners*, 244 Ore. 1, 414 P.2d 335 (1966) (applied to requirement that those holding themselves out as specialists have approved training in their specialty).

⁶⁷ *State v. Willburn*, 49 Hawaii 651, 426 P.2d 626 (1967).

⁶⁸ *Zito v. Kingsley*, 92 N.J. Super. 37, 42, 222 A.2d 130, 133 (Super. Ct. 1966) ("The problem which plaintiffs pose is one that may be found in any classification of objects which must be described in the language available to drafters of legislation."); cf. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940).

to be considered administratively in order to arrive at compliance with the standard.⁶⁹ These decisions properly seem to fall within the category here treated.

(3) *Imprecise Standard Applied to Limited Subject Matter.*

In these cases, while the words used are of a more imprecise type than those used in standards coming within the first two categories, the legislation relates to a narrow subject matter. This limitation makes it possible for agencies and courts to discern the objectives which the legislature desires to reach.

Examples of a standard of this sort include an authority to prescribe the books and records to be kept by a taxpayer, obviously intended to be limited to such as will facilitate the determination of liability and the collection of the revenue;⁷⁰ regulations concerning the use of federal forest reserves such as will insure their objects;⁷¹ rules for the disposition of enemy owned property, seized during war, the court implying that these must be such as would promote the successful prosecution of the conflict;⁷² authority to prescribe reasonable variations, tolerances, exemptions as to small packages, in connection with a statutory requirement that packages shipped in interstate commerce be plainly marked to show contents in terms of weight, measure or numerical amount;⁷³ authority to regulate the alcoholic liquor traffic;⁷⁴ determination of professional experience as the basis for issuance of an occupational license.⁷⁵

One of the most interesting applications of this classification relates to acts which, while they wholly omit verbally to state any sort of standard, nevertheless deal with a subject so narrowly limited that the public interest which the legislature desires served, and the manner of furtherance, are clearly apparent, at least upon

⁶⁹ *N.B.C. v. United States*, 319 U.S. 190 (1943), affords a typical example. The court relied upon *New York Central Securities Corp. v. United States*, 287 U.S. 12 (1932), wherein the objectifying factors were found in various other provisions of the Transportation Act of 1920 which added up to concern with adequate, efficient, economic, appropriately provided and adjusted national transportation service. Cf. *Opp Cotton Mills, Inc. v. Adm'r of Wage and Hour Div.*, 312 U.S. 126 (1941).

⁷⁰ *United States v. Eaton*, 144 U.S. 677 (1892).

⁷¹ *United States v. Grimaud*, 220 U.S. 506 (1911).

⁷² *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, (1926). Note that this case also might be classified under the last category, discussed hereafter.

⁷³ *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77 (1932).

⁷⁴ *Boehl v. Sabre Jet Room, Inc.*, 349 P.2d 585 (Alas. 1960).

⁷⁵ *Garman v. Myers*, 183 Okla. 141, 80 P.2d 624 (1938).

reasonable reflection. Most of the cases which appear at first blush to authorize unguided delegation may be sustained upon this basis.

The point is best illustrated by consideration of two cases arising in New York. In the first,⁷⁶ the relevant legislation forbade the vending of milk without a written permit from the appropriate board of health. Naught was said about the basis on which the board should determine whether to grant or to refuse permission. Nonetheless, the New York courts sustained the requirement against objections brought on constitutional grounds. The Appellate Division perhaps most clearly expressed the basis by saying that;

It was clearly lawful...to prohibit...any person from dealing in milk without first obtaining a license under reasonable conditions and restrictions with reference to the source of supply, the manner of transporting and keeping the milk, and such supervision of the same as may tend to insure the delivery of wholesome milk to consumers....

The section, properly construed, does not permit unjust discrimination....⁷⁷

This is all very well, but the legislation does not speak at all about "the delivery of wholesome milk to consumers" or the ways in which this is to be accomplished. What the court really is saying is that the only reasonable objective that the legislature could have had in mind in authorizing regulation of the sale of milk by the requirement of a license therefor was the protection of consumers against the perils of unwholesome, adulterated or watered milk. In the classic words of Li'l Abner, "Any fool can plainly see!" The court of appeals was less detailed in its repulsion of the constitutional objection: "It is presumed that public officials will discharge their duties honestly and in accordance with the rules of law."⁷⁸ However, it is clear that the foundation for its judgment matched that of the appellate division.

The second New York decision⁷⁹ denied validity to a statute requiring private schools, as a prerequisite to operation, to be "registered under regulations of the commissioner."⁸⁰ There was

⁷⁶ *People ex rel. Lieberman v. Van De Carr*, 175 N.Y. 440, 67 N.E. 913 (1903), *aff'd* 199 U.S. 552 (1905).

⁷⁷ *People ex rel. Lieberman v. Van De Carr*, 81 App. Div. 128, 131-32, 80 N.Y.S. 1108, 1111 (1903).

⁷⁸ *People ex rel. Lieberman v. Van De Carr*, 175 N.Y. 440, 446, 67 N.E.913, 914 (1903), *aff'd* 199 U.S. 552 (1905).

⁷⁹ *Packer Collegiate Institute v. Bd. of Regents*, 298 N.Y. 184, 81 N.E.2d 80 (1948).

⁸⁰ N.Y. Educ. Law § 3210 (2) (e) (McKinney 1953).

dissent, but the majority of the court seem clearly right in this determination.⁸¹ Quotation appears the most appropriate way of illustrating the grounds for decision.

Try as we will... we cannot find in it, or around it, express or implied, any standards at all. To be frank, we cannot understand what it means or what it was intended to accomplish.⁸²

The opinion then went on to summarize the broad, widely-ranging, unconsolidated mass of regulations for the registration of schools which the commissioner of education, acting with the authority of the regents, had promulgated. The majority then concluded:

A comparison of those regulations with the bare and meager language of the statute forces the conclusion that, however good or bad the commissioner's rules may be, they were not controlled, suggested or guided by anything in the statute. It is to be doubted that the Legislature had in mind the requiring of financial statements from nursery schools, or that it expected that the rules would mandate 'parent education' in kindergartens. At any rate, the statute contains no declaration of purpose or policy, general or particular, and the commissioner was left to make such laws as he thought wise—which he proceeded to do.⁸³

The minority thought that a standard could be implied because "the regulations to be promulgated... by necessary inference, [must] bear some reasonable relation to education."⁸⁴ However, I think we must agree that the field of "education" is so broad, and the theories of what is proper, ranging from the disciples of John Dewey to those of Max Rafferty, are so diverse that neither judges nor legal writers may affirm, with any degree of confidence, that a particular regulation conforms to or departs from a legislative policy no more specifically enunciated than "relating to education." These two cases, and the statutes upon which they are based, well illustrate the principle of the unstated but clearly apparent standard.

The cases vary greatly in result. The Supreme Court of the United States has tended to support delegations without expressly spelled out standards wherever the subject is sufficiently narrow and the consensus as to basic social needs is sufficiently developed to allow adequate judicial policing of discretion.⁸⁵ It has seemed

⁸¹ See discussion in 49 COLUM. L. REV. 573 (1949).

⁸² *Packer Collegiate Institute v. Bd. of Regents*, 298 N.Y. 184, 191, 81 N.E.2d 80, 83 (1948).

⁸³ *Id.*

⁸⁴ *Id.* at 195, 81 N.E.2d at 85.

⁸⁵ *Douglas v. Noble*, 261 U.S. 165 (1923); *New York ex rel. Lieberman v. Van De Carr*, 199 U.S. 552 (1905), affirming the *New York Lieberman* decision, see note 76 *supra*, *Crowley v. Christensen*, 137 U.S. 86 (1890).

more hesitant when freedom of speech might be affected.⁸⁶ Many state decisions also uphold delegations without express standards where the intended objectives can be spelled out from the narrow subject matter of the enactment.⁸⁷ But there are decisions to the contrary where the subject and the surrounding conditions seem equally adapted to the discovery of legislative purpose.⁸⁸ At least in some of these cases, the results may have been influenced by the common failure of courts and of counsel to analyze the problems involved in the pursuit, capture and domestication of standards.

(4) *Imprecise Words Acquiring Legal Significance.*

Instances of this sort of terminology include that old term, familiar to all judges and lawyers from the early beginnings of our law: reasonable. Attach that to your standard, and you are almost sure of a sympathetic hearing, because every judge of any experience at all is perfectly at home with the rule of reason and its application.

⁸⁶ *Kunz v. New York*, 340 U.S. 290 (1951), declining to support New York courts in reading into an ordinance which, without a formal standard, required a license for street preaching, the implication that the right should be denied only for proper cause such as public ridicule and denunciation of other beliefs.

⁸⁷ *In re Petersen*, 51 Cal. 2d 177, 331 P.2d 24 (1958) (designation of taxicab stands); *State v. Gray*, 61 Conn. 39, 22 A. 675 (1891) (liquor license); *Cutsinger v. City of Atlanta*, 142 Ga. 555, 83 S.E. 263 (1914) (rooming house license); *Marchesi v. Selectmen of Winchester*, 312 Mass. 28, 42 N.E. 2d 817 (1942) (bowling alley license); *State ex rel. Mincev v. Schoenig*, 72 Minn. 528, 75 N.W. 711 (1898) (gift, fire and bankrupt sales); *Shelton College v. State Bd. of Education*, 48 N.J. 501, 226 A.2d 612 (1967) (whether college should be licensed to grant degrees); *Belmont v. Parent*, 90 N.H. 249, 7 A.2d 255 (1939) (site for junkyard); *State v. Van hook*, 182 N.C. 831, 109 S.E. 65 (1921) (dance hall license); *Rowland v. State*, 104 Ohio St., 366, 135 N.E. 622 (1922) (same); *Adams v. New Kensington*, 357 Pa. 557, 55 A.2d 392 (1947) (mechanical music); *McMillan v. Sims*, 132 Wash. 265, 231 P. 943 (1925) (designation of fish reserves); *State ex rel. Hardman v. City of Glenville*, 102 W. Va. 94, 134 S.E. 467 (1926) (pool hall license); *State ex rel. Bluemound Amusement Park v. Mayor of Milwaukee*, 207 Wis. 199, 240 N.W. 847 (1932) (revocation of amusement license).

⁸⁸ *Ellis v. Thiesen*, 78 Fla. 47, 82 So. 607 (1919) (extension of time for required action); *Territory v. Ontai*, 28 Hawaii 534 (1925) (location for dance hall); *People v. Brown*, 407 Ill. 565, 95 N.E.2d 888 (1950) (conduct of licensure examination); *Schireson v. Walsh*, 354 Ill. 40, 187 N.E. 921 (1933) (revocation of physician's licenses); *Noel v. People*, 187 Ill. 587, 58 N.E. 616 (1900) (permits to sell proprietary and domestic remedies); *Bear v. City of Cedar Rapids*, 147 Iowa 341, 126 N.W. 324 (1910) (milk dealer's license); *City of Shreveport v. Herndon*, 159 La. 113, 105 So. 244 (1925) (prohibition or limitation of parking on streets); *Jones v. Logan City Corp.*, 19 Utah 2d 169, 428 P.2d 160 (1967) (condemnation of dangerous building); *Thompson v. Smith*, 155 Va. 367, 154 S.E. 579 (1930) (revocation of driver's license).

Specification of reasonable rates, whether for public utilities⁸⁹ or for insurers,⁹⁰ or for coal mines⁹¹ or for vendors of commodities,⁹² reasonable profits,⁹³ reasonable fees,⁹⁴ or provision for reasonable hospital costs,⁹⁵ or for reasonable rules as to service,⁹⁶ all find judicial approval as workable standards.⁹⁷ The term "discriminatory," with a like background in public utility law, finds acceptance.⁹⁸ Cause or good cause, in connection with the discipline of licensed occupations or of public employees, also has a sufficiently familiar ring to judges experienced in the common law,⁹⁹ not possessed by less "artificial" words.¹⁰⁰ Such long standing concepts as the public health,¹⁰¹ the public safety,¹⁰² the public order,¹⁰³ and the public peace,¹⁰⁴ the public morals,¹⁰⁵ generally have been deemed to possess enough background of judicial administration to permit employment as guides to administrative conduct. How long the common law terms will be permitted to survive the growing dislike of the Supreme Court of the United States for like terms in the criminal law that, through their vagueness, may lead to abridgment of

⁸⁹ *United States v. Illinois Cent. R.R. Co.*, 291 U.S. 457 (1934); *Village of Saratoga Springs v. Saratoga Gas, Elec. Lt. & Pow. Co.*, 191 N.Y. 123, 83 N.E. 693 (1908).

⁹⁰ *State ex rel. Wisconsin Inspection Bureau v. Whitman*, 196 Wis. 472, 220 N.W. 929 (1928).

⁹¹ *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940).

⁹² *Nebbia v. New York*, 291 U.S. 502 (1934) ("reasonable return"). "Fair and equitable" has a sound similarly comforting to judicial ears. *Yakus v. United States*, 321 U.S. 414 (1944).

⁹³ *Aetna Ins. Co. v. Hyde*, 34 F.2d 185 (W. D. Mo. 1929).

⁹⁴ *Kesselring v. Wakefield Realty Co.*, 312 Ky. 334, 227 S.W.2d 416 (1950).

⁹⁵ *Masachusetts Hosp. Serv., Inc. v. Comm'r of Administration*, 351 Mass. 248, 218 N.E.2d 383 (1966).

⁹⁶ *Avent v. United States*, 266 U.S. 127 (1924).

⁹⁷ The reverse concept of unreasonability found acceptance as long ago as the decision in *Field v. Clark*, 143 U.S. 649 (1892).

⁹⁸ See note 90 *supra*.

⁹⁹ *Farish v. Young*, 18 Ariz. 298, 158 P. 845 (1916); *G. F. Redmond & Co. v. Michigan Securities Comm'n*, 222 Mich. 1, 192 N.W. 688 (1923).

¹⁰⁰ Cf. *Fisher v. State Ins. Bd.*, 139 Okla. 92, 281 P. 300 (1929) ("other bad practices").

¹⁰¹ *Moy v. City of Chicago*, 309 Ill. 242, 140 N.E. 845 (1923); *Weber v. Bd. of Health*, 148 Ohio St. 389, 74 N.E.2d 331 (1947).

¹⁰² *Commonwealth v. Slocum*, 230 Mass., 180, 119 N.E. 687 (1918); *Am. Baseball Club of Philadelphia v. City of Philadelphia*, 312 Pa. 311, 167 A. 891 (1933).

¹⁰³ *City of Milwaukee v. Ruplinger*, 155 Wis. 391, 145 N.W. 42 (1914).

¹⁰⁴ *Talarico v. City of Davenport*, 215 Iowa 186, 244 N.W. 750 (1932).

¹⁰⁵ *Commercial Pictures Corp. v. Board of Regents*, 305 N.Y. 36, 113 N.Y.2d 502 (1953).

¹⁰⁶ *Kingsley int'l Pictures Corp. v. Regents of New York Univ.*, 360 U.S. 684 (1959).

liberty of expression¹⁰⁶ or of demonstration¹⁰⁷ or to oppression of the disadvantaged¹⁰⁸ is worthy of consideration. Perhaps, at least to the extent that substantive constitutional objections are cleared, a resolution may be found in combining these terms with provisions for procedural safeguards, discussed in the next classification.

The common law is not the sole source of clarifying specificity. This may derive from experience with the administration of other statutes,¹⁰⁹ even from other jurisdictions,¹¹⁰ or from prior administrative experience under like language.¹¹¹ This raises the possibility that what once may have been unconstitutionally vague now is valid, simply because failure to challenge gave it a chance to prove its utility. I doubt that we need be greatly disturbed by this interesting demonstration of the Holmesian aphorism that the life of the law consists in experience.

(5) *Imprecise Words Aided by Analogous Statutes.*

In a sense, this is only a specific application of the familiar rule of construction by which statutes *in pari materia* are construed together, "read together," as the phrase goes. Certainly, there need be no great surprise that independent, but related, enactment may be resorted to for the purpose of discovering the object which the lawmakers wish administrators to accomplish.¹¹²

(6) *Imprecise Words Made Specific by Administrative Action.*

In many, many instances, the needed specificity is provided through application of the standards by the administrators, subject to procedural safeguards, usually involving notice to parties in interest, with full opportunity to be heard, supplemented by resort to judicial review if there is challenge to the application made of the statutory language. Of course, this is a sort of bootstrap operation but it does give opportunity for the broad statutory language

¹⁰⁷ Cox v. Louisiana, 379 U.S. 536 (1965).

¹⁰⁸ *In re Gault*, 387 U.S. 1 (1967). Cf. *Hicks v. District of Columbia*, 383 U.S. 252 (1966) (dissenting opinion). The outrageous extension of the concept of immorality to include political activity of teachers against the superintendent and the school board, *Watts v. Seward School Board*, 395 P.2d 372 (Alas. 1964), may add to the argument against the adequacy of such a standard. I would prefer to regard it as an insupportable aberration, however, rather than as a demonstration of inadequacy.

¹⁰⁹ *Fahey v. Mallonee*, 332 U.S. 245 (1947).

¹¹⁰ *Id.*

¹¹¹ *Zemel v. Rusk*, 381 U.S. 1 (1965); *Lichter v. United States*, 334 U.S. 742 (1948); *Wotton v. Bush*, 41 Cal. 2d 460, 261 P.2d 256 (1953).

¹¹² *Mahler v. Eby*, 264 U.S. 32 (1924); *Blue v. Beach*, 155 Ind. 121, 56 N.E. 89 (1900); *Bankers Union Life Ins. Co. v. Read*, 182 Okla. 103, 77 P.2d 26 (1938).

to be sharpened through the adversary process and to give to the parties ample opportunity to know what is being done to them, upon what grounds, for what reasons. It also permits the full development of the various factors of expedience and of public interest that justify the very general policy expressed in the statute. It may have been beyond the legislative competence to foresee all the many situations to which the policy would apply, with sufficient percipience to enable the lawmakers to lay down precise standards. The provision of a means whereby specific application can be worked out on the basis of data developed through the prescribed procedures is calculated either to justify the administrative decision or to render obvious its unwarranted character. As a result, despite its bootstrap nature, in allowing the relationship between standard and action to be demonstrated from the face of the record rather than from the face of the statute, the category seems legitimate. As a matter of fact, most, if not all, of the decisions in which judges have said that the impossibility of writing precise standards justifies omitting them prove, on examination, to have been rendered under statutes which did provide for this sort of definatory procedure.¹¹³

In many instances, the provision of procedural safeguards is ancillary to standards that well might have been regarded as sufficiently definite under other guarantees. Certainly this is so of the federal Wage and Hour Administration's authority to fix wage rates to reach a prescribed figure as rapidly as possible, with the negative injunction not to curtail employment, and with a list of other factors to be considered in setting the rate. This delegation seems justifiable under either Category 2 or Category 3. However, in the sustaining opinion, weight was given to the provisions for hearing and for judicial review.¹¹⁴

¹¹³ Typical cases include *State Racing Comm'n v. Latonia Agricultural Ass'n*, 136 Ky. 173, 123 S.W. 681 (1909); *Motors Acceptance Corp. v. McLain*, 154 Neb. 354, 47 N.W.2d 919 (1951); *McCormick v. Bd. of Education*, 58 N.M. 648, 274 P.2d 299 (1954); *City of Lakewood v. Thormyer*, 171 Ohio St. 135, 168 N.E.2d 289 (1960); *Kelleher v. Minshull*, 11 Wash. 2d 380, 119 P.2d 302 (1941); *Morris v. West Virginia Racing Comm'n*, 133 W. Va. 179, 55 S.E.2d 263 (1949).

¹¹⁴ "True, the appraisal of facts in the light of the declared policy and in conformity to prescribed legislative standards, and the inferences to be drawn by the administrative agency from the facts, so appraised, involve the exercise of judgment within the prescribed limits. But where, as in the present case, the standards set up for the guidance of the administrative agency, the procedure which it is directed to follow and the record of its action which is required by the statute to be kept or which is in fact preserved, are such that Congress, the courts and the public can ascertain whether the agency has conformed to the standards which Congress has prescribed, there is no failure of performance of the legislative function." *Opp Cotton Mills v. Adm'r of Wage and Hour Div.*, 312 U.S. 126, 144 (1941).

In other instances, the provision for administrative hearing and determination seems decisive to the sustension of the test. Examples are to be found in the determination of public convenience and necessity as the foundation for granting or refusing permission to furnish motor vehicle transportation service;¹¹⁵ in the standards of undue or unnecessary complication of corporate security structures and of unfair or inequitable distribution of voting power as a basis for regulating public utility holding companies;¹¹⁶ in the protection of "correlative rights" and the prevention of "waste" as a standard for the establishment of oil and gas well-spacing requirements;¹¹⁷ in the prevention of the waste of gas as a test for the validity of price-fixing orders;¹¹⁸ in the adoption of official criteria for containers of horticultural products "in order to promote, protect and further develop the horticultural interests of the state."¹¹⁹ The significance of the relation between procedural safeguards and the proper administration of standards has received judicial recognition.¹²⁰ I suggest that recognition of its significance will be of great advantage in clearing our approach to this matter.

(7) *National Self-Preservation: War Power and Foreign Relations.*

This category, obviously, has application to the national government alone. In the leading case,¹²¹ it was asserted that less precision in establishing a standard was required because

- (1) the executive, under the Constitution, is for the sole organ of the government in the field of international relations;
- (2) the President, through his superior sources of confidential information, is better informed than the Congress respecting the need for action and the bases upon which it should be taken;
- (3) the resultant need for preserving secrecy as to the information which the President receives;
- (4) the President's special responsibility to determine "the effect which his action may have upon our foreign relations" [and]
- (5) "the unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed."¹²²

¹¹⁵ *ICC v. Parker*, 326 U.S. 60 (1945) (although Category 5 might also apply).

¹¹⁶ *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946).

¹¹⁷ *Patterson v. Stanolind Oil & Gas Co.*, 182 Okla. 155, 77 P.2d 83 (1938).

¹¹⁸ *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 203 Okla. 35, 220 P.2d 279 (1950).

¹¹⁹ See note 9 *supra*.

¹²⁰ *Carlson v. Landon*, 342 U.S. 524 (1952); *Boehl v. Sabre Jet Room, Inc.*, 349 P.2d 585 (Alas. 1960); *Warren v. Marion County*, 222 Ore. 307, 353 P.2d 257 (1960).

¹²¹ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

¹²² *Id.* at 321-22.

On cursory examination this seems to add up to the proposition that Congress may just tell the President to go ahead and do what he deems best for the country in the area of international affairs or of the nation's defense. The practice, however, has been far better than the preachment. The cases sustaining the foreign relations and defense power delegations, from the beginning, have involved congressionally set standards that can be related reasonably to the categories governing more conventional delegations.¹²³ *The Brig Aurora v. United States*,¹²⁴ for instance, sustained conditioning of the termination of the embargo upon foreign commerce on the cessation of interference with our foreign trade by the practices of France and of Great Britain. Obviously, this falls under Category 1. The *Curtiss-Wright case*¹²⁵ itself, was determined on a major directive, commanding contribution to "the reestablishment of peace" between countries involved in a presently existing and specifically designated war, which seems an adequate compliance with Category 2, while the actual thing to be done, the prohibition of arms sales to the combatants or those acting in their interest, fits Category 1. The only wholly liberating provision is the authority of the President to allow sales under "such limitations and exceptions" as he may prescribe. This dispensing power, however, was not involved in the litigation. Hence we have no reason to read the decision as sustaining it. However, there would be no difficulty in a construction that the limitations and exceptions were to be fashioned with a view to the basic standard, the reestablishment of peace. The decisions in other war power and foreign relations cases also seem capable of classification under one or the other of our preceding categories.¹²⁶ The latest¹²⁷ definitely involves the dis-

¹²³ See *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 422 (1935).

¹²⁴ 11 U.S. (7 CRANCH) 382 (1813).

¹²⁵ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

¹²⁶ *Carlson v. Landon*, 342 U.S. 524, 542 (1952), definitely refers to factors related to Categories 4 and 5; *Lichter v. United States*, 334 U.S. 742, 778-87 (1948), refers to considerations apt for Categories 4 and 5; *Bowles v. Willingham*, 321 U.S. 503, 512-16 (1944); and *Yakus v. United States*, 321 U.S. 414, 420-27 (1944), involve considerations apt to Categories 4 and 6; and *United States v. Chemical Foundation, Inc.*, 272 U.S. 1 (1926), we have already placed in Category 3. In *Northern Pac. Ry. Co. v. North Dakota*, 250 U.S. 135 (1919), the adequacy of the standard of necessity for the national defense does not seem to have been raised, perhaps because Congress by enactment, as shown in the opinion, had approved the presidential seizure of transportation and communication facilities. However, if we accept the successful prosecution of war as an adequate standard for implication, *United States v. Chemical Foundation*, *supra*, it surely must be adequate when expressed.

¹²⁷ See note 109, *supra*.

covery and the application of a standard which the court finds clearly apparent, though unexpressed, on the basis of past administrative practice under similar legislation, available to Congress when it acted. This clearly falls under Category 4. The one aberration which may justify the separate category is the *Knauff* decision.¹²⁸ In view of the strong dissents in that case, and the current of judicial opinion apparent in the *Kent* and the *Zemel* decisions, there may be doubt as to how much authority remains in the sustention of the sufficiency of the standard "interests of the United States," unsupplemented by any procedural safeguards, as a base for executive interference with most important personal rights.

In conclusion, may I suggest that the concept that American constitutions, as customarily framed, require administrative powers over persons and their interests, or, even over significant questions of the conduct of public affairs, to be vested under reasonably intelligible and administrable standards performs a valuable role in the operation of a legal order devoted to liberty and also to effective governance. Much of the doubt as to its effectiveness, and therefore, as to its value, stems from our failure to systematize its application. I hope that the discussion here may stimulate the conscious effort to achieve such a systemization.

¹²⁸ *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950).