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CONSTITUTIONAL IMPLICATIONS OF THE OPP COTTON MILLS CASE WITH RESPECT TO PROCEDURE AND JUDICIAL REVIEW IN ADMINISTRATIVE RULE-MAKING

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A prominent high-light of the dramatic 1940 term of the Supreme Court of the United States was the sustention in all essential respects of the validity of the Federal Fair Labor Standards Act.[1] In *United States v. S. W. Darby Lumber Co.*,[2] in an opinion by Mr. Justice Stone which will be a point of reference for many years to come, the Court brought to a head its present views of the scope of the commerce power and administered the final coup de grâce to the ill-starred case of *Hammer v. Dagenhart*.[3] In *Opp Cotton Mills v. Administrator of Wage and Hour Division*,[4] decided the same day, the Court sustained

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1. (1938) 52 Stat. 1060, c. 676, 29 U. S. C. A. §201 et seq.
2. (1941) 312 U. S. 100.
3. (1918) 247 U. S. 251.
4. (1941) 312 U. S. 126. The Wage and Hour Division, which enforces all but the child labor provisions of the act, is in the Department of Labor. For a discussion of the procedural aspects of its work see the monograph of the Attorney General's Committee on Administrative Procedure (1941) 77th Cong., 1st sess., S. Doc. 10, Part I.

The *Opp* case, in addition to the aspects of the decision covered in the text, sustains the wage-order provisions of the act as against the contention that they unconstitutionally confer legislative power upon the Administrator. The holding upon this point was a foregone conclusion. In the statute, Congress definitely specified the factors that were to be considered by the Administrator in arriving at his discretionary determinations. Although in attaching relative weight to these factors and in estimating the significance of each in a particular case the Administrator is virtually free to move in any direction he pleases (Golding, The Industry Committee Provisions of the Fair Labor Standards Act (1941) 50 Yale L. J. 1141, 1145,

the statutory procedure for arriving at minimum wage orders for particular industries, as it had been carried out by the Administrator. The Court, undertaking to apply the statutory provisions for judicial review of such orders, sustained the order for the textile industry.

As is well known, the Administrator is authorized to make industry wage orders, establishing minimum wages higher than the present statutory minimum of 30 cents an hour, but not to exceed 40 cents an hour. This authority will continue to be in effect until a uniform statutory minimum of 40 cents goes into effect in October, 1945.[5] After that time, the Administrator will be empowered to continue industry wage orders which vary the statutory minimum downward.[6] Wage orders have now been made for 28 industries.[7]

The statutory procedure for arriving at an industry wage order requires as the first step the convening of an industry committee by the Administrator.[8] This committee is in theory an investigative and deliberative body.[9] When a committee has arrived at recommendations for minimum wages for the industry,[10] it reports to the Administrator. He, then, after notice and hearing to affected parties, can either accept or reject the recommendations. If he does the latter, he cannot himself formulate a wage order but must either drop the matter or re-submit it to the same or a substituted industry committee.[11] If the Administrator approves, he may translate the industry committee's recommendations into a wage order for the industry in question.

1148, 1161), the same may be said of other, similar discretionary powers previously sustained by the Court. (1941) 312 U. S. 126, 146. "The fact that Congress accepts the administrative judgment as to the relative weights to be given to these factors in each case when that judgment in other respects is arrived at in the manner prescribed by the statute, instead of attempting the impossible by prescribing their relative weight in advance for all cases, is no more an abandonment of the legislative function than when Congress accepts and acts legislatively upon the advice of experts as to social or economic conditions without re-examining for itself the data upon which that advice is based." Id. at 145-146.

5. (1938) 52 Stat. 1060, 1062, c. 676, §6, 29 U. S. C. A. §206.

6. (1938) 52 Stat. 1060, 1064, c. 676, §8(e), 29 U. S. C. A. §208(e).

7. (1941) 4 W. H. R. 163, 253, 301, 342, 364, 408, 443, 558, 575, 576, 577, 578, 579.

8. (1938) 52 Stat. 1060, 1062, 1064, c. 676, §§5, 8(a), 29 U. S. C. A. §§205, 208(a).

9. Id. at §8(b), 29 U. S. C. A. §208(b).

10. Id. at §8(b) (c), 29 U. S. C. A. §208(b) (c).

11. Id. at §8(d), 29 U. S. C. A. §208(d).

The order, however, must be supported by the evidence adduced at the hearing before the Administrator.[12] In proceedings which may be brought by "any person aggrieved by an order of the Administrator" a Circuit Court of Appeals or the United States Court of Appeals for the District of Columbia may affirm, modify, or set aside in whole or in part an order of the Administrator. "The review by the court," however, "shall be limited to questions of law, and findings of fact by the Administrator when supported by substantial evidence shall be conclusive."[13]

The procedural objections to the textile industry wage order, advanced in the *Opp Cotton Mills* case, were as follows: (1) that the definition of the textile industry was improperly changed after the appointment of the industry committee; (2) that the Administrator's decision to exclude the woolen industry from the proceedings and from the order was improperly based; (3) that the industry committee was not properly representative; (4) that a hearing conducted before the industry committee did not satisfy the requirements of due process; (5) that the notice of the hearing before the Administrator was inadequate; and (6) that the Administrator's basic finding, to the effect that a minimum wage of 32½ cents an hour for the textile industry would not "substantially curtail employment," together with certain other findings, was not supported by substantial evidence. The Court rejected all of these contentions.

The two amendments to the definition of the industry which were made after the appointment of the industry committee were made upon recommendation of the committee. The first excluded knitted fabrics and at the same time extended the definition to include certain other products such as blankets and sheets. The second amendment added to the industry the manufacture of mixed products containing not more than 45 per cent wool. The act contains no specific guide to the definition of an industry. It does, however, provide that the Administrator's final order shall define the industry to which it applies[14] and that the industry committee may establish classifications within the industry "for the purpose of fixing for each classification * * * the highest minimum wage * * * which (1) will not substantially

12. Ibid.
13. (1938) 52 Stat. 1060, 1065, c. 676, §10, 29 U. S. C. A. §210.
14. (1938) 52 Stat. 1060, 1064, c. 676, §8(f), 29 U. S. C. A. §208(f).

curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification." In amending the definition of the textile industry the Administrator took similar considerations into account. The Court held that it was proper for him to do so; that "it is to the advantage of the administration of the Act that the completeness and accuracy of the definition should be re-examined and the definition revised with the aid of the committee at any time before its report is submitted";[15] and, inferentially, that no failure of adequate representation of the industry by the committee was brought about by these particular changes in definition.

The Administrator's original decision to exclude the woolen industry, which was carried forward into his definition of the textile industry in his final order, was based upon similar considerations. The Court found no want of propriety here and no lack of substantial evidence to support the Administrator's conclusion.[16]

The contention that the industry committee was not properly representative was based upon the fact that, whereas 31 per cent of the factories, 51.5 per cent of the value of the product, and 55 per cent of the wage-earners in the industry were in the South, only 9 of the 21 members of the committee came from that section. This geographical distribution of representation arose as a result of a combination of factors. By the statute the committee was required to be equally representative of employers, employees, and the public.[17] Accordingly, seven members of the textile committee were from each category. Among employers, rayon and silk were each represented by one member, who came from the North because those textiles are largely manufactured there. One of the five cotton manufacturers also came from the North. Five of the labor representatives were labor union officials and were from the North because in the textile industry these organizations center there. Three public repre-

15. Opp Cotton Mills v. Administrator of Wage and Hour Division (1941) 312 U. S. 126, 149.
16. Id. at 149-150.
17. (1938) 52 Stat. 1060, 1062, c. 676, §5(b), 29 U. S. C. A. §205(b).

sentatives came from the South, but the others came from the North and Middle West. The Court held that the statutory injunction to the Administrator in appointing the committee to "give due regard to the geographical regions in which the industry is carried on"[18] does not require a strict mathematical proportioning and that the Administrator had not failed in this instance to take due account of the geographical factor along with others.[19]

Since the statute does not require a hearing to be conducted at all by an industry committee, the Court had no difficulty in holding that the hearing which in this instance was held[20] could not be attacked as procedurally insufficient. The committee, the Court pointed out, is an investigative body and is not required to conduct a quasi-judicial proceeding.[21]

The petitioner's objection to the notice of the hearing before the Administrator appears to have been based upon the contention, grounded upon the decision in the second *Morgan* case,[22] that the notice contained an inadequate definition of the issues to be taken up. The Court pointed out, however, that the report of the industry committee was made available to all parties in advance of the hearing and that, since the hearing was to be upon that report, there was no want of notice.[23]

The petitioner's final contention, touching the alleged lack of support for the Administrator's basic findings in the evidence, required the Court both to review the economic reasoning of the Administrator and to appraise the sufficiency of the evidence supporting his conclusions. In brief, the Administrator's reasoning was that, since a minimum wage in the industry of 32½ cents an hour would raise wages in the industry only 2.1 per cent and only 2.15 per cent in the southern portion, and would increase the labor costs of the group of mills most adversely affected by only about 4.5 per cent, and since further the total

18. Ibid.
19. Opp Cotton Mills v. Administrator of Wage and Hour Division (1941) 312 U. S. 126, 151.
20. For a discussion of hearings before industry committees, which have been held in a number of instances, see Attorney General's Committee, op. cit. supra, note 4, at 14-17.
21. Opp Cotton Mills v. Administrator of Wage and Hour Division (1941) 312 U. S. 126, 152.
22. Morgan v. U. S. (1938) 304 U. S. 1.
23. Opp Cotton Mills v. Administrator of Wage and Hour Division (1941) 312 U. S. 126, 154.

manufacturing cost would be increased only 1.94 per cent on the average and 3.75 per cent in those mills most adversely affected, and since technological improvements induced by higher wages would displace relatively few workers, the 32½ cent minimum would not "substantially curtail employment." The evidence supporting these conclusions was, of course, largely statistical—and therefore hearsay. Only some of it was supported by the oral testimony of compilers who were subject to cross-examination. The Court noted that this evidence was not objected to at the time of the hearing and that even in a court of law evidence of this character, if admitted without objection, may be considered by the court. It would follow that the Administrator might consider such evidence under similar circumstances. But in addition Mr. Justice Stone pointed out that "it has long been settled that the technical rules for the exclusion of evidence applicable in jury trials do not apply to proceedings before federal administrative agencies in the absence of a statutory requirement."[24] Hence the evidence supporting the Administrator's findings upon these points would give them substantial support. The Court dealt similarly with contentions that findings which the Administrator made with respect to the cost of living for workers in different sections of the country, leading to the conclusion that a classification within the industry for this reason was uncalled for, were insufficiently supported.[25]

The decision of the Court upon the foregoing points could hardly have been different if statutory schemes of regulation such as that in the Fair Labor Standards Act are to stand at all. Although it is true that the procedural requirements of the act and its provision for judicial review, as thus interpreted, leave in the Administrator, within the statutory range of wages, a virtually complete discretion with respect to wage fixation for particular industries,[26] it is impossible to provide by statute both for the desired flexibility of wage regulation and for effective restriction of the discretion of the administrative authority. In dealing with subjects so complex as the definition of industries, the prescription of classifications within industries, the calculation of costs, and the estimation of the effects of wage and price

24. Id. at 155.
25. Ibid.
26. See note 4, supra.

changes, the responsible administrative authority can hardly accord more than a single reasonably sufficient hearing to interested parties; and, from the range of testimony adduced, it is almost inevitable that substantial evidence can be found for any rational conclusion.[27] All that the statute can secure is a procedure which permits, and to a certain extent compels, due consideration of all relevant factors, accompanied by a judicial safeguard against entirely high-handed or arbitrary exercise of authority. The decision upon the procedural and judicial-review aspects of the case, therefore, in effect gives approval to the maximum safeguards that could be provided for private interests in connection with the administrative wage-fixing process.

The line of reasoning in the opinion of Mr. Justice Stone, however, involves two constitutional propositions which have far-reaching implications, neither of which could be considered as firmly established prior to this decision. Neither appears to have been argued before the Court. Either could be repudiated in the future if the occasion should arise. In the meantime it is worth while to consider their implications. The propositions are (1) that due process of law requires certain minimum procedural safeguards in connection with such administrative rule-making as wage fixation for an industry and (2) that judicial review of the legality of administrative regulations may properly extend to determining whether administrative findings of fact, upon which such regulations are made to rest, are supported by substantial evidence. These propositions will now be discussed.

There can be no doubt that traditionally the guaranty of due process of law did not secure the observance of any procedural safeguards whatever in connection with the process of laying down general regulations by administrative action. Only in recent years has it been suggested that notice and hearing and the accompanying paraphernalia of procedure should at times accompany the administrative rule-making process.[28] Despite an

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27. Golding, supra note 4.

28. Attorney General's Committee on Administrative Procedure, *Final Report* (1941) 105. See, however, the acute forecast of James Hart in his *Ordinance Making Powers of the President* (1925) 175, to the effect that Wichita R. R. & Light Co. v. Public Utilities Commission (1922) 260 U. S. 48 (itself a rate case) "raises the interesting possibility that, in industrial ordinance making, due process may make notice and hearing essential." The *Wichita* case is one of the two upon which the Supreme Court later relied in Panama Ref. Co. v. Ryan (1935) 293 U. S. 388, in for the first

impressive array of statutory provisions and administrative practices which secure participation by interested parties in the rule-making process,[29] the basic doctrine has remained that such procedural safeguards are not required by the Constitution, either because rule-making is legislative in character and hence need not be accompanied by a judicial type of procedure,[30] or because procedural safeguards are impractical in carrying out functions of such wide scope, involving numerous parties, many of whom may be unknown to the administrative authorities.[31]

There are a number of analogies, however, which suggest possible limitation of this basic constitutional doctrine with respect to procedure in administrative rule-making. The prescription of rates for public utilities, which undoubtedly was legislative in its origins, has been declared to be quasi-judicial when carried on administratively and now is accompanied by an elaborate range of constitutionally-secured procedural safeguards.[32] It may be asked, moreover, whether there really is any clear difference between administrative rule-making on the one hand and administrative "adjudication" on the other, and whether the practical reasons for care in conducting the latter are any greater than in carrying on the former. If the grounds of distinction between

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time imposing procedural requirements (findings to accompany the regulations) upon administrative rule making.

29. Attorney General's Committee on Administrative Procedure, *Final Report* (1941) 103 et seq.

30. Jacobson v. Massachusetts (1905) 197 U. S. 11; Belcher v. Farrar (1864) 90 Mass. (8 Allen) 325; State ex rel. v. Newark Milk Co. (1935) 118 N. J. Eq. 504, 179 Atl. 116; Health Department of New York v. Rector of Trinity Church (1895) 145 N. Y. 32, 39 N. E. 833; State v. Quattropani (1926) 99 Vt. 360, 133 Atl. 352. "Where an act of government applies to an indefinite number of people alike and thus establishes a general principle, notice to every individual affected thereby is impossible and unnecessary and the generality of the principle is supposed to be a guaranty against its being arbitrary and unreasonable. This is the fundamental distinction between administration and legislation; the former requires notice and hearing which with regard to it constitutes due process, while the latter does not." Freund, *The Police Power* (1904) 15. In this view, administrative regulations are an exercise of delegated legislative power, rather than of the administrative power itself. Freund, *Administrative Powers Over Persons and Property* (1928) 15. The legislative analogy is criticized in Attorney General's Committee on Administrative Procedure, *Final Report* (1941) 101-102.

31. Norwegian Nitrogen Products Co. v. U. S. (1933) 288 U. S. 294; Belcher v. Farrar (1864) 90 Mass. (8 Allen) 325.

32. Chicago, M. & St. P. Ry. v. Minnesota (1890) 134 U. S. 418; St. Joseph Stockyards Co. v. U. S. (1936) 298 U. S. 38; Morgan v. U. S. (1936) 298 U. S. 468, (1938) 304 U. S. 1. See also Southern Ry. v. Virginia (1933) 290 U. S. 190.

rule-making and "adjudication" fail, then it is arguable that they should be assimilated for procedural purposes and that the same constitutional doctrines apply to both.

Now it is perfectly true that there is no hard and fast necessary distinction between rule-making by administrative agencies and other types of functions which those agencies perform. At least in many instances, there is knowledge of the proceedings by substantially all interested parties in rule-making as in other types of proceedings.[33] It is sometimes possible, indeed, for an administrative agency to name all the interested parties as respondents and to conduct the proceedings as though they were adjudicative in character.[34] It may be just as necessary, moreover, for affected private interests to protect themselves in relation to proposed regulations as it is in proceedings of an adjudicative character, since their rights will be disposed of by the regulations as finally as they could be if a license were revoked or denied or a cease-and-desist order were issued in respect to a named party.[35]

The foregoing considerations, however, point rather to a realistic approach to the problem of procedure in administrative rule-making than to ignoring the distinction between rule-making and

33. Fuchs, Procedure in Administrative Rule-Making (1938) 52 Harv. L. Rev. 259, 263, 266, 277.

34. Attorney General's Committee on Administrative Procedure, op. cit. supra, note 29, at 110-111.

35. "A rule or regulation is promulgated * * * it is going to be effective on such and such a date. In the future your license will come up * * * and you have the unhappy alternative of complying with that rule or regulation * * * or of violating the same and standing the chance and the certainty * * * that * * * it will be used as grounds for revocation." Testimony of Mr. Duke M. Patrick with respect to the Federal Communications Commission, Transcript of Proceedings before the Attorney General's Committee on Administrative Procedure, June 27, 1940, 64-65. Actual illegality of a regulation could, of course, be made a ground of judicial reversal of the Commission's revocation or denial of a license on the basis of the regulation; but determinations of fact, unless wholly arbitrary, and discretionary decisions underlying the regulation, are made with finality in the process of formulating it. For an indication of the nature of the contending private interests that are disposed of, often with relative finality, in rule-making proceedings, see Attorney General's Committee on Administrative Procedure, op cit. supra, note 29, at 108-109. Under the Bituminous Coal Act it has become necessary, in order to give effect to the statutory injunction to "preserve as nearly as may be existing fair competitive opportunities," to break down the price-fixing proceedings in the end into proceedings to establish a price for each grade and size of coal produced in each mine in the country, with regard to each separate market in which that coal is sold. Rostow, Bituminous Coal and the Public Interest (1941) 50 Yale L. J. 543, 577 et seq.

"adjudication." According to the conventional distinction, when a proceeding involves named parties, it may be considered adjudicative in character; when there are no such parties and the order that is contemplated will govern all who may be concerned, the administrative proceeding is an instance of rule-making.[36] It is true that the latter may at times involve fewer parties than sometimes are concerned in the former and may affect them very definitely and vitally. We cannot say, therefore, that rule-making applies to many persons and adjudication only to a few, or that the latter involves definite rights or privileges whereas the former does not. Procedural safeguards may be as necessary in rule-making as in "adjudication." If, however, procedure in connection with the two types of functions can usefully be discussed separately, and if realistic, fair procedural provisions can be secured for each type of function by considering it separately, it may be useful to deal with them on that basis. This has been the practice in modern discussions of administrative law.[37]

Realistic considerations, as well as a certain amount of assimilation of rule-making proceedings to those of an adjudicatory nature, have led to the introduction of procedural safeguards into some administrative rule-making in recent years. It is possible to discern categories of rule-making with respect to which these safeguards have become frequent if not usual.[38] In these circumstances it is natural to ask whether due process of law does not require that such safeguards be employed in at least some instances of rule-making as it does in many types of administrative adjudication. Even though it is true that no such constitutional mandate has been operative until now, one might easily evolve, as constitutional requirements have evolved for other types of proceedings.[39]

The suggestion that due process of law requires the observance of procedural safeguards in rule-making as well as in other types

36. Fuchs, supra note 33, at 265.

37. Id. at 265; Fuchs, Concepts and Policies in Anglo-American Administrative Law Theory (1938) 47 Yale L. J. 538, 545, 548.

38. Attorney General's Committee on Administrative Procedure, op. cit. supra, note 29, at 103-108. For a criticism of the use of categories in this connection see Feller, Administrative Law Investigation Comes of Age (1941) 41 Colum. L. Rev. 589, 595.

39. Note (1931) 80 U. Pa. L. Rev. 96; Note (1932) 80 U. Pa. L. Rev. 878; Note (1931) 4 Sel. Ess. on Const. Law 557, 579; Hanft, Utilities Commissions as Expert Courts (1936) 15 N. C. L. Rev. 12, 4 Sel. Ess. on Const. Law 592.

of administrative proceedings emerged very prominently after the decisions of the Supreme Court in *Panama Refining Co. v. Ryan*,[40] *United States v. B. & O. Railroad Co.*[41] and *Morgan v. United States*.[42] In the first two cases it was definitely held that administrative regulations, in the one case promulgated by the President of the United States himself,[43] must be accompanied by supporting findings of fact. This is so even when the statute does not require such findings and the necessity for them rests solely upon the due process clause of the Fifth Amendment.[44] The *Morgan* case, although it did not involve an instance of administrative rule-making as above defined, was widely interpreted as imposing its procedural requirements, which were of a somewhat elaborate character, upon all administrative proceedings that vitally affect private interests.[45]

Against the background of the foregoing cases Congress enacted a number of regulatory statutes, including the Fair Labor Standards Act, under which administrative rule-making plays a prominent part, and provided in the statutes for the observance of elaborate procedural safeguards in connection with the promulgation of regulations.[46] Either because of supposed constitutional necessity or because of practical considerations, or for both reasons, hearings of an essentially judicial, or "adversary" type became a feature of the administrative rule-making process in large areas of administration.[47] A number of pertinent constitutional questions have remained prominent since that time. These may be stated as (1) whether it is indeed true that constitutionally-required procedural safeguards, other than that of supporting findings in certain instances,[48] attach to the process of administrative rule-making; (2) if so, what specific procedural practices are embraced within them, and (3) under what circumstances these safeguards apply, as over against the circum-

40. Note 28, supra.
41. (1935) 293 U. S. 454.
42. (1936) 298 U. S. 468, (1938) 304 U. S. 1.
43. Panama Ref. Co. v. Ryan (1935) 293 U. S. 388.
44. Ibid.
45. Fuchs, in Symposium on Administrative Law (1939) 9 Am. L. Sch. Rev. 139.
46. Attorney General's Committee on Administrative Procedure, op. cit. supra, note 29, at 108 et seq.
47. Fuchs, supra note 33, at 276 et seq.
48. Text at note 43, supra.

stances in which the traditional absence of constitutionally-required procedures in rule-making still obtains.[49]

As regards the third question, it is fairly clear that if such procedural safeguards in rule-making are constitutionally required, they apply particularly to price-fixing, wage-fixing, the designation of commodity standards, and certain related functions which have been prominent in recent statutory regulation of business.[50] Wage-fixing under the Fair Labor Standards Act obviously is an instance of this sort. It is therefore not surprising that the Opp Cotton Mills Company should have alleged a constitutional basis for its procedural contentions. Although the Court did not sustain these contentions, it did assume the applicability of due process criteria, stating that these are not more strict than the provisions of the act and the procedure actually followed. "The proceedings before the Administrator * * * satisfied the requirement of due process without further requirement, which the statute omits, of a hearing on notice before the committee."[51] The Court also characterized the proceedings before the Administrator himself as "judicial in character," requiring, no doubt, the observance of definite procedural safeguards.[52] Thus one may imply an affirmative answer to the first question stated above, as well as the inclusion of administrative wage-fixing within the implied constitutional requirement. The fact that the procedure actually followed conformed to due process throws some light upon the character of the requirement but does not establish its minimum content.

One must, however, exercise caution in connection with these conclusions. At times due process is envisaged in discussions of administrative and constitutional law as a sort of procedural norm which may exist apart from constitutional considerations and which the Constitution may or may not require in particular situations. The reasoning is analogous to that which formerly gave rise to the question whether the exercise of the "police power" is subject to the requirements of due process of law in

49. See Feller, Prospectus for the Further Study of Federal Administrative Law (1938) 47 Yale L. J. 647, 659, 665 et seq.

50. Attorney General's Committee on Administrative Procedure, op. cit. supra, note 29, at 107-108.

51. Opp Cotton Mills v. Administrator of Wage and Hour Division (1941) 312 U. S. 126, 153.

52. Id. at 147.

the substantive sense or not.[53] If this reasoning be followed, the *Opp Cotton Mills* case may be taken as interpretating the requirements of a norm embodied in the statute rather than in the Fifth Amendment—in short, "statutory due process." Since the statute requires a hearing before the Administrator, the Court would then be undertaking to say what that requirement implies. It might or might not follow that the Constitution would impose the same requirements if the statute did not, or render the statute invalid because of their absence.[54] It seems unlikely, however, that Mr. Justice Stone would have used the words "due process," which are now so familiar as expressive of constitutional requirements, in any other sense. It seems likely, rather, that the Court, with or without conscious consideration of the matter, assumed that a constitutional requirement of due procedure does attach to administrative wage-fixing under the Fair Labor Standards Act. If this is true, the doctrine of some earlier cases that procedural requirements do not attach to administrative rule-making[55] may be taken as having been repudiated as to some situations, at least for the time being. But the question of what types of proceedings, other than wage-fixing, the newly recognized constitutional requirement covers and the question of what procedural safeguards it embraces, remain to be elaborated. For light upon these questions one must turn, first, to existing statutory patterns of procedure in rule-making and, second, to a limited number of cases in the state courts and lower federal courts that have dealt with these problems.

Existing statutes which contain procedural requirements for administrative rule-making appear to fall into two principal categories—with gradations between, of course. In the first category are those statutes which simply require a "hearing" or

53. See the discussion of earlier authorities by the Supreme Court of Iowa in Peverill v. Board of Supervisors of Black Hawk County (1929) 208 Iowa 94, 108, 222 N. W. 535, 542. The modern view is, of course, that all exercise of governmental power is subject to the requirements of due process, but that the content of this requirement varies with the necessities of the situation dealt with. Mott, *Due Process of Law* (1926) 326.

54. Note (1941) 29 Geo. L. J. 882, 886-887. In Southern Garment Manufacturers Ass'n v. Fleming (App. D. C. 1941) 4 W. H. R. 371, National Ass'n of Wool Manufacturers v. Fleming (App. D. C. 1941) 4 W. H. R. 396; Andree & Seedman, Inc. v. Administrator (App. D. C. 1941) 4 W. H. R. 378, the conformity of numerous details of the wage-hour procedure to the statutory requirements is discussed. The procedure is sustained in all respects.

55. Note 30, supra.

"notice and hearing," without more.[56] If the procedure under such a statute is questioned in court, the issue may be either whether the legislative intention with respect to the character of the hearing has been carried out or whether the constitutional requirements for a hearing in such circumstances have been complied with. Often the two ways of looking at the matter are difficult to distinguish.[57] The other type of statute includes those which require that the administrative regulation, when issued, be based upon findings that are supported by evidence in the record of the hearing and those which inferentially make the same requirement by subjecting the resulting regulations to judicial review in which the court is permitted to set aside a regulation if a supporting finding is not based upon substantial evidence in the record.[58] In these statutes, apparently, the legislatures contemplate full oral hearings, at which all the facts in support of the regulations are brought forward, presumably for the purpose of permitting affected interests to refute them and perhaps cross-examine with respect to them, as well as of facilitating judicial review. Whether or not these statutes are at present expressive of constitutional requirements, they may, as interpreted, in time become a pattern which the courts will hold to be constitutionally necessary in certain circumstances.

The cases in which procedural requirements for administrative rule-making have been considered, whether as a matter of statutory interpretation or as a matter of actual constitutional requirement, throw further light upon the considerations involved. Some of these cases have received previous consideration in the pages of this review,[59] including three[60] that were decided shortly after the first *Morgan* case had directed attention to the procedural problem. Two of these held that the requirements of that

56. Attorney General's Committee on Administrative Procedure, op. cit. supra, note 29, at 105-107; Note (1939) 24 WASHINGTON U. LAW QUARTERLY 233, 239-240; Andrews, *Administrative Labor Legislation* (1936) 82-84.

57. Morgan v. U. S. (1936) 298 U. S. 468, (1938) 304 U. S. 1; Fuchs, supra note 45.

58. Attorney General's Committee on Administrative Procedure, op. cit. supra, note 29, at 108-109; text at notes 64, 66, infra.

59. Note (1939) 24 WASHINGTON U. LAW QUARTERLY 233.

60. Highland Farms Dairy v. Agnew (D. C. E. D. Va. 1936) 16 F. Supp. 575, aff'd (1937) 300 U. S. 608; Western Union Tel. Co. v. Industrial Comm. (D. C. Minn. 1938) 24 F. Supp. 370; Baldwin v. Dellwood (1934) 15 Misc. 762, 270 N. Y. S. 418; State ex rel. v. Newark Milk Co. (1935) 118 N. J. Eq. 504, 179 Atl. 116; Colteryahn Sanitary Dairy v. Milk Control Comm. (1938) 332 Pa. 15, 1 A. (2d) 775.

decision applied, respectively, in the administration of a state minimum wage law[61] and in the establishment of minimum prices under a state milk control act.[62] The third case held that the requirements of the *Morgan* decision did not apply to the fixing of minimum prices for milk.[63]

Since the foregoing decisions were handed down, other cases have been decided with respect to both minimum-wage and milk-price fixing, as well as with regard to the fixing of barbers' prices and rates for dry cleaning. The principal points of procedure involved have been, first, the legality of basing a regulation in part upon evidence not made of record at a hearing required by statute and, second, the necessity of interim findings after a statutory hearing has been held and before oral argument is had. A brief review of these cases will serve to indicate the present state of judicial doctrine with regard to rule-making procedure.

In *McGrew v. Industrial Commission*,[64] the Commission was held to have proceeded improperly in setting minimum wages and maximum hours for women and minors in the retail trades of Utah. The procedure prescribed by the statute corresponded closely to that in the Fair Labor Standards Act. Wage orders were to be made industry by industry, with an investigation by a wage board in each industry before action by the Commission. After the wage board had made its recommendations, the Commission was directed to hold public hearings upon them and then to issue an order. Review of wage orders by the courts was permitted and was to be upon the evidence taken at the hearing. In the particular case the only hearing held by the Commission was what the Court called a "public meeting," at which the Commission introduced no evidence but simply afforded an opportunity to interested parties to express their views. No witnesses were sworn and no record of their statements was made. The Court therefore remanded the case to the Commission with directions to hold a more adequate hearing. Had the decision rested solely upon the necessity under the statute of providing a record

61. Western Union Tel. Co. v. Industrial Comm. (D. C. Minn. 1938) 24 F. Supp. 370.

62. Colteryahn Sanitary Dairy v. Milk Control Comm. (1938) 332 Pa. 15, 1 A. (2d) 775.

63. Highland Farms Dairy v. Agnew (D. C. E. D. Va. 1936) 16 F. Supp. 575.

64. (1938) 96 Utah 203, 85 P. (2d) 608.

of the hearing, upon which judicial review of the wage-hour order might be based, the case would not have constitutional implications. The Court did not, however, stop at this point. It went on to hold that minimum wage hearings must be conducted with "regard to judicial standards—not in a technical sense but in regard to fundamental requirements of fairness,—that one shall hear before one condemns, and that judgment shall be based on evidence—which are the essence of due process in a proceeding of a judicial nature." These non-technical judicial standards, according to the Court, mean that all the evidence upon which the Commission acts must come in at the hearing and that there must be findings of fact supported by substantial evidence. The first *Morgan* case[65] was cited along with decisions involving workmen's compensation and public utility proceedings, and Mr. Chief Justice Hughes in the *Morgan* case was echoed in a demand for the observance by administrative agencies of "the inbred concepts of fair play and the cherished traditions of a cautious, deliberate and judicious determination of the questions affecting people's rights or liberties."

People v. Johnson[66] was another minimum wage case, in which the *Western Union Telegraph Company* case and *McGrew v. Industrial Commission* were cited with approval. The specific difficulty with the proceedings leading to the wage order here was that, in the view of the Court, the Commission's notice of its hearing upon the proposed order was insufficient. This insufficiency was caused by the fact that the order in question did not relate to a specific industry but applied to all "unclassified occupations," which were defined as including "all employment not classified" under certain designations of industries and occupations, for most of which wage orders had previously been made. The Court found, however, that the enumeration of classified occupations included some for which no orders had been made and which were later covered by the "unclassified" order, and omitted some for which orders had already been issued. Accordingly, the notice did not serve adequately to convey information to all parties actually affected that their interests were involved in the wage proceedings. The constitutional import of the decision is rendered somewhat doubtful by the fact that the Court both

65. Morgan v. U. S. (1936) 298 U. S. 468.
66. (Cal. Super. Ct. 1941) 109 P. (2d) 770.

stated that "an opportunity for the interested parties to be heard, in a matter of this kind, where the legislature has committed to a special tribunal the fixing of wages" is essential to due process, and mentioned that "the provision for the hearing and for notice thereof, being a part of the statutory embodiment of due process, must be regarded as mandatory, for, even though some other form of hearing or some different notice might have been regarded as sufficient, the statute has not so declared, and compliance must be had with what has been, not merely with what might have been, provided." The Court seemingly intends, however, not that procedural requirements might have been omitted, but merely that others equally adequate might have been sufficient.

Recent cases involving minimum-price orders under state milk control acts, like those decided somewhat earlier,[67] have similarly involved the question, among others, of whether the administrative authority is obliged to incorporate the evidence in support of its order in the record of the hearing when the statute requires a hearing to be held. In a Pennsylvania Superior Court case,[68] following an earlier decision in which the supreme court of that state had held that a complete record of the evidence must be built up at the hearing,[69] it was decided that advantage of an administrative failure to bring forward some of the evidence at the hearing could be taken only in direct review proceedings. Objection to this procedural defect, which was advanced in defense of a prosecution for violation of the price order, came too late. The Court also remarked that, since all parties were afforded ample opportunity to offer evidence and argument at the numerous hearings held, the proceedings appeared to have been entirely fair. It also stated that there was ample evidence in the record to support the order.

The matter of administrative procedure in connection with milk-price orders has received extensive attention in the California case of *Ray v. Parker.*[70] The State Milk Control Act[71]

67. Note 60, supra.

68. Commonwealth v. Ziegler Dairy Co. (1940) 11 A. (2d) 669.

69. Colteryahn Sanitary Dairy v. Milk Control Comm. (1938) 332 Pa. 15, 1 A. (2d) 775.

70. (1940) 15 Cal. (2d) 275, 101 P. (2d) 665.

71. Cal. Agriculture Code (Deering 1937) c. 10. Subsequent changes contained in Cal. Stats. (1939) c. 941 (Deering's Supp. 1939, 373 et seq.), not applicable to the proceedings in this case, do not affect its holding.

required that at least one hearing be held in connection with the formulation of any price order, that the testimony at such hearings be under oath, and that a record be kept.[72] Certain findings were required to be made as a basis for any price order;[73] but these covered only limited aspects of the situations with which such orders must deal; and the statute contained no requirement that findings be based upon evidence in the record of the hearing. The section providing for judicial review specified simply that "any order of the Director hereunder substantially affecting the rights of any interested party may be reviewed by any court of competent jurisdiction" within thirty days after its effective date or after its injurious effects become reasonably apparent.[74] At the hearings that were conducted with reference to the order in question, the Director of Agriculture announced that the information upon which his proposed order, which had been distributed with the notices of the hearings, was based, was available for inspection, and that certain of his assistants and experts who had gathered this information were available for cross-examination. Evidence in support of the proposed order was not actually offered at the hearings. The Director also announced his readiness to receive evidence from all interested parties. As a matter of fact evidence was offered by interested parties and upon some occasions assistants to the Director were subjected to cross-examination. The Court stressed the legislative character of the proceedings, reviewed many earlier cases, and held the procedure employed by the Director to have been entirely sufficient. It paid tribute to the care with which the milk-price problem had been investigated and it pointed out that even the limited hearings which were had resulted in a record of several hundred pages. Edmonds, J., dissented upon the ground that the statute impliedly required the Director to present his case at the hearings and that the partial record actually made was an insufficient basis for judicial review of the order.

The necessity of an intermediate report, consisting of a tentative order and accompanying findings, as a basis for argument in advance of the issuance of a final order, was presented in the *Ziegler Dairy Company* case.[75] The contention that such a report

72. Id. at §736.12.
73. Ibid.
74. Id. at §735.6.
75. (Pa. Super. Ct. 1940) 11 A. (2d) 669.

was necessary was based upon the second *Morgan* decision.[76] The Court drew a clear distinction between such a proceeding as that in the *Morgan* case, in which named respondents enter into a "contest with the government," and a proceeding which eventuates in a general price order. It held that in the absence of a specific statutory requirement no such intermediate report is necessary in the latter type of proceeding.

Other aspects of rule-making procedure, involving constitutional considerations, have arisen in a number of recent cases. In *Johnson v. Michigan Milk Marketing Board*[77] the Court held the statutory provision for the composition of the Milk Marketing Board to be unconstitutional because it provided for the membership, in addition to the Commissioner of Agriculture, of two milk producers and only one distributor and one consumer. Although "no claim is made that any member of the present Board has acted unfairly or arbitrarily," the Court held that a balanced Board is essential to due process. The Court relied on *Carter v. Carter Coal Company*,[78] which held unconstitutional a provision of the first Bituminous Coal Act giving legal force to such wages in the bituminous coal industry as might be agreed upon by the producers of more than two-thirds of the annual national tonnage and more than one-half of the workers employed. The Court also drew an analogy to the judicial function and pointed out that "no one should act as a judge in his own cause." McAllister, J., dissenting with the concurrence of North, J., pointed out both that the function here involved was not a judicial one and that the members of the Milk Marketing Board became public officials for the purpose of performing their functions under the act, so that the *Carter Coal Company* case was inapplicable. The composition of the Board did not in this view present a serious due-process issue.[79]

In *Lion Oil Refining Co. v. Bailey*[80] the question of the sufficiency of the findings of the Arkansas Oil and Gas Commission, made in connection with an emergency shut-down order for all the regulated wells of the state, was decided favorably to the Commission. The Court held that, while findings as to the essen-

76. Morgan v. U. S. (1938) 304 U. S. 1.
77. (1940) 295 Mich. 644, 295 N. W. 346.
78. (1936) 298 U. S. 238.
79. See Comment (1941) 54 Harv. L. Rev. 872.
80. (1940) 200 Ark. 436, 139 S. W. (2d) 683.

tial facts were necessary, a statement substantially embracing them, even though not denominated a statement of findings, was sufficient. In another case[81] the Supreme Court of Florida sustained as constitutional an act permitting the fixation of minimum prices for the laundry and dry-cleaning businesses, but noted that a hearing in substantial compliance with the views of the Supreme Court in the second *Morgan* case[82] would be necessary. In *Whittenburg v. United States*[83] the Circuit Court of Appeals for the Fifth Circuit sustained the constitutionality of the Agricultural Marketing Agreement Act,[84] remarking that the statutory provisions for "notice to and hearing of those to be affected" and for judicial review of orders, made it apparent that liberty and property would not be taken without due process of law.

It is evident from the foregoing decisions that the courts are inclined to attach some sort of procedural requirements, based upon the due process provisions of the Fifth and Fourteenth Amendments, to the performance of rule-making functions by administrative agencies, in situations where the vital economic interests of private parties are directly affected. The statement of such procedural requirements in constitutional doctrine is now usual, owing to the abandonment of the legislative practice of conferring this type of rule-making powers without statutory safeguards.[85] One cannot quarrel with such a result under a system in which the validity of governmental powers affecting private interests must be approved by the courts; for it is undoubtedly true that under some circumstances administrative rule-making may affect such interests vitally and with as much finality as other types of governmental action.[86] Statutes which are too highly fraught with the danger that the powers they confer will be exercised without the knowledge of interested parties or without an opportunity for them to make their views known, may rightly be stricken down. An instance occurred

81. Miami Laundry Co. v. Florida Dry Cleaning & Laundry Board (1938) 134 Fla. 1, 183 So. 759.
82. (1938) 304 U. S. 1.
83. (1939) 100 F. (2d) 520.
84. (1937) 50 Stat. 246, c. 296, 7 U. S. C. A. §601 et seq. The milk-price provisions of the act were sustained generally in United States v. Rock Royal Cooperative (1939) 307 U. S. 533.
85. Text at note 38, supra.
86. See note 35, supra.

some years ago in a case in which the Supreme Court of Kansas held unconstitutional an act which provided for the regulation of electric wiring in buildings by the "National Electrical Code," promulgated by a private organization, without statutory provision for procedural safeguards.[87]

The decisions here reviewed still leave very much in doubt, however, the precise content of the constitutional requirement for procedural safeguards in rule-making, as well as the types of rule-making to which the safeguards are applicable. The laying down of uniform procedural standards is, indeed, practically impossible.[88] Any rule that might be stated with respect, say, to the necessity of a hearing, even though it were limited to price and wage-fixing or to some other reasonably well-defined categories of administrative regulation,[89] would both ignore important distinctions and either be added to existing investigatory and conference procedures, which are sufficient in themselves, or would tend to displace them.[90] The establishment of constitutional minima of procedure in rule-making must, therefore, not exclude variety and adaptability, which are essential to maximum utility.

Recognition that there may be variety, and that procedural requirements which attach to some instances of rule-making do not necessarily attach to others, appears in some of the decided cases. *Panama Refining Co. v. Ryan,*[91] which first announced the rule that there must be findings in connection with the promulgation of executive regulations, was shortly followed by *Pacific*

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87. State v. Crawford (1919) 104 Kan. 141, 177 Pac. 360. The delegation of public authority to a private group is an independent ground of objection to such a statute. Carter v. Carter Coal Co. (1936) 298 U. S. 288. The objection is obviated where the wishes of the private group become law only after the discretionary approval of a properly-constituted public authority. Herrin v. Arnold (1938) 183 Okla. 392, 82 P. (2d) 977.

88. Attorney General's Committee on Administrative Procedure, op. cit. supra, note 29, at 108; Fuchs, supra note 33.

89. The fixing of minimum wages or prices has quite different effects, for example, from the fixing of maxima. The latter places a definite, legally-prescribed limit upon the economic gains of the recipients, from which it is difficult, if not impossible, to escape; the former usually imposes no such rigid limits, since more than the minimum may be demanded on the one hand and, on the other hand, increased costs caused by paying higher wages or prices can be shifted in whole or in part, except by consumers. These differences in economic effect may be reflected legitimately in the procedures employed when prices or wages are fixed.

90. See Feller, supra note 38, at 596.

91. Note 28, supra.

States Box & Basket Co. v. White,[92] in which the requirement was said not to attach to the regulations there involved.[93] Orders which do not entail definite legal consequences to private interests need not be preceded by safeguards which should attach to regulations of greater or more immediate effect.[94] There is no prospect that the traditional basic doctrine, which attaches no constitutionally-prescribed procedures to rule-making, will be abandoned as respects the great mass of regulations issuing from administrative agencies. The most one can say is that the courts are inclined at times to apply constitutional provisions so as to require some sort of procedural minima in some types of rule-making, as they have with respect to adjudication; but these requirements will be confined to proceedings in which vital private interests are directly at stake, and they will vary.[95] The tendency toward rigidifying the requirement of a judicial type of procedure, which for a while was manifested because of the second *Morgan* decision,[96] seems unlikely to endure.[97]

It is particularly to be hoped that the courts will not insist

92. (1935) 296 U. S. 176.

93. The reasons for applying the requirement of findings in the one case and not in the other are impossible to discern. Fuchs, supra note 45, at 140-141.

94. See the holding in Ray v. Parker (1940) 15 Cal. (2d) 275, 101 P. (2d) 665, that the initial designation of a milk marketing area under a milk control act, since it does not have immediate legal consequences, need not be preceded by a hearing. The entire problem of the procedural safeguards necessary in the formation of special improvement districts by other than legislative agencies turns upon whether their formation entails tax liability without further proceedings in which a hearing may be had. Potts, Due Process in Local Assessments (1926) 12 A. B. A. J. 457. If a hearing is held, its incidents may vary because of the number of parties involved or for other reasons. Fuchs, supra note 33, at 277.

95. The proposal by three members of the Attorney General's Committee on Administrative Procedure that Congress enact a code of administrative procedure for the guidance of federal agencies, extends to procedure in rule-making. *Final Report* (1941) 214-216. The proposed code is for the most part not mandatory, however; and even its requirement that "formal" rule-making hearings shall be held in situations where the applicable statutes call for hearings, does not define the incidents of a formal hearing except to indicate that cross-examination and rebuttal testimony, to the extent that these will be useful, should be permitted and to require an intermediate report prior to argument, unless the argument is preceded by the announcement of tentative regulations. Id. at 229 (proposed code, §209(d)).

96. Text at note 42, supra.

97. The recently-strengthened tendency of the Supreme Court to defer to the judgment of administrative agencies within their fields of competence extends to matters of procedure. Comment (1940) 25 WASHINGTON U. LAW QUARTERLY 608, discussing Federal Communications Comm. v. Pottsville Broadcasting Co. (1940) 309 U. S. 134.

upon having detailed procedural safeguards written into the statutes themselves. The need is great of permitting administrative adaptation and of having the courts confine themselves to judging procedure as it actually evolves administratively. If the formulation of a particular regulation has been accompanied by due procedure, that is all that should be required,[98] at least where the opportunity to challenge a regulation on procedural grounds exists.[99] There is, of course, every reason why legislation should embody procedural safeguards, the desirability of which is known.[100] But to require this in all cases would be to impose an impossible burden. It should be enough that legislative and administrative action, taken together, have in a specific situation provided a reasonable safeguard against abuse.

The evolution of constitutional doctrine in respect to rule-making procedure, as well as the outcome just suggested, establishes litigation in each particular instance as the sole means of determining with finality whether or not constitutional requirements have been observed; for there is no precise rule to apply. Frequent burdensome litigation would be the inevitable result if the courts were to become meticulous in retroactively imposing their own detailed views in regard to procedure. There would be no

98. The question of whether notice and hearing must be explicitly provided by statute in connection with administrative "adjudications" for which they are constitutionally necessary has long been an important one. The view that this should not be required is excellently stated in Gellhorn, *Administrative Law, Cases and Comments* (1940) 451, 460. In rule-making, for which the procedure probably is more variable, it would be doubly unfortunate to require that the legislature must attempt to specify it in advance.

99. Where statutory judicial review of regulations is provided, the allegation of deficiencies in the procedure accompanying the formulation of a regulation would clearly present issues affecting the legality of the regulation, upon which the court would be competent to pass. In the absence of a statutory method of review, a challenge to a regulation on constitutionally-supported procedural grounds, advanced in an equity suit or declaratory judgment action or by way of defense to an enforcement proceeding, would permit an inquiry into any essential points of procedure. Carl Zeiss, Inc. v. U. S. (1935) 23 C. C. P. A. 145, 76 F. (2d) 412 (misleading notice); Staley Mfg. Co. v. Secretary of Agriculture (C. C. A. 7, 1941) 120 F. (2d) 258 (omission of essential finding). See Hart, loc. cit. supra, note 28: "This is * * * a matter upon which the courts are entirely competent to check up * * * With reference to procedure the courts can review administrative action without usurping policy-determining functions."

100. The merit of recent statutes imposing detailed procedural requirements in rule-making is now being tested in practice and may furnish a guide to future legislation dealing with similar subjects. Attorney General's Committee on Administrative Procedure, op. cit. supra, note 29, at 110; Fuchs, The Formulation and Review of Regulations under the Food, Drug, and Cosmetic Act (1939) 6 L. & Contem. Prob. 43, 53 et seq.

certainty until the parties had tried out their several views before the sole authority that had final power to decide. Such an outcome seems unlikely now, however. The Supreme Court has given ample evidence of a policy of permitting procedural independence, as well as a free exercise of discretionary substantive powers,[101] to administrative agencies.[102] This tendency probably will be reflected in the state courts also. The result of it in regard to rule-making procedure, even when this is subject to a judicial check in respect to its constitutionality, will be to sustain any reasonably-devised procedure, whether or not the accompanying safeguards are of the "judicial" type. There will be an accompanying discouragement to ill-founded litigation. Affected private interests, in cooperation with administrative agencies, will in the main give attention to the essential task of suggesting and maintaining sensible, effective methods.[103]

The second constitutional implication, mentioned above as deriving from the opinion in the *Opp Cotton Mills* case, is that the federal courts may properly undertake the type of judicial review of administrative regulations which is required of them with respect to wage orders under the Fair Labor Standards Act. The question does not bear upon the constitutional minimum of judicial review;[104] it has to do rather with the maximum. That Congress may not require the federal courts to go beyond the judicial function by entering into administrative questions in reviewing the acts and orders of administrative authorities has long been recognized.[105] It is also established that out of an administrative function which is non-judicial in character there may arise questions which courts may properly be called upon to determine.[106] The trick is, of course, to distinguish between

101. Railroad Comm. v. Rowan & Nichols Oil Co. (1940) 310 U. S. 573, commented on in (1941) 26 WASHINGTON U. LAW QUARTERLY 265.

102. See note 97, supra.

103. The recommendation of the Attorney General's Committee on Administrative Procedure that an Office of Federal Administrative Procedure be established would result, if adopted, not only in continuous study and coordination of the procedural methods of the federal agencies but also in the creation of a channel through which the experience and opinion of those affected by administrative regulations might be brought to bear. *Final Report* (1941) 123.

104. Id. at 80.

105. Id. at 79; Federal Radio Comm. v. General Electric Co. (1930) 281 U. S. 464.

106. Interstate Commerce Comm. v. Brimson (1894) 154 U. S. 447; Federal Radio Comm. v. Nelson Bros. Bond & Mtg. Co. (1933) 289 U. S. 266; Fuchs, supra note 37, at 555.

those aspects of a proceeding that are so essentially administrative that a court may not be called upon to enter into them and those aspects, on the other hand, which are suitable for judicial determination. In general it seems that the exercise of the discretion which is entrusted to an administrative agency is the essence of the administrative task and cannot be imposed upon a court.[107] Any attempt on the part of Congress to require the federal courts to formulate the content of an administrative regulation thus would meet with a rebuff at the hands of the courts.[108]

The Fair Labor Standards Act, together with most of the other recent statutes patterned upon the same model, does not attempt to impose this task upon the courts.[109] The scope of the judicial review of regulations which it calls upon the courts to exercise does, however, go beyond that which has traditionally been available with respect to administrative regulations. The traditional type of review of such regulations has taken place collaterally in enforcement proceedings or in injunction, declaratory judgment, or other actions instituted to attack the legality of regulations.[110] The issue in such proceedings, surrounding the validity of regulations, is strictly one of law, relating to their legality under the statutes, just as in cases in which the constitutionality of a statute is attacked the issue is whether the statute conforms to the Constitution.[111] In so far as statutory review of administrative regulations is confined to the traditional legal issue of the statutory authorization for them, it does not impose non-judicial functions upon the courts; although it is necessary to provide that the review proceedings must be instituted by parties having a sufficient interest to generate a judicially-cognizable case or controversy.[112] The review provided in the Fair Labor Standards

107. Fuchs, supra note 37, at 546; Hart, loc. cit. supra, note 28.

108. Fuchs, supra note 100, at 65-66.

109. Ibid.

110. Attorney General's Committee on Administrative Procedure, op. cit. supra, note 29, at 115.

111. Cases in which regulations, allegedly promulgated under statutory power, have been held invalid because they were in excess of the statutory authorization include the following: Waite v. Macy (1918) 246 U. S. 606; Utah Power & Light Co. v. U. S. (1917) 243 U. S. 389; United States v. Johnson (D. C. Nev. 1929) 35 F. (2d) 256; Nolan v. Morgan (C. C. A. 7, 1934) 69 F. (2d) 471; People v. Love (1921) 298 Ill. 304, 131 N. E. 809, 16 A. L. R. 703.

112. Under the Fair Labor Standards Act judicial review of regulations may be requested by a person "aggrieved"—presumably one who has an interest sufficient and sufficiently threatened, to generate a case or con-

Act and other recent legislation conforming to the same pattern[113] provides in addition, however, that the courts shall set aside a regulation if a finding upon which it is based is not supported by substantial evidence, contained in the record of the administrative proceedings. The question that has arisen in some minds, and which the Supreme Court impliedly answers affirmatively in the *Opp Cotton Mills* case, is whether such an inquiry into the evidentiary support for a finding of fact, upon which a regulation is based, is an inquiry of a judicial nature.

There appears to be no previous direct authority upon the point just mentioned. It is, of course, well established that a similar inquiry into the evidentiary support for an essential finding in an administrative adjudication is a proper incident to judicial review of the order in which the proceeding has eventuated.[114] But it has been pointed out that the kinds of facts which form the substance of the findings in rule-making, as well as the evidence bearing upon them, are different in character from the findings and the evidence in adjudicatory proceedings.[115] The latter relate to particular events and to facts affecting the existence of rights and duties in specific individuals. They involve the kinds of determinations which juries and courts have traditionally made. The findings of fact which underlie administrative regulations, on the other hand, relate largely to general

troversy. Text at note 13, supra. The language of other similar recent legislation (note 58, supra) is equivalent. The code proposed by three members of the Attorney General's Committee on Administrative Procedure, which provides for judicial review of regulations, specifies that the review shall be "upon contest of its application * * * or upon proper application for declaratory judgment * * * where the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the constitutional or statutory rights, privileges, immunities, or benefits of any person." *Final Report* (1941) 230 (proposed code, §211). The Logan-Walter Bill (76th Cong., 3rd sess., H. R. 6324), as amended for final passage, provided in its third section for review of regulations in the United States Court of Appeals for the District of Columbia "upon petition by any person substantially interested in the effects" of such a regulation. In Staley Mfg. Co. v. Secretary of Agriculture (C. C. A. 7, 1941) 120 F. (2d) 258, it was held that a producer of corn syrup had a sufficient interest in regulations prescribing standards for sweetened condensed milk, which barred his product from use by producers of the latter, to entitle him to bring proceedings to test the regulation under §701(f) of the Food, Drug, and Cosmetic Act, note 117, infra.

113. Note 58, supra.

114. Attorney General's Committee on Administrative Procedure, op. cit. supra, note 29, at 88 et seq.

115. Id. at 118.

tendencies and conditions and to the consequences of alternative courses of action. Questions such as these do not lie traditionally within the judicial sphere. It has been argued that there is no benefit involved in attempting to subject administrative judgment in such matters to review by the courts.[116] Had the court in the *Opp Cotton Mills* case declined to undertake to review the evidentiary support for the findings of the Administrator, it would have established that the type of review usually accorded collaterally to administrative regulations is the maximum that may be exacted of the courts. Review upon the administrative record would have remained an acceptable substitute, however, for review after a trial, such as must take place when collateral proceedings are had.[117]

It is difficult to see that any particular good can result from judicial assumption of the duty to inquire into the support for administrative findings of fact in rule-making proceedings. Harm might result if the courts were likely to act without restraint in substituting their judgment upon such issues for the judgment of the administrative authorities. But again this seems unlikely.[118] The federal courts, delving into administrative records to inquire whether support exists in the evidence for essential findings of fact, will almost certainly find such evidence.[119]

116. Id. at 119.

117. Id. at 116. It might be argued from the analogy of the judicial process in cases in which the constitutionality of statutes is challenged, that the courts may not be restricted to the administrative record when "quasi-legislative" acts are under review, but that, on the contrary, the courts must be free to range more widely in seeking evidence of whether the rights of a litigant have been infringed. A similar argument has had weight in influencing the courts to go outside the administrative record in getting at "constitutional" facts involved in an administrative decision. St. Joseph Stock Yards Co. v. U. S. (1936) 298 U. S. 38, 51. Whatever may be the situation where constitutional rights are involved, however, there seems little reason in connection with more ordinary matters for casting aside the economy of confining the fact-gathering function to the agencies established for the purpose. The newer federal acts providing for the judicial review of regulations, like their counterparts involving administrative decisions, specify that if the need of additional evidence arises upon review, the proceedings shall be remanded to the administrative agency for this purpose. Fair Labor Standards Act (1938) 52 Stat. 1060, 1066, c. 676, §10(a), 29 U. S. C. A. §210(a); Food, Drug, & Cosmetic Act (1938) 52 Stat. 1040, 1055, c. 675, §701(f)(2), 21 U. S. C. A. §371(f)(2).

118. Fuchs, supra note 100, at 63-64.

119. Administrative authorities, anticipating possible judicial review on the basis of the administrative record, pursuant to a statutory provision for such review, will hardly omit to include in the record some, and probably all, of the data upon which the regulation is based.

The remaining questions will be the same ones, surrounding the legality of the regulations under review, that would have arisen in the more traditional type of collateral proceedings. What the new statutes accomplish in respect to judicial review, therefore, seems to be the substitution of a slightly different type of proceeding for that formerly employed, coupled with review on the basis of the administrative record instead of upon a record newly made in court.[120] In so far as administrative records become unduly cumbersome because of the necessity of having an eye to this type of judicial review, the result is regrettable.[121] In so far, on the other hand, as the necessity of the reception of new evidence in court is avoided, economy of effort will result. It is too early as yet to cast the balance upon this account.[122]

In any case the *Opp Cotton Mills* decision lends implied judicial sanction to an important series of legislative experiments with respect to administrative rule-making procedure and judicial review of regulations. At the same time it does not impose a rigid constitutional mold upon procedure. The responsibility for evolving satisfactory patterns rests where it belongs—upon administrators, upon the legal profession, and upon Congress.[123]

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120. The form of judgment will also be different in most cases. Whereas in a collateral action involving the validity of a regulation the judgment in terms disposes of the rights of the litigants in the light of the legal conclusion regarding the regulation, the judgment upon statutory review of the regulation will deal with the regulation itself. A question might be raised regarding the constitutionality of requiring the courts to determine "general" questions in this manner. It would, however, be a picayunish question, since the courts upon statutory review are only performing explicitly the same function that has been implicit in their work all along. Were the constitutional question decided adversely to the review of the regulations themselves, it would be possible to provide instead for the determination of the rights of the parties seeking review, upon the basis of the courts' determination of the legality of the regulations. There would then be no doubt that genuine declaratory judgments, rather than advisory opinions, were contemplated by the statutes. The regulations might then, like statutes that have been "declared" unconstitutional, retain a paralyzed existence after adverse decisions with regard to them. Their invalidity would not be a matter adjudicated; but the doctrine of *stare decisis* would operate powerfully to nullify them.

121. See the opinion in Ray v. Parker (1940) 15 Cal. (2d) 275, 101 P. (2d) 665.

122. Attorney General's Committee on Administrative Procedure, op. cit. supra, note 29, at 110.

123. Three bills, proposing reforms in federal administrative procedure, are now pending in Congress and have been made the subject of hearings before a subcommittee of the Senate Judiciary Committee. 10 U. S. L. Week 2030 (July 8, 1941); 9 id. 2584, 2599, 2631, 2646, 2659, 2675, 2695, 2711, 2723, 2739, 2759, 2776 (1941). A transcript of the hearings has been pub-

lished in four parts. Two of the bills (77th Cong., 1st sess., S. 675, S. 674) emanate from the Attorney General's Committee on Administrative Procedure and embody the legislative recommendations of the Committee and of three of its members who favor more elaborate provisions. They are printed in the Committee's *Final Report* (1941) 191, 217. The other bill (77th Cong., 1st sess., S. 918) combines some of the features of the former Logan-Walter bill with many of the provisions of S. 674, the separate bill of the three Committee members. Considerable summarization and discussion of the report of the Attorney General's Committee and of the pending bills has been published. See, e. g., Analysis of Bills Accompanying Report of Attorney General's Committee (1941) 27 A. B. A. J. 140, and Administrative Law Symposium (1941) 27 A. B. A. J. 207; Feller, Administrative Law Investigation Comes of Age (1941) 41 Colum. L. Rev. 589; Jaffe, The Report of the Attorney General's Committee on Administrative Procedure (1941) 8 U. Chi. L. Rev. 401; J. Hart, The Acheson Report, a Critique (1941) 26 Ia. L. Rev. 801; Lavery, The Administrative Process (1941) 1 F. R. D. 651.