

4-1-1940

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Recommended Citation

Ralph F. Fuchs, *An Approach to Administrative Law*, 18 N.C. L. REV. 183 (1940).Available at: <http://scholarship.law.unc.edu/nclr/vol18/iss3/1>

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AN APPROACH TO ADMINISTRATIVE LAW

RALPH F. FUCHS*

I. OLD AND NEW APPROACHES

Administrative law is being subjected to a new and realistic approach on the part of many of those who are concerned with it. The problems that are thought to compose it have to do more and more with the practical advantages and disadvantages of different ways in which administrative agencies proceed and less and less with the conformity of administrative organization and procedure to preconceived notions of government.

A decade ago the talk was all about the relation of "administrative justice" to "the supremacy of law", of administrative procedure to due process of law, or of administrative functions to the separation of powers. Today, emphasis is likely to be placed upon the fate of specific public interests and private rights under the control of particular administrative agencies. "Vertical" studies of single agencies have superseded over-all discussions of administrative law as the principal additions to the literature of the subject.¹ Synthesis of the knowledge thus gained into new standards of administrative organization and procedure awaits further progress in studies now going forward or later to be made.

The new approach, if it may be called that, has not yet generated a concept of administrative law which is appropriate to it. Under the older approach, the possible disregard by administrative agencies of supposedly established governmental norms was the measure of relevance of the matters to be studied.² Due process of law was thought to require something very much like judicial process, and the "rule of law" (in the sense of supremacy of law) to demand the decision by a court of most of the vital matters affecting private interest that arise in the course of governmental administration. The separation of powers was assumed to require the performance of various "functions" in

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¹ DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION (1936); HENDERSON, THE FEDERAL TRADE COMMISSION (1924); PATTERSON, THE INSURANCE COMMISSIONER IN THE UNITED STATES (1927); SHARFMAN, THE INTERSTATE COMMERCE COMMISSION (5 vols., 1931-1937); VAN VLECK, THE ADMINISTRATIVE CONTROL OF ALIENS (1932). The Attorney General's Committee on Administrative Procedure is at present gathering data by means of individual studies of federal agencies. See its monographs 1-11 (mimeographed, 1940). In regard to the practical approach see Feller, *Prospectus for the Further Study of Federal Administrative Law* (1938) 47 YALE L. J. 647.

² See Rosenberry, *Administrative Law and the Constitution* (1929) 23 AM. POL. SCI. REV. 32.

governmental administration by different agencies, duly separated from each other. The emergence of new regulatory agencies in which these norms clearly were not observed was the phenomenon with which critics of administrative law dealt.³ Some opposed; some justified; but all seemed to agree where the problems lay.

It may not be particularly important to define administrative law upon some new basis at this time. So long as studies go forward that throw light upon what is transpiring in particular agencies and suggest ways of improvement, it is not essential that the boundaries of the subject be clearly marked. It is possible, however, that older concepts of the subject may becloud men's judgments as to what is significant in administrative law and as to what requires remedy. If so, a new concept should be evolved.

Under the former approach, preoccupation with due process of law and the "rule of law" has produced some bad results. Judicial determination of questions of "jurisdictional fact"⁴ and questions of "constitutional right"⁵ has been held to be necessary as a matter of due process in various classes of proceedings. Nobody knows by what token a jurisdictional fact may be recognized or why a court is particularly qualified to pass upon one.⁶ Neither has it been satisfactorily explained why some questions of "constitutional right" should be reserved to the courts.⁷ These difficulties may justly be charged to preoccupation with the due process clause and the "rule of law" in considering the problems of administrative law. Unwarranted insistence upon some attributes of court proceedings in connection with administrative determinations springs from the same cause.⁸ In the main, however, the requirements of due process and of the "rule of law" must be determined on practical grounds, since the phrases themselves are vague and there is an absence of recognized sub-concepts to apply.⁹ Due process may mean many things; in relation to administrative proceedings it necessarily means such differing processes as are reasonably adapted to different specific matters. The "rule of law" can only mean, in the last analysis, those ways of determining rights and duties which

³ See Fuchs, *Concepts and Policies in Anglo-American Administrative Law Theory* (1938) 47 YALE L. J. 538.

⁴ *Crowell v. Benson*, 285 U. S. 22, 52 Sup. Ct. 285, 76 L. ed. 598 (1932).

⁵ *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287, 40 Sup. Ct. 527, 64 L. ed. 908 (1920); *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 56 Sup. Ct. 720, 80 L. ed. 1033 (1936).

⁶ Dissent of Mr. Justice Brandeis in *Crowell v. Benson*, 285 U. S. 22, 65, 52 Sup. Ct. 285, 298, 76 L. ed. 598, 621 (1932).

⁷ Freund, *The Right to a Judicial Review in Rate Controversies* (1921) 27 W. VA. L. Q. 207.

⁸ *Jones v. Securities and Exchange Comm.*, 298 U. S. 1, 56 Sup. Ct. 654, 80 L. ed. 1015 (1936). See Landis, *Administrative Policies and the Courts* (1938) 47 YALE L. J. 519, 526 *et seq.*

⁹ FREUND, *STANDARDS OF AMERICAN LEGISLATION* (1917) *passim*.

the courts are willing to approve as suitable to particular situations. In other words, to focus upon due process and the "rule of law" in considering the problems of administrative law is not in the main to adopt an unrealistic approach.¹⁰

It is otherwise with respect to the separation of powers as the doctrine is usually applied. Not only is its relation to the problems of administrative law frequently regarded as more fundamental than that of the other doctrines mentioned, but it is also deemed to have a specific content which is definitely inconsistent with the manner in which administrative agencies usually function. Indeed, the exercise of "legislative" and "judicial" "functions" by officials in the executive branch of the government has frequently been stated to be in itself the identifying badge of those agencies that are of concern to students of administrative law.¹¹ Even when this "commingling of functions" is not opposed, it is regarded as an anomaly.¹² More often it is looked upon as an evil.¹³

Such a view of the relation of administrative law to the separation of powers may produce difficulties. When it accepts, rather than opposes, the "commingling" of functions it suggests no means of reconciling the continuance of the "anomaly" with a constitutional doctrine that remains explicitly in effect in many jurisdictions and binds the courts in all. Conflict and misunderstanding are likely to result.¹⁴ If this view is correct, it indicates that modern government and the separation of powers are incompatible. The establishment of other govern-

¹⁰ Compare the conclusion of Mr. A. H. Feller, *Administrative Procedure and the Public Interest: The Results of Due Process*, 25 WASH. U. L. Q. (April, 1940), that, thus far, the application of the due process clause to administrative procedure, although hampering and productive of some threat for the future, has not on the whole prevented the service of the public interest.

¹¹ (1934) 59 A. B. A. REP. 541; BLACHLY AND OATMAN, *ADMINISTRATIVE LEGISLATION AND ADJUDICATION* (1934); terms of reference of the (English) Committee on Ministers' Powers, in Report of the Committee (1932) at v; Stason, *Administrative Tribunals—Organization and Reorganization* (1938) 36 MICH. L. REV. 533, 535-536.

¹² STASON, *CASES AND MATERIALS ON ADMINISTRATIVE TRIBUNALS* (1937) 4.

¹³ (1936) 61 A. B. A. REP. 727. "The act itself made for an arbitrary administration by investing the board with legislative, executive and judicial powers, making it prosecutor, jury and judge all in one—a merger of functions it took centuries of struggle to unscramble in the interest of justice for the common man." Objection of Republican Program Committee to the National Labor Relations Act, N. Y. Times, Feb. 19, 1940, p. 2, col. 4.

¹⁴ "Either the constitutions have been violently disregarded in the union of all the powers in each one of the departments, and in certain administrative officers, or . . . the distinction between the departments was not intended to be based upon differences existing in the nature of the powers to be exercised by each department." BONDY, *SEPARATION OF GOVERNMENT POWERS* (1893) 46.

A related result is the view that certain administrative acts should not be subject to procedural requirements or to judicial review on the simple ground that they are "legislative". See Brookings Institution, Press Release for use Feb. 23, 1940, p. 3, stating objections to the proposals contained in the Logan-Walter Bill (76th Cong. S. 915) with respect to administrative rule-making.

mental safeguards would be furthered by an explicit repudiation of the doctrine of separation. Before the death knell is rung upon the historic doctrine,¹⁵ however, it would be wise to examine its precise nature more closely and to determine with certainty whether the sacrifice is really necessary. It may be found that, in fact, the doctrine of separation has not lost its vitality; that it is no more incompatible with administrative agencies than with other aspects of government; and that the measure of what is important in administrative law lies elsewhere. In short, the separation of powers, when rightly viewed, is neither more nor less relevant to administrative law than to other aspects of government. Administrative law should be defined and studied from an entirely different angle.

II. THE MEANING OF THE SEPARATION OF POWERS

By its terms, the doctrine of separation has reference to "powers". The critics of "commingling" usually refer to "functions".¹⁶ Unless the two are the same, ambiguity lurks in this interchange of words.

Whatever may be intended by the words "powers" and "functions" as variously used, there undoubtedly are two distinct classes of actualities which these words suggest and which should be known by different names. The one consists of governmental tasks, such as the enactment of statutes, the appointment of officers, the regulation of the currency, and the decision of cases in law and equity, which the constitutions in fact apportion among the three departments of government and which might well be called "powers". The other consists of processes, or types of governmental operations, such as rule-making, the issuance of orders to named individuals, or physical interference with property, which might be called "functions". Now the doctrine of separation may conceivably have reference to the distribution of either of these actualities among the departments of government; it can scarcely have reference to both. It may mean, in theory, that each department shall perform those tasks assigned to it and shall not interfere with the other departments in their similarly allotted work. Or, it may mean that the processes which are involved in performing the tasks of government belong, respectively, to the three departments according to a predetermined scheme. But it cannot mean that each governmental task involves a single process and that both the task and the process belong to a single

¹⁵ Root, *Public Service by the Bar* (1916) 41 A. B. A. REP. 355, 368.

¹⁶ "The legislative department will in a normal case exercise all the legislative functions; the executive department, all the executive functions; the judiciary department, all judicial functions. Any other distribution would lead to a confusion of powers. This is the legal consequence of the separation of powers." WYMAN, *PRINCIPLES OF ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS* (1903) 62.

government department, for it seems obvious that the performance of many of the tasks of each department requires processes which are also involved in the tasks of other departments. Enacting statutes, administering the maritime safety laws, and deciding cases all involve the making of investigations and the preservation of order at hearings, by direct action against disturbers if necessary. Appropriating money for a bureau, issuing a license, and entering a money judgment all involve decisions. Regulating the coinage of money, enforcing the food and drug laws, and issuing an injunction all involve the exercise of discretion and the laying down of rules to govern future conduct. The departments cannot call upon each other to carry on these processes and still perform their tasks in separation. To apportion the tasks of government among the departments means to duplicate the processes within the departments; to distribute the processes means to divide each task.

The meaning of the separation of powers is confused, of course, by the fact that some of the governmental tasks which have been apportioned among the departments cannot stand alone. They are partial tasks, which must be completed by other departments. The President nominates; the Senate advises and consents. Congress "regulates" by enacting statutes which the executive in part enforces, and which, at the same time, give rise to cases in law and equity. Congress establishes courts that to some extent are managed by the executive and which proceed to render decisions by virtue of somewhat independent constitutional authority. It is easy to conclude not only that governmental tasks are sometimes divided, but also that they are, or should be, divided according to an underlying logic which the separation of powers was intended to impose.

Historically, there seems to be relatively little authority for this view. As previously noted, the Federal and state constitutions actually distribute tasks, not processes, among the departments.¹⁷ The "powers", it is true, are also assigned generally, by name, to the three departments.¹⁸ The significance of this fact turns upon what these powers were thought to embrace at the time they were assigned. Evidently, they signified the tasks specifically assigned and others like them, which pertained to the three departments. Montesquieu speaks of the three powers of enacting laws, of executing the public resolutions, and of

¹⁷ See HART, *THE ORDINANCE MAKING POWERS OF THE PRESIDENT* (1935) 135 ff.

¹⁸ "All legislative powers herein granted shall be vested in a Congress of the United States. . . ." U. S. CONST. Art. I, §1. "The executive power shall be vested in a President of the United States. . . ." *Id.* Art. II, §1. "The judicial power . . . shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish." *Id.* Art. III, §1.

judging the crimes or differences of individuals.¹⁹ Nowhere does he analyze the processes that are involved in carrying out these powers or indicate that there are processes which are sacred to particular departments, nor does such an analysis appear in the writings of any of the fathers. At most there are a few comments upon certain characteristics of the way in which the three departments proceed with their work.²⁰ It seems to have been enough for the older expounders of the separation of powers that they were supporting a practical division of labor in government, and one guarding against tyranny, in such matters as treaty-making, impeachment, appointments to office, enactment of statutes, and law enforcement.²¹ Flexibility in the apportionment of tasks and parts of tasks was recognized as desirable, so long as no department came to possess the "whole power of another department";²² for by the sharing of powers the operation of checks and balances might be promoted.²³

It could scarcely have been otherwise under a theory predicated, as Montesquieu's was, upon the British government, which was being applied to a new government by men who had British institutions in mind.²⁴ A consistent separation could scarcely emerge in the British government, which began with all powers centered in the King, supplemented by that incipient legislature, the Curia Regis, and aided by the Council in undifferentiated official matters—a government in which specialization of organs and differentiation of functions took place only

¹⁹ 1 MONTESQUIEU, *THE SPIRIT OF LAWS* (London, 1823) bk. XI, c. 6.

²⁰ The application, "according to the principles of right and justice", of the "constitution and laws to facts and transactions in cases" is "not altogether without intricacy or difficulty" or lacking in the need "of skill in the science of jurisprudence". 1 JAMES WILSON, *WORKS* (Chicago, 1896) 363. "In planning, forming, and arranging laws, deliberation is always becoming and always useful" and in their execution vigor, speed, and even secrecy are necessary. *Id.* at 358.

²¹ Recent commentators, seeking to depict the present status of the doctrine of separation, have written in similar terms. LUCE, *LEGISLATIVE PROBLEMS* (1935) c. IV; WILLIS, *CONSTITUTIONAL LAW OF THE UNITED STATES* (1936) c. V; WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* (1910) cc. LXIII, LXIV, LXV.

²² Sharp, *The Classical American Doctrine of "The Separation of Powers"* (1935) 2 U. OF CHI. L. REV. 385, 390 (Montesquieu), 393 (Blackstone), 400 (John Adams), 407 (Madison).

²³ THE FEDERALIST, no. XLVII. "If it be asked why people were so unwise . . . as to hamper government by division of authority and by checks and balances, the answer is simple: such was the kind of government the leaders and probably men in general wanted. . . . In some ways the most marked development of the idea of popular government from that time to this has been the development of the belief that governments, strongly directed by popular opinion, should be competent and active—a change from the belief that governments should not do things to the belief that they should do things." McLAUGHLIN, *A CONSTITUTIONAL HISTORY OF THE UNITED STATES* (1935) 117. See also Cheadle, *The Delegation of Legislative Functions* (1918) 27 YALE L. J. 892, 893.

²⁴ "The separation which was intended to be enforced by the constitutions was based upon historical rather than purely scientific distinctions." BONDY, *SEPARATION OF GOVERNMENTAL POWERS* (1893) 46.

slowly and always incompletely as interests clashed and official burdens multiplied.²⁵ No consistent separation has in fact emerged.²⁶

It may be argued, however, that whatever may have been the case historically, it is possible today to separate governmental processes, or functions, into three classes which correspond to the three departments of government and to assign each class to the proper department. It may be contended that the fathers sensed the possibility of such a classification, even if they did not fully develop it, and that the realization of the separation of powers today demands an end to the "commingling of functions" in the hands of administrative agencies. To test the validity of such a contention requires an exploration of the possible bases for classifying governmental "functions" into categories.

The members of the assumed triad of functions can be defined with reference either to their roles in the governmental process, to the mechanics of their performance, or to the official acts in which they eventuate. Thus, legislation may be either the formulation of the will of the government, or law-making; the deliberative methods usually employed in the framing of statutes; or the enactment of general regulations. Similarly, adjudication, or the "judicial" function, may be the determination of particular rights and duties according to law, the method of hearing and deciding cases and controversies, or the formulation of judgments or orders of specific application. It is also possible to define functions with reference to the authorities performing them, and this is perhaps the traditional way of distinguishing legislation from other governmental functions.²⁷ But, obviously, such a definition furnishes no means of determining who are the authorities that should be performing these functions. All of the enumerated definitions of legislation and adjudication have been advanced at various times by different writers and courts.

That legislation is the formulation of the will of the government is the essence of the Benthamic analysis, the purpose of which is to lay bare the bases for wise legislation from the standpoint of utility.²⁸

²⁵ ALLEN, *LAW IN THE MAKING* (1927) 245; MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* (1883, pub. 1926) 60-75, 90-92, 133-137, 179-190, 195-226, 245-246, 251-275, 292-320, 383-421; MCLWAIN, *HIGH COURT OF PARLIAMENT* (1910) vii-viii, 22, 216 *et seq.*, 313-328; Goebel, *Constitutional History and Constitutional Law* (1938) 38 COL. L. REV. 555, 559, n. 11; Weeks, *Legislative Power Versus Delegated Legislative Power* (1937) 25 GEO. L. J. 314, 319-322.

²⁶ Carpenter, *The Separation of Powers in the Eighteenth Century* (1928) 22 AM. POL. SCI. REV. 32, 36-37. "The more we study our constitution in the present or in the past, the less do we find it conform to any such plan as a philosopher might invent in his study." MAITLAND, *op. cit. supra* note 25, at 197. As to the present blending of the legislative and executive departments, see *id.* at 382-387, 392-403, 415.

²⁷ Akzin, *The Concept of Legislation* (1936) 21 IOWA L. REV. 713, 728.

²⁸ BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789) cc.I-IV; intro. to *id.* (2d ed. 1823). Montesquieu's conception of legis-

Neither Bentham nor Austin, whose philosophy is linked with his, denied the creative capacity, or legislative quality, of the authoritative decision of particular cases, when uncontrolled by prior statutes.²⁹ Bentham advocated statutes in preference to decisions as means of creating law, because of their asserted superiority in clarity and knowability and the greater rationality and completeness which are attainable by means of them.³⁰ Bentham, in short, was concerned with the content of legislation, however effected, and with statutes as the best form of legislation. He was not led into an identification of legislation, considered as law-making, with legislation as a "power" exercised by a particular branch of the government.

The definition of legislation as law-making is not greatly different from the oft-repeated modern view that it involves determining what the law "shall be".³¹ Sometimes it is said that legislation is the function of determining policy—and it is noteworthy that the classic analysis of governmental functions into policy-determining and policy-executing accords the executive a full share in the former.³²

Related to the foregoing definitions of legislation is the more juristic one, that: "Legislation is the creation by the state of a right, . . . duty, or status not dependent on the existence of a previous right, duty, or status. . . ." ³³ By contrast, "Adjudication is the imposition of a specific duty *in personam*, or of a liability, or the granting of a right or status which is dependent on a previous right or duty, in that it is imposed by way of giving effect to a right or duty determined to exist or to have existed, or by way of redress or punishment for its violation."³⁴ Thus law-making and law-executing, policy-determining and policy-executing, right- and duty-creating and right- and duty-declaring, which

lation seems to have been on the whole the same. Cf. WILLOUGHBY, PRINCIPLES OF LEGISLATIVE ORGANIZATION AND ADMINISTRATION (1934) 20: "Properly speaking, the legislative function is simply that of law making." See also BONDY, *op. cit.* *supra* note 14, at 41.

²⁹ AUSTIN, JURISPRUDENCE (1861) 10, 23, 148-149; BENTHAM, COMMENT ON THE COMMENTARIES (ed. Everett, 1932) 125, 168, 190.

³⁰ *Id.* at 187, 213-214; BENTHAM, THEORY OF LEGISLATION (ed. London 1931) 156-157. Compare BENTHAM, CONSTITUTIONAL CODE, 9 WORKS (1843) 8.

³¹ WILLOUGHBY, *op. cit. supra* note 21, at 1264, quoting Mr. Justice Field, dissenting, in *Sinking-Fund Cases*, 99 U. S. 700, 761, 25 L. ed. 496, 516 (1879); *Cincinnati, W. & Z. R. R. v. Commissioners*, 1 Ohio St. 77, 88 (1852), quoted in *Hampton & Co. v. United States*, 276 U. S. 394, 407, 48 Sup. Ct. 348, 351, 72 L. ed. 624, 629 (1928).

³² GOODNOW, PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES (1905) 325.

³³ Green, *Separation of Governmental Powers* (1920) 29 YALE L. J. 369, 373.

³⁴ *Ibid.* "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. . . . Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power." *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 226, 29 Sup. Ct. 67, 69, 53 L. ed. 150, 158 (1908).

are alternative statements of the same concepts, stand in contrast to each other in one classification of the functions of legislation and adjudication.

When the basis of classification is shifted from the office of these functions to the methods whereby they are carried on, the definition of legislation becomes less clear-cut. It is evident, however, that deliberation upon numerous factors entering into a legislative determination is the essence of the matter. "Consultation is necessary in the making of laws. The defect or grievance they are intended to remove must be distinctly perceived, and the operation of the remedy upon the interests, the morals, and the opinion of the community profoundly considered."³⁵ The corresponding definition of adjudication is more clearly put. "Generally speaking I understand the judicial function to be the power to hear and determine a controversy and the power to make a binding decision, sometimes subject to appeal, which may affect the person or property or other rights (interests) of parties involved in the dispute."³⁶ In this view, a function is "judicial" despite its involvement of policy-determination or the issuance of a "rule of conduct" as its end product, if the adversary type of hearing is employed in its performance,³⁷ i.e., if a "controversy" in some technical sense is present. Conversely, an investigation of a claim by non-adversary methods is not an adjudication, even though the matter was susceptible to treatment as a controversy.³⁸

Definitions of legislative and adjudicative functions upon the basis of the official acts in which they eventuate have been more usual re-

³⁵ 1 KENT, COMMENTARIES (12th ed. 1873) 271. See also 1 GOODNOW, COMPARATIVE ADMINISTRATIVE LAW (1893) 10; 1 WILSON, WORKS (ed. Chicago, 1896) 358. To the end of securing the proper deliberation, the representative assembly "should be in miniature an exact portrait of the people at large" so as to mirror their thoughts and interests and "to do strict justice at all times". ADAMS, *Thoughts on Government* (1776) in 4 WORKS (1851) 195. "There is an obvious difference between legislative determination and the finding of an administrative official not supported by evidence. In theory, at least, the legislature acts upon adequate knowledge after full consideration and through members who represent the entire public." *Southern Ry. v. Virginia*, 290 U. S. 190, 197, 54 Sup. Ct. 148, 151, 78 L. ed. 260, 266 (1933).

³⁶ Wm. A. Robson, testifying before the Committee on Ministers' Powers. Minutes of Ev. (1932) 64. In the ensuing discussion Dr. Robson defended his view that "controversies", to which the hearing and appeal procedure should apply, can be recognized and distinguished from other issues arising in the course of administration. *Id.* at 64, 81. As to the confusion in the American cases see DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* (1926) 4 n.

³⁷ "The knowledge of facts upon which legislative action is based, exists, for the most part, in the minds of the members, and they depend very little upon facts specially communicated by evidence. . . . On the other hand, courts can only act upon knowledge of facts communicated upon the trial by evidence." Benton, *The Distinction between Legislative and Judicial Functions* (1885) 8 A. B. A. REP. 261.

³⁸ *United States v. Ferreira*, 13 How. 40, 14 L. ed. 42 (U. S. 1851); cf. *La Abra Silver Mining Co. v. United States*, 175 U. S. 423, 20 Sup. Ct. 168, 44 L. ed. 223 (1899).

cently than either of the types of definitions just discussed. General rules on the one hand and, on the other hand, orders or official acts which by their terms are directed to specified situations or individuals are the principal types of governmental acts for this purpose. The former seem to bear an analogy to statutes, the latter to the judgments and decrees of courts. It is natural, therefore, to speak of these acts as legislative and judicial. Legislation, it is said, "consists of an abstract formulation of a general rule";³⁹ "adjudication operates concretely upon individuals in their individual capacity".⁴⁰

The last-mentioned conception of legislation and adjudication prevails in writings which stress the "commingling of functions". Thus, the 1934 report of the American Bar Association committee takes the view that legislative functions consist of "the formulation of rules and regulations and the modification thereof to keep pace with progress".⁴¹ Adjudication, on the other hand, is "the application of law to particular individuals on particular states of facts".⁴²

Executive functions have not been similarly defined. Although the final execution of the will of the state is sometimes said to be the essence of the executive function, it has never been supposed that the hangman, the sheriff, and the soldier were the sole, or even the principal, functionaries in the executive department. In truth, the variety of the determinations, processes, and acts of the executive has always been so great that they could not possibly be crowded into a single category, upon whatever basis. Since it is seldom contended in these days that executive functions are wrongly reposed in other departments,⁴³ it is not necessary to identify them with precision for present purposes.

The foregoing review of the possible definitions of legislative and judicial functions demonstrates the invalidity of contending that the "commingling" of these functions, however defined, in the hands of the executive is a violation of the separation of powers. All of the functions have always been exercised in conjunction by each of the

³⁹ ALLEN, *LAW IN THE MAKING* (1927) 238; WILLIS, *THE PARLIAMENTARY POWERS OF ENGLISH GOVERNMENT DEPARTMENTS* (1933) 49.

⁴⁰ DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* (1926) 21. Dickinson warns specifically against identifying the function of adjudication as thus defined with "a function which our courts have pronounced to be 'judicial' for constitutional purposes". *Id.* at 22. It is essential to the latter that it eventuate in judgments that are enforceable without further resort to legislation or discretionary administrative action. *Gordon v. United States*, 2 Wall. 561, 17 L. ed. 921 (U. S. 1865).

⁴¹ *Report of the Special Committee on Administrative Law* (1934) 59 A. B. A. REP. 539, 543. See also 58 *id.* at 410 (1933), 61 *id.* at 727 (1936).

⁴² 61 *id.* at 726 (1936), quoting an address by Dickinson before the Judicial Section of the American Bar Association.

⁴³ Occasionally, of course, the judiciary resists the imposition upon it of duties that are more properly "legislative", or non-judicial. See Fuchs, *Concepts and Policies in Anglo-American Administrative Law Theory* (1938) 47 YALE L. J. 538, 555.

departments. No one has even supposed that the executive does not determine policy as well as the legislature; that courts do likewise, although in lesser degree, is now familiar learning. Rights must be determined by executive officers as well as courts. Any policy-determining body in the executive branch must employ deliberative processes resembling in some degree those of the legislature. A dispute before an executive agency must be resolved pursuant to a framing of issues, an investigation, and a decision that can differ in name and in incidentals, but not in fundamental nature, from the elements that reside in judicial methods. The public must always be informed by ordinances, orders-in-council, or executive regulations, and by rules of court,⁴⁴ as well as by statutes, what is expected of it in certain situations. An executive officer or board, no less than a court, would be at a loss how to proceed if its commands could not be communicated to persons named therein. In short, the various definitions of legislative and judicial functions embrace virtually all the possible processes of government. Each of them includes processes that no branch of the government can dispense with. It certainly is not the purpose of the separation of powers to take away from any department those means of doing its work which it has always employed and must continue to employ if it is to carry on its tasks.

If, as seems to be the case, the "commingling of functions" in a governmental agency, whether "administrative" or not, does not fall under the condemnation of the separation of powers, there is no occasion to refer to administrative agencies as a "fourth branch" of government.⁴⁵ Structurally they are, for the most part, clearly in the executive branch, performing, as do practically all executive agencies, the tasks entrusted to them by the legislature. Even the "independent" boards and commissions do not occupy a unique position, for independent authority in the uncoordinated heads of a plural executive is common in American state government. The sole constitutional problem related to the separation of powers that surrounds any of these agencies to a greater extent than other agencies grows out of the fact that the "independent" federal agencies seem to violate the constitutional provision which vests the entire executive power in the President.⁴⁶ Partly for this reason, these agencies are often referred to as legislative and as designed to carry on the work of Congress. If this is a sound view, it need occasion no concern that legislative agencies

⁴⁴ For a discussion of the constitutional questions surrounding the rule-making power of the courts, see Williams, *The Source of Authority for Rules of Court Affecting Procedure* (1937) 22 WASH. U. L. Q. 459.

⁴⁵ Or to exempt them from the doctrine of the separation of powers. Berle, *The Expansion of American Administrative Law* (1917) 30 HARV. L. REV. 430.

⁴⁶ President's Committee on Administrative Management, Report (1937) *passim*.

are carrying on order-issuing and licensing, as well as rule-making, functions. Legislatures themselves have traditionally performed all of these.⁴⁷

To maintain that the separation of powers does not inhibit the "commingling of functions" is not to contend that the doctrine has no application to administrative agencies. It has exactly the same meaning for them as for other governmental agencies—a meaning which centers, as the history of the doctrine indicates that it should, upon *power*. Under our system of government, no agency should be permitted to exercise a degree of power, in relation to small matters or large, which renders it unduly dangerous to human freedom. Governmental authority with respect to any subject must be divided, or its exercise checked upon, in such a way as to minimize the danger of abuse. Thus understood, the doctrine of separation is practical in nature and not confined by any logical scheme. It is political rather than legal and only to a slight extent enforceable by courts. In relation to administration, its chief significance lies in a limitation, which the courts at times undertake to enforce, against the vesting of too broad a discretion in executive officers.⁴⁸ The exercise of adequate discretion for dealing with the problems of a complex society and the simultaneous provision of sufficient safeguards against the abuse of discretion are the two clearest needs of modern democratic government.⁴⁹ The separation of powers has a role to play in preventing the second of these needs from being ignored.

III. A REORIENTATION

If, then, the traditional constitutional doctrines fail as the basis of an acceptable approach to administrative law, the question of a satisfactory alternative naturally arises. It was suggested at the beginning of this article that a newer approach to administrative law has arisen which takes account of practical considerations relating to the operation of administrative agencies. But one naturally asks, practical considerations from the standpoint of what interests and with respect to what agencies? For, clearly, not all that government affects and not all of

⁴⁷ Haines, *The Adaptation of Administrative Law and Procedure to Constitutional Theories and Principles* (1940) 34 AM. POL. SCI. REV. 1, 5. The 70th Congress by special acts granted 376 permits for the construction of bridges over navigable rivers. Fuchs, *The Quantity of Regulatory Legislation* (1930) 16 ST. LOUIS L. REV. 51, 54.

⁴⁸ In the guise of invalidating delegations of "legislative" power. Fuchs, *Concepts and Policies in Anglo-American Administrative Law Theory* (1938) 47 YALE L. J. 538, 545.

⁴⁹ Marx, *Comparative Administrative Law: A Note on Review of Discretion* (1939) 87 U. OF PA. L. REV. 954; Marx, *Comparative Administrative Law: Economic Improvisation by Public Authorities* (1940) 88 U. OF PA. L. REV. 425.

the agencies of government are embraced in the study of administrative law, and the term "administrative" remains to be defined.

It has been suggested that the newer, specialized "tribunals" which exercise regulatory power over particular industries or over particular phases of economic activity are the significant administrative agencies.⁵⁰ But this approach minimizes an imposing array of economic regulatory agencies that have existed for a much longer time,⁵¹ as well as agencies, old and new, which affect non-economic aspects of life.⁵² Unless there are significant differences between the functioning of the indicated newer agencies and those which are left out of the picture, there seems to be no justification for making this distinction. Certainly there is no line of demarcation between the suggested sets of agencies in the organization of the government, for some of those selected as "administrative" are contained in the regular departments⁵³ while others are "independent". Nor do any of those chosen for inclusion have tasks to perform or functions to carry out which cannot be duplicated in the agencies omitted. The distinction seems arbitrary and lacking in significance.

The basis for a reorientation is supplied by the fact that the present transcending interest in administrative law arises out of the increased application of governmental authority to private activity through non-judicial agencies. For a number of decades prior to 1887, the year of the Interstate Commerce Act, the "capitalist-constable" conception of the state⁵⁴ had actually prevailed in the United States and had generated in the minds of men, and especially of lawyers, the view that the final decision of governmental matters affecting the citizen lay exclusively with the courts,⁵⁵ carrying out directly the mandates of the legislature. When, therefore, agencies in the executive branch began to exercise rule-making powers and to deal authoritatively with private interests on a new and larger scale, it seemed as though the fundamental character of the government were being changed. As this tendency increased, the opposition to it grew. Both reached a culmination in the New Deal in this country as they had in England a few years earlier.

⁵⁰ LANDIS, *THE ADMINISTRATIVE PROCESS* (1938).

⁵¹ Notably in the field of banking and in the licensing of occupations. Regulation of safety at sea, which has important economic consequences, has prevailed since at least the early part of the nineteenth century.

⁵² Notably health and taxing authorities and those in control of immigration, penal institutions, and poor relief.

⁵³ Especially those in the Department of Agriculture which regulate agricultural marketing.

⁵⁴ Beard, *Individualism and Capitalism* (1930) 1 ENCYC. SOC. SCIENCES 145, 161. See LYON, WATKINS, AND ABRAMSON, *GOVERNMENT AND ECONOMIC LIFE* (Brookings Institution, 1939) c. II.

⁵⁵ FREUND, *THE GROWTH OF AMERICAN ADMINISTRATIVE LAW* (1923) 17.

It would be out of place to review again the oft-repeated story of the clash between increased governmental regulation and the earlier conception of the state. Its economic roots are evident and its outgrowth in present legislative proposals for curbing "bureaucracy" and in the opposition to them is a subject of much comment.⁵⁶ It is important, however, to point out the falsity of the assumption that control through executive agencies is something new. Taxation, the licensing of trades, and drastic powers to safeguard health and safety, to say nothing of the price- and wage-fixing that were only a few decades removed, had been exercised continuously all through the heyday of *laissez faire*. In the exercise of these and other governmental powers the executive branch, as previously pointed out, had exercised all of the "functions", however defined, which all branches of government must always employ if they are to carry on their tasks. The phenomenon that was new to those who reacted naively against it was the large-scale regulation of private interests through executive agencies. In that fact lies the clue to a realistic approach to "administrative law".

Administrative law is simply the law which establishes the procedure and methods of the executive branch of the government in its contacts with private interests and provides for judicial checks upon its authority. It has its roots deep in the past and embraces old agencies as well as new. It has come into prominence recently because of the increased importance of the executive in relation to private affairs. Its recent applications are on so much larger a scale than before that many of its problems take on a new aspect, but they are no more unrelated to what has gone before than modern corporate reorganization is unrelated to the more primitive law of bankruptcy.

Thus defined, administrative law is distinguishable both from the substantive law which administrative agencies apply and from the law of public administration which orders the internal affairs of the executive branch. The use of the term "administrative law" in a distinct sense from the "law of public administration" is obviously arbitrary; yet it is justified by the existence of two fairly distinct sets of considerations attaching to the two fields of law. The procedure of executive agencies in dealing with private interests is quite a different matter from the questions of personnel administration, budgetary procedure, administrative management, and the like, with which the law of public administration is concerned.

⁵⁶ Fuchs, *Current Proposals for the Reorganization of the Federal Regulatory Agencies* (1938) 16 TEX. L. REV. 335; Haines, *The Adaptation of Administrative Law and Procedure to Constitutional Theories and Principles* (1940) 34 AM. POL. SCI. REV. 1, *passim*; Jaretzki, *The Administrative Law Bill; Unsound and Unworkable* (1940) 2 LA. L. REV. 1; McGuire, *The American Bar Association's Administrative Law Bill* (1939) 1 LA. L. REV. 550.

There is, of course, a border zone of considerable size between the two areas. Both considerations relating to procedure in dealing with private interests and considerations of administrative efficiency affect the problem of governmental organization—witness the controversy over the advisability of “independent” regulatory agencies.⁵⁷ Some phases of personnel administration and of the law relating to public officers affect the personal interests of officials to such a degree as to involve them, in effect, as private individuals in relation to the government.⁵⁸ Still more noteworthy is the fact that in the modern “service state” many aspects of governmental management, involving the administration of publicly-owned utilities, of the public domain, or of state pension and insurance systems, affect individual welfare to a marked degree, if not private “rights” in the strict sense. These cannot be left out of the picture of either administrative law or the law of public administration.

Another possible source of ambiguity in the suggested definition of administrative law lies in the fact that it relates to the procedure of executive, as distinguished from legislative and judicial, agencies and in the further fact that these are not always readily distinguishable. The Supreme Court has been unable to evolve a clear means of recognizing a fully judicial court as distinguished from one which engages in administration,⁵⁹ and it is common to state that some administrative agencies perform legislative work and are in a sense arms of the legislature. Ordinarily, however, it is not difficult to determine when an agency is executive by reason of its place in the organization of the government. For present purposes, that fact will suffice.

It is, moreover, not primarily a definition but a working concept of administrative law which is here being sought. And an approach that is oriented about the involvement of private interest in executive proceedings directs attention to those problems that have a distinct significance. Hence, such an approach gives unity to the subject and permits its boundaries to be determined by practical considerations. Obviously, it should be taken to include procedure in rendering public services and administering benefits;⁶⁰ for the same necessity for maintaining efficient, fair procedure in dealing with persons not in the public service exists in these areas of administration as in the field of regulation.

⁵⁷ Fuchs, *Current Proposals for the Reorganization of the Federal Regulatory Agencies* (1938) 16 *Tex. L. Rev.* 335, *passim*.

⁵⁸ This is obviously true in relation to pension rights, separation from the service, etc.

⁵⁹ *Ex parte Bakelite Corp.*, 279 U. S. 438, 49 Sup. Ct. 411, 73 L. ed. 789 (1929); *O'Donoghue v. United States*, 289 U. S. 516, 53 Sup. Ct. 740, 77 L. ed. 1356 (1933); *Williams v. United States*, 289 U. S. 553, 53 Sup. Ct. 751, 77 L. ed. 1372 (1933).

⁶⁰ See, e.g., the careful provisions of Title II of the amended Social Security Act with respect to procedure in contested old age and survivors insurance cases. 53 *STAT.* 1362, 42 U. S. C. A. §401 *et seq.* (Supp. 1939).

Given such an approach, the investigation of problems of efficiency and fairness in administrative procedure and judicial review and the formulation of improved methods can proceed realistically, unhampered by the unwarranted application of constitutional doctrines. The purpose will be to promote the legitimate public and private interests attaching to administration and not to preserve or to ascertain the fate of supposed governmental norms. The problems to be dealt with will be defined with reference to specific agencies, particular interests which come under the control of the executive, or identifiable functions performed by administrative agencies.⁶¹ To prevent confusion and misunderstanding the processes, or functions, of administrative agencies should not be referred to as "legislative" or "judicial", even when these terms are "softened by a quasi". The dead weight of alleged separation-of-powers limitations should be cast overboard finally and definitively, bag and baggage.

Not only will the study of administrative law be released by this means, but the constitutional limitations themselves will be given renewed vitality. Freed from the obscuring fog of fictitious doctrine,⁶² their actual meaning will stand forth more clearly for legislatures, administrative officers, courts, and critics⁶³ to perceive. Correctly understood, constitutional limitations recall those enduring human interests which government exists to further and which no administrative scheme should be allowed to strike down.

⁶¹ Fuchs, *Procedure in Administrative Rule-Making* (1938) 52 HARV. L. REV. 259. The only comprehensive attempt to define administrative functions that seems thus far to have been attempted in English is that of the late Ernst Freund. See FREUND, *ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY* (1928).

⁶² For a keenly written, vigorous attack upon "the judicial gloss which has been superimposed upon" the doctrine of the separation of powers in order "to place obstructions in the way of the incipient efforts to bring under control some of the unjust and destructive tactics of an industrial regime which were beyond effective control by the ordinary legal processes", see Haines, *The Adaptation of Administrative Law and Procedure to Constitutional Theories and Principles* (1940) 34 AM. POL. SCI. REV. 1, 5.

⁶³ As to the role of these several classes of individuals in relation to administrative procedure, see the remarks of the present writer in *Symposium on Administrative Law* (1939) 9 AM. L. SCHOOL REV. 139-144.