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ADMINISTRATIVE RULES—INTERPRETATIVE, LEGISLATIVE, AND RETROACTIVE

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ADMINISTRATIVE agencies make rules which if valid have the full force of law, they issue interpretative rules having varying degrees of authoritative weight, they publish many kinds of announcements and releases and opinions and rulings whose legal effect is frequently unclear, and they establish and follow practices and usages which in some practical respects are almost the equivalent of rules.

This article will discuss (1) the nature of administrative rules, the efforts at definition, and the problem of interpreting the definition provided by the Administrative Procedure Act; (2) the vital but partially false theory concerning the distinction between legislative and interpretative rules; (3) some of the factors which especially affect the authoritative weight which courts give to interpretative rules; and (4) problems concerning the retroactive operation of both legislative and interpretative rules.

I. THE PROBLEM OF DEFINITION

Even before the Administrative Procedure Act added new obstacles to the task, probably no effort to provide a precise definition of the term "rule" was wholly successful. Yet its core of meaning is generally understood and may be simply described. A rule is the product of rule-making, and rule-making is the part of the administrative process that resembles a legislature's enactment of a statute. Adjudication is the part of the administrative process that resembles a court's decision of a case. Admittedly this analogy to statutes and to decisions of courts is imperfect and is of little use in trying to classify borderline or mixed activities. But precise definition in the abstract is not necessarily desirable, for the same function may well be regarded as rule-making for one purpose or in one context and as something else for some other purpose or in another context.[1] Here as elsewhere throughout the law a proper

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1. This is what the Supreme Court usually does. For instance, rate fixing for the future had been held legislative for various purposes in many cases. Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226 (1908); Ohio Valley Water Co. v. Ben Avon Borough,

classification requires that both the purpose and the effect of the particular classification be taken into account. For practical law-making, definitions must draw from special circumstances accompanying particular problems. Play in the joints of the case-to-case method is for this purpose especially meritorious, as it is in giving meaning to such concepts as "due process of law" and "income."

Often the best solution of the problem of classifying borderline activities is to avoid classifying them—to skip the labelling and to proceed directly to the problem at hand. Thus, if the problem is to determine appropriate procedure for a particular activity, the practical procedural needs may be studied without calling the activity either rule-making or something else; usually nothing will be lost if the activity is regarded as borderline or mixed or unclassifiable.

One of the most helpful definitions of rule-making is that of Professor Fuchs, who concludes that rule-making should be defined as "the issuance of regulations or the making of determinations which are addressed to indicated but unnamed and unspecified persons or situations." [2] Another definition is that of Mr. Dickinson: "What distinguishes legislation from adjudication is that the former affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitely touched by it; while adjudication operates concretely upon individuals in their individual capacity." [3] A definition which has produced many unsatisfactory practical results [4] is that of Mr. Justice Holmes: "a judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. 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. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial. . . ." [5]

Each of these efforts at definition is (necessarily, probably) in some way lacking in precision. Rules are typically designed to apply to unnamed parties, but, like private bills enacted by a legislature, rules

253 U.S. 287, 289 (1920); St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 50 (1936). But when the question came along as to what procedure should be followed for fixing stockyard agencies' rates, the Court said that, for that purpose, fixing rates for the future called for "quasi-judicial" procedure. *See* Morgan v. United States, 298 U.S. 468, 480 (1936).

2. Fuchs, *Procedure in Administrative Rule-Making*, 52 HARV. L. REV. 259, 265 (1938).

3. DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW 21 (1927).

4. For a sample of an undesirable consequence of this definition, a case permeated with conceptualism and unrealism, *see* Oklahoma Packing Co. v. Oklahoma G. & E. Co., 309 U.S. 4 (1940).

5. Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226 (1908).

or amendments of rules may sometimes be directed to a problem of a named individual or a small group.[6] Adjudications are typically designed to apply to named parties, usually only a few, but, like cases in courts, adjudications may involve hundreds or thousands of parties, and members of classes need not necessarily be named.[7] Rules may often need to be applied in a further proceeding before the legal position of any individual will be definitely touched by them, but, like statutes, rules are normally obeyed without enforcement proceedings, just as adjudications ordinarily guide conduct without enforcement proceedings. Rules ordinarily look to the future, although, like statutes, they are occasionally retroactive.[8] Relatively, adjudication looks backwards, typically applying law and policy to past facts, but, like equity decrees, declaratory judgments, and even orders to pay money, adjudications may be primarily concerned with the future.

Attempted definitions of rule-making usually try to differentiate between rule-making and adjudication and do not attempt to draw a line between interpretative rules [9] and various kinds of announcements, interpretations, opinions, releases, rulings, practices, usages, and policies. Something that either is akin to rule-making or is rule-making takes place when particular courses of official action are repeatedly followed. More than a century ago the Supreme Court observed that "usages have been established in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits." [10] In the Portal-to-Portal Act of 1947, Congress gave a special legal effect to "any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency." [11] Congress was relieving employers from liability under the Fair Labor Standards Act, the Walsh-Healey Act, and the Bacon-Davis Act when they act in good faith in reliance on the administrative interpretation. Therefore an "administrative practice or enforcement policy," even when unannounced or wholly negative, may sometimes have about the same effect as a formal rule.

An agency may announce policies in connection with deciding cases,

6. Thus, § 3 (a) of the Administrative Procedure Act, 60 STAT. 237, 5 U.S.C.A. § 1001 (1946), provides for publication in the Federal Register of certain rules, "but not rules addressed to and served upon named persons. . . ." See discussion of the Act, p. 924 *et seq. infra.*

7. For instance, FED. R. CIV. P., 23(a) allows class actions in certain circumstances "if persons constituting a class are so numerous as to make it impracticable to bring them all before the court."

8. See the discussion of retroactive rule-making, p. 944 *et seq. infra.*

9. See the discussion of the difference between legislative rules and interpretative rules, p. 928 *et seq. infra.*

10. United States v. Macdaniel, 7 Pet. 1, 14-5 (U.S. 1833).

11. 61 STAT. 88, 89 (1947), 29 U.S.C. §§ 258, 259.

or informally through press releases or reports or speeches, or formally through regulations. The practical effect of each of these three courses is often almost the same, and yet a good deal may hinge on the form. In *Columbia Broadcasting System v. United States*,[12] the Supreme Court divided five to three in holding that regulations of the Federal Communications Commission were a reviewable "order" though they merely announced a policy as to circumstances in which the Commission would deny licenses. The majority conceded that a mere press release would not be reviewable, and the minority argued that a press release would have the same practical impact. The majority, however, emphasized that the regulations were "avowedly" adopted in the exercise of the rule-making power, and that they were "couched in terms of command." The line was drawn largely in reliance on mere form. Under any view an attempt to distinguish a rule from an announcement of policy which is not a rule seems likely to yield a fuzzy product, as it did in the *Columbia Broadcasting* case. The Communications Commission issued in 1946 a pamphlet known as "the Blue Book"; as a statement of policies, it has many of the attributes of regulations, and yet technically its statements are not rules.[13] In some circumstances even a speech of a commissioner may have about the same effect as formal rules, especially if the speech authoritatively states enforcement or adjudication policy. If by any informal method a prosecuting agency makes known what it will not prosecute, the result is closely akin to a rule.

The term "ruling" signifies an interpretation or an application of a rule or statute or practice to a particular situation. Rulings usually have some of the qualities of both rules and decisions. Sometimes the important effect is establishment of a rule for the future, and sometimes the primary impact is on a named party. A local War Price and Rationing Board deciding who in wartime may buy a pair of rubber boots exemplifies the blending of rule-making with adjudication.[14] What the Federal Reserve Board calls "rulings" are said to "partake somewhat of the characteristics of individual case decisions, of interpretations, of advisory or advance opinions, and of implementations of the statutes and the regulations themselves." [15] Advisory opinions may have some or most or all of the characteristics of rules, as in various kinds of interpretative work in the Securities and Exchange Commission.[16] The

12. 316 U.S. 407 (1942).

13. Hearst Radio v. FCC, 165 F.2d 225 (App. D.C. 1948).

14. See Oppenheimer, *The War Price and Rationing Boards*, 43 COL. L. REV. 147 (1943).

15. ATT'Y GEN. COM. AD. PROC. MONOGRAPH, Part 9, *Federal Reserve System* 20 (1940).

16. The Federal Register for Sept. 27, 1946, contains a large compilation of SEC interpretative regulations and related materials, called releases, letters or opinions of officers, letters of the Commission, statements of the Commission, and the like. See

Wage and Hour Division issues interpretative bulletins of a general character, and other statements which are general or specific or mixed—opinion letters, opinions of the Solicitor's office and "releases".[17]

In the Treasury Department's arsenal of rules and rulings of varying dignity, not only does the relative weight of each type of pronouncement remain uncertain but frequently amendments of rules cannot be distinguished from interpretations or new applications. That "Regulations" are amended by "Treasury Decisions" reflects the merger of rule-making with informal adjudication. Regulations and Treasury Decisions are of higher dignity than memoranda of the General Counsel (G.C.M.'s), rulings of the Income Tax Unit of the Bureau of Internal Revenue (I.T.'s), and "Mimeographs." The Department's Cumulative Bulletin formally cautions that the various rulings show "the trend of official opinion in the administration of the Bureau of Internal Revenue; the rulings other than Treasury Decisions have none of the force or effect of Treasury Decisions and do not commit the Department to any interpretation of the law which has not been formally approved and promulgated by the Treasury." [18] The difficulty is exemplified by the fact that the Supreme Court has quoted and applied the Treasury's words of caution,[19] has asserted that "departmental rulings not promulgated by the Secretary are of little aid in interpreting a tax statute," [20] and has given weight to I.T.'s [21] and to an opinion of the General Counsel.[22]

A few unanswered questions illustrate some remaining puzzles. If the Maritime Commission or the Reconstruction Finance Corporation through negotiation fixes the amount of a government subsidy, is the process rule-making or adjudication or neither? If the Civil Aeronautics Board after a formal hearing resembling a trial fixes airmail subsidies, is the nature of the function different because of the procedural methods? Does the nature of the function of awarding a subsidy depend upon whether the government is merely acting in its proprietary capacity or whether the statute creates a "right" in the recipient? Is the determination of what rate is reasonable adjudication when the purpose is reparation and rule-making when no reparation is involved? Does the classification of rate-fixing depend on whether reparation is insignificant or whether reparation is the main interest? Is inspection of an

Blair-Smith, *Forms of Administrative Interpretation under the Securities Laws*, 26 IOWA L. REV. 241 (1941).

17. See 2 CCH, LAB. LAW SERV. ¶ 33,000 *et seq.* (1946).

18. This caution appears in fine print in each issue of the Bulletin.

19. Helvering v. New York Trust Co., 292 U.S. 455, 468 (1934).

20. Biddle v. Commissioner, 302 U.S. 573, 582 (1938).

21. McFeely v. Commissioner, 296 U.S. 102, 108 (1935).

22. Helvering v. Wilshire Oil Co., 308 U.S. 90, 98 (1939). See Griswold, *A Summary of the Regulations Problem*, 54 HARV. L. REV. 398, 418 n.60 (1941), asserting that "Bureau practice is Bureau practice, and when it clearly appears and has been long-continued, it should be given effect regardless of the form in which it appears."

airplane or a ship or a locomotive adjudication even when it involves formulation of a new rule or a new application of an old rule? If in deciding a case the agency overrules a line of decisions thought of as a "rule," and announces a new "rule" for the future, is the agency engaged in rule-making? The War Production Board issued sweeping regulations without advance knowledge of what interests might be unfairly pinched, allowing "appeals" to its Industry Division and further to the War Production Board Appeals Board for exceptions or special modifications of regulations—were the appeals tribunals engaged in rule-making or adjudication or both? [23] Does it make any difference whether the order of the appellate tribunal takes the form of special dispensation to the applicant or whether the rule is formally modified? Is the process of determining broad policy or substantive law in the nature of legislation or rule-making no matter what kind of proceeding it is attached to, and is the process of finding disputed facts from conflicting evidence in the nature of adjudication no matter what kind of proceedings it is attached to?

Questions like these can be multiplied indefinitely. Sometimes rules are identifiable because they are unmixed with other administrative output. Sometimes rules are blended with decisions or with informal interpretations or with prosecuting or with supervising. Mixed or unclassifiable functions are constantly carried on satisfactorily without any definite labelling. When some practical question hinges on the label, then the label should be affixed with an eye to producing a good result in the particular case—and for many such functions the need for affixing the label may never arise.

If the legislators were omniscient and had at their disposal linguistic precision tools, the interpreter's function would involve no more than finding and applying the meaning of words. But since legislators can neither anticipate all problems nor define terms with minute exactness, judges must necessarily cooperate with legislators in trying to build a sound and workable system. Judges who rest interpretations solely upon abstract meanings of words fail to do their part as working partners with legislators. The meaning of such a term as "rule" must frequently depend not only upon word contexts but also upon practical contexts.

The Administrative Procedure Act.

One criterion for distinguishing rules from decisions has long been the idea that rules typically apply to unnamed parties but that decisions typically apply to named parties. The Administrative Procedure Act seems on its face to reject this criterion and to rely almost alto-

23. See O'Brian and Fleischmann, *The War Production Board Administrative Policies and Procedures* 13 GEO. WASH. L. REV. 1 (1944).

gether on the idea that rules must be of future effect. Section 2 provides:

> (c) "Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.
> (d) "Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.
> (e) "License" includes the *whole or part of any part* of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license.

The surprising feature lies in the words "or particular" in the definition of rule as "any agency statement of general or particular applicability and future effect. . . ." If these words "or particular" are literally applied, almost every process except licensing becomes rule-making. An order requiring specified affirmative action in the future, such as an order of the NLRB requiring the employer to reinstate employees with back pay, fits perfectly the Act's definition of "rule." [24] Yet prior to the Act such a proceeding was a typical example of adjudication. An ordinary award of money, either a determination requiring *A* to pay *B*, or a determination that *X* is entitled to a payment from government funds, comes within the Act's definition of "rule," literally interpreted—the essence of what has heretofore been regarded as adjudication. To interpret the Act as meaning that an award of reparation, or of workmen's compensation, or of a social security benefit is a "rule" would be nothing short of ludicrous. Such an interpretation would rob provisions of the Act relating to "adjudication" of virtually all meaning, for such provisions would apply to hardly anything except

24. The word "injunctive" in the definition of "order" would probably prevent a cease and desist order from being considered a rule, even under a literal interpretation. Of the addition of the word "injunctive," the House Committee explained: "This addition is prompted by the fact that some people interpret 'future effect' as used in defining rule making, to include injunctive action, whereas the latter is traditionally and clearly adjudication. It is made even more necessary that this matter be clarified because of the

a part of licensing. The reasons are overwhelming for giving the Act's definition some interpretation other than the strictly literal one, if the broad congressional intent is to be given effect.

The legislative history yields a satisfactory solution. In early drafts, "rule" was defined as "any agency statement of general applicability designed to implement. . . ." [25] The manifest purpose was to provide a definition which would adopt the accepted meaning. That purpose was never changed. True, the words "or particular" were added. But the legislative history is very clear as to the purpose of that addition. The House Judiciary Committee reported: "The change of language to embrace specifically rules of 'particular' as well as 'general' applicability is necessary in order to avoid controversy and assure coverage of rule making addressed to named persons." [26] The traditional meaning of the word "rule" remains,[27] and is clarified by the specific language of Section 2(c), but the words "or particular" are added to make sure that what has traditionally been regarded as a rule will still be a rule even though it has particular instead of general applicability.[28]

The words "or particular" were not intended to change into rule-making what has heretofore been regarded as adjudication. Those words mean no more than that what is otherwise rule-making does not become adjudication merely because it applies only to particular parties or to a particular situation.[29]

The overall result is that "rule" still has about the same meaning as it did before the Act, except that the Act clarifies some points that were

amendment of section 2(c) to embrace clearly particularized rule making. . . ." SEN. DOC. No. 248, 79th Cong., 2d Sess. 283 (1946).

25. *See e.g.*, the Senate Judiciary Committee Print of June, 1945, SEN. DOC. No. 248, 79th Cong., 2d Sess. 13 (1946). At page 14 the Senate Committee says: "The definition of rule making and rule follows essentially the definitions of the Federal Register Act. . . ." The clear intent was to make no change in the traditional meaning.

26. Appendix A of the House Committee Report, *id.* at 283, n.1.

See the more complete account of the legislative history in Ginnane, *"Rule Making," "Adjudication" and Exemptions Under the Administrative Procedure Act*, 95 U. OF PA. L. REV. 621, 622 *et seq.* (1947).

27. Great practical advantage, of course, will ensue from following the traditional meaning of the terms. Much can be said for the proposal of the Attorney General's Committee, whose bill merely used the term "rules" without defining it. REP. ATT'Y GEN. COMM. AD. PROC. 192 *et seq.* (1941). The same is true of the bill proposed by the minority of that Committee, which defined the word in terms of itself: "'Rules' means rules, regulations, standards, statements of policy. . . ." *Id.* at 218.

28. The addition of the words "or particular" came very late in the bill's history—after enactment by the Senate. The change came in a committee report dated May 3, 1946. SEN. DOC. No. 248, 79th Cong., 2d Sess. 283 (1946).

29. This interpretation is not only fully supported by the legislative history but it is a remarkably simple solution of the troublesome problem created by the words "or particular." That problem has caused considerable consternation. Many of the speakers and questioners at the New York University Institute were perplexed by it. See FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES (1947) *passim.*

doubtful. The definition of Professor Fuchs emphasizing "unnamed and unspecified persons or situations" [30] is still a good definition, except that under the Act a rule may also apply to named or specified persons or situations when it has enough other characteristics of a rule. Before the Act, the nature of licensing was doubtful;[31] under the Act all licensing functions are explicitly classified as adjudication. Before the Act, prescribing or approving plans of corporate reorganization might well have been regarded as adjudication, since that function is one which courts customarily perform; [32] under the Act approving or prescribing corporate or financial structures or reorganizations thereof is rule-making. Before the Act, prescribing rates and wages and prices for the future was probably legislative for most purposes [33] but nevertheless sometimes required a "quasi-judicial" procedure; [34] under the Act, the procedural requirements designed for adjudication do not apply to prescribing rates and wages and prices for the future. Before the Act, independent valuation proceedings, like those conducted over several decades to find the valuation of railroad properties, probably could not be classified definitely as either rule-making or adjudication; under the Act such proceedings are rule-making.

The Act by no means solves all problems of classifying proceedings as rule-making or adjudication. Most questions concerning classification of borderline and mixed functions still remain. Indeed, the Act adds some new difficulties to such problems. The same function may come within the Act's definition of rule-making and also within the Act's definition of licensing. The disposition of an application to the Wage and Hour Division for an exemption from wage and hour requirements is a rule, because it implements wage fixing for the future, and at the same time it is a license, which the Act defines as "any agency permit, . . . approval, . . . or other form of permission." A Federal Reserve Board "ruling" is a rule because it implements a statute, and it is also a license if it grants an approval or permit. Granting or denying an exception to the long-and-short-haul clause is licensing under the Act's definition, and it is also rule-making because it involves practices related to rates for the future.

Of course the way to solve problems of classifying activities which analytically fall into more than one category or into no category is to

30. Fuchs, *Procedure in Administrative Rule-Making*, 52 HARV. L. REV. 259, 165 (1938).

31. In Federal Radio Commission v. General Elec. Co., 281 U. S. 464 (1930), and in other similar cases, licensing was held non-judicial for purposes of determining whether de novo review was permissible.

32. *See* Reconstruction Finance Corp. v. Bankers Trust Co., 318 U. S. 163, 170-71 (1943).

33. Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 226 (1908).

34. Morgan v. United States, 298 U. S. 468, 480 (1936).

keep an eye on producing a good practical result in the particular case. The various provisions of Section 5 apply only to adjudication, never to rule-making. Courts' ideas about the desirability or undesirability of applying the requirements of Section 5 to a particular proceeding should assist the classification in each case.[35] Except when the meaning of authoritative words is beyond dispute, the choice of labels should depend largely upon judgments concerning practical results.

II. The Distinction Between Interpretative and Legislative Rules

The Administrative Procedure Act exempts "interpretative rules" from the Act's procedural requirements, without defining the term.[36] The meaning of the term must be found in case law, in practices of agencies, and in usage. Resort to such materials reveals a theoretical distinction which has played an important role but which has been sometimes ignored, a distinction which is weak in the borderland and in some respects is even positively misleading. Yet a full examination of the theoretical distinction is indispensable to understanding administrative rules.

According to the theory, legislative rules are the product of a power to create new law, and interpretative rules are the product of interpretation of previously existing law.[37] Legislative rules may change the law but interpretative rules merely clarify the law they interpret.[38]

35. This is probably the best way to carry out such congressional intent as is discoverable. See Ginnane, *"Rule Making," "Adjudication" and Exemptions Under the Administrative Procedure Act,* 95 U. of Pa. L. Rev. 621, 627 (1947): "Significantly, while the definitions of 'rule' and 'order' were being drastically rewritten, the principal operating sections—4, 5, 7 and 8—remained largely untouched. This suggests that the definitions were adjusted in order to fit the operating provisions to the needs of various agency functions, and that the rationalization of the definitions lies in the impact of those provisions upon various types of such functions."

36. Sec. 4(a).

37. For expositions of the distinction between legislative rules and interpretative rules, see Comer, Legislative Functions of National Administrative Authorities c. V (1927); Field, Columbia Income Tax Lectures 96-8 (1921); Lee, *Legislative and Interpretative Regulations,* 29 Geo. L. J. 1 (1940); Surrey, *The Scope and Effect of Treasury Regulations under the Income, Estate, and Gift Taxes,* 88 Univ. of Pa. L. Rev. 556 (1940); Alvord, *Treasury Regulations and the Wilshire Oil Case,* 40 Col. L. Rev. 252, 258 *et seq.* (1940).

The Attorney General's Committee on Administrative Procedure said: "Administrative rule-making . . . includes the formulation of both legally binding regulations and interpretative regulations. The former receive statutory force upon going into effect. The latter do not receive statutory force and their validity is subject to challenge in any court proceeding in which their application may be in question. The statutes themselves and not the regulations remain in theory the sole criterion of what the law authorizes or compels and what it forbids." Rep. Att'y Gen. Comm. Ad. Proc. 100 (1941).

38. See the discussion of the difficulties or impossibilities of translating this theory into practice, p. 932 *et seq. infra.*

Valid legislative rules have the same force and effect as valid statutes; the rules are valid if proper procedure is followed and if they are within the statutory and constitutional authority of the agency. Since interpretative rules theoretically do not embody new law but merely interpret previous law, they are valid only if the reviewing court finds the interpretation a permissible one. In theory, reviewing courts may no more substitute their judgment on policies declared by legislative rules than they may substitute their judgment on policies declared by statutes. But since interpretative rules are supposed to be merely interpretations of previous law, courts often deem themselves free to substitute their judgment as to content of interpretative rules. As will be detailed subsequently, however, the courts have evolved a number of doctrines to guide judicial self-restraint.[39]

Although assertions have been made that authority to make legislative rules must be specifically delegated,[40] and although such authority usually is not inherent in other administrative tasks, yet both legislative and interpretative rules may clearly rest upon statutory authority which is either express or implied. An agency with power to adjudicate may announce policies or rules it intends to follow; such an announcement often has the practical effect of legislative rules. This is essentially what the Federal Communications Commission did, for instance, in issuing chain broadcasting regulations.[41] The regulations provided that the Commission would grant no license to a station having specified relationships with networks. The Commission said the regulations "are nothing more than the expression of the general policy we will follow in exercising our licensing power. . . ." [42] The power to issue regulations governing the contractual relationships between stations and networks was not specifically conferred by the Act. To sustain the regula-

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Compare COMER, LEGISLATIVE FUNCTIONS OF NATIONAL ADMINISTRATIVE AUTHORITIES 29 (1927): "Administrative [legislative] rules, the very essence of complementary or detailed legislation, are those that appreciably add to the procedural or enforcing provisions of substantive law and are enforceable; they involve the discretion of a lawmaker on the part of the Executive; and their source of authority is found in a general statutory delegation of rule-making power, in a delegation of a general character for a particular law, or in a specific delegation for a particular provision of a law. Interpretative regulations supposedly express the true meaning of a statute or division thereof; they are not in themselves law. . . ."

39. For instance, the Supreme Court has said: "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially re-enacted statutes, are deemed to have received congressional approval and have the effect of law." Helvering v. Winmill, 305 U. S. 79, 83 (1938). That this statement goes somewhat further than later, better-considered decisions, see pp. 939–43 *infra*.

40. *E.g.*, Alvord, *Treasury Regulations and the Wilshire Oil Case*, 40 COL. L. REV. 252, 259 (1940). See also Brown, *Regulations, Reenactment, and the Revenue Acts*, 54 HARV. L. REV. 377, 384–5 (1941).

41. *Cf.* Columbia Broadcasting System, Inc. v. United States, 316 U. S. 407 (1942).

42. *Id.* at 411.

tions the Supreme Court was forced to look to the general purposes and framework of the Act.[43] Dissenting Justices said the Court had fabricated authority.[44] That the Court regarded the regulations as legislative and not merely as interpretative is proved by its remark concerning the scope of judicial review: "Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress." [45]

Although the power to issue interpretative regulations is commonly inherent or implied, it may be expressly conferred. A leading example of interpretative regulations is the huge bulk of tax regulations issued by the Treasury Department, most of which now rest upon Section 3791(a) of the Internal Revenue Code: "The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this title." [46] But many provisions of the tax regulations (one commentator counted 56 in the income tax law in 1940) [47] are legislative rules, because they spring from grants of power to create new law. For instance, Section 23(m) provides for a "reasonable allowance" for depletion "under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary." [48]

A prominent example of interpretative rules not resting upon a statutory grant of rule-making power is the Interpretative Bulletins of the Wage and Hour Division. Interpretative Bulletin No. 1, dealing with coverage, recites that the Act confers no power upon the Administrator to issue regulations concerning coverage, and that a draft of the bill providing for issuance of such regulations had been rejected. Nevertheless, the Administrator issued the Bulletin, explaining that it serves "to indicate merely the construction of the law which will guide the Administrator in the performance of his administrative duties, unless and until he is directed otherwise by authoritative ruling of the courts." Despite this disclaimer of power, the Supreme Court in 1940 said that the administrative interpretations are entitled to "great weight." [49] Then in 1944 the Supreme Court in a unanimous opinion discussed at length the effect of what it called the "interpretative regulations." [50]

43. *See* National Broadcasting Co. v. United States, 319 U. S. 190, 218–9 (1943).

44. *Id.* at 238.

45. *Id.* at 224.

46. See also INT. REV. CODE § 62.

47. Alvord, *Treasury Regulations and the Wilshire Oil Case*, 40 COL. L. REV. 252, 258 (1940).

48. 53 STAT. 14 (1939), 26 U.S.C. § 23 (1940). The Court apparently treated as legislative the rules issued pursuant to this provision, in Douglas v. Commissioner, 322 U. S. 275 (1944).

49. United States v. American Trucking Associations, Inc., 310 U. S. 534, 549 (1940).

50. Skidmore v. Swift & Co., 323 U. S. 134, 140 (1944).

The Court said the Interpretative Bulletin and the informal rulings "provide a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it," [51] but that "they are not, of course, conclusive." [52] After pointing out the silence of the statute as to what deference courts should pay to administrative interpretations, the Court declared: "The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." [53] This is decidedly different from the effect given to a legislative regulation issued by the same agency; a wage order, for instance, is binding upon the courts if the procedure followed is proper, if the order is supported by substantial evidence, and if it is within the agency's statutory and constitutional authority.[54]

The Portal-to-Portal Act of 1947, as we have seen, modified the Fair Labor Standards Act so as to give additional effect to administrative interpretations.[55] By the amendment Congress specifically recognized the difference between interpretative and legislative regulations. Before 1947 the courts were free to supplant the Administrator's interpretative bulletins with their own interpretations. The Administrator in his 1944 annual report stated the inadequacies of interpretative regulations: "At the present time, the Administrator has no power to issue authoritative interpretations of the general provisions of the Act. This is highly unsatisfactory because it means that an employer who complies with the Administrator's interpretation on a doubtful question can never be sure that he will not be subjected to liability in an employee suit. . . . Accordingly, I recommend that the Act be amended to give the Administrator power to make regulations necessary or appropriate to implement the Act's provisions. . . ." [56] No doubt an

51. *Id.* at 138.

52. *Id.* at 139.

53. *Id.* at 140.

54. *E.g.*, Opp Cotton Mills, Inc. v. Administrator, 312 U. S. 126, 154 (1941). The holding as to scope of review rested on the statutory provision. For a holding to the same effect, but not resting on a specific statutory provision, *cf.* National Broadcasting Co. v. United States, 319 U. S. 190, 224 (1943).

55. 61 STAT. 88, 89 (1947), 29 U.S.C.A. §§ 258, 259 (Supp. 1947). These provisions amend not only the Fair Labor Standards Act but also the Walsh-Healey Act and the Bacon-Davis Act.

56. WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS, ANN. REP. 7 (1944). The recommendation is renewed in the 1945 Annual Report at p. 1. The Administrator goes on to make the highly questionable statement: "It will be observed that the Treasury Regulations under the Revenue Acts are almost an exact precedent for the procedure now proposed." The trouble with this observation is that the bulk of the Treasury Regulations have about the same legal effect as the Wage-Hour Administrator's Interpretative

employer who complied with interpretative regulations and was still made a defendant in a suit by employees for double the deficiencies in back pay could see quite clearly that the distinction between interpretative and legislative rules has been not merely academic.[57] The Portal-to-Portal Act provides that an employer shall not be liable if he complied in good faith with any administrative interpretation, notwithstanding later modification or rescission of the interpretation or its invalidation by judicial authority. The effect is to give force of law to administrative interpretations in the employer's favor when the employer relies on them, but to withhold force of law from administrative interpretations which operate against the employer's interest; the regulations are now legislative for one purpose and remain interpretative for other purposes.[58]

Nearly all the regulations issued by the Secretary of Agriculture under the Food and Drug Act of 1906 concerning standards for food were interpretative—merely "a guide for officials of this department in enforcing the Food and Drug Act." [59] A long struggle for a grant of power to issue legislative regulations was partially won in 1930 [60] and fully won in 1938.[61] The differences between the interpretative regulations issued under the 1906 Act and the legislative regulations issued under the 1938 Act are very real, not merely theoretical.[62]

Although the theoretical distinction between legislative and interpretative rules is often clear, the practice does not always follow the theory, and in the borderland between the two kinds of rules, the differences, if any, are sometimes obscured or ignored. For instance, the Fair Labor Standards Act provides that the Act shall not apply "to any individual employed within the area of production (as defined by the Administrator), engaged in . . . canning of agricultural or horticultural commodities for market. . . ." [63] This provision grants power to

Bulletins. See Herman, *The Administration and Enforcement of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROB. 368, 378–9 (1939).

57. But compare the statement made editorially in KATZ, CASES AND MATERIALS ON ADMINISTRATIVE LAW 162 (1947): "Interpretative regulations bind the persons whom they purport to affect and the administrative agencies which promulgate them in the same manner and within the same limits as other types of regulations."

58. Compare the provision of the Securities Act quoted in note 165 *infra*.

59. Lee, *Legislative and Interpretative Regulations*, 29 GEO. L. J. 1, 9 (1940); Cavers, *The Food, Drug and Cosmetic Act of 1938; Legislative History and Substantive Provisions*, 6 LAW & CONTEMP. PROB. 2 (1939).

60. The McNary-Mapes Amendment, 46 STAT. 1019 (1930), 21 U.S.C. § 10 (1940).

61. The Food, Drug and Cosmetic Act, 52 STAT. 1040 (1938) 21 U.S.C. § 301 (1940).

62. Under the former Act courts have even held to be adulterated or misbranded food which complied with the Department's interpretative regulations. United States v. One Hundred Barrels of Vinegar, 188 FED. 471 (D. Minn. 1911); United States v. Six Barrels of Ground Pepper, 253 Fed. 199 (S.D.N.Y. 1917). The new Act provides that food is adulterated or misbranded if it fails to conform to the administrative regulations.

63. 52 STAT. 1067 (1938), 29 U.S.C. § 213(a) (1940). The Supreme Court held

make rules which if valid have force of law, and yet the test of validity is in part whether the rules properly interpret the statute. Rules issued under such a provision have some earmarks of interpretative rules and some earmarks of legislative rules; the theoretical distinction loses much of its practical utility.

Not merely in the borderland is the theory weak. The conception that interpretative rules do not embody new law but merely interpret previous law seldom accords with reality. Here as elsewhere the process of interpretation necessarily involves the creation of new law. A ready example is Section 22(a) of the Internal Revenue Code, which contains a one-sentence definition of "income," partly in terms of itself. The regulations supposedly interpreting this sentence contain detailed provisions concerning such subjects as sale of patents, annuities and insurance policies, discharge in bankruptcy, sale and purchase by a corporation of its own bonds. To say that such regulations "interpret" the statute is artificial; the regulations go far beyond the statute. The regulations draw not merely from the conventional materials of interpretation but from administrative experience, from policy considerations, and from court decisions. Pursuing Section 22(a) one step further leads to a spectacular example showing how law which is theoretically statutory interpretation may grow through the interaction of interpretative regulations and court decisions.

In 1945 the Treasury added the "*Clifford*" regulations to its regulations under Section 22(a).[64] The Supreme Court had held in the *Clifford* case of 1940 that a grantor was taxable on income of a five-year trust where the grantor had broad powers of management and the beneficiary was the grantor's wife.[65] The Court made clear that the result rested upon the combination of three factors, the short term, the control, and the immediate relationship of the beneficiary. The *Clifford* decision flooded the tax tribunals with cases involving variations of its facts, leading to what the Treasury regulation calls "considerable uncertainty and confusion." And the new Treasury regulations can hardly be called an attempted codification of the judicial decisions—far from it. The regulations disregard one of the three key elements of the *Clifford* case: whether or not the beneficiary is a member of the grantor's immediate family. The regulations abandon the idea that the various factors must

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the Administrator's regulations under this provision invalid in Addison v. Holly Hill Fruit Products, Inc., 322 U. S. 607 (1944). None of the three opinions in this case labels the regulations as interpretative or as legislative, but the majority says: "It is not for us to write a definition. That is the Administrator's duty." *Id.* at 619. This seems to indicate that the Court deemed the regulations to be legislative. Yet the Court held that the regulations to be framed to replace the invalid ones would be retroactive. See the discussion of the retroactive feature, p. 946 *infra*.

64. T.D. 5488 (1945), amended 1947, Regs. 111, 29.22 (a)-21.

65. Helvering v. Clifford, 309 U. S. 331 (1940).

be considered in combination. The regulations substitute precise tests for vague ones. Instead of pretending that the regulations are merely interpretations of previous law, the Treasury, by limiting the regulations to prospective operation, recognizes that the regulations do change the law. That the regulations are intended to be merely interpretative along with the bulk of other tax regulations seems beyond doubt. Yet they are clearly designed to make bold and abrupt changes in the law. The theory of interpretative rules is in this instance out of step with the practical realities.

The theoretical distinction between legislative and interpretative rules is imperfect, frequently without practical utility, and partially false. Yet that distinction, with all its faults, is the foundation for a large amount of living law. Probably no sensible issue can be drawn concerning the acceptance or rejection of the theoretical distinction. But the case law and the practices of the agencies can be gradually molded to get rid of the misconception that what is theoretically interpretation never involves the creation of new law.

III. Factors Which Vary the Authoritative Weight of Interpretative Rules and Practices

The supposition is common that legislative rules have the force of law and that interpretative rules do not. Much more accurate is the statement that legislative rules have the force of law [66] and that interpretative rules sometimes do. To be still more precise, we must depart from the uncertain concept of "force of law." Courts frequently give as much effect to interpretative rules as to legislative rules, and courts frequently find ways to set aside legislative rules. The idea of "force of law" ignores many refinements; an unappealed decision of a lower court has the force of law in its effect upon immediate parties but is only of some persuasive weight in another court. Even a decision of the highest court lacks force of law to the extent that an overruling may be retroactive. Meticulous analysis must avoid the dichotomy depending on force of law. A more significant inquiry is into degrees of authoritative weight. Legislative rules normally have greater authoritative weight than interpretative rules, but the authoritative weight of interpretative rules varies considerably. Courts are not supposed to substitute their their judgment as to content of legislative rules, but although courts are free to substitute their judgment as to content of interpretative rules they often refrain in varying degrees from doing so.

Degrees of authoritative weight of interpretative rules may depend upon such factors as the extent of judicial confidence in the particular agency and the relative skills of administrators and judges in handling

66. Assuming of course that the rules are promulgated in accordance with proper procedure and that they are within constitutional and statutory authority.

the particular subject matter. A complex interpretative rule relating to electrical interference which the FCC's engineers can best handle does not invite substitution of judicial judgment. Just as "perplexities, both geological and economic," [67] have impelled the Supreme Court to emphasize judicial self-restraint in a context of due process, so perplexities in any non-judicial field encourage judicial self-restraint in any context. At the other extreme are interpretative regulations dealing with questions on which judges are the experts. A good example is the Wage and Hour Division's Interpretative Bulletin dealing with coverage, depending upon limits of congressional power under the commerce clause and upon the meaning of such statutory phrases as "production of goods for commerce." Here it is hardly surprising to find courts reaching conclusions at variance with interpretative regulations, even without mentioning the regulations.[68] Probably most tax regulations lie between these extremes, and judges are free to give any degree of authoritative weight to the Treasury's views. One commentator regards the interpretative regulations as "the Treasury's guess as to what the law means," having "no more legal effect than the taxpayer's." [69] If this remark ever did reflect prevailing attitudes, which is doubtful, the recent tendency is to regard Treasury regulations with much greater respect.[70] Another writer has made an exceedingly persuasive argument for the proposition that interpretative tax regulations should prevail "in the absence of a clear showing of error." [71] This proposition probably does not yet embody existing practice, but the movement in the tax field is in this direction.

67. Railroad Commission v. Rowan & Nichols Oil Co., 311 U. S. 570, 574 (1941).

68. 10 East Fortieth St. Bldg., Inc. v. Callus, 325 U.S. 578 (1945); Chapman v. Home Ice Co., 136 F.2d 353 (C.C.A. 6th 1943), *cert. denied*, 320 U.S. 761 (1943); Hamlet Ice Co. v. Fleming, 127 F.2d 165 (C.C.A. 4th 1942), *cert. denied*, 317 U.S. 634 (1942). The last two cases hold that supplying ice within a state to refrigerator cars on interstate trains is producing goods for commerce. The opinions do not mention the Interpretative Bulletin to the contrary. The Commissioner later changed the Bulletin to conform to the decisions, but the change was limited to prospective effect after April 15, 1945.

69. Alvord, *Treasury Regulations and the Wilshire Oil Case*, 40 COL. L. REV. 252, 261 (1940). A good example of a case in which the Supreme Court seems to have adopted this view is Commissioner v. South Texas Lumber Co., 68 S.Ct. 695 (1948), where the Court said: "This Court has many times declared that Treasury regulations must be sustained unless unreasonable and plainly inconsistent with the revenue statutes. . . ." *Id.* at 698. The Court then discussed the statute, the legislative history, and the practice, and concluded: "We find nothing unreasonable in the regulations here." *Id.* at 700. The case of course does not mean that the Court will not in the future substitute its judgment for that of the Treasury in regulations whenever the Court's disagreement is strong enough.

70. Textile Mills Corp. v. Commissioner, 314 U. S. 326, 338-9 (1941); Magruder v. Washington B. & A. R. Corp., 316 U.S. 69, 73-4 (1942); Merchants Nat. Bank v. Commissioner, 320 U.S. 256, 260 (1943).

71. Eisenstein, *Some Iconoclastic Reflections on Tax Administration*, 58 HARV. L. REV. 477, 528 (1945).

Apart from such broad considerations, the weight given to interpretative rules depends upon various special circumstances.[72] Courts tend to give extra weight, often approximating "force of law," in various situations, three of the most important being: (1) when the administrative interpretation was made contemporaneously with the enactment of the statute by those who may have been familiar with the legislative intent, (2) when the administrative interpretation is of long standing, and (3) when the statute has been reenacted. These and other factors appear in the cases in nearly all possible combinations; they are separated here only for convenience of discussion.

(1) *Contemporaneous construction.* As early as 1827, interpreting a North Carolina statute of 1782, the Supreme Court declared: "In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect." [73] Cases thus giving weight to contemporaneous construction are legion.[74] A reliable modern statement is that of Mr. Justice Cardozo in *Norwegian Nitrogen Co. v. United States*:[75] "Administrative practice, consistent and generally unchallenged, will not be

72. One interesting special circumstance involves the agency's interpretations of its own legislative rules. Unless a rule-making procedure is followed and the rule specifically amended, an administrative interpretation of a rule, even if published as the controlling interpretation, is probably interpretative. But the science of interpretation of administrative rules—both administrative interpretation and judicial interpretation—is still in its infancy. An outstanding recent case is Bowles v. Seminole Rock & Sand Co., 325 U. S. 410 (1945), in which the question was how to interpret an OPA Price Regulation. The Court said: "The ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation. . . . Our only tools . . . are the plain words of the regulation and any relevant interpretations of the Administrator." Another view, which in an appropriate case is very likely to get approval of the Supreme Court, is expressed by a lower court in Southern Goods Corp. v. Bowles, 158 F.2d 587, 590 (C.C.A. 4th 1946): "It would be absurd to hold that the courts must subordinate their judgment as to the meaning of a statute or regulation to the mere unsupported opinion of associate counsel in an administrative department." Here as elsewhere, judges' views of the merits of particular cases are likely to govern choices among competing theories concerning degrees of judicial intervention. *Compare* Fleming v. Van Der Loo, 160 F.2d 906 (App. D. C. 1947), *with* Mechanical Farm Eq. Distributors v. Porter, 156 F.2d 296 (C.C.A. 9th 1946).

For a thorough and comprehensive treatment of this increasingly important subject, see Newman, *How Courts Interpret Regulations*, 35 CALIF. L. REV. 509 (1947).

73. Edward's Lessee v. Darby, 12 Wheat. 206, 210 (U.S. 1827).

74. Magruder v. Washington B. & A. Corp., 316 U. S. 69, 73 (1942); United States v. American Trucking Associations, Inc., 310 U. S. 534, 549 (1940); National Lead Co. v. United States, 252 U. S. 140, 145 (1920); United States v. Hill, 120 U. S. 169, 182 (1887). Typical is the language of Hassett v. Welch, 303 U. S. 303, 310–11 (1938). *But see*, rejecting the contemporaneous construction, Trust of Bingham v. Commissioner, 325 U. S. 365 (1945).

75. 288 U.S. 294, 315 (1933).

overturned except for very cogent reasons if the scope of the command is indefinite and doubtful. . . . The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new."

One of the most revealing cases is *White v. Winchester Country Club.*[76] The question was whether certain payments to a club were taxable. The Treasury's contemporaneous regulations provided they were. Six years later a district court held they were not. "During a period" after that decision the Treasury complied with it. Congress then reenacted the statute in the same terms. The Supreme Court said that the Treasury's revision of the regulation was not voluntary but was dictated by the district court, that the reenactment did not adopt the district court's decision since one decision does not approach the dignity of a well-settled interpretation, and that "substantially contemporaneous expressions of opinion are highly relevant and material evidence of the probably general understanding of the times and of the opinions of men who probably were active in drafting the statute." [77] Yet the Court's holding does not stand for the proposition that contemporaneous administrative construction will be given more weight than a statutory reenactment while a different administrative practice prevails, for the Court's own views as to the merits necessarily played a part.

An additional reason for giving extra authoritative weight to contemporaneous interpretations is that judicial decisions usually lag so far behind administrative practices that business may long be transacted in reliance upon administrative interpretations.[78]

Two limitations on giving extra weight to contemporaneous construction have been suggested.[79] First, the administrators may or may not have participated in the framing of the legislation; when they have not, contemporaneous construction may deserve less weight. Secondly, the framework for administrative activities in dynamic fields ought not to be frozen, but the agency should have freedom to try to achieve general legislative objectives by taking into account later developments and later experience.[80]

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76. 315 U.S. 32 (1942).

77. *Id.* at 41.

78. See Griswold, *A Summary of the Regulations Problem,* 54 HARV. L. REV. 398, 406-7 (1941).

79. See Feller, *Addendum to the Regulations Problem,* 54 HARV. L. REV. 1311, 1319-20 (1941).

80. An outstanding exemplification of this view is the holding of the majority in National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

A possible third limitation may flow from such considerations as are suggested by

(2) *Interpretations of long standing.* Courts give extra authoritative weight to interpretative rules and practices consistently followed over a long period. Thus, in upholding regulations, the Supreme Court has stressed that "these regulations . . . have been in force for a period of more than eighteen years, with the silent acquiescence of Congress." [81] Emphasis on this element has its roots in the last century.[82] More recently the Supreme Court has often overstated the effect given to long-standing rules: "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially re-enacted statutes, are deemed to have received congressional approval and have the effect of law." [83] Language like this is common when administrative interpretations are otherwise amply supported, but courts seldom give the effect of law to administrative interpretations with which they disagree. In *Koshland v. Helvering* [84] the Supreme Court nullified a regulation which had been uniformly accepted as law for sixteen years, even though the reasons for respecting long-standing regulations were present in their strongest combination—the need for predictability, the widespread reliance on the customary practice, the harshness of upsetting retroactively the accepted law. Similarly, although the Bureau of Internal Revenue since 1939 and the Social Security Board since 1942 had refused to treat back pay awarded under the National Labor Relations Act as "wages" within the meaning of the Social Security Act, the Supreme Court in 1946 overturned the long-standing practice, because "the Board's interpretation of this statute to exclude back pay goes beyond the boundaries of administrative routine and the statutory limits. This is a ruling which excluded from the ambit of the Social Security Act payments which we think were included by Congress. It is beyond the permissible limits of ad-

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the following: A former employee of the Treasury Department, testifying before a Senate Committee in 1924, said that the Bureau of Internal Revenue "had a progressive policy which it followed in interpreting the law, a policy of progressing from conservatism to liberalism. Regulations were harsh, he said, under the new law in order to discourage excessive claims for amortization, but later were amended to favor the taxpayer. He claimed that to interpret the law so as to favor the government and to permit a modification later if the taxpayers could prove that the original interpretation was incorrect was the proper course for tax official to follow." COMER, LEGISLATIVE FUNCTIONS OF NATIONAL ADMINISTRATIVE AUTHORITIES 142-3 (1927). Compare 1 MERTENS, LAW OF FEDERAL INCOME TAXATION 88 (1942): "The Treasury Department's interest is in revenue and naturally its regulations would be favorable to its maintenance rather than judicially impartially balanced."

81. United States v. Shreveport G. & E. Co., 287 U.S. 77, 84 (1932). The Court also relied on the contemporaneousness of the regulations.

82. *E.g.,* Smythe v. Fiske, 90 U.S. 374, 382 (1874).

83. Helvering v. Winmill, 305 U.S. 79, 83 (1938), *quoted with approval in* Boehm v. Commissioner, 326 U.S. 287, 292 (1945), *and paraphrased in* Commissioner v. Flowers, 326 U.S. 465, 469 (1946).

84. 298 U.S. 441 (1936).

ministrative interpretation." [85] When cases both ways are read together the conclusion emerges that long-followed regulations or practices are often given extra authoritative weight but do not necessarily have the effect of law.[86]

(3) *Reenactment.* Many Supreme Court opinions, early and late, say that reenactment of a statute is an implied legislative approval of administrative interpretations which may give the interpretations the force of law. In 1908 the Supreme Court asserted that "the reenactment by Congress, without change, of a statute, which had previously received long continued executive construction, is an adoption by Congress of such construction." [87] This doctrine has been stated, restated and applied in a long line of cases.[88] The doctrine has been extensively criticized,[89] but the Supreme Court persists in declaring that an interpretation after a reenactment "is deemed to possess implied legislative approval and to have the effect of law." [90] Since the doctrine has played a part in only a few cases outside the tax field,[91] the doctrine's role in tax cases is most instructive.

Despite the Supreme Court's continued propensity for unqualified statement of the doctrine, cases refusing to apply it indicate qualifications. When the Court thinks statutory language requires a different interpretation it rejects the reenactment doctrine: "Where the law is plain the subsequent reenactment of a statute does not constitute the adoption of its administrative construction." [92] Even when the statute is seemingly colorless, the Court may reject the reenactment rule when its policy views are sufficiently strong.[93] And when the administrative

85. Social Security Board v. Nierotko, 327 U.S. 358, 369-70 (1946).

86. An entirely reliable statement is that of Mr. Justice Jackson in Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944), concerning an interpretative bulletin of the Wage and Hour Division, quoted *supra* at pp. 930-31.

87. United States v. Cerecedo Hermanos, 209 U.S. 337, 339 (1908), relying upon United States v. Falk, 204 U.S. 143, 152 (1907), where the Court said that an interpretation by the Attorney General which had been followed by executive officers was "adopted" by Congress by reenactment.

88. *E.g.*, United States v. Dakota-Montana Oil Co., 288 U.S. 459, 466 (1933): "The administrative construction must be deemed to have received legislative approval by the reenactment of the statutory provision, without material change." *See* Helvering v. R. J. Reynolds Tobacco Co., 306 U.S. 110, 115 (1939): "Under the established rule Congress must be taken to have approved the administrative construction and thereby to have given it the force of law."

89. See references in note 100, *infra*.

90. Commissioner v. Flowers, 326 U.S. 465, 469 (1946). See also Crane v. Commissioner, 331 U.S. 1, 7-8 (1947); Boehm v. Commissioner, 326 U.S. 287, 292 (1946).

91. *E.g.*, New York, N.H. & H. R.R. v. ICC, 200 U.S. 361, 401-2 (1906); Louisville & N.R.R. v. United States, 282 U.S. 740, 757 (1931).

92. Biddle v. Commissioner, 302 U.S. 573, 582 (1938).

93. This seems rather clearly to be true of Koshland v. Helvering, 298 U.S. 441 (1936), despite the Court's statement that "where, as in this case, the provisions of the act are unambiguous, and its directions specific, there is no power to amend it by

interpretation has lacked clarity [94] or consistency [95] the reenactment doctrine is inapplicable. Contemporaneous construction has been held more weighty in one set of circumstances than a reenactment.[96] Furthermore, whenever, instead of mechanically reciting the reenactment doctrine to bolster a result reached largely on other grounds, the Court has come to grips with the doctrine, its limited character has often been recognized in explicit terms.[97] The Court has even meekly acknowledged that the reenactment rule "has been stated in various and not entirely consistent terms."[98] The most reliable observation is that the reenactment rule "is no more than an aid in statutory construction." [99]

What weight, if any, a court should give to statutory reenactment is a problem of many facets. An unusually fine flurry of law review articles has led to conflicting conclusions.[100] A crucial factor is whether or not

regulation." *Id.* at 447. Realistically, the question was not whether the statute was ambiguous or unambiguous, for the statute was silent; what was being interpreted was not so much the statute as an earlier decision of the Supreme Court. That the Treasury interpretation was a reasonable one seems to be shown by the view of the dissenting Justices and by decisions of other courts.

94. *E.g.,* Estate of Sanford v. Commissioner, 308 U.S. 39, 49 (1939); "At most the regulation is ambiguous and without persuasive force in determining the true construction of the statute."

95. *E.g.,* Haggar Co. v. Helvering, 308 U.S. 389, 398 (1940).

96. White v. Winchester Country Club, 315 U.S. 32 (1942). But in other circumstances reenactment might be more persuasive than contemporaneous construction.

97. Helvering v. Wilshire Oil Co., 308 U.S. 90, 101 (1939).

98. Helvering v. Griffiths, 318 U.S. 371, 396 (1943). The Court in a long footnote quotes inconsistent excerpts from former opinions. For a more extended discussion of variations in judicial language, *see* Walker v. United States, 83 F.2d 103, 106–7 (C.C.A. 7th 1936).

99. Helvering v. Reynolds, 313 U.S. 428 (1941). This decision seemingly recognized the unsoundness of the earlier decision in Helvering v. R. J. Reynolds Tobacco Co., 306 U.S. 110 (1939). But unfortunately the Court more recently has reverted to its earlier unqualified statements.

100. Mr. Griswold advances the view that "the mere reenactment of a statute following administrative construction should be given no weight whatever in determining the proper construction of the statute." Griswold, *A Summary of the Regulations Problem,* 54 HARV. L. REV. 398, 400 (1941). Mr. Feller concludes: "What I suggest is an application of the reenactment rule with varying degrees of light and shade depending on the circumstances of reenactment. In no event do I urge the extreme 'force of law' formulation of the rule . . ." Feller, *Addendum to the Regulations Problem,* 54 HARV. L. REV. 1311, 1318 (1941). Mr. Paul says that "though one may denounce the reasoning of the doctrine as a mockery of the facts, one may yet applaud many of its results. . . . Applied as a persuasive but not a conclusive factor the principle promotes an increased degree of predictability . . . [and] may on occasion accomplish a desirable result in adding stability to regulations upon which taxpayers are forced to rely." PAUL, STUDIES IN FEDERAL TAXATION, 420, 429–30 (3d Series, 1940) (But if such additional stability is desirable, it ought to attach to all regulations irrespective of the fortuitous and sometimes irrelevant element of reenactment.). Compare Eisenstein, *Some Iconoclastic Reflections on Tax Administration,* 58 HARV. L. REV. 477 (1945) (arguing that all interpretative tax regulations should be upheld unless clearly wrong). Mr. Surrey rejects the reenactment doctrine,

Congress or some part of it has deliberately decided not to change the administrative interpretation. Mr. Randolph Paul reminds us that the reenactment rule presumes "that Congress, each time it passes a revenue act, has omniscience as to all outstanding regulations and judicial decisions and that it will be thoroughly diligent to correct by legislation any interpretation with which it disagrees. There follows the thought that inaction is action in that a failure to legislate implies an agreement with all outstanding regulations, without any apparent distinction as to their interpretative or legislative character. Anyone cognizant of the processes and exigencies of tax legislation is perfectly familiar with the simple fact that any such presumption is not only artificial, but in large part unfounded." [101] Whenever a congressional awareness of the administrative interpretation does not appear and seems unlikely, the basis for the reenactment rule vanishes.

Even when some reason appears for surmising that someone in the legislative process has considered the administrative interpretation, such as when a congressional committee has made an unusually comprehensive study, the crucial difference between approval and failure to disapprove must be recognized. Failure to disapprove may reflect no more than willingness to leave details to special skills of administrators and judges.[102] Congress normally limits itself to the basic framework, dealing with relative detail only when special need arises. The reason for administrative power to issue regulations is that the administrative process is better equipped than the cumbersome legislative machinery to handle a tremendous mass of relative minutia. To say that Congress by reenactment approves detailed interpretations is to defeat the purpose of Congress in unloading the administrative burden onto the Treasury, even though affirmative indication appears that some consideration was given to the administrative interpretation. In the words

except when actual approval by Congress is shown. Surrey, *The Scope and Effect of Treasury Regulations*, 88 U. OF PA. L. REV. 556 (1940). Mr. Brown thinks reenactment should be given weight but should not be conclusive. Brown, *Regulations, Reenactment, and the Revenue Acts*, 54 HARV. L. REV. 377 (1941). Mr. Alvord takes the extreme view that reenactment freezes an administrative interpretation even to such an extent that the administrative authority cannot change it. Alvord, *Treasury Regulations and the Wilshire Oil Case*, 40 COL. L. REV. 252, 265 (1940).

101. PAUL, STUDIES IN FEDERAL TAXATION, 420, 426-7 (3d Series, 1940). Looking at the problem from another angle may throw better light: "If Congress gave thought to the matter, the natural question would be: 'Will we dare in the future to enact a comprehensive revenue act without a complete study of the regulations issued by the Commissioner?'" *Id.* at 420.

102. The statute involved in Helvering v. R. J. Reynolds Tobacco Co., 306 U.S. 110 (1939) was reenacted after regulations were issued and then reenacted after the regulations had been changed. According to the theory of the reenactment rule, Congress approved both the unamended regulations and the amended regulations; under the unqualified rule both had the force of law. Similarly, when a regulation is one way and a court decision is the other way, the theory is that Congress approves both—an absurdity.

of Judge Learned Hand, "To suppose that Congress must particularly correct each mistaken construction under penalty of incorporating it into the fabric of the statute appears to us unwarranted; our fiscal legislation is detailed and specific enough already." [103] And so, failure of Congress to disapprove may be a far cry from approval. Yet failure to disapprove may still sometimes deserve some weight.[104] The weight should perhaps vary with the degree of probability that Congress might have changed the administrative practice if a different construction had been preferred; the degree of probability may never be measurable, but circumstances may permit a fair guess.[105]

Of course, the reenactment problem must depend in part upon other factors in a particular case. When other factors are about in equilibrium, the reenactment rule may conceivably be decisive.[106] But no set of reenactment circumstances is likely to divert the Supreme Court from giving effect to a deep conviction concerning policy. An extreme example is a case much celebrated for other reasons, *Helvering v. Clifford.*[107] Congress had specifically considered the administrative interpretation and a Treasury proposal for change, but had reenacted the statute without change; [108] a stronger case for applying the reenactment

103. F. W. Woolworth Co. v. United States, 91 F.2d 973, 976 (C.C.A. 2d 1937), *cert. denied* 302 U. S. 768 (1938).

104. It is of course arguable that an interpretation which is not specifically considered by Congress in reenacting the statute is approved on the ground that if the interpretation were clearly at variance with the will of Congress the interpretation would have been considered. But such a line of reasoning is not only speculative but unreal.

105. One may easily surmise that Congress would have changed the administrative practice if Congress had disapproved "the industry earnings and product pricing standards" used by the Administrator in Gillespie-Rogers-Pyatt Co. v. Bowles, 144 F.2d 361 (Em. Ct. App. 1944). The standards were of sufficient importance to justify congressional action, and the legislative history specifically showed a congressional understanding of the standards. The price-ceiling order, of course, was legislative, not interpretative; yet the court leaned on the reenactment doctrine in upholding the order. This seems to be an instance of an entirely sound reliance on the reenactment doctrine.

106. *E.g.,* United States v. Dakota-Montana Oil Co., 288 U. S. 459, 466 (1933); Helvering v. Winmill, 305 U. S. 79, 83 (1938).

Compare PAUL, STUDIES IN FEDERAL TAXATION, 420, 425 (3d Series, 1940), who catalogs the various forms of statement of the reenactment rule and observes: "These degrees of verbal rhetoric, however, merely clutter up the interpretative problem, and could be abolished from the judicial lexicon with little loss; it is most unlikely that any actual judgment in many cases would have been different if the court had started out with exactly the opposite formula."

107. 309 U.S. 331 (1940). See discussion pp. 933–4 *supra.*

108. *Hearings before Committee on Ways and Means on H.R. 7835,* 73d Cong., 2d Sess. 151 (1934); Griswold, *A Summary of the Regulations Problem,* 54 HARV. L. REV. 398, 403–4 (1941). Perhaps it is arguable that what Congress rejected was the proposal to tax short-term trusts, not a proposal to tax where three factors come together, one of which is the short term of the trust.

rule seldom occurs.[109] Yet the Supreme Court adopted the view Congress had rejected.[110]

An incidental problem is whether the reenactment rule applies not only to interpretative rules but also to legislative rules. One commentator has argued that it does not: "It would seem clear, though, that reenactment must be immaterial as to the validity of a *legislative* regulation. Either the regulation is within the authority delegated by Congress, or it is not. If it is within the delegated power, there is no question of a proper construction of the statute or of actual legislative intent, and reenactment is not necessary. If it is beyond the delegated power, then, under even the strongest formulation of the reenactment rule, no amount of reenactment can help it." [111] The weakness of this either-or analysis is that each of its two parts starts with the assumption that the regulation is either valid or invalid, whereas in many cases that is the problem to be solved. When the question is whether legislative regulations go beyond the agency's power, a statutory reenactment may in some circumstances constitute an approval or a failure to disapprove the exercise of the power. To the extent that the reenactment doctrine has validity for interpretative rules and practices, it should probably apply equally to the question whether legislative rules are within statutory authority. And the Supreme Court apparently has so held.[112]

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109. A stronger case might be the situation brought out by Feller, *Addendum to the Regulations Problem,* 54 HARV. L. REV. 1311, 1316 (1941): "Where an agency construes its powers as covering a particular class of expenditure and Congress thereafter appropriates money under the same general description, it has been held that the new appropriation constitutes congressional ratification of the validity of the original expenditure." Alabama Pwr. Co. v. Ickes, 64 Wash. L. Rep. 563 (D.C. Supr. Ct. 1936), *aff'd on other grounds,* 302 U.S. 464 (1938). This idea has been one of the main props for many war agencies created by executive action.

110. In fields other than taxation the Supreme Court has often brought about results which bills rejected by Congress sought to produce. *E.g.,* Gemsco, Inc. v. Walling, 324 U.S. 244 (1945); Hartford-Empire Co. v. United States, 323 U.S. 386 (1945), *reconsidered and clarified,* 324 U.S. 570 (1945).

111. Griswold, *A Summary of the Regulations Problem,* 54 HARV. L. REV. 398, 401 (1941). The same view is expressed in Alvord, *Treasury Regulations and the Wilshire Oil Case,* 40 COL. L. REV. 252, 262 (1940): The reenactment doctrine obviously "has no proper application to legislative regulations. Validly promulgated legislative regulations speak with the force of the statute itself. There is no necessity for legislative adoption." This reasoning may be unsound in that it assumes validity when validity is the question at issue. Reenactment may tend to confirm a doubtful exercise of power to promulgate particular regulations.

112. In Douglas v. Commissioner, 322 U.S. 275 (1944), the Court was dealing with depletion regulations issued under a grant of power in section 23(m) of the Internal Revenue Code. The Court said: "As Congress obviously could not foresee the multifarious circumstances which would involve questions of depletion, it delegated to the Commissioner the duty of making the regulations. . . . Congress has enacted numerous revenue acts since that time and has seen no occasion to change the statutory delegation of authority to the Commissioner of Internal Revenue which is the basis of this long-

IV. Retroactive Rules

Retroactive rules involve all the difficulties of retroactive statutes, complicated by the subordinate position of the agency, by the theoretical distinction between legislative and interpretative rules, and by the various doctrines concerning the authoritative weight of interpretative rules.

Retroactive statutes are often upheld. The constitutional prohibition of ex post facto laws has always been limited to criminal law and has never applied to civil legislation or regulations.[113] Due process prevents retroactive legislation deemed unreasonable.[114] Yet retroactive legislation is often reasonable and valid.[115] For instance, the Supreme Court has upheld a 1935 statute taxing income received in 1933,[116] a statute providing for deportation of aliens on account of acts committed before the enactment of the statute,[117] a legislative extension of a statutory period of limitation which had already run,[118] a statutory withdrawal of a vested right to a tax refund,[119] and a legislative ratification of tax collections admittedly illegal when made.[120]

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standing regulation. This evidences that [the regulations] are within the rule-making authority which was intended to be granted the Commissioner." *Id.* at 281–2. The Court was not explicit in regarding the regulations as legislative.

In Gillespie-Rogers-Pyatt Co. v. Bowles, 144 F.2d 361 (Em. Ct. App. 1944) the court relied in part upon the reenactment doctrine in upholding the validity of a price-ceiling order. The specific legislative history showed a clear congressional understanding of the principles the Administrator was applying. The order was of course legislative, not merely interpretative.

113. Calder v. Bull, 3 Dall. 386 (U.S. 1798). The case upheld a legislative enactment granting a new trial after the time for applying for a new trial had expired.

114. Before the adoption of the 14th Amendment, nothing in the Federal Constitution prevented retroactive legislation. *See* Satterlee v. Matthewson, 27 U.S. 380, 412 (1829): "Retrospective laws which do not impair the obligation of contracts or partake of the character of ex post facto laws are not condemned or forbidden by any part of the constitution." *See also* Baltimore & S. R. R. v. Nesbit, 51 U.S. 395, 401 (1850).

115. See Smith, *Retroactive Laws and Vested Rights*, 5 Tex. L. Rev. 231 (1927), 6 Tex. L. Rev. 409 (1928); Shulman, *Retroactive Legislation* in 13 Encyc. Soc. Sci. 355 (1934); Stimson, *Retroactive Application of Law*, 38 Mich. L. Rev. 30 (1939).

116. Welch v. Henry, 305 U.S. 134 (1938). The Court generalized: "A tax is not necessarily unconstitutional because retroactive . . . It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens." *Id.* at 146.

117. Mahler v. Eby, 264 U.S. 32 (1924).

118. Chase Securities Corporation v. Donaldson, 325 U.S. 304 (1945), following the great leading case to the same effect, Campbell v. Holt, 115 U.S. 620 (1885); *accord*, Paramino Lumber Co. v. Marshall, 309 U.S. 370 (1940).

119. Graham v. Goodcell, 282 U.S. 409 (1931). The opinion contains a rather full survey of the authorities.

120. United States v. Heinszen & Co., 206 U.S. 370 (1907); *accord*, People v. Title & M. G. Co., 264 N.Y. 69, 190 N.E. 153 (1934).

Legislative rules.

Since legislative rules are merely the administrative counterpart of statutes, the argument is plausible that legislative rules may be retroactive whenever a statute may be retroactive, since the fairness or unfairness is the same and judicial ideas of fairness are decisive.[121] But agencies have no powers except those conferred and power to issue retroactive rules is not easily implied.[122] And courts are more reluctant to upset statutes than mere administrative regulations. Because retroactivity is not favored, a reasonable initial view is that retroactive rules should be tolerated only when specifically authorized by statute. Dean Griswold has asserted that "as a matter of wise tax administration, the Treasury should be held to have no power to amend a legislative regulation retroactively." [123] This assertion embodies a splendid ideal which will find general acceptance. But the ideal must be qualified to meet the exigencies of administration both in the tax field and elsewhere. The cases departing from the ideal invite special attention.

A good starting point is a tax decision of the Supreme Court.[124] The statute provided that the basis of stock of a reorganized corporation should be apportioned between old and new stock "under rules and regulations prescribed by the Commissioner with the approval of the Secretary." At the time of the reorganization and at the time the stock was sold, the regulation provided that the portion of the basis of the old shares attributed to the new stock should not exceed the value of the new shares at the time of the distribution, but an amendment later eliminated this limitation. The amendment operated to the taxpayer's detriment. The Court upheld the retroactive application of the amendment, on the ground that the original regulation was inconsistent with the statute and that the amended regulation therefore "in effect became the primary and controlling rule in respect of the situation presented. It pointed the way, for the first time, for correctly applying the antecedent statute to a situation which arose under the statute. . . . It is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand." [125] The intrinsic situation probably compels retroactive creation of law. At the time of

121. The opinions often revolve around such conceptual distinctions as that between vested and non-vested rights and that between rights and remedies, but at bottom each decision depends on notions of fairness.

122. *Cf.* the view of three dissenting Justices in Addison v. Holly Hill Co., 322 U.S. 607, 640–1 (1944): "If Congress intended the Administrator to act retroactively, Congress wholly failed to express this purpose. . . . Seldom if ever . . . may administrative or executive authority to apply it (the principle of retroactivity) be inferred from legislation not expressly giving it."

123. Griswold, *A Summary of the Regulations Problem*, 54 HARV. L. REV. 398, 411 (1941).

124. Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129 (1936).

125. *Id.* at 135.

the taxable events, the only law on the point was the original regulation, and that was invalid. The tax had to be computed. If no valid method had been prescribed in advance, some method had to be formulated afterwards, either judicially [126] or administratively.

Indeed, under a common form of statutory delegation, legislative regulations must be initially retroactive. This is true whenever the statute provides specified results but delegates power to prescribe details through legislative regulations. For instance, a statute becoming effective in June may provide that a tax or a deduction shall be computed in accordance with regulations to be prescribed by the Commissioner with the approval of the Secretary, the taxable events may occur in July, and the regulations may be published in September; no practical course is possible except to apply the regulations retroactively.[127]

The Supreme Court has even affirmatively instructed an administrator to issue regulations and to give them retroactive effect.[128] The Fair Labor Standards Act provides for exemption of employees "within the area of production (as defined by the Administrator), engaged in . . . canning of agricultural . . . commodities. . . ." The Administrator by regulation defined "area of production." The Supreme Court held the regulation invalid. Then the Court faced the extraordinarily difficult problem of the proper disposition of the case. It could (1) hold the entire canning industry exempt irrespective of area of production, (2) hold the entire canning industry subject to the Act irrespective of area of production, (3) rewrite the regulation retroactively to make it valid and to give new meaning to "area of production," (4) remand the case to await the Administrator's preparation of a new regulation to be applied retroactively, or (5) give effect for the past to the invalid regulation as if it were valid. Either of the first two courses would clearly defeat the intent of Congress; three dissenting Justices chose the second course, thus favoring nullification of the exemption provided by the Act.[129] The third course would involve judicial usurpation of a power given the Administrator, as well as retroactive creation of law; the Circuit Court of Appeals and one Justice of the Supreme Court adopted

126. The Court might itself have created law retroactively in favor of the taxpayer and thus have avoided the unfairness of retroactivity. But the Court would then (a) make law inconsistent with what it found to be the legislative intent, and (b) assume a power Congress gave to the administrative authorities.

127. Furthermore, the fact that judicial decisions interpreting statutes are usually retroactive sometimes virtually forces retroactive changes in regulations, if the regulations are to be kept consistent with judicial interpretations. This factor, of course, is more important with respect to interpretative regulations than with respect to legislative regulations.

128. Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607 (1944).

129. Rutledge, Black, and Murphy, JJ., argued that the regulation was valid, and that if it were invalid, then "clearly it exempts no one, petitioners are covered by the Act, and the respondent must pay." *Id.* at 638. These three Justices vigorously condemned

this view.[130] The fourth would have the sole disadvantage of explicitly requiring retroactive law making; the majority of the Court made this choice.[131] The fifth is logically self-contradictory and has the practical disadvantage of requiring judicial enforcement of a regulation specifically held invalid; yet the disadvantages of the fifth solution from a practical standpoint may be the least, even though they are still very real.[132] Congress in 1947 retroactively superseded the Supreme Court's choice, providing a solution somewhat resembling the fifth course.[133] The statute provides that no employer shall be liable if he complied either with the original invalid regulation or with the new regulation retroactively applied. True, the congressional choice does not adversely affect employers retroactively. But it does retroactively deprive employees of rights they had before enactment of the statute.[134]

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the retroactivity required by the majority. They did not specifically discuss the question whether their solution involved retroactive law-making. Inasmuch as Congress clearly intended to provide an exemption, and inasmuch as the view of the dissenters would deny the exemption for the past, it would seem that their view did involve retroactive law-making.

130. Mr. Justice Roberts said: "I think the Administrator's order may well be allowed to stand with the illegal and unauthorized feature of it deleted. This is what the Circuit Court of Appeals decided and I believe it was right." *Id.* at 624. *See* Holly Hill Fruit Products, Inc. v. Addison, 136 F.2d 323 (C.C.A. 5th 1943).

131. The majority did not choose this solution because of its merit but because of the greater demerit of other solutions: "To be sure this will be a retrospective judgment, and law should avoid retroactivity as much as possible. But other possible dispositions likewise involve retroactivity, with the added mischief of producing a result contrary to the statutory design." Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607, 620 (1944). The three dissenters did not specifically answer this analysis.

132. The fifth comes as close as any to avoiding retroactivity, and in a sense succeeds in doing so. The accepted legal theory is that the regulation was invalid all the while, not that the Supreme Court's holding retroactively makes it so. If the theory is realistic, the fifth solution would thus involve retroactivity. If it is more realistic to say that the regulation was effective law until the Supreme Court held it invalid (thus departing from traditional theory), then giving effect to the invalid regulation for the past avoids retroactivity. See Comment, 35 CALIF. L. REV. 92 (1947).

In Atlantic Coast Line R. R. v. Florida, 295 U.S. 301 (1935), the railroads had charged increased rates pursuant to a Commission order which was later held invalid for lack of adequate findings. The question was whether the railroads should be required to make restitution of the increases that had been charged before a new and valid order had reinstated the higher rates. The Court, five to four, denied restitution, thus giving full effect to the invalid order. Since, however, the Commission issued a new order like the old one, saying that the Court gave retroactive effect to the new order is just as accurate.

Fixing rates retroactively is quite different in practical effect from fixing wages retroactively under a statute which imposes double liability on the employer for deficiencies.

133. 61 STAT. 89 (1947), 29 U.S.C.A. § 261 (Supp. 1947). The provision is a part of the Portal-to-Portal Act.

134. The House Committee said: "Congress has the power to provide protection to employers who have complied in good faith with administrative regulation, interpretation, or enforcement practices." For this the Committee cited Graham v. Goodcell, 282

All six solutions—the five available to the Court and the one Congress chose—involve retroactive creation of law. Retroactivity is intrinsic to the problem. When the problem is not *whether* law shall be made retroactively but is *what* law shall be made retroactively, an observation that retroactive law-making is undesirable hardly contributes to the solution. This melancholy conclusion may perhaps be softened by a mellow reflection of Mr. Justice Cardozo: "Hardship must at times result from postponement of the rule of action till a time when action is complete. It is one of the consequences of the limitations of the human intellect and of the denial to legislators and judges of infinite prevision." [135]

Retroactive legislative regulations may sometimes be desirable even when circumstances permit limiting to prospective operation. When trial-and-error techniques are appropriate, when hindsight is greatly superior to prediction, when urgency requires action first and deliberation afterwards, and when retroactivity involves no serious hardship, the making of law may often properly follow the event. Orders fixing rates or prices are often retroactive. A typical reparation order fixes rates retroactively; the little ritual that a reparation order is "judicial" does not alter that plain fact. Since most railroad rates are fixed by carriers, reparation orders retroactively fixing rates usually do not change rulings of the Interstate Commerce Commission. The hard problem arises when the Commission tries to change an earlier rate order retroactively. This is the problem of the *Arizona Grocery* case,[136] which denied to the Commission the power to award reparation for shipments moving under rates the Commission had previously approved. The Court said that the Commission's order declaring a rate reasonable "has the force of a statute" [137] and that the Commission "may not in a subsequent proceeding, acting in its quasi-judicial capacity, ignore its own pronouncement promulgated in its quasi-legislative capacity and retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed." [138] The opinion was devoted to logic and conceptualism—no effort was made to inquire into practical advantages and disadvantages of retroactive changes in rate orders. Justices Holmes and Brandeis dissented, emphasizing the experimental character of rate making and arguing for "that flexibility of adaptation, the maintenance of which is necessary to the life and growth of our great and changing commerce." [139] When due weight is given such

U.S. 409 (1931) and Skidmore v. Swift & Co., 323 U.S. 134 (1944). See H. R. Rep. No. 71, 80th Cong., 1st Sess. (1947).

135. Cardozo, The Nature of the Judicial Process 145 (1921).

136. Arizona Grocery Co. v. Atchison, T. & S. F. Ry., 284 U.S. 370 (1932).

137. *Id.* at 386.

138. *Id.* at 389.

139. This view was stated by Judge Hutcheson in Eagle Cotton Oil Co. v. Southern

factors as the necessity for issuing orders in advance of full investigation, the swiftness of economic changes, and the advantages of trial-and-error methods, the reasonableness of adjusting rates after shipments are made becomes apparent.[140] The Commission's opinions are persuasive that some play should be given to administrative discretion to determine what orders should be retroactive and to what extent.[141]

Interpretative rules.

At the foundation of all problems of retroactive operation of interpretative rules lies the discrepancy between the theory of interpretative rules and what is often the reality. The theory is that since an interpretative rule merely declares the meaning of previous law,[142] such a rule "is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand." [143] According to the theory, an interpretative rule which does not express the true meaning of the statute is necessarily a nullity, irrespective of a party's reliance on the rule.[144] Reliance cannot make an erroneous interpreta-

Ry., 51 F.2d 443, 447 (C.C.A. 5th 1931), to which Justices Holmes and Brandeis referred.

140. The books are full of special ICC situations in which retroactive legislative orders are upheld. Atlantic Coast Line R. R. v. Florida, 295 U.S. 301 (1935), is outstanding. In General Amer. Tank Car Corp. v. El Dorado T. Co., 308 U.S. 422 (1940), the Court held that a district court should keep on its docket a case involving reasonableness and legality of practices with respect to car leases until the Commission could retroactively determine that issue. The Court denied a petition for rehearing based on an argument that retroactive determination was unfair. *Accord,* New York Edison Co. v. Maltlaie, 244 App. Div. 436, 279 N.Y.S. 949 (1935), *aff'd* 271 N.Y. 103, 2 N.E.2d 277 (1936). *But cf.* United States v. Baltimore & O. Ry., 284 U.S. 195 (1931).

In the third *Morgan* case, United States v. Morgan, 307 U.S. 183 (1939), the Court held that funds impounded after the commencement of a rate-reduction proceeding should be disposed of in accordance with an order of the Secretary to be issued in the future. The result was to give the Secretary's order retroactive effect.

141. Some opinions are collected and discussed in 2 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION, 369 *et seq.* (1931). See also Note, 41 YALE L. J. 625 (1932).

An OPA price order has been applied retroactively to sales made thirteen months before issuance of the order, where the reason for the order's lateness was the seller's failure to make reports that the OPA needed to fix the ceiling. Porter v. Senderowitz, 158 F.2d 435 (C.C.A. 3d 1946), *cert. denied sub nom.* Senderowitz v. Fleming, 330 U.S. 848 (1947). *See also* Martini v. Porter, 157 F.2d 35 (C.C.A. 9th 1946), *cert. denied sub nom.* Martini v. Fleming, 330 U.S. 848 (1947); Porter v. Kramer, 156 F.2d 687 (C.C.A. 8th 1946). *But cf.* Collins v. Fleming, 159 F.2d 431 (Em. Ct. App. 1946), *cert. denied,* 330 U.S. 850 (1947).

142. See discussion p. 928 *et seq. supra.*

143. Manhattan Gen. E. Co. v. Commissioner, 297 U.S. 124, 135 (1936). The Court used this language even in dealing with a legislative regulation which had been retroactively changed.

144. Judicial opinions are full of observations to this effect. An example: "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will

tion correct, for that would be to depart from the requirements of a statute whose validity is not in question. Of course, when a court holds an interpretative rule invalid, the agency is obligated (if the judicial authority is high enough) [145] to conform its rule to the court's decision, and the amendment must date from the enactment of the statute, for the true and constant meaning of the statute is now known. Thus, under the theory, agencies not only may but must apply retroactively amendments occasioned by judicial decisions.[146]

If the theory is rigorously applied with blind logic, no question of retroactive change in an interpretative rule can arise, for either the change expresses the true meaning of the statute or it does not; if it does, then that is what the statute has always meant and the law has not been changed retroactively; if it does not, then the change is invalid because inconsistent with the statute.

This theory, despite judicial lip service, is unreal and unsound. The plain truth is that statutory interpretation frequently far transcends the discovery of a meaning or a legislative intent.[147] Statutory interpretation often involves creation of new law on questions which neither the legislative body nor any committee nor any legislator nor any draftsman anticipated, directly or indirectly.[148] Remembered only for its gauche naïveté is the serious assertion that the duty of a court in interpreting the Constitution is "to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide

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of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." Manhattan Gen. E. Co. v. Commissioner, 297 U.S. 129, 134 (1936).

In Utah Hotel Co. v. Industrial Commission, 107 Utah 24, 151 P.2d 467 (1944), the hotel company had relied upon an administrative interpretation of an unemployment compensation statute, but the court permitted a retroactive change in the interpretation. The court recognized "that the hotel company is now in a position under which it will be penalized for abiding by and relying upon the regulation or interpretation of the Department. . . ." The basis for the court's decision was the notion that an administrative interpretation "is nothing more than an initial guess by the administrative tribunal as to what the statute . . . means. . . . An administrative interpretation out of harmony and contrary to the express provisions of a statute cannot be given weight."

145. It is familiar practice for the Treasury to announce nonacquiescence in decisions of lower tribunals in tax cases.

146. This theory was so strong that an express statutory provision was deemed necessary to allow the Treasury to limit changes in regulations to prospective operation. Revenue Act (1921) § 1314, 42 STAT. 227, 314 (1921). Not until 1928 did the statute allow such a limitation when the change was occasioned by a judicial decision. 45 STAT. 791, 874 (1928). The present provision is § 3791(b) of the Internal Revenue Code.

147. See examples given pp. 932–4 *supra*.

148. An example with respect to which probably no reasonable mind would doubt the truth of this observation is T.D. 5512 (May 1, 1946), amending sec. 81.17 of Regulation 105, concerning the details of the scope of the doctrine of Helvering v. Hallock, 309 U.S. 106 (1940).

whether the latter squares with the former." [149] In the sense of historical fact Congress did not "intend" the result reached by the Supreme Court when it held that the Sherman Act should be applied to interstate insurance,[150] that the Norris-LaGuardia Act should affect the criminal law,[151] that a violator of the anti-trust laws should be required to license patents at reasonable royalties,[152] that the Wage and Hour Division may prohibit industrial homework,[153] that retention by the settlor of a trust of a remote reversionary interest makes the whole trust property taxable as part of the settlor's estate,[154] that the Federal Power Commission may radically depart from conventional methods of rate fixing,[155] or that the Federal Communications Commission may issue elaborate regulations governing the contractual relations between broadcasting networks and local stations.[156] That the Supreme Court in the name of statutory interpretation manufactures new law is a commonplace.

Most opinions, to be sure, speak the language of legislative "intent." But judicial habits of speech cannot turn fiction into fact. Only occasionally do judges throw out reminders of realism. In the second *Chenery* case,[157] the majority of the Supreme Court did so. The Securities and Exchange Commission, in approving a corporate reorganization, required officers, directors and controlling stockholders to surrender at cost plus dividends the preferred stock they had purchased, without fraud and with full disclosure, during reorganization. In upholding the order, the Court, instead of pretending that the Commission was applying pre-existing law embodied in the statute's broad terms, declared frankly that the Commission was "announcing and applying a new standard of conduct." [158] Mr. Justice Jackson in dissent said the Com-

149. Mr. Justice Roberts in United States v. Butler, 297 U.S. 1, 62 (1936).

150. United States v. South-Eastern Underwriters Assoc., 322 U.S. 533 (1944).

151. United States v. Hutcheson, 312 U.S. 219 (1941).

152. Hartford-Empire Co. v. United States, 323 U. S. 386 (1945), *reconsidered and clarified*, 324 U.S. 570 (1945).

153. Gemsco, Inc. v. Walling, 324 U.S. 244 (1945).

154. Helvering v. Hallock, 309 U.S. 106 (1940); Fidelity-Philadelphia Trust Co. v. Rothensies, 324 U.S. 108 (1945).

155. Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591 (1944).

156. National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

157. SEC v. Chenery Corp., 332 U.S. 194 (1947). The first *Chenery* case, 318 U.S. 80 (1943) had set aside the same order because the legal analysis upon which it rested was found deficient. On remand, the Commission stated new grounds and the case came to the Supreme Court a second time.

158. *Id.* at 203. The Court was thus forced to acknowledge that the result was retroactive law-making. The Court then said: "Every case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency. But such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that

mission had exceeded its statutory authority and argued: "If what these parties did really was condemned by 'statutory design' or 'legal and equitable principles,' it could be stopped without resort to a new rule and there would be no retroactivity to condone." [159] This argument is a quibble founded on a fiction—a fiction in which Mr. Justice Jackson himself does not believe. Indeed, Mr. Justice Jackson spoke for the majority in *Western Union Tel. Co. v. Lenroot*, applying retroactively the Court's interpretation of the statute but candidly acknowledging: "Ascertainment of the intention of Congress in this situation is impossible.It is to indulge in a fiction to say that it had a specific intention on a point which never occurred to it." [160] The law would gain strength from more of the Jackson view in the *Western Union* case and less of the Jackson view in the *Chenery* case.

Happily, the Supreme Court is more and more rejecting the theory that interpretative rules involve no more than discovering a legislative intent.[161] Thus, instead of purporting to find in the statute's broad definition of income an answer to the question whether a corporation may realize a gain on sale of treasury stock, the Court said that the statute ". . . is so general in its terms as to render an interpretative regulation appropriate." [162] The Court has said that a depletion statute was ". . . susceptible of various meanings and hence administrative interpretation of it was peculiarly appropriate." [163] The Court has even asserted that considerations extraneous to statutory words and legislative history may govern interpretative rules; under a provision for the deduction of "ordinary and necessary" expenses, the interpretative rules denied deduction of lobbying expenses, and the Court, referring to the common-law policy against lobbying, said ". . . there is no reason why, in absence of clear Congressional action to the contrary, the rule-making authority cannot employ that general policy in drawing a line between legitimate business expenses and those arising from that family of contracts to which the law has given no sanction." [164]

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mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law."

159. *Id.* at 214. In this opinion Mr. Justice Frankfurter joined. The opinion is otherwise vehement, if not intemperate, since it characterizes what the majority approves as "administrative authoritarianism" and "conscious lawlessness."

160. 323 U.S. 490, 508 (1945). See Radin, *A Case Study in Statutory Interpretation: Western Union v. Lenroot*, 33 CALIF. L. REV. 219 (1945).

161. More than a century ago the Supreme Court disapproved retroactive change in administrative practices. Speaking of usages in the exercise of discretion in government departments, the Court said: "No such change of such usages can have a retrospective effect, but must be limited to the future. Usage cannot alter the law, but it is evidence of the construction given to it; and must be considered binding on past transactions." United States v. Macdaniel, 7 Pet. 1, 14–5 (U.S. 1833).

162. Helvering v. R. J. Reynolds Tobacco Co., 306 U.S. 110, 114 (1939).

163. Helvering v. Wilshire Oil Co., 308 U.S. 90, 102 (1939).

164. Textile Mills Securities Corp. v. Commissioner, 314 U.S. 326, 339 (1941). See

Whenever interpretative rules do in fact create new law, retroactive law-making should be dealt with as such, unprejudiced by the false notion that results never flow from the interpreter. Problems of retroactivity then will be solved on the basis of ideas of fairness and the necessities of practical administration.

Retroactive clarification of uncertain law ordinarily involves no unfairness.[165] It is retroactive change of settled law, not retroactive settling of unsettled law, which may produce unjust results. This is why interpretative rules issued after the enactment of a new statute may normally speak as of the time of the statutory enactment.[166] Retroactively applying an original interpretation of an unclear statute is not unfair.[167] Similarly, if administrative and judicial decisions are inconsistent with interpretative rules, no injustice results from retroactively changing the interpretative rules to clarify the confusion.[168] New in-

further illustrations in Eisenstein, *Some Iconoclastic Reflections on Tax Administration*, 58 HARV. L. REV. 477, 529 *et seq.* (1945).

165. Of course, on the strictly substantive side, retroactive law-making varies considerably. For instance, other factors being equal, retroactive creation of criminal law or of the administrative counterpart of criminal law may be more objectionable than retroactive creation of tax law. It is for this reason that statutory protection against retroactive changes in rules is sometimes provided. An outstanding example is found in the Securities Act of 1933: "No provision of this subchapter imposing any liability shall apply to an act done or omitted in good faith in conformity with any rule or regulation of the Commission, notwithstanding that such rule or regulation may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason." 48 STAT. 908 (1934), 15 U.S.C. § 77s (1940). On substantive problems of retroactive law-making see Smith, *Retroactive Laws and Vested Rights*, 5 TEX. L. REV. 231 (1927), 6 TEX. L. REV. 409 (1928).

166. It is assumed by Congress in INT. REV. Code § 3791(b). The Supreme Court so held in Helvering v. Reynolds, 308 U.S. 428 (1941).

167. In Ross v. Oregon, 227 U.S. 159 (1913) the Court specifically rejected a contention that the defendant in a criminal case was denied due process because a doubtful question of statutory construction was decided for the first time in his case. In SEC v. Chenery, 332 U.S. 194 (1947) the Court upheld "a new standard of conduct" which the Commission had created and applied retroactively, theoretically interpreting the statute.

168. At this point, we depart slightly from Griswold, *A Summary of the Regulations Problem*, 54 HARV. L. REV. 398, 413 (1941). Mr. Griswold lays down two propositions: "(1) An administrative interpretation should be freely amendable in the early or formative days of the regulation. (2) After the regulation has become seasoned, the Commissioner should have no power to make retroactive amendments, at least against the interest of the taxpayer." Sometimes regulations remain unamended for long periods but case law grows up which conflicts with the regulations and conflicts with itself; when this occurs a retroactive clarification through amended regulations (whether or not occasioned by judicial decision) is not likely to be unfair. Compare Mr. Justice Stone for the Court in Estate of Sanford v. Commissioner, 308 U.S. 39, 52 (1939): "Administrative practice may be of persuasive weight in determining the construction of a statute of doubtful meaning where the practice . . . is not so inconsistent with applicable decisions of the courts as to produce inconsistency and confusion in the administration of the law." The regulations and practices in the *Sanford* case were certainly "seasoned." But the Court rejected them—retroactively. Then Congress in INT. REV. CODE, § 1000(c),

terpretative rules often may be changed retroactively without unfairness, for parties should know that new regulations are frequently experimental.

Retroactive change in settled law may be unjust whether the change is made by administrative action, by a court decision, or by an administrative amendment designed to conform to changes brought about by judicial decisions. The common-law tradition to the contrary notwithstanding, a retroactive change of settled law by judicial decision is just as fair or unfair as a retroactive change of settled law *in similar circumstances* by administrative or legislative action.[169] Therefore changes in settled law, whether by judicial decision or otherwise, frequently should be limited to prospective operation. Courts have inherent power to limit decisions to prospective operation, but they seldom do so.[170] Administrative action so to limit the effect of judicial decisions often becomes appropriate.[171] Since 1921 the Treasury has had authority expressly conferred by statute to apply changes in regulations prospectively only, except when the changes are occasioned by judicial decisions,[172] and in 1928 the exception was eliminated.[173] Experience proved the need for such power, and it has often been exercised. In absence of express statutory authority to limit changes in regulations

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as added by § 502 of the Act of 1943, 58 STAT. 71 (1944), 26 U.S.C. § 1000 (Supp. 1941–1946), partially cured the retroactivity. *See also* Rasquin v. Humphreys, 308 U.S. 54 (1939).

169. The difference in tradition may be attributable mainly to the simple fact that retroactivity is intrinsic to the process of adjudicating cases on past facts. Furthermore, with respect to the parties to the particular case, the court may weigh the harshness of retroactivity against other considerations, whereas retroactive legislation normally provides no such cushioning. When retroactive rules are made by the same agency which applies them to particular cases, an alert administration may at least theoretically provide the cushioning.

170. The Supreme Court has held that a court's refusal to apply to a particular case the law the court believes to be right is not a denial of due process, when the court is trying to avoid the undesirable effect of making a change retroactive. Great Northern Ry. v. Sunburst Oil & Ry. Co., 287 U. S. 358 (1932).

171. An outstanding example is § 81.17 of Regulation 105, providing that in designated circumstances the tax otherwise applicable does not apply to transfers made between November 11, 1935, when the Supreme Court decided Helvering v. St. Louis Union Trust Co., 296 U.S. 48, and January 29, 1940, when the Court decided Helvering v. Hallock, 309 U.S. 106, which overruled the *St. Louis Trust* case. The Court itself did not limit the *Hallock* decision to a prospective operation.

172. 42 STAT. 227, 314 (1921). This provision was retained in the Acts of 1924 and 1926.

173. 45 STAT. 791, 874 (1928). The present provision, § 3791(b) of the Internal Revenue Code, provides: "The Secretary, or the Commissioner with the approval of the Secretary, may prescribe the extent, if any, to which any ruling, regulation, or Treasury Decision, relating to the internal revenue laws, shall be applied without retroactive effect." See the Court's account of the history of this provision in Helvering v. Griffiths, 318 U.S. 371, 397–9 (1943).

to prospective effect, a power to make rules ought to be deemed sufficient authority to impose such a limitation, even when the changes result from judicial decisions. Thus, when courts held that the Fair Labor Standards Act applied to activities which under an Interpretative Bulletin of the Wage and Hour Administrator were beyond the scope of the Act, the Administrator amended his Interpretative Bulletin to comply with the decisions but expressly provided that the amendment would apply only after a specified future date.[174]

The reenactment doctrine plus a bit of logic may sometimes prevent not only retroactive changes in interpretative rules, but even prospective changes in interpretative rules. In its extreme form the doctrine assumes that reenactment implicitly approves interpretative rules, giving them "the force of law." [175] The conclusion inexorably follows that on reenactment the administrative authority loses its power to change previously promulgated rules,[176] either retroactively or prospectively.[177]

This application of the reenactment doctrine, despite its palpable unsoundness, has been the subject of several Supreme Court decisions. The most instructive case, now partly discredited, is *Helvering v. R.J. Reynolds Tobacco Co.*[178] The question was whether a corporation which buys its own shares and sells them at a profit has a taxable gain. The only statutory provision was the broad definition of income. The administrative practice had been uniformly against taxing, and the regulations so provided when the shares were sold. A Treasury Decision five years later amended the regulations to provide that when a corporation deals in its own shares as it might in the shares of another corporation any gain is taxable. The Court rejected the Commissioner's effort to apply the amendment retroactively, reasoning that "since the legis-

174. Wage and Hour Interpretative Bulletin No. 1 (1938) provided: "The act does not cover plants where the employees work on raw materials derived from within the State and where none of the product of the plant moves in intrastate commerce." On March 13, 1945, the Administrator "announced" that because of decisions in Chapman v. Home Ice Co., 136 F.2d 353 (C.C.A. 6th 1943), and Hamlet Ice Co. v. Fleming, 127 F.2d 165 (C.C.A. 4th 1942), the rule was modified to conform to the decisions, but that the change would not be effective for enforcement purposes until April 15, 1945. The Administrator, however, had no power to limit the change to a prospective effect with respect to private suits by employees.

175. *See* Helvering v. R. J. Reynolds Tobacco Co., 306 U.S. 110, 116 (1939): ". . . the legislative approval of existing regulations by reenactment of the statutory provision to which they appertain gives such regulations the force of law. . . ." See fuller explanation of the reenactment rule pp. 939–43 *supra.*

176. See Alvord, *Treasury Regulations and the Wilshire Oil Case,* 40 COL. L. REV. 252, 265 (1940): "If the Treasury's construction has received legislative approval, its interpretation has become fixed in the statute; and the Treasury should have no more power to change its regulation than it has to change the wording of the statute itself."

177. The doctrine that contemporaneous construction or long-continued construction should add weight to interpretative rules does not produce the same difficulty because only the reenactment doctrine depends on the higher authority of Congress.

178. 306 U. S. 110 (1939).

lative approval of existing regulations by reenactment of the statutory provision to which they appertain gives such regulations the force of law, we think that Congress did not intend to authorize the Treasury to repeal the rule of law that existed during the period for which the tax is imposed." [179] The Court expressly left open the question whether the Treasury could change its rule prospectively after reenactment. The Court also rejected a contention that reenactment in 1936 and 1938 constituted a legislative approval of the 1934 amendment.[180] The Court might properly have said that in these circumstances a retroactive amendment of a rule embodying settled law may not adversely affect a party who has relied on the rule.[181] The case should have been so decided irrespective of reenactment.[182] The Court's unnecessary exaltation of the reenactment doctrine necessitated later backtracking.[183]

In the *Wilshire Oil* case later the same year the Court held that reenactment did not prevent amending a regulation prospectively.[184] Although the Court seemingly assumed, perhaps erroneously, that the regulation was legislative,[185] the opinion was clear and compelling: "The oft-repeated statement that administrative construction receives legislative approval by reenactment of a statutory provision, without material change . . . does not mean that a regulation interpreting a provision of one act becomes frozen into another act merely by reenactment of that provision, so that administrative interpretation cannot be

179. *Id.* at 116.

180. That congressional silence is supposed to have amounted to approval of both the original regulation and the amended regulation tends to show the unsoundness of the reenactment doctrine.

181. This is in accord with our reasoning pp. 954–55 *supra.*

The law was probably settled that a gain could not be realized on the sale of the corporation's own stock which is has purchased on the market. But the law was the other way on the closely related question whether a transaction in which a corporation receives its own shares could result in taxable gain. *E.g.,* Allyne-Zerk Co. v. Commissioner, 83 F.2d 525 (C.C.A. 6th 1936), and cases there cited. In some such cases the language was broad enough to cover the question whether a corporation could realize a gain on sale of its own stock. *See e.g.,* Commissioner v. S. A. Woods Mach. Co., 57 F.2d 635, 636 (C.C.A. 1st 1932): "Where . . . a corporation has legally dealt in its own stock as it might in the shares of another corporation, and in so doing has made a gain or suffered a loss, we perceive no sufficient reason why the gain or loss should not be taken into account in computing the taxable income." *Cf.* Note, 39 COL. L. REV. 716 (1939).

182. It probably would be so decided today under the doctrine of Helvering v. Reynolds, 308 U.S. 428 (1941).

183. See the following text discussion.

184. Helvering v. Wilshire Oil Co., 308 U.S. 90 (1939).

185. The Court quoted a grant of rule-making power in section 23 and said that the regulation was made pursuant to that power. But a careful analysis in Alvord, *Treasury Regulations and the Wilshire Oil Case,* 40 COL. L. REV. 252 (1940), convincingly demonstrates that another section was the subject of interpretation and that the rule was interpretative instead of legislative. Nevertheless, the Court's apparent treatment of the rule as legislative weakens the case as an authority concerning the effects of interpretative rules.

changed prospectively through exercise of appropriate rule-making power. . . . Such dilution of administrative powers would deprive the administrative process of some of its most valuable qualities—ease of adjustment to change, flexibility in light of experience, swiftness in meeting new or emergency situations." [186]

This language was carried into definitive holding in *Helvering v. Reynolds*.[187] The Revenue Acts of 1921, 1924, and 1926 provided that the basis of property acquired by inheritance should be the value "at the time of such acquisition." The Treasury uniformly ruled that a contingent remainder was acquired when the remainder vested. The Acts of 1928 and 1932 contained different language, and then the Act of 1934 reverted to the earlier language. The taxpayer's father died in 1918, leaving the taxpayer a contingent interest which vested in 1934. The question was whether the basis was the 1918 or the 1934 value. The Court upheld the application of a 1935 regulation making the basis the 1918 value. A contention based on the *Reynolds Tobacco* case was rejected because "that case turned on its own special facts," [188] and the "fact that the regulation was not promulgated until after the transactions in question had been consummated is immaterial. . . . The magnitude of the task of preparing regulations under a new act may well occasion some delay. . . ." [189] The Court said of the reenactment doctrine: "That rule is no more than an aid to statutory construction. While it is useful at times in resolving statutory ambiguities, it does not mean that the prior construction has become so embedded in the law that only Congress can effect a change. . . . It gives way before changes in the prior rule or practice through exercise by the administrative agency of its continuing rule-making power." [190] The *Reynolds* case not only obliterated the doubts raised by the *Reynolds Tobacco* case as to whether reenactment bars prospective amendments but demonstrated that in some circumstances reenactment does not prevent even a retroactive amendment.[191]

186. Helvering v. Wilshire Oil Co., 308 U.S. 90, 100–1. This is somewhat at variance with the view taken in Griswold, *A Summary of the Regulations Problem*, 54 HARV. L. REV. 398, 415–7 (1941).

187. 313 U.S. 428 (1941). Despite similarity of name, this case is not to be confused with Helvering v. Reynolds Tobacco Co., 306 U.S. 110 (1939), which it partially supersedes. *See also* American Chicle Co. v. United States, 316 U.S. 450 (1942), upholding a prospective change in interpretative regulations after statutory reenactment.

188. *Id.* at 432.

189. *Id.* at 433.

190. *Id.* at 432.

191. In the *Reynolds* case, it is arguable that the opposite result should have been reached on the ground that the uniform administrative interpretation over a long period had sufficiently settled the law that a retroactive change ought not to be permissible. But because the Acts of 1928 and 1932 were different, the Court could and did regard the 1934 Act as a new one, so that the regulations issued thereunder could properly relate back to the time of the enactment. Two doctrinal aids to construction thus collided, and both could not be followed. The Court's preference for a particular substantive result no doubt controlled the choice.

V. Summary and Conclusions

Precise definition of the term "rule" in the abstract may be impossible. But abstract definition is not necessarily desirable, for advantageous classifications usually should depend in part on varying purposes and contexts. Frequently the best solution of the problem of classifying mixed or borderline administrative action is to skip the labelling or to call it mixed or borderline.

The Administrative Procedure Act's definition of "rule" as an "agency statement of general or particular applicability and future effect" seems on its face to include cease and desist orders and orders for the payment of money. Probably the words "or particular" should be interpreted as meaning only that what is otherwise a rule does not become an order merely because it applies to named parties. The most important criterion for classifying an activity under the Act is the practical desirability or undesirability of applying Section 5, which does not affect rule-making.

The theoretical distinction between legislative and interpretative rules is of great practical importance even though it is partly false. Legislative rules are the product of power to create new law, have the force and effect of law if valid, and are valid if the agency has followed proper procedure and has acted within statutory and constitutional authority; courts are not supposed to substitute judgment as to content of legislative rules. Theoretically, interpretative rules do not embody new law, and are valid only if the reviewing court agrees with the interpretation or finds it a permissible one; courts commonly substitute judgment as to content of interpretative rules. The assumption that interpretative rules do not embody new law is often false, for interpretation, both judicial and administrative, frequently involves creative determination of policy.

Interpretative rules are usually given extra authoritative weight—sometimes "force of law"—when they are contemporaneous with the statute they interpret, when they are of long standing, and when the statute has been reenacted while the rules are outstanding. The weight of course depends also on the reviewing court's views of the merits and on such factors as relative skills of judges and administrators in handling the particular subject matter. Statutory reenactment without disapproval of interpretative rules may in some rare circumstances indicate legislative approval, but more frequently legislators and draftsmen are either unaware of the rules or they consider that detailed rules should be left to administrators to mold and remold.

Despite their general undesirability, retroactive rules are sometimes unavoidable and are occasionally desirable even when avoidable. When a problem could not be solved without retroactivity, the Supreme Court specifically required an agency to issue legislative rules and to

make them retroactive. Advantages of retroactive rate orders sometimes outweigh disadvantages.

Since interpretative rules frequently create new law, problems of their retroactivity should be dealt with as such, without reliance on the false theory that interpretative rules never change the law. Yet it is retroactive change of settled law, not retroactive clarification of uncertain law, that may be unfair. Even when rules must be changed to conform to new judicial decisions, changes should often be limited to prospective operation; power so to limit changes should be deemed implicit in the power to make rules.

The Supreme Court has quite properly retreated from the extreme application of the reenactment doctrine which made questionable the power of an agency to change a rule prospectively after the statute's reenactment. Now even a retroactive change after reenactment is sometimes permissible.