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Recommended Citation
Forrest Revere Black, Jurisdictional Fact Theory and Administrative Finality, 22 Cornell L. Rev. 349 (1937)
Available at: http://scholarship.law.cornell.edu/clr/vol22/iss3/2

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THE "JURISDICTIONAL FACT" THEORY AND ADMINISTRATIVE FINALITY†

FORREST REVERE BLACK

I

The relation of the "jurisdictional fact" theory¹ to the general problem of administrative finality² is one of the most perplexing in the field of administrative law. One of the pioneer scholars in this new field has declared: "Administrative law is groping; it necessarily is still crudely empirical."³ This appraisal is peculiarly applicable to the jurisdictional fact problem. The case material to date cannot be reconciled or reduced to a logical system, but it is believed that a careful analysis will indicate certain significant trends.

The multiplication of administrative officers⁴ (commissions, boards, and bureaus) has challenged and cut deep inroads into many well-established doctrines. Old landmarks in the law are crumbling before this new assault. The separation-of-powers doctrine has been "softened by a quasi."⁵ Until recently,⁶ its corollary, "delegata potestas non potest delegari," had been

†This paper was made possible by a Social Science Research Council Grant-in-Aid.
³FRANKFURTER AND DAVIDSON, CASES ON ADMINISTRATIVE LAW (1932) Preface, p. vii.
⁵The expression of Mr. Justice Holmes dissenting in Springer v. Government of the Philippine Islands, 277 U. S. 189, 210, 211 (1928). Maitland said that "'quasi' is one of the few Latin words that English lawyers really love." H. A. L. FISHER, MAITLAND, p. 161. No one can study the development of administrative law in America without realizing that this phrase has performed yeoman's service for American lawyers.
⁶The Hot Oil case, Panama Ref. Co. v. Ryan, 293 U. S. 388 (1935), was the first
reduced to an almost bodiless bogeyman continually inflated by argument and deflated by decision. The court appropriately considers at least three principles in a case involving the delegation issue: (1) the definiteness of the standard laid down by the statute for the guidance of the administrative officer; (2) the degree of necessity, in view of the subject matter, for the delegation; and perhaps (3) as a practical element, the confidence felt by the court in the body so entrusted with the power. The "rule of law" as expounded by Dicey has been elbowed into narrower quarters with the development of administrative agencies. Ernest Freund deplores this trend: "Discretionary administrative power over individual rights . . . is undesirable per se and should be avoided as far as may be, for discretion is unstandardized power and to lodge in an official such power over person or property is hardly conformable to the 'Rule of Law'." To those who have been accustomed to rely on the judiciary as the sole protection of the individual against arbitrary governmental power, the intrusion of administrative bodies that both make and apply (with finality) rules and regulations to particular cases affecting individual rights has appeared to be an unwarranted regression to the days when St. Louis and his Frankish predecessors sat under the oak tree at Vincennes and dealt out a rude and arbitrary executive justice. The growth of administrative tribunals is responsible for a frontal attack on the concept of "judicial supremacy." The older theory of the relation of the courts to administrative tribunals was based on the idea that both were parts of a single system in which the courts wielded ultimate authority. The newer conception is that of a dual system of public administration of justice which recognizes a division of function between courts and administrative agencies, to the end that some administrative determinations are final while others are subject to judicial supervision.

It is easy, however, to overemphasize the importance of such a classification. It should not be assumed that the lines of demarcation between these two schools of thought are clearly drawn. Not only has Congress blurred the division line by creating hybrid agencies known as "legislative
courts,"13 but also the courts themselves have exercised a wide and unpredictable jural freedom14 in reviewing or failing to review administrative findings. In this connection, the statement of Professor Thomas Reed Powell is important: "The limitations upon the reviewing power of the courts are and must be, in the last analysis, self-imposed ones."15 And again: "Judicial review of administrative action is always possible, if we mean that the courts may always inquire as to its validity. But the courts have themselves established as a rule of law that in many instances where the power of the administrative to act is lawfully vested, they will assume without examination of the evidence the correctness of the administrative determination."16 No more convincing evidence of this phenomenon is needed than a comparative study of the present status of the Interstate Commerce Commission and the Federal Trade Commission in relation to judicial review. These two independently constituted commissions charged with the regulation of transportation and trade "arose from the same political and social movements, the Trade Commission was modeled after the Commerce Commission, and their duties and functions are similar in many respects, yet . . . the practice of the courts, broadly speaking, follows the first (single system) for the Trade Commission and the second (the dual system) for the Commerce Commission."17

Since the beginning of the twentieth century, the protagonists of the two rival agencies in government, law and administration, have been marshalling their forces and skirmishing on many fronts. Almost three decades ago, Dean Pound stated in an admirable fashion the respective claims of these two schools of thought. He said, "Administration achieves public security by preventive measures. It selects a hierarchy of officials to each of whom definite work is assigned, and it is governed by ends rather than rules. It is personal. Hence it is often arbitrary, and is subject to the abuses incident to personal as contrasted with impersonal or law-regulated action. But well exercised it is extremely efficient; always more efficient than the rival agency can be. Law, on the other hand, operates by redress or punishment rather than by prevention. It formulates general rules of action and visits infractions of these rules with penalties. It does not supervise action. It leaves individuals free to act, but imposes pains on those who do not act in accordance with the rules prescribed. It is impersonal, and safeguards against ignorance, caprice, or corruption of magistrates. But it is not quick

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14See Dickinson, op. cit. supra note 1, c. 3.
15Conclusiveness &c. (1907) 1 AM. POL. SCI. REV. 592.
16(1913) 28 Pol. Sci. Q. 34, 47, supra note 2.
17This is the conclusion of McFarland, amply supported by evidence in his study, supra note 1, pp. 4, 34.
enough, or automatic enough, to meet the requirements of a complex social organization."

In the perennial struggle between the forces of judicial and administrative supremacy, several doctrines have been developed and several ancient doctrines have been revived that have had the ultimate effect of contributing to administrative autonomy although in some instances such was not their pristine purpose. In presenting them by way of background, we shall enumerate rather than discuss the doctrines that have given aid and comfort to the adherents of administrative supremacy. They are: (1) the non-suability of the state or of the United States; (2) the doctrine of the necessity of exhausting administrative remedies before resorting to judicial review; (3) the presumption of regularity attending administrative determinations; (4) the Jeffersonian and Jacksonian interpretation of the separation of powers doctrine, to the effect that the executive and judicial departments have concurrent and independent power to interpret the law in the regular course of their separate duties; (5) perhaps the most important

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19The best presentation of the legal bases of administrative autonomy is Isaacs, Judicial Review of Administrative Findings (1921) 30 Yale L. J. 781, at 786.
21See Note, The Necessity of Exhausting Administrative Remedies Before Resorting to Judicial Review (1927) 27 Col. L. Rev. 450. An examination of this doctrine will show that it is subject to many exceptions and that its application is more often based on propriety than on lack of power. However, the legislature may provide that resort to a series of administrative bodies is necessary as a condition precedent to judicial review or the statute may attribute finality to the administrative finding. See Milhein v. Tunnel District, 262 U. S. 710 (1923); Prentis v. Atlantic Coast Line, 211 U. S. 210 (1908).
22In the Trade Mark Cases, 100 U. S. 82 (1879), the court said "a due respect must be given "to the coordinate branch of this government." In Shurtleff v. United States, 189 U. S. 311 (1903), the court declared that the "presumption is a strong one." In Jew Ho v. Williamson, 103 Fed. 10 (C. C. A. N. D. Colo. 1900) the court declared that the presumption "should prevail if there is the slightest doubt as to the correctness of an opposite allegation."
24Jackson's Bank Veto Message of July 10, 1832, 2 Richardson, Messages and Papers of the Presidents, 582.
25Taney, C. J., accepted the Jeffersonian-Jacksonian interpretation in Decatur v. Paulding, 14 Peters 497 (U. S. 1840). Here, although a question of "law" was involved, the court refused to take jurisdiction. Congress passed a general act providing pensions for the widows of naval officers who had died in the service. A special resolution was also passed at the same time granting a pension to the widow of Commodore Stephen Decatur. The Secretary of the Navy ruled that she might make her election to receive either pension, but was not entitled to both. Mrs. Decatur applied for a writ of mandamus to compel the Secretary to make payments to her under both the act and the resolution. The case obviously turned on the interpretation of the reso-
single doctrine making for administrative autonomy, is the court's self-imposed jurisdictional limitation known as the doctrine of "political questions." This self-effacing attitude can be explained either because the court may fear the vastness of the consequences that a decision on the merits might entail, or because the court may feel that it is incompetent or impotent to deal with the particular type of question involved.

We are now in a position to analyze the role of the jurisdictional fact theory in this continuous struggle for supremacy between judicial and administrative forces. It will be shown that this theory is a potential weapon in the judicial armory which can be utilized effectively to check the rising pretensions of administrative agencies. The case material to date will demonstrate that the courts enjoy a wide and almost unpredictable jural freedom in the exercise of this effective weapon. We shall attempt to evaluate the utility and limitations of the jurisdictional fact theory, and from the welter of precedents it is hoped that there will emerge certain significant trends that may "illumine the relation between commissions and courts, now left obscure by the printed pages of court opinions."

The amorphous jurisdictional fact concept has plagued students of the law. It is a hybrid creation, the component parts of which defy analysis. On the one hand, the lines of demarcation between questions of fact, mixed questions of law and fact, and questions of law have been so refined as to

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26See Field, The Doctrine of Political Questions in Federal Courts (1924) 8 MINN. L. Rev. 485; Finklestein, Judicial Self-Limitations (1923) 37 HARV. L. REV. 338, (1925) 39 HARV. L. Rev. 221; and answer by Weston in (1924) 38 HARV. L. Rev. 296, 329 et seq.; Potter, The Political Question in International Law in the Courts of the United States (1911) 8 S. W. Pol. & Soc. Sci. Q. 127. The Supreme Court of the United States has held the following questions political: (1) territorial extent and de jure character of a government, Foster v. Nielson, 2 Peters 253 (U. S. 1829); (2) existence of a status of independence, war, or belligerency, U. S. v. Palmer, 3 Wheat. 610 (U. S. 1818); (3) whether a treaty has been sufficiently ratified, Doe v. Braden, 16 How. 635 (U. S. 1853); (4) whether a given person is an accredited diplomatic agent, Ex Parte Baiz, 145 U. S. 453 (1891); (5) recognition of foreign governments, Oetjen v. Central Leather Co., 246 U. S. 297 (1917); (6) de jure character of state governments, Luther v. Borden, 7 How. 1 (U. S. 1849); (7) power of calling out militia, Martin v. Mott, 12 Wheat. 19 (U. S. 1827); (8) how long Cuba should be occupied, Neely v. Henkel, 180 U. S. 109 (1900); (9) existence of tribal relations among Indians, United States v. Holliday, 3 Wall. 407 (U. S. 1865).

become illusory in many instances. On the other hand, the term "jurisdictional" is not a word of art having a definite and precise content. When the component parts of this concept, considered separately, are so vague, it is idle to expect that clarity will result from the combination. Further, it should be recognized that the jurisdictional fact theory has a different meaning in administrative law than in the field of judicial proceedings. On this point, Professor Freund has said:

"Questions of fact in administrative determinations differ from like questions in judicial proceedings in two respects: in the latter, where the cause is one of general common law or equity jurisdiction, the question of fact is practically never a jurisdictional fact, but one submitted for decision, while administrative jurisdiction frequently presupposes the existence of the fact as a jurisdictional prerequisite; and notice and hearing is the normal judicial process, while administrative authorities may be authorized to proceed \textit{ex parte}, or their action may be ministerial in the sense of being inconclusive if they proceed upon an erroneous assumption of fact. If the fact is a jurisdictional fact, if the proceeding is \textit{ex parte}, or if the officer acts ministerially, the question of fact is open to judicial examination."

Chief Justice Hughes, speaking for the majority of the Supreme Court, recognized the distinction between the use of the jurisdictional fact theory in the field of administrative law and in judicial proceedings in these words: "The term 'jurisdictional', although frequently used, suggests analogies which are not complete when the reference is to administrative officials or bodies."

In the field of judicial proceedings, the question of jurisdictional facts does not raise a particularly intricate problem because the same court has to decide all the facts, jurisdictional or otherwise. In such cases the question is usually raised by an attempted collateral attack and is based on the error of the first decision, not on the question of the power of the first court to make final determination of such facts. Moreover, it is the finding and not


\textsuperscript{29}Gordon, The Relation of Facts to Jurisdiction (1929) 45 L. Q. Rev. 459.

\textsuperscript{30}The jurisdictional fact problem is not limited to the field of administrative law. As applied to judicial proceedings the jurisdictional fact problem arises as to whether a summons was served [D'Arcy v. Ketchum, 11 How. 165 (U. S. 1850)], whether the court had jurisdiction of the res in an action of rem [Thompson v. Whitman, 18 Wall. 457 (U. S. 1874)], as to the fact of death of a person for whom an administrator was appointed [Griffith v. Frazier, 8 Cranch 9 (U. S. 1814)]. See Van Fleet, Collateral Attack §§ 60-63.

\textsuperscript{31}Administrative Powers over Persons and Property, p. 293.

\textsuperscript{32}Crowell v. Benson, 76 L. Ed. at 614, n.

\textsuperscript{33}See Interstate Commerce Commission v. United States, 224 U. S. 474, 484 (1911), where the court said, "It is true that there may be a jurisdiction to determine the possession of jurisdiction (Ex parte Harding, 219 U. S. 363), but the full doctrine of that case cannot be extended to an administrative body."
the existence of the fact *per se* that is controlling. If it were the latter, a
reversal on appeal, by removing the estoppel, would decide that the first tri-
bunal acted without jurisdiction. Such is not necessarily the effect of a
reversal.34

We are concerned solely with the administrative law aspect of the juris-
dictional fact theory. As restricted to this field, the doctrine has been
declared as follows:

"Where a statute purports to confer on an administrative agency a
power to make decisions, but is construed as conferring that power only
over, or with reference to, certain kinds of objects, situations or acts,
then the fact-question of whether or not in any given case of such a
decision the object, situation or act was in fact of the kinds specified
in the statute goes to the jurisdiction of the administrative agency to
make the decision at all."35

A review of some of the landmark cases in the early development of the
jurisdictional fact doctrine (as applied to the older type of public officer)
will demonstrate that it is closely related to the ultra vires concept. The
jurisdictional fact theory is supposed to have made its earliest appearance in
*Terry v. Huntington,*36 decided in 1669, and Sir Matthew Hale is credited
with its authorship. This case was an action of trover for goods levied by
warrant of the commissioners of excise. The question was whether an
action lay against the officers if they adjudged "low wines" to be "strong
waters." Hale, Chief Baron, said:

"The commissioners have only a stinted limited jurisdiction, and if
they exceed it, that does not take away the jurisdiction of this court.
Special jurisdictions are circumscribed (1) with respect to place, as a
leet or corporation; (2) with respect to persons; (3) with respect to
the subject-matter of their jurisdiction; and the statute limits their
jurisdiction in all these three respects, and therefore if they give judg-
ment in a cause arising in another place, or betwixt private persons, or
in other matters, all is void and *coram non judice,* as if they should
adjudge rose water to be strong water."

Another early landmark decision, which illustrates the relation between the
jurisdictional fact theory and the doctrine of the liability of public officers,
is *Warne v. Varley,*37 decided in 1795. An act of Parliament authorized and
bound official inspectors to seize leather insufficiently dried. The officers

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31Ashcroft v. Bourne, 3 B. & A. 684 (1832); Brittain v. Kinnaird, 1 Brod. & B.
Hughes in Crowell v. Benson said: "In relation to administrative agencies, the question
in a given case is whether it falls within the scope of the authority validly conferred."
76 L. ed. at 614, n.
34Durn. & E. 443 (1795).
were held liable in trespass for a seizure, upon a subsequent finding by the jury that the leather so seized was in proper condition. Lord Kenyon said:

"This statute, after directing that searchers shall be appointed, authorizes them to seize leather of a certain description... It seems reasonable that if these searchers exercise their authority bona fide, and only seize such leather... as in their judgment ought to be examined, they should be protected... But the Act of Parliament affords them no such protection. It only allows them to seize leather which is not dried."

Ashhurst, J., said:

"The Act of Parliament only authorizes the searchers to seize goods of a certain denomination; the goods in question are not of that description; therefore the seizure is illegal and the defendants are trespassers."

This decision is predicated on the theory (1) that the condition of the leather is a "jurisdictional fact"; (2) that the language of the statute precluded any construction other than the narrow one that the officers had no authority over any leather other than "leather insufficiently dried"; (3) that the determination of the officers as to the condition of the leather was not final but was subject to a reexamination by the courts. The effect of the decision was to remove any protection to the officer merely because he acted in good faith, and this harsh view was enforced although the statute did not contemplate seizure for the purposes of confiscation but as preliminary to a subsequent trial. (4) Although the court intimated that it was constrained to its holding by the language of the Parliamentary act, it should be noted that the court in accepting this interpretation as to the mandate of the statute, in fact enjoyed a wide jural freedom to take a broad or a narrow view as to what facts were "jurisdictional". It might have been argued that the officer had jurisdiction over "leather" to determine whether it was insufficiently dried. This interpretation would have clothed the officer with a type of "judicial" power and with it would have followed a judicial immunity. Warne v. Varley, however, utilized the jurisdictional fact theory in its strict sense to break down this immunity, and is historically important because the jurisdictional fact theory became the entering wedge as a method of control over public officers.

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38 Professor Freund criticized the holding in these words: "The statute authorized the seizure for subsequent trial; under the circumstances it was absurd to construe the statute literally as subjecting to preliminary seizure only the good of the forbidden description." Administrative Powers over Persons and Property, p. 249.

39 In Seaman v. Patten, 2 Caines 312 (N. Y. 1805), it was held that where the defendant officer was authorized to remove beef in danger of spoiling, his jurisdiction extended to all beef which in his judgment he regarded as in danger of spoiling.

40 Many courts accepted the theory that administrative officers exercising quasi-judicial functions should enjoy immunity if they acted in good faith; see Cooley, Torts (2d ed.) 479, 480-482.
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A century later, Justice Holmes, speaking for the Supreme Court of Massachusetts in another famous case, Miller v. Horton, followed the Warne v. Varley doctrine. A Massachusetts statute provided that "in all cases of farcy or glanders the commissioners, having condemned the animal infected therewith, shall cause such animal to be killed without appraisement." The court held that the order of the commissioners afforded no defense as to an action by the owner for compensation against those who executed it, unless the animal is in fact infected with farcy or glanders, the statute providing no compensation for healthy animals killed by mistake as diseased ones. The court declared that "the reasons for this construction seem decisive to a majority of the court when they consider the grave questions which would arise as to the constitutionality of the clause, if it were construed the other way."

This case strikingly illustrates the premise that the courts may extend or contract the scope of judicial review of administrative action by applying or refusing to apply the jurisdictional fact theory in its strict sense. In the last analysis, restraints on judicial review in this field are self-imposed. The court would have been within its rights in Miller v. Horton if it had accepted a broad interpretation of the facts that were jurisdictional and had held that the statute conferred on the officer jurisdiction over animals for the purpose of determining whether they were diseased. This would have admitted a judicial element into the officer's duties and he would have been protected and his decision would have been final, if made in good faith. But the court accepted the Warne v. Varley theory which permitted a judicial reexamination de novo and added to the century-old theory the idea that to permit the commissioners to determine conclusively the limits of their own jurisdiction would look suspiciously like allowing them to determine a "matter of law".

Terry v. Huntington, Warne v. Varley, and Miller v. Horton are the judicial mileposts that must be stressed in any historic treatment tracing the development of the jurisdictional fact theory. But it should be understood that these cases were concerned with the older type of administrative officer, and that in each case the officer was being sued for damages on the theory that he had acted ultra vires the statute. With the rise and development of the newer types of administrative officer, certain refinements have been engrafted upon the historic jurisdictional fact theory. By way of background, we intend to introduce at this point an analysis of the recent famous case of Crowell v. Benson, decided by the Supreme Court of the United States.

152 Mass. 540, 26 N. E. 100 (1891).

The broad interpretation is defended by Wyman, The Principles of Administrative Law Governing Public Officers, § 133.

See Dickinson, op. cit. supra note 1, p. 52.

285 U. S. 22 (1932).
States in 1932, in order that the reader may have a clear picture of the nature and effect of the modern jurisdictional fact theory applied in an actual legal setting.

This suit was brought in the Federal District Court to enjoin the enforcement of an award made by petitioner Crowell, as deputy commissioner of the United States Employees' Compensation Commission, in favor of the petitioner Knudsen and against the respondent Benson. The award was made under the Longshoremen's and Harbor Workers' Compensation Act, and rested upon the finding of the deputy commissioner that Knudsen was injured while in the employ of Benson and performing service upon the navigable waters of the United States. The complainant alleged that the award was contrary to law for the reason that Knudsen was not at the time of his injury an employee of the complainant and his claim was not "within the jurisdiction" of the deputy commissioner. The District Judge denied motions to dismiss and granted a hearing de novo upon the facts and the law, expressing the opinion that the act would be invalid if not construed to permit such a hearing. The case was transferred to the admiralty docket, answers were filed presenting the issue as to the fact of employment, and the evidence of both parties having been heard, the District Court decided that Knudsen was not in the employ of the petitioner and restrained the enforcement of the award. The decree was affirmed by the Circuit Court of Appeals. The Supreme Court of the United States held that:

"... the Longshoremen's and Harbor Workers' Act contemplates that the decision of the deputy commissioner in proceedings for an award of compensation for injury sustained by an employee, as to the circumstances, nature, extent, and consequence of the employee's injuries, the amount of compensation that should be awarded, and as to whether the injury was occasioned solely by the intoxication of the employee, or by the wilful intention of the employee to injure or kill himself or another, shall be final." The court then proceeded in the following language to apply the jurisdictional fact theory:

"What has been said thus far relates to the determination of claims of employees within the purview of the Act. A different question is presented where the determinations of fact are fundamental or 'jurisdictional', in the sense that their existence is a condition precedent to the operation of the statutory scheme. These fundamental requirements are that the injury occurs upon the navigable waters of the United States and that the relation of master and servant exists. These conditions are indispensable to the application of the statute, not only because the Congress has so provided explicitly, but also because the power of

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43 F. (2d) 137; 38 F. (2d) 306 (S. D. Ala. 1930).
45 F. (2d) 66 (C. C. A. 5th, 1930).
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Congress to enact the legislation turns upon the existence of these conditions."

_Crowell v. Benson_ introduced into our law a host of perplexing legal problems. It is impossible at this time to predict accurately the effect of this five-to-three decision on the development of administrative law. But inasmuch as this is the leading case expounding the jurisdictional fact theory in the Supreme Court of the United States, it is important that a critique be presented.

(1) The majority opinion was predicated on the distinction between "jurisdictional" and other facts. Chief Justice Hughes, speaking for the Court, insisted that the locale of the injury, i.e., "upon the navigable waters of the United States", and the fact of employment, i.e., "the relation of master and servant", were the only relevant facts falling within the first category. The court conceded that the decision of the deputy commissioner as to all other facts bearing on the question of liability under the statute should be final. The dissenting opinion questioned the validity of this line of demarcation excluding all but two facts from the jurisdictional fact category. Mr. Justice Brandeis argued that if the fact of employment is pivotal and fundamental, why not the fact of the existence of the injury, or the fact that the injury occurred in the course of employment, or the fact that it was not wilfully self-inflicted. The dissent further countered with the alternative suggestion that the employer-employee relationship was only a "quasi-jurisdictional fact" going to the applicability of the substantive law, and not to the jurisdiction of the tribunal.

(2) The court held that the locale of the injury and the fact of employment were not only jurisdictional facts, but constitutional facts as well. The former was pivotal in order to bring the subject matter within the maritime and admiralty jurisdiction; the latter, under the statute, was indispensable for the imposition of liability without fault. The court declared:

"In the present instance, the Congress has imposed liability without fault only where the relation of master and servant exists in maritime employment and, while we hold that the Congress could do this, the fact of that relation is the pivot of the statute and, in the absence of any other justification, underlies the constitutionality of this enactment. If the person injured was not an employee of the person sought to be held, or if the injury did not occur upon the navigable waters of the United States, there is no ground for an assertion that the person against whom the proceeding was directed could constitutionally be subjected,

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49 Chief Justice Hughes delivered the opinion of the court; Justices Brandeis, Stone, and Roberts dissented. Mr. Justice Cardozo had not been appointed to the bench when the case was decided.
in the absence of fault upon his part, to the liability which the statute creates."

(3) The second point upon which there was a clear clash between the majority and the dissent involved the question "upon what record shall the district court's review of the order of the deputy commissioner be based?" Must there be a trial de novo or merely a judicial redetermination based on the administrative record? The court held that the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the federal court determine such an issue upon its own record and the facts elicited before it. The dissent insisted that neither the statute nor the constitution required a trial de novo to determine the existence of the two facts that the court held to be jurisdictional.

It should be noted that the majority opinion did not hold that a trial de novo was mandatory upon the lower court and must be granted as a matter of right in all cases, but rather that that court had discretion as to whether it would accept the administrative finding as to the existence of the jurisdictional facts. The lower court having exercised its discretion and granted a trial de novo, the Supreme Court of the United States found that that court did not err in permitting a trial de novo on the issue as to the existence of the jurisdictional facts. The court argued (a) that there is no provision of the statute which seeks to confine the court in such a case to the record before the deputy commissioner or to the evidence which he has taken; and (b) as the question is one of the constitutional authority of the deputy commissioner as an administrative agency, the court is under no obligation to give weight to his proceedings pending the determination of that question. The court said:

"The question in the instant case is not whether the deputy commissioner has acted improperly or arbitrarily as shown by the record of his proceedings in the course of administration in cases contemplated by the statute, but whether he has acted in a case to which the statute is inapplicable."

(c) The existence of the jurisdictional facts are essential conditions precedent to the right to make any claim for compensation under the act; and (d) this decision is in complete accord with the provisions of the statute to the effect that the deputy commissioner "shall have full power

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50The doctrine of constitutional fact as developed in Crowell v. Benson applies to constitutional limitations on administrative jurisdiction the same reasoning which the doctrine of jurisdictional fact applies to statutory limitations." Dickinson, supra note 48, at 1067.

51See discussion of this point in (1932) 10 N. Y. U. L. Q. Rev. 98.

52Supra note 44, at 63.

53§ 19 (a).
and authority to hear and determine all questions in respect of such claim”.

(4) There has been considerable speculation as to whether the Supreme Court rested its decision upon both the due process clause of the Fifth Amendment and on Article III, or upon the latter only. The Circuit Court of Appeals stressed the due process contention almost exclusively, while the District Court seemed to rely on both grounds. The real basis of the decision in our opinion is to be found in Article III of the Constitution. The court explicitly stated that for Congress to vest the authority to make all determinations of fact “with finality in its own instrumentalities or in the Executive Department . . . would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system.”

If the due process clause of the Fifth Amendment was the basis of the decision, then state administrative agencies, such as Workmen's Compensation Commissions, would, under a similar interpretation of the due process clause of the Fourteenth Amendment, be governed by the Crowell doctrine. But if Article III of the United States Constitution is the basis of the decision, the procedure of state administrative bodies will remain unaffected, except to the extent that state courts give analogous state constitutional provisions similar effect. There is an especially strong possibility of such a development in those states wherein the state constitution contains an express distributive clause separating the legislative, executive, and judicial powers and prohibiting a fusion thereof in any department.

The dissent vigorously attacked the doctrine of the majority that to allow administrative finality with respect to the two facts which were considered “jurisdictional” would violate that “appropriate maintenance of the federal judicial power which Article III requires”. Mr. Justice Brandeis argued (a) that “the judicial power” of Article III of the Constitution is the power of the federal government, and not of any inferior tribunal. There is nothing in that article which requires any controversy to be determined as of first instance in the federal district courts. The jurisdiction of those courts is subject to the control of Congress and matters which may be placed within their jurisdiction may instead be committed to the state courts.

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“Article III provides: “The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.”

“Supra note 47.

“33 Fed. (2d) 306. Supra note 46.

“Supra note 44, at 57.

“See (1933) 46 Harv. L. Rev. 478, (1932) 32 Col. L. Rev. 738.


“Wann, Federal Criminal Laws and the State Courts (1925) 38 Harv. L. Rev. 545; Frankfurter and Landis, The Business of the Supreme Court (1928) pp. 65-68. While Congress has no power to force jurisdiction upon a state court, it has the power to leave jurisdiction to a state court.”
or to federal "legislative" courts. (b) The dissent further contended that the power of Congress to provide by legislation for liability under certain circumstances subsumes the power to provide for the determination of the existence under those circumstances. "It does not depend upon the absolute existence in reality of any fact." (c) The dissent, apparently interpreting the majority decision as being based partly on the due process clause, argued that due process ordinarily does not even require that parties shall be permitted to have a judicial tribunal pass upon the weight of the evidence introduced before the administrative body and further that the law is settled by a host of cases that Congress may commit to an administrative tribunal the function of collecting evidence.

(5) The court limited the effect of the decision by stressing "the distinction at once apparent, as to determinations of fact, between cases of private right and those which arise between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." Chief Justice Hughes relied on Doe ex dem. Murray v. Hoboken Land and Improvement Company in which the court had declared that "there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper". Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payment to veterans. The court declared that "the mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power

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"Katz, Federal Legislative Courts (1930) 43 Harv. L. Rev. 894. If Congress in creating a tribunal with judicial functions proceeds under the sanction of Article III of the Constitution, then its creation is a "constitutional" inferior court, but if Congress finds the sanction in some other grant of power then its creation is a "legislative" court. Ex parte Bakelite Corporation, 279 U. S. 438 (1929).

"At p. 83 of principal case. Professor John Dickinson, in developing this idea, has characterized the court's attitude as "naive realism." The majority assumed that the existence of a fact is something fixed and absolute; that the court has access in a way that the administrative body does not to the fact itself and not merely to a conclusion or opinion about it. The court thus checks the fact against the administrative body's opinion of the fact. Dickinson, Crowell v. Benson (1932) 80 U. of Pa. L. Rev. 1055, at 1074.

"Dahlstrom Metallic Door Co. v. Industrial Board, 284 U. S. 594 (1931).

"See dissent, n. 5, at pp. 69, 70, 71 of the principal case. Mr. Justice Brandeis further argued that in instances in which Congress intended to permit the introduction of additional evidence in the District Court it has so provided in express terms. See, e.g., sec. 2, 42 Stat. 388, 389, § 2 (1922), 7 U. S. C. § 292.

"18 How. 272 (U. S. 1856)."
to executive officers, or may commit it to judicial tribunals." The court declared that the present case does not fall within the categories just described but is one of private right, i.e., of the liability of one individual to another under the law as defined. Congress, by recognizing this distinction, can, in the field of "public rights," safeguard administrative finality from the devastating effects of the Crowell v. Benson doctrine.

(6) A year before the Crowell case Mr. Chief Justice Hughes, in a public address, said:

"The power of administrative bodies to make findings of fact which may be treated as conclusive, if there is evidence both ways, is a power of enormous consequence. An unscrupulous administrator might be tempted to say, 'let me find the facts for the people of my country, and I care little who lays down the general principles.'"

This fear was undoubtedly one of the motivating forces responsible for this decision. Although all human institutions are imperfect and although there must be a final tribunal somewhere for deciding every question, there is deeply rooted in Anglo-American political thinking a skepticism toward administrative finality. One school of thought has always insisted that judicially administered justice is superior to administrative justice. In the discussion that follows we shall show that the finality which the Chief Justice feared would not have been absolute even if the position of the dissent had been endorsed. And it should also be noted at this point that the fears of the dissent that the Crowell doctrine would hamper the efficient administration of the act and clog the court dockets have not materialized.

Thus far we have considered the jurisdictional fact problem in relation to administrative finality almost exclusively as a struggle between the courts and administrative agencies. It has been our thesis that in the ultimate analysis as between these two branches of the government judicial limitations are self-imposed and that the courts enjoy a wide jural freedom in applying or refusing to apply the jurisdictional fact doctrine. The problem becomes more complicated, however, when the legislature attempts to immunize administrative orders against judicial review. In attempting to

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65For this proposition the court relied on Ex parte Bakelite Corporation, 279 U. S. 438, 451 (1929).
67For the English reaction see Hewitt, THE NEW DESPOTISM (1929); Marriott, THE CRISIS OF ENGLISH LIBERTY (1930); Allen, BUREAUCRACY TRiumphant (1931) c. 4. For a criticism of the American tendency toward bureaucracy see Beck, Our WONDERLAND OF BUREAUCRACY.
69Id. at 480.
70See Burgess, Recent Efforts to Immunize Commission Orders Against Judicial Review (1931) 16 IOWA L. REV. 52.
answer the question, "to what extent can the legislature restrict the judiciary in the application of the jurisdictional fact theory?" it will be well to start with the English experience, wherein the immunization process has been carried to extreme lengths.

Lord Chief Justice Hewart, in his thought-provoking work, The New Despotism,\(^7\) protests against the belief "that Parliamentary institutions and the Rule of Law have been tried and found wanting, and that the time has come for the departmental despot, who shall be at once scientific and benevolent, but above all a law to himself."\(^7\) Let us consider the English methods of delegation and immunization by means of which Parliament has created administrative agencies that are free from judicial supervision. Various techniques are utilized. In addition to the general power to fill in details and to "make orders having the effect of law", (1) administrative bodies in England have been granted the power, within limits, to repeal or vary the express provisions of the act conferring the powers.\(^7\) (2) They have been granted the power to suspend or modify the provisions "as they shall think fit".\(^7\) (3) There are other cases where it is expressly enacted that an order made by the Minister "shall not be subject to an appeal to any court".\(^7\) (4) Another device is to provide that the rule or order shall take effect "as if enacted in this Act".\(^7\) This provision is apparently thought to give the rule or order the status of an Act of Parliament, the validity of which cannot, in any circumstances, be questioned. (5) In several recent statutes there appears the extreme provision that "the confirmation of the Board shall be conclusive evidence that the requirements of this act have been complied with, and that the order has been duly made and is within the powers of the act."\(^7\)

Lord Hewart declares:

\(^{71}\)(1929).
\(^{72}\)Id. at 8.
\(^{73}\)Under § 1-(2) of the Road Transport Lighting Act, 17 & 18 Geo. V, c. 37 (1927), the Minister of Transport may exempt, wholly or partially, vehicles of particular kinds from the requirements of the act, and by § 1-(3) he may by regulations add to or vary such requirements. See also § 1 of the Trade Boards Act, 8 & 9 Geo. V, c. 32 (1918). The Unemployment Insurance Act, 10 & 11 Geo. V, c. 30 (1920), by § 45 provides: "If any difficulty arises . . . whatsoever in bringing this Act into operation, the Minister . . . may by order do anything which appears to him necessary or expedient . . . for carrying the order into effect."
\(^{76}\)The Poor Law Act, 17 & 18 Geo. V, c. 14 (1927); the Electricity Supply Act, 9 & 10 Geo. V, c. 100 (1919) § 34.
\(^{77}\)§ 39 of the Small Holdings and Allotments Act, 8 Edw. VII, c. 36 (1908); The Housing & Town Planning Act, 9 Edw. VII, c. 44 (1909); § 10 of the London Traffic Act, 14 & 15 Geo. V, c. 34 (1924).
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"The excuses which are offered even by the most able of the apologists of the new despotism are sometimes rather entertaining. It is said that Parliament simply has not time to do otherwise than delegate legislative power; that Parliament, even if it had the time, has not the requisite aptitude for the work; and that, after all, it is not the task of Parliament, but the task of the Executive, to govern the country."78

To this argument, the Lord Chief Justice counters:

"True, it is indeed the task of the Executive to govern the country. But it is the task of Parliament to make the laws, and the real business of the Executive is to govern the country in accordance with the laws which Parliament has made. Is it not precisely because it is the task of the Executive to govern the country that it is so dangerous to hand over to the Executive the power of making laws as well, and of making them in ways which, while a kind of formal homage is paid to the sovereignty of Parliament, have the effect of employing the sovereignty of Parliament to oust the jurisdiction of the Courts?"79

The general effect on the English legal system of this modern practice of delegation to and immunization of administrative bodies has never been more succinctly stated than by the Lord Chief Justice:

"The paradox which is in course of being accomplished is, indeed, rather elaborate. Writers on the Constitution have for a long time taught that its two leading features are the sovereignty of Parliament and the rule of law. To tamper with either of them was, it might be thought, a sufficiently serious undertaking. But how far more attractive to the ingenious and adventurous mind to employ the one to defeat the other, and to establish a despotism on the ruins of both! It is manifestly easy to point a superficial contrast between what was done or attempted in the days of our worst Kings, and what is being done or attempted today. In those days the method was to defy Parliament—and it failed. In these days the method is to cajole, to coerce, and to use Parliament—and it is strangely successful. The old despotism, which was defeated, offered Parliament a challenge. The new despotism, which is not yet defeated, gives Parliament an anesthetic. The strategy is different, but the goal is the same. It is to subordinate Parliament, to evade the Courts, and to render the will, or the caprice, of the Executive unfettered and supreme."80

78THE NEW DESPOTISM, p. 76.
79Id. at 77.
80Id. at 10-11. Mr. Stanley Baldwin, Prime Minister, speaking in the House of Commons on July 4, 1929, stated that in the three years, 1925-28, the average number of Parliamentary acts was 50.6, the average number of pages occupied by them was 539; while the average number of Statutory Rules and Orders was 1,408.6, the average number of pages, 1,844. See ALLEN, BUREAUCRACY TRIUMPHANT, p. 80. Mr. Allen enumerates the apologies for this unusual delegation of power by Parliament to administrative bodies as follows: (1) Urgency, growing out of emergency conditions; (2) Technicality, many of these matters are claimed to be beyond the competence of anybody but highly trained specialists; (3) Experimentation, subordinate legislation enables experiments to be carried out in a way which would be impossible if the slow
It is obvious that much of this English practice could not gain a foothold in this country under our written constitution with its express due process limitation and its implied recognition of a tripartite system of separation of powers as evidenced by Articles I, II, and III. The correlative doctrine, delegata potestas non potest delegari, which to many had become a bodiless bogeyman, "continually inflated by argument, continually deflated by decision," was given new life by the recent "Hot Oil" and N.R.A. decisions, and the separation of powers doctrine was rejuvenated in the Court's development of the Article III contention in the Crowell case.

What has been the American doctrine with reference to legislative attempts to immunize administrative action against judicial review? (1) Suppose the statute after providing that the decision of the administrative agency shall be "final" is silent with reference to any right to a review of the administrative decision in the courts? The general rule has been that a statute is not unconstitutional as contravening due process of law because it does not expressly provide for a right of appeal to the courts from the decision of an administrative officer or body. At the basis of these decisions lies the fundamental principle, that an implied right of judicial review is always available, by bill in equity, certiorari, mandamus or other appropriate proceeding by virtue of the general law.

In Dayton Goose Creek Railway v. United States, which involved the
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“recapture” paragraphs of the Transportation Act of 1920, the objection was raised that under the Act no opportunity was given for a judicial hearing as to whether the return fixed was a fair return. The opinion declared:

“No special provision need be made in the Act for the judicial consideration of its reasonableness on the issue of confiscation. Resort to the courts for such injury exists under Sections 208 and 211 of the Judicial Code.”

It should be noted that sections 208 and 211 are merely declaratory and recognize the jurisdiction of the Federal district courts to entertain proceedings to set aside orders of the Interstate Commerce Commission. This practice has existed for some years before these sections were added to the Judicial Code.

In *Louisville and Nashville Railway v. Garrett*, the argument was raised that because a Kentucky statute empowering a railway commission to fix rates made the order of the commission final and did not provide for an appeal to the courts, it was unconstitutional. Mr. Justice Hughes, in rendering the opinion of the Court, said:

“It is further insisted that the failure to provide for an appeal to any court from the final order of the Commission, or for a judicial review of the reasonableness of the prescribed rates before they became effective, makes the statute void. But the statute does not deny the carrier the right of access to the courts for the purpose of determining any matter which would be the appropriate subject of judicial inquiry. We have not been referred to any decision of the state court holding that the statute should be so construed... In answer to the present objection it is sufficient to say that there is no showing here of any attempt to preclude such resort to the courts, or to deny to the carrier the assertion of its rights.”

In *Reetz v. Michigan*, a Michigan statute made the action of the Board of Medical Registration final on the “legal question” whether an applicant had been “legally registered” under a prior statute. The Supreme Court of the United States said that statute was not unconstitutional merely because it did not provide for appeal to the courts. The Court also declared, however, that “while the statute makes in terms no provision for a review of the proceedings of the board, yet it is not true that such proceedings are beyond investigation in the courts.”

In conformity with this federal rule,
the decisions of the state courts support the doctrine that if there is an available and adequate judicial review existing by virtue of the general law, it is unnecessary to provide one in the statute.91

(2) Another common legislative device is to provide that the decision of the administrative agency shall be final “if in accordance with law”.92 Obviously the clause “if in accordance with law” permits an implied right to judicial review.93 The case material is in much confusion (a) because of the difficulty of distinguishing between questions of fact, questions of law, and mixed questions of law and fact;94 and (b) because there is no commonly accepted theory upon which the actual practice of judicial review may be predicated.95 The clause “if in accordance with law” is not a term of art having a precise legal content. Consequently, its interpretation by various courts runs the whole gamut of the legal theories that have been evolved in the struggle between the forces of administrative finality and judicial review.96


92For various forms of the “if in accordance with law” provision, see O. L. Pond, Methods of Judicial Review in Relation to the Effectiveness of Commission Control (May, 1914) 53 ANNALS AMER. ACAD. POL. SCI. 54-65.

93See FREUND, op. cit. supra note 85, 345; Dickinson, op. cit. supra note 1, 49; Brown, The Functions of Courts and Commissions in Public Utility Rate Regulations (1924) 38 HARV. L. REV. 140, 175.


95Dickinson, op. cit. supra note 1, p. 50, n.: “The typical formulae for expressing the scope of court review are hopelessly confused because of a persistent confusion between at least three different theories of review: (1) the distinction between “ministerial” and “judicial” duties, resulting in the doctrine that the exercise of “judicial discretion” is not reviewable even for errors of law, except perhaps where “impure motive” or some other abuse is present. This theory survives most strongly in the mandamus cases. (2) The “jurisdictional” theory of review, resulting in the doctrine that even determinations of fact, where “jurisdictional,” are reviewable. (3) The doctrine that errors of law, but not of fact, are reviewable. All three theories represent developments in different directions of the nebulous fundamental doctrine that the exercise of discretion within the limits of jurisdiction is not reviewable.” See GOODNOW, PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES, pp. 405-407.

96Students of administrative law are not agreed as to the line of demarcation between the fields of administrative finality and that of judicial review. Albertsworth, Judicial Review of Administrative Action by the Federal Supreme Court (1921) 35 HARV. L. REV. 127, suggests the following analysis as indicating the pertinent questions involved: (1) questions of procedure; (2) questions of jurisdiction; (3) questions of discretion; (4) questions of fact. Tollefson, Administrative Finality (1931) 29 MICH. L. REV. 839, suggests the following analysis: (1) findings of fact; (2) discretion; (3) questions of privilege; (4) mixed questions of law and fact; (5) errors of law; (6) adequacy of process; (7) questions of jurisdiction; (8) arbitrary action—bias—bad faith—fraud; (9) whether findings are based on evidence; (10) whether administrative remedies are exhausted.
The general rule is that findings of administrative agencies, if supported by substantial evidence, are conclusive as to issues of fact. The courts will set aside findings (a) if there is a complete absence of supporting evidence on an essential point; (b) if the order is made wholly on the basis of evidence which points in an opposite direction; (c) or is such that it could not rationally have been reached by fair-minded men from the evidence; (d) or where the inference of the fact-finding body involves an obvious logical error; (e) or where the conclusion of the fact-finding body rests upon an inference at variance with the known principles of physics or mechanics.

There are two types of cases that present grave difficulties and subject the courts to the charge of usurpation: (a) where the court reverses the fact-finding body's decision, not from the logical or physical impossibility of the inference, nor from the total absence of evidence, but because the court feels in doubt because it regards the evidence as meager and unsatisfactory in character; (b) where the decision of the fact-finding body is set aside by the court as beyond the bounds of rational inference, without indicating whether the impossibility of inference is or is not due to the operation of some principle which the court chooses to regard as a principle of law. In either situation, the court is likely to be criticized for interfering improperly with the function of the body responsible for applying the standard.

(3) A statute may be declared unconstitutional if it is so construed as to

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104 Compare Manufacturers Railway Co. v. United States, 246 U. S. 457 (1917); United States v. Ill. Central R. R., 263 U. S. 515 (1923); United States v. B. & O. R. R., 231 U. S. 274 (1913). HOLMES, THE COMMON LAW, pp. 120, 121: "When a judge rules that there is no evidence of negligence, he does something more than is embraced in an ordinary ruling that there is no evidence of fact. He rules that the acts of omissions proved or in question do not constitute a ground of legal liability, and in this way the law is gradually enriching itself."
preclude or hinder an adequate judicial review or deny a judicial trial de novo where a constitutional right is claimed. In the famous Ben Avon case, the Public Service Commission of Pennsylvania acting on complaint of Ben Avon Borough found after due notice and hearing that increased rates adopted by the Ohio Valley Water Company were unreasonable, and it prescribed a schedule of lower rates which it estimated would yield 7% upon its own valuation of the property used and useful in the service. The company, following a procedure established by the statute, appealed to the state Superior Court on the ground that its property had been undervalued and that the prescribed rates were therefore confiscatory and violated its rights under the 14th Amendment. The Superior Court, passing on the weight of the evidence introduced before the Commission, found the value to be $1,324,621. The Commission's finding had been $924,744. Acting on its valuation, the Superior Court reversed the order of the Commission and directed the Commission to fix a schedule of rates that would yield 7% on the new valuation. From this decision of the Superior Court, the Commission appealed to the Supreme Court of the State, contending that the Superior Court, in passing on the weight of the evidence before the Commission, had exceeded its jurisdiction. The State Supreme Court sustained this contention, reversed the decree of the Superior Court, and reinstated the order of the Commission. The case was brought before the United States Supreme Court on writ of error, on the ground that "the interpretation of the Public Service Company law by the Pennsylvania Supreme Court, requiring the Superior Court to sustain the Commission's order if there was substantial evidence to support it, deprived the water company of its constitutional right to a judicial review of the Commission's action." This contention the United States Supreme Court upheld in a brief opinion by Mr. Justice McReynolds. The Court said:

"Looking at the entire opinion [of the Pennsylvania Supreme Court], we are compelled to conclude that the state Supreme Court interpreted the statute as withholding from the courts power to determine the question of confiscation according to their own independent judgment when the action of the Commission comes to be considered on appeal. . . . In cases of this kind if the owner claims that confiscation of its property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause of the 14th Amendment."

The United States Supreme Court, after considering the "statements by the state Supreme Court... and admitted local practice", found that section 31 of the act providing for injunctive relief "did not offer an opportunity to test the order so clear and definite that the plaintiff in error was obligated to proceed thereunder or suffer the loss of rights guaranteed by the Federal Constitution." The decision in the Ben Avon case concluded with these words:

"Plaintiff in error has not had proper opportunity for an adequate judicial hearing as to confiscation; and unless such an opportunity is now available, and can be definitely indicated by the court below in the exercise of its power finally to construe laws of the state (including, of course, section 31), the challenged order is invalid. The judgment of the Supreme Court of Pennsylvania must be reversed and the cause remanded there, with instructions to take further action not inconsistent with this opinion."

The Ben Avon decision has been subjected to a barrage of criticism.

(A) The Court held that whether a rate is confiscatory or non-confiscatory is a judicial question. It has been urged that a question of value is a matter of opinion; that there is no right to one decision rather than another so long as the decision is fairly reached.\(^{106}\) If it is difficult to find the line between a reasonable and an unreasonable rate, it will pass the wit of commissions and courts to differentiate "unreasonably low but not confiscatory" from "so unreasonably low as to be confiscatory," considering that the maximum rate or return conformable to due process has never been fixed.\(^{107}\) Hence the Court is accused of confusing the inevitable differences in fair valuation with confiscatory valuation. On the other hand, it might be argued that since the Court's valuation was forty percent in excess of the Commission's valuation, it follows that a seven percent return on the Court's valuation would be equivalent to a ten percent return on the Commission's valuation. The query might be raised, in the face of how great a discrepancy can it be maintained that there is no abuse of discretion and that there was substantial evidence to support the Commission's findings?

(B) It has been contended that there are ample precedents wherein the Supreme Court has upheld statutes giving administrative bodies final determination of valuation in cases of condemnation\(^{108}\) and taxation,\(^{109}\) and it is insisted that the same rule should apply to valuation for rate making.\(^{110}\) In answer to this contention, a distinction has been drawn between rate making.

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\(^{106}\)Freund, supra note 105.
\(^{107}\)Freund, Administrative Powers over Persons and Property, p. 298.
\(^{110}\)Hardman, supra note 105.
and condemnation or taxation. The latter are purely administrative; the former is legislative. It is argued that if the legislature had set the rate directly, there would have been court review. Why should the rule be different when the legislature speaks through its mouthpiece, the Commission? It is insisted that the argument that the Commission is competent does not answer the problem. The real question is, can the court surrender the judicial function of passing on the constitutionality of the rate when the charge is made that it is confiscatory in violation of the 14th Amendment?

(C) It has been asserted that the court was confused in its analysis of the scope of the concept, "independent judgment of the court," to which it said an appellant was entitled on the question of confiscation or constitutionality. It has been suggested that "independent judgment" does not extend to subsidiary questions bearing on constitutionality, but only to the ultimate question of constitutionality; that if the former power is asserted by the courts, it will reduce the administrative body to a nullity with a barren power of initial recommendation; that it will destroy the effectiveness of administrative regulation and that it will reduplicate the uncertainty of any particular regulation. It is claimed that such a power would give the courts the right to examine all the evidence de novo, and that by analogy such a procedure would be tantamount to requiring a court to substitute its conclusions from the evidence for the jury's. Further, it has been asserted that the doctrine of the majority in the Ben Avon case is unworkable because it in effect makes the court an assessing authority. The defenders of the decision counter with the argument that valuation is an integral part of the rate making process; that when the confiscation issue is raised it is unrealistic to treat valuation as a subsidiary question; and that the utility under the 14th Amendment is entitled to a court review on the judicial question of confiscation or non-confiscation. One thing is certain: from the vantage ground of the present—fifteen years after the Ben Avon decision—it cannot be gainsaid that many of the predictions of the critics were rash and unreliable.

(4) Another famous case wherein a legislative attempt to immunize an administrative determination from judicial review was ineffective is Southern Railway Company v. Virginia. A Virginia statute provided that when-

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111Green, supra note 105.
112Dickinson, op. cit. supra note 1, pp. 195-203.
113See Albertworth, supra note 105.
114See Freund, supra note 105.
ever, in the opinion of the Highway Commissioner, it should become necessary, for reasons of public safety and convenience, to eliminate dangerous railroad crossings over state highways, the Commissioner should notify and submit plans for their elimination to the railroad maintaining the dangerous crossings. In the event of disagreement, the railroad might, within sixty days, petition the State Corporation Commission for the substitution of its own plans for those of the Commissioner, at which time, upon the hearing and adjudication, one of the plans would be approved. The Court held that the failure to provide for a hearing prior to, or an adequate judicial review of, the Commissioner’s original decision whether the crossing was dangerous and required elimination, was a denial of due process rendering the statute unconstitutional.

The majority of the Court decided that the fact findings of the Commissioner (as to the necessity of eliminating the grade crossings) were made conclusive by the statute and could not be attacked in collateral proceedings. The Court said:

"Undoubtedly, it attempts to give to an administrative officer power to make a final determination in respect of facts—the character of a crossing and what is necessary for the public safety and convenience—without notice, without hearing, without evidence; and upon this ex parte findings not subject to general review, to ordain that expenditures shall be made for erecting a new structure. The thing so authorized is no mere police regulation."

The Supreme Court of Appeals of Virginia, upholding the Commissioner’s order, said:

"The railroad is not without remedy. Should the power vested in the Highway Commissioner be arbitrarily exercised, equity’s long arm will stay his hand."

The Supreme Court of the United States rejected this contention in the following words:

"By sanctioning the order directing the Railway to proceed, it, in effect, approved action taken without hearing, without evidence, without opportunity to know the basis therefor. This was to rule that such action was not necessarily 'arbitrary'. There is nothing to indicate what that court would deem arbitrary action or how this could be established in the absence of evidence or hearing. In circumstances like those here disclosed no contestant could have fair opportunity for relief in a court of equity. There would be nothing to show the grounds upon which the Commissioner based his conclusion. He alone would be cognizant of the mental processes which begot his urgent opinion. The infirmities of the enactment are not relieved by an indefinite right of review in respect of
Although the case contains some troublesome dicta, it is submitted that under a proper doctrine of stare decisis, *Southern Railway v. Virginia* stands for the proposition that a state statute which attempts to authorize an administrative officer to require railway companies to eliminate existing grade crossings and substitute overhead crossings whenever, in his opinion, this is necessary for the public safety and convenience, and which provides no notice to or hearing of a company on the existence of such necessity and no means of reviewing the officer's decision of it, violates the due process of law clause of the 14th Amendment. The fatal defect, according to the Court, lies in the fact that the statute makes the administrative determination final, not subject to review and not subject to an attack in collateral proceedings.

The legislature may attempt to immunize administrative determinations by imposing severe cumulative penalties to prevent the *litigating* of the validity of the statute and the administrative order made thereunder. That such an attempt will be unavailing is shown by the leading case of *Ex parte Young*.11 In the *Young* case, there was involved an order by state authorities requiring a public utility to put into immediate effect a substantial reduction in freight and passenger rates, under severe statutory penalties in case of refusal to comply. The new rates were established without giving the railroad company an opportunity for a hearing. The court in commenting on the statute said:

"For disobedience to the freight act the officers, directors, agents and employees of the company are made guilty of a misdemeanor, and upon conviction each may be punished by imprisonment in the county jail for a period not exceeding ninety days. Each violation would be a separate offense, and, therefore, might result in imprisonment of the various agents of the company who would dare disobey for a term of ninety days each for each offense. DisobEDIence to the passenger rate act renders the party guilty of a felony and subject to a fine not exceeding five thousand dollars or imprisonment in the state prison for a period not exceeding five years, or both fine and imprisonment. The sale of each ticket above the price permitted by the act would be a violation thereof. It would be difficult, if not impossible, for the company to obtain officers, agents or employees willing to carry on its affairs except in obedience to the act and orders in question. The company itself would also, in case of disobedience, be liable to the immense fines provided for in violating orders of the Commission. The company, in order to test the validity of the acts, must find some agent or employee to disobey them at the risk stated. . . ."

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11209 U. S. 123 (1908).
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"The necessary effect and result of such legislation must be to preclude a resort to the courts (either state or Federal) for the purpose of testing its validity. The officers and employes could not be expected to disobey any of the provisions of the act or orders at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid. The result would be a denial of any hearing to the company. . . . It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights. . . . We hold, therefore, that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates."^118

Mr. Justice Cardozo has said: "A fertile source of perversion in constitutional theory is the tyranny of labels."^119 It is a grievous error and a glaring illustration of this "tyranny of labels" to assume, merely because a statute contains severe penalties, that ergo, the Ex parte Young doctrine applies. It is imperative that we analyze and distinguish between various types of penalties. (a) Read in the light of the whole statute, is the penalty section imposed to prevent litigating the validity of the statute or is it imposed for violating it?^120 (b) The question whether a penalty is unreasonable as constituting "an excessive fine" within the meaning of the 8th Amendment, or as a deprivation of due process of law or of the equal protection of

\[^{118}\text{Id. at 147.}\]
\[^{119}\text{Snyder v. Mass., 291 U. S. 97, 114 (1934).}\]
\[^{120}\text{Mr. Justice Lamar speaking for the court in Wadley Southern Railway v. Georgia, 235 U. S. 651, 662 (1914) developed this distinction. After referring to the Young case and others of a similar pattern, he said: "These cases do not proceed upon the idea that there is any want of power to prescribe penalties heavy enough to compel obedience to administrative orders, but they are all based upon the fundamental proposition that under the constitution, penalties cannot be collected if they operate to deter an interested party from testing the validity of legislative rates or orders legislative in their nature. . . . A statute therefore which imposes heavy penalties for violations of commands of an unascertained quality, is in its nature, somewhat akin to an ex post facto law since it punishes for an act done when the legality of the common has not been authoritatively determined. . . . He must either obey what may finally be held to be a void order, or disobey what may ultimately be held to be a lawful order. If a statute could constitutionally impose heavy penalties for violation of commands of such disputable and uncertain legality, the result inevitably would be that the carrier would yield to void orders, rather than risk the enormous cumulative or confiscatory punishment that might be imposed if they should thereafter be declared to be valid."}\]

For cases holding that penalties are so severe as to deter complaining parties from seeking the courts, see Van Dyke v. Geary, 218 Fed. 111 (D. Ariz. 1914); Bonnett v. Vallier, 136 Wis. 193, 116 N. W. 885 (1908).
laws, depends upon the circumstances.\(^{(c)}\) At least two courts\(^{(d)}\) have held that a "not-more-than" penalty statute is not open to the criticism of being excessive, and for that reason void, and issues based on the size of the penalty cannot be settled until the size of the penalty has been determined. \(^{(d)}\) The nature of the suit, whether by the government or at the instance of the complaining citizen, and \(^{(e)}\) the time of bringing suit, whether before or after violation of the statute, are material considerations that have a direct bearing on the question as to whether the penalty section is valid or invalid. \(^{(f)}\) The point is often pertinent whether a fair interpretation of the statute permits penalties to run during good faith litigation or whether they are suspended pendente lite. If the latter interpretation prevails, the case will be taken out of the \textit{Ex parte Young} doctrine.\(^{(g)}\) Finally, the penalty provision as to fines (if invalid) may be construed as separable. This doctrine of separability furnishes one of the handiest detours around the \textit{Ex parte Young} doctrine.\(^{(h)}\)

The foregoing analysis of five types of legislative effort to immunize administrative tribunals from court review demonstrates the general futility of such a procedure. Within a limited field it is true that the legislature which creates the administrative agency can at its discretion determine the scope of its powers. But in the ultimate analysis "the limitations upon the reviewing power of the courts are and must be self-imposed ones."\(^{(i)}\) If such is the

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\(^{(c)}\) See Hardwicke, \textit{Penalties as Affected by Good Faith Litigation} (1934) 33 Mich. L. Rev. 40, 44, 45. Great latitude is allowed the government in fixing the size of penalties. The Supreme Court of the United States approved a cumulative penalty of $1,623,900, most of the penalty being figured at the rate of $1500 a day, for a violation over a period of years of the Texas Anti-Trust Law by a corporation whose properties were worth more than $40,000,000, and whose dividends have been as high as 700 percent per annum. See Waters Pierce Oil Co. v. Texas, 212 U. S. 86. (1908).

\(^{(d)}\) Noble v. Carlton, 36 F. (2d) (976) (S. D. Fla. 1930); Culver v. Smith, 74 S. W. (2d) 754 (Tex. Civ. App. 1934). In Missouri-Pacific Railway v. Tucker, 230 U. S. 340 (1913), the Court held that the imposition by a Kansas statute of a liability of $500 as liquidated damages, together with a reasonable attorney's fee for every charge by a common carrier in excess of the rates therein fixed, takes property without due process of law. For other cases holding invalid statutes that set a minimum fine for each offense, see Consolidated Gas Co. v. Mayer, 146 Fed. 150 (C. C. S. D. N. Y. 1906); \textit{Ex parte Wood}, 155 Fed. 190 (C. C. W. D. N. C. 1907); Consolidated Gas Co. v. Mayer, 157 Fed. 849 (C. C. S. D. N. Y. 1907), reversed on other grounds, 212 U. S. 19 (1908).


\(^{(h)}\) Supra note 15.
situation with reference to legislative attempts at immunization, we should expect that the same rule would apply where administrative agencies attempt to immunize themselves against judicial review by so phrasing their orders as to boldly assert in the language of the statute that they have given due consideration to all of the elements which they were required to consider and that their findings and orders were made upon the basis of such consideration. In the case of *Monroe Gaslight & Fuel Co. v. Michigan Public Utility Commission*, the court made the following statement with reference to the attempt on the part of an administrative agency to lift itself by its own bootstraps:

"It will be noted, however, that pursuant to a common practice the (Public Utility Commission) report seeks to immunize itself against attack by a careful declaration that no one element is given controlling effect in fixing the rate base, but that actual cost, investment, capitalization, reconstruction costs, depreciation, etc., are given and each is given due weight in reaching the final composite conclusion. We do not see that an otherwise appropriate judicial revision can be escaped in this manner. It is the duty of the court to determine the rate base from the evidence before it; and while there must be great hesitancy in overturning a conclusion reached by the Commission, after it has considered all relevant facts, neither presumption nor expressed statement by the Commission that it has given due weight to everyone can prevail against the contrary inference required by the proofs."

Although the "Hot Oil" decision will be remembered especially for its declaration as to the lack of a legislative standard in Section 9(c) of the National Industrial Recovery Act, it should be noted that the court also in referring to the question of the necessity for administrative findings made it clear that it did not intend to renounce its supervisory power over those findings. Mr. Chief Justice Hughes speaking for the court said:

"The first section is but a general introduction, it declares no policy and defines no standard with respect to the transportation which is the subject of Section 9(c). But if from the extremely broad description contained in that section and the widely different matters to which the section refers, it were possible to derive a statement of prerequisites to the President's action under Section 9(c), it would still be necessary for The President to comply with those conditions and to show that compliance as the ground of his prohibition."

The court in elaborating its position said:

"We are concerned with the question of the delegation of legislative power. If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due

292 Fed. 139, 143, 144 (1923).
Panama Refining Co. v. Ryan, 293 U. S. 388 (1935).
process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and if that authority depends on determinations of fact, those determinations must be shown."

The court then quoted with approval from an earlier decision to the effect that

"... when ... an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. ... If it is lacking, the order is ineffective. ... We put this conclusion not only on the language of the statute but also on general principles of constitutional government. We cannot regard the President as immune from the application of these constitutional principles."†

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‡The second installment of this article, discussing the operation of the foregoing theory in various specific fields of law, will appear in a subsequent issue.