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Frank R. Strong

University of North Carolina

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Judicial Review: A Tri-Dimensional Concept of Administrative-Constitutional Law

FRANK R. STRONG* 

In an earlier issue of the present volume of the Review, an effort was made to dispel the seeming absurdity that "Separation of Powers, the cardinal principle upon which the federal and all state governments are founded, a great American contribution to the science of government, violates the due process clause!" The quotation is from an able and exhaustive article on Judicial Review of Administrative Action in West Virginia, written by Kenneth Culp Davis at the beginning of a teaching and writing career which has brought him preeminence in the field of Administrative Law. The article appeared in Volume 44 of this Law Review.

There is yet another paradox which has been of equal perplexity for Professor Davis and other scholars in the field of administrative law. This paradox is the seeming inconsistency in judicial views, especially on the part of the Supreme Court of the United States, regarding the degree of finality to be accorded administrative findings of fact. In many situations the courts allow the administrative finding of fact to stand if supported by substantial evidence; yet in other instances, and arguably for no good reason, courts demand an independent judicial judgment on the facts or even a judicial trial de novo. For this confusion Professor Davis in his article faulted "an abstraction known as the doctrine of separation of powers," concluding a hundred pages later that "Due process and other provisions of the bill of rights constitute adequate safeguards against arbitrary action; the theory of separation of powers is not a satisfactory tool to use for this purpose." Although

* Professor of Law, University of North Carolina; Dean and Professor of Law Emeritus, The Ohio State University.


66 Davis, supra note 1, at 272.

67 Id. at 375.
the use, or misuse, of the doctrine has been a contributing factor, as Professor Davis showed for this State, a full explanation of this paradoxical judicial behavior must be found by distinguishing between two different judicial acts, each of which, unfortunately, is known as judicial review.68

II. Judicial Review of Constitutionality Distinguished from Judicial Review Under Separation of Powers

One type of judicial act which goes by the name of judicial review, especially in the field of administrative law, consists of judicial reconsideration of legislative and executive action, as it bears upon a given individual, before governmental sanction (whether civil, administrative or criminal) becomes final as to that person. Familiar aspects of this behavior are statutory interpretation, fact finding, and application of the intended governing rule to the specific facts as found. Altogether different is judicial review in the sense of court review of the constitutionality of governmental acts. This is the form of judicial review the two dimensions of which were examined in the first Lecture.

While now by no means indigenous to the United States, this second kind of judicial review is not a feature of all legal systems.69 It ought to be rechristened constitutional judicial review to distinguish it from the first type, which has nothing to do with enforcement of constitutional limitations. Little need be said regarding constitutional judicial review save to restress the distinction

68 The difficulty is not just one of terminology; in the literature of administrative law and constitutional law, there is little differentiation between the two basically different types of judicial act. An illustration is the ambitious effort to evolve standards for "judicial review" made by Hyman and Newhouse, Standards for Preferred Freedoms, 60 N.W. U. L. Rev. 1 (1965). An exception is VANDERBILT, SEPARATION OF POWERS 98 (1953). Employing the terms of differentiation proposed in the text, it is a valid generalization to say that in the literature of constitutional law "judicial review" connotes, almost without exception, constitutional judicial review, whereas in American administrative law writings "judicial review" refers interchangeably to ordinary judicial review and constitutional judicial review. English writers appear to be more careful. WADE, ADMINISTRATIVE LAW chap. 3 (1961); Gelinas, Judicial Control of Administration Action: Great Britain and Canada, 1983 PUB. LAW J. 140.

69 Kadish, supra note 23, is a most informative comparison of constitutional judicial review as practiced by the High Court of Australia and the Supreme Court of the United States. The current extent of judicial review of constitutionality in European countries is sketched by Cappelletti and Adams, Judicial Review of Legislation: European Antecedents and Adaptations, 79 HARV. L. REV. 1207 (1966).
taken in the earlier Lecture between constitutional judicial review of direct limitations and constitutional judicial review of indirect limitations. By contrast, the first type of judicial review is common to most legal systems; differences obtain among countries only in respect to the degree to which exceptions to such review are accepted practice. In a very real sense, the term "judicial review" is descriptively correct for this form of judicial operation: the judicial action comes in time after relevant legislative and executive action and, historically at least, functions as a review of, and brake upon, the action of one or both of the other branches. But in order to differentiate it from constitutional judicial review let it be called ordinary judicial review in recognition of its commonness among the world's legal systems.

Ordinary judicial review is the judicial function which Locke embryonically identified and to which Montesquieu gave status. In English law the great decisions vouchsafing to the courts this type of judicial power are those of Dr. Bonham's Case\textsuperscript{70} (1610) and Prohibitions Del Roy\textsuperscript{71} (1612). Both were by Sir Edward Coke.\textsuperscript{72} It was in Dr. Bonham's Case, by far the better known of the two, that Coke made his celebrated statement that "it appears in our books, that in many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void; for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void."\textsuperscript{73} Although this assertion has often been claimed, by scholar and advocate,\textsuperscript{74} to be the forerunner of constitutional judicial review, it is more soundly viewed as judicial assertion of the power to interpret legislation.\textsuperscript{75} Dr. Bonham's Case

\textsuperscript{70} 8 Co. 114a, 77 Eng. Rep. 647 (1610).
\textsuperscript{71} 12 Co. 63, 77 Eng. Rep. 1342 (1612).
\textsuperscript{72} Jaffe, The Right to Judicial Review 1, 71 Harv. L. Rev. 401, 412-414 (1958), credits Dr. Bonham's Case and Coke's decision in James Baggs's Case, 11 Co. 93b, 77 Eng. Rep. 1271 (1615), with laying the English groundwork for a common law of judicial review. No mention is made of Prohibitions Del Roy.
\textsuperscript{73} 8 Co. 118a, 77 Eng. Rep. 652 (1610).
\textsuperscript{74} E. g. James Otis, in Paxton's Case, Quincy's Case, :Corwin, Establishment of Judicial Review, 9 Mich. L. Rev. 102 (1910); Plucknett, Bonham's Case and Judicial Review, 40 Harv. L. Rev. 30 (1926); Smith, Dr. Bonham's Case and the Modern Significance of Lord Coke's Influence, 41 Wash. L. Rev. 297 (1966).
is no less significant by reason of its classification as an assertion of court power to engage in ordinary judicial review. For to quote once again Bishop Hoadly's penetrating observation, "whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the Law-giver to all intents and purposes, and not the person who first wrote or spoke them."

In Prohibitions Del Roy, just two years later, the issue was the issuance of writs of prohibition by the common law courts in their jurisdictional struggle with the ecclesiastical courts. On plea of the Archbishop of Canterbury, James I summoned him and Coke to Whitehall on a Sunday. Bancroft, the Archbishop, found it "clear in divinity" that the King has authority "by the word of God in the Scripture" to decide "in his Royal person" cases of contested jurisdiction. Coke, however, reporting the occasion, claims he challenged this thesis, asserting "that the King in his own person cannot adjudge any case, either criminal, as treason, felony, etc., or betwixt party and party, concerning his inheritance, chattels, goods, etc., but this ought to be determined and adjudged in some Court of Justice, according to the law and custom of England." To this James is said to have answered "that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges." By way of reply Coke asserts that he conceded "that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it." Greatly offended, the King asserted that it was "treason to affirm" that "he should be under the law" and it may well be that Coke would right then have been on his way to the Tower of London had not his Uncle, the King's treasurer and favorite, interceded on behalf of Coke who contributed his part by getting down "on all fowers". But, if we can believe Coke, this celebrated encounter ended with Coke countering the King's assertion by quoting Bracton to the

76 Gray, Nature and Sources of the Law 125 (2d ed. 1924).
77 Included in Catherine Drinker Bowen's magnificent volume on Sir Edward Coke is an account of the confrontation between James and Coke which varies in colorful particulars from Coke's own version. Bowen, The Lion and the Throne 301-306 (1958).
effect that "quod Rex non debet esse sub homine, sed sub Deo et lege."\(^6\)

Correctly understood, ordinary judicial review is, both historically and functionally, a part of constitutional law; it constitutes the original manner in which courts asserted their authority to participate in limitation of governmental power. In the largely disregarded or misunderstood final paragraph of Number 78 of the Federalist Papers, Hamilton explained its great significance:

But it is not with a view to infractions of the Constitution only, that the independence of the Judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the Judicial magistracy is of vast importance in mitigating the severity, and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the Legislative body in passing them . . .

This is a circumstance calculated to have more influence upon the character of our Governments, than but few may be aware of.\(^7\)

\(^6\) Quotations are from 12 Co. at 63-65, 77 Eng. Rep. at 1342-1343.

\(^7\) The passing years have produced growing awareness of the power which the exercise of ordinary judicial review gives courts for tempering the thrust of the other departments of government. From a considerable literature may be cited Cohen, The Process of Judicial Legislation, 48 AM. L. REV. 161 (1914); JACkSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 57-62, 139-141 (1941). A revealing contemporary decision is that of Sherman v. Immigration and Naturalization Service, 350 F. 2d 894 (C. A. 2d, 1965-1966), remanded, 385 U.S. 276 (1968). On review of an administrative determination of deportability by INS, the majority of a three-judge panel read the pertinent sections of the applicable statute as directed solely to the scope of ordinary judicial review to be accorded in deportation proceedings and irrelevant on the issue of burden of proof. The statute put to one side, the panel insisted that for aliens of long United States residency the burden of proof ought to be as heavy as that in the prosecution in criminal cases. "All we can require is that the special inquiry officer and the Board conscientiously ask whether the facts on which the deportation of a long-term resident alien depends are almost certainly true." 350 F.2d. at 899. Professor Jaffe hailed the decision of the panel in Comment, 79 HARv. L. REV. 914 (1966), although conceding that "there is some difficulty in meshing a heavy burden of persuasion with a limited scope of review." Id. at 916. Meantime, however, the panel decision had been reconsidered and reversed by the Second Circuit on rehearing en banc, the majority of the full Bench adopting the views of the dissenting panelist. All opinions are set forth in the bound volume of the Federal Reporter under the citation above given. The Supreme Court in effect
It is this authority to exercise ordinary judicial review that the doctrine of separation of powers sought to vouchsafe to the judiciary.\textsuperscript{60} This is the significance of the case of \textit{Bayard v. Singleton} and of Louis Boudin's favorable reaction thereto, discussed in the first lecture.\textsuperscript{61} One may instance as a further illustration the incorporation in the Massachusetts Constitution of 1780 of Article XXIX, calling for independence of the judiciary, immediately preceding the oft-quoted Article XXX, which articulated the principle of separation of powers "to the end it may be a government of laws and not of men."\textsuperscript{62}

Strictly applied, the American concept of separated powers\textsuperscript{63} would prevent finality of administrative decision, whether of fact or law. Finality of decision is the very hallmark of judicial action,

reversed, two Justices dissenting, by reinstating the interpretation of the panel. The litigation discloses the potentialities of ordinary judicial review for the tempering of legislative harshness in a sensitive area of policy. Shades of Blackstone's Rule 10, a classic articulation of the nature of ordinary judicial review, are to be seen in Professor Jaffe's further comment, \textit{id. at} 917; "If the statute is to be interpreted in its very evident spirit of Draconian severity, the court's interpretation is not easy to come by. But it is, I take it, a dominant principle of the Supreme Court today that the merely implicit elements of a statute will not be given effect if the consequences to the individual are in the Court's opinion harsh and unfair." The citation to Rule 10 in the \textit{Commentaries} appears \textit{supra} note 75.

\textsuperscript{60} Despite the clear historical grounding of ordinary judicial review in the concept of separation of powers, some courts and commentators have difficulty with its constitutional basis. Hart, \textit{The Power of Congress to Limit the Jurisdiction of Federal Courts}, 68 Harv. L. Rev. 1305, 1375 (1955), finds "the constitutional right to access to courts" in the Due Process and Habeas Corpus Clauses. Jaffe, \textit{The Right to Judicial Review II}, 71 Harv. L. Rev. 769, 795-814 (1958), regards due process and separation-of-powers as alternative bases of ordinary judicial review. Cited \textit{id. at} 796-798 are cases using not only these bases but two others. Berger, \textit{Administrative Arbitrariness and Judicial Review}, 65 Col. L. Rev. 55, 88-89 (1965), finds the bases of a right to review in due process, implications from delegation of powers, and the creation of courts. American constitutional law and theory bear evidence of close interplay between the concepts of due process and separated powers. Strong, \textit{American Constitutional Law} 138-139 (1950). But it is as odd as it is unnecessary to look to due process for vindication of ordinary judicial review. For this requires that courts claim the power of constitutional judicial review in order to justify their older, far more accepted practice of ordinary judicial review. The doctrine of separation-of-powers adequately provides the predicate for ordinary judicial review, leaving for another day and theory the explanation of constitutional judicial review.

\textsuperscript{61} The discussion appears \textit{supra}, at page 119.

\textsuperscript{62} $^2$ \textsc{Thorpe}, \textit{American Charters, Constitutions, and Organic Laws} 1893 (1909).

the end product of the operation of governmental machinery.\textsuperscript{84} Some State courts attempt to continue adherence to the strict view, but largely they have beat a retreat by redefining the judicial function in such a way as to exclude much of the decision-making engaged in by administrative bodies. A classic illustration is the advisory opinion of the mid-thirties given by the supreme court of New Hampshire in response to a request of the State's Senate for advice on the constitutionality of a proposed "Act Relating to Compensation for Motor Vehicle Accidents."\textsuperscript{85} This early proposal for solution of the growing problem of compensation for injury and death by motor vehicle looked to the use of an administrative base while retaining negligence as the predicate of liability.\textsuperscript{86} The nub of the court's reasoning in declaring the proposal unconstitutional is contained in the following paragraph of the opinion:\textsuperscript{87}

In the connection between the departments some overlapping is permissible, and there is a region of authority, alternative and concurrent, the boundaries of which are fixed by no final rule. As a rule which meets most situations, when an executive board has regulatory functions, it may hear and determine controversies which are incidental thereto, but if the duty is primarily to decide questions of legal right between private parties, the function belongs to the judiciary. Courts of justice, in their popular sense, may not be set up and established in the executive organization. They pertain exclusively to the branch of the judiciary.\textsuperscript{88}

The Supreme Court of the United States has in general yielded to federal administrative bodies, on the point of finality, with sur-

\textsuperscript{84} Gordon v. United States, 117 U.S. 697 (1884), emphasized this consideration by way of defining the judicial power as forbidding any mitigation of a judicial decision by subsequent act of any other branch of government.

\textsuperscript{85} Opinion of the Justices, 87 N.H. 492, 179 Atl. 344 (1935).

\textsuperscript{86} The Bill is reprinted in 110 A.L.R. 820-825. Compare the current proposal of Professors Keeton and O'Connell, Basic Protection—A Proposal for Improving the Automobile Claims System, 78 Harv. L. Rev. 329 (1964); since expanded to a volume, Keeton and O'Connell, Basic Protection for the Traffic Victim (1965).

\textsuperscript{87} 87 N. H. at 493, 179 Atl. at 345.

\textsuperscript{88} The classic studies of court retreat but not surrender on the front of ordinary judicial review are those of Pillsbury, Administrative Tribunals, 36 Harv. L. Rev. 405 (1923); Brown, Administrative Commissions and the Judicial Power, 19 Minn. L. Rev. 261 (1935).
prising ease. Today the acknowledged authority on American administrative law, Professor Davis has observed that

The Supreme Court of the United States has never held that judicial power has been improperly vested in an agency, although the question has come up in cases involving aliens, unreasonable obstructions to navigation, the Selective Draft Law of the First World War, fixing allowances in a reorganization, and statutory interpretation in railroad regulation and in coal price-fixing.⁵⁹

The Court’s retreat first appeared with reference to fact determinations. Presumably, this was in deference to the supposed expertise of administrative bodies once described by Holmes as “appointed by law and informed by experience.” Yet the retreat is not complete, the general federal rule being that administrative determinations of fact are final only if supported by substantial evidence.⁶⁰ The Court appears to find constitutional salve in the retention of some reviewing power; a number of state courts have reasoned thusly although the New Hampshire supreme court, in the advisory opinion to which reference has been made, did not consider this view “to be sound in principle.”

In a more recent development, the Court has in a number of instances according near-finality to administrative interpretation of federal statutes, by tradition a “law” question. The test here is that of rational basis; the administrative conclusion as to statutory meaning stands, provided there is a rational basis for it.⁶¹ While of great significance, this development should not be as surprising, nor as difficult to explain, as many have taken it to be. The Court’s early tolerance of contingency delegation of legislative power, which is the analogue of the substantial evidence test in delegations of power traditionally exercised by courts, has long since been followed by Court approbation of delegation of broad rule-making power, i.e., the power of administrative bodies to promulgate law within the bounds of generalized declarations of Congressional policy. The law-fact distinction having disintegrated in judicial

⁶⁰ Id. at §§ 29.01, 29.11.
⁶¹ This development is considered by Professor Davis, id. chap. 30, who finds in the cases both inconsistency and lack of satisfactory explanation for this inconsistency.
control of delegations of legislative power, is its threatened disappearance so surprising with respect to judicial review of administrative adjudication on “law” questions as well as “fact” questions?92

If in this development there is any basis for surprise, it lies in the Court’s failure to invoke constitutional judicial review to insist, in accordance with the separation of powers principle of the Constitution, upon its right to a more authoritative participation in law determinations, which, together with the resolution of fact issues, constitutes the essence of ordinary judicial review. But here again, the likely explanation for this attitude of the Court lies in a combination of the Court’s respect for federal administrative bodies and the flexibility which remains to it in applying the rational basis test to administrative determinations of law questions.93

When, however, there was pressed upon the Supreme Court of the United States the proposition that it should in effect further yield its function of constitutional judicial review by according essential finality to administrative fact determinations decisive of constitutional issues of federalism or private right, the Court balked in a celebrated series of decisions beginning with Ohio Valley Water Co. v. Ben Avon Borough94 and Ng Fung Ho v. White,95 and continuing through Crowell v. Benson96 and St. Joseph Stock Yards Co. v. United States.97 Although these cases are well known by name, a full understanding of them requires close analysis of each.

Ben Avon, the earliest of these decisions, involved the value to be placed on a water utility for purposes of rate regulation. Dissatisfied with the value set by the Public Service Commission of

92 Convinced that administrative agencies are best equipped to make all types of fact determinations, Dean Landis in his study of the administrative process faced the question whether, if the issue is one of determining who can best perform a particular task, traditional law questions ought not also be determined by the administrative. Resolution of the question led him into a stimulating consideration of the concept of the rule of law and of the role which courts should play. LANDIS, THE ADMINISTRATIVE PROCESS, 140-155 (1938).
93 DAVIS, op. cit. supra note 89, at § 30.08.
94 253 U.S. 287 (1920).
95 259 U.S. 276 (1922).
96 285 U.S. 22 (1932).
97 298 U.S. 38 (1936).
Pennsylvania, the company appealed to the Pennsylvania courts. In the Superior Court it was successful; that court "reviewed the certified record," appraised the company's property at a substantially higher figure, and remanded. But on further appeal by the Commission, the supreme court of Pennsylvania reinstated the administrative order. Asserting that as to those items "wherein the Superior Court differed from the commission upon the question of values, there was merely the substitution of the former's judgment for that of the commission," the State supreme court declared that the lower court should not have interfered "as there was competent evidence tending to sustain the Commission's conclusion and no abuse of discretion appeared." 98 In turn, the supreme court of Pennsylvania was reversed by the Supreme Court of the United States. The essence of the majority position is contained in the following paragraph: 99

The order here involved prescribed a complete schedule of maximum rates and was legislative in character. [Citations omitted]. In all such cases, if the owner claims confiscation of his 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, Fourteenth Amendment. [Citations omitted].

Joined by Justices Holmes and Clarke, Mr. Justice Brandeis dissented. With the essentials of procedural due process satisfied and substantial evidence to support the Commission's findings, he was of the view that "the judgment of the Supreme Court of Pennsylvania must be affirmed, unless, as contended, the claim of confiscation compels this court to decide, upon the weight of the evidence, whether or not its property has been undervalued or unless some error of law is shown." 100 The Justice could find no such compulsion in the allegation of confiscation.

On writ of error to a state court . . . we accept facts as there found, whether in law or equity and although the

98 253 U.S. at 288.
99 Id. at 289.
100 Id. at 297.
existence of the federal question depends upon the determination of the issue of fact, and although the finding of fact will determine whether or not there has been a taking of property in violation of the Fourteenth Amendment. [Citations omitted].

To Mr. Justice Brandeis was assigned the writing of the Court's opinion, two years later, in Ng Fung Ho v. White. With respect to four persons of the Chinese race, the lower federal courts had sustained, as against test by habeas corpus, deportation proceedings ordered as a consequence of administrative hearings on warrants of deportation asserting presence in the United States in violation of the Chinese Exclusion Act. The Supreme Court affirmed in the cases of two as to whom there was no claim of United States citizenship. "Congress has power to order at any time the deportation of aliens whose presence in the country it deems hurtful; and may do so by appropriate executive proceedings." The judicial task here "is merely to ascertain the intention of Congress." But the other two, claiming United States citizenship, gained reversal. With no reference to Ben Avon, Mr. Justice Brandeis thus explained the difference in result:

Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact . . . . To deport one who so claims to be a citizen, obviously deprives him of liberty, as was pointed out in Chin Yow v. United States . . . . It may result also in loss of both property and life; or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law. The difference in security of judicial over administrative action has been adverted to by this court.

After a ten-year interval, and some change in Court membership, the issue returned to the Court. The opinions in each of the two cases of the 1930's are considerably longer, suggesting greater
effort on the part of each view to firm up its position. Careful analysis of the opinions must perforce be longer. For the majority in Crowell v. Benson, Mr. Chief Justice Hughes opens by observing that the Federal Act under challenge, the Longshoremen’s and Harbor Workers’ Compensation Act, “has two limitations that are fundamental. It deals exclusively with compensation in respect of disability or death resulting ‘from an injury occurring upon the navigable waters of the United States’ if recovery ‘through workmen’s compensation proceedings may not validly be provided by State law’, and it applies only when the relation of master and servant exists.” 104 Later in his opinion the Chief Justice makes it clear that these limitations are fundamental in the constitutional, as well as the statutory, sense. “These conditions are indispensable to the application of the statute, not only because the Congress has so provided explicitly (§ 3), but also because the power of the Congress to enact the legislation turns upon the existence of these conditions.” 105 Apart from instances “involving constitutional rights,” said the Chief Justice, “there can be no doubt that the Act contemplates that, as to questions of fact arising with respect to injuries to employees within the purview of the Act, the findings of the deputy commissioner, supported by evidence and within the scope of his authority, shall be final.” 106

This is so as to both the challenge under due process and that under article III. The former contention is disposed of in two paragraphs, the gist of which is contained in the following sentence: “The use of the administrative method for these purposes, assuming due notice, proper opportunity to be heard, and that findings are based upon evidence, falls easily within the principle of the decisions sustaining similar procedure against objections under the due process clauses of the Fifth and Fourteenth Amendments.” 107 Passing to the contention under article III, Chief Justice Hughes, noting that the issue concerns only determinations of fact, comments upon the “at once apparent” distinction “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 legisla-

104 285 U.S. at 37-38.
105 Id. at 55.
106 Id. at 46.
107 Id. at 47.
Reference is then made to the recognition of this distinction in Murray's Lessee v. Hoboken Land & Improvement Co., one of the cases discussed in the first lecture. Admittedly, the Chief Justice observes, the present case "is one of private right, that is, of the liability of one individual to another under the law as defined. But in cases of this sort, there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges." He instances the use of juries at common law, the ancient employment of juries in admiralty, and the "historic practice" in both admiralty and equity of calling "to the assistance of the courts, without the consent of the parties, masters and commissioners or assessors" whose findings were not disturbed, as a matter of practice, when supported by evidence and uninfected by errors of law. Summing up, Chief Justice Hughes declared that:

For the purposes stated, we are unable to find any constitutional obstacle to the action of Congress in availing itself of a method shown by experience to be essential in order to apply its standards to the thousands of cases involved, thus relieving the courts of a most serious burden while preserving their complete authority to insure the proper application of the law.

Clearly, the Court is here saying, consistent with what we have already found as to the position of the Supreme Court of the United States, that the doctrine of separation-of-powers does not prevent transference to federal administrative bodies of near-finality in the ordinary type of fact determination. Stated otherwise, the Court is willing to yield to the administrative process as regards its historic exercise of ordinary judicial review, retaining only a minimal reviewing power.

But, the Chief Justice immediately asserts, "A different question is presented where the determinations of fact are fundamental or 'jurisdictional,'" meaning, as we have already seen, fact determinations controlling of constitutional limitations. Here, those limita-

108 Id. at 50.
109 18 How. 272 (1855), discussed supra at pages 125-126.
110 285 U.S. at 51.
111 Id. at 54.
tions are two: the federalistic one of Congressional power vis-a-vis the States and the due process prohibition on both the States and the Congress as concerns imposition of liability without fault "regardless of particular circumstances or relations."\textsuperscript{112} Then follows the climactic paragraph of the opinion:\textsuperscript{113}

In relation to these basic facts, the question is not the ordinary one as to the propriety of provision for administrative determinations. Nor have we simply the question of due process in relation to notice and hearing. It is rather a question of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions. It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency — in this instance a single deputy commissioner — for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instruments or in the Executive Department. That 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, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law.

Dissenting, Mr. Justice Brandeis, with whom Justices Stone and Roberts joined, made much of the fact that the majority, in affirming the district court, permitted a trial de novo on the issue of employment. In so doing the Court had clearly gone beyond \textit{Ben Avon's} requirement of an independent judgment of the courts on facts decisive of constitutionality. The essence of the Brandeisian

\textsuperscript{112} The federalistic limitation is spelled out \textit{id}. at 55; the other \textit{id}. at 56.

\textsuperscript{113} \textit{Id}. at 56-57.
opinion is to be found in Parts Fourth, Fifth, and Sixth. Careful attention to the following passages will disclose the thrust of the dissent.

Fourth. Trial de novo of the issue of the existence of the employer-employee relation is not required by the due process clause. That clause 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 board. See Dahlstrom Metallic Door Co. v. Industrial Board, 284 U.S. 594. The findings of fact of the deputy commissioner, the Court now decides, are conclusive as to most issues, if supported by evidence. Yet as to the issue of employment the Court holds not only that such findings may not be declared final, but that it would create a serious constitutional doubt to construe the Act as committing to the deputy commissioner the simple function of collecting the evidence upon which the court will ultimately decide the issue.

It is suggested that this exception is required as to issues of fact involving claims of constitutional right. For reasons which I shall later discuss, I cannot believe that the issue of employment is one of constitutional right. But even assuming it to be so, the conclusion does not follow that the trial of the issue must therefore be upon a record made in the district court. That the function of collecting evidence may be committed to an administrative tribunal is settled by a host of cases, and supported by persuasive analogies, none of which justify a distinction between issues of constitutional right and any others. Resort to administrative remedies may be made a condition precedent to a judicial hearing. [Citations omitted]. This is so even though a party is asserting deprivation of rights secured by the Federal Constitution . . . .

Fifth. Trial de novo of the existence of the employer-employee relation is not required by the Judiciary Article of the Constitution . . . . The argument is that existence of the relation of employer and employee is, as a matter of
substantive law, indispensable to the application of the statute, because the power of Congress to enact the legislation turns upon its existence; and that whenever the question of constitutional power depends upon an issue of fact that issue must, as a matter of procedure, be determinable independently upon evidence freshly introduced in a court. Neither proposition seems to me well founded.

Whether the power of Congress to provide compensation for injuries occurring on navigable waters is limited to cases in which the employer-employee relation exists has not heretofore been passed upon by this Court and was not argued in this case. I see no justification for assuming, under those circumstances, that it is so limited. Without doubt the word "employee" was used in the Longshoremen's Act in the sense in which the common law defines it. But that definition is not immutable; and no provision of the Constitution confines the application of liability without fault to instances where the relation of employment, as so defined, exists. . . .

Sixth. Even if the constitutional power of Congress to provide compensation is limited to cases in which the employer-employee relation exists, I see no basis for a contention that the denial of the right to a trial de novo upon the issue of employment is in any manner subversive of the independence of the federal judicial power. Nothing in the Constitution, or in any prior decision of this Court to which attention has been called, lends support to the doctrine that a judicial finding of any fact involved in any civil proceeding to enforce a pecuniary liability may not be made upon evidence introduced before a properly constituted administrative tribunal, or that a determination so made may not be deemed an independent judicial determination. Congress has repeatedly exercised authority to confer upon tribunals which it creates, be they administrative bodies or courts of limited jurisdiction, the power to receive evidence concerning the facts upon which the exercise of federal power must be predicated, and to determine whether those facts exist. The power of

115 Id. at 80, 81-82.
Congress to provide by legislation for liability under certain circumstances subsumes the power to provide for the determination of the existence of those circumstances. It does not depend upon the absolute existence in reality of any fact.  

St. Joseph Stock Yards Co. v. United States was a suit to restrain enforcement of an order of the United States Secretary of Agriculture fixing maximum rates for the company's services. The suit was first heard by a three-judge federal district court, which, upon the record made before the Secretary, dismissed the bill as against the company's assertion of confiscation violative of the Fifth Amendment. Puzzled by decisions of the Supreme Court on the extent of judicial review required in cases of this kind, the district court put the question directly:

If in a judicial review of an order of the Secretary his findings supported by substantial evidence are conclusive upon the reviewing court in every case where a constitutional issue is not involved, why are they not conclusive when a constitutional issue is involved?

For itself, the lower court was of the view that the substantial evidence test was applicable notwithstanding the presence of an issue of confiscation. Nevertheless, it took the precaution of weighing the evidence and making many findings of its own.

This prudent action on the part of the federal district court averted reversal, but not an explanatory lecture, by the Supreme Court. Again the mouthpiece of the majority, Chief Justice Hughes patiently explained the difference which had eluded the lower court:

In determining the scope of judicial review of [a legislative act such as the fixing of rates], there is a distinction between action within the sphere of legislative authority and action which transcends the limits of legislative power.

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116 Id. at 84-85.
118 298 U.S. at 50-51, 51-52.
Exercising its rate-making authority, the legislature has a broad discretion. It may exercise that authority directly, or through the agency it creates or appoints to act for that purpose in accordance with appropriate standards. The court does not sit as a board of revision to substitute its judgment for that of the legislature or its agents as to matters within the province of either . . . .

But the Constitution fixes limits to the rate-making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation. When the legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power . . . . Legislative declaration or findings is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation.

In a clear reference to the position taken in these cases by Mr. Justice Brandeis, the Chief Justice then comments:119

It is said that we can retain judicial authority to examine the weight of evidence when the question concerns the right of personal liberty. But if this be so, it is not because we are privileged to perform our judicial duty in that case and for reasons of convenience to disregard it in others. The principle applies when rights either of person or of property are protected by constitutional restrictions. Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority.

In closing the explanatory lecture, Chief Justice Hughes does mitigate to some extent the stringency of the majority position:120

119 Id. at 52.
120 Id. at 53.
But this judicial duty to exercise an independent judgment does not require or justify disregard of the weight which may properly attach to findings upon hearing and evidence. On the contrary, the judicial duty is performed in the light of the proceedings already had and may be greatly facilitated by the assembling and analysis of the facts in the course of the legislative determination. Judicial judgment may be none the less appropriately independent because informed and aided by the sifting procedure of an expert legislative agency.

Because the majority affirms, rather than reverses, the lower court, Mr. Justice Brandeis finds himself in concurrence and not in dissent. Yet his grounds for affirmance differ:

Like the lower court, I think no good reason exists for making special exception of issues of fact bearing upon a constitutional right. The inexorable safeguard which the due process clause assures is not that a court may examine whether the findings as to value or income are correct, but that the trier of the facts shall be an impartial tribunal; that no finding shall be made except upon due notice and opportunity to be heard; that the procedure at the hearing shall be consistent with the essentials of a fair trial; and that it shall be conducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed.

But from a later portion of his concurrence we learn that this restriction of the due process concept to procedural-type rights is not always operative. Relying upon a host of earlier decisions of the Court, Mr. Justice Brandeis notes that "they draw distinctions which give clear indication when due process requires judicial process and when it does not."

The first distinction is between issues of law and issues of fact . . . . The second distinction is between the right to liberty of person and other constitutional rights. A citizen who claims his liberty is being infringed is entitled, upon habeas corpus, to the opportunity of a judicial deter-

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121 Id. at 73.
mination of the facts. And so highly is this liberty prized, that the opportunity must be accorded to any resident of the United States who claims to be a citizen. Compare *Ng Fung Ho v. White* . . . with *United States v. Ju Toy* . . . and *Tang Tun v. Edsell* . . . But a multitude of decisions tells us that when dealing with property a much more liberal rule applies. They show that due process of law does not always entitle an owner to have the correctness of findings of fact reviewed by a court . . . 122

From careful analysis of *Ben Avon, Fung Ho, Crowell* and *St. Joseph*, against a background of full understanding of the admittedly complicated constitutional structure of this country, the following propositions become clear:

First, in none of the four cases was the decisive holding bottomed on the doctrine of separation-of-powers. The one clear involvement of this doctrine appears in the first portion of the Court's opinion in *Crowell v. Benson*, where a liberal position is taken with respect to the transference to federal administrative bodies of near-finality in non-constitutional fact situations. Misunderstood has been the Chief Justice's later assertion that the two issues involving constitutional fact determinations present "a question of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions." It must be conceded that in the early portion of the paragraph which follows this climactic one, the Court is talking the language of separation of powers in urging "the irrelevancy of State statutes and citations from State courts as to the distribution of State powers . . . " because a "State may distribute its powers as it sees fit. . ." 123 But the Chief Justice may be forgiven this lapse into Montesquieu-like language, which not uncommonly, although erroneously, is employed to explain and justify the exercise of *constitutional* judicial review. As sensed by a major commentator who made much of this passage, 124 its significance is largely vitiated by the Court's proviso to the effect that a State's freedom

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122 *Id.* at 77.
123 *285 U.S.* at 57.
with respect to power distribution is subject to "those restrictions of the Federal Constitution [including due process] which are applicable to State authority."\textsuperscript{125}

In the total context of the Hughesian analysis, the reference to article III is not to any separation-of-powers requirement; rather, it is to the Court's assertion that under that article, despite the lack of clarity of the authority, it has power to engage in constitutional judicial review, here of a federal statute challenged as beyond Congressional bounds, both federalistically and substantively. The confusion is directly traceable to the admitted fact that, while article III looks to ordinary judicial review, it is at best unclear as to judicial exercise of constitutional judicial review. And, while it is correct to say, with Professor Davis, that "The Ben Avon case has usually been interpreted as a bit of separation-of-powers conceptualism,"\textsuperscript{126} this common interpretation misses the point because it fails to make the distinction, labored in the first Lecture, between indirect and direct constitutional limitations. It is because in the context of Ben Avon substantive due process imposes a stricter standard than does separation-of-powers that the majority insisted that "the State must provide a fair opportunity for submitting that issue [i.e., the issue of confiscation] to a judicial tribunal for determination upon its own independent judgment as to both law and facts."\textsuperscript{127} Conceptualism there is, but it is justifiable conceptualism in a constitutional system employing both direct and indirect limitations on governmental power.

Second, in all four cases the Court was concerned with the protection of constitutional right. In Crowell, two different constitutional rights were involved; in each of the other three, a single right. All of the four involved varying contentions grounded in due process—one of liberty and three of property. Only in Crowell was there also a constitutional contention based upon the federalistic division of power between Nation and States. Otherwise stated, the claims of constitutional right sprung largely from direct limitations on the power of Congress and the States. "All of the cases deal with a claim that a constitutional limit has been transgressed, and they reduce to the premise that the judicial func-

\textsuperscript{125} 285 U.S. at 57.
\textsuperscript{126} A. Davis, Administrative Law Treatise § 29.09, at 165 (1958).
\textsuperscript{127} The full quotation appears supra at page 258.
tion vested in the courts by article III encompasses a power—perhaps a duty—to determine de novo the relevant facts in all cases involving constitutional limits.”128 To Professor Jaffe is to be attributed not only this insight but also much further understanding of the admittedly confusing interrelationship between the terms “jurisdictional fact” and “constitutional fact.” Professor Davis finds wearisome and uninformative Professor Jaffe’s analysis of “Jurisdictional Fact at Common Law” as background for better evaluation of the “constitutional fact” doctrine.129 Yet there is value in it because it lays the basis for a realization that the confusion is that of failing to make the distinction between ordinary judicial review and constitutional judicial review. For Professor Jaffe makes it clear that the doctrine of jurisdictional fact was the key device by which, from Dr. Bonham’s Case on, English and American courts evolved the common-law system of judicial review “with respect to questions of statutory power.” Mr. Justice Brandeis was as guilty as was Chief Justice Hughes in using the term “jurisdictional fact,” historically shorthand for an aspect of ordinary judicial review, to refer to the functionally distinct use of judicial power in the United States to exercise constitutional judicial review, which necessarily gives significance to “constitutional fact.”130 The two concepts coalesce in meaning only where a legislature has exercised its power to the utmost constitutional limit. Both Hughes in

128 Jaffe, Judicial Review: Constitutional and Jurisdictional Fact, 70 Harv. L. Rev. 953, at 975 (1957). This article has been reprinted as chap. 16 of Jaffe, Judicial Control of Administrative Action (1965).


130 Holmes had seen the distinction in the much debated case of Miller v. Horton, 152 Mass. 540, 26 N.E. 100 (1891). Damages were there sought by the owner of a horse for its destruction by the commissioners of contagious diseases, who had acted in the belief the horse had the glanders. Writing the opinion of the supreme judicial court of the Commonwealth, Judge Holmes interpreted the controlling statute literally, to limit the authority of the commissioners to instances where the animal did “in fact” have the glanders. He then asserted that the owner was entitled to a subsequent judicial trial even on the assumption that the Massachusetts legislature could have drawn the statute more broadly, to authorize destruction as well where the horse did not, as where it did, have the disease. Thus he recognized the power of the court to exercise ordinary judicial review, although of course he did not use this term. But, continuing, Holmes declared the court unable to “admit that the legislature has an unlimited right to destroy property without compensation, on the ground that destruction is not an appropriation to public use” within the Massachusetts constitution . . . “Certainly the legislature could not declare all cattle to be nuisances and order them to be killed without compensation.” 152 Mass. at 547, 26 N. E. at 102. Here, clearly, Holmes recognized the power of constitutional judicial review.
Crowell and Brandeis in Fung Ho assumed Congressional exercise of power to this degree; hence there was some justification for their descriptions of the issues before the Court as ones of jurisdictional-constitutional fact. Nevertheless, clear analysis requires abandonment of the term "jurisdictional fact" in the context of the four cases under examination.  

Third, it is neither inconsistent nor surprising to find the Court unwilling to surrender to administrative bodies an essential ingredient of its power to exercise constitutional judicial review. Bowing to the necessities of modern governmental administration, it early and ungrudgingly yielded its authority to continue in the Federal administrative area the historic judicial practice of ordinary judicial review. Further concession would seem to be expected only of vigorous opponents of constitutional judicial review. Mr. Justice Brandeis was certainly unwilling to surrender the Court's power of constitutional judicial review where personal liberty was involved because of the greater "security of judicial over administrative action." That he was willing to do so, where federalistic or property values were concerned, provides us with our cue. There is some objection per se to constitutional judicial review of direct constitutional limitations. Yet much of today's opposition to this form of judicial review is largely selective, dependent upon the nature of the values seeking judicial protection. The easy dichotomy between property values and those of personal, civil and political liberty, if not self-satisfactory, can be buttressed by the view that the distinction is necessary to the reconciliation of constitutional judicial review with democracy. There is no question but that, while Brandeis lost the battle of the four cases, he won the day in the law reviews, both at the time and since, and with Professor Davis. Fung Ho is fine, say the commentators, and it is a happy fact that

131 The position taken here is at odds with the textual analysis of the Big Four Cases made by Gellhorn and Byse, Administrative Law: Cases and Comments 472-493 (4th ed. 1960). Despite the fact that their view has been the one generally accepted, the writer respectfully questions its soundness.

132 Rostow, supra note 23, effects reconciliation by reliance upon this distinction.

133 Davis, op. cit. supra note 126, cites to much of the periodical literature in § § 29.08, note 23; 29.09, note 4. There have been some commentators who have swum against the current. One such is Weil, Administrative Finality, 38 Harv. L. Rev. 447 (1925); see also Keefe, Administrative Rule-Making and the Courts, 8 Fordham L. Rev. 303, 320-323 (1939).

134 Davis, supra note 1; Davis, op. cit. supra note 89, §§ 29.08, 29.09; 4 Davis, op. cit. supra note 126, §§ 29.08, 29.09.
its authority survives; the other three decisions, primarily Ben Avon and Crowell, are quite unacceptable, and they are "going, going, almost gone"\textsuperscript{135} in hope if not in fact.

Whether Crowell and Ben Avon are in fact about gone, as their numerous critics so devoutly hope, must await another day's analysis. For now, it will have to suffice to complete analysis of the four celebrated cases by considering the subsidiary, yet important, question as to the extent to which the Court should review beyond the substantial evidence test where constitutional facts are at issue. The choice made by the majority in each of the cases under consideration is that between independent judgment on the facts and trial de novo. Fung Ho and Crowell called for trial de novo; Ben Avon and St. Joseph viewed the function of constitutional judicial review as satisfied by judicial exercise of an independent judgment on the facts as contained in the administrative record. In his Crowell dissent, Mr. Justice Brandeis made no effort whatsoever to reconcile his rejection of trial de novo in that situation after requiring it in Fung Ho. The explanation cannot lie in the absence of an administrative record in the earlier case; in the first paragraph of his opinion for the unanimous Court he states that "The case was heard upon the original files of the Bureau of Immigration containing the record of the deportation proceedings."\textsuperscript{136} The reason must lie in his expressed feeling of insecurity regarding the then administrative process in deportation, a feeling he did not have when it came to administration of federal workmen's compensation.

But how explain the majority's requirement of trial de novo in Crowell? Chief Justice Hughes, in a closing paragraph, points to the wording of the statute as the explanation:\textsuperscript{137}

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. The remedy which the statute makes available is not by an appeal or by a writ of certiorari for review of his determination upon the record before him. The

\textsuperscript{135} Davis, supra note 129.
\textsuperscript{136} 259 U.S. at 278.
\textsuperscript{137} 285 U.S. at 63-64.
remedy is “through injunction proceedings, mandatory or otherwise.” § 21(b) . . . . By providing for injunction proceedings, the Congress evidently contemplated a suit as in equity, and in such a suit the complainant would have full opportunity to plead and prove either that the injury did not occur upon the navigable waters of the United States or that the relation of master and servant did not exist, and hence that the case lay outside the purview of the statute.

Mr. Justice Brandeis is quite convincing in his counter-argument that “the decree should be reversed, because Congress did not authorize a trial de novo.” From this he passed, as revealed in the paragraphs of his dissent earlier quoted, to his contention that the Constitution, no more than the Congress, required trial de novo. But perhaps it is he who provides a clue to an inarticulate major premise of the majority when he observes that

The lower federal courts, except in the case at bar [italics added] have uniformly construed the Act as denying a trial de novo of any issue determined by the deputy commissioner; have held that, in respect to those issues, the review afforded must be upon the record made before the deputy commissioner; and that the deputy commissioner's findings of fact must be accepted as conclusive if supported by evidence, unless there was some irregularity in the proceeding before him.

Examination of the opinion of the federal district court discloses that the trial judge was of opinion that the teachings of both Murray's Lessee and Ben Avon required him to hold a hearing de novo to pass upon the merits of Benson's claims, rather than to limit himself “to the question whether or not the commissioner on the evidence before him could have found liability.” But why the necessity of choice between the most extreme views; in light of Ben Avon, why did he believe trial de novo to be constitutionally necessary, rather than an independent judgment on the constitutionally relevant facts? In affirming, the Circuit Court of Appeals for the Fifth Circuit found support in Murray's Lessee

138 Id. at 68.
and Ben Avon, and Fung Ho as well, for the trial court's view that the Constitution required that he go beyond the evidence adduced at the administrative hearing. But in closing its opinion the intermediate federal court declared that the instant case would present "an anomalous situation" were the court to be "restricted to a consideration of only the evidence which the Deputy Commissioner had before him . . ." The anomaly is thus described:

Though in the hearing before him there was testimony tending to prove facts from which the existence of [the employment] relationship arose, it was not made to appear that the Deputy Commissioner in reaching his legal conclusion had in mind such facts, or that he was influenced by that evidence or accorded it any probative value. There was nothing before the court to negative the inference that the stated legal conclusion of the Deputy Commissioner was based entirely upon what he or some other person saw or heard in an investigation or inquiry other than the hearing in which was adduced evidence which was brought before the court. What was seen or heard in such other investigation or inquiry was not made known to the court in any way. The record does not show that the Deputy Commissioner found any fact or state of facts having any bearing on the question of the existence vel non of the relation of employer and employee between the appellee and the claimant. It does not show that evidence produced in the hearing before the Deputy Commissioner supported any conclusion of fact reached by him with reference to any relation between the claimant and the appellee.

This contention, that in this case the Deputy Commissioner violated the basic requirement of administrative law that all evidence be of record, was repeated in respondent's argument in the Supreme Court, again as a sort of flying buttress to the constitutional contention based upon the demands of due process. If true, there could not be an adequate constitutional judicial review on the administrative record and there would perforce be

141 Id. at 70.
142 285 U.S. at 34.
need for trial de novo. If this be the inarticulate reasoning of the Court, we have as a basis for explaining *Crowell's* requirement of trial de novo a reason akin to that which Brandeis advanced for the Court in *Fung Ho*; by the same token, we have a predicate for bringing into reconciliation, as regards the extent of deviation from the substantial evidence test applicable to facts not decisive of constitutionality, all four of the decisions we have been considering. For in both *Ben Avon* and *St. Joseph* there seems to be no doubt as to the adequacy of the administrative record; in such instances, constitutional judicial review can be satisfactorily effectuated by independent judicial judgment on the facts as found by the administrative body.

Not only do we have a basis for reconciliation, but the basis is sound. It avoids the artificial and impracticable distinction attempted between constitutional fact and constitutional claim, by which one commentator manfully sought to restrict the supposed impact of *Crowell's* call for trial de novo by treating it as a right discretionary with the Court rather than mandated by the Constitution. It renders *functus officio* the far more common commentator conclusion that we are here faced with unruly judicial concepts of unpredictable and unjustified application. Affirmatively, this basis for reconciliation limits trial de novo to those infrequent situations where either the administrative record is inadequate, the administrative procedure faulty, or the administrative agency untrustworthy. In the normal run of situations, constitutional judicial review will be limited to an independent court evaluation of the facts administratively found. And even here Chief Justice Hughes assures, it will be recalled from the oft-quoted passage of *St. Joseph*, that "this judicial duty of independent judgment does not require or justify disregard of the weight which may properly attach to findings upon hearing and evidence." Thus is preserved the meaningfulness of both the administrative process and the constitutional-judicial process. Only where the administrative process fails to live up to quality standards normally achieved by it must the courts take over the burden of ascertaining the facts decisive of substantive constitutional

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144 Supra note 120. The full quotation is not repeated here.
claims, primarily those arising from direct constitutional limitations on governmental power.\footnote{While Professor Davis would apply the substantial evidence test to constitutional facts, he has urged that pragmatic considerations, including the relative capacity of administrators and judges in specific situations, govern decision as to the extent of judicial review over administrative action, rather than traditional conceptualism. \textit{Davis, To What Extent Should the Decisions of Administrative Bodies be Reviewable by the Courts?}, 25 A. B. A. J. 770 (1939). To similar effect is Tollefson, \textit{Administrative Finality}, 29 Micr. L. Rev. 839 (1931). Compare Professor Davis's disagreement with Professor Jaffe as to whether administrators or judges are the better experts "on problems of procedural fairness." \textit{Davis, supra} note 129, at 673.}