

June 1933

## Judicial Review of Administrative Determinations and the Doctrine of Separation of Powers

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### Recommended Citation

George W. McQuain, *Judicial Review of Administrative Determinations and the Doctrine of Separation of Powers*, 39 W. Va. L. Rev. (1933).

Available at: <https://researchrepository.wvu.edu/wvlr/vol39/iss4/5>

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# West Virginia Law Quarterly

and The Bar

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Published by the Faculty of the College of Law of West Virginia University, and issued in December, February, April and June of each academic year. Official publication of The West Virginia Bar Association.

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Subscription price to individuals, not members of The West Virginia Bar Association, \$2.00 per year. To those who are members of the Association the price is \$1.50 per year and is included in their annual dues. Single copies, 50 cents.

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## STUDENT NOTES

### JUDICIAL REVIEW OF ADMINISTRATIVE DETERMINATIONS AND THE DOCTRINE OF SEPARATION OF POWERS

The statute creating the State Water Commission provided for a review by certiorari in the circuit court with an appeal to the Supreme Court of Appeals.<sup>1</sup> It also authorized the circuit court to hear evidence and make such order as the whole matter demanded. The commission ordered the city of Princeton to install a certain sewage plant or stop dumping its sewage into Brush Creek. The Supreme Court of Appeals held the statute unconstitutional as an attempt to delegate legislative functions to the judiciary. *Danielley v. City of Princeton*.<sup>2</sup>

The doctrine of separation of powers is merely a practical device for the division of labor.<sup>3</sup> All governmental powers are

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<sup>1</sup> W. VA. REV. CODE (1931) c. 38, art. 5.

<sup>2</sup> 167 S. E. 620 (W. Va., 1933).

<sup>3</sup> Pound, *Spurious Interpretation* (1907) 7 COL. L. REV. 379, 384. No one will assert at present that separation of powers is part of the legal

not essentially legislative, executive or judicial. They necessarily overlap to some extent.<sup>4</sup> Even in West Virginia, which has gone further than most states in placing a rigid doctrine of separation of powers in its constitution,<sup>5</sup> the senate approves or disapproves appointments by the governor; the governor suggests legislation and may veto enactments at pleasure; the legislature acts judicially in impeachment cases; courts construe legislation, declare some of it unconstitutional, and even legislate by their decisions; administrative bodies perform functions partaking of legislative, executive and judicial characteristics. No perfect test has been found to determine what acts are legislative and what are judicial.<sup>6</sup>

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order of nature or that it is essential to liberty. We recognize today that it is a practical device existing for practical ends; that it is only the principle of division of labor applied to government, and that it exists in modern states as a mere specialization for the reason that any function will be better fulfilled by a special organ than by one charged with many functions.

<sup>4</sup> *Ex Parte Grossman*, 260 U. S. 87, 119, 45 S. Ct. 332, 336 (1924). The federal constitution nowhere expressly declares that the three branches of the government shall be kept separate and independent. Complete independence and separation between the three branches, however, are not attained, or intended, as other provisions of the constitution and the normal operation of the government under it easily demonstrate. *Dreyer v. Illinois*, 187 U. S. 71, 23 S. Ct. 28 (1902). The three great powers of government need not be entirely segregated. There is some necessary overlapping. But all the functions of one department cannot be delegated to another.

<sup>5</sup> W. Va. Const., art. 5. "The legislative, executive, and judicial departments shall be separate and distinct, so that neither shall exercise powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the legislature."

<sup>6</sup> *Searle v. Yensen*, 118 Neb. 835, 226 N. W. 464 (1929). (Passing upon the propriety of incorporating a light, heat, and power district is a legislative function which cannot be delegated to the courts). *Barnes v. Minor*, 80 Neb. 189, 114 N. W. 146 (1907). (Incorporating a drainage district and deciding what lands could be excluded as not being benefited by it is a proper judicial function). *Funkhouser v. Randolph*, 287 Ill. 94, 122 N. E. 144 (1919). (Whether a special drainage district should be organized and what lands should be included in it is a legislative function which cannot be delegated to the court). *Bisenius v. City of Randolph*, 82 Neb. 520, 118 N. W. 127 (1908). (Deciding on the propriety of cutting out a tract of land from a city corporation is a proper judicial function). *Tyson v. Washington County*, 78 Neb. 211, 110 N. W. 634 (1907). (Whether a drainage ditch will be conducive to the public health, convenience, or welfare, or whether the route is practical are questions of governmental or administrative policy which cannot be delegated to the courts). West Virginia has several cases holding that the circuit courts may act administratively or as subsidiaries of the legislature in reviewing assessments of property, incorporating towns, settling boundary disputes, and in other similar instances. *Ritchie County Bank v. County Court*, 65 W. Va. 208, 63 S. E. 1098 (1909); *Bluefield Water Works Co. v. State*, 63 W. Va. 480, 60 S. E. 403 (1908); *Summers County v. Monroe County*, 43 W. Va. 207, 27 S. E. 307 (1897); *State v. South Penn Oil Co.*, 42 W. Va. 80, 24 S. E. 688 (1896); *In re Town of Union Mines*, 39 W. Va. 179, 19 S. E. 398 (1894); *Mackin v. Taylor County Court*, 38 W. Va. 338, 18 S. E. 632 (1893); *Railway Co. v. Board of Public Works*, 28 W. Va. 264 (1886).

Courts have held the same act to be both.<sup>7</sup> The test Mr. Justice Holmes laid down in the *Prentis* case,<sup>8</sup> while far from perfect, is the one most frequently quoted:

“A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts, and under existing laws, while legislation looks to the future and changes conditions, making new rules to be thereafter applied.”

By this test, rate making is a legislative function, but in *Ohio Valley Water Co. v. Ben Avon Borough*,<sup>9</sup> the court said due process requires a complete judicial review on the facts as well as the law where confiscation is charged. It would seem that the water commission statute went no further than due process requires according to the *Ben Avon* case. The task, on review, was about the same in each instance. The validity of a rate depends entirely upon the facts of the particular case. Only because courts have long been passing upon the reasonableness and unreasonableness of rates do they feel qualified to do so. Their qualifications in rate cases probably are no greater than in stream pollution cases. Each decision calls for expert knowledge and judgment in a field where courts ordinarily have no special training. Complete judicial review is of doubtful value in either case.

Since the doctrine in the *Ben Avon* case is questionable even when confined to rate making,<sup>10</sup> it should not be extended further than its own facts demand. That seems to be the tendency,<sup>11</sup> al-

<sup>7</sup> *In re Davis*, 168 N. Y. 89, 61 N. E. 118 (1901) (Statute required the supreme court justices to hold hearings and obtain evidence to be used by the attorney general in prosecutions under the anti-trust act. It was held these were judicial duties because they were incidental to a judicial proceeding.) *In the Matter of Richardson*, 247 N. Y. 401, 160 N. E. 655 (1928). (Statute required the justices of the supreme court to hold hearings to obtain evidence to be used in disqualifying public officers. Judge Cardozo said this was an executive function which could not be imposed on the courts or on the judges.)

<sup>8</sup> *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 29 S. Ct. 67 (1908). Enabling and validating legislation is usually based on present or past facts. By their decisions, courts actually lay down rules for the future. To the effect that rate making is a legislative act, see *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 14 S. Ct. 104 (1893).

<sup>9</sup> 253 U. S. 287, 40 S. Ct. 527 (1920). Accord *Bluefield Water Works Co. v. Public Service Comm.*, 262 U. S. 679, 43 S. Ct. 675 (1923); *Laidlow v. Abraham*, 43 Fed. 297 (C. C. D. Ore., 1890); *Duluth v. Railroad and Warehouse Comm.*, 167 Minn. 311, 209 N. W. 10 (1926).

<sup>10</sup> See the dissenting opinions of Justice Holmes, Brandeis, and Clarke in the *Ben Avon* case, *supra* n. 8.

<sup>11</sup> *Keller v. Potomac Electric Power Co.*, 261 U. S. 428, 43 S. Ct. 445 (1923). Mr. Chief Justice Taft held void the part of an act of Congress which attempted to give the Supreme Court of the United States revisory powers over rates in the District of Columbia. Due process does not require a judicial review of a medical board's determination on the qualification of a

though Mr. Chief Justice Hughes did go so far recently as to say that due process requires a trial *de novo* as to the existence of the jurisdictional facts upon which the commission acted.<sup>12</sup> But it is not clear that due process need require more than a review to determine the existence of a full and fair hearing, the good faith of the commission, and the existence of substantial evidence.<sup>13</sup>

Yet a statute should not be held unconstitutional if it can be saved at all.<sup>14</sup> In the *Danielley* case, the court may have felt that it was bound by the decision in *Hodges v. Public Service Commission*.<sup>15</sup> In the latter case, which was concerned with the administration of the water power act,<sup>16</sup> the commission was required to weigh the interests of the state before granting or refusing a license for power development. That probably came a little nearer being pure legislative action, if there can be such a thing, than either rate making or remedying stream pollution.<sup>17</sup> The statute clearly required a review *de novo* by the court.

The water commission act, under consideration in the *Danielley* case, was apparently capable of two constructions. The provision for certiorari was inconsistent with that for taking further evidence in the circuit court. It is suggested the latter provision might have been held void. In *United Fuel Gas Co. v. Public Service Commission*<sup>18</sup> the statute authorized an appeal to the supreme court from the findings of the commission, with the provi-

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physician. See *Reitz v. Michigan*, 188 U. S. 505, 23 S. Ct. 390 (1903); *People v. Hasbrouck*, 11 Utah 291, 39 Pac. 918 (1895); *Albert v. General Council of Medical Education and Registration*, 23 Q. B. D. 400 (1889). See generally, *Interstate Commerce Comm. v. Union Pacific Railroad Co.*, 222 U. S. 541, 32 S. Ct. 108 (1911); *Chin Yow v. United States*, 208 U. S. 8, 28 S. Ct. 201 (1907); *United States v. Ju Toy*, 198 U. S. 253, 25 S. Ct. 644 (1905); *Public Clearing House v. Coyne*, 194 U. S. 497, 24 S. Ct. 789 (1904).

<sup>12</sup> *Crowell v. Benson*, 285 U. S. 22, 52 S. Ct. 285 (1931). See the dissenting opinion of Mr. Justice Brandeis in the same case and cases there cited.

<sup>13</sup> *Local Government Board v. Arlidge*, (1915) H. L., A. C. 120; *Kwock Jan Fat v. White*, 253 U. S. 454, 40 S. Ct. 566 (1920); *Bates & Guild Co. v. Payne*, 194 U. S. 106, 24 S. Ct. 595 (1904); *Denver, etc., R. Co. v. Chicago, etc., R. Co.*, 64 Colo. 229, 171 Pac. 74 (1918); *Provident Life Assurance Society v. Cutting*, 181 Mass. 261, 63 N. E. 433 (1902).

<sup>14</sup> *United Fuel Gas Co. v. Public Service Comm.*, 73 W. Va. 571, 80 S. E. 931 (1914).

<sup>15</sup> 110 W. Va. 649, 159 S. E. 834 (1931).

<sup>16</sup> W. VA. REV. CODE (1931) c. 31, art. 9.

<sup>17</sup> *Fall v. Sutton*, 21 Cal. 237 (1862). The question of what the public convenience requires is a political and not a legal question. Its decision rests with the legislature and depends upon its discretion, the exercise of which, in the granting of a subsequent franchise is conclusive and not reviewable by the courts. See also *Searle v. Yensen*; *Funkhouser v. Randolph*; and *Tyson v. Washington Co.*, all *supra* n. 5.

<sup>18</sup> *Supra* n. 14.

