



Fall 9-1-1948

Separation Of Powers

Fred L. Fox

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Administrative Law Commons](#), and the [Constitutional Law Commons](#)

Recommended Citation

Fred L. Fox, *Separation Of Powers*, 5 Wash. & Lee L. Rev. 185 (1948).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol5/iss2/3>

This Article is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

SEPARATION OF POWERS*

FRED L. FOX†

Many great political philosophers discussed the theory of Separation of Powers prior to the American Revolution; but it is perhaps best expressed in the writings of Montesquieu in his great philosophical work called "Spirit of Laws," which was published about the middle of the eighteenth century, and was well known to students of history in this country when the Revolution came on. Every government then existing in the world was more or less autocratic except in England, where Parliament had become supreme, though not at that time (before the Reform Bills of 1832 and 1867) representative of the people. However, the democratic movement was progressing, particularly in France. Political philosophers, while favoring some form of democracy, felt that even such a form of government could be used to create tyranny; and to prevent such result they developed the idea of a government with three separate and distinct branches, each independent of, and acting as a check on, the others. It was always known that if the people were to be represented in their views and aspirations, there must be the legislative body; that if the legislative body enacted laws, there must be some power set up to enforce them, calling for an executive department; and then, finally, it was recognized that disputes would arise as to what was the law and what was not the law and how laws should be applied, and the necessity for a judicial department became clearly apparent.

With these ideas controlling, the framers of our Federal Constitution, in the delegation of powers by the states to the Federal Government, set up a system under which there was created the legislative, executive and judicial branches of our government. There is nothing in the Constitution which particularly stresses the independence of one from the other; but that was then, and has always been, understood to be implied from the provisions of the Constitution itself. The Constitution provides for the creation of the legislative branch, with strictly defined powers; it creates an executive department with limited

*An address delivered before the Howard-Rogers Legal Society, composed of students in the School of Law from West Virginia. With Judge Fox's permission, the footnotes were compiled by MR. LLOYD R. KUHN, a member of the Board of Student Editors.

†Judge, Supreme Court of Appeals of West Virginia.

powers, and, to a certain extent, with power to restrain legislative action, because the executive may veto a legislative act of the Congress, which veto can be only overturned by a two-thirds majority vote; and then the judicial department is created in very simple language. Judicial power had developed under the common law and had a well-defined and accepted meaning, as did both the legislative and executive powers. Therefore, there did not seem to be any necessity for detailed designation of the powers of the several departments.

The important thing was that under the federal system these powers should be treated as exclusive to each department, except in those special instances where they supplemented each other. There was never any doubt that when the Constitution conferred powers on a particular department, such authority amounted to a limitation on the exercise of any other power, unless required by necessary implication. This is clearly held in *Marbury v. Madison*¹. It will be remembered that in that case the decision turned on whether the Supreme Court of the United States, under the Constitution, had original jurisdiction in mandamus.

The Constitution of the United States provides that the Supreme Court shall have original jurisdiction in all cases affecting ambassadors, other public ministers, and consuls, and those in which a state be a party, and that in all other cases the Supreme Court shall have appellate jurisdiction². Congress conferred upon the Supreme Court original jurisdiction in mandamus, and that act was held unconstitutional. In *Scott v. Sandford*,³ it was held that "neither the legislative, executive, nor judicial Departments of the Government can lawfully exercise any authority beyond the limits marked out by the Constitution." In 1881, in the famous case of *Kilbourn v. Thompson*,⁴ Justice Miller, one of the ablest men who ever sat on the Supreme Court of the United States, in discussing separation of powers, said: "It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to Government, whether State or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of

¹1 Cr. 137, 2 L. ed. 60 (1803).

²U. S. Const. Art. III, § 2.

³19 How. 393, 401, 15 L. ed. 691, 699 (1857).

⁴103 U. S. 168, 190-191, 26 L. ed. 377, 387 (1881).

the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the power appropriate to its own department and no other. To these general propositions there are in the Constitution of the United States some important exceptions. One of these is, that the President is so far made a part of the legislative power, that his assent is required to the enactment of all statutes and resolutions of Congress."

Justice Miller then goes on to discuss further the proposition, and ends with this warning: "It may be said that these are truisms which need no repetition here to give them force. But while the experience of almost a century has in general shown a wise and commendable forbearance in each of these branches from encroachments upon the others, it is not to be denied that such attempts have been made, and it is believed not always without success. The increase in the number of States, in their population and wealth, and in the amount of power, if not in its nature to be exercised by the Federal government, presents powerful and growing temptations to those to whom that exercise is intrusted, to overstep the just boundaries of their own department, and enter upon the domain of one of the others, or to assume powers not intrusted to either of them."⁵ This warning is of particular significance in these later days.

It cannot be doubted that the framers of our Federal Constitution intended a clear separation of the powers of the three branches of the government; but I think they were somewhat at a loss to determine just how that particular theory of government should be enforced. Fortunately for the country, there was an early settlement of that question in the famous case of *Marbury v. Madison*.⁶ President Jefferson, acting through Secretary of State Madison, had withheld delivery of the commissions of several Justices of the Peace who had been appointed by Jefferson's predecessor, John Adams. The appointees, acting under a Congressional Act purporting to give the Supreme Court of the United States original jurisdiction in mandamus, petitioned the Court for such a writ. The Court refused the writ, holding that the statute was an unconstitutional attempt to enlarge the original juris-

⁵Kilbourn v. Thompson, 103 U. S. 168, 191-192, 26 L. ed. 377, 387 (1881).

⁶1 Cr. 137, 2 L. ed. 60 (1803).

riktion of the Supreme Court beyond the limits set out in Article III of the Constitution. By this method was determined for the first time by the Supreme Court of the United States the question of its power to declare unconstitutional an act of Congress; and, so far as any one can foresee, it has been settled for all time. It is now an accepted theory, in both the federal and state judiciary systems, that judicial power includes the power to declare unconstitutional an act of Congress or of a state legislature, and to declare such an act void if contrary to the terms of the Constitution. This power, however, is circumscribed by the self-imposed limitation that a court will not declare an act of Congress or of a state legislature unconstitutional unless it is clearly so, and, as has been held, beyond reasonable doubt.

Thus it is that the courts have taken unto themselves, without any express constitutional provision in either the Federal or State Constitutions, the power to impose the separation of powers as the framers of our Constitution intended. If there is any laxity in the enforcement of this principle of government, it must rest squarely upon the judiciary, because it possesses the power to maintain its right to enforce the separation of powers. I do not think it possesses a more wholesome power, nor one which it should more zealously preserve and use.

I have discussed the theory of the separation of powers from the standpoint of the Federal Government. Virginia, from which we in West Virginia get the fundamentals of our laws, has a splendid record on this point; and that record, I think, has been preserved by her offspring to the west.

The first Constitution of Virginia, adopted June 29, 1776, eleven years before the Federal Constitution was framed, provided: "The Legislative, Executive and Judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other; nor shall any person exercise the powers of more than one of them at the same time, except that the justices of the county courts shall be eligible to either House of Assembly." The Virginia Constitutions of 1829 and 1851 contained identical provisions, and the principle is preserved in the Constitution of 1902.⁷

When West Virginia was formed in 1863, and adopted a Constitution, it contained this provision: "The Legislative, Executive, and Judicial Departments of the Government shall be separate and distinct. Neither shall exercise the powers properly belonging to either of the others. No person shall be invested with or exercise the powers of

⁷Va. Const. (1902) Art. III, § 39.

more than one of them at the same time." And our present Constitution includes a provision which is virtually identical to the above-quoted section of the present Virginia Constitution.⁸

Thus, for more than one hundred and seventy years, Virginians have held to the theory of the separation of powers, expressly provided for in their several Constitutions. But as Justice Miller warned in 1881, conditions have changed, and attacks have from time to time been made upon this principle. We have been rather steadfast in West Virginia, but, on occasion, we have slipped. For example, for a long time we have had a statute in West Virginia authorizing the incorporation of communities of two thousand population and less as municipal corporations, upon a vote of the people, the incorporation to be approved by the circuit court of the county in which the community proposed to be incorporated is located.⁹ In 1894, in the case of *In Re Town of Union Mines*,¹⁰ this act of the legislature was held constitutional, the Court holding that the said act, in so far as it conferred on the circuit court functions in their nature judicial and administrative, although in furtherance of the legislative department of the state government, was constitutional and valid. At the same time the court refused to grant an appeal or writ of error, because it said that the circuit court, in discharge of this function, acted as a subordinate of the legislature and was not subject to the appellate jurisdiction of the Supreme Court of Appeals of the state.¹¹ In discussing the case, Judge Dent said: "In dis-

⁸W. Va. Const. (1872) Art. V.

⁹W. Va. Stat. (1868) c. 47, § 9.

¹⁰39 W. Va. 179, 19 S. E. 398 (1894).

¹¹Contrary to the West Virginia rule, it is generally held that the creation, enlargement or diminution of municipal corporations is a legislative function, and that any statute attempting to delegate this function to the *uncontrolled discretion* of a court violates the provision of the applicable state constitution separating the powers of the government into legislative, executive and judicial departments. 11 Am. Jur., Constitutional Law § 227; 37 Am. Jur., Municipal Corporations § 8; Note (1930) 69 A. L. R. 266, 267.

In several jurisdictions, statutes purporting to vest in the courts the power to approve incorporation of municipalities, similar to that involved in the Town of Union Mines case, have been struck down as violating the separation of powers doctrine. State ex rel. Luly v. Simons, 32 Minn. 540, 21 N. W. 750 (1884); Territory ex rel. Kelly v. Stewart, 1 Wash. St. 98, 23 Pac. 405, 8 L. R. A. 106 (1890); In re Village of North Milwaukee, 93 Wis. 616, 67 N. W. 1033, 33 L. R. A. 638 (1896). The reasoning of these cases is best expressed as follows: "... the act of determining, either tentatively or finally, whether it is for the best interest of the people that they should be incorporated into a village, and fixing the boundaries, is not the determination of a mere question of fact, but is the exercise of legislative discretion, and, if such power be delegated at all, it must be delegated to the proper bodies named in the constitution." In re Village of North Milwaukee, 93 Wis. 616, 67 N. W. 1033, 1037, 33 L. R. A. 638, 642 (1896).

In a similar vein, acts conferring on the courts power to change the boundaries

of municipal bodies by annexing or disconnecting territory have been struck down as unconstitutional delegation of legislative power. "Whether cities, towns or villages should be incorporated, and, if incorporated, whether enlarged or contracted in their boundaries, presents no question of law or fact for judicial determination. It is purely a question of policy, to be determined by the legislative department." *City of Galesburg v. Hawkinson*, 75 Ill. 152, 157 (1874). Accord: *In re Village of Ridgefield Park*, 54 N. J. L. 288, 23 Atl. 674 (1892). The Galesburg decision has been limited by a subsequent Illinois decision upholding an act authorizing the court to disconnect territory only after finding designated statutory facts, the supreme court holding that the court without exercising any discretion determines only the statute's execution. *Punke v. Village of Elliott*, 364 Ill. 604, 5 N. E. (2d) 389 (1936). In *Nebraska and North Dakota*, statutes authorizing the courts on appeal from the action of the city council to issue orders disconnecting from municipalities land coming within certain descriptions if the petition ought to be granted and could be granted without injustice to the inhabitants have been declared unconstitutional delegations of legislative functions. *Winkler v. City of Hastings*, 85 Neb. 212, 122 N. W. 858 (1909); *Gaspeil v. City of Jamestown*, 11 N. D. 86, 88 N. W. 1023 (1902). A statute allowing the court to consider the advisability of making annexation and to issue an order of annexation if it is to the municipality's best interest is a void delegation of legislative authority. *Udall v. Severn*, 52 Ariz. 65, 79 P. (2d) 347 (1938); *In re Ruland*, 120 Kan. 42, 242 Pac. 456 (1926).

However, the Supreme Court of the United States has decided that there is no Federal Constitutional objection if a state legislature sees fit to give full jurisdiction over such matters to the courts of that state. *Forsyth v. Hammond*, 166 U. S. 506, 17 S. Ct. 665, 41 L. ed. 1095 (1896).

Despite this Supreme Court stand, no cases exactly supporting the West Virginia rule have been found. Some courts, it is true, have upheld similar statutes on various grounds; but none of them have held that the court is acting as a legislative agent which is not subject to the appellate jurisdiction of a higher state court, as West Virginia did. In fact, it is usually held that the court is exercising *judicial power*, since it can declare towns incorporated only if it finds that certain prerequisite facts set out in the statute do exist. *Kayser v. Trustees of Bremen*, 16 Mo. 88 (1852); *State ex rel. Williams v. Second Judicial District Court*, 30 Nev. 225, 94 Pac. 70 (1908); *Straw v. Harris*, 54 Ore. 424, 103 Pac. 777 (1909). Other courts have gone further, upholding statutes which authorized the court "in its discretion" to enter the order of incorporation if the requisite statutory facts are found. To save the statutes, the courts interpreted "in its discretion" to mean merely judicial determination in weighing evidence. *Board of Supervisors of Norfolk County v. Duke*, 113 Va. 94, 73 S. E. 456 (1912); *Nash v. Fries*, 129 Wis. 120, 108 N. W. 210 (1906). All these decisions differ from the West Virginia holding in two respects: (1) Unless the original review was by the highest state court, the decision of the lower state court, as an exercise of judicial power, could be appealed; (2) the statutes involved limited the courts' discretion more severely than did the West Virginia statute interpreted in the *Town of Union Mines* case.

Subject to either or both of these limitations, statutes providing for court approval of the extension or contraction of municipal boundaries have generally been upheld. A statute which provides that a board of county commissioners shall consider and decide whether designated land shall be annexed to a municipality, with either the landowner or the municipality having the right of appeal to the circuit court, does not delegate legislative power to the court. *Forsythe v. City of Hammond*, 142 Ind. 505, 41 N. E. 950, 30 L. R. A. 576 (1895). The Indiana Supreme Court has also upheld a statute giving the courts appellate jurisdiction over orders of municipal councils disannexing land from municipalities, saying that the council in so doing acts judicially. *Livengood v. City of Covington*, 194 Ind. 633, 144 N. E. 416 (1924).

Statutes authorizing the court, after determining that the statutory conditions

charging these functions, the Circuit Court does not act under the judicial branch of the government and is not subject to its supervision, except by mandamus or prohibition in a proper case, but acts as a part of the legislative branch of the government under the express authority of the constitution and is subject to its supervision and control only, however, by impeachment or amendment or repeal of the law. Hence its action in discharging these legislative judicial functions, cannot be reviewed by this Court by a writ of error or other ordinary appellate writ notwithstanding their judicial character."¹² Although understandably, the court seemed somewhat confused on the subject, this principle was later followed in several West Virginia cases.¹³ None of these decisions can, in the judgment of our Supreme Court of Appeals, as presently constituted, be defended in law or logic, as I shall point out.

We have also departed from the principle of separation of powers in matters relating to appeals from decisions of the board of public

have been fulfilled, to annex territory to or disconnect territory from an incorporated city "if justice and equity" require have been upheld as properly delegating fact-finding to the judiciary; the court has no discretion once it finds such facts. *Town of Edgewater v. Liebhardt*, 32 Colo. 307, 76 Pac. 366 (1904); *City of Burlington v. Leebrick*, 43 Iowa 252 (1876); *Callen v. City of Junction City*, 43 Kan. 627, 23 Pac. 652, 7 L. R. A. 736 (1890); *City of Wahoo v. Dickinson*, 23 Neb. 426, 36 N. W. 813 (1888); *In re Fullmer*, 33 Utah 43, 92 Pac. 768 (1907).

The Virginia courts have gone even further in interpreting statutes providing for court approval of annexation or disannexation of territory. A statute conferring on the circuit judge the power to determine the necessity of expanding a city's territory and to fix the actual boundaries has been upheld. *Henrico County v. City of Richmond*, 106 Va. 282, 55 S. E. 683 (1906). Likewise, an act providing for disconnection of an area from the corporate limits of a town if the court should determine that it would be in the interest of the majority of the people in the territory proposed to be detached and that the general good of the community would not be affected is not an unconstitutional delegation. *Town of Falls Church v. County Board of Arlington County*, 166 Va. 192, 184 S. E. 459 (1936). This Virginia view closely approaches that of the West Virginia court in upholding a virtually uncontrolled delegation of discretion to the judiciary. But the Virginia rule differs in that it allows the higher courts of the state to review the circuit judge's determination.

Although some of these decisions upholding either type of statute seem to strain to find some limits on judicial discretion in approving or disapproving annexation, extension, or contraction of municipal corporations, all of them agree in principle that a delegation of *uncontrolled discretion* to the court would violate the separation of powers doctrine. And in common they hold that the court function is judicial in nature, subject to appellate jurisdiction of higher state courts. Hence, even though such statutes are often upheld, the holdings seem to disagree with the West Virginia rule which Judge Fox condemns.

¹²*In re Town of Union Mines*, 39 W. Va. 179, 182, 19 S. E. 398, 399 (1894).

¹³*Morris v. Taylor*, 70 W. Va. 618, 74 S. E. 872 (1912); *State v. Harden*, 62 W. Va. 313, 58 S. E. 715 (1907); *Bloxton v. McWhorter, Judge*, 46 W. Va. 32, 32 S. E. 1004 (1899); *Elder v. Incorporators of Central City*, 40 W. Va. 222, 21 S. E. 738 (1895).

works and other taxing authorities. In the case of *Pittsburgh, Cincinnati and St. Louis Ry. Co. v. Board of Public Works*,¹⁴ our Court held that the action of a circuit court in supervising the decision of the board of public works as to the assessment and valuation of railroad property, taken under the existing statute, was merely an administrative and not a judicial act, and that the court acted in such capacity by exercising powers distinct from those belonging to it as a court or judicial tribunal. At the same time an appeal to the Supreme Court of Appeals was refused because the circuit court had not exercised its judicial power and was not, therefore, subject to the appellate jurisdiction of the higher court.¹⁵

¹⁴28 W. Va. 264 (1886).

¹⁵A few cases from other jurisdictions provide some support for the West Virginia view that the court in supervising the tax assessment body is performing a mere administrative duty and so is not subject to the appellate jurisdiction of the higher state courts. The Supreme Court of Missouri has held that the legislative power of levying assessments for condemnation benefits may be delegated to judicial officers and to courts themselves as agents of the taxing authority. *Schwab v. City of St. Louis*, 310 Mo. 116, 274 S. W. 1058 (1925). By implication it would seem that no appeal lies to higher state courts. An early New Jersey opinion, in upholding a statute requiring the circuit court to hear any objection which might be made to an assessment and making the court's confirmation essential to the validity of the assessment, apparently considered that the circuit court's determination would be final, with no right of appeal. *Van Riper v. Township of North Plainsfield*, 43 N. J. L. 349 (1881).

Another minority view denies the constitutionality of statutes providing for any judicial review or approval of tax assessments levied by administrative bodies. "Correcting an assessment is no more of a judicial act than making the assessment originally. True it involves determination; but so does almost every political or executive act. But it is not a judicial determination." *Silven v. Board of Commissioners of Osage County*, 76 Kan. 687, 92 Pac. 604, 605, 13 L. R. A. (N.S.) 716, 720 (1907). In another case involving evaluation of railroad property for purposes of tax assessment, the Kansas court recognized that the power of reviewing such assessment is an incident of the taxing power which cannot constitutionally be delegated to a judicial body. *Auditor of State v. Atchison, T. and S. F. R. R. Co.*, 6 Kan. 500, 7 Am. Rep. 575 (1870). And in Connecticut it has been held that an act conferring on the superior court appellate jurisdiction, in a purely advisory capacity, over a tax assessor's property valuation unconstitutionally attempts to delegate purely administrative duties to the judiciary. *Bradley v. City of New Haven*, 73 Conn. 646, 48 Atl. 960 (1901).

The overwhelming weight of authority, however, holds that a state legislature has power to provide for appeals to the court from tax assessments. Note, L. R. A. 1915B, 875. As the Minnesota Supreme Court has held, "it may be committed to the court to determine as a quasi judicial question whether the assessing officers have correctly determined the facts upon which the assessment is made." *State ex rel. Mayor of City of Duluth v. Ensign*, 55 Minn. 278, 56 N. W. 1006, 1008 (1893). Accord: *Boston & M. R. R. v. State*, 76 N. H. 515, 85 Atl. 616 (1912); *Hopper v. Oklahoma County*, 43 Okla. 288, 143 Pac. 4, L. R. A. 1915B, 875 (1914). Many statutes providing for such judicial review of administrative tax assessment have been con-

It may be said also that we have departed from the strict principle of separation of powers in the handling of appeals or reviews from the decisions of administrative authorities in our State. The Public Service Commission of West Virginia was established by the Legislature in 1913. The act creating the commission provided for an appeal from its decisions to the Supreme Court of Appeals. The question arose as to whether that provision of the act was constitutional. The Court had a difficult question to decide, and it settled the matter by making the following holding in the case of *United Fuel Gas Co. v. Public Ser. Commission*:¹⁶ "It seems to us that the character of the proceedings thus prescribed comport rather with proceedings as upon original process by prohibition or mandamus¹⁷ than upon appellate process.¹⁸ The Commission itself is a party, the main defendant, indeed the only defendant specifically recognized by the statute, and whatever judgment or order this court might make would operate upon its order to suspend or nullify it. The matter in controversy, which we must determine, is whether or not the order of the Commission, within our proper limitations, is right and just. If it is, so far as we have jurisdiction to inquire, we would decline to interfere; if not, we would suspend the order, nullify it, and if need be prohibit its enforcement, leaving the matter open thereafter for further investigation and consideration by the Commission, if required by the nature of the case."

On this theory the appeal was entertained, but the rule was laid down that acts of the public service commission would not be set aside

strued without even questioning their constitutionality. *Arizona Copper Co. v. State*, 15 Ariz. 9, 137 Pac. 417 (1913); *Clay County v. Brown Lumber Co.*, 90 Ark. 413, 119 S. W. 251 (1909); *Farmers' Loan & Trust Co. v. City of Newton*, 97 Iowa 502, 66 N. W. 784 (1896); *Chestpeake & Potomac Telephone Co. v. Board of County Commissioners*, 116 Md. 220, 81 Atl. 520 (1911); *In re Bankers' Life Ins. Co.*, 88 Neb. 43, 128 N. W. 661 (1910); *Royal Mfg. Co. v. Mayor and Common Council of City of Rahway*, 75 N. J. L. 416, 67 Atl. 940 (1907); *Warner Iron Co. v. Pace*, 89 Tenn. 707, 15 S. W. 1077 (1891). The Alabama court has gone so far as to give tacit recognition to the constitutionality of a statute providing for a *de novo* review of assessment proceedings in the circuit court. *State v. Sloss-Sheffield Steel & Iron Co.*, 162 Ala. 234, 50 So. 366 (1909).

¹⁶73 W. Va. 571, 581, 80 S. E. 931, 935 (1914).

¹⁷The use of these common law methods of judicially reviewing administrative action is discussed in Kearney, *The Problem Of De Novo Judicial Review Of Administrative Action* (1939) 14 *Notre Dame Lawyer* 233, 239-249; Stason, *Methods Of Judicial Relief From Administrative Action* (1938) 24 *A. B. A. J.* 274; Sherwood, *Mandamus To Review State Administrative Action* (1946) 45 *Mich. L. Rev.* 123.

¹⁸Cf. *Hooper Telephone Co. v. Nebraska Telephone Co.*, 96 Neb. 245, 147 N. W. 674 (1914), where it was held that a statute providing for appeal from decisions of the State Railway Commission directly to the state supreme court *did* confer appellate jurisdiction on the court.

unless “ (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law.”¹⁹

¹⁹73 W. Va. 571, 583, 80 S. E. 931, 936 (1914).

This is substantially the federal view as to the scope of judicial review of administrative action, *except* as to judicial review of administrative rate-making. Albertsworth, *Judicial Review of Administrative Action by the Federal Supreme Court* (1921) 35 *Harv. L. Rev.* 127, 151. The United States Supreme Court has held that “where the decision of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and . . . even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it. . . .” *Bates & Guild Co. v. Payne*, 194 U. S. 106, 109-110, 24 S. Ct. 595, 597, 48 L. ed. 894, 895 (1904). This federal view may have been slightly modified by the Federal Administrative Procedure Act. The act allows the reviewing court to set aside agency action if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” In certain types of cases the court can set aside the agency’s findings if “unsupported by substantial evidence,” and can always set aside orders “unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.” *Federal Administrative Procedure Act*. 60 Stat. 237, 243 (1946), 5 U. S. C. A. § 1009e (Supp. 1947).

The Supreme Court has, however, seen fit to make an exception to this usual presumption of correctness in reviewing rate-making orders of administrative bodies. It is the general rule that a legislature cannot delegate to the courts the power to fix rates in the first instance, but the court does have power to decide whether the rates as fixed by the Public Service Commission or by the corporation itself are unreasonable. 16 C. J. S., *Constitutional Law* § 1399; Note (1908) 9 *Ann. Cas.* 823. In the federal courts, the rule is that if confiscation is alleged in a rate-making controversy, the court on review must look into the evidence de novo, deciding for itself the propriety of the rate. *Ohio Valley Water Vo. v. Ben Avon Borough*, 253 U. S. 287, 40 S. Ct. 527, 64 L. ed. 908 (1920). This decision has been severely criticized as violative of the theory of separation of governmental powers and entirely repugnant to the Supreme Court’s tendency to limit the scope of judicial review of administrative action. Kearney, *The Problem of De Novo Judicial Review of Administrative Action* (1939) 14 *Notre Dame Lawyer* 233, 256-257; Albertsworth, *Judicial Review of Administrative Action by the Federal Supreme Court* (1921) 35 *Harv. L. Rev.* 127; and see articles cited in Note (1936) 50 *Harv. L. Rev.* 78, 82, n. 30. Yet the opinion was re-examined and reaffirmed in *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 56 S. Ct. 720, 80 L. ed. 1033 (1936). The rule has since been somewhat relaxed. Where a water company sought review of the commission’s determination in a rate case by the limited statutory remedy of certiorari, it waived its equitable remedy which would have entitled it to the court’s independent judgment on both the law and the facts. *People ex rel. Consolidated Water Co. of Utica v. Maltbie*, 303 U. S. 158, 58 S. Ct. 506, 82 L. ed. 489 (1937). The question of reasonableness of rates fixed by a commission may be submitted to a jury, and this satisfies the requirements of an independent judicial review. *United Gas Public Service Co. v. Texas*, 303 U. S. 123, 58 S. Ct. 483, 82 L. ed. 490 (1937).

To be consistent with these decisions, it would seem that the state courts would uphold statutes providing for de novo judicial review of administrative rate-making findings as declaratory of the law as laid down by the Supreme Court of the United States. And yet such statutes are usually held unconstitutional. In Alabama, a court on review can set aside a rate-making order of the Public Service Commission only

On the basis of this decision the legislature of our state has frequently provided for appeals to the Supreme Court of Appeals of West Virginia, in matters originating in our Compensation Department, Unemployment Compensation Department, State Board of Health, Department of Agriculture and many others. In support of this theory, there has recently grown up the idea that all of these administrative bodies possess what is termed "quasi judicial power." The present situation in West Virginia, with respect to appeals to the Supreme Court of Appeals in matters of administrative law, is clearly stated in *State v. Huber*:²⁰ "More recently, on the theory of the exercise of quasi judicial power by administrative agencies, the practice of permitting appeals or writs of error from the findings of administrative officials, boards and commissions is clearly recognized by our decisions. [Citing cases]²¹ All of these cases recognize the distinction between 'judicial power' and 'quasi judicial power.' Whether there is a justification for the use of the latter term, and whether in lieu of permitting 'appeals and writs of error to the courts on that theory, we should resort to the old system under which, generally speaking, direct proceedings in court were required to set aside, or question, the actions of administrative boards and commissions, need not be decided. Apparently the law

if it is so unreasonable as to be confiscatory; to allow the court in its own discretion to set new rates "is to have the court substitute its judgment in a legislative matter for that of the commission." *City of Birmingham v. Southern Bell Telephone & Telegraph Co.*, 234 Ala. 526, 176 So. 301, 307 (1937). In Maryland, even in rate-making cases, the court will not disturb the order of the commission except upon clear and satisfactory evidence that it is unreasonable or unlawful; it will not substitute its independent examination of the facts for that of the commission to which the carrying out of the state policy has been delegated. *West v. United Rys. & Electric Co. of Baltimore*, 155 Md. 572, 142, Atl. 870 (1928); *Oppenheimer*, *Administrative Law In Maryland* (1938) 2 Md. L. Rev. 185, 209-210. And see Note (1939) 24 Corn. L. Q. 235, 238, n. 18, for cases and statutes from other jurisdictions.

For a discussion of do novo judicial review in types of cases other than those involving rate-making, see note 23, *infra*.

²⁰40 S. E. (2d) 11, 24 (W. Va. 1946).

Another excellent and exhaustive case discourse on the doctrine of separation of powers, closely paralleling the views of the Huber case, is contained in *State ex rel. Young v. Duval County*, 76 Fla. 180, 79 So. 692 (1918). The different holdings in the two cases can be traced to the difference in the applicable state constitutions and in the subject matter of the two cases.

The problem of court review of beer license revocation, with which the Huber case deals, is fully treated in note 31, *infra*.

²¹*Spurdone v. Shaw*, Judge, 114 W. Va. 191, 171 S. E. 411 (1933); *State ex rel. Board of Education v. Martin*, 112 W. Va. 174, 163 S. E. 850 (1932); *Quesenberry v. State Road Commission*, 103 W. Va. 714, 138 S. E. 362 (1927); *Reynolds Taxi Co. v. Hudson*, Judge, 103 W. Va. 173, 136 S. E. 833 (1927); *Ellis v. State Road Commission*, 100 W. Va. 531, 131 S. E. 7 (1925).

is settled in favor of the use of the appeal method, on the theory that duly constituted administrative boards and commissions do sometimes exercise quasi judicial power, and that, on that theory, there can be brought into play what is called judicial power."

But in later years our courts have attempted to regain some lost ground. Our legislature in 1929 passed a rather comprehensive water power bill.²² It made the Governor of the state a member of the Public Service Commission, and authorized the commission to investigate proposed development of water power, to hold hearings, etc. The act also provided for an appeal as a matter of right, by any party of record, from a decision of the commission granting or refusing to grant a license, to the Circuit Court of Kanawha County, where the seat of the State Government is located, with trial on the appeal *de novo*²³ on the original record before the commission and upon any additional evidence offered by any party in interest. An appeal was provided for from the circuit court to the Supreme Court of Appeals of West Virginia. The constitutionality of this act was raised in a proper proceeding, which reached the Supreme Court of Appeals in the case of *Hodges v. Public Service Commission*.²⁴ The Court held that "The legislature cannot commit to the judiciary powers which are primarily legislative."²⁵ The

²²W. Va. Stat. (1929) c. 58.

²³In a case testing an Arkansas statute which provided for a *de novo* hearing in the Circuit Court of Appeals from a rate-making order of the municipal council, it was held that the power to fix rates for the future is legislative and cannot validly be delegated to the judiciary in the guise of appellate jurisdiction. *Helena Water Co. v. City of Helena*, 277 Fed. 66 (E. D. Ark. 1921). But see note 19, *supra*, for a discussion of review of rate-making orders by the Supreme Court of the United States.

In Illinois it has been held that a statutory provision for a *de novo* review by the circuit court of the refusal of an old age compensation award by the State Department of Public Welfare was an unconstitutional attempt to delegate executive power to the judiciary. *Borreson v. Department of Public Welfare*, 368 Ill. 425, 14 N. E. (2d) 485 (1938). This holding has, however, been severely criticised. Notes (1939) 37 Mich. L. Rev. 639; (1940) 19 Neb. L. Bul. 51.

Note 31, *infra*, discusses several cases dealing with *de novo* judicial review of administrative orders revoking liquor and beer licenses.

²⁴110 W. Va. 649, 159 S. E. 834 (1931). See Davis, *Judicial Review of Administrative Action In West Virginia—A Study In Separation of Powers* (1938) 44 W. Va. L. Q. 270; Donley, *The Hodges Case And Beyond* (1939) 45 W. Va. L. Q. 291; Davis, *A Final Word On The Doctrine Of The Hodges Case* (1939) 45 W. Va. L. Q. 316.

²⁵110 W. Va. 649, 159 S. E. 834 (1931).

The Supreme Court of the United States has said that when "a state constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder so far as the Constitution of the United States is concerned." *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 225, 29 S. Ct. 67, 69, 53 L. ed. 150, 158 (1908).

decision of the court was based upon Article V of our Constitution which I have quoted. Section 1, of Article VIII of our Constitution provides that: "The judicial power of the State shall be vested in a supreme court of appeals, in circuit courts and the judges thereof, in such inferior tribunals as are herein authorized and in justices of the peace." Section 12 of Article VIII, conferring jurisdiction on circuit courts, after specifically defining its jurisdiction, provides: "They shall also have such other jurisdiction, whether supervisory, original, appellate or concurrent, as is or may be prescribed by law." This latter provision furnished basis for the contention that the legislature was not limited in its power to confer jurisdiction on courts, but the *Hodges* case rejects that contention by saying that: "Prior to the words 'other jurisdiction,' section 12 mentions certain proceedings and cases in which circuit courts shall have jurisdiction, which the context clearly shows is *judicial* jurisdiction. No intimation is given there or elsewhere that circuit courts may assume the duties of another department, either as subordinates or as supervisors. We cannot agree that, after delimiting the three departments of the government so precisely, the framers then meant by the words 'other jurisdiction' to confer on circuit courts departmental authority in or over the other two departments. We adopt the natural inference that the 'other jurisdiction' is jurisdiction essentially juridical (then or thereafter prescribed by law) over proceedings not named in the section."²⁶ As the opinion of Judge Hatcher in this case clearly states, to adopt any other theory than that the legislature meant to limit jurisdiction of courts to matters judicial in their

Congress itself has delegated purely administrative duties to the courts of the District of Columbia in its role as legislature for the District, and this delegation has been upheld by the Supreme Court. Congress can empower the courts of the district to review and amend all valuations, rates, and regulations established by the Public Utilities Commission; in so doing, the court is exercising purely legislative power and provision for appeal to the United States Supreme Court is void. *Keller v. Potomac Electric Power Co.*, 261 U. S. 428, 43 S. Ct. 445, 67 L. ed. 731 (1923). Again in 1930, the Supreme Court, in construing the review provisions of the Radio Act of 1927, held that the proceeding in the Court of Appeals for the District of Columbia to review the Radio Commission's action in issuance of a license was purely administrative and not a case or controversy subject to review in the Supreme Court under the Judiciary Article of the Federal Constitution. *Federal Radio Commission v. General Electric Co.*, 281 U. S. 464, 50 S. Ct. 389, 74 L. ed. 969, 1930).

The Supreme Court of Florida, in upholding a statute authorizing circuit court review and approval of toll bridge rates, decided that a legislature may delegate to the courts the performance of administrative functions when the state constitution does not forbid. *State ex rel. Young v. Duval County*, 76 Fla. 180, 79 So. 692 (1918).

²⁶110 W. Va. 649, 654, 159 S. E. 834, 836 (1931).

character would emasculate and render ineffective the whole theory of separation of powers so far as it relates to the judiciary.

The West Virginia Court has also had occasion to review the propriety of judicial supervision of land tax sales as conducted by an administrative agency. In 1863 what is now West Virginia was generally undeveloped, particularly the southern portion thereof. Millions of acres of land had been granted to different people, without much concern as to where it was located or with whom it interfered. The litigation over these grants has not yet ended. When our first Constitution was framed, there was adopted a system by which lands could be forfeited for the nonpayment of taxes, and legislation was soon enacted under which land could be returned delinquent for the nonpayment of taxes, sold by the sheriff, and purchased, either by the State or by individuals, with reasonable time to redeem. When the period of development came along, it was necessary to settle these conflicting titles, and they were generally settled through tax sales, or through adverse possession. Under the Constitution of 1872, and the statutes enacted thereunder, it was held in the case of *McClure v. Maitland*²⁷ that a proceeding to sell lands forfeited to the State, or purchased by it for the nonpayment of taxes, was not a judicial proceeding, and that the former owner was not a necessary party thereto. Subsequently, in 1882, the legislature enacted a law²⁸ under which proceedings for the sale of land forfeited to the state, or purchased by it for the nonpayment of taxes, became a judicial proceeding, in which the former owner was required to be made a party, the case then proceeding as an ordinary chancery suit in the circuit court.

In 1941, in an effort to clear up the tax status of thousands of tracts of land in West Virginia, title to which had vested in the state during the depression, the legislature passed an act by which it went back to the theory of *McClure v. Maitland* and made a proceeding for the sale of lands an administrative one, but, at the same time, required the circuit courts of the state to act as the agency through which these lands could be sold. In *Sims v. Fisher*,²⁹ the Supreme Court of West Virginia held: "Article 4, Chapter 117, Acts of the Legislature 1941, relating to the sale of lands for the benefit of the school fund, so far as it attempts to require of circuit courts, and this Court, the performance of administrative and non-judicial functions, is unconstitutional." In that case the question of the separation of powers is discussed at length.

²⁷24 W. Va. 561 (1884).

²⁸W. Va. Stat. (1882) c. 130, § 27.

²⁹125 W. Va. 512, 25 S. E. (2d) 216, 217 (1943).

Again the legislature of West Virginia, in seeking to correct what it thought was an evil connected with the sale of non-intoxicating beer, enacted a law at its 1945 session³⁰ in which it conferred upon circuit courts of the several counties of the state the power to revoke the licenses of persons engaged in the business of selling non-intoxicating beer in their respective circuits, upon petition, proof and due hearing. The Supreme Court of West Virginia, on its own motion, declared this act unconstitutional, in so far as it conferred upon circuit courts jurisdiction to pass upon questions relating to revocation of the licenses. This holding was based on the general theory that the licensing, revocation of licenses, and sale of non-intoxicating beer was a purely administrative function of the legislature, with which circuit courts should have nothing to do, unless the legislative power was exercised in an illegal, arbitrary or unconstitutional manner, creating a situation which would call for the intervention of judicial power.³¹

³⁰W. Va. Stat. (1945) c. 15, art. 16.

³¹State v. Huber, 40 S. E. (2d) 11 (W. Va. 1946).

It is undoubtedly the general rule that "the revocation of a liquor license is an administrative and not a judicial proceeding and that accordingly no appeal lies in the absence of a statute specifically conferring the right." Note, Ann. Cas. 1917A, 1024. State ex rel. City of Puyallup v. Superior Court of Pierce County, 50 Wash. 650, 97 Pac. 778 (1908); State ex rel. City of Aberdeen v. Superior Court of Chehalis County, 44 Wash. 526, 87 Pac. 818 (1906).

Such statutes are quite common. "The object is not punishment, but the revocation of a privilege. The power to license and to cancel licenses being vested in the legislature, the mode and manner in which it shall be done rests in its discretion." Black, *Intoxicating Liquors* (1892) 237.

In Utah, a statute very similar to that involved in the Huber case was upheld as validly conferring on the district court the power to order city councils to revoke liquor licenses, the supreme court holding that the lower court was acting as an administrative agent of the state in the exercise of state police powers, with no right of appeal to a higher court. In re Grant, 44 Utah 386, 140 Pac. 226, Ann. Cas. 1917A, 1019 (1914).

Usually the statute contemplates judicial review of ordinary scope. In some cases the legislature has provided for de novo judicial review of a commission's revocation of liquor licenses. The courts have interpreted such statutes to allow reversal of the commission's order of revocation only if it was arbitrary or illegal. To interpret them as allowing an independent finding on the law and the facts by the court would render them unconstitutional as invalidly delegating legislative authority to the judiciary. *Cripps v. Liquor Control Commission*, 130 Conn. 693, 37 A (2d) 227 (1944); *De Mond v. Liquor Control Commission*, 129 Conn. 642, 30 A. (2d) 547 (1943); *Bradley v. Texas Liquor Control Board*, 108 S. W. (2d) 300 (Tex. Civ. App. 1937). For criticism of the latter case and discussion of other Texas cases, see Note (1938) 16 Tex. L. Rev. 400.

In Kentucky, where the statute provides for appeal from an administrative order revoking a liquor license to the circuit court and then to the court of appeals, it is held that the courts will not interfere with the action of the license board unless it abuses the discretion vested in it by law. *Hays v. City of Louisville*, 145 Ky.

Only a short time ago, after the decisions of *Sims v. Fisher*³² and *State v. Huber*,³³ some people who were opposed to the incorporation of a small town near the City of Charleston asked the Supreme Court of Appeals to declare unconstitutional and invalid the act which empowered circuit courts to authorize the incorporation of towns of a population of two thousand or less. The Court³⁴ conceded that the principle announced in the cases of *Sims v. Fisher* and *State v. Huber* would compel a holding that the act should have been held unconstitutional in the beginning. However, in view of the fact that numerous decisions of the Court had upheld the constitutionality of the act, that as a matter of common knowledge many towns throughout the state had been incorporated by circuit courts on the strength of the case of *In Re Town of Union Mines*,³⁵ which sustained the statute, and that in all probability all of these towns had either incurred obligations, granted franchises, or were engaged in proprietary municipal enterprises of different characters, the Court decided, on the general theory of *stare decisis*, that it would not be justified in overruling that case and the cases which followed. The position taken by the Court was that it could not make its decision prospective only,³⁶ and that the

125, 140 S. W. 47 (1911); *Pezold Bros. v. City of Louisville*, 140 Ky. 784, 131 S. W. 802 (1910).

This latter view, which is in accord with the holding of the *Huber* case, is much like that taken by the federal courts in interpreting the National Prohibition Act. The court, in reviewing the revocation by the Commissioner of Internal Revenue of a druggist's permit to sell prescription whiskey, could reverse the Commissioner's order only if it was based on an error of law, or was wholly unsupported by the evidence, or was clearly arbitrary. *Elsinore Perfume Co., Inc. v. Campbell*, 31 F. (2d) 235 (C. C. A. 2d, 1929), rev'g 26 F. (2d) 745 (E. D. N. Y. 1928), cert. denied 279 U. S. 870, 49 S. Ct. 512, 73 L. ed. 1006 (1929); *Qualtop Beverages, Inc. v. McCampbell*, 31 F. (2d) 260 (C. C. A. 2d, 1929).

³²125 W. Va. 512, 25 S. E. (2d) 216 (1943).

³³40 S. E. (2d) 11 (W. Va. 1946).

³⁴*In re Proposal To Incorporate Town of Chesapeake*, 45 S. E. (2d) 113 (W. Va. 1947).

³⁵39 W. Va. 179, 19 S. E. 398 (1894). See discussion in text at note 10.

³⁶It is the general rule that an unconstitutional statute is not a law at all and is as void as if never passed. *Chicago, Indianapolis & Louisville Railway Company v. Hackett*, 228 U. S. 559, 33 S. Ct. 581, 57 L. ed. 966 (1913); *Norton v. Shelby County*, 118 U. S. 425, 6 S. Ct. 1121, 30 L. ed. 178 (1886); *Cooley, Constitutional Limitations* (5th ed. 1883) 224; 11 Am. Jur., *Constitutional Law* § 148. Further, it is generally agreed that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, striking down the former decision from the time it was first entered. *People ex rel. Rice v. Graves*, 242 App. Div. 128, 273 N. Y. Supp. 582 (1934), aff'd 270 N. Y. 948, 200 N. E. 288 (1936), cert. denied 298 U. S. 683, 56 S. Ct. 953, 80 L. ed. 1403 (1936); 14 Am. Jur., *Courts* § 130; Note (1946) 4 Wash. and Lee L. Rev. 77. But there is overwhelming authority that a court in announcing its

decision *can* expressly provide whether it is to operate retrospectively as normally or prospectively only, either by an express saving clause protecting all rights accrued under the previous decision or otherwise. Justice Cardozo expressed this view as follows: "A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions." *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U. S. 358, 364, 53 S. Ct. 145, 148, 77 L. ed. 360, 366, 85 A. L. R. 254, 260 (1932). Accord: *Payne v. City of Covington*, 276 Ky. 380, 123 S. W. (2d) 1045 (1938); *Barker v. St. Louis County*, 340 Mo. 986, 104 S. W. (2d) 371 (1937); *Gibson v. Phillips University*, 195 Okla. 456, 158 P. (2d) 901 (1945); 21 C. J. S., Courts §194a; Note (1946) 4 Wash. and Lee L. Rev. 77; Note (1933) 85 A. L. R. 262.

It is somewhat difficult to understand the West Virginia court's position on this doctrine of prospective operation of its judgments, as expressed in the Town of Chesapeake case. The Supreme Court of Appeals of West Virginia was the originator of the minority doctrine that a court judgment construing a statute as unconstitutional is not a judgment against the statute, voiding it *ab initio* for all purposes, but is merely an interpretation of the statute as applied in the particular case then before the court. *Shepherd v. Wheeling*, 30 W. Va. 479, 4 S. E. 635 (1887). And on the question of judicial impairment of the obligation of contract, the same court has said: "... when former decisions are overruled they are considered as never having been the law, but that for a time they obscure the true and sound law; but this rule is subject to one exception, based on decisions of the courts; that is, that where there is a statute, and a decision of the highest court construing it, and a contract is made which is good under that statute, so construed, *no subsequent contrary decision can affect such prior contract*..." *Falconer v. Simmons*, 51 W. Va. 172, 41 S. E. 193 (1902) [italics supplied]. It would seem that these two holdings together, if presented to the court, would be proper precedent for a determination that the statute authorizing judicial approval of municipal incorporation is unconstitutional without thereby invalidating all incorporation contracts previously entered into on the faith of the statute as then construed and all contracts entered into with municipal corporations so formed. This could be done most effectively, in order to bar litigation, by an overruling decision with a clause expressly saving all rights accrued under the statute and providing for prospective operation only of the overruling decision. On the strength of *Falconer v. Simmons*, no contract right secured while the statute was adjudged valid could be impaired by an overruling decision even though no such saving clause were included in overruling the previous construction.

This latter view is almost universally supported. "After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself; and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment." *Douglass v. County of Pike*, 101 U. S. 677, 687, 25 L. ed. 968, 971 (1879). See also *Taylor v. Ypsilanti*, 105 U. S. 60, 26 L. ed. 1008 (1882); *Olcott v. The Supervisors*, 16 Wall. 678, 21 L. ed. 382 (1873); *Gelpecke v. City of Dubuque*, 1 Wall. 175, 17 L. ed. 520 (1864); *Haskett v. Mazey*, 134 Ind. 182, 33 N. E. 358, 19 L. R. A. 379 (1893); *Eberle v. Kopljar*, 85 S. W. (2d) 919 (Mo. 1935); *Wilkinson v. Wallace*, 192 N. C. 156, 134 S. E. 401 (1926); *Schramm v. Steel*, 97 Wash. 309, 166 Pac. 634 (1917); 14 Am. Jur., Courts §130; 21 C. J. S., Courts §194b; Notes (1937) 16 Ore. L. Rev. 397; (1928) 4 Wis. L. Rev. 485; Ann. Cas. 1915C, 578; (1910) 23 L. R. A. (N.S.) 500; (1907) 5 L. R. A. (N.S.) 860, 861.

Although the Supreme Court of the United States refuses to permit a state court thus to impair the obligations of a contract by a decision overruling a prior construction of a statute, it does so only after acquiring jurisdiction on some grounds

effect of holding the act unconstitutional and void from the beginning would be to create grave disturbances in the fiscal affairs of hundreds of municipalities in the state. But the Court pointed out an easy way by which the matter could be handled by the legislature, by an act prospective in its nature.

The theory of separation of powers encounters its greatest difficulty in these days when so many disputes are settled through the processes of administrative law. I am not one of those who rail against administrative law. I think there is a place for it, but I think provision should always be made whereby, in some way, parties aggrieved may have the right of resort to the courts. Whether there is logic in the proposition, in West Virginia we have reached the point where this question does not any longer trouble us. We treat these administrative bodies as quasi judicial in their nature, and in deference to the legislative mandate and under some supposed powers of original jurisdiction, we hear matters of administrative law, confining ourselves, however, to the principles laid down in the case of *United Fuel Gas Co. v. Public Service Commission*,³⁷ heretofore mentioned. This case, in effect, confines us to the legal and judicial questions involved, and leaves to the administrative agency all questions of fact and discretion, unless that discretion is abused and the case is decided against overwhelming proof. In other words, we pass upon cases where a court would have been justified in taking jurisdiction had the right of appeal not been provided for. In practice we probably go farther than that, and often the case is decided in the same manner that we decide other types of cases.

However, there is one thing that should be sternly stressed: when the legislature imposes upon courts the responsibility, and perhaps the duty, to pass upon these questions growing out of administrative law, it cannot expect courts to approve or to uphold acts and conduct

other than the unconstitutionality of such impairment. It is a fundamental error "that this court can, as an appellate tribunal, reverse the decision of a State court, because that court may hold a contract to be void which this court might hold to be valid." *Railroad Co. v. Rock*, 4 Wall. 177, 18 L. ed. 381 (1867). Despite this Supreme Court holding, only one other state appears to accept the view that West Virginia contends for in the *Town of Chesapeake* case. The Texas court has held that a later decision overruling a former one which had held a statute valid does not impair the obligation of a contract entered into on the faith of the earlier construction for the reason that a decision of a court is not in fact a law. *Storrie v. Cortes*, 90 Tex. 283, 38 S. W. 154, 35 L. R. A. 666 (1896). And at least one writer has condemned the doctrine of prospective operation of judicial decisions, classifying the doctrine as judicial legislation. Von Moschzisker, *Stare Decisis In Courts Of Last Resort* (1924) 37 Harv. L. Rev. 409, 426-427.

³⁷73 W. Va. 571, 80 S. E. 931 (1914).

on the part of administrative officers which do not conform to the sound principles by which disputes are heard and determined in courts of justice. We have heard much in these later days of arbitrary acts and conduct on the part of administrative officers, commissions, special masters, and trial examiners. If courts are to be expected to pass upon these questions of administrative law, they should insist upon the right to do so without control by legislative authority. There is no reason why a person involved in a dispute requiring the use of the provisions of administrative law should not have his case tried upon the general principles of right and justice which govern the trial of cases in courts of justice. Any rule or system which does not guarantee to interested persons the right to such trial departs in spirit, if not in actual effect, from what we call due process of law. In my judgment, judicial power, represented by the duly established courts of the land, should, as a part of its high duty to State and Nation, see to it that, whether before a board or commission or whether in the courts of last resort, there be dealt out that form of equal and exact justice, which every court of justice seeks to adjudge.

Of course, we know that the urgencies of modern times call for speed in the settlement of disputes which naturally lend themselves to administrative law, and sometimes the strict rules of evidence are necessarily waived. But the foundation upon which the settlement of all disputes rests, that of justice to those interested therein, should at all times be maintained. One of the great tasks confronting the judiciary of this country at the present time is that of bringing into line with established judicial principles—the outgrowth of centuries of trial and error—the multitudinous disputes which have arisen from the marvelous advances in the economic and mechanical developments of the age.

Washington and Lee Law Review

Member of Southern Law Review Conference

Volume V

1948

Number 2

BOARD OF STUDENT EDITORS

Editors

JAMES M. BALLENGEE

EDMUND D. WELLS, JR.

Assistant Editors

RAYMOND E. FREED

LLOYD R. KUHN

T. HALLER JACKSON, JR.

ENOS ROGERS PLEASANTS, JR.

JAMES A. QUISENBERRY

Business Manager

JOHN E. SCHEIFLY

Contributors

CHARLES F. BLACKBURN

O. T. KAYLOR, JR.

CARTER C. CHINNIS

BERNARD LEVIN

HENRY C. CLARK

JAMES O. PORTER

JAMES C. HOLLORAN, JR.

BENTON C. TOLLEY, JR.

ROBERT S. IRONS

HUGH T. VERANO

BOARD OF FACULTY EDITORS

Editor

THEODORE A. SMEDLEY

Assistant Editor

CHARLES P. LIGHT, JR.

Business Manager

CHARLES R. McDOWELL

CHARLES V. LAUGHLIN

CLAYTON E. WILLIAMS

Published twice a year by the School of Law, Washington and Lee University, Lexington, Virginia. Subscription price, \$2.00 per year, \$1.00 per issue. If a subscriber wishes his subscription to THE REVIEW discontinued at its expiration, notice to that effect should be given; otherwise it is assumed that a continuation is desired.

The materials published herein state the views of the writers. THE REVIEW takes no responsibility for any statement made, and publication does not imply agreement with the views expressed.