CONSTITUTIONAL FACT: HOW FAR DOES DUE PROCESS REQUIRE THE INDEPENDENT JUDGMENT OF JUDGES?

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Professor Frank Strong, in a trenchant article,1 written with his usual wit and acuity, recently has raised the question of the persistence of the doctrine of "constitutional fact." It seems to me, however, that he deals with two substantially different constructs under the same title. In the first part of his writing, he treats the rule first enunciated in Ohio Valley Water Company v. Ben Avon Borough,2 elaborated upon by the fancy of "constitutional jurisdictional fact" in Crowell v. Benson,3 and supposedly reaffirmed after full debate in St. Joseph Stock Yards Company v. United States,4 to the effect that whenever an administrative ruling is challenged on grounds of its unconstitutionality and the question of validity depends upon the resolution of issues of fact, the administrative view of the facts, even on reasonably convincing evidence, may not be accorded finality. Instead, it is an inexorable command of due process of law that the party affected have a "fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment"5 as to the facts. After a review of the course of decision, Professor Strong finds the doctrine perhaps moribund but not wholly without possibility of revival.6

The second concept with which Professor Strong deals centers around the extent to which the federal courts, sitting in review of the propriety of state proceedings which affect matters vital to constitutionally protected personal civil rights, should examine independently the facts concerning the alleged invasion. Here it is usually a determination of a state court which is under survey. Moreover, the facts at issue are not so much those upon which the content of the right depends; rather, they go to whether in particular instances the right has been violated. The question is

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2. 253 U.S. 287 (1920).
not one of deference to or of control over the appraisal of evidence by administrative agencies. It is, instead, one of the relative weight to be given by federal courts to the appraisal of facts by state courts in the application of federal constitutional principles. The problem is not how tight a rein due process requires courts to keep over administrative tribunals. Rather, it is how far state tribunals by determinations of fact may affect constitutional rights. It is a continuation of the dilemma faced by the federal courts many years ago when they feared that state judges were evading the impact of the contracts clause of the Federal Constitution by affirming that no contract had been created.7

The two problems, while related, seem to me to be quite distinct, with not too much carryover of principle from the one to the other. So I shall let the second part of the discussion go with the simple comment that I agree fully with what I understand to be Professor Strong's conclusion: The complexity of the problems which arise may seriously clog the judicial process if the federal courts embark upon an undiscriminating review of state factual determinations.8 What more concerns me is the implication of the first part of Professor Strong's discussion that the original "constitutional fact" doctrine, as enunciated in 1920, may survive to plague and to perplex the profession wherever any administrative determination of fact conceivably can have a decisive effect upon a claim of federal (or state) constitutional right.

The doctrine of "constitutional fact," when first announced, aroused much adverse critical comment,9 and its apparent reaffirmance did not evoke marked enthusiasm.10 The "constitutional jurisdictional fact" variation, with the accompanying suggestion of a need for de novo evidential hearings upon such issues, proved still more puzzling to most observers.11 However, this last requirement

8. See Strong, supra note 1, at 281-83.
9. See Brown, The Functions of Courts and Commissions in Public Utility Rate Regulation, 38 HARV. L. REV. 141, 143 n.7 (1924) for a list of the major comments. See also Beutel, Valuation as a Requirement of Due Process of Law in Rate Cases, 43 HARV. L. REV. 1249 (1930); Cheadle, Judicial Review of Administrative Determinations, 3 SW. POL. SCI. Q. 1 (1922); Wiel, Administrative Finality, 38 HARV. L. REV. 447 (1925).
soon was limited to those instances wherein the opportunity to present evidence on the issue before the administrative agency did not exist. So limited, it probably has become of little significance, save as another facet of the general doctrine requiring that there be available independent judicial judgment of issues of fact in the review of administrative decisions affecting constitutional rights. 

Because of some more recent judicial decisions, later to be discussed, there has been widespread speculation that the "constitutional fact" aspect of due process of law has passed away, although some commentators have expressed doubt in light of the repercussions which the demise of the doctrine might have upon state decisions. The truth, of course, is that there has been no formal overruling. Hence, the pathway to the argument that the doctrine still is alive remains unblocked. I suggest, however, that the truth is that the Ben Avon doctrine, as commonly understood, was not reaffirmed in the St. Joseph decision. Instead, the rule was stated in accordance with the technique which now we term "review to determine whether the administrative findings are supported by substantial evidence upon the whole record." As such, it is in accord with the current of modern thought as to the proper relation between administrative agencies and the courts with respect to the review of agency factual determinations. Rightly construed, the doctrine of "constitutional fact" may save state judges from entering upon some paths which they might otherwise pursue to what is thought to be an unwise destination.

As originally conceived and applied in the Ben Avon decision, there is no doubt that the "constitutional fact" dogma envisioned that the reviewing court was to weigh the evidence in the record, independently evaluating it to determine the facts. This is clear from the history of that case, which concerned the appraisement of the property of a public utility to determine whether the rates it charged were excessive. The Pennsylvania regulatory commission had placed one valuation upon certain items. The Pennsylvania

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Superior Court, in which the reviewing function was vested, felt that the evidence led to a higher valuation, which it adopted in passing on the issue of confiscation.\textsuperscript{17} The Supreme Court of Pennsylvania held this action to be error.\textsuperscript{18} The Supreme Court of the United States in turn reversed the Supreme Court of Pennsylvania, upon the ground that the due process clause was violated by its refusal to permit substitution of the superior court's "own independent judgment" as to the fact of value for the judgment of the commission.\textsuperscript{19}

This interpretation of the case seems to have been pursued by the Supreme Court in the opinions immediately succeeding. Thus, Chief Justice Taft in 1923 assumed as valid a criticism of the statutory burden upon the protestant of a rate schedule "to show by clear and satisfactory evidence the inadequacy, unreasonableness or unlawfulness" thereof, saying that it "will be time enough" to consider the question "when it is sought . . . to bar or limit an independent judicial proceeding raising the question whether a rate or other requirement of the Commission is confiscatory."\textsuperscript{20} The same Chief Justice later said of federal regulation of rates, citing the Ben Avon decision: "It is only where such opportunity [for judicial consideration of reasonableness of such regulation on the issue of confiscation] is withheld that a provision for legislative fixing of rates violates the Federal Constitution."\textsuperscript{21}

More specifically, in announcing the high tribunal's complete disagreement with the Supreme Court of Ohio's treatment of certain basic issues of fact bearing upon claimed confiscation, Mr. Justice Sutherland, having recited the Supreme Court's own evaluation, said that "[I]t is evident that the state Supreme Court did not accord to the plaintiff in error that sort of judicial inquiry to which under the decisions of this Court it was entitled."\textsuperscript{22} How-

\textsuperscript{21} Dayton-Goose Creek Ry. v. United States, 263 U.S. 456, 466 (1924).
See also State Corp. Comm'n v. Wichita Gas Co., 290 U.S. 561, 569 (1934) ("Upon the issue of confiscation vel non they are entitled to the independent judgment of the courts as to both law and facts."); United Rys. & Elec. Co. v. West, 280 U.S. 234, 251 (1930) ("The court in the discharge of its constitutional duty on the issue of confiscation must determine the amount to the best of its ability in the exercise of a fair, enlightened and 'independent judgment as to both law and facts.'"); St. Louis & O'Fal-
ever, in view of later developments, it may be observed that the commission's findings apparently were so lightly sustained by evidence that it would be difficult to say that, on the record, there was any real support for its conclusions.

Two cases during this period justified some skepticism as to the Court's enforcement of the Ben Avon dogma. In *Lehigh Valley Railroad v. Board of Commissioners,* the Court sustained the validity of a New Jersey procedure for compelling grade separation of railways and highways at appropriate crossings through the adjudication of a commission. The argument was founded upon the basis that the governing statute allowed the administrative decision to be set aside only when it clearly appeared "that there was no evidence before the Board reasonably to support the same, or that the same was without the jurisdiction of the Board." In holding the argument not to be sustainable, the Supreme Court, speaking once more through Chief Justice Taft, upheld the New Jersey procedure on the basis of a New Jersey interpretation that the court must determine the issue by affirming the commission's order "if there was any evidence to support it, no matter how overwhelming the evidence to the contrary might be," but, "in the usual way, according to the whole of the evidence." The state court made its meaning even plainer by saying that the judges would not "merely substitute their judgment for that of [the administrative] body" but would "determine for ourselves upon all the evidence" whether the order was confiscatory.

The test thus stated by the New Jersey court and approved by the Supreme Court of the United States is what today we refer to as review for support "by substantial evidence in view of the entire record." The court does not substitute its appraisal of

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23. 278 U.S. 24 (1928).
24. Id. at 37.
25. Public Service Gas Co. v. Board of Comm'rs, 84 N.J.L. 463, 87 A. 651 (Sup. Ct. 1913), aff'd on rehearing, 87 N.J.L. 581, 95 A. 1079 (Err. & App. 1915) (affirmance was on the basis of the lower court's opinion).
26. Id. at 466-67, 87 A. at 653.
27. Id. at 468, 87 A. at 654.
28. The quoted language is that of the original ABA Model State Administrative Procedure Act, § 13 (e) (1946). The ABA Revised Model
the facts as disclosed by the evidence for that of the agency. As phrased by the New Jersey court, it does not "merely substitute" its judgment for that of the agency. Instead, taking into account "all the evidence," it decides whether the facts necessary to establish the constitutional claim definitely are established without room for reasonable differences of opinion.

Five years later and three years preceding the review of the Ben Avon dogma in the St. Joseph case, the Supreme Court, speaking now through Mr. Chief Justice Hughes, used the following language in sustaining the validity of the congressional provision for review of orders of the Federal Radio Commission:

Whether the commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the commission and govern its action, are appropriate questions for judicial decision. These are questions of law upon which the court is to pass. The provision that the commission's findings of fact, if supported by substantial evidence, shall be conclusive unless it clearly appears that the findings are arbitrary or capricious, cannot be regarded as an attempt to vest in the court an authority to revise the action of the commission from an administrative standpoint and to make an administrative judgment. A finding without substantial evidence to support it—an arbitrary or capricious finding—does violence to the law. It is without the sanction of the authority conferred. And an inquiry into the facts before the commission, in order to ascertain whether its findings are thus vitiated, belongs to the judicial province and does not trench upon, or involve the exercise of, administrative authority. Such an examination is not concerned with the weight of evidence or with the wisdom or expediency of the administrative action.

State Administrative Procedure Act, § 15 (g) (1961), changes the phraseology somewhat by setting up as a ground for reversal that the administrative finding is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record," preceded by the basic direction that the "court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." There are those who make a distinction, thinking that the latter phrasing opens the door to a more searching review than the former. See 2 Cooper, State Administrative Law 724-30 (1965). I must confess my inability to follow such hairline, if not hairsplitting distinctions. To me either phrasing adds up to the same test: that whereby a reviewing court decides whether the agency determination can stand under the evidence.

Once more the test for review, including review of fact questions of constitutional substance, is phrased in terms of support by substantial evidence on the whole record, a clear renunciation of concern with the weight of evidence.

The next year the Interstate Commerce Commission's finding of a constitutional fact, namely that certain state-prescribed intrastate freight rates were so low as to cause unjust discrimination against interstate commerce, the basis for the right of Congress to authorize federal interference with such rates, was held not to be subject to judicial review "if supported by substantial evidence."31 Once again the reach of judicial review over questions of constitutional fact was confined more sharply than the literal phrasing of the Ben Avon dogma appeared to require. The stage then was set for the famous reappraisal of that dogma made in St. Joseph Stock Yards Company v. United States.32

In form the St. Joseph Stock Yards case was a confrontation of the arguments for and against full judicial weighing of evidence presented to administrative tribunals with respect to the existence or nonexistence of the facts upon which the claimed constitutional rights of litigants depend. There is no need here to go into the details of these arguments. They can be found in the opinions in the Ben Avon33 and the St. Joseph34 cases, and have been discussed at length in the literature.35 In form, after thorough canvassing of the arguments, Mr. Chief Justice Hughes, joined by four other members of the Court, reaffirmed the Ben Avon dogma. Mr. Justice Brandeis, joined by Mr. Justice Stone and Mr. Justice Cardozo, proclaimed the view that the proper test was whether the administrative findings were supported by substantial evidence. Both groups, however, concurred in affirming the trial court's sustention of the administrative order, each feeling that the court had properly applied its rule. Mr. Justice Roberts concurred in the result, giving no reason whatever.

At first blush the profession in its various branches was inclined to accept the determination at its face value. Those who favored the Ben Avon rule applauded the Hughes opinion; those

31. Florida v. United States, 292 U.S. 1, 12 (1934) ("The question of the weight of the evidence was for the Commission and not for the court."). Accord, Ohio v. United States, 292 U.S. 498 (1934).
32. 298 U.S. 38 (1936).
35. For a rather spirited debate, see Burgess, Recent Efforts to Immunize Commission Orders Against Judicial Review, 16 Iowa L. Rev. 53, 60–61 (1930); Merrill, Recent Efforts to Immunize Commission Orders Against Judicial Review: A Reply, 16 Iowa L. Rev. 62, 71–72 (1930).
who opposed it praised the Brandeis opinion. However one's preferences ran, the natural tendency was to regard the nose-counting as a formal commitment of the majority of the Court to the *Ben Avon* formula. As we shall note, there were repercussions upon state legislation and state decision. When, in later determinations of the Supreme Court, there appeared inconsistence with the majority pronouncement, it seemed most natural to raise the question whether and to what extent the doctrine was being abandoned. Such an approach still leaves the possibility that the "ghost" once more may assume corporeal form. It also increases the difficulty in allaying the effects of the dogma on state law. It seems to me that the time may now be ripe for a reassessment of what actually was the position espoused by Chief Justice Hughes and his fellows. Perhaps it was too easily assumed that they were positively affirming and applying the *Ben Avon* dogma.

Not too many years after the *St. Joseph* decision, while I still was under the influence of the apparently deliberate choice of phraseology on the part of the majority, I called attention to the fact that the Hughes and Brandeis opinions were not too far apart in the practical application of judicial oversight over administrative action. The difference, I suggested, was more in approach than in result. At the same time, I noted an apparent tendency "against fully logical application" of the rule espoused by the majority. Today, in light of over 30 years of subsequent decisions and upon a closer reading of the opinions, I venture to assert that both opinions, in variant terms, really espoused the "substantial evidence on the whole record" rule, and that, in fact, this is the rule that the Supreme Court has been applying over the years to administrative findings of constitutional fact.

To begin, let us take the crucial language of the opinion of Mr. Chief Justice Hughes, following his formal espousal of the *Ben Avon* dogma:

> 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 pro-

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38. Id. at 72.
JUDGMENT OF JUDGES

procedure of an expert legislative agency. Moreover, as the question is whether the legislative action has passed beyond the lowest limit of the permitted zone of reasonableness into the forbidden reaches of confiscation, judicial scrutiny must of necessity take into account the entire legislative process, including the reasoning and findings upon which the legislative action rests. We have said that "in a question of ratemaking there is a strong presumption in favor of the conclusions reached by an experienced administrative body after a full hearing." Darnell v. Edwards, 244 U.S. 564, 569. The established principle which guides the court in the exercise of its judgment on the entire case is that the complaining party carries the burden of making a convincing showing and that the court will not interfere with the exercise of the rate-making power unless confiscation is clearly established.39

In summing up, the Chief Justice said:

It follows, in the application of this principle, that as the ultimate determination whether or not rates are confiscatory ordinarily rests upon a variety of subordinate or primary findings of fact as to particular elements, such findings made by a legislative agency after hearing will not be disturbed save as in particular instances they are plainly shown to be overborne.40

Examine this language closely, for it defines the scope of that "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," which the majority opinion has set as the constitutional minimum review which the legislature must accord.41 The court in applying the "independent judgment" rule is not to "disregard . . . the weight which may properly attach upon hearing and evidence." The independence of judicial judgment is not infringed because it is "informed and aided by the sifting procedure of an expert . . . agency."

The Court approves an earlier statement that "[T]here is a strong presumption in favor of the conclusions reached by an experienced administrative body after a full hearing."42 Finally, in exercising judicial "judgment on the entire case," the reviewing court must be guided by the principle "that the complaining party carries the burden of making a convincing showing" and that there is to be no interference "with the exercise of the rate-making power

40. Id. at 54.
41. Id. at 51-52. Note also the acceptance of the ground of error that the court below, in passing on confiscation, "failed to exercise its independent judgment upon the facts." Id. at 49.
42. Darnell v. Edwards, 244 U.S. 564, 569 (1917).
unless confiscation is clearly established." The summation is that:

[A]s the ultimate determination whether or not rates are confiscatory ordinarily rests upon a variety of subordinate or primary findings of fact as to particular elements, such findings made by a legislative agency after hearing will not be disturbed save as in particular instances they are plainly shown to be overborne.

The burden is upon the one asserting confiscation to make not only a convincing showing but to establish clearly his contentions. The primary administrative findings as to the facts upon which the conclusion of compensation depends will not be disturbed "save as in particular instances they are plainly shown to be overborne." This certainly is not that independent weighing of the evidence, that substitution of the view of the reviewing court for that of the agency, which the Ben Avon decision held to be so necessary that the Supreme Court of Pennsylvania was guilty of constitutional error for failing to permit it. New evidence is not to be introduced, so that the "overbearing" of the administrative decisions on issues of constitutional fact obviously must be found in the evidence before the administrative body. Moreover, since the overbearing must be "plain" and must be "clearly established," it is evident that the court is not to substitute its own view of the simple preponderance of proof for that of the agency. The result is the simple, familiar review to see whether the evidence favoring the administrative finding is so completely negated by the evidence in conflict therewith that the finding cannot stand, because, taking into consideration the whole record, a reasonable mind could not properly come to such a conclusion. There should be no reversal of the agency because the reviewing court finds "the record tilting one way rather than the other, though fair-minded judges [or administrators] could find it tilting either way." Conversely, the rule as stated negates the review which looks only to see if there is evidence to support the administrative finding and disregards everything in opposition thereto, which some courts administer under statutes requiring that the administrative determination, if supported by substantial evidence, be accepted as established.

46. In re Cutshaw, 6 Ariz. App. 330, 432 P.2d 474 (1967); Board of
So much for Mr. Chief Justice Hughes. What of Mr. Justice Brandeis? In form he was arguing for the "substantial evidence" rule, under which the court looks only at the evidence in support of the administrative finding. He did, however, recognize that "where what purports to be a finding upon a question of fact is so involved with and dependent upon questions of law as to be in substance and effect a decision of the latter, the Court will, in order to decide the legal question, examine the entire record, including the evidence if necessary. . . ."47 Moreover, he agreed that findings might be set aside because the evidence was such "that it was impossible for a fair minded board to come to the result which was reached,"48 a test which he later reiterated as applicable to the case at bar, stating that the trial court's duty, fully performed in his view, was "to determine merely whether there was evidence upon which reasonable men could have found as the Secretary did, with regard to value and income."49 This, I submit, is simply a rephrasing of the exact test espoused by Chief Justice Hughes: review for support by substantial evidence upon the whole record. Small wonder that the two doughty gladiators eventually agreed that the trial court had performed its whole duty. In essence their supposedly divergent tests were actually the same.

When the St. Joseph opinions are submitted to this analysis, it becomes clear that the subsequent course of decision is not limiting or recessionary or overruling in its character. The various cases simply are applying the rule as established and with consistence. This is true whether the problem is confiscation;50 the freedom to
set non-discriminatory rates;¹⁵¹ the right of an employer not to be required to respond in absolute liability for injuries unrelated to his employment of the person injured;²¹ the right of an employer to discharge an unprofitable servant when the action is not motivated by resentment against union activity;²³ the right to be free from arbitrary and unreasonable regulations respecting the production of hydrocarbons;²⁴ the vested right not to have a tax clos-

that the Ben Avon rule was not followed); Railroad Comm'n v. Pacific Gas & Elec. Co., 302 U.S. 388, 401 (1938) (utility, complaining of constitutional invalidity of state-prescribed rates, has the burden of showing such invalidity by "convincing proof"; the case was remanded for trial on the issue of confiscation.). Cf. New York ex rel. Consolidated Water Co. v. Maltbie, 303 U.S. 158 (1938) (question of the unavailability of the proper remedy under state law to invoke independent judgment was not properly raised).

51. Swayne & Hoyt v. United States, 300 U.S. 297, 304 (1937): If the evidence supports the finding, even "though upon a consideration of all the evidence a court might reach a different conclusion, it is not authorized to substitute its own for the administrative judgment."

52. Banks v. Chicago Grain Trimmers Ass'n, 390 U.S. 459, 467 (1968) (finding of a causal connection between injury at work and a later fatal fall at home "must be affirmed if supported by substantial evidence on the record considered as a whole"); O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965) (same standard, as to the conclusion that conditions of recreation were an incident of employment); O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 508 (1951) (independent judgment of the reviewing court is to be exercised only to determine if administrative findings "are unsupported by substantial evidence on the record considered as a whole." The rule was applied to a determination that an attempted rescue of an endangered swimmer was in the course of employment.); Cardillo v. Liberty Mut. Ins. Co., 330 U.S. 469, 484 (1947) (whether a trip to or from a job site is a part of work; on "sufficient evidence," the administrative finding should have been sustained); Parker v. Motor Boat Sales, Inc., 314 U.S. 244, 249 (1942) (whether an employee, hired solely to work on the land, went on a boat as an aid in testing the motor for his employer; granting "that more than one conclusion could have been reached upon the evidence," the court should have accepted the administrative finding "as final"); Voehl v. Indemnity Ins. Co., 288 U.S. 162, 166 (1933) (whether Sunday visit to premises was for employer or for the workman's own purpose; administrative "findings of fact supported by evidence must be deemed . . . conclusive"). All these cases seem to impose liability that would violate due process of law if the facts were other than those administratively found.

53. Washington, Va. & Md. Coach Co. v. NLRB, 301 U.S. 142, 146 (1937) ("[W]e should not review the facts, since . . . the act . . . provides that the finding of the Board as to the facts, if supported by evidence, shall be conclusive," and there was substantial evidence to support the finding.)

54. Railroad Comm'n v. Rowan & Nichols Oil Co., 311 U.S. 570, 576 (1941) ("[I]t is clear that the Due Process clause does not require the feel of the expert to be supplanted by independent view of judges on the conflicting testimony of witnesses and prophecies and impressions of expert witnesses."); Railroad Comm'n v. Rowan & Nichols Oil Co., 310 U.S. 573, 584 (1940) ("It is not for the federal courts to supplant the Commission's
ing agreement set aside save on proof of fraud;\textsuperscript{55} or the constitutional freedom of contract set over against the statutory prohibition to an employer to "keep" a labor union.\textsuperscript{56} "Independent judgment" simply means independent judgment as to the clearly erroneous character of the administrative judgment, taking into account the whole record.

The foregoing summary suggests not only that the federal standards for review of administrative findings on issues of constitutionality have been established for a long time in accordance with the interpretation of the \textit{St. Joseph Stock Yards} case\textsuperscript{57} for which I have argued, but also that this is the standard by which state decisions are to be brought to judgment under the Federal Constitution. Interestingly enough, there seems to have been no formal treatment of the question whether states have adequately afforded the review required by due process for nearly 30 years. Whether this phenomenon is due to the decline of the importance of substantive due process as applied to the regulation of economic affairs or to the lack of opportunity for federal review brought about by the view of state judiciaries that they are still bound by the \textit{Ben Avon} dogma may be open to question. It may be that state judges are unaware of their freedom; therefore, there may be value in a brief survey of the state reactions to the federal decisions.

When the \textit{Ben Avon} doctrine first was promulgated, it must have seemed novel to courts which had habitually sustained administrative action supported by substantial evidence, even though such evidence was conflicting. The country was still under the influence of the progressive era and had faith in the ability of its legal institutions to control, in the public interest, the enterprises that supplied public needs. It had not yet slipped into the cynical lethargy that sometimes seems to reduce that control to a meaningless ceremony. Even after eight years of \textit{Ben Avon}, one state court of standing doubted the soundness of the dogma and proclaimed its preference for the older view.\textsuperscript{58} For the most part,
though, state courts were content to sustain the local laws by pro-
claiming that they permitted the full judicial factual review which
the Supreme Court of the United States apparently had re-
quired.\(^5\) In at least one case, involving no constitutionally guaran-
tee rights and therefore no issue of constitutional fact, the state
court appeared to reverse the Scriptures by pouring the old wine
of “presumptive validity” into the new bottle of “independent judg-
ment,”\(^6\) thereby anticipating to some degree a later refinement de-
veloped by the Supreme Court of the United States.\(^6\) However,
during the succeeding years, before the St. Joseph case, the state
courts generally accorded the Ben Avon rule face value, affirming
trial courts in supplanting agency judgment as to constitutional
facts on the basis of an independent judicial weighing of the evi-
dence,\(^6\) exercising a like revisionary power when sitting in direct
review of administrative action,\(^6\) and reversing trial courts for not
properly exercising their powers of independent evaluation.\(^6\) A
curious distinction between “legislative” and “adjudicative” func-
tions of agencies led to inapplicability of the independent judg-
ment principle in the review of workmen’s compensation awards,\(^6\)

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5. 68 Colo. 92, 188 P. 747 (1920) in Public Util. Comm'n v. City of Loveland,
87 Colo. 556, 289 P. 1090 (1930).
6. 59. Southern Cal. Edison Co. v. Railroad Comm'n, 6 Cal. 2d 737, 59
50, 104 So. 538 (1925); Chicago & N.W. Ry. v. Railroad Comm'n, 188 Wis.
(1925); In re Opinion of the Justices, 251 Mass. 569, 147 N.E. 681 (1925);
Wisconsin-Minnesota Lt. & Pow. Co. v. Railroad Comm'n, 183 Wis. 96, 197
N.W. 359 (1924). See also Shealey v. Seaboard Air Line Ry., 131 S.C. 144,
126 S.E. 622 (1924); St. Louis Sw. Ry. v. Stewart, 150 Ark. 586, 235 S.W.
1093 (1921); Modeste v. Connecticut Co., 97 Conn. 453, 117 A. 494 (1922);
summary of the state reactions, see Buchanan, The Ohio Valley Water Co.
Case and the Valuation of Railroads, 40 HARV. L. REV. 1033, app. at 1070
(1926).
7. 60. Clear Creek Oil & Gas Co. v. Fort Smith Spelter Co., 161 Ark. 12,
255 S.W. 903 (1923) (reversing the trial court for not requiring sufficiently
preponderant evidence as the basis for its overturning the presumptively
valid commission order).
9. City of Duluth v. Railroad & Warehouse Comm'n, 167 Minn. 311,
209 N.W. 10 (1926); State ex rel. Hopkins v. Southwestern Bell Tel. Co., 115
327 (1935). Note that in this case the court also states that the appellant
must overcome the presumptive correctness of the order, a position which
the dissenters charge misapplies the Ben Avon rule.
524, 248 N.W. 229 (1933); Otis Elev. Co. v. Industrial Comm’n, 302 Ill. 90,
134 N.E. 19 (1922).
a position which seems inconsistent with that later taken, at least temporarily, by the Supreme Court of the United States in the Crowell case.66

How do the state courts stand since 1936? A considerable number seem to believe that the Supreme Court reaffirmed the rule requiring independent judicial judgment of constitutional fact as a part of due process of law.67 Accordingly, they affirm lower courts in according such a review,68 reverse them for failing to do so,69 or state that they exercise that power themselves.70 The Massachusetts court has found the principle embedded within its own Commonwealth's constitution,71 which likely makes irrelevant within the Bay State any consideration of the effect of the federal decisions.72 However, note that in one decision the Massachusetts court has required that confiscation be "clearly established."73 In a number of states, the "independent judgment" doctrine has been taken to require that where statutes governing judicial review of agencies do


68. Southern Cont. Tel. Co. v. Railroad & Public Util. Comm'n, 201 Tenn. 697, 301 S.W.2d 387 (1955); In re Northwestern Bell Tel. Co., 73 S.D. 370, 43 N.W.2d 553 (1950); Alabama Public Serv. Comm'n v. Southern Bell Tel. & Tel. Co., 253 Ala. 1, 42 So. 2d 655 (1949); Marrs v. Railroad Comm'n, 142 Tex. 293, 177 S.W.2d 941 (1944); State ex rel. Pacific Tel. & Tel. Co. v. Department of Public Serv., 19 Wash. 2d 200, 142 P.2d 498 (1943).
70. City of Fort Smith v. Southwestern Bell Tel. Co., 220 Ark. 70, 247 S.W.2d 474 (1952); New Jersey Suburban Water Co. v. Board of Comm'r's, 123 N.J.L. 303, 8 A.2d 350 (Err. & App. 1939). The same rule once was applied by the Supreme Court of Oklahoma, in review of rulings by that state's industrial commission, while the Court was mesmerized by the supposed Crowell implications. Sartin v. State Ind. Comm'n, 183 Okla. 268, 81 P.2d 306 (1938); Tulsa Rig & Reel Mfg. Co. v. Case, 176 Okla. 262, 55 P.2d 777 (1936); McKeever Drilling Co. v. Egbert, 170 Okla. 259, 40 P.2d 32 (1934). The issue now has become moot, with the transformation of the commission to a court. See OKLA. STAT. tit. 85, § 69.1 (1961).
not provide for the redetermination of constitutional facts, opportunity be afforded for resort to the general equitable jurisdiction of the courts to achieve it.\textsuperscript{74}

Before looking at the state cases which have examined the federal course of decision more perceptively, we may note a number of decisions in which the federal authorities have been cited for the general proposition that due process requires opportunity for judicial review of administrative determinations,\textsuperscript{75} a proposition not necessarily involving any specific command as to the manner of dealing with issues of fact, constitutional or otherwise. Likewise, we may take note of the technique for avoiding the supposed impact of the federal cases by holding that, as no constitutional "right" is involved, there are no issues of constitutional fact to be reviewed.\textsuperscript{76} It may be significant that there is federal precedent for this technique in an opinion by Chief Justice Hughes which followed close upon the heels of the \textit{St. Joseph} pronouncement.\textsuperscript{77}


\textsuperscript{75} People ex rel. Radium Dial Co. v. Ryan, 371 Ill. 597, 21 N.E.2d 749 (1939); Reynolds v. Fabritius, 233 Ala. 625, 172 So. 889 (1937). The California cases respecting the necessity for de novo consideration of all issues arising before administrative agencies of statewide jurisdiction, Laisne v. State Bd. of Optometry, 19 Cal. 2d 831, 832 P.2d 457 (1942); Drummey v. State Bd. of Funeral Dir. & Embalmers, 13 Cal. 2d 75, 87 P.2d 848 (1939), insofar as they rely upon the federal decisions, fall within the same category. Actually those decisions involve purely local concepts of the effect of the separation of powers provisions of the California constitution and probably have no persuasive precedential value beyond the borders of that state.


\textsuperscript{77} Acker v. United States, 298 U.S. 426 (1936), relying upon Mr. Justice Brandeis' earlier dictum in \textit{Tagg Bros. & Moorhead v. United States}, 280 U.S. 420, 443 (1930). The opinion in the \textit{Acker} case purports to make a distinction between utilities which have a substantial property investment and those which render personal services. The question well may be asked whether it is less confiscatory to require the rendition of services for an inadequate return than to restrict unduly the earnings from the use of property. The purported distinction does not harmonize well with Chief Justice Hughes' reported response to the Brandeis argument for a difference between the extent of judicial review required in cases involving personal liberty as compared with those involving property: "You've no
Since the late 1930's, taking account of the obvious disparity between the impression created by a superficial reading of the Hughes-Brandeis debate of 1936 and the subsequent course of decision, a number of state judges have felt compelled to examine the matter more closely. In some instances their examination has taken the same form as that which was noted at the beginning of this article, a speculation as to whether the Ben Avon-Crowell-St. Joseph doctrine has been abandoned. Increasingly, however, numerous state courts have applied the principle that a successful attack on an agency's determination of constitutional facts must clearly and plainly establish the alleged error and that the courts should not overturn an administrative decision simply because, in the judges' view, the weight of the evidence points to a different result, as distinguished from the rule that courts will only overturn such a decision where it is clearly established by the entire record that the agency's conclusion was plainly erroneous. Even Massachusetts in one decision has followed this principle.

It is my view, for the reasons stated, that the current of authority in the state courts is in harmony not only with the federal cases since 1936, but also with the view of the issue of constitutional fact stated in the majority opinion in the St. Joseph Stock Yards case. Hence, the question is not whether that right to split the due process clause for the purpose of judicial convenience." See Pusey, CHARLES EVANS HUGHES 707 (1951).


81. St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936). See the comment in Wood, DUE PROCESS OF LAW 1932-1949 at 294 (1951) to the effect that there was "no suggestion that the Court should refuse to examine both sides of the case and make a final decision," made without apparent recognition of the significance of the comment.
case and the decisions in Crowell\textsuperscript{82} and Ben Avon\textsuperscript{83} have been overruled sub silentio. It is my view that the decision of 1936 abandoned the "independent judgment" doctrine, under cover of words perhaps designedly chosen to avoid dissent by a not too patent wounding of the sensibilities of the Ben Avon school.\textsuperscript{84} The purported grand debate between Chief Justice Hughes and Justice Brandeis was a mere logomachy. Acker v. United States\textsuperscript{85} decided shortly thereafter, merely carried the change along. Its significance lies in the extension of the idea that independent judicial weighing of evidence is not required. When Justices Butler and McReynolds realized later that they had been led down the road by language the sweep of which they apparently had not realized, they strenuously dissented from its application, and invoked Ben Avon fruitlessly,\textsuperscript{86} concluding with the rather bitter statement:\textsuperscript{87}

\begin{quote}
A tribunal required to accept weighty presumptions against a defendant, resolve all doubts against it, pare down valuations to the utmost and refuse a judgment in its favor when the evidence is conflicting as to valuations or other important elements, could not reach an independent judgment in respect of the law and facts—could not arrive at a fair judicial determination. To us the proceedings in the state courts seem an empty show.
\end{quote}

Then, however, it was too late in the day, if indeed it had not always been too late. The Supreme Court had grown accustomed to the new face of judicial review and was not about to accept a return to the old. Perhaps the basic explanation is that the long continued scholarly and professional criticism of the "own independent judgment" shibboleth had borne its fruit by 1936. The Supreme Court was ready to abandon it. Chief Justice Hughes' part was to provide the technique whereby the abandonment could be implemented without arousing an anguished and disturbing protest from devotees of the old formula. There may be no finer example of the oft-praised Hughesian talent for judicial administration and court leadership. Realization of this fact might have saved much erroneous appraisement of federal precedent by the state courts.

What is the significance of all this for the particular facet of

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\item \textsuperscript{82} Crowell v. Benson, 285 U.S. 22 (1932).
\item \textsuperscript{83} Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920).
\item \textsuperscript{84} See PUSEY, CHARLES EVANS HUGHES 706 (1951).
\item \textsuperscript{85} 298 U.S. 426 (1936).
\item \textsuperscript{86} See the separate dissenting opinion of Mr. Justice McReynolds and Mr. Justice Butler in United Gas Public Serv. Co. v. Texas, 303 U.S. 123, 153 (1938) (Court's opinion by Hughes, C.J.).
\item \textsuperscript{87} Id. at 158.
\end{itemize}
constitutional law that we have been discussing? In the first place, it should remove all doubt of the fact of the death of the "own independent judgment" rule as applied to issues of constitutional fact. The death certificate for which the Supreme Judicial Court of Massachusetts longs actually was issued in 1936. Those state courts which have adhered to the Ben Avon formula under the supposed compulsion of federal decision need do so no longer. The state courts which have departed from it, in recognition of the implications of the post-1936 course of decision, may lay to rest whatever misgivings may linger as to the walking of ghosts of 1924, since interment definitely occurred in 1936. There should be no doubt, either, as to the validity across the board of the judicial review provisions of either the Model State Administrative Procedure Act or of the revised version thereof. Finally, realization of the true significance of the 1936 reconsideration and its aftermath should aid state courts in interpreting local legislation phrased in terms of the "independent judgment" rule, obviously designed to comply therewith, so as to require adherence only to that rule as authoritatively determined in 1936. These advantages, at least, should come to aid our understanding of administrative law problems in the area of judicial review.

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89. See note 28 supra.