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ADMINISTRATIVE LAW IN MARYLAND

By REUBEN OPPENHEIMER.*

While the subject of administrative law has not as yet found a place in any Maryland Digest, it is, in the opinion of many, the most important in modern jurisprudence. As the functions of the State and its municipalities have increased with the growing complexity of economic life, more and more of the operation of our governmental machinery has been transferred to boards and commissions. The average Maryland citizen is far more apt to come into contact with legal processes as they are carried on by these administrative boards than he is to be involved in court proceedings. The Maryland Unemployment Compensation Board, to take only one example, has had over one hundred and twenty-two thousand claims filed with it in the first three months of 1938, more than the total number of civil cases filed in the Baltimore nisi prius courts, inclusive of the People’s Court, in a whole year.

The State of Maryland has in operation over forty boards and commissions, to whom the Legislature has entrusted the carrying out of important policies. These function more or less independently. They carry on and to some degree combine executive, quasi-legislative and quasi-

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judicial functions. This number does not include the many municipal and county bodies of the same general nature.

A Marylander today is born under the auspices of a doctor whose qualifications have been passed upon by a Board of Medical Examiners, and a nurse whose fitness has been determined by the State Board of Examiners of Nurses. If he attends the public schools, the scope of his education and the text books which mold his thoughts are selected or approved by the State Board of Education. If, after his schooling, he wishes to become a doctor, lawyer, dentist, architect or plumber, he must satisfy the appropriate State board of his qualifications before he can begin to earn his living. His very movements to and from work bring him into close contact with the processes of administrative law. The carfare or taxicab fare which he pays are determined by the Public Service Commission; if he drives an automobile, his license may be revoked for any cause which the Commissioner of Motor Vehicles deems sufficient; he cannot even take to the air without a license from the State Aviation Commission. His amusements are closely supervised by administrative bodies. The moving pictures that he sees are only those which the Maryland State Board of Censors has determined are not sacrilegious, obscene, indecent, inhuman or immoral; if he wishes to attend a prize fight, the exhibitor must have obtained a license from the State Athletic Commission; if he places a bet at a race track, he does so under the rules and regulations prescribed by the Maryland Racing Commission. The food which he eats has been inspected or comes from premises approved by the State Board of Health. If he wishes to convert his dwelling into a store, he probably must obtain a permit from the Zoning Commissioner. If he is engaged in any one of a large number of occupations and has an accident in the course of his employment, his compensation is determined by the State Industrial Accident Commission. If he loses his job, he goes to the Unemployment Compensation Board. When he reaches the age of sixty-five, his old age pension is administered by the Board of State Aid and Charities, and
when he dies his interment will be presided over by a licensee of the Board of Funeral Directors and Embalmers.

Administrative law involves the nature of the operations of administrative agencies, as well as the control exercised by courts over their creation and activities. There is no greater need in Maryland governmental affairs than for a comprehensive and comparative study of the first aspect of the subject. As to the second, the decisions of the Court of Appeals show a statesmanlike analysis of the proper judicial function in this field. It has been observed by one of the most eminent authorities on the subject that the general failure to recognize an administrative law has hampered its development and delayed the solution of its real and manifold problems. It is submitted, however, that, in Maryland at least, the very failure to admit administrative law as a member of the legal hierarchy has resulted, despite some confusion of thought, in a needed elasticity during a formative period. The roots of our modern boards go deep into history, but their tremendous growth in number and importance is a phenomenon of this century. The periphery of legal decisions within which our Maryland State and local boards can function might not have been drawn with the same breadth and understanding had it been traced too soon.

Delegation of Power to State Administrative Agencies

If so many of the discussions of administrative law are concerned with questions of constitutionality, it is because, in the past, the impingement of board and court has largely been in that realm, and because the very consideration of the constitutionality of these boards and commissions often brings out their structure and the nature of their functioning.

The Court of Appeals has found no difficulty in upholding the constitutionality of the creation of such agencies of state government as the Public Service Commission.

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*Felix Frankfurter, Foreword (1938), 47 Yale L. J. 515, 517.
*Gregg v. Public Service Commission, 121 Md. 1, 87 Atl. 1111 (1913).
and the State Industrial Accident Commission. These decisions, on the side of administrative law, involve not only the right of the Maryland Legislature to delegate its power to the necessary extent, but also the applicability of Article 8 of the Declaration of Rights, which declares "that the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other."

The right of the Legislature to delegate some of its powers to a municipal corporation was early recognized, and one hundred years ago the same principle was invoked to uphold the legislative grant of power to a board to license doctors. The question of the mingling of powers, on its face, is more difficult. Article 8 of the Declaration of Rights presented a more concrete barrier than any which the Supreme Court has had to hurdle under the Federal Constitution. The State Industrial Accident Commission, for example, as the Court of Appeals pointed out in the Solvuca case, is required to exercise judgment and discretion and to apply the law to the facts in each particular case; it can make reasonable and proper rules to govern its procedure and is to satisfy itself of the ability of employers to make the required payments. Analytically, these functions, it is submitted, are respectively judicial, legislative and administrative. Nor can we obscure this fact by invoking the thought-saving prefix "quasi". Similarly, while the establishment of a rate by the Public Service Commission may be taken as a making of a rule for the future and, therefore, an act legislative, not judicial, in kind, an examination of the weekly number of complaints heard by the Public Service Commission certainly indicates that a large part of its activi-

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6 Harrison v. Mayor & City Council of Baltimore, 1 Gill 264 (1843) ; Rossberg v. State, 111 Md. 304, 412, 74 Atl. 581 (1909).
ties are concerned with that determination of specific controversies between definite parties which we commonly associate with the judicial process.

Decisions such as the Solvucca and Gregg cases rest, it is submitted, on three grounds:

First, these boards, while operating as independent and important agencies in the carrying out of state policies, do so on a plane which, in theory at least, is subordinate in importance to that occupied by the legislative, judicial and executive branches of our government. It is certainly true that their policies and indeed their very existence is dependent upon the will of the Legislature which created them, while the functions and powers of the Governor, the Judges and the Legislature are imbedded in the Constitution. Article 8 of the Declaration of Rights is to be taken, upon this reasoning, as having reference only to those three orthodox parts of the Government and is, therefore, not applicable to other subordinate agencies. 9

It may be noted in passing, as a commentary upon the vagaries of nomenclature, that this line of thought invokes the so-called strict interpretation of the Constitution to attain a so-called liberal result.

Second, there is the historical argument. The mingling of functions in administrative boards as well as the existence of these organisms go far back in English and American history. Reference can be made, for example, to the Commissioners of Sewers of the Sixteenth Century, who were given legislative powers, powers to impose rates upon landowners, and to fix and collect penalties for non-payment. 10 We can turn to the English Justices of the Peace, who, in addition to their ancient local powers over migration of laborers, assessment of wages and preservation of rivers, were, in Tudor times, given the power to compel action by towns in regard to fortification, to assess and collect taxes for repair of bridges, to punish surveyors of bridges for negligence, and to license ale houses, and who

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9 See Crane v. Meginnis, 1 G. & J. 463, 476 (1829) and Wright v. Wright, 2 Md. 429, 452 (1832).
10 23 Henry VIII, c. 5 (1531). See Report of Committee on Ministers' Powers (1832 Cmd. 4060) 8 et seq.
played an important part in that national system of control of wages and prices in the sixteenth century which in many respects foreshadowed modern times. In our own country, local blending of judicial, administrative and executive functions was an accepted and approved fact at the time of the formation of the United States.

Third, there is the argument of necessity. The Court of Appeals itself has called attention to the fact that these administrative boards and commissions are necessitated because of "the constantly increasing complexity of modern society. The field has become so vast, and the things to be considered so enlarged in number and so interrelated with one another, that it has been found practically impossible to provide in laws and ordinances specific rules and standards by which every conceivable situation can be measured and determined. The result has been that we have turned more and more to the plan of providing in our laws and ordinances general rules and standards, and leaving to administrative boards and agencies the task of acquiring information, working out the details, and applying these rules and standards to specific cases."

Chief Judge Bond has said:

"Legislation which has to provide for a large number of special cases of varied facts, or for unforeseeable conditions present or future, must be supplemented by the action of administrative officers with power to adapt and vary the rule as the special cases come before them, one by one. If this were not permissible, then the legislative branch of the government could not deal with some of the needs of the country or of the community at all, for it can be done in no other way. . . . Senator Elihu Root, who speaks with the authority of a most profound understanding of our institutions and of the law, said to the American Bar Association in 1916: 'As any community passes from simple to complex conditions the only way in which government can deal with the increased burdens thrown

11 Port, Administrative Law, (1929) 54.
12 Dickinson, Administrative Justice and the Supremacy of Law, (1927) 33, n. 5; 15 The Writings of Thomas Jefferson (Memorial Ed. 1903) 44.
13 Tighe v. Osborne, supra, Note 3.
upon it is by the delegation of power to be exercised in detail by subordinate agents, subject to the control of general directions prescribed by superior authority. The necessities of our situation have already led to an extensive employment of that method. The Interstate Commerce Commission, the State Public Service Commissions, the Federal Trade Commission, the powers of the Federal Reserve Board, the health departments of the states, and many other supervisory offices and agencies are familiar illustrations. Before these agencies the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight. There will be no withdrawal from these experiments. We shall go on; we shall expand them, whether we approve theoretically or not, because such agencies furnish protection to rights and obstacles to wrongdoing which under our social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation."

This third and most important ground of necessity is neither an acceptance of a \textit{fait accompli} nor a constitutional abnegation. On the contrary, it is a recognition of the foresightedness of our constitutional system of government, which is so designed that we may adapt ourselves to changing conditions and at the same time preserve the fundamentals of our freedom. Inherent in the doctrine, so interpreted, is the necessity of seeing to it that these new agencies we have had to forge to meet new times themselves take their proper place in our system of government, so that the increased regulation which they represent may be carried out with both fairness and efficiency, with substantial justice as well as with social wisdom.

\textbf{Recognition of Municipal Administrative Agencies}

The difficulty the Court of Appeals has had in connection with the legality of administrative agencies created by municipalities and counties has been largely caused by the fact that, at least in the early cases, questions of administrative law were not separated from questions of po-

\textsuperscript{14} Dissenting opinion in Goldman v. Crowther, 147 Md. 282, 312, 320, 321, 128 Atl. 50 (1925).
lice power. Before the Court determines whether or not an administrative board is properly set up, it must first determine whether or not the legislative body has the right to act at all as to the particular subject matter. Even where the two questions are dealt with separately, when it is decided that the legislative body did not have the constitutional right of regulation, the vigor with which the unlawful usurpation of power is characterized may be carried over into consideration of the type of regulatory agency which had been created.

In the cases relating to local administrative agencies, there were additional complicating factors. The zoning cases, in which the question generally arose, show a changing concept of the police power on the part of the Court; a distinct difference in point of view in considering the constitutional right to regulate the size and use of buildings within a municipality is evidenced, for example, in the two cases of Goldman v. Crowther, and Tighe v. Osborne. Moreover, many of the cases involve the subsidiary question of statutory construction as to whether or not the Legislature had intended to delegate its power. Again, in some of the zoning cases the regulation was by the municipal body itself, whereas in others it had been entrusted to separate zoning agencies. It is only lately that the concept of the sub-delegation of powers is shown to have been but the cocoon from which are emerging true doctrines of administrative law.

The real import of the zoning cases, insofar as they relate to administrative law, is best considered by dividing the decisions into categories according to their actual

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15 In the case of Schechter v. United States, 295 U. S. 495, 79 L. ed. 1570, 55 S. Ct. 837 (1935), for example, the Supreme Court recognized that it had two separate questions before it; first, whether Congress had the right to legislate with respect to the poultry industry under the Interstate Commerce Clause; and, second, whether the type of regulation embodied in the N.R.A. Code was in itself valid. Both questions were answered in the negative, but the first involved the right of Congress to act at all as to the particular subject matter, and the second involved far reaching doctrines of administrative law.


17 Supra Note 14. See language of majority opinion at 147 Md. 282, 282.

18 Supra Note 3.
holdings. The first category comprises those cases where the zoning was in the nature of municipal legislation, as where ordinances were passed limiting the height of buildings in a certain locality,\(^{19}\) requiring open areas in comparatively small sections of a city,\(^{20}\) or forbidding filling stations or ice factories in certain areas.\(^{21}\) These cases involve only the questions of whether there could be regulation under the police power, and, if there could, whether the right of regulation had been sufficiently delegated to the local authority by the State Legislature. They do not involve any real question of administrative law. The decisions involving the actions of local administrative officers or boards\(^{22}\) fall within an entirely different category, for, in these cases, when the right of regulation is sustained, the question is whether the limitations within which the regulatory bodies can operate have been sufficiently marked out, and whether definite standards within which discretion can be exercised have been established. The third category consists of those cases where the zoning ordinances represent a combination of legislation by the municipality and discretion delegated to administrative agencies.\(^{23}\) In this third category, as the latter cases make clear, the question as to whether or not the discretion of the administrative agency was properly canalized, which is a matter of administrative law, is separate and distinct from the question of whether or not the zoning legislation involved is a proper exercise of the police power.

There is still a fourth category of the zoning decisions, which is by far the most troublesome. These are the decisions where the local legislative body also acts as the administrative agency in carrying out the legislation. It is

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\(^{19}\) Cochran v. Preston, 108 Md. 220, 70 Atl. 113 (1908).


\(^{21}\) Pocomoke City v. Standard Oil Co., 162 Md. 365, 159 Atl. 902 (1932); Lipsitz v. Parr, 164 Md. 222, 164 Atl. 743 (1933).

\(^{22}\) Bostock v. Sams, 95 Md. 400, 52 Atl. 655 (1902); Stubbs v. Scott, 127 Md. 86, 95 Atl. 1060 (1915).

\(^{23}\) Goldman v. Crowther, supra Note 14; Tighe v. Osborne, 149 Md. 349, 131 Atl. 801 (1925); Tighe v. Osborne, 150 Md. 452, 133 Atl. 465 (1926); R. B. Construction Co. v. Jackson, 152 Md. 671, 137 Atl. 278 (1927); Jack Lewis, Inc. v. Mayor & City Council of Baltimore, 164 Md. 146, 164 Atl. 220 (1933); Sugar v. North Baltimore Methodist Church, 164 Md. 487, 165 Atl. 703 (1933).
submitted that the right given to the Mayor of Baltimore in the case of *Baltimore v. Radecke*\(^2\) to revoke any permit for the use of a steam engine, and the duty imposed upon the Commissioners of Easton\(^3\) and the Mayor and City Council of Salisbury\(^4\) to pass upon applications for new buildings, in reality put these officials in the status of administrative boards or commissions, to the same extent as though the duty of passing upon applications had been entrusted to a board of zoning appeals. The mere title of the governmental officer should not obscure the real nature of the governmental function which he is performing. The granting of divorces was once a prerogative of the Maryland Legislature, but that fact did not alter the judicial nature of the action. The most important aspect of *Panama Refining Company v. Ryan*\(^5\) is the holding of the Supreme Court that the principles of administrative law are to be applied to action administrative in nature, even though the carrying out of the particular function has been delegated by Congress to the President of the United States.

The Court of Appeals has not hesitated to apply the rules of administrative law to the operations of legislative or executive officials in certain types of cases, where those operations are really administrative in nature.\(^6\) The line of demarcation, then, is not the official title of the agency. In other cases, however, where the administrative nature of the official activities seems equally clear, the Court has decided on the question of police power alone, without applying the doctrine that reasonably definite standards must be laid down to guide administrative action. The only consistency of these cases is on an arbitrary factual classification; where ordinances prohibit the erection of buildings without a permit from the governing body of the munici-

\(^2\) 49 Md. 217 (1878).

\(^3\) Commissioners of Easton v. Covey, 74 Md. 262, 22 Atl. 268 (1891).

\(^4\) Farmers & Planter's Co. v. Mayor & City Council of Salisbury, 136 Md. 611, 11 Atl. 112 (1920).


pal corporation, the Court regards the exercise of the power as legislative in nature.\(^{29}\) The building-permit cases can only be regarded as an exception to the rule, based, historically, perhaps, upon the realization that, to small communities, the building of each new house is really a matter of general civic interest, and, analytically, upon the early confusion between police power and administrative law.

In any event, the rule that administrative boards and commissions may be validly created by a municipality as well as by the State itself, if the subject matter of their regulation comes within powers of the local government, is firmly established. Whether the organisms of these local administrative bodies are legally sound, whether the limits of their discretion are sufficiently demarcated, and whether the nature of their proceedings is in accordance with due process of law are questions governed, with the exception of the building-permit cases, by the same principles which apply to the agencies created by the State itself.

**Administrative Boards as Agencies of Government**

The case of *Maryland Cooperative Milk Producers v. Miller*\(^{30}\) offers an interesting comparison with the *Schechter* case\(^{31}\). Both cases were decided in 1935, the former in December and the latter in May. Neither case refers to the other, although both, it is believed, announce the same fundamental principle. The Court in the *Miller* case expressly refrained from passing upon the power of the Maryland Legislature to regulate the milk industry,\(^{32}\) whereas in the *Schechter* case the question of regulation under the interstate commerce clause was a highly important one. The administrative machinery in the *Miller* case was of the type which the Maryland Court, as well as the Supreme Court, had, in the past, approved, whereas in the *Schechter* case the governing body attempted to be created rep-

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\(^{29}\) Kramer v. Mayor & City Council of Baltimore, 166 Md. 324, 171 Atl. 70 (1934).

\(^{30}\) 170 Md. 81, 182 Atl. 432 (1935).

\(^{31}\) Supra note 15.

resented an unprecedented departure from the kind of administrative boards with which we have become familiar. Both cases, however, stand for the vitally important principle that an administrative board must be an agency of government and cannot be merely the vehicle by which an industry seeks to impose its collective will upon the community.

The point of the Miller case was that the Milk Control Law did not directly and immediately delegate to the Milk Control Commission power to supervise and regulate the milk industry in any specific area. The existence and the exercise of its powers were expressly conditioned upon a request by a substantial proportion of "the producers and/or consumers and/or distributors" in the area to be established. The regulatory powers of the Commission could only be invoked by action of an undetermined portion of an unascertained group in an unmarked area. But the declaration of the unconstitutionality of the Milk Control Law, it is submitted, rests, not only upon the Court's refusal to accept a statutory legerdemain, but also upon the broader concept that, irrespective of how much regulation modern life demands, regulation must be by government and for the community as a whole. Our Legislature will not be allowed to abdicate its functions in favor of any economic group, just as Congress will not be allowed to delegate its rights to a national industry. Administrative boards and commissions have properly and necessarily been given broad powers in the conduct of our governmental affairs, but those powers can be invoked and exercised only on behalf of the Government itself.

There is a sharp distinction between making regulation dependent upon the consent of a geographical unit, which is perfectly valid,\(^3^8\) and making it dependent upon the consent of an economic group. It is true that legislation pertaining to a geographical area must today necessarily have an effect beyond the territorial boundary, but that is far different, both in quality and degree, from making legis-

lation dependent upon the consent of a majority of the persons engaged in a particular industry. The latter may be separated from the rest of the community insofar as their wishes and even their immediate financial interests are concerned, but our economic structure is too closely interrelated to make it possible that their actions shall not have far reaching effects upon the community as a whole. The distinction is that between government by law and government by guild.

It by no means follows that the industry or profession to be regulated may not validly be called upon to furnish its own regulators. In Scholle v. State, the Court upheld the validity of a statute providing that no person could practice medicine without qualification before one of two boards of examiners, even though the members of the boards were to be appointed, in the one case, by the Medical & Chirurgical Faculty of Maryland and, in the other, by the Maryland State Homeopathic Medical Society. One of the essentials for good government by commissions is that the commissions shall be composed of experts trained by experience to meet the problems which they are called upon to face. Even though these experts are supplied by the group to be regulated, once chosen, they carry on their duties, not on behalf of their profession, but on behalf of the State which they represent.

The real nature of an administrative board was made clear by the Court in the concrete and undramatic way of the common law, so much more illuminating than definition or abstract discussion. In the case of Clark v. Harford Agricultural & Breeders Association, the question was whether the actions of the Harford County Racing Commission were invalid because the members of the Commission had not taken the oath which the Constitution requires for persons elected or appointed to office of profit. The Court held that the members of the Commission were not officers within the meaning of the Constitution:

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"90 Md. 729, 46 Atl. 328 (1900)."
"Supra note 8."
"It was not the design or the purpose of the Act, that the members of the commission should be independent officers, or to impose upon them, personally, the powers and duties that were committed to the commission itself under the Act . . . it was not contemplated that the members of the commission should be independent officers or persons, otherwise, than as members of a *quasi* corporation, and it was not intended that they should act as individuals."  

The Court in the *Clark* case recognized that the modern administrative board or commission is a separate kind of governmental agency with an independent life of its own, that its members function, not as state or local officials, but as members of an independent entity. The particular question in the *Clark* case was unimportant; many of the statutes creating administrative boards provide for oaths to be taken by the members. It is highly important, however, that these boards and commissions be recognized, as the Court of Appeals has recognized them, as distinct in nature from the other branches of our Government, with different duties and with different problems.  

The fact that administrative tribunals form a distinct species of governmental agency and that the legal rules applicable to them must be conditioned by the nature of the work which they do, is recognized in the series of cases to the effect that, in general, a review of their operations cannot be obtained through the remedy of a writ of mandamus. Mandamus may be brought to compel the performance of the duty of a public official which is purely ministerial, but it does not lie where the exercise of judgment involves an element of discretion. That element is generally inherent in the existence of administrative tribunals. Indeed, the fact that the general policy of the Legislature is to be applied, within proper limits, in the judgment of the agency, is the primary reason for the existence of the tribunal.

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*118* Md. 608, 617.  
Canalization of Discretion

One of the universal rules of administrative law is that the discretion entrusted to the board or commission to carry out the policy of the legislative body must be exercised according to reasonably definite standards. In the striking metaphor of Mr. Justice Cardozo, the delegation of administrative power must be "canalized within banks that keep it from overflowing". The balance must be struck between the public policy which sustains the granting of reasonable discretion in order to carry out the general mandate, and the equally strong public policy that individuals must be protected against the granting of an indefinite authority which may result in arbitrary discrimination.

The phrase "reasonably definite standards" like the phrase "due process of law", takes on meaning only as it is applied to concrete circumstances. It is a fundamental, although often unexpressed, principle of administrative law, that whether or not standards are reasonably definite is to be determined, not by abstract argument, but by scrutiny of the nature of the governmental policy which is to be exercised, the field of operation and the practical difficulties and results of regulation in that field. In the application of the rule, three pairs of cases decided by the Court of Appeals are of interest.

The first two cases illustrate the difference between the failure to provide any reasonably definite standards and the provision for such standards, in the regulation of the same subject matter. In County Commissioners v. Northwest Cemetery Company, Inc., there was before the Court, on injunction proceedings, the validity of an act of the Legislature providing that it should be unlawful for any person, firm or corporation to establish or maintain in Prince George's County a cemetery or graveyard without the written permission of the County Commissioners. Violation of the act was made a misdemeanor. The act was

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* 160 Md. 653, 154 Atl. 452 (1931).
held invalid because the omission to prescribe reasonably definite standards might result in arbitrary discriminations. In Gordon v. Commissioners of Montgomery County, the facts were as follows: The Legislature passed an act authorizing the County Commissioners of Montgomery County to license and regulate cemeteries within the limits of the County, and, in order to safeguard the public health, safety and welfare, to pass rules, regulations or ordinances which should provide proper standards for the exercise of the discretion. The act declared it to be unlawful to establish or conduct a cemetery in the County without first obtaining a license therefor from the County Commissioners if required by any rule, regulation or ordinance authorized by the act. In pursuance of the statute, the County Commissioners passed an ordinance requiring a permit for the establishment or operation of any cemetery and setting forth the standards which should govern the granting or refusal of such permits. These standards provided that consideration was to be given in the granting of a permit to the number of adjacent residents and the proximity of public institutions within a specified distance. The plaintiff attempted to open and operate a cemetery in the County without applying for and obtaining a permit, and filed a bill for injunction to prevent the County Commissioners from interfering with his effort. A demurrer to the bill was held to have been properly sustained. The Court held that the standards prescribed were clearly appropriate and adequate.

Two cases arising under the zoning ordinances of Baltimore City illustrate the difference, as applied to the same subject matter, between standards unreasonably indefinite and reasonably definite. In the first case of Tighe v. Osborne, the ordinance provided that no building or structure should be erected, nor should the existing use of land, buildings or structures in Baltimore City be changed, without a permit from the Zoning Commissioner, and that the Zoning Commissioner should grant permits, unless, in his

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40 164 Md. 210, 164 Atl. 676 (1933).
41 Supra note 23.
judgment, after investigation, the proposed building or change of use would create hazards from fire or disease, or would in any way menace the "public welfare, security, health or morals". Appeal could be taken from the Zoning Commissioner to the Board of Zoning Appeals. Another section provided that, in passing upon applications, consideration should be given to the character and use of buildings, the number of persons resident in the adjoining property, the location of water mains, sewers and other utilities and traffic conditions. The majority of the Court held the ordinance was unconstitutional; the grant of the power to the Zoning Commissioner and the Board of Zoning Appeals was held to be arbitrary and without proper safeguards. A few days after the decision, the Mayor and City Council of Baltimore passed another ordinance, which also undertook to regulate the grant of "use" permits in Baltimore City. It differed from the ordinance in the first Tighe case almost solely in the omission of the two words "public welfare" from the grant of power to the Zoning Commissioner and the Board of Zoning Appeals. Under the new ordinance, the zoning officials were authorized to refuse to issue permits if the proposed buildings or structures, use or changes of use, would create hazards from fire or disease, or would menace "the public security, health or morals". This ordinance was held by the Court of Appeals, in the second cause of Tighe v. Osborne, to be valid.

The second Tighe case is not a reversal of the preceding decision. The omission of the phrase "public welfare" was more than a mere change of wording. A discretion which can be exercised in any way which the administrative agency may deem to be for the public welfare is far more uncontrolled than a discretion limited to the terms "public security, health or morals". The latter phrase the Court construed in the second Tighe case to be substantially similar to the words "hazards from fire or disease". This is a definite concept, a standard which can be applied to particular facts. The general welfare, on the

*Supra* note 3.
other hand, covers an almost unlimited field of discretion which can hardly be the subject of any judicial review.

A particular standard can be definite enough to be valid when applicable to one set of facts and too indefinite to be constitutional when applied to another. The same zoning ordinance was before the Court in the cases of *Goldman v. Crowther*\(^{43}\) and *R. B. Construction Company v. Jackson*.\(^{44}\) One of the terms of this ordinance was that the zoning officials were given the right to disregard and, in effect, set aside its provisions in certain cases where the zoning officials found there were “practical difficulties or unnecessary hardships” in the way of carrying out the strict letter of the ordinance. In the case of *Goldman v. Crowther*, the majority of the Court held, *inter alia*, that this power was too arbitrary and indefinite to be sustained insofar as it applied to the “use” provisions of the ordinance. In the case of *R. B. Construction Company v. Jackson*, the majority of the Court held that the same phrase in the same ordinance provided sufficiently definite standards when applied to the matter of provisions for varying the dimensions of specified areas for side yards. The two decisions are consistent. In the *Goldman* case, the Court expressly said that, even though the phrase failed to provide any proper standards or rules by which the exercise of discretion must be guided and limited, insofar as applied to the use to which the property could be put, it did not necessarily follow that the standards were insufficient to limit and control discretion when applied to the location and construction of buildings. The Court said:\(^{45}\)

> “For in the one case, the subject of the discretion is intangible, impalpable, and aesthetic, while in the other it is material and substantial, and its physical incidents and consequences are capable of being positively and definitely ascertained. ‘Practical difficulties,’ and ‘unnecessary hardships’ may have a definite meaning when applied to the construction of a building, but are quite meaningless when applied to

\(^{43}\) Supra note 14.

\(^{44}\) Supra note 23.

\(^{45}\) 147 Md. 311.
the effect which the proximity of a small tailor shop may have on the aesthetic sensibilities of persons in its vicinity."

The statutes show a great range in the amount of discretion entrusted to the various administrative agencies in carrying out the legislative policy, a range which is reflected in some of the cases. The discretion may be limited to a selection by the agency between concrete alternatives of action; the statute creating the agency may, with a particularity which can only be changed by amendment, enumerate the specific rules governing the exercise of discretion; or the standard can be pulled down to the realm of constitutional definiteness only by the doctrine of reasonable implication.48

DECISIONS WITH RESPECT TO METHOD OF FUNCTIONING

It is inherent in the nature of administrative agencies that the method of their functioning may differ from that of legislatures or courts, for they are neither. It is equally true, however, that, if their proceedings involve life, liberty or property of the citizen, those proceedings must be such as to do substantial justice. Due process of law is not confined to judicial proceedings; but due process of law as applied to administrative action does not con-note the same technique that it does in judicial proceedings, if the fundamentals are preserved.

The fundamentals which must be preserved, if the nature of the administrative proceeding is essentially judicial, are provisions for notice to the parties to be affected and opportunity for a hearing.50 There is authority that even notice and hearing may be dispensed with if the act

46 Mayor & City Council of Baltimore v. Gahan, 104 Md. 145, 64 Atl. 716 (1906).
49 Ulman v. Mayor and City Council of Baltimore, 72 Md. 587, 20 Atl. 141 (1890), overruling Mayor & City Council of Baltimore v. Johns Hopkins Hospital, 56 Md. 1 (1881); Solvuca v. Ryan & Reilly Co., supra note 5.
50 Ulman v. Mayor & City Council of Baltimore, supra note 49; Jarvis v. Berlin, 153 Md. 156, 138 Atl. 7 (1927); Solvuca v. Ryan & Reilly Co., supra note 5.
creating the agency gives a statutory right of review broader than mere judicial determination of good faith.\textsuperscript{51} It is clear that there is no constitutional right to a jury trial in preliminary proceedings, at least where the law secures trial by jury upon an appeal.\textsuperscript{52}

In one important particular, the Court of Appeals differs from the Supreme Court as to due process in administrative law. Under the doctrine of the \textit{Panama Refining Company} case,\textsuperscript{53} a definite finding of fact is necessary if the jurisdiction of the agency is to be sustained. In Maryland, while the reason for the action of the agency should be made clear in the proceedings,\textsuperscript{54} a formalized finding of fact is not jurisdictional.\textsuperscript{55}

If the nature of the administrative agency is essentially legislative, the requirements of notice and hearing are not necessary. The validity of a rule of future action which affects a group, if vested rights of liberty or property are not involved, is not determined according to the same rules which apply in the case of the direct application of a policy to a specific individual. The difference between an administrative agency whose actions are essentially legislative in character and a tribunal whose functioning is quasi-judicial is illustrated in the cases of \textit{Murphy v. State Roads Commission}\textsuperscript{56} and \textit{Solvuca v. Ryan & Reilly Company}.

In the case of \textit{Metcalf v. Cook},\textsuperscript{58} the State Board of Education had enacted a by-law that teachers' certificates should be issued only to graduates of a standard college who attained a certain scholastic rating. The appellant had begun his studies, with a view to procuring a teacher's certificate, before the by-law was passed and did not

\textsuperscript{52} Steuart v. Baltimore, 7 Md. 500 (1855) ; Solvuca v. Ryan & Reilly Co., \textit{supra} note 5.
\textsuperscript{53} \textit{Supra} note 27.
\textsuperscript{54} Applestein v. Mayor & City Council of Baltimore, 156 Md. 40, 143 Atl. 686 (1928).
\textsuperscript{56} 158 Md. 7, 149 Atl. 666 (1930).
\textsuperscript{57} \textit{Supra} note 5.
\textsuperscript{58} \textit{Supra} note 37.
attain the required standing. He was refused a certificate and prayed a writ of mandamus, which the Court of Appeals held was properly denied. The Court pointed out that the appellant had no vested right in the standard of work, and held that there was no requirement in the formulation of by-laws by the particular agency of notice to individuals.

There is a borderland of doubt as to what agencies perform essentially legislative functions and what agencies are really judicial in their operations, from which the mist of uncertainty can only be rolled back by the process of inclusion and exclusion.\textsuperscript{59} This process in our own courts has not as yet been invoked to the extent apparent in the decisions of the Supreme Court. But the Court of Appeals, in its decisions, has made manifest its realization that the requirements of due process in administrative law depend upon the particular nature of the agency involved. The cases give weight to the desirability, on the one hand, of permitting the elastic and informal functioning inherent in the very nature of administrative tribunals, and to the necessity, on the other, of seeing that substantial justice be done the individual in procedure as well as in result.

It has come to be customary in statutes creating administrative agencies expressly to provide that they shall not be bound by the ordinary common law rules of evidence. There are two underlying reasons for these provisions. First, many of the individuals affected by the workings of administrative agencies cannot afford counsel, so that invocation of trial technique, objections to evidence, and the technicalities of legal proof, would only penalize economic inequality. Second, the tribunals and commissions should be composed of experts who are better able in their particular fields to disregard irrelevancies than are juries of laymen, and whose training should equip them to weigh and make use of data which the ordinary rules of evidence would make inadmissible.

Such statutory provisions are not a rejection of the principles of evidence built up by our Anglo-American system of law through the centuries, insofar as court proceedings are concerned. Most of those rules are predicated upon the existence of the jury system, whereas administrative tribunals must work under different circumstances. The process, like many of the processes in connection with administrative law, is still in the formative stage; like the development of the substantive common law itself, its evolution is an adaptation of general principles to changed conditions and new tribunals.

The Court of Appeals, in a series of cases dealing with appeals from findings of the State Industrial Accident Commission, has clearly pointed out this process of evolution and, at the same time, has shown its appreciation of the fact that the function of the Court is one of guidance rather than of frustration.

In reviewing the proceedings of the State Industrial Accident Commission, the Court of Appeals does not pass directly upon them, but upon the proceedings on the appeal to the nisi prius court permitted by statute. The Workmen's Compensation Act provides "that the Commission shall not be bound by the usual common law or statutory rules of evidence and technical or formal rules of procedure, but may make the investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of this Act". The statutory proceedings in the nisi prius court are in the "nature of an appeal" and are to be "informal and summary". The Court of Appeals has characterized the nature of the proceedings before the Commission in the following terms:

"In view of the informal nature of the proceeding under the act, and of the fact that the commissioners are not required to be trained in the law, the freedom of action thus allowed is not only wise, but, in the interest of speedy and substantial justice, unavoidable, but the difficulty has been to define its limits. That

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there must be limits to the discretion which the commissioners may exercise in admitting or rejecting evidence appears inevitable, otherwise the whole administration of the article would lack the certainty which is so essential an element of our jurisprudence, and the problem has been to formulate working rules which will not violate the spirit of informality and liberality which is inherent in the article, but which will prevent the introduction of evidence which under any system of law should have little or no probative force. . . . From an examination of the digests, the text-books and the decisions of courts of last resort, it cannot be said that the problem, if indeed in its nature it is susceptible of final or complete solution, has been satisfactorily solved. The most that has been done is to mark the outer limits of the discretion reposed in the commission, leaving its application within those limits to be determined by the facts of each case to which it is applied."61

The Court review of the proceedings before the Commission brings up the same questions in somewhat different form:

"Under section 56 of the Maryland Statute, in the 'informal and summary' proceedings 'in the nature of an appeal' the court is required to determine whether the commission has justly considered all the facts concerning injury. It has not been directed to relax its established rules of evidence in any degree, or under any conditions. And it seems unquestionably true that the mere allowance of an appeal must intend a review of the decision of the commission with some advantages from the special training and methods of the judicial tribunal. Yet to test the award or decision of the commission strictly by the rules of judicial proceedings must often subject it to requirements which a commission would be unable to meet, and might in effect make it to some degree impracticable for the commission to work effectively without surrendering the freedom given it in Section 10. We conclude, therefore, that the courts are required to adapt themselves somewhat to the increased latitude allowed to the commission, and that this adaptation must at the same time, and as far as it can consistently

61 Horn Ice Cream Co. v. Yost, 164 Md. 24, 163 Atl. 823 (1933).
be done, avoid abandonment of cautions and safeguards which seem necessary, not only for constitutional due process of law, but also for the assurance of reliability in the basis of adjudication. We conclude that the courts are not intended to withdraw from litigants under the act all the precautions which in the course of time have been worked out as essentials of orderly, certain justice.\(^{62}\)

The specific question involved in these cases was whether or not it was proper for the Court below to admit hearsay evidence. In two of the cases,\(^{3}\) the hearsay evidence was, in effect, corroborated by the testimony of eye witnesses. In one of the cases,\(^{4}\) the testimony of eye witnesses admitted an inference to the same effect as the hearsay testimony. In another case,\(^{6}\) the Court below admitted, under objection, statements of a deceased workman, said to have been made to his wife and to his physicians, as to the occurrence of an accident as to which there was no direct evidence; the statements were reproduced by three or four witnesses who heard them at first hand from the workman and referred to a simple fact. In the most recent case,\(^{5}\) the only evidence of the cause of the alleged accident was the hearsay statements of the deceased to his wife and physician, and the conclusion of the physician, that the deceased had been overcome by poisonous gas while working. In each of these five cases, the testimony was held to have been properly admitted, although the Court emphasized that how far the usual rules of evidence are to be relaxed must be determined not by a general rule, but by the facts of each case.

**Judicial Review of Findings**

In no other phase of the subject has the liberal attitude of the Court of Appeals been more marked than in the much mooted matter of the scope of judicial review. The

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\(^{3}\) Standard Oil Co. v. Mealey, 147 Md. 249, 127 Atl. 850 (1925).

\(^{4}\) Bethlehem Steel Co. v. Traylor, 158 Md. 116, 148 Atl. 246 (1930); Waddell George’s Creek Coal Co. v. Chisholm, 163 Md. 49, 161 Atl. 276 (1932).

\(^{5}\) Horn Ice Cream Co. v. Yost, *supra* note 61.


\(^{7}\) Spence v. Bethlehem Steel Co., 197 Atl. 302 (Md. 1938).
position of the Court has been consistent; it will not substitute its own judgment on the facts for the finding of the administrative agency.

Where the determination of the administrative tribunal is essentially legislative in character or where it does not directly affect vested rights of liberty or property, the Court will not review the exercise of discretion, unless it can clearly be shown that the power of the tribunal was corruptly or fraudulently used.\textsuperscript{7} The Court will intervene if there is no evidence to support the action of the administrative agency,\textsuperscript{68} and will require the agency to exercise its discretion if action is required by statute.\textsuperscript{69} But the Court will not interfere with or control the method of the exercise of discretion or the performance of any duty requiring the exercise of judgment, nor will it correct errors of discretion which have honestly been made in the discharge of such duty within the limits of the prescribed standard.\textsuperscript{70} In these decisions, the Court emphasizes the peculiar fitness of administrative officials familiar with the subject matter and informed by experience and training to pass upon the questions of fact presented to them, and recognizes that, in the absence of unusual circumstances, the Courts should not substitute their own judgments for such findings.\textsuperscript{71}

Even in the rate making cases, where there are mixed questions of law and of fact, the Court of Appeals has consistently adhered to the rule that it will not disturb the order of the commission, except upon clear and satisfactory evidence that it is unreasonable or unlawful.\textsuperscript{72} It will

\textsuperscript{67} Wiley v. School Commissioners, 51 Md. 401 (1879); Murphy v. State Roads Commission, \textit{supra} note 56; State Funeral Directors Assn. v. State Board of Undertakers, 150 Md. 294, 133 Atl. 62 (1926).
\textsuperscript{68} Applestein v. Mayor & City Council of Baltimore, \textit{supra} note 54.
\textsuperscript{69} Manger v. Board of Examiners, 90 Md. 659, 45 Atl. 891 (1900).
\textsuperscript{70} Cases cited \textit{supra} note 37.
\textsuperscript{71} Public Service Commn. v. United Railways Co., 155 Md. 572, 142 Atl. 870 (1928) reversed, 280 U. S. 234, 74 L. ed. 390, 50 S. Ct. 123 (1932); Cahill v. Mayor & City Council of Baltimore, 196 Atl. 305 (Md. 1938).
\textsuperscript{72} Public Service Commn. v. Northern Railway Co., 122 Md. 355, 90 Atl. 105 (1914); Pennsylvania R. R. Co. v. Public Service Commn., 126 Md. 59, 94 Atl. 330 (1915); Havre de Grace Bridge Co. v. Public Service Commn., 132 Md. 16, 103 Atl. 319 (1918); Public Service Commn. v. Byron, \textit{supra} note 55; Public Service Commn. v. United Railways Co., \textit{supra} note 71.
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. The position of the Court of Appeals on this matter has been substantially similar to that of the minority of the Supreme Court in Crowell v. Benson and the St. Joseph Stock Yards case.

CONCLUSION

Court control is only one of the safeguards offered by the American system of government for the proper development of the administrative process. The Court of Appeals, in every phase of the subject, has evidenced its conviction that the supremacy of the law does not demand the substitution of the Court's judgment for that of the administrators. On the contrary, subject to insistence upon basic principles of fairness, the Court has allowed to administrative agencies the freedom of function which is vital to their successful operation. But judicial abstention does not of itself insure that success. Public insistence upon a trained and able personnel; intensive analytical study of the actual workings of the agencies by the bar, the law schools and the press; legislative scrutiny of the methods by which the various administrative bodies carry out the policies entrusted to them, and of the results of their activities in the subject matter of regulation—all are necessary for efficient government under the principles of our democracy.