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CONSTITUTIONAL LIMITS ON THE DECISIONAL POWERS OF COURTS AND ADMINISTRATIVE AGENCIES IN MARYLAND

EDWARD A. TOMLINSON*

The accommodation of administrative agencies to the tripartite model of government has proved a difficult theoretical task for federal and state courts. How does one reconcile the rate-making and licensing responsibilities of an administrative agency such as the Maryland State Insurance Department with the traditional separation of governmental powers into legislative, executive and judicial departments? Should not such agencies located within the executive branch of government be limited to executive or prosecutorial roles and leave the law-making to the legislature and the adjudication of cases to the courts? How does one justify the existence of an administrative process defined to include "those law-making and law-deciding powers which are exercised not by the legislature or the traditional courts, but by organs of government classified in our scheme as 'executive.'"¹

The initial response of practitioners and judges to administrative agencies that enjoyed rule-making or adjudicatory powers was often hostile, but legislators evidently viewed matters differently and, through legislative initiative, administrative agencies continued to proliferate. The administrative agency in Maryland finally received an authoritative judicial seal of approval in State Insurance Commissioner v. National Bureau of Casualty Underwriters,² where Chief Judge Hammond wrote for the court:

The early fears of the bar and bench have largely disappeared with experience. It became apparent that the complex problems of modern social, economic and industrial life for ever-increasing numbers of knowledgeable people could be solved or settled more expeditiously, effectively, cheaply and simply by administrative processes than by the traditional executive, legislative and judicial processes, because the blending of powers in one agency, which operates in its particular field or specialty continuously over the years and produces an expertise and a superior ability both correctly to evaluate specialized questions and to supply correct answers to these questions — often due largely to the staff of permanent, expert employees who serve under the successive heads of the agencies; and secondly, it was recognized that the dangers

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inherent in government by administrative bodies lie not in the blending of powers in a single body but in permitting that body's power to be beyond check or review.\(^3\)

This judicial recognition of the appropriateness of the administrative process does not leave administrative agencies free of all constraints. Quite to the contrary, Chief Judge Hammond in *Insurance Commissioner* emphasized the "principle of check" by which courts "restrain improper exercises of administrative powers whether judicial or legislative in nature."\(^4\)

The primary issue in Maryland administrative law has therefore become the relative roles of administrative agencies and of the judiciary.\(^5\) While the availability and scope of judicial review of administrative action determines in large part the relationship between courts and agencies, a study of the relative roles of courts and agencies must do more than survey the present law of judicial review. It must also consider the more basic question of the allocation of decision-making competence. Are there disputes (e.g., medical malpractice claims) that are so judicial in nature that their resolution cannot be entrusted to administrative agencies subject only to the check of judicial review? Conversely, are there questions (e.g., the propriety of issuing a license) that are so administrative in nature that their resolution cannot be entrusted to the judiciary?

The answers to these questions have varied over time. One of the most important of the early regulatory statutes enacted by the Maryland General Assembly directed the justices of the circuit courts to license public ferries and "to ascertain in current money the prices of ferriage for passengers and horses, and the several kinds of carriages (not allowing anything for the baggage of passengers) at every ferry by them licensed."\(^6\) The justices were also instructed to determine

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3. Id. at 299, 236 A.2d at 286.
4. Id. at 300, 236 A.2d at 286.
5. The formal distinction between a "court" and an "agency" derives from article IV, section 1 of the Maryland Constitution, which provides:
   
   The Judicial power of this State shall be vested in a Court of Appeals, and such intermediate courts of appeal, as shall be provided by law by the General Assembly, Circuit Courts, Orphans' Courts, such Courts for the City of Baltimore, as are hereinafter provided for, and a District Court; all said Courts shall be Courts of Record, and each shall have a seal to be used in the authentication of all process issuing therefrom.

This enumeration of the courts of this state is exclusive, and other bodies exercising fact-finding or adjudicatory powers are by constitutional necessity defined as executive or administrative agencies. The Maryland Tax Court, therefore, is an administrative agency and not a court. *Shell Oil Co. v. Supervisor of Assessments*, 276 Md. 36, 343 A.2d 521 (1975).
how many and what kind of boats were to be kept by each licensed 
ferry and what number of able-bodied and skillful hands were to be 
employed to operate them. While the constitutionality of this law was 
ever sustained by any court (evidently because it was never chal-
lenged judicially), the legislature was not troubled by this assignment 
of seemingly regulatory or administrative tasks to a court. The legis-
lature saw no conflict between this statute and the separation of powers 
provision in the recently adopted Maryland Constitution of 1776. 
Article 6 in the Declaration of Rights to that constitution\(^7\) provided: 
"[t]hat the Legislative, Executive and Judicial powers of government, 
ought to be forever separate and distinct from each other." The 
General Assembly nevertheless continued in effect its Act for the 
judicial regulation of public ferries until 1860.

In two recent cases, the Maryland Court of Appeals has dealt 
with the constitutional limits on the administrative and the judicial 
process. In *County Council v. Investors Funding Corp.*,\(^8\) the court 
upheld in large part the constitutionality of the Montgomery County 
Fair Landlord-Tenant Relations Act which delegated to an adminis-
trative agency the adjudication of disputes between landlords and 
tenants. In *Department of Natural Resources v. Linchester Sand & 
Gravel Corp.*,\(^9\) on the other hand, the court declared unconstitutional 
a statute which required a de novo trial on a landowner’s appeal from 
the Department of Natural Resources’ denial of a permit to fill private 
wetlands. The statute was held to be beyond the legislature’s power 
to enact because it required the court to perform a non-judicial or 
administrative function. The ramifications of these two recent cases 
on the broader question of the proper allocation of decision-making 
competence between courts and agencies form the principal focus 
of this article.

**The Law of Judicial Review in Maryland**

The federal law of judicial review of administrative action has 
been shaped largely by the federal Administrative Procedure Act 
enacted by Congress in 1946.\(^{10}\) The judicial review provisions in that

\(^7\) Now article 8, Maryland Declaration of Rights. The present text contains an 
additional provision that “no person exercising the functions of one of said Depart-
ments shall assume or discharge the duties of any other.”

\(^8\) 270 Md. 403, 312 A.2d 225 (1973).

\(^9\) 274 Md. 211, 334 A.2d 514 (1975).

\(^{10}\) Administrative Procedure Act, 60 Stat. 237 (1946), *as amended*, 80 Stat. 378 
Act\textsuperscript{11} apply to almost all federal agencies. Section 706\textsuperscript{12} on the scope of judicial review establishes six grounds for a court's holding unlawful or setting aside agency action\textsuperscript{13} which are uniformly applicable except to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.\textsuperscript{14} These two exceptions permit Congress (subject only to constitutional restrictions) to limit or preclude the judicial review otherwise available under section 706. Both exceptions have been narrowly construed by the Supreme Court to require Congress to speak in the clearest terms if it wishes to insulate agency action from the normal judicial review.\textsuperscript{15} Congress is likewise free to expand for specific agency actions the scope of judicial review otherwise available under section 706 by enacting special statutory review procedures.\textsuperscript{16} That section has nevertheless formed the basis for a reasonably uniform and coherent body of federal law on judicial review of administrative action. Under the prevailing approach the role of the reviewing court is a limited one.

\begin{itemize}
    \item \textsuperscript{11} 5 U.S.C. §§ 701-06 (1970).
    \item \textsuperscript{12} 5 U.S.C. § 706 (1970).
    \item \textsuperscript{13} § 706. Scope of review
        To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
        \begin{enumerate}[(1)]
            \item compel agency action unlawfully withheld or unreasonably delayed; and
            \item hold unlawful and set aside agency action, findings, and conclusions found to be—
                \begin{enumerate}[(A)]
                    \item arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
                    \item contrary to constitutional right, power, privilege, or immunity;
                    \item in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
                    \item without observance of procedure required by law;
                    \item unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
                    \item unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
                \end{enumerate}
        \end{enumerate}
    \end{itemize}

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.


\begin{itemize}
    \item \textsuperscript{14} 5 U.S.C. § 701(a)(1)-(2) (1970).
    \item \textsuperscript{16} See, e.g., 7 U.S.C. § 2022(c) (1970), which provides that judicial review of administrative disqualification from the food stamp program shall consist of "a trial \textit{de novo} by the court in which the court shall determine the validity of the questioned administrative action in issue." (emphasis added).
\end{itemize}
The court does not substitute its own judgment for that of the agency. It ascertains instead whether the agency took a hard look at the problem and engaged in reasoned decision-making; if the administrative action passes this test, then the court must affirm regardless of how it would have decided the case had it originally been presented to the court.17

The situation in Maryland is not so clear. In 1957 Maryland enacted its own Administrative Procedure Act18 based on the Model State Administrative Procedure Act approved in 1946 by the American Bar Association and the National Conference of Commissioners on Uniform State Laws. Section 255 of the Act on judicial review specifies in subsection (g)19 eight distinct grounds for judicial review of agency decisions that are roughly comparable to the six grounds specified in the federal statute. This section has not had the same unifying effect on the law of judicial review as has its federal counterpart. First, eight of the more important state agencies have been specifically exempted from the definition of "agency" in section 244(a) and are therefore not subject at all to the provisions of the State Administrative Procedure Act.20 The judicial review provisions in section 255 therefore do not apply to those agencies, which have their own statutes

19. § 255 [Contested cases] — Judicial Review.

(g) Affirmance, remand, reversal or modification of decision. —
The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional provisions; or
(2) In excess of the statutory authority or jurisdiction of the agency; or
(3) Made upon unlawful procedure; or
(4) Affected by other error of law; or
(5) Unsupported by competent, material, and substantial evidence in view of the entire record as submitted; or
(6) Against the weight of competent, material and substantial evidence in view of the entire record, as submitted by the agency and including de novo evidence taken in open court; or
(7) Unsupported by the entire record, as submitted by the agency and including de novo evidence taken in open court; or
(8) Arbitrary or capricious.


20. The agencies specifically excluded are: the Board of Parole, the Department of Parole and Probation, the Workmen's Compensation Commission, the State Accident Fund, the State Insurance Department of Maryland, the Public Service Commission, the Employment Security Board and the State Tax Commission. Md. Ann. Code art. 41, § 244(a) (Supp. 1975).
and case law on the availability and scope of judicial review. Second, county and municipal agencies are not covered by this Act; judicial review of their decisions therefore does not take place under section 255.21 Finally, the Maryland legislature on numerous occasions has enacted special provisions for judicial review of agency action that supplant and are often inconsistent with the provisions in section 255. These special provisions generally require some form of heightened or de novo review of administrative action22 and can only be understood as a legislative expression of distrust of administrators.

The Maryland Court of Appeals has nevertheless striven mightily to achieve a uniform approach to judicial review of administrative action. The hallmark of this approach has been that a reviewing court should not “itself make independent findings of fact or substitute its judgment for that of the agency.”23 *State Insurance Commissioner v. National Bureau of Casualty Underwriters*, where the court articulated this approach, involved a challenge to agency fact-finding on the validity of rate increases filed with the agency by insurance companies. The court identified the various tests for judicial review of agency fact-finding contained in section 255(g) of the Administrative Procedure Act, in other statutes, and in the case law governing judicial review in the absence of statute. Those tests required alternatively that the reviewing court uphold the agency’s factual findings if supported by substantial evidence on the record as a whole,24 if not clearly erroneous or if fairly debatable (applicable to judicial review of zoning decisions),25 or if supported by the weight or preponderance of the evidence on the entire record.26 The court recognized that there were differences between the tests but contended the differences “are slight and under any of the standards the judicial review essentially should be limited to whether a reasoning mind reasonably could have reached the factual conclusion the agency reached.”27 The Baltimore City Court in the *Insurance Commissioner* case had held unconstitutional

22. See, e.g., Md. Ann. Code art. 23, § 161(H)(e) (1973), which provides that on appeal from the decision of the Board of Building Savings and Loans Commissioners, the court shall “hear the matter de novo, without a jury . . . .”
27. 248 Md. at 309, 236 A.2d at 292.
the applicable statutory provision requiring the reviewing court to find whether the Insurance Commissioner's denial of a rate increase was supported "by the preponderance of the evidence on consideration of the record as a whole." The court's decision turned on the fact that the statute required the reviewing court to weigh the evidence and substitute its judgment on the facts for that of the agency. The Court of Appeals interpreted the statute somewhat differently: "The statutory standard imposed on the court is not to decide whether the Commissioner was right in his factual determinations and inferences but whether those determinations could reasonably have been made by a reasoning mind using the preponderance of the evidence test."29

This interpretation blurs the distinction between substantial evidence and the weight of the evidence since a reference to the "reasonable" or "reasoning" mind is typical of a narrower substantial evidence review.30 It is nevertheless satisfactory for the court's purposes because it insures an appropriate level of judicial restraint and saves the constitutionality of the statute. What remains unclear is why it is not only inappropriate but also unconstitutional for a court to determine itself whether or not the facts warrant a rate increase. While the prescriptive setting of rates and other forms of on-going regulation of the insurance industry may today be tasks assignable only to an expert administrative body exercising delegated legislative powers, the validity of a particular rate increase raises different questions that do not necessarily involve a court in prospective standard-setting for an entire industry. Rate filings are submitted to the Commission by individual insurers or rating organizations.31 Passing on the validity of rate increases involves in large part the determination of adjudicative facts (i.e., facts involving the particular company or companies seeking the increase) and the application of the statutory standards on rate filings to those facts. Why are courts not constitutionally competent to do that job if expected to do it by the legislature, just as they are competent to determine whether a defendant's course of conduct violates a criminal or civil statute. In the past, disgruntled travellers or consumers were at times able to challenge in court the reasonableness of charges exacted from them by common carriers and public utilities.32 The accepted wisdom today is that such determinations are

29. 248 Md. at 305, 236 A.2d at 289.
30. See Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938); International Ass'n of Machinists, Lodge 35 v. NLRB, 110 F.2d 29, 35 (D.C. Cir. 1939) (Rutledge, J.); See also Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).
32. See 4 R.C.L. Carriers, § 552 at 1100; Missouri, K.&T. Ry. v. Empire Express Co., 221 S.W. 590 (Tex., 1920) (courts do not have power to set carrier rates, but
better left to expert regulatory agencies, but the adoption of this approach by most if not all legislatures does not by itself constitutionally incapacitate the courts.

The emphasis in *Insurance Commissioner* on the limited role of the reviewing court should not obscure the fundamental importance of the judicial function of "checking" arbitrary administrative action. Well before the enactment of the Maryland Administrative Procedure Act, the Court of Appeals had asserted in *Hecht v. Crook* that in cases where the legislature had not provided for an appeal from an administrative decision the courts still had "inherent power, through the writ of mandamus, by injunction, or otherwise, to correct abuses of discretion and arbitrary, illegal, capricious or unreasonable acts. . . ." This inherent power of a court to set aside illegal, arbitrary and capricious administrative action survives to this day and is still applicable in cases where no appeal from agency action is available under section 255 of the Administrative Procedure Act or under any special statutory provision. In most cases, the administrative illegality or arbitrariness complained of involves a misconstruction by the agency of the relevant statute. For example, in *Hecht*, it was alleged that the Board of Trustees of the Employees' Retirement System of Baltimore City had arbitrarily and illegally denied retirement benefits to a former City Tax Court judge by wrongly construing the statutory term "removed" to exclude instances where the employee failed to win reappointment. Courts naturally view the judicial branch as the appropriate forum for resolving legal or constitutional questions, but the inherent power of the courts to review administrative action is not limited to matters of legality. Courts are also willing to exercise their inherent powers to review factual findings for arbitrariness. In *Heaps v. Cobb*, for example, the court overturned as arbitrary the finding by the same Board involved in the *Hecht* case that the deceased had died of a heart attack and not from an automobile accident. The finding was arbitrary because it was without supporting evidence. After reviewing the record, the court found "no evidence whatever

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33. 184 Md. 271, 40 A.2d 673 (1945).
34. Id. at 280, 40 A.2d at 677.
36. 185 Md. 372, 45 A.2d 73 (1945).
that Mr. Cobb's death was due to a 'heart attack.' This review of factual findings for arbitrariness has subsequently been expanded by the Court of Appeals in a line of decisions culminating in *Dickinson-Tidewater, Inc. v. Supervisor of Assessments* to require that there be substantial evidence to support the administrative findings. "Thus, where the scope of review is not specified in the statute, the substantial evidence test has been followed." While this expansion overlooks the traditionally understood distinction between review of factual findings for arbitrariness under a no evidence or no supporting evidence standard and the more intensive forms of review for substantial evidence or preponderance of the evidence under various administrative procedure acts, it is appropriate in cases like *Dickinson-Tidewater* where the Maryland legislature had established a right to appeal from administrative orders of the Maryland Tax Court but had not specified the standard for review either in the appeals statute itself or by reference to the Administrative Procedure Act. The presence of a statutory right to appeal makes it unnecessary for the courts to invoke their inherent power to set aside illegal, arbitrary or capricious actions

37. *Id.* at 381, 45 A.2d at 77.
39. *Id.* at 256, 329 A.2d at 25.
40. The appeals statute used in *Dickinson-Tidewater*, Chapter 385 of the Acts of 1971, authorizing a direct appeal from final orders of the Tax Court to the Maryland Court of Appeals, was recently declared unconstitutional in *Shell Oil Co. v. Supervisor of Assessments*, 276 Md. 36, 343 A.2d 521 (1975). The Court of Appeals held that its jurisdiction and that of the Court of Special Appeals under article IV, section 1 of the Maryland Constitution was exclusively appellate and that the exercise of appellate jurisdiction required a prior action by some judicial authority or the prior exercise of judicial power. Since the Tax Court was an administrative agency and not one of the courts enumerated in article IV, section 1 of the Maryland Constitution, judicial review of its orders must initially take place in the circuit courts and the Baltimore City Court. This rigid requirement that judicial review take place initially in what are essentially trial courts may have an undesirable effect in some areas by inserting an extra layer in the review process. Congress has often found it desirable to channel judicial review of administrative decisions to the Courts of Appeals rather than to the District Courts. If primarily legal questions are involved and if there is no need or opportunity to take further testimony to supplement the administrative record, direct judicial review in an "appellate" court is eminently sensible. Congress, of course, has constitutional authority to create whatever lower federal courts it chooses and to assign them whatever combination of appellate and original jurisdiction Congress believes suitable, while the Maryland General Assembly is restricted by article IV, section 1 of the Maryland Constitution (for the full text, see note 5 *supra*) to the establishment of "intermediate courts of appeal." Whether this constitutional provision is too rigid in its preclusion of direct judicial review of administrative decisions in the Court of Special Appeals or Court of Appeals is a question which deserves serious consideration. For a discussion of this issue in the federal context see Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1 (1975).
in order to review the administrative order. While the narrow review of factual findings under the no supporting evidence test originally contemplated in *Heaps* may be satisfactory if limited to those few areas where the legislature has not provided for an appeal or has acted affirmatively to restrict judicial review of administrative action to the constitutional minimum, it is not acceptable if extended to the findings of such important agencies as the Tax Court.

The *Heaps* opinion contained important and oft-repeated dictum that the legislature could not "divest the judicial branch of the government of its inherent power to review actions of administrative boards shown to be arbitrary, illegal or capricious, and to impair personal or property rights."

At least when personal or property rights are at stake this judicial check is therefore available to aggrieved litigants as a matter of constitutional right. This principle was recently transformed into a holding in *Criminal Injuries Compensation Board v. Gould,* where the court reversed an order of the Criminal Injuries Compensation Board denying an award to a taxi driver abducted and robbed while operating his taxi. The legislature had provided that the Maryland Attorney General could obtain review of an award by the Board which he or the Secretary of Public Safety and Correctional Services considered improper but that "[t]here shall be no other judicial review of any decision made or action taken by the Board . . . ."

Despite the legislature's rather clear intent to preclude judicial review, the court still held that on an application for writ of mandamus or certiorari it could reverse the Board's "arbitrary [and] illegal" decision that was based on "[m]istaken interpretations of law." The Board had usurped the power of the courts by erroneously rejecting a determination of the Workmen's Compensation Commission that Gould was an independent contractor and not an employee of the Yellow Cab Company to whom the company was liable for job-related injuries and had erroneously treated Gould's failure to prosecute vigorously his Workmen's Compensation claim as a disqualifying failure to cooperate "with all law enforcement agencies" as required by section 12 of the Act.

While the court recognized that section 10(a) of the Act precluded the "broad scope of judicial review" otherwise permitted in appeals under the Administrative Procedure Act, the statute could only preclude judicial review "so far as it might be within the legislative

41. 185 Md. at 379, 45 A.2d at 76.
42. 273 Md. 486, 331 A.2d 55 (1975).
44. 273 Md. at 513, 521, 331 A.2d at 71, 76.
46. 273 Md. at 499, 331 A.2d at 64.
power to do so" and could not "divest the courts of the inherent
to review and correct actions by an administrative
agency which are arbitrary, illegal, capricious or unreasonable."48

Despite the broad language in its opinion, the court in Gould
actually restricted its role to the determination of strictly legal ques-
tions. Gould is thus consistent with a long line of federal49 and state50
decisions where courts have utilized a variety of devices to resolve
constitutional and other legal challenges to administrative actions de-
spite legislative efforts to oust courts from their traditional role.
Courts have always viewed themselves as guardians of legality and the
ultimate deciders of all constitutional and legal questions. Consistent
with this approach, the Gould court showed no inclination to review
factual questions, or even mixed questions of law and fact involving
the application of a statutory term to undisputed facts. If the Board
had denied Gould's claim for compensation because it found that
Gould was not the victim of a crime but a participant in it and Gould
had claimed that this finding was not supported by substantial evidence
on the record as a whole, the Gould court plainly would not have re-
viewed the evidence because Gould limited its holding on the avail-
ability of judicial review to claimants whose eligibility as a crime
victim under section 5 of the Act had already been established.51
Seemingly the court also would not have heard a claim that the Board's
findings were arbitrary because supported by no evidence whatsoever,
but that conclusion is less clear because of the Gould court's reliance
on Heaps. However, the court in Gould did determine that Gould
possessed a sufficient personal right once he met the eligibility require-
ments of a crime victim. At that point his claim for compensation
was transformed into a right protected by the court's inherent power
to review administrative actions for arbitrariness. It appears, there-
fore, that the factual question of a person's eligibility for compensa-
tion could constitutionally be left to the Board subject to no judicial
review whatsoever or at most to judicial review under an arbitrari-
ness/no evidence standard. Persons who claim to be crime victims
do not have a personal or property interest in the compensation fund

47. Id. at 500, 331 A.2d at 64.
48. Id. at 501, 331 A.2d at 65.
administrative decision on veterans' benefits final and conclusive on the courts does
not preclude constitutional challenge to eligibility limitation); Harmon v. Brucker,
355 U.S. 579 (1958) (finality accorded by statute to Army discharges does not pre-
clude review of discharge decision for "jurisdictional" errors).
50. See, e.g., Dauphin Deposit Trust Co. v. Myers, 388 Pa. 444, 130 A.2d 686
(1957); County Bd. of Educ. v. Parker, 242 Iowa 1, 45 N.W.2d 567 (1951) (dictum).
51. 273 Md. at 512, 331 A.2d at 71.
as they have not contributed directly to it; and the legislature may consider it desirable to preclude the entanglement of courts in the factual contentions of disappointed claimants. Under this approach, seemingly adopted in *Gould*, the scope of review is less when the legislature acts affirmatively to restrict judicial review to the minimum constitutionally permissible level than when the legislature simply does not provide persons aggrieved by administrative action with an appeal to the courts under the Administrative Procedure Act or some other statute. In the latter instance of legislative silence, *Dickinson-Tidewater* tells us that the scope of review is often not much different than in appeals under the Administrative Procedure Act.

**The Limits on the Judicial Role**

*Department of Natural Resources v. Linchester Sand & Gravel Corp.* is the culmination of a long line of Maryland cases that place constitutional limits on the role of courts in checking executive or administrative actions. The doctrinal underpinning for these decisions is article 8 in the Declaration of Rights to the Maryland Constitution of 1867 which provides, "[t]hat 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 Court of Appeals has consistently interpreted this provision to prohibit the legislature from allocating non-judicial functions to the courts, but has had difficulty in formulating a comprehensive definition of "non-judicial." In *Board of Supervisors of Election v. Todd*, one of the earliest and most cited cases, the court took a "you know it when you see it" approach similar to Justice Stewart's approach to defining hard-core pornography.

It is only necessary in this case to say that counting the names upon a petition, ascertaining whether the names appended thereto are those of voters at the last election for Governor, and ordering an election [on whether the county should be wet or dry] is not a judicial function is a proposition that would seem to be too plain to need argument to enforce it.

Despite the mechanical nature of the task assigned to the circuit courts by the statute successfully challenged in *Todd*, the Court of

52. 274 Md. 211, 334 A.2d 514 (1975).
53. 97 Md. 247, 54 A. 963 (1903).
55. 97 Md. at 264, 54 A. at 965.
Appeals evidently felt that the assignment was too political in nature. The legislative allocation of more judgmental tasks to a court had previously been upheld in *McCrea v. Roberts*, where the statute required the circuit court on a contested application for a liquor license to determine whether the nine persons who signed the certificate supporting the applicant were reputable freeholders who resided in the neighborhood where the applicant proposed to conduct his business. Applications were initially filed with the court clerk, who referred them to the judge for decision only if they were contested. In ruling on contested applications, the judge was expected, in the court’s words, to "exercise his judgment after hearing the evidence." The Court of Appeals nevertheless concluded that these were questions of fact and law whose determination could appropriately be assigned to the judiciary.

In *Cromwell v. Jackson*, the most important case in Maryland on the limits of the judicial function prior to *Linchester*, the Court of Appeals affirmed its holding in *McCrea* but held unconstitutional a statute that allocated to a judge the further questions whether an applicant for a liquor license was a "fit" person, whether the place for which the license was applied for was a "proper" one, and whether the applicant should receive one of the limited number of licenses available in the county (one per 1500 inhabitants). The court’s primary objection to the legislation was the absence of any standard or guide for determining answers to these questions. "The Act lays down no rule to guide the Court as to who is a fit person for the license . . . . Surely the Court, if acting judicially, cannot be governed by the individual view of the judge . . . ." Similarly, the Act contained no standard for what is a proper neighborhood.

Is such a license to be allowed in a residential district, or in a business district? Is it to be allowed where the majority of people drink or do not drink; where there is a quiet neighborhood or where persons will not object to the sale of alcoholic beverages?

The court considered these to be "question[s] of public policy or expediency" and not judicial questions.

Surprisingly, the *Cromwell* court made no reference to the fact that this absence of standards would make any similar legislative dele-

56. 89 Md. 238, 43 A. 39 (1899).
57. Id. at 252, 43 A. at 42.
58. 188 Md. 8, 52 A.2d 79 (1947).
59. Id. at 26, 52 A.2d at 88.
60. Id. at 27, 52 A.2d at 88.
61. Id. at 26, 52 A.2d at 88.
gation to an administrative official constitutionally vulnerable. The
doctrine that delegation of licensing and other adjudicatory powers
to administrative agencies must be accompanied by adequate standards
was more vigorously enforced in the 1930's and 1940's than it is
today. Several years prior to Cromwell, the Court of Appeals had
declared unconstitutional for lack of adequate standards a public local
law that prohibited most forms of public entertainment without prior
payment to the Police Commissioner of a daily fee of between $5 and
$100.62 The law gave the Police Commissioner "uncontrolled discre-
tion" to set the fee in particular cases between these assigned limits,
a power which the court found could readily be used to prohibit enter-
tainments (such as dance halls) disfavored by the Commissioner and
which had been so used on at least one occasion in the past.63 The
real defect in the statute declared unconstitutional in Cromwell was
that the legislature had not performed its law-making role by resolving
questions of public policy or expediency, but had invalidly delegated
law-making powers to an executive official.64 Once the legislature has
done its job by promulgating adequate standards, it appears that the
questions of law and fact that arise in applying the statutory standards
to particular fact situations can be determined by a court as well as
by an administrative agency. Indeed, many of the early critics of
administrative agencies charged that the delegation of this adjudi-
catory task to licensing boards and other regulatory agencies was an
unconstitutional delegation of judicial power to the executive branch
of government, and unfairly subjected private interests to "adminis-
trative absolutism."65 Today, however, we freely recognize the constitu-
tionality of administrative agencies performing quasi-judicial functions
subject to the check of judicial review.

This relationship between the adequacy of the statutory standards
and the nature of the task allocated to either judges or administrators is
gain apparent in the Linchester case. The Maryland "Wetlands Act,"66
enacted in 1970, regulates the use of both private and state
wetlands. Section 9-306 requires any person who proposes to conduct
an private wetlands any "activity" not authorized by rules or
regulations adopted by the Secretary of Natural Resources first to

63. Id. at 383, 24 A.2d at 914-15.
64. See County Council v. Investors Funding Corp., 270 Md. 403, 441, 442, 312
65. See Report of the Special Committee on Administrative Law, 63 A.B.A.
obtain from the Secretary a permit for the proposed work. A license from the Board of Public Works is also required under section 9–302 if the proposed activity includes the dredging or filling of state wetlands. Following the enactment of the Wetlands Act, the Secretary, by order, established wetland boundaries for each affected county, and promulgated rules and regulations for each county which in identical terms prohibited the dredging or filling of private wetlands without a permit. The provisions in section VI of the Secretary’s Regulations on the subject of permits simply repeat verbatim the statutory standards contained in section 9–306(b) of the statute: in granting, denying or limiting any permit the Secretary or his designated hearing officer “shall consider the effect of the proposed work with reference to the public health and welfare, marine fisheries, shell fisheries, wildlife, economic benefits, the protection of life and property from flood, hurricane and any other natural disaster, and the public policy set forth in the law.”67 The statutory declaration of policy in section 9–102 is equally open-ended. After extolling the importance of wetlands for marine life, conservation and navigation, the legislature declared it to be the “public policy of the state, taking into account varying ecological, economic, developmental, recreational, and aesthetic values, to preserve the wetlands and prevent their despoliation and destruction.”68

In early 1971 the Linchester Sand and Gravel Corporation dredged a marsh on land owned by it to obtain fill for a man-made dune designed to make the property more suitable for the construction of a home for its president and for access to the beach. The corporation did not have a permit for this work and was promptly ordered by the Department of Natural Resources to cease and desist from its dredging and filling activity until it obtained a permit. When Linchester’s permit application was denied by the Secretary of the Department of Natural Resources and by the departmental board of review on an administrative appeal, it appealed to the circuit court under the provisions of section 9–308 of the statute.69 Subsection (b)

69. § 9–308. [Permit to conduct activity not permitted by rules and regulations] — Judicial appeal from decision of board of review.
   (a) Appeal procedure; time limitation. — Any party to the appeal to the board of review pursuant to § 9–307 may appeal to the circuit court for the county in which the land is located within 30 days after the decision of the board of review.
   (b) Appeal not subject to Administrative Procedure Act; de novo trial; election of jury trial; no right of removal. — The appeal is not subject to the provisions of the Administrative Procedure Act. The court shall
of that section exempted the appeal from the provisions of the Administrative Procedure Act and instructed the circuit court to "hear the case de novo" with a jury trial available at the election of either party. Subsection (c), on the other hand, authorized the circuit court to set aside or modify a decision of the departmental board of review if the decision was an unreasonable exercise of the police power. On Linchester's appeal the circuit court judge first ruled under subsection (c) that the board of review's denial of the permit did not constitute an unreasonable exercise of the police power by confiscating Linchester's property without just compensation. Linchester was not deprived of all practical use of the land; and the president's home could still be constructed on the land and access to the beach obtained, although in a way somewhat different from that preferred by Linchester. Linchester had elected a jury trial under subsection (b). The judge interpreted that provision to require him to submit to the jury the question whether the permit should be granted. He instructed the jury by reading to it relevant excerpts from sections 9-102 and 9-306 of the Wetlands Act and formulated the issue as follows: "After weighing the facts, considering the testimony and applying the law as given to you by the court, should the requested permit be granted or denied?"70 The jury responded that the permit should be granted and the court entered a judgment awarding the permit to Linchester. The Department of Natural Resources then appealed to the Court of Appeals and succeeded in convincing that court that the trial de novo provisions in the Department's own statute unconstitutionally "usurp[ed] the province of the administrative prerogative."71

How did subsection 9-308(b) of the Wetlands Act assign a non-judicial function to the circuit court? There is little doubt that the broad statutory standards were adequate to uphold the delegation of permit authority to the Department. Recent cases have been very liberal in upholding broad delegations in areas related to the public health, safety and general welfare so as to afford administrative officials

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70. 274 Md. at 217, 334 A.2d at 519.

71. Id.
the necessary flexibility to implement the legislative will.\textsuperscript{72} In the Wetlands Act the legislature had declared it to be the public policy of this State to prevent the despoliation and destruction of wetlands. The valuable functions performed by wetlands which are enumerated in various sections of the statute give meaning to the terms “despoliation” and “destruction.” In particular, the permit section of the statute, section 9–306, recognizes the importance of wetlands for the preservation of marine and shellfisheries and the protection of life and property from flood, hurricane and other natural disasters; and the statutory declaration of policy in section 9–102 further recognizes the ability of wetlands to absorb silt and thus keep the channels of navigation open. Plainly, the propriety of granting or denying a permit depends on the effect of the proposed activity covered by the permit application on these valuable functions performed by wetlands. The permit-issuing body should determine in this fashion whether the proposed activity on private wetlands significantly despoils or destroys the still remaining wetlands, private or state. In making this inquiry the permit-issuing authority is instructed by section 9–102 to take into account “varying ecological, economic, developmental, recreational, and aesthetic values.” The board of review for the Department of Natural Resources has interpreted this provision to mean that other considerations may on occasion outweigh the State’s policy to preserve wetlands in their present form, at least where any damage to the wetlands is slight.\textsuperscript{73} This balancing of interests is simply another way to approach the question of what constitutes despoliation or destruction.

This inquiry accompanying the decision to grant or deny a permit requires the decider to find the facts and apply the law to those facts. The Secretary and the departmental board of review must do this initially in deciding whether or not to issue a permit; and section 9–308(b) seemingly requires the circuit court or jury to do so again on appeal by making independent findings of fact and substituting its own judgment for that of the agency. The Linchester court believed that this empaneling of circuit court judges and juries as the ultimate wetland decision-makers created an intolerable situation because lay judges and juries could substitute their determinations for those of the Department’s experts and thus reduce the agency’s power as a practical matter to a nullity.\textsuperscript{74} No doubt this is a powerful argument against the wisdom of the legislation because the Department’s experts

\textsuperscript{72} See, e.g., Pressman v. Barnes, 209 Md. 544, 121 A.2d 816 (1956).
\textsuperscript{73} Brief for Appellant at 8, Department of Natural Resources v. Linchester Sand & Gravel Corp., 274 Md. 211, 334 A.2d 514 (1975).
\textsuperscript{74} 274 Md. at 228–29, 334 A.2d at 525.
are seemingly better qualified to appraise the deleterious effects of the proposed activity on wetlands than are lay judges or juries. The Linchester court might also have mentioned the undesirability of inconsistent decisions rendered by different judges and juries which could be avoided if decision making were entrusted to a single administrative agency subject to limited judicial review.

These pragmatic arguments, however, do not address the constitutional competence of a court to determine whether a permit should issue. On this question the Linchester court did state that the Wetlands Act required the Department, within the guidelines and standards prescribed by the legislature, to "gather and sift evidence which is directed both at present and future repercussions so as to take into account the needs of the public in general." The Court of Appeals held that the judiciary could only review such a process under an "arbitrary and capricious" type of scrutiny and could not perform such a function itself. The court evidently believed that the judiciary was not competent to perform the task because of the predictive nature of the findings and the necessity of considering the needs of the public and not just of the applicant. This task must have struck the Court of Appeals as resembling too closely the highly discretionary tasks of determining whether it was desirable or necessary to construct a particular highway or to appoint certain persons to a board of visitors to supervise a county jail, a function held non-judicial in Beasley v. Ridout.

The presence of standards in the Wetlands Act, however, circumscribed the court’s decisional role just as it did the agency’s. In many other areas courts are expected to make predictive determinations based on both individual and societal needs. For example, the judicial release provision of the Mental Hygiene Law requires a court (or a jury, if requested by the patient) to determine whether a person civilly committed to the Department of Mental Hygiene or a Veterans' Ad-

75. Id. at 228, 334 A.2d at 525.
76. It was not competent, therefore, for the court to empanel a jury and then in effect instruct it to convert itself into an administrative body with authority, as if original, to grant or deny a permit and in doing so determine whether there was, or potentially could be a deleterious effect, as contemplated by the ‘wetlands statute,’ if Sharpley dredged and filled as he desired. This the Maryland Constitution, which divides the powers of government into three separate branches, neither to usurp the authority of the other, steps forth and forbids. On appeal, § 9-308(b) notwithstanding, the circuit court is constitutionally limited to an assessment of whether that determination was based on evidence sufficiently substantial so that the permit denial was not “arbitrary and capricious.”

Id. at 228, 334 A.2d at 525.
77. 94 Md. 641, 52 A. 61 (1902).
ministration Hospital has a mental disorder "of such a nature that
for the protection of himself or others, the patient needs inpatient
medical care or treatment." Likewise, a common law court, operating
in the absence of legislation or of controlling precedent that has not
been overruled, takes into account predictive determinations of social
needs in fashioning rules of liability and immunity. The Court of
Appeals itself has recognized in *Deems v. Western Maryland Railway,*
that "[t]he determination of rights and liabilities according to status
and general circumstance . . . are the warp and woof of our judicial
system." In *Deems,* the court overruled precedent and recognized
the wife's cause of action for loss of consortium. Judicially fashioned
common law rules, based at least in part on a judicial evaluation of
social mores and social needs, do not violate the separation of powers
 provision by usurping the function of the legislature. The undemo-
cratic nature of law-making by the judiciary serves to limit the occasion
for its use; and courts normally decide cases on the basis of precedent
or statute. The subordination of judge-made law to statutory law on
non-constitutional questions reflects the superior capacity of the legis-
lative branch to resolve questions of expediency and public policy in
the course of declaring the law.

Could not the legislature in exercising its law-making function
declare it to be the public policy of this state to preserve wetlands and
prevent their despoliation and destruction, and make it unlawful for
an owner of private wetlands to engage in any activity on his property
that significantly endangered the preservation of the wetlands and
threatened them with despoliation and destruction? The statute could
be enforced directly through criminal prosecutions in the courts, but its
potential vagueness and protective purpose might well influence the
legislature to authorize the circuit court where the land was located
to enjoin any such activity at the behest of the State's Attorney or of
any person adversely affected thereby. Putting aside the question
whether such a statute unconstitutionally takes private property with-
out just compensation, it is hard to conceive of a successful constitu-
tional challenge to this legislation which expands the law of nuisance
and entrusts enforcement responsibility directly with the judiciary
without assigning any intermediate adjudicatory role to an adminis-
trative agency. The function performed by the circuit courts under
the hypothetical statute would be no different than the function de-

80. 247 Md. 95, 231 A.2d 514 (1967).
81. *Id.* at 101, 231 A.2d at 517.
declared unconstitutional in *Linchester*. Of course, the judiciary in the hypothetical situation would not “usurp the province of the administrative prerogative,” as the circuit court was reversed for doing in *Linchester*. But it is hard to imagine how any “usurpation” that did occur in *Linchester* could violate the constitutionally mandated separation of powers if the legislature were free to eliminate the agency’s role altogether.

The Department of Natural Resources in *Linchester* was exercising quasi-judicial powers of fact-finding and law-applying within limits established by the legislature. Such a role is permissible because the Department only renders decisions subject to the check of judicial review and does not itself enter judgments or decrees, a judicial function reserved exclusively to the courts under article IV of the Maryland Constitution. The very fact that the Department’s function was labeled quasi-judicial should indicate that it could be performed by a court as well as by an administrative agency. Chief Judge Hammond recognized this distinction in his seminal opinion in *State Insurance Commissioner v. National Bureau of Casualty Underwriters*, when he acknowledged that a court could constitutionally make independent findings of fact and substitute its judgment for that of the agency in reviewing licensing decisions of the Insurance Commissioner, but not in reviewing the Commissioner’s “legislative” or rule-making decisions. The assumption of an independent decisional role by the courts may turn the agency into a paper tiger and may make the invocation of its procedures exercises in futility, but any such adverse consequences reflect on the wisdom of the legislation and not on its constitutionality. The very opposite may in fact occur; the agency may be able to resolve speedily and informally the great mass of cases and leave for the judicial process only those difficult cases warranting more formal judicial proceedings.

The decision in *Linchester* which declared unconstitutional a possibly unwise statutory provision discourages the General Assembly from enacting comparable provisions in the future. The approach of the Court of Appeals is consistent with its prior rulings and with case law in the majority of states where the courts have refused, on separation of powers grounds, to issue or revoke licenses or permits themselves or even to find the facts or exercise independent judgment on whether an administrator should have issued or revoked a license or

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84. 248 Md. 292, 236 A.2d 282 (1967).
85. Id. at 303–05, 236 A.2d at 288–89.
permit. These tasks have been viewed as administrative or discretionary and therefore non-judicial in nature.\textsuperscript{86}

Courts in California and a number of other states, however, have held that if an administrative board revokes a license or otherwise deprives a person of a vested right, due process and the separation of powers require that the reviewing court itself (either at a trial de novo or on the basis of the administrative record) find the facts and exercise independent judgment on whether the license should be revoked.\textsuperscript{87} The California courts have even ruled that if judicial fact-finding were not available, an administrative agency that revoked a license or otherwise deprived a person of a vested right "would be exercising the complete judicial power" in violation of the separation of powers provision in the California Constitution.\textsuperscript{88} The California approach assigns the court reviewing an administrative disciplinary proceeding the role of redetermining whether a licensee or other respondent has violated the applicable standard of conduct. The issues to be resolved are analogous to those at a criminal trial, but the available sanctions are normally license suspension or revocation rather than a fine or jail term. The California courts have so far refused to extend the constitutional requirement of an independent judicial determination to cases where an applicant seeks to obtain a vested right, but have deferred in those cases to the "administrative expertise of the agency" and have engaged in only limited judicial review of the agency's "delicate task of determining whether the individual qualifies for the sought right."\textsuperscript{89} This distinction between seekers and holders of vested rights has been criticized as illogical.\textsuperscript{90} An initial licensing decision may involve the same types of issues that are involved in a typical disciplinary proceeding (\textit{e.g.,} did the applicant cheat on the qualifying examination or engage in some other form of misconduct). Moreover, disciplinary determinations often require a high level of expertise for the delicate task of reviewing a licensee's conduct (\textit{e.g.,} whether a doctor's performance fell below acceptable professional standards).

\textsuperscript{86} L. Jaffe, Judicial Control of Administrative Action 103-09 (1965) (cases collected at 106 n.85) [hereinafter cited as Jaffe].


\textsuperscript{88} Laisne v. State Bd. of Optometry, 19 Cal. 2d 831, 835, 123 P.2d 457, 460 (1942).

\textsuperscript{89} Bixby v. Pierno, 4 Cal. 3d 130, 144, 481 P.2d 242, 252, 93 Cal. Rptr. 234, 244 (1971).

\textsuperscript{90} Id. at 161, 481 P.2d at 264, 93 Cal. Rptr. at 256 (Mosc, J., concurring); Southern Calif. Jockey Club, Inc. v. California Horse Racing Bd., 36 Cal. 2d 167, 182, 223 P.2d 1, 9 (1950) (Traynor, J., concurring).
Whatever need there is for an independent judicial determination is potentially present in both situations.

The judicial initiative taken by the California courts has been heavily criticized on policy grounds.91 The line of decisions culminating in Strumsky v. San Diego County Employees Retirement Ass’n92 and Bixby v. Pierno93 nevertheless seeks to protect licensees and other holders of vested rights from harassment by subservient, biased or captured administrative agencies that may look with disfavor on maverick or unpopular members of the regulated trade or profession. The device selected to protect the potential victims is the availability of independent judicial fact-finding and law-applying before they could be deprived of a vested right. The strongest objection to the California decisions is that this initiative more properly should come from the legislature than from the judiciary.94 The legislature’s superior fact-gathering capacity better qualifies it to determine which licensees, property owners or even applicants need the special safeguards of the judicial process to protect them from administrative decisions liable to be influenced by an agency’s predilections or biases. The legislature can then fashion special procedures in response to ascertained needs, while the courts can only enforce an across-the-board constitutional rule. To have the facts found and the standards applied by a disinterested generalist judge (with or without the assistance of a jury) rather than by a specialized and self-interested agency may be a real advantage to the private citizen. Such arrangements may not always be wise, but the legislature should be able to allocate ultimate adjudicatory responsibility to a court if it chooses to do so. If the legislature supplies the standards and if the rights of an individual are at stake, there is no reason why a court cannot adjudicate those rights. Courts cannot determine whether highways should be built or elections held, but they can determine a person’s rights. The making of such determinations is the very essence of judicial power. As stated by Judge Markell:

*Any* question of law or fact which is made the basis of a legal right, when a court is given jurisdiction to hear and determine by a final judgment the existence of the legal right, is a *judicial* question. This is true, regardless of whether the particular question might or might not, by different legislation, be withdrawn from *judicial* determination and submitted, as a “quasi-judicial”

93. 4 Cal. 3d 130, 481 P.2d 242, 93 Cal. Rptr. 234 (1971).
94. JAFFE, supra note 86, at 103.
question, to an executive (i.e., "administrative") board for decision, subject to the inherent power of judicial review or to broader statutory review of "appeal." 98

A number of Maryland statutes seemingly recognize a greater decisional role for the courts than the limited scope of review permissible after the Court of Appeals in Linchester declared section 9–308(b) of the Wetlands Act unconstitutional. Section 72 of article 56 authorizes the circuit court on an appeal from the comptroller's suspension or revocation of a wholesaler's or retailer's cigarette license to "determine the issue de novo, after considering the applicable provisions of the law and all the evidence before it." 96 Similarly, section 204(e)(2) of article 56 provides for a "trial de novo" on an appeal from a decision of the State Roads Commission rejecting a permit application for an outdoor advertising display. At trial, the court may be required to redetermine whether the advertising display "will be so illuminated as to create a hazard to one operating a motor vehicle upon the State highway." However, a similar provision authorizing the court to "hear the matter de novo, without a jury" on an appeal from a licensing decision of the Board of Building, Savings and Loan Commissioners was narrowly construed in County Federal Savings & Loan Ass'n v. Equitable Savings & Loan Ass'n 97 to accomplish no more than to remove any restrictions on the admissibility of new evidence at the court trial. The role of the court in reviewing the administrative decision was still limited in scope in accordance with the provisions of sections 255(g)(6) and (7) of the Administrative Procedure Act. This technique of construing the appeal statute "in a way that makes the review granted constitutional" 98 was not invoked by the court in Linchester, perhaps because the statutory reference to the jury made clear the legislative intent to require independent fact-finding on contested issues of fact.

Potentially the most important statute conferring independent decisional power on a reviewing court is section 6–211(a) of the Motor Vehicle Article, which grants a right of appeal to the circuit court to any person denied a motor vehicle license or whose license has been cancelled, refused, suspended or revoked by the Department of Motor Vehicles, except in cases where the cancellation or revocation

95. Cromwell v. Jackson, 188 Md. 8, 37, 52 A.2d 79, 93 (1947) (Markell, J., dissenting).
is mandatory. The section confers on the court jurisdiction to "take testimony and examine into the facts of the case" and specifically instructs the court "to determine if the petitioner is entitled to a license or is subject to suspension, refusal, cancellation, or revocation of license under the provisions of this article." This statutory provision, which is part of the former Uniform Motor Vehicle Operator's and Chauffeur's License Act, has received varying interpretations in different jurisdictions but it seemingly contemplates a trial de novo with an independent judicial determination on both the facts and the law. The statute was so interpreted by the Oregon Supreme Court in Stehle v. State Department of Motor Vehicles, where the court held that a reviewing court could constitutionally determine whether a driver was subject to license suspension for "habitual incompetent, reckless or negligent" driving. While the Oregon court recognized that some licensing decisions might require the formulation of legislative policy and thus be beyond the constitutional competence of a court, once the legislature had established "specific statutory criteria" the "discretionary" process of determining whether those criteria have been met "might well be assigned to the judiciary rather than to an administrative department."

If the courts still take seriously the doctrine that the delegation of adjudicatory authority to an administrative agency must be accompanied by adequate standards, it is hard to imagine an instance where delegation to an agency could be upheld when the assignment of the same task to a court would involve the court in the forbidden formulation of legislative policy. The choice between court and agency is therefore largely left to the legislature. In most instances the legislature has wisely opted for limited judicial review of administrative adjudications by so specifying in the statute which establishes the agency or by allowing judicial review to be governed by the limited review provisions of the Administrative Procedure Act. Those provisions are normally applicable to the decisions and orders of state

100. See, e.g., Johnson v. Sanchez, 67 N.M. 41, 351 P.2d 449 (1960) (review limited to a determination of whether there is substantial evidence to support the administrative order); Bureau of Highway Safety v. Wright, 355 Pa. 307, 49 A.2d 783 (1946) (statute provides for a trial de novo).
102. Id. at 552, 368 P.2d at 391.
103. Id. at 551-52, 368 P.2d at 390.
104. See, e.g., the very limited appeal available from the licensing decisions of the boards of license commissioners for alcoholic beverages, Md. Ann. Code art. 2B, § 175 (1968).
agencies not only where the legislature so specifies but also in the absence of any special statutory review provisions.

The legislature's capacity to distinguish between those situations where limited judicial review suffices and those where an independent judicial determination is desirable is reflected in the Wetlands Act itself. The trial de novo provisions apply only to denials of permits for proposed activities on private wetlands. The statute contains no provision for judicial review of denials of applications for licenses to dredge and fill state wetlands; and the limited review provisions of the Administrative Procedure Act should govern appeals from such denials. The legislative scheme thus reflects an intent to afford greater protection to a person's use of his own property than to his use of state property. If the legislature opts for more extensive judicial involvement to protect private rights, the Maryland Court of Appeals should be more cautious than it was in Linchester in concluding that such statutes impose upon the judiciary prohibited non-judicial functions.

The legislature does not enjoy the same flexibility in allocating rule-making powers to courts as it does in allocating adjudicatory powers. Courts can only decide cases and controversies and issue judgments that determine the rights of the parties thereto. They cannot announce substantive rules except in the context of deciding a particular case. Such a decision affects non-parties only as a precedent. Agencies, on the other hand, may exercise broader rule-making powers. Despite occasional misgivings, courts have recognized that legislatures can constitutionally delegate to executive officials the authority to promulgate rules having general applicability and legal effect. Administrative officials engaged in rule-making are not exercising prohibited legislative powers, but merely executing the legislative will by making more definite the statutory standards. Thus agencies, unlike courts, may formulate in separate rule-making proceedings prescriptive regulations that are enforceable by fines or other sanctions against all persons who violate their terms.

Rule making and adjudication both involve fact-determination and the application of a statutory term to concrete fact patterns. If an agency desires to prohibit a certain activity, it often has the choice between enacting a rule prohibiting it generally or acting in particular cases to order the cessation of the activity or to deny or revoke applications or licenses of persons who have engaged in the activity. Courts

107. Cf. JAFFE, supra note 86, at 103.
nevertheless properly refuse to substitute their judgment for that of
the agency on the desirability of a rule and limit themselves to an
arbitrariness and capriciousness type of review because a rule does not
determine private rights as does an adjudication. But when an execu-
tive official attempts to enforce an administrative rule against an
individual, then a court is competent to find the facts and to determine
whether the rule is applicable to those facts and whether the rule has
been violated. Courts perform that function every day when adminis-
trative rules are enforced through misdemeanor prosecutions just as
agencies perform it when enforcing their own rules in disciplinary pro-
ceedings. Of course, an enforcement court does not redetermine the
factual basis for the rule but limits its inquiry to the rule's rationality.
The validity of the rule in other circumstances does not affect the rights
of the parties before the court, and the court can do no more than
assure itself that the statute has been rationally applied in the case
before it. For this reason it would seem constitutional and perhaps
desirable for the enforcement court, if the defendant claims that the
enforcement of the rule in his case constitutes an unreasonable or un-
constitutional application of the statute, to determine those issues itself
rather than to defer to the agency. It was that type of issue which
the legislature seemingly allocated to the courts when it provided in
section 9–305 of the Wetlands Act that the circuit court should deter-
mine de novo with the aid of the jury whether the application of a
rule or regulation promulgated by the Secretary of the Department of
Natural Resources to private wetlands "restricts the use of his [the
landowner's] property so as to deprive him of its practical use and is
an unreasonable exercise of the police power so as to constitute a taking
of property without compensation." The issue formulated by the
statute seems eminently suitable for judicial resolution and does not
even require the court to engage in the predictive balancing functions
that may have been required if it were to decide under section 9–308(b)
whether a permit should be issued. If the court exempts the property
from the regulation, then the state has the option of attempting to
preserve the wetlands by instituting eminent domain proceedings. The
Court of Appeals in Linchester nevertheless declared section 9–305(a)
unconstitutional in a footnote without further comment. The very
same issue, however, may be back before the courts when an affected
property owner seeks to enjoin the application of a private wetlands

109. It would seem that § 9–305(b), providing for an appeal, in the identical lan-
guage of § 9–308(b), from the administrative rules and regulations decisions by
the Secretary and review board, likewise would be constitutionally invalid for the
same reason. 274 Md. at 229 n.6, 334 A.2d at 525 n.6.
regulation to his property on the grounds that the application constitutes an uncompensated taking of his property. Does not the court find the facts independently in that context? The case law on unconstitutional takings indicates that the court is expected to make its own independent findings on whether the challenged statute or zoning regulation constitutes an unconstitutional taking of property depriving a landowner of all beneficial use of his property. While the property owner must affirmatively demonstrate to the court that such is the case, the taking issue is separate and distinct from the court's limited review of the statute or zoning regulation for arbitrariness and capriciousness.110

The Limits on the Administrative Role

The prior section of this article argues that the Maryland legislature enjoys considerable flexibility in allocating adjudicatory powers (i.e., fact-finding and law-applying in particular cases) exclusively to the courts, to administrative officials subject to the check of limited judicial review, or to executive officials whose decisions are subject to independent judicial scrutiny. So far attention has focused on the constitutional limits on the role of the courts. Now the focus shifts to the constitutional limits on the role of administrators. Are there instances where it is constitutionally necessary that a court find the facts and apply the law to those facts rather than simply review an administrator's performance of those tasks?

The most obvious instance where a judicial trial is required is a criminal proceeding. Courts have always provided the exclusive forum for convicting and punishing criminal offenders. Long ago in Wong Wing v. United States111 the Supreme Court held that the due process clause in the fifth amendment to the United States Constitution requires in the federal system a judicial trial to establish guilt before punishment may be imposed for a crime. Article 21 of the Maryland Declaration of Rights also guarantees to the criminal defendant a judicial proceeding with "a speedy trial" by an impartial jury, effectively precluding an administrative trial. Difficulties arise, however, in defining criminal punishment. Wong Wing treated as punishment for a crime the imprisonment at hard labor and property confiscation imposed by the Commissioner of Immigration on aliens found by him.


111. 163 U.S. 228 (1896).
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to be present illegally in this country. While this classification is surely sound, the limits of criminal punishment have been drawn quite narrowly. It appears that related governmental impositions, such as fines, license revocations, quarantines, and property destruction (e.g., of putrid food), are not inherently punitive in nature but may often serve regulatory purposes. The Wong Wing doctrine, therefore, does not preclude an administrative agency from conducting a proceeding that results in the imposition of these sanctions. To escape the punitive label, however, the purpose of the sanctions must be to protect the public and not to condemn or impose retribution on the wrongdoer.

Once criminal proceedings are eliminated, it is hard to argue that the due process clause in the fourteenth amendment to the United States Constitution or the due process clause in Article 23 of the Maryland Declaration of Rights guarantees judicial fact-finding and law-applying in other categories of cases. Administrators are capable of conducting fair hearings; and most procedural safeguards necessary for a fair hearing (e.g., cross-examination) can usually be afforded by administrative agencies. The legislature can and usually does delegate to agencies with important adjudicatory responsibilities the power to issue compulsory process and to administer oaths. If fairness requires, agencies can also observe the rules of evidence applicable in judicial proceedings and can even employ independent hearing officers that enjoy tenure in office. Administrative process is flexible and is intended to vary from agency to agency and even from proceeding to proceeding. While informality has generally been considered one of the advantages of the administrative process, that process can be judicialized if due process so requires. The Supreme Court has not hesitated to enforce the commands of procedural due process and as a result the conduct of many administrative hearings resembles all too closely the conduct of a court trial.

This observation raises the basic question of how courts do differ from agencies that exercise adjudicatory powers. The availability of a jury is of course one difference. Courts also have an aura of dignity that derives from their constitutional stature. In addition, judges enjoy the independence of a constitutionally fixed tenure in office. Most importantly, courts are considered the ultimate upholders of law and guardians of legality. Agencies and administrators do not enjoy

any of these attributes. However, the constitutional status of courts does not necessarily qualify them as superior fact-finders or adjudicators. May not agencies do that job just as well, subject to judicial review for legality. The legal realists have educated us on the elusiveness of facts and on the impossibility of accurately reconstructing after the event what happened or what was in people's minds at a given point in the past. Given the intractability of the fact-finding task, administrators may be better qualified to "find" the facts because, unlike judges, they are not limited to party presentations but may affirmatively investigate to assure the completeness of the factual record.\(^{117}\) But adjudication (i.e., fact-finding and law-applying in particular cases) also requires the decider to exercise judgment and discretion. Judges and juries approach this task as disinterested, independent generalists, while administrators, regardless of the procedural safeguards that accompany their decision-making, are infected with a mission. The statute establishing the agency has given it a job to do and a combination of tools with which to accomplish it. It is not just that agencies often engage in rule-making and enforcement activities as well as in adjudication, but that each agency considers itself as having a task to accomplish. This built-in bias does not preclude the agency from proceeding fairly, but it does lead to the commonplace belief that a person does not receive the same impartial trial from an agency that he receives from a court. Since an agency is nevertheless capable of adjudicating fairly, these differences between courts and agencies are primarily policy considerations for the legislature to weigh in allocating business between courts and agencies; they do not directly affect the constitutional competence of agencies to adjudicate.

Of course, specific constitutional provisions sometimes confer on the parties to an adjudicatory proceeding the right to jury fact-finding or to some other form of judicial process. Section 6 of article XV of the Maryland Constitution provides a right to jury trial on all issues of fact in civil proceedings where the amount in controversy exceeds five hundred dollars, while section 40 of article III recognizes the parties' right to a jury finding on just compensation in condemnation cases. The seventh amendment to the United States Constitution also recognizes a right to jury trial in civil cases, but that provision has so far not been held applicable to state proceedings.\(^{118}\) To the extent that these constitutional provisions are applicable, they require a

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judicial proceeding where facts are found and law applied by a jury and do not permit administrators to perform those functions subject to limited judicial review. Administrative agencies have never been delegated the authority to empanel juries, and surely when the constitutional framers recognized the role of the civil jury they contemplated a jury empaneled and supervised by a court exercising judicial powers.

The Maryland Constitution confers the judicial power of the State on certain enumerated courts. The text of section 1 of article IV on the Judiciary Department presently reads:

The Judicial power of this State shall be vested in a Court of Appeals, and such intermediate courts of appeal, as shall be provided by law by the General Assembly, Circuit Courts, Orphans' Courts, such Courts for the City of Baltimore, as are hereinafter provided for, and a District Court; all said Courts shall be Courts of Record, and each shall have a seal to be used in the authentication of all process issuing therefrom.

This section derives from a similar provision first found in section 1 of article IV of the constitution of 1851. Section 56 of the original constitution of 1776 did no more than establish various courts without expressly vesting the State's judicial power in the enumerated courts. The present section 1 of article IV operates in conjunction with the separation of powers article in the Declaration of Rights to prevent the legislature from delegating judicial powers to executive officials or administrative boards. While this constitutional principle is uniformly accepted, it leaves unresolved the more difficult question of what constitutes a "judicial" power. Does fact-finding and law-applying by a licensing board in a disciplinary proceeding constitute the forbidden exercise of a judicial power, or is it only "quasi-judicial" and therefore permissible? The prefix "quasi" is an unfortunate one because it hints at the employment of a subterfuge or fiction to circumvent a constitutional mandate. In actuality the phrase "quasi-judicial" does no more than designate those adjudications of individual rights that may constitutionally be entrusted to an administrative agency subject to limited judicial review. For this reason, the phrase "adjudicatory" powers is preferable to "quasi-judicial" powers.

The Maryland Court of Appeals has consistently upheld the constitutionality of legislative delegations to administrators of the power to find the facts and apply the law in particular cases. These tasks

require administrators to exercise judgment and discretion but do not involve the exercise of judicial powers. Thus, prior to its recent decision in *Investors Funding*, the Court of Appeals had upheld the authority of the Workmen's Compensation Commission to "exercise judgment and discretion" in applying the law to the facts in industrial accident cases, the authority of retirement boards to determine facts and to make decisions on pension rights, and the authority of the Maryland Racing Commission to suspend a trainer's license upon the basis of a factual determination that the trainer had violated a Commission rule. These decisions did not supply any limiting principle on the legislature's authority to delegate adjudicatory power to an administrative agency. They did, however, indicate that the judicial power is properly preserved in the courts if the courts retain their inherent power to review administrative action for illegality and other forms of arbitrariness and the legislative power is properly exercised by the legislature if the statute provides some standards to guide the administrators. As a result, "innumerable controversies . . . that traditionally fell within the scope of judicial inquiry" are today decided by "boards of legislative creation." This phenomenon, of course, is not limited to Maryland and is not entirely of recent vintage since administrative powers to license, to impose a tax and to award a benefit are as old as this country. The recent proliferation of administrative agencies reflects the very practical fact that we cannot afford, in these complex times, to resolve in the courtroom every one of the "innumerable controversies" that arise between an individual and the government, especially those controversies that grow out of regulatory programs. Courts should be saved for more important functions; and the legislature should retain broad discretion under the constitution to delegate the adjudication of less important controversies or controversies less deserving of a full judicial trial to administrative agencies subject only to limited judicial review. Policy considerations, therefore, strongly support the results reached by the Court of Appeals in the cases discussed above.

If the jury trial provisions are not applicable, when does due process require independent judicial fact-finding and law-applying? The federal courts have developed a doctrine that while most fact-

123. Maryland Racing Comm'n v. McGee, 212 Md. 69, 128 A.2d 419 (1957).
125. K. Davis, Administrative Law § 1.04, at 24 (1958) [hereinafter cited as Davis]; Oppenheimer, Administrative Law in Maryland, 2 Md. L. Rev. 185, 189-91 (1938).
finding can be delegated to administrative agencies subject to limited judicial review, there are categories of jurisdictional and constitutional facts that must be found independently by the reviewing court. *Crowell v. Benson*,128 the most important case in the history of the doctrine, arose under the Federal Longshoremen's and Harbor Workers' Compensation Act,127 which established administrative tribunals for handling the claims of injured workers. The Supreme Court upheld the authority of Congress to establish such tribunals but insisted that article III of the United States Constitution on the Judicial Power required that the reviewing court not only determine all questions of law but also find independently the "fundamental" or "jurisdictional" facts of whether the claimant was an "employee" of the respondent and whether the claimant's injury occurred on the navigable waters of the United States.128 Twelve years prior to *Crowell*, the Supreme Court, in an undistinguished and conclusory opinion by Justice McReynolds, had held that the due process clause of the fourteenth amendment required a judicial tribunal of some sort to exercise its own independent judgment on the facts and the law when a public utility claimed that a state rate order unconstitutionally confiscated its property.129

Today the doctrine of constitutional or jurisdictional facts articulated in the *Crowell* and *Ben Avon* cases is moribund at best, although the Supreme Court has so far declined to issue the death certificate. The Court has not invoked it since *St. Joseph Stock Yards Co. v. United States*,130 and commentators have almost uniformly condemned it.131 The occasional usefulness of the doctrine is nevertheless illustrated by Justice Brandeis' opinion for the Court in *Ng Fung Ho v. White*.132 In that case the Supreme Court upheld the constitutionality of administrative proceedings for the deportation of aliens but added that a person subject to a deportation order who claimed to be a citizen was constitutionally entitled on habeas corpus to a judicial determination of his status. While Justice Brandeis' opinion employs the language of jurisdictional fact by arguing that the executive has no "jurisdiction" to deport a citizen and that independent judicial findings of fact on citizenship are therefore necessary, he later vigorously dissented from the application of the jurisdictional fact doctrine in *Crowell*

130. 298 U.S. 38 (1936).
131. *See, e.g.*, 4 DAVIS, supra note 125, § 29.08, at 161–62; JAFFE, supra note 86, at 648–52.
132. 259 U.S. 276 (1922).
The real basis for his opinion in *Ng Fung Ho* was the due process clause of the fifth amendment. Due process required judicial rather than administrative fact-finding to determine *Ng Fung Ho*’s status because of the significance of the interests at stake.

To deport one who so claims to be a citizen, obviously deprives him of liberty. ... It may result also in loss of both property and life; or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law.¹³⁴

Justice Brandeis wrote these words against the background of Attorney General Palmer’s notorious campaign to rid the country of undesirable and radical aliens. The Attorney General’s efforts often rode roughshod over the rights of his victims, and quite significantly Justice Brandeis adverted in his opinion to the “difference in security of judicial over administrative action.”¹³⁵

The issues raised in these Supreme Court cases have so far received scant attention in Maryland. The Maryland Court of Appeals has ruled that “due process does not necessarily mean judicial process” and that the legislature may constitutionally substitute an administrative procedure for the valuation of bank stock surrendered by dissenting minority shareholders for the judicial evaluation previously performed by an equity court.¹³⁶ Such a reallocation of decision-making competence does not confer judicial power on an administrative agency and does not violate due process, so long as there is “an opportunity for court review to pass on the legality . . . of the award.”¹³⁷

There are intimations, however, that judicial process may be necessary when certain more vital interests are at stake. In *Ellis v. Ellis*,¹³⁸ the Court of Special Appeals ruled that in child custody proceedings the Chancellor must make an “independent assessment” of any evidence taken before a master¹³⁹ and that the system of resorting to masters in equity whose findings of fact are *prima facie* correct “cannot supplant the ultimate role of judges in the judicial process itself.”¹⁴⁰ Strictly speaking, this requirement of judicial fact-finding derives from the legislature’s decision to make child custody proceed-

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¹³⁴. 259 U.S. at 284–85.
¹³⁵. Id. at 285.
¹³⁷. Id. at 189, 96 A.2d at 260.
¹³⁹. Id. at 367, 311 A.2d at 431.
¹⁴⁰. Id. at 365, 311 A.2d at 430.
ings judicial proceedings. Former section 66(a) of article 16, now section 3-602 of the Courts and Judicial Proceedings Article, confers on the equity courts of this state jurisdiction in cases involving the custody, guardianship, maintenance and support of a child. The actual holding in Ellis is therefore rather narrow: "Litigants in a child custody proceeding, as in all judicial proceedings, are entitled to have their cause determined ultimately by a duly qualified judge of a court of competent jurisdiction." But could the legislature constitutionally divest equity courts of their original jurisdiction in child custody cases and allocate those cases to an administrative agency subject to only limited judicial review? The Maryland Court of Appeals has treated the predecessor of the present jurisdictional statute as declaratory of the pre-existing and inherent power of equity courts over the custody of minors. This long-standing practice of handling child custody cases directly through the courts rather than through an administrative process may form the basis for a contention that due process requires judicial process, for historical practice is certainly one factor to be used in determining what process is due. It would be surprising at this late date for the legislature to establish a Maryland Child Custody Administration and delegate to it the authority to determine the custody, guardianship, maintenance and support of children subject to only limited judicial review. The interests at stake for both parent and child are simply too vital to permit the substitution of administrative for the traditional judicial process.

It would be more difficult to argue, however, that such legislation violates article 8 of the Declaration of Rights on the separation of powers by delegating a judicial function to an executive official. Custody of the mentally ill has traditionally in this state been determined administratively, subject to limited judicial review by way of habeas corpus. This use of administrative process for the involuntary civil commitment of the mentally ill has never been considered to violate the separation of powers. In addition, despite the importance of the interest in personal liberty at stake, due process only requires that the state establish the basis for commitment at a fair administrative hearing and not necessarily at a judicial trial. This approach to due process is understandable in light of the long history in Maryland and in at least ten other states of the administrative commitment

141. Id.
of the mentally ill. The civilly committed patient in Maryland may also petition at any time for judicial release; and the court must then, subject to certain limitations on subsequent petitions, redetermine whether the patient satisfies the criteria for civil commitment.

The adjudication of private rights is another area traditionally reserved for the courts. Sir Edward Coke and other early champions of the common law vigorously defended against the encroachments of prerogative or executive courts the exclusive power of the common law courts to resolve question of "meum and tuum" between private subjects. While the government has traditionally enjoyed wide leeway in channeling non-criminal disputes between itself and its subjects into various administrative or non-judicial forums, disputes between private citizens that may lead to an award of money damages have traditionally been left to the courts for resolution with the aid of a jury.

Workmen's Compensation Acts provided an early exception in Maryland and most other states to this generalization. The Court of Appeals, however, has encountered little difficulty in upholding the constitutionality of Maryland's Workmen's Compensation Act. In the initial challenge to the Act, the court simply concluded that the State Industrial Accident Commission was an administrative body exercising quasi-judicial powers and not a court exercising judicial powers. The Act was also construed to preserve the parties' constitutional right to jury trial in civil proceedings because it provided for a jury trial in the circuit court on appeals from orders of the Commission. Subsequently, in Branch v. Indemnity Insurance Co., the Court of Appeals abandoned its interpretation that the Act preserved the parties' constitutional right to jury trial in civil proceedings because it provided for a jury trial in the circuit court on appeals from orders of the Commission.

The constitutionality of the present Maryland procedures for the civil commitment of the mentally ill may potentially be affected by the Supreme Court's recent holding that a pretrial detainee in a criminal case has a fourth amendment right to a judicial determination of probable cause by a neutral and detached magistrate. The prosecutor's determination that probable cause exists is not a sufficient basis for holding the defendant in custody pending trial because of the prosecutor's adversarial role in law enforcement. Gerstein v. Pugh, 420 U.S. 103 (1975). While Gerstein is limited to criminal defendants, it is hard to see how the interest in liberty of the civilly committed patient is any less vital than that of a criminal defendant and the role of the Department of Mental Hygiene significantly less adversarial than that of a State's Attorney. Even property interests presently receive greater due process protection than the personal liberty of the mentally ill. In North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975), the Court indicated that a judge must resolve questions of factual and legal sufficiency before a pre-judgment writ of garnishment is issued at the behest of a civil plaintiff.

145. Id.
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149. 156 Md. 482, 144 A. 696 (1929).
right to jury trial when it held that the legislature could constitutionally deny the employer a stay of a Commission award pending appeal because the jury trial on contested issues of fact available on appeal was not "essential to the validity of the Workmen's Compensation Act of Maryland." 150 The Branch court distinguished the new statutory benefits available under the Act to injured and deceased workmen and their families from the employees' common law cause of action for negligence that had been abrogated by the Act. The legislature's substitution of a program of statutory benefits for the common law remedy, and its establishment of an informal administrative procedure to handle claims, convinced the court "that the method prescribed by the act for the determination of an applicant's right to its specified benefits is essentially different from a civil proceeding in a court of law to recover an 'amount in controversy.'" 151 Because there was therefore no "civil proceeding" with an "amount in controversy," the parties did not have a constitutional right to a jury trial under section 6 of article XV of the Maryland Constitution. A claim for benefits no more required a trial by jury than did a license revocation proceeding or a tax assessment. The court did not view as determinative and did not even mention the fact that any "benefit" awarded the claimant would be paid out of the pocket of the employer or of its insurance carrier if the employer had not previously made payments into a State Fund.

In County Council v. Investors Funding Corp., the Court of Appeals again faced the question of "the limits of adjudicatory powers which can, within the Maryland Constitution, be conferred on an administrative agency." 152 In 1972, the County Council for Montgomery County enacted a Fair Landlord-Tenant Relations Act 153 that comprehensively regulated the apartment rental business and its concomitant landlord-tenant relationships and activities in Montgomery County. The Act required the licensing of all residential rental facilities in the county and established two new agencies to administer its provisions: The Office of Landlord-Tenant Affairs and the Commission on Landlord-Tenant Affairs. The Executive Director of the Office of Landlord-Tenant Affairs was delegated authority to issue, revoke, deny or suspend licenses, to inspect licensed rental facilities, and to investigate complaints of defective tenancies filed with him by either

150. Id. at 489, 144 A. at 698.
151. Id. at 486, 144 A. at 697.
152. 270 Md. 403, 428, 312 A.2d 225, 239 (1973).
tenants or landlords. The Act broadly defined a "defective tenancy" to mean "any condition in a rental facility which constitutes a violation of the terms of the lease or any provision of this chapter, or constitutes a violation of any law, regulation or code." Adjudicatory powers were delegated to the Commission, which was comprised of nine members appointed by the County Executive, three of whom were to be selected from nominations made by organizations representing landlords, three from nominations made by organizations representing tenants, and three members from the public at large who were neither landlords nor tenants. Persons aggrieved by the licensing decisions of the Executive Director could appeal to the Commission, which was required to make its own independent decision by issuing its own "findings, opinion, and order in writing." The Commission also adjudicated complaints of defective tenancies brought by the Executive Director. Prior to bringing a complaint before the Commission, the Executive Director was required to make an affirmative finding that a violation or defective tenancy existed and to undertake conciliation efforts. If the Commission found that a landlord or tenant had caused a defective tenancy, it could order a variety of remedial actions, including the termination of leases and the award of compensatory damages not to exceed $1,000 to the affected landlord or tenant for actual loss to person or property. If a landlord had caused the defective tenancy, the Commission could also order repairs and the return to tenants of security deposits and of any rental monies paid and award reasonable expenditures for obtaining temporary substitute rental housing. Monetary awards entered by the Commission could be enforced by the landlord or tenant "in any court of competent jurisdiction, and any such court is authorized to grant judgment for such monies plus interest from the date of the award." Finally, the Act delegated to the Commission the authority to impose a civil penalty not exceeding $1,000 for the violation of any provision of the Act, including the causing of any defective tenancy. Violations of Commission orders were also a misdemeanor punishable in the criminal courts by a fine of up to $1,000.

158. Montgomery County Code § 93A-17(a) (1965), as amended, now § 29-17(a) (1972), as amended (Supp. 1974).
The broad remedial powers delegated to the Commission presented the Court of Appeals a new and difficult problem in determining whether the Commission was exercising forbidden judicial powers. Executive officials have traditionally exercised administrative powers to investigate violations of regulatory codes and to order violators to cease and desist upon finding that a violation exists, but they have only rarely been given the power to award compensatory damages or otherwise to adjudicate private rights (e.g., by terminating leases). Even workmen's compensation commissions only award benefits under a predetermined statutory schedule and do not themselves place a dollar value on the claimant's loss or otherwise determine the legal rights of the parties. The Court of Appeals nevertheless upheld the conferral of these powers on the Commission on Landlord-Tenant Affairs because they were only incidental to the Commission's legitimate regulatory powers. "[T]he Commission's function is not primarily to decide questions of legal rights between private parties, but [that function] is merely incidental, although reasonably necessary, to its regulatory powers." 159 The Court of Appeals cited, in support of its holding, Maryland workmen's compensation cases and a number of out-of-state cases upholding administrative awards of compensatory damages and other relief to the victims of racial discrimination.160

159. 270 Md. at 441, 312 A.2d at 245-46.


The Court of Appeals in Investors Funding did declare unconstitutional section 93A-9(c) of the Fair Landlord-Tenant Relations Act which authorized the Commission to impose a civil penalty not to exceed $1,000 for violation of any provision of the Act. 270 Md. at 441-42, 312 A.2d at 246. The court held that the variable penalty constituted an invalid delegation of legislative power because it gave the Commission "unrestricted, unbridled discretion in fixing the amount of the penalty." Id. at 441, 312 A.2d at 246. Evidently judges can exercise unbridled discretion in fining but administrators cannot. The court's holding is nevertheless rather limited because the case law is running strongly in favor of the constitutionality of a variable administrative fine and because the legislative body should be able to develop standards that leave administrators with the necessary flexibility in fining without granting them "unbridled" discretion. See City of Waukegan v. Pollution Control Bd., 57 Ill. 2d 170, 311 N.E.2d 146 (1974) (upholding administratively imposed variable civil penalty for water pollution violations, where statute contained broad standards to guide the administrators). Subsequent to the Investors Funding decision, the Court of Appeals upheld the imposition of a $3,000 civil penalty by the Commissioner of Labor and Industry, J.I. Hass Co. v. Department of Lic. & Reg., 275 Md. 321, 340 A.2d 255 (1975). Two judges concurred in the result solely on the grounds that the appellant had not challenged the constitutionality of the administratively imposed civil penalty.
The Court of Appeals did not indicate why the constitutionality of conferring these remedial powers on an administrative agency was dependent on the regulatory functions performed by the Commission or precisely identify the regulatory powers that saved the delegation. It would seem that the adjudicatory task performed by the Commission would be basically the same regardless of any additional regulatory functions performed by it. After finding that the landlord or tenant caused a defective tenancy, the Commission would have to determine whether it was an appropriate case in which to order the termination of the lease or to award damages and, in the latter instance, to determine the dollar amount of loss suffered. The Commission’s regulatory role also appears to be a limited one; it does not have the authority to determine itself appropriate standards of landlord and tenant behavior and to enforce those standards subject to limited judicial review. Its role is primarily enforcement-oriented to the exclusion of policy-making. In its licensing and complaint proceedings the Commission adjudicates violations of pre-existing standards that are found in housing codes, lease agreements and in the Act itself and does not itself “regulate” by setting the standards within guidelines established by the legislative body. No doubt the Executive Director of the Office of Landlord-Tenant Affairs performs administrative functions of licensing, inspection, investigation and conciliation, but the nature of the Executive Director’s job does not seem relevant to the question whether the Maryland Constitution requires that he bring his complaints before a court exercising judicial power under section 1 of article IV rather than before the Commission.

The saving nature of the Commission’s regulatory functions is therefore not readily apparent but perhaps can be determined by analyzing the contention in the dissenting opinion of Judge Barnes (joined by Judge Smith) that the Act delegated to the Commission the

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The statute instructed the Commissioner to give “due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the employer’s history of previous violations.” Md. Ann. Code art. 89, § 40 (f-x) (Supp. 1974).

161. Section 93A-26(e), of the 1972 Act, now Montgomery County Code § 29-26(e) (1972), requires that all leases contain the landlord’s express warranty of habitability and covenant to repair. The Commission can adjudicate violations of that duty and of other covenants in the lease.

162. Sections 93A-26(b) and 93A-27(c) of the 1972 Act, now Montgomery County Code § 29-26(b) and § 29-27(c) (1972), require that all leases entered into after the effective date of the Act be offered for an initial term of two years, at the tenant’s option, unless a reasonable cause exists for offering an initial term for other than two years. The Court of Appeals upheld the authority of the County Council to change the common law in this manner, and in the manner described in note 161. supra. 270 Md. at 419, 312 A.2d at 234.
authority to "fix the amounts of penalties and of damages resulting from tortious action." The dissent does not cite any authority for the proposition that causing a defective tenancy is a tort. Maryland case law does hold, however, that a landlord is liable to his tenant for injuries to person or property sustained by him as a result of defects in the premises caused by the landlord's negligent breach of a covenant to repair. Likewise, a tenant who commits or permits waste is liable to the landlord for actual damages suffered by the property. A tenant is also liable to his landlord for damages caused by the breach of his covenant to surrender possession of the premises at the expiration of his tenancy in as good a condition as when he received possession. There is thus a close correlation between conduct which causes a defective tenancy and conduct that is tortious at common law. While the concept of causing a defective tenancy may be the broader of the two (housing code violations may cause defective tenancies but are not necessarily torts), it is surely proper to characterize one of the functions of the Commission as the fixing of damages (or the terminating of leases) for tortious or wrongful conduct. Take the case, for example, of the tenant who suffers a broken leg on some rickety stairs that the landlord failed to repair. The issues in the case do not vary depending on whether the case is heard in court or before the Commission. Did the landlord breach a covenant to repair? Did the breach cause the tenant's injury, or did something else cause it, such as the tenant's own fault? What are the tenant's damages? The dissent in Investors Funding is therefore correct when it contends that the cases upholding the Maryland Workmen's Compensation Act are distinguishable because that law established a new program of statutory benefits in lieu of a common law right to recover damages for negligence and did not authorize the Commission to fix damages resulting from tortious conduct.

The Fair Landlord-Tenant Relations Act, however, did not transfer the adjudication of tort claims from the courts to a Commission. If it did, it would most likely have been an unconstitutional delegation of judicial power to an executive body. Additionally, it would have

163. 270 Md. at 462, 312 A.2d at 257.
167. The landlord's breach of his covenant to repair "causes" a defective tenancy under the Act in that it "constitutes a violation of the terms of the lease." MONTGOMERY COUNTY CODE § 93A-4(e) (1965), as amended, now § 29-1 (1972), as amended (Supp. 1974).
168. 270 Md. at 462, 312 A.2d at 257 (Barnes, J., concurring in part and dissenting in part).
deprived the parties of their right under the Maryland Constitution to a trial by jury on factual issues in civil proceedings where the amount in controversy exceeds five hundred dollars.\textsuperscript{169} The Act did not accomplish a transfer because the jurisdiction of the courts remained unaffected; landlords and tenants retained whatever judicial remedies were available to them. No additional rights were conferred on landlords or tenants other than the right to file a complaint with the Executive Director of the Office of Landlord-Tenant Affairs. Certainly the Act did not recognize any new administrative cause of action since it is not possible for an aggrieved tenant or landlord to initiate Commission proceedings or to become a party thereto. The Executive Director is the charging party who initiates and controls the course of the proceedings. While the Executive Director has a duty to investigate all complaints to determine whether a violation has occurred, he has no duty to file charges with the Commission unless he affirmatively finds that a violation has occurred and notifies the Commission that the efforts at conciliation that he is required to undertake have been unsuccessful. If the Executive Director refuses to make the finding or notifies the Commission that his efforts at conciliation have been successful, a dissatisfied complainant has no remedy before the Commission. While the complainant might seek judicial review of the Executive Director's decision, it is likely that the courts will hold that the Director's charging decision, like that of a State's Attorney, is a discretionary one subject to review for only the grossest abuse.\textsuperscript{170} Similarly, the Executive Director has broad authority over the disposition of the case, either through settlement with the responding party or through the relief he requests from the Commission. Section 93A–43 authorizes the Commission to award damages, terminate leases and grant other relief, but it very plainly states that the Commission "may" (rather than shall) grant such relief once it finds that a landlord or tenant has caused a defective tenancy. The complaining tenant plainly does not have a right to claim damages or other relief and is not even a party to the administrative proceeding.

The regulatory function of the Commission now becomes apparent. The Commission, as indicated by the purposes and policies enunciated in the preamble of the Act, regulates or controls landlord-tenant relations in the public interest at the behest of a public official and

\textsuperscript{169} The Attorney General has so ruled in advising the legislature that compulsory arbitration on the issue of liability in common law tort claims without a de novo jury trial on appeal was unconstitutional. 60 Md. Att'y Gen. Rep. & Op. 159 (1975).

\textsuperscript{170} Brack v. Wells, 184 Md. 86, 40 A.2d 319 (1944).
does not adjudicate private claims. Incidental to its regulatory function, the Commission may in appropriate cases award damages or other relief to an aggrieved landlord or tenant. From the perspective of the respondent landlord or tenant, the impact of these remedies resembles the impact of a monetary fine or license suspension or revocation, sanctions which an administrative agency may constitutionally impose.\textsuperscript{171} The award of compensatory damages or the termination of leases differs from the other sanctions chiefly because a benefit is directly transferred to a third person. That difference is not significant enough within a regulatory framework to transform an otherwise proper administrative proceeding into a lawsuit between private parties that can only be tried in a court. Likewise, the administrative proceeding initiated by the Executive Director before the Commission is not transformed into a private suit with an amount in controversy; it therefore does not qualify as a "civil [proceeding] . . . where the amount in controversy exceeds the sum of five hundred dollars" where the parties are entitled to a jury trial under section 6 of article XV of the Maryland Constitution.\textsuperscript{172}

The above analysis of the \textit{Investors Funding} case supports the result reached by the Court of Appeals but indicates that any transfer of personal injury claims or other private litigation from the courts to an agency raises quite different questions. Any transfer of adjudicatory power is unlikely to gain legislative acceptance unless the claimant retains a right to recover damages either for negligence or under conditions of strict liability specified by statute. The constitutionality

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\textsuperscript{171} For a discussion of the constitutionality of an administratively imposed fine, see note 160 \textit{supra}.
\textsuperscript{172} A potentially troubling aspect of the Fair Landlord-Tenant Relations Act not discussed by the Court of Appeals is the composition of the nine member Commission on Landlord-Tenant Affairs. The part time, uncompensated lay members of the Commission no doubt bring a sense of the neighborhood or community court to the proceedings conducted by the Commission. Some commentators believe it necessary to establish more neighborhood tribunals with informal procedures if people are to retain their faith in the legal system. See \textit{Final Report of the American Assembly, Law and a Changing Society II} (June, 1975). On the other hand, attention has recently focused on the qualifications and competence of both administrative and judicial decision makers. The California Supreme Court has held that due process requires that an attorney-judge and not a lay-judge preside at all criminal trials involving charges which carry the possibility of a jail sentence. Gordon v. Justice Court, 12 Cal. 3d 323, 525 P.2d 72, 115 Cal. Rptr. 632 (1974), \textit{cert. denied}, 420 U.S. 938 (1975). The United States Supreme Court has agreed to hear a state case from Kentucky raising similar issues under the Due Process Clause of the fourteenth amendment. North v. Russell, 422 U.S. 1040 (1975) (probable jurisdiction noted). While both \textit{Gordon} and \textit{North} involved criminal trials where due process standards are very high, the requirement of fundamental fairness also applies to administrative proceedings and administrative decision makers must be sufficiently competent to find the facts and understand the applicable law.
\end{footnotesize}
of legislation allocating the resolution of such claims exclusively to an administrative agency subject to limited judicial review depends primarily on the strength of the analogy to the Workmen's Compensation Act. The adjudication of compensation claims by the Workmen's Compensation Commission is constitutional because the legislature has abolished entirely the employee's common law negligence claim against his employer for work-related injuries and substituted in its place a program of statutory benefits. The analogy is therefore a strong one if the legislature chooses to abrogate completely a category of tort claims based on fault and to substitute in its place a statutory right to compensation for actual loss sustained. For example, the legislature might abrogate medical malpractice claims based on fault, and provide a statutory basis for recovery for persons who suffer iatrogenic injuries in the course of medical treatment. Such claims could just as well be determined administratively as judicially and paid from a Physicians' Insurance Fund. But the legislature may on policy grounds prefer an administrative scheme that more closely resembles the present judicial handling of tort claims. The constitutionality of such arrangements remains untested.

CONCLUSION

The legislature enjoys considerable flexibility under the Maryland Constitution in allocating adjudicatory powers between courts and administrative agencies. There are constitutional limits on the powers that courts and agencies may exercise, but within those limits the legislature has the constitutional authority to determine the respective decisional roles of judges and administrators. In making those determinations the legislature should weigh the competing policy considerations that favor an administrative or a judicial forum. The judiciary, in reviewing the constitutionality of particular legislative choices, should respect whenever possible the legislative determination of the appropriate forum. Only the clearest demonstration that a function assigned to the courts is a non-judicial one should prevent the courts from performing it. Courts in Maryland and in other jurisdictions have too readily held unconstitutional the assignment to judges and juries of adjudicatory responsibilities in regulatory programs. While a court cannot formulate policy except in the context of determining the rights of parties before it, it can find facts and apply what law there is to those facts to determine the rights of individuals. Likewise, if the legislature opts for an administrative forum, courts

retain their inherent power to review administrative action for illegality and arbitrariness but should not otherwise interfere with the legislative choice except upon the clearest demonstration that the function assigned to the agency is exclusively a judicial one. While agencies cannot hear criminal cases or common law causes, courts should not allow considerations of self-interest or tradition to block the development of new institutions for resolving disputes between the government and individuals or between private litigants. It should be remembered that even the great Lord Coke in his struggle to protect the common law courts from encroachments by the prerogative courts of the Stuart Kings blindly condemned the equity jurisdiction of the Chancellor and refused to recognize that the common law contained any defects requiring correction through the development of new institutions.