

2-1-1968

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Frank R. Strong

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## Recommended Citation

Frank R. Strong, *The Persistent Doctrine of Constitutional Fact*, 46 N.C. L. REV. 223 (1968).Available at: <http://scholarship.law.unc.edu/nclr/vol46/iss2/1>

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# THE PERSISTENT DOCTRINE OF "CONSTITUTIONAL FACT"†

FRANK R. STRONG\*

## INTRODUCTION

As with the news of Mark Twain's supposed passing, so the view that public law is about free of the doctrine of "constitutional fact" appears somewhat exaggerated. This familiar doctrine, it will be recalled, was spawned by the unreconstructed Court in a series of four celebrated cases. *Ben Avon* and shortly thereafter *Fung Ho* were decided in the early 1920's; *Crowell* and *St. Joseph* came in the early and mid 1930's, respectively. It is also familiar learning that in these cases the Court was insistent that, as to findings by administrative agencies of facts decisive of constitutional issues, the facts must at the least be independently weighed in the course of judicial review or even found independently by the reviewing court. In one of the four cases, *Fung Ho*, unanimity prevailed in an opinion written by Mr. Justice Brandeis. Few there are among the commentators who have been unhappy over *Fung Ho*'s requirement of careful judicial scrutiny of administrative orders of deportation, where citizenship is claimed, even though that scrutiny must take the extreme form of trial de novo. On the other hand, few have been the commentators to support the majority view in the other three of the cases, largely involving substantive property rights, where Mr. Justice Brandeis split the Court with the thesis that here the substantial evidence test should be applicable, as in the case of non-constitutional facts. The leading critics, like Professor Kenneth Culp Davis, have been trying for some time to encourage *Ben Avon* and *Crowell* to get lost<sup>1</sup> and currently Professor Davis sees them as "going, going, almost gone."<sup>2</sup>

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† The origins of the doctrine and its development in four celebrated cases in the 1920's and 1930's have been thoroughly canvassed in an earlier article by the author, *Judicial Review: A Tridimensional Concept of Administrative-Constitutional Law*, 69 W. VA. L. REV. 249 (1967).

\* Professor of Law, University of North Carolina; Dean and Professor of Law Emeritus, Ohio State University.

<sup>1</sup> If *Ben Avon* will go away, so presumably will *St. Joseph*.

<sup>2</sup> Davis, "Judicial Control of Administrative Action": A Review, 66 COLUM. L. REV. 635, 676 (1966). The Davis review is of a volume of the same title, cited note 3 *infra*, which collects the writings of Professor Louis Jaffe on Administrative Law.

The principle of these four cases requires that judicial review of constitutional facts go beyond the substantial evidence test. The degree to which this principle has fastened itself upon Administrative Law continues to be a matter of debate among the commentators. There appears to be no quarrel with the Davis view that "The *Ng Fung [Ho]* case still stands. . ." Contrast in view, however, marks consideration of the other three. Professor Jaffe does not satisfy Professor Davis when to Davis's assertion that "Judicial control of the finding of fact is limited to the inquiry whether there is substantial evidence," he caveats that "This simple formulation, however, must be qualified by the so-called doctrine of *Crowell v. Benson*".<sup>3</sup> And to Professor Jaffe it remains a question whether *Ben Avon* is still good law.<sup>4</sup> Reinquiry into the status of the doctrine of constitutional fact indicates that a careful judgment cannot be made without a reconsideration of a range of developments occurring since the Big Four decisions.

#### "CONSTITUTIONAL FACT" AND ECONOMIC RIGHTS

##### *Ben Avon Since the 1930's*

Consider first the status of the *Ben Avon* doctrine of independent judicial judgment with respect to constitutional facts. It is significant that despite the seeming strength of Mr. Justice Brandeis' contention in 1936 that the then precedents did not compel the majority view in *St. Joseph*, Justices Cardozo and Stone would have been tempted to hold with Chief Justice Hughes had he there been willing to rest upon precedent, rather than reargue the merits, because of "the weight of precedent that has now accumulated against" the Brandeis position. In *Alabama Public Service Comm. v. Southern Railway Co.*,<sup>5</sup> the Court as constituted in 1951 avoided commitment on this major issue. Despite this history of judicial position, the commentators appear to be convinced that the *Ben Avon* doctrine has been rejected by the Supreme Court.

Professor Davis, for one, finds in the two cases of *Texas Railroad Comm. v. Rowan & Nichols Oil Co.*<sup>6</sup> the first sign of

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<sup>3</sup> L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 624 (1965) [hereinafter cited as JAFFE].

<sup>4</sup> *Id.* at 651.

<sup>5</sup> 341 U.S. 341 (1951).

<sup>6</sup> 310 U.S. 573 (1940); 311 U.S. 570 (1941).

eclipse.<sup>7</sup> Yet the Court did not so view the second *Rowan & Nichols* case in its opinion in the *Alabama Public Service* case, and the first *Rowan & Nichols* case of 1940 is itself at least equivocal. The paragraph subsequently added to the original opinion in the first case<sup>8</sup> does sound in terms of limitation of the scope of federal-court review, but as concerns the extent to which the federal courts should go in considering state issues under the *Siler* rule of pendent jurisdiction. It is not clear whether the analogy to federal review of respondent's "claims under the Due Process Clause" runs to scope of review or to the insufficiency of those substantive claims. But in asserting that "these latter claims we have found untenable," the Court must be referring to passages in the original opinion in which it clearly rejected the Oil Company's claims of confiscation of property in violation of due process. This is especially evident in the sentence, stricken from the original opinion for its misstatement of the scope of federal jurisdiction, in which the Court depicted the problem before it as one "whether the state action complained of has transgressed whatever restrictions the vague contours of the Due Process Clause may place upon the exercise of the state's regulatory power."<sup>9</sup>

Certainly the three dissenters, all of whom had participated in earlier decisions on scope of review, interpreted the majority opinion as concerned with the reach of substantive due process restrictions on state regulation of private property. Their objection lay in the asserted application in *Rowan & Nichols I* of "principles with respect to the review of administrative action challenged under the due process clause directly contrary to those which have been established." The correctly applicable principles they "found in the opinion of Mr. Justice Brandeis, written for a unanimous court, in *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, dealing with a proration order affecting gas, entered by the same commission which entered the order here in issue."<sup>10</sup> The *Thompson* case, decided in 1937, is the one in which Justice Brandeis, declaring that "Our law reports present no more glaring instance of the taking of one man's property and giving it to another,"<sup>11</sup> invalidated an earlier order of the Texas commission.

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<sup>7</sup> K. DAVIS, ADMINISTRATIVE LAW TEXT 535 (2d ed. 1959).

<sup>8</sup> 311 U.S. 615 (1940).

<sup>9</sup> 310 U.S. at 580; 311 U.S. at 614.

<sup>10</sup> 310 U.S. at 585.

<sup>11</sup> 300 U.S. 55, 79 (1937).

The same three Justices who had dissented in the first *Rowan & Nichols* case also dissented in the second, decided in early 1941, for the reasons earlier stated.<sup>12</sup> This suggests that they continued to regard the constitutional issue as one of substantive due process. Actually, the amended order of the Texas Railroad Commission was less restrictive on Rowan & Nichols than the original one unsuccessfully challenged in the first litigation. To the majority, in consequence, the result on subsequent review must be the same; "[T]his comparison of the practical operation of the two orders exposes the emptiness of the claim that a constitutional line can be drawn between them."<sup>13</sup> Despite this basis for decision, Mr. Justice Frankfurter, writing for the majority, does seem to repudiate *Ben Avon* three paragraphs later when he denies that "the federal courts [are] qualified to set their independent judgment on such matters against that of the chosen state authorities."<sup>14</sup> But that he does not so intend appears from the following passage which concludes that paragraph. There, consistent with the view of this decision later taken in *Alabama Public Service Comm. v. Southern Railway Co.*,<sup>15</sup> the Justice is only rejecting the more extreme doctrine of *Crowell*:

Indeed, we are asked to sustain the district court's decree as though it derived from an ordinary litigation that had its origin in that court, and as though Texas had not an expert Commission which already had canvassed and determined the very issues on which the court formed its own judgment. For it appears that the court below nullified the Commission's action without even having the record of the Commission before it. When we consider the limiting conditions of litigation—the adaptability of the judicial process only to issues definitely circumscribed and susceptible of being judged by the techniques and criteria within the special competence of lawyers—it is clear that the Due Process Clause does not require the feel of the expert to be supplanted by an independent view of judges on the conflicting testimony and prophecies and impressions of expert witnesses.<sup>16</sup>

Professors Byse and Gellhorn assert that "another big nail seemed to be driven into the coffin of the Ben Avon case"<sup>17</sup> by *Fed-*

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<sup>12</sup> 311 U.S. 570, 577 (1941).

<sup>13</sup> *Id.* at 574.

<sup>14</sup> *Id.* at 575.

<sup>15</sup> See quotation in text accompanying note 55 *infra*.

<sup>16</sup> 311 U.S. at 576.

<sup>17</sup> W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW: CASES & COMMENTS 479 (4th ed. 1960) [hereinafter cited as GELLHORN & BYSE].

*eral Power Commission v. Hope Natural Gas Co.*,<sup>18</sup> decided four years after *Rowan & Nichols*. But they are more accurate when later they observe of *Hope*, "Thus was written off as an irrelevancy the precise issue of fact which, in *Ben Avon*, the Court had said must be open to independent judicial reappraisal if the Constitution were to be preserved. [T]he 'fair value' concept no longer rules the ratemaking process, and with its demise the area of dispute about 'confiscation' has shrunk to the vanishing point."<sup>19</sup> Professor Jaffe also has pointed out that it was the demise of *Smyth v. Ames* in *Hope* that has sapped *Ben Avon* and *St. Joseph* of their potency.<sup>20</sup> Their impotency is the consequence of the withdrawal of constitutional protection of "fair value" under the reconstructed Court's reinterpretation of economic due process; it is not explained by any necessary eclipse of the doctrine of constitutional fact. The true victim of *Hope* was *Smyth v. Ames* and its progeny, with the Court substituting therefor, as the measure of due process, a rate base which in result yields just and reasonable rates.

The detail with which Mr. Justice Douglas's opinion for the majority in *Hope* examines the Federal Power Commission's findings is consistent with an acceptance of the necessity for an independent judicial evaluation of the facts administratively found so far as they determine the constitutional issue. Admittedly, there are some statements in the opinion which sound in terms of the substantial evidence test, but the controlling view of the Court's function on review would seem clearly to be at one with that articulated by Chief Justice Hughes in the *St. Joseph* case—independent judicial judgment on the facts "informed and aided by the sifting procedure of an expert legislative agency." Thus:

If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important. Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences."<sup>21</sup>

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<sup>18</sup> 320 U.S. 591 (1944).

<sup>19</sup> GELLHORN & BYSE 480.

<sup>20</sup> JAFFE 650.

<sup>21</sup> 320 U.S. at 602.

Two major state court cases, decided in the wake of the Supreme Court decisions just considered, are most instructive. In the New York case of *Staten Island Edison Corporation v. Maltbie*,<sup>22</sup> the majority of a narrowly divided court of appeals were of opinion that *Ben Avon* "has never been overruled; on the contrary the principle that where constitutional rights of liberty or property are involved due process requires independent judicial determination of the constitutional question in the courts has been affirmed."<sup>23</sup> In consequence, the majority opinion took the position that New York procedure must afford, to a public utility alleging confiscatory rates, a greater court review than afforded by the substantial evidence test under certiorari proceedings. Continuing, the opinion asserts that there is "nothing inconsistent with such a practice" either in the Texas oil and gas proration cases or the cases arising under the Federal Natural Gas Act. "In none of these decisions was the right to try the issue of confiscation disputed. Indeed that was the judicial process pursued in each one of these cases."<sup>24</sup> Chief Justice Stone is then quoted from *Federal Power Comm. v. Natural Gas Pipeline Co.*,<sup>25</sup> decided between the *Rowan & Nichols* cases and *Hope*, and comment made thereon, in the following passage:<sup>26</sup>

"By long standing usage in the field of rate regulation the 'lowest reasonable rate' is one which is not confiscatory in the constitutional sense. [Citations.] Assuming that there is a zone of reasonableness within which the Commission is free to fix a rate varying in amount and higher than a confiscatory rate [citations], the Commission is also free under § 5 (a) to decrease any rate that is not the 'lowest reasonable rate'. It follows that the Congressional standard prescribed by this statute coincides with that of the Constitution, and that the courts are without authority under the statute to set aside as too low any 'reasonable rate' adopted by the Commission which is consistent with constitutional requirements." The opinion then proceeds to a full review of the facts upon which the commission made its determination leading to the conclusion that such determination was consistent with constitutional requirements.

A careful reading of the dissenting opinion in *Maltbie* discloses that the minority was of the view that the majority position, by

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<sup>22</sup> 296 N.Y. 374, 73 N.E.2d 705 (1947).

<sup>23</sup> *Id.* at 381-82, 73 N.E.2d at 707.

<sup>24</sup> *Id.* at 384, 73 N.E.2d at 709.

<sup>25</sup> 315 U.S. 575 (1942).

<sup>26</sup> 296 N.Y. at 383-84, 73 N.E.2d at 709.

permitting use of the bill in equity rather than certiorari for review of administrative action, in effect permitted a second trial and re-instituted the substantive test of fair value. If the dissent be correct on either count, then as has been seen the majority position is at variance with the later decisions of the Supreme Court of the United States. But there is no indication that the majority intended to reinstate *Smyth v. Ames* as the governing interpretation of either the Federal or the New York State constitutions, nor is this a necessary corollary of insistence upon judicial review by a test stronger than substantial evidence. And the majority would appear to have negated any idea of a revival of *Crowell* in the following paragraph:<sup>27</sup>

We find no compelling necessity for a trial de novo of every rate case in which confiscation is claimed. The illegality in such cases is confiscation or deprivation of property without due process of law. The legality of the rate must primarily depend upon the proceedings before the commission, and the record of those proceedings will of necessity be before the trial court since the statute authorizes determination in the first instance by the commission, and the courts may not properly consider the question without knowledge of the administrative record. *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 310 U.S. 573 . . . ; *Manufacturers Ry. Co. v. United States*, 246 U.S. 457 . . . This appears to be the practice when injunction suits such as this are brought in the Federal courts. We see no reason for departing from that practice in the trial of this action. We need not now consider under what circumstances, if any, the court may be justified in receiving additional proofs or newly discovered evidence.

Nearly a decade later, the relevant Supreme Court cases, including now *Alabama Public Service Comm. v. Southern Railway Co.*, were clear to a unanimous bench in *Opinion of the [Massachusetts] Justices*.<sup>28</sup> *Ben Avon* and *St. Joseph* were not dead, despite Professor Davis's eagerness to witness their demise; their doctrine was to be distinguished from the more extreme requirement of trial de novo. But "even if there is some doubt as to the Constitution of the United States," interpretations placed upon the Constitution of Massachusetts "forbid any statute which, in cases where confiscation or [other] violation of the Constitution is claimed, fore-

<sup>27</sup> 296 N.Y. at 383, 73 N.E.2d at 708.

<sup>28</sup> 328 Mass. 679, 106 N.E.2d 259 (1952).



closes the right of a utility to submit those issues 'to a court for determination upon its own independent judgment as to both law and facts.'"<sup>29</sup> At the same time, on the other hand, insistence upon this extent of judicial review does not carry in its train a resurrection of the rule of *Smyth v. Ames*:

[T]here is no constitutional requirement, even in a case involving a claim of confiscation or of other violation of constitutional right, as to the precise method by which the court must review a commission's findings of fact, provided the method is fully adequate to enable the reviewing court to make certain that it has before it all available pertinent evidence on the constitutional issue and provided that, as to that issue, the court is free to act upon its own independent judgment as to both law and fact.<sup>30</sup>

A study of the decade in which fell the decisions that have been discussed discloses considerable vitality for *Smyth v. Ames* in the state courts, as a matter of interpretation of either state statute or state constitution.<sup>31</sup> Where the rule of *Smyth* remains, *Ben Avon* is a very likely corollary.<sup>32</sup> But, as the Massachusetts and New York holdings demonstrate, rejection of *Smyth* under the impact of *Pipeline* and *Hope* does not signify the disappearance of the doctrine of *Ben Avon*. As substantive constitutional protection diminishes, the operative range of *Ben Avon* necessarily becomes more constricted; but even in instances of total disappearance of substantive constitutional protection of property interests *Ben Avon* may well remain, although in a state resembling suspended animation. Appreciation of this fact should assist in removing the puzzlement that has been found in inquiry into the vitality of the *Ben Avon* rule in the states.<sup>33</sup>

### *The Vicissitudes of Crowell*

An even more careful analysis of the vicissitudes of *Crowell v. Benson* is essential to a determination of its present status. To

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<sup>29</sup> *Id.* at 687, 106 N.E.2d at 264. That omission of the bracketed word "other" was here unintentional seems clear from its inclusion in similar context in the sentence immediately following, quoted in the text. Thus the Massachusetts court intends to limit to constitutional issues the requirement of independent judicial review.

<sup>30</sup> *Id.*

<sup>31</sup> Mendelson, *Smyth v. Ames in State Courts, 1942 to 1952*, 37 MINN. L. REV. 159 (1953).

<sup>32</sup> *Id.* at 161-62.

<sup>33</sup> See Note, *Independent Review of Administrative Agency Determinations in the States: The Vitality of the Ben Avon Rule*, 102 U. PA. L. REV. 108 (1953).

ascertain the fate of the extreme requirement of trial de novo in the courts, it is necessary to commence with decisions of the Supreme Court announced only three weeks after that in *St. Joseph. Acker v. United States*<sup>34</sup> was a challenge of commission rates set for market agencies by the Secretary of Agriculture under the Packers and Stockyards Act. A unanimous Supreme Court, in an opinion by Mr. Justice Roberts, affirmed the refusal of injunctive relief by the lower court of three judges. To the claim of entitlement to a trial de novo on the issue of confiscation, the Court replied that<sup>35</sup>

The case does not involve any question of confiscation. The appellants employ little physical property in their business and no complaint is made as to the allowance of interest on such as they do employ. They render a personal service and the issue before the Secretary was whether the uniform schedule of rates for that service was reasonable or unreasonable. On this issue he was bound to afford the appellants due process of law. . . . No reason appears why the appellants could not be afforded due process of law by a review of any questions they deemed material upon the record as made in the administrative proceeding, or why the delay, expense and burden of a new trial should be imposed simply because they demanded it. The issue before the Secretary was not confiscation but the reasonableness of a charge for personal service. No new or different issue could have been presented upon a trial *de novo*. We think the court correctly held that its function was the consideration of questions raised upon the record made before the Secretary.

Professors Byse and Gellhorn have viewed *Acker* as having "somewhat blunted the speculation, to which the *St. Joseph* case gave rise, . . . about the opportunity for de novo consideration of a newly identified category of 'constitutional facts.'"<sup>36</sup> But *St. Joseph*,<sup>37</sup> like its most direct precedent, *Ben Avon*,<sup>38</sup> called only for an independent judicial judgment on the facts found administratively where those facts are decisive of constitutionality. *Fung Ho*<sup>39</sup> and *Crowell*<sup>40</sup> were the two to insist on *de novo* trial in the courts. Reference to the opinion of the lower court in *Acker* makes it clear

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<sup>34</sup> 298 U.S. 426 (1936).

<sup>35</sup> *Id.* at 434.

<sup>36</sup> GELLHORN & BYSE 477.

<sup>37</sup> *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 58 (1936).

<sup>38</sup> *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920).

<sup>39</sup> *Ng Fung Ho v. White*, 259 U.S. 276 (1922).

<sup>40</sup> *Crowell v. Benson*, 285 U.S. 22 (1932).

that, although finding the Secretary's order to be supported by substantial evidence, the three judges at the same time evaluated that evidence independently.<sup>41</sup> Yet on the issue which had earlier split the Court in *Crowell*, there is no indication of Court division. And this, in a case in which no contention of substantive due process was deemed possible.

Decided the same day as *Acker* was *Baltimore & Ohio Railroad Co. v. United States*.<sup>42</sup> On petition for rehearing by the Interstate Commerce Commission of its order prescribing divisions of joint rates on citrus fruit moving from Florida to northern points, the northern carriers raised the issue of confiscation. Dissatisfied with the Commission's refusal to entertain the claim, these carriers sought permanently to enjoin the administrative order. "The case was tried by three judges," the Court noted; "[i]n addition to the evidence given before the commission there were offered and received at the trial the testimony of many witnesses and much documentary evidence."<sup>43</sup> Dismissal of the case by the court below was affirmed by the Supreme Court, the majority finding the full evidence insufficient to support the claim of confiscation. Joined by Justices Stone, Roberts and Cardozo, Mr. Justice Brandeis concurred:

In passing upon the issue of confiscation the Court dismissed the question, whether the trial court properly admitted evidence which had not been introduced before the Commission; and decided that the evidence was admissible. I do not agree with the Court's conclusion on that subject. But as the issue of "confiscation" was, in my opinion, not properly before the trial court, I refrain from discussing the question what evidence would have been admissible if that issue had been. See *Crowell v. Benson*, 285 U.S. 22 and . . . *St. Joseph Stock Yards Co. v. United States*. . .<sup>44</sup>

Here, clearly, the Brandeis objection is to the extreme of trial *de novo* of the carrier claim of confiscation, especially in a situation where to him there was no valid basis for an assertion of denial of substantive due process.

Although remaining on the Court, Mr. Justice Brandeis did not,

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<sup>41</sup> *Acker v. United States*, 12 F. Supp. 776, 781 (N.D. Ill. 1935).

<sup>42</sup> 298 U.S. 349 (1936).

<sup>43</sup> *Id.* at 353.

<sup>44</sup> *Id.* at 392.

two years later in the *Shields* case,<sup>45</sup> take exception to the following statement by Chief Justice Hughes as to the scope of judicial review available to a western carrier in a challenge of its classification by the Interstate Commerce Commission as other than an interurban electric railway:

As Congress had constitutional authority to enact the provisions of the Railway Labor Act looking to the settlement of industrial disputes between carriers engaged in interstate commerce and their employees, and could include or except interurban carriers as it saw fit, no constitutional question is presented calling for application of *our decisions* with respect to a trial *de novo* so far as the character of the respondent is concerned.<sup>46</sup>

In consequence, the judicial determination to be made was as to whether the finding of the Commission "had a basis in substantial evidence or was arbitrary and capricious;" the lower court erred in permitting a trial *de novo*.

Inclusion in "our decisions" of both *Ben Avon* and *Crowell* does not assist in clarification of the problem of the *extent* to which the presence of "constitutional fact" questions requires a court to go beyond the substantial evidence test; the same is true of Justice Brandeis's citation of *St. Joseph* along with *Crowell* in his concurrence in the *Baltimore & Ohio* case.<sup>47</sup> It must be that in the *Shields* case the Chief Justice felt that the issue of the classification of the Utah-Idaho Central Railroad, had it presented a constitutional question of fact, would have necessitated not only an independent judgment of the reviewing court on the administrative record but, as well, an independent judicial judgment on a judicially-made record.

A clearer instance for application of the *Crowell* extreme seemed to two lower federal courts to be presented by a United States bill to enjoin the Appalachian Power Company from constructing a dam in the New River save on conditions imposed by the Federal

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<sup>45</sup> *Shields v. Utah-Idaho Cent. R.R. Co.*, 305 U.S. 177 (1938).

<sup>46</sup> *Id.* at 184-85. Italics are supplied to stress that by footnote 13 both *Ben Avon* and *Crowell* are cited by the Court as among "our decisions."

<sup>47</sup> Two contemporary commentators read these cases and *United States v. Idaho*, 298 U.S. 105 (1936), as ones in which "The Court still recognized that a trial *de novo* would be required on facts on which issues of constitutional jurisdiction depend, although it might not be required if merely questions of statutory jurisdiction are involved." 25 CORNELL L.Q. 274, 284 (1939). See Larson, *The Doctrine of "Constitutional Fact"*, 15 TEMP. L.Q. 185, 192-94 (1941).

Power Commission. The issue was the navigability of the New at the dam point and the possible effect of the dam on interstate commerce. Both the district court in denying relief, and the court of appeals in affirming, were of opinion that the case was controlled by *Crowell*, thus necessitating trial *de novo*.<sup>48</sup> The Supreme Court reversed, finding navigability and effect on interstate commerce.<sup>49</sup> But, as a commentator has remarked,<sup>50</sup> "The conclusion of the lower courts that *Crowell v. Benson* required a trial *de novo* of the issues of navigability and effect upon interstate commerce was not interfered with by the Supreme Court." The Supreme Court simply disagreed with the lower courts as to the conclusion to be drawn from the facts developed at the judicial hearing. In the words of Mr. Justice Roberts, dissenting, reversal was based on "a conclusion resting on findings of fact, made here *de novo*, and in contradiction of the concurrent findings of fact of two courts below."<sup>51</sup>

If the present writer's rationale of the Big Four cases is sound on this subsidiary point,<sup>52</sup> the distinction taken in these subsequent cases should have been that between the rule of independent judicial judgment on constitutional facts and the rule of administrative finality on substantial evidence for all non-constitutional facts. For the administrative agencies involved were dependable adjudicators and their hearings entirely adequate, thus negating any justification for the *Crowell* requirement of *de novo* trial in the reviewing court. Hopefully, a major step toward this position was taken by the Court, albeit somewhat obliquely, in the already considered abstention case of *Public Service Commission v. Southern Railway Co.*<sup>53</sup>

A three-judge federal court there assumed undoubted statutory

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<sup>48</sup> *United States v. Appalachian Elec. Power Co.*, 23 F. Supp. 83, 116 (W.D. Va. 1938), *aff'd*, 107 F.2d 769, 791 (4th Cir. 1939).

<sup>49</sup> *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940).

<sup>50</sup> Schwartz, *Does the Ghost of Crowell v. Benson Still Walk?*, 98 U. PA. L. REV. 163, 178 (1949) [hereinafter cited as Schwartz].

<sup>51</sup> 311 U.S. at 429. It may be contended that the Court's failure to give attention to invocation of *Crowell* by the two lower courts stemmed from the fact that the government, which had in those courts pressed for the substantial evidence test, did "not seek to have this Court pass on it in this case." 311 U.S. at 402 n. 7. But this withdrawal need not have prevented the Court from admonishing the lower courts on the use of full-scale judicial hearings.

<sup>52</sup> Strong, *Judicial Review: A Tri-Dimensional Concept of Administrative-Constitutional Law II*, 69 W. VA. L. REV. 249, 272-76 (1967) [hereinafter cited as Strong].

<sup>53</sup> 341 U.S. 341 (1951).

jurisdiction on a bill to enjoin, heard evidence de novo on the issue of the discontinuance of certain passenger service, and granted relief. In ruling that that court should have abstained under the principles of *Burford v. Sun Oil Co.*,<sup>54</sup> leaving the matter for state court determination with the possibility of ultimate review by it, the Supreme Court of the United States observed that<sup>55</sup>

The Supreme Court of Alabama has held that it will review an order of the [Alabama Public Service] Commission as if appealed directly to it . . . , and that judicial review calls for an independent judgment as to both law and facts when denial of due process is asserted. . . The fact that review in the Alabama courts is limited to the record taken before the Commission presents no constitutional infirmity. . . And, whatever the scope of review of Commission findings when an alleged denial of constitutional rights is in issue, it is now settled that a utility has no right to relitigate factual questions on the ground that constitutional rights are involved. *New York v. United States*, 331 U.S. 284, 334-336, (1947); *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 311 U.S. 570, 576 (1941). . . . As adequate state court review of an administrative order based upon predominantly local factors is available to appellee [footnote appended], intervention of a federal court is not necessary for the protection of federal rights.

Quoting the heart of the above passage, Professor Schwartz at the time concluded that "This certainly would seem to imply that the *Ben Avon* doctrine is no longer law."<sup>56</sup> But on the above analysis no such implication is sound. Rather, the Court has ruled out, at least for due process claims, the extreme of trial de novo. That this is true for due process claims other than alleged confiscation in rate cases would appear from the nature of the principal case and the cited cases of *New York v. United States* and *Rowan & Nichols*. This is further substantiated by the fact that in the footnote appended by the Court it is said that the two cited decisions hold "that due process does not require relitigation of factual matters determined by an administrative body . . . ;"<sup>57</sup> the context would seem clearly to embrace all forms of due process claim, including that advanced in *Crowell*. The language of the Court in

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<sup>54</sup> 319 U.S. 315 (1943).

<sup>55</sup> 341 U.S. at 348-49.

<sup>56</sup> Schwartz, *A Decade of Administrative Law: 1942-1951*, 51 MICH. L. REV. 775, 860 (1953).

<sup>57</sup> 341 U.S. at 349 n.11.

the Alabama opinion is even broader, referring generally to "constitutional rights." This could include federalistice issues of constitutional dimensions, the other half of *Crowell*. Thus *Alabama Public Service* appears to have put the trial de novo concept to rest as a general requirement of the doctrine of constitutional fact, save for those exceptional situations which the *Fung Ho* and *Crowell* Courts thought were disclosed by the patterns of those respective cases.

Reconfirmation of the exception, but with clear indication of its narrow limits, is furnished by the subsequent decision in *American Trucking Ass'ns v. United States*.<sup>58</sup> Motor carriers there unsuccessfully challenged an Interstate Commerce Commission rule restricting the lease or interchange of equipment on the twin grounds that it exceeded both statutory authority<sup>59</sup> and constitutional limitation. With respect to the latter contention, error was assigned by the motor carriers in the district court's refusal to entertain evidence on the issue of confiscation. The Supreme Court's response was as follows:

This Court has indicated many times, it is true, that those concerned with an order affecting their just compensation for transportation services must be heard; indeed, their right to introduce evidence to support the claim that the order in question will unconstitutionally confiscate their property may be enforced even in the District Court, if the Commission bars an opportunity to do so.

But the right is not to be construed as an avenue toward delay. The claim of confiscation must be substantial, the import of the proffered evidence clear, and the inability to test the question before the Commission patent, in order to justify an oral hearing on the question in the courts. In the case at bar, appellants seek in substance to show that the outlawing of trip-leasing will affect their business; perhaps they might even be able to prove that some concerns would fail if they were unable in the future to resort to nonowned equipment for short periods. In this context, however, we do not think that a right to trial de novo is automatically established merely because the Commission denied a petition for rehearing which invoked constitutional principles. In the first place, there was in truth a multitude of evidence before the Commission on the importance of trip-leasing

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<sup>58</sup> 344 U.S. 298 (1953).

<sup>59</sup> Black & Douglas, JJ., dissented on this ground, agreeing with the contention of the Trucking Association.

to some concerns. Moreover, we are clear that appellants had an opportunity to introduce this very evidence in the agency hearings, for it required no great prescience, in view of the notice of the hearings published by the Commission, to know that they would concern the importance and desirability of the very practices appellants seek to protect.<sup>60</sup>

The four citations omitted from this excerpt are familiar from prior discussion or quotation. *New York v. United States*<sup>61</sup> explains *Baltimore & Ohio* as one "where the Commission refused to receive evidence proffered on the point of confiscation."<sup>62</sup> *St. Joseph* and the 1918 case of *Manufacturers Railway Co. v. United States*<sup>63</sup> are cited for "the correct practice [which] requires that, where the opportunity exists, all pertinent evidence bearing on the issues tendered the Commission should be submitted to it in the first instance and should not be received by the District Court as though it were conducting a trial *de novo*."<sup>64</sup>

But even if *Crowell* has been stripped of its requirement of trial *de novo*, as is to be hoped,<sup>65</sup> there may remain in it sufficient vitality to impose, for constitutional facts, the intermediate requirement of an independent judicial judgment on the administrative record. To this extent *Crowell* may be no more "gone" than appears to be the case with *Ben Avon*. With it, as with *Ben Avon*, the supposed disappearance may be only a mirage resulting from the recession of constitutional protections in the areas of its operation. The *Appalachian Electric Power* case, previously discussed,<sup>66</sup> is suggestive. There, where the issue of federal versus state legislative power came to the fore, the Court was clearly unwilling to accept the facts controlling of constitutionality as administratively found, subject only to the test of substantiality. At the same time, on the other hand, the case is as unusual as it is suggestive; in most instances, the great expansion of congressional power vis-a-vis the states, achieved largely through expansive interpretation of the

<sup>60</sup> 344 U.S. at 320-21 (footnotes omitted).

<sup>61</sup> 331 U.S. 284 (1947), cited in the quotation from Alabama Public Service Commission, p. 235 *supra*.

<sup>62</sup> *Id.* at 334.

<sup>63</sup> 246 U.S. 457 (1918), cited in the excerpt from the majority opinion in the New York *Malibie* case, p. 229 *supra*.

<sup>64</sup> New York v. United States, 331 U.S. 284, 335 (1947).

<sup>65</sup> See the writer's discussion in Strong, *supra* note 52.

<sup>66</sup> See pp. 233-34 *supra*.



necessary and proper clause, leaves little occasion for application of *Crowell* in any federalistic context. The issue there has become almost entirely one of statutory, not constitutional, interpretation.<sup>67</sup>

So, on analysis, of the due process half of *Crowell*. Prior to that decision the Court had twice declared, in appeals under the Utah Workmen's Compensation Act, that due process required a substantial causal connection between the injury and the employment.<sup>68</sup> And because the Utah Act, interpreted to apply to employees killed on their way to work, was deemed to extend close to constitutional bounds, the Court, consistently with *Ben Avon*, made its own independent judgment on the basis of the administrative record.<sup>69</sup> *Crowell v. Benson* itself, while calling for greater judicial participation than permitted under the substantial evidence test in determination of facts decisive of constitutionality, nevertheless moved back to the employment relation the constitutional line protective of property. Consistently with this partial recession in substantive constitutional protection, the Court subsequently indicated in a line of decisions<sup>70</sup> that whether or not an industrial accident arose out of or in the course of the employment presented no constitutional issue and therefore required only the substantial evidence test.

In seeking at this point in time to measure the vitality of *Crowell*, Professor Schwartz reflected the puzzlement of judges and commentators in the following passage:<sup>71</sup>

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<sup>67</sup> The textual assertion concerns congressional power vis-a-vis the states. Problems of constitutional interpretation and application remain as regards state power over foreign and interstate commerce in the absence of congressional preemption. Consistently, the doctrine of constitutional fact continues to be of significance in this area. *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 659 (1945) (Ohio taxation of foreign commerce), and *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 771 (1945) (Arizona regulation of interstate commerce) are illustrative. In *Evatt* the Court independently reviewed the facts of record; in *Southern Pacific*, the findings of fact. In each the Court found undue burden decisive of invalidity.

<sup>68</sup> *Cuhady Packing Co. v. Parramore*, 263 U.S. 418 (1923); *Bountiful Brick Co. v. Giles*, 68 Utah 600, 251 P. 255 (1926), *aff'd*, 276 U.S. 154 (1928).

<sup>69</sup> Professor Dickinson so interpreted these decisions in his oft-cited critique of *Crowell v. Benson*. Dickinson, *Crowell v. Benson: Judicial Review of Administrative Determinations of "Constitutional Fact"*, 80 U. PA. L. REV. 1055, 1071 nn.52 & 53 (1932) [hereinafter cited as Dickinson].

<sup>70</sup> *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951); *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469 (1947); *Del Vecchio v. Bowers*, 296 U.S. 280 (1936); *Voehl v. Indemnity Ins. Co.*, 288 U.S. 162 (1933).

<sup>71</sup> Schwartz 171.

It is difficult to see why, if Chief Justice Hughes was correct in his assertion that the existence of an employer-employee relationship was essential to the power of Congress to impose liability without fault, the same was not also true of the relation of the injury to the employment. . . . And would not the same apply to the question of whether there was, in fact, any injury or disability? Yet *Crowell v. Benson* lists only the two "fundamental jurisdictional" facts.

One wonders, too, whether Chief Justice Hughes' assertion that the existence of an employment relation is essential to the constitutional operation of a compensation scheme would be followed by the present Court. In the first place, it is the Congress who have the constitutional authority to define the classes of "employees" who are to receive compensation. But, it may be argued, this does not detract from the proposition that the legislative power is limited by the bounds set by the concept of "employment."

In his *Crowell* dissent, Mr. Justice Brandeis, speaking for Justices Roberts and Stone as well as for himself, could not "believe that the issue of employment is one of constitutional right" and, as Professor Schwartz contends, this view appears now established by the Court's major decision in *National Labor Relations Board v. Hearst Publications*.<sup>72</sup> Whether the line of constitutional defense has receded even beyond this point is uncertain. But it is clear that the substantial diminution in the substantive property content of due process has left little upon which *Crowell* can operate until such time as legislatures may again crowd constitutional limits by major enlargement of the coverage of workmen's compensation statutes. Yet it is not the *Crowell* requirement of more than substantial evidence that is "about gone," but the content of property due process.

*American Trucking Association v. United States*, discussed a few paragraphs back,<sup>73</sup> demonstrates the Court's continuing acceptance of a close interplay between "constitutional fact" on the one hand and, on the other, constitutional limitation on property expropriation. Following immediately the passage above quoted are these concluding paragraphs:

"Confiscatory" is not a magic word. Whether it should open the door to further proceedings depends on the nature of the

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<sup>72</sup> 322 U.S. 111 (1944).

<sup>73</sup> See pp. 236-37 *supra*.

order attacked. We think a claim of rate confiscation, which was the concern of the cases just cited, stands on a fundamentally different footing from that made in the instant case. Rate-making represents an order affecting the volume of income; it is said to confiscate property when it prohibits a reasonable return on investment beyond operating and initial costs. But the economic significance of the abolishment of trip-leasing is not nearly so direct. The Commission has merely determined by what method the carrier's income is to be produced, and not how much it may charge.

It is true that we have admonished the Commission and the Courts to permit introduction of evidence on the economic impact of a rate order where the claim that it could not have been prof-fered during the original proceedings was genuine. But that was because the 'constitutional right of compensation,' *St. Joseph Stock Yards Co. v. United States* . . . , was drawn in question. Here, appellants can make no comparable claim. They attack an order which is valid even if its effect is to drive some operators out of business. . . . This being the case, appellants had no constitutional claim in support of which they are entitled to introduce evidence de novo, and the court did not err in sus-taining the objection thereto.<sup>74</sup>

In sum, the motor carriers had no right to introduction of evi-dence de novo not alone because they could not qualify under the exception to the general rule but, as well, because they did not have the constitutional claim to justify that degree of judicial interven-tion.

#### CONSTITUTIONAL RIGHTS IN TRANSITION; "CONSTITUTIONAL FACT" RENASCENT

While constitutional limits have receded in the area of economic interests, they have made rapid and revolutionary advances as con-cerns First Amendment freedoms. This phenomenon of constitu-tional life is altogether too familiar to require documentation. From many possible illustrations of the new restrictions, those of decisions respecting municipal regulation of public parks and streets perhaps portray most vividly the dimensions of the change. While on the Supreme Judicial Court of Massachusetts, Holmes had sustained the power of the City of Boston to exclude whom it would from

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<sup>74</sup> 344 U.S. at 321-323.

Boston Common on analogy of city parks to residential property: surely, the City owns its lands in the same absolute sense as does the private individual.<sup>75</sup> The decision was affirmed in the Supreme Court of the United States.<sup>76</sup> This view has now been repudiated for nearly thirty years.<sup>77</sup> Presumably, judicial interment by the reconstructed Court was unobtrusive out of respect for the venerable Yankee from Olympus. A distinguished committee of the American Bar Association, appearing amici curiae, served as honorary pallbearers. So as to a city's streets; although the city retains authority for reasonable regulations of traffic, noise, and the like, its formerly unquestioned power to license their use on its own terms now rests in the graveyard of rejected constitutional doctrine.<sup>78</sup> Even the burden of litter must be assumed by the city where those in the tradition of Thomas Paine find little sustained interest for their pamphlets.<sup>79</sup> Moving with almost breath-taking speed on other dimensions, the Court is bringing within the ambit of first amendment protection civil interests which but a short time ago had no constitutional underpinning whatsoever. As especially noteworthy sequence is that of *NAACP v. Button*,<sup>80</sup> 1963; *New York Times v. Sullivan*,<sup>81</sup> 1964; *Griswold v. Connecticut*,<sup>82</sup> 1965; *Memoirs v. Massachusetts*,<sup>83</sup> 1966; *Time, Inc. v. Hill*,<sup>84</sup> 1967.

Familiar also is the revolutionary expansion of procedural guarantees, especially those pertaining to the criminally accused. The initial breakthrough came hard on the heels of *Near v. Minnesota*,<sup>85</sup> which in 1931 implemented by a holding of unconstitutionality the Court's earlier assumption that the fourteenth amendment contains the equivalent of the First Amendment. *Powell v. Alabama*<sup>86</sup> was decided in 1932; *Norris v. Alabama*<sup>87</sup> in 1935; *Brown v. Missis-*

<sup>75</sup> *Commonwealth v. Davis*, 162 Mass. 510, 39 N.E. 113 (1895).

<sup>76</sup> *Davis v. Massachusetts*, 167 U.S. 43 (1897).

<sup>77</sup> *Hague v. CIO*, 307 U.S. 496 (1939).

<sup>78</sup> *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

<sup>79</sup> *Schneider v. State*, 308 U.S. 147 (1939).

<sup>80</sup> 371 U.S. 415 (1963).

<sup>81</sup> 376 U.S. 254 (1964).

<sup>82</sup> 381 U.S. 479 (1965).

<sup>83</sup> 383 U.S. 413 (1966).

<sup>84</sup> 385 U.S. 374 (1967).

<sup>85</sup> 283 U.S. 697 (1931).

<sup>86</sup> 287 U.S. 45 (1932).

<sup>87</sup> 294 U.S. 587 (1935).

sippi<sup>88</sup> in 1936; *Palko v. Connecticut*<sup>89</sup> in 1937; *Johnson v. Zerbst*,<sup>90</sup> in 1938. During the past thirty years expansive decisions have been many and significant. A portentous string of recent date is *Gideon v. Wainwright*,<sup>91</sup> 1963; *Escobedo v. Illinois*<sup>92</sup> and *Malloy v. Hogan*<sup>93</sup> in 1964; *Pointer v. Texas*,<sup>94</sup> 1965; *Miranda v. Arizona*<sup>95</sup> and *Sheppard v. Maxwell*<sup>96</sup> in 1966; *In re Gault*,<sup>97</sup> 1967.

If the doctrine of constitutional fact does in fact have remaining vitality, one should find it emerging in these areas of civil liberties. For, clearly, its functional *locus* is at the points where constitutional restriction cuts sharply into attempted governmental objectives. A bellwether of developments to come was *Estep v. United States*,<sup>98</sup> of the vintage of World War II. A section of the Selective Service Act exempted from military training and service, although not from registration, regularly or duly ordained ministers of religion. Estep, a Jehovah's Witness, claimed the exemption but it was denied by his local board. Refusing to proceed with induction, Estep was prosecuted and convicted for violation of the Act. After an unsuccessful appeal to the court of appeals, he won reversal and new trial at the hands of the Supreme Court of the United States. With a nod to *Fung Ho* for the thesis that "judicial review may indeed be required by the Constitution,"<sup>99</sup> the Court concluded that, because "We are dealing here with a question of personal liberty," it "cannot read § 11 as requiring the courts to inflict punishment on registrants for violating" orders of local boards which are beyond their jurisdiction.<sup>100</sup>

Although technically in concurrence, Mr. Justice Frankfurter would have none of the Court's line of reasoning:<sup>101</sup>

This argument revives, if indeed it does not multiply, all the casuistic difficulties spawned by the doctrine of "jurisdictional

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<sup>88</sup> 297 U.S. 278 (1936).

<sup>89</sup> 302 U.S. 319 (1937).

<sup>90</sup> 304 U.S. 458 (1938).

<sup>91</sup> 372 U.S. 335 (1963).

<sup>92</sup> 378 U.S. 478 (1964).

<sup>93</sup> 378 U.S. 1 (1964).

<sup>94</sup> 380 U.S. 400 (1965).

<sup>95</sup> 384 U.S. 436 (1966).

<sup>96</sup> 384 U.S. 333 (1966).

<sup>97</sup> 387 U.S. 1 (1967).

<sup>98</sup> 327 U.S. 114 (1946).

<sup>99</sup> *Id.* at 120.

<sup>100</sup> *Id.* at 121-22.

<sup>101</sup> *Id.* at 142.

fact." In view of the criticism which that doctrine, as sponsored by *Crowell v. Benson*, . . . brought forth and of the attritions of that case through later decisions, one had supposed that the doctrine had earned a deserved repose.<sup>102</sup>

The *Selective Service Draft Law Cases* from World War I<sup>103</sup> make it clear that the exemption involved in *Estep* was the product of congressional grace and not of constitutional requirement. The issue, therefore, involved jurisdictional fact, not constitutional fact.<sup>104</sup>

The "constitutional fact" doctrine was not long in making its appearance in the areas of the Supreme Court's new concentration. Indeed, it is a valid generalization that insistence upon an independent judicial judgment on constitutional facts has here followed the delineation of each new constitutional right. With respect to several types of non-economic constitutional claims, that delineation had occurred before the year of the *Estep* decision; and in each of those situations "constitutional fact" had emerged as a requirement by the time Mr. Justice Frankfurter was expressing the hope "that the doctrine had earned a deserved repose." Among more recent delineations, the historic *New York Times* case is significant for the simultaneous appearance of a newly-drawn constitutional line and full-blown constitutional fact. "The Court makes malice a 'constitutional fact' that it will review de novo and indeed did review de novo in the case itself."<sup>105</sup> The detail of the persistence of "constitutional fact" doctrine in the new judicial age warrants more attention than commentators have given it, especially in light of the serious implications for constitutional adjudication which widespread use of the doctrine involves when coupled with the balancing test for fixing the line between governmental power and private right.

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<sup>102</sup> Compare Mr. Justice Frankfurter dissenting in *Yonkers v. United States*, 320 U.S. 685, 692 (1944).

<sup>103</sup> 245 U.S. 366 (1918).

<sup>104</sup> Lest misunderstanding arise from reference to *Estep*, it should be cautioned that the difference between the Court and Mr. Justice Frankfurter was not one over independent judgment versus substantial evidence but of minimal judicial review as against none at all. What makes *Estep* relevant is the Court's continuing feeling that the quantum of judicial review should be greater with respect to jurisdictional fact.

<sup>105</sup> Kalven, *The New York Times Case: A Note on the "Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 220 (1964).

## "CONSTITUTIONAL FACT" AND PROCEDURAL RIGHTS

*Jury Discrimination Cases*

Although the constitutional prohibition against racial discrimination in jury selection does date back to 1880<sup>106</sup> its first thirty-some years were marked by impediments in its application. Until 1910 challenges were dogged by difficulties where removal to federal court was attempted,<sup>107</sup> by failures in time or form properly to raise the claim in the state courts,<sup>108</sup> and by lack of success in satisfying the Court of discrimination even when procedural obstacles were overcome.<sup>109</sup> For twenty-five years thereafter Shepard's discloses no pertinent litigation in the Supreme Court. Then came *Norris v. Alabama*,<sup>110</sup> the second successful resort to the Supreme Court on behalf of the Scottsboro Negroes. "There is no controversy as to the constitutional principle involved. That principle, long since declared, was not challenged, but was expressly recognized by the Supreme Court of the State."<sup>111</sup> Nor, with able counsel for Norris, did technical obstacles prevent a reaching of the issue of discrimination. "The question is of the application of this established principle to the facts disclosed by the record."<sup>112</sup> Continuing, Chief Justice Hughes for a unanimous Court then immediately proceeded to a consideration of the extent to which there would be review of the State conviction.

That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether

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<sup>106</sup> *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Ex parte Virginia*, 100 U.S. 339 (1880).

<sup>107</sup> *Gibson v. Mississippi*, 162 U.S. 565 (1896); *In re Wood* 140 U.S. 278 (1891); *Bush v. Kentucky*, 107 U.S. 110 (1883); *Neal v. Delaware*, 103 U.S. 370 (1881); *Virginia v. Rives*, 100 U.S. 313 (1880). *Wood* was a petition for habeas corpus.

<sup>108</sup> *Franklin v. South Carolina*, 218 U.S. 161 (1910); *Martin v. Texas*, 200 U.S. 316 (1906); *Rogers v. Alabama*, 212 U.S. 226 (1904); *Tarrance v. Florida*, 188 U.S. 519 (1903); *Gibson v. Mississippi*, 162 U.S. 565 (1896); cf. *Carter v. Texas*, 177 U.S. 442 (1900).

<sup>109</sup> *Thomas v. Texas*, 212 U.S. 278 (1909). The accused was successful in the *Neal* and *Bush* cases cited *supra* note 107, and in *Carter* and *Rogers* cited *supra* note 108.

<sup>110</sup> 294 U.S. 587 (1935).

<sup>111</sup> *Id.* at 589. For authority the Court cites most of the decisions of the 1880-1910 period, collected *supra* notes 106, 107, 108, and 109.

<sup>112</sup> *Id.* at 589.

it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured.<sup>113</sup>

The remainder of the opinion was devoted to an examination of the evidence. That this examination was thorough is patent. Illustrative is the Court's disposition of a dispute as to the genuineness of entries of the names of six negroes on the jury roll. Testimony showed that an incoming jury commissioner had directed the new clerk to draw lines under the list of names appearing on the jury roll prepared under the direction of the old commission; that the lines on the pages in question had been drawn in red; that the names of the negroes, in each instance appearing above the red lines, had not been entered by the clerk of the former commission; and that the entries made by the new clerk were below these lines. An expert witness for the defense, who was neither cross-examined nor contradicted, gave it as his judgment that the names in question had been superimposed upon the red lines. Footnoting that "The books containing the jury roll in question were produced on the argument at this bar and were examined by the Court,"<sup>114</sup> the Chief Justice concluded that the evidence did not justify the trial court's conclusion that names of the negroes were originally on the old jury roll. Perhaps in the interest of achieving unanimity of opinion it was unwise to risk the opening of still-fresh wounds within the Court. Neither *Ben Avon*, *Crowell* nor *Fung Ho* is anywhere cited in the opinion, but there is no mistaking that the degree of independent judicial review surviving from them constitutes the decision's inarticulated major premise.

By express reliance upon *Norris*, the doctrine of that case was unanimously reaffirmed by the Court at about midpoint in its "reconstruction."<sup>115</sup> Reversing on certiorari an affirmance of con-

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<sup>113</sup> *Id.* at 589-90.

<sup>114</sup> *Id.* at 593.

<sup>115</sup> The Court was at the time composed of Chief Justice Hughes, and Black, Brandeis, Butler, Frankfurter, McReynolds, Reed, Roberts, & Stone, JJ.



viction of a negro by the supreme court of Louisiana, the then new Mr. Justice Black declared in *Pierre v. Louisiana*:<sup>116</sup>

In our consideration of the facts the conclusions reached by the Supreme Court of Louisiana are entitled to great respect. Yet, when a claim is properly asserted—as in this case—that a citizen whose life is at stake has been denied the equal protection of his country's laws on account of his race, it becomes our solemn duty to make independent inquiry and determination of the disputed facts—for equal protection to all is the basic principle upon which justice under law rests.<sup>117</sup>

When fully reconstructed, the Court soon began to disclose an internal division over the meaning of insistence that determinations of the State courts on the question of negro jury exclusion warrant "great respect." In *Akins v. Texas*<sup>118</sup> Mr. Justice Reed for the Court, after citing *Norris* for the proposition that an assertion of race discrimination "calls for our examination of evidence to determine for ourselves whether a Federal constitutional right has been denied, expressly or in substance and effect," asserts that the great respect for conclusions of the state judiciary called for by *Pierre* "leads us to accept the conclusion of the trier on disputed issues 'unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process' or equal protection."<sup>119</sup> Because Chief Justice Stone and Mr. Justice Black dissented without opinion, it is conjectural whether they took exception to the limitation on scope of review or found discrimination even on the undisputed facts. Dissenting in opinion, Mr. Justice Murphy did not express himself on the issue of scope of review but appears to have based his conclusion on an independent judgment on the entire record without distinguishing between disputed and undisputed facts. After two decisions in which for technical reasons great weight could not properly be given to the state court determinations,<sup>120</sup> differences among the

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<sup>116</sup> 306 U.S. 354 (1939).

<sup>117</sup> *Id.* at 358.

<sup>118</sup> 325 U.S. 398 (1945).

<sup>119</sup> *Id.* at 402. The Court's own quotation is from *Lisenba v. California*, 314 U.S. 219, 238 (1941), one of the relatively early forced confession cases. This category of case is considered *infra*.

<sup>120</sup> *Fay v. New York*, 332 U.S. 261, 272 (1947); *Patton v. Mississippi*, 332 U.S. 463, 466 (1947). The *Fay* litigation involved the constitutionality of New York's blue ribbon jury plan.

Justices again surfaced in *Cassell v. Texas*.<sup>121</sup> The seven Justices there reaching the question whether Negroes had been systematically excluded from the grand jury were all agreed on reversal but divided four to three on the basis for reversal. In an opinion announcing the judgment of the Court, an opinion in which he was joined by Chief Justice Vinson and Justices Black and Clark, Mr. Justice Reed dealt shortly with the matter of extent of Court review.

It was from an examination of facts that the court deduced its conclusion that racial discrimination had not been practiced. Since the result reached may deny a federal right, we may re-examine the facts to determine whether petitioner has sustained by proof his allegation of discrimination.<sup>122</sup>

This language does not expressly opt for review in the fullest sense, yet neither does it foreclose that policy. Perhaps Mr. Justice Reed, who in *Akins* cut off review of disputed facts, had altered his views; more likely is it that he had to temper his statement on this issue in order to hold Mr. Justice Black and possibly the other two with him. The Reed statement has been interpreted as calling for review even of disputed facts.<sup>123</sup> Mr. Justice Frankfurter, for himself and Justices Burton and Minton, was more categorical:

This Court does not sit as a jury to weigh conflicting evidence on underlying details, as for instance what steps were taken to make up the jury list, why one person was rejected and another taken, whether names were picked blindly or chosen by judgment. This is not the place for disputation about what really happened. On that we accept the findings of the State court. But it is for this Court to define the constitutional standards by which those findings are to be judged. Thereby the duty of securing observance of these standards may fall upon this Court.<sup>124</sup>

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<sup>121</sup> 339 U.S. 282 (1950).

<sup>122</sup> *Id.* at 283.

<sup>123</sup> Comment, *Supreme Court Review of State Findings of Fact in Fourteenth Amendment Cases*, 14 STAN. L. REV. 328, 358 n.161 (1962).

<sup>124</sup> 339 U.S. at 291-92 (concurring opinion). The context in which the above statement appeared merits quotation in full:

A claim that the constitutional prohibition of discrimination was disregarded calls for ascertainment of two kinds of issues which ought not to be confused by being compendiously called "facts." The demonstrable, outward events by which a grand jury came into being raise issues quite different from the fair inferences to be drawn from what took place in determining the constitutional question: was there a purposeful non-inclusion of Negroes because of race or a merely symbolic representation, not the operation of an honest exercise of relevant judgment or the uncontrolled caprices of chance?

This Court does not sit as a jury to weigh conflicting evidence on

The issue posed by the internal Court conflict in *Cassell* has not been resolved, decisions subsequent to 1950 having turned on the constitutional interpretation of undisputed facts.<sup>125</sup> As remarked by a recent commentator:

The key question—whether the Court will review and re-determine disputed facts—does not, however, appear in most cases, because there are almost never any disputed facts. The evidence for the petitioner consists generally of statistical data showing that a disproportionately small number of his race have served on juries; the state's evidence consists of disclaimers of intent to discriminate, and attempts to explain the statistics. Since usually the statistics are irrefutable and establish a prima facie case despite any disclaimers of intent, the cases generally turn on the state's ability to explain the disproportionate representation.<sup>126</sup>

The decisive question, is, under the commentator's classification, usually one of law application, calling for independent Court judgment on a limited factual record. This is in itself significant by comparison with review restricted to Court inquiry into the presence or absence of substantial evidence supporting the State finding of non-discrimination. But more importantly, the *Norris-Pierre* precedent is well-entrenched in the cases,<sup>127</sup> Mr. Justice Black's "sacred trust" philosophy as to the Court's obligation toward the Bill of Rights<sup>128</sup> is consistent only with Court review of the full record; and, as borne out by the contemporaneous *Watts* decision on forced confessions, the Frankfurter pronouncement came at the height of

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underlying details, as for instance what steps were taken to make up the jury list, why one person was rejected and another taken, whether names were picked blindly or chosen by judgment. This is not the place for disputation about what really happened. On that we accept the findings of the State court. But it is for this Court to define the constitutional standards by which those findings are to be judged. Thereby the duty of securing observance of these standards may fall upon this Court. The meaning of uncontrovertible facts in relation to the ultimate issue of discrimination is precisely the constitutional issue on which this Court must pass. [Citation omitted]. Of course even as to this, as always when a State court judgment is claimed to be in disregard of the Constitution, appropriate respect should be given to the State court.

<sup>125</sup> *Swain v. Alabama*, 380 U.S. 202 (1965) (peremptory strike system); *Arnold v. North Carolina*, 376 U.S. 773 (1964); *Eubanks v. Louisiana*, 356 U.S. 584 (1958); *Hernandez v. Texas*, 347 U.S. 475 (1954); *Avery v. Georgia*, 345 U.S. 559 (1953).

<sup>126</sup> Note, 14 STAN. L. REV. 328, 358 (1962).

<sup>127</sup> See discussion *infra* under *Forced Confession Cases*.

<sup>128</sup> Black, *The Bill of Rights*, 35 N.Y.U.L. Rev. 865, 880 (1960).

his influence in the Court.<sup>129</sup> There is therefore much basis for believing that, should any allegation of jury discrimination again involve disputed fact, the Court would not hesitate to review to the extent of independent resolution of that dispute.

### *Forced Confession Cases*

Forced confessions were held inconsistent with the fifth amendment in *Bram v. United States*,<sup>130</sup> 1897, and with the fourteenth amendment in *Brown v. Mississippi*,<sup>131</sup> 1936. The technical distinction in the basis of the two rulings, now obliterated by the decision in *Malloy v. Hogan*,<sup>132</sup> is in any event not germane to the present discussion. *Chambers v. Florida*,<sup>133</sup> the first case to deal explicitly with scope of review,<sup>134</sup> was decided in 1940. In an opinion by Mr. Justice Black for a unanimous Court, the question of the extent of the Court's reviewing power was immediately faced. To Florida's challenge that the Court had no jurisdiction to look behind the judgments below to the issues of fact finally determined already by a jury, Mr. Justice Black answered:

Since petitioners have seasonably asserted the right under the Federal Constitution to have their guilt or innocence of a capital crime determined without reliance upon confessions obtained by means proscribed by the due process clause of the Fourteenth Amendment, we must determine independently whether petitioners' confessions were so obtained, by review of the facts upon which that issue necessarily turns.<sup>135</sup>

Significantly, the cases cited for this proposition were *Norris* and *Pierre*, discussed in the immediately preceding section of this article. On thorough scrutiny of the record the Justice found "a sharp conflict upon the issue of physical violence and mistreatment" but none as to psychological coercion. The convictions were, needless to say, overturned.

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<sup>129</sup> See, e.g., the comment of JAFFE 654 n.86, on *Norris* and *Watts*.

<sup>130</sup> 168 U.S. 532 (1897).

<sup>131</sup> 297 U.S. 278 (1936).

<sup>132</sup> 378 U.S. 1 (1964).

<sup>133</sup> 309 U.S. 227 (1940).

<sup>134</sup> Thorough review of the record was a feature of both *Ziang Sun Wan v. United States*, 266 U.S. 1 (1924), and *Brown v. Mississippi*, 297 U.S. 278 (1936); but in neither did the Court express its views on scope of review. The facts being undisputed in each case, there was no occasion for the Court to resolve the question of its position as to review of disputed facts. In each instance, conviction was reversed.

<sup>135</sup> 309 U.S. at 228-29.

After exhaustive review of the record, a majority of the Court, in *Lisenba v. California*,<sup>136</sup> affirmed a California conviction. Through Mr. Justice Roberts, that majority stated the rule for review as follows:

Where the claim is that the prisoner's statement has been procured by [compulsion] we are bound to make an independent examination of the record to determine the validity of the claim. The performance of this duty cannot be foreclosed by the finding of a court, or the verdict of a jury, or both. If the evidence bearing upon the question is uncontradicted, the application of the constitutional provision is unembarrassed by a finding or a verdict in a state court; even though, in ruling that the confession was admissible, the very tests were applied in the state court to which we resort to answer the constitutional question.

There are cases, such as this one, where the evidence as to the methods employed to obtain a confession is conflicting, and in which, although denial of due process was not an issue in the trial, an issue has been resolved by court and jury, which involves an answer to the due process question. In such a case we accept the determination of the triers of fact, unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process.<sup>137</sup>

Dissenting, Mr. Justice Black, joined by Mr. Justice Douglas, weighed the evidence, including that in dispute, to conclude that the facts were sufficient to make applicable the principles and conclusion of *Chambers*.<sup>138</sup> They did not dissent in a shortly subsequent decision that appears to have applied the majority test.<sup>139</sup>

However, in *Ashcraft v. Tennessee*,<sup>140</sup> with Mr. Justice Black again assigned to write the majority opinion, the Roberts formulation is significantly shortened.

This treatment of the confessions by the two State courts, the manner of the confessions' submission to the jury, and the emphasis upon the great weight to be given confessions make all the more important the kind of "independent examination" of petitioners' claims which, in any event, we are bound to make. *Lisenba v. California* . . . Our duty to make that examination

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<sup>136</sup> 314 U.S. 219 (1941).

<sup>137</sup> *Id.* at 237-38.

<sup>138</sup> *Id.* at 243.

<sup>139</sup> *Ward v. Texas*, 316 U.S. 547 (1942). "Conceding that the question of physical mistreatment was conclusively resolved by the jury's verdict, we return to the admitted facts" to find psychological coercion. *Id.* at 552. Opinion by Mr. Justice Byrnes for a unanimous Court.

<sup>140</sup> 322 U.S. 143 (1944).

could not have been "foreclosed by the finding of a court, or the verdict of a jury, or both." We proceed therefore to consider the evidence relating to the circumstances out of which the alleged confessions came.<sup>141</sup>

To the Court's conclusion that the confessions were coerced, Mr. Justice Jackson took exception in a dissent in which he was joined by Frankfurter and Roberts, JJ.

In determining these issues of fact, respect for the sovereign character of the several states always has constrained this Court to give great weight to findings of fact of state courts. While we have sometimes gone back of state court determinations to make sure whether the guarantees of the Fourteenth Amendment have or have not been violated, in close cases the decisions of state courts have often been sufficient to tip the scales in favor of affirmance. . . .

As we read the present decision the Court in effect declines to apply these well-established principles. Instead, it: (1) substitutes for determination on conflicting evidence the question whether this confession was actually produced by coercion, a presumption that it was, on a new doctrine that examination in custody of this duration is "inherently coercive;" (2) it makes that presumption irrebuttable—i.e., a rule of law—because, while it goes back of the State decisions to find certain facts, it refuses to resolve conflicts in the evidence to determine whether other of the State's proof is sufficient to overcome such presumption; and, in so doing, (3) it sets aside the findings by the courts of Tennessee that on all the facts this confession did not result from coercion, either giving those findings no weight or regarding them as immaterial.<sup>142</sup>

The first of these two paragraphs, which cites to *Lisenba*, constitutes the dissent's reaffirmation of the rule for review as there articulated. The second paragraph is significant for the assertion of the dissenters that the majority have essayed beyond their earlier insistence upon resolving even disputed facts; now they want to dispose of the issues in this class of case by a rule of law to the effect that confession under circumstances of long and intensive grilling, incommunicado and without aid of counsel, is inherently coercive. In retrospect, any care in reading the forced confession cases discloses *Escobedo* and *Miranda* in gestation; but to anticipate them by two decades is indeed prescient.

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<sup>141</sup> *Id.* at 147-48.

<sup>142</sup> *Id.* at 157-58.

Passing over two intervening decisions which appear to deal with a deviational problem,<sup>143</sup> examination of the coerced confession cases next brings us to *Haley v. Ohio*.<sup>144</sup> There a minority of four, in an opinion by Mr. Justice Burton, quoted the *Lisenba* rule in full, and regarded it as controlling.

This Court properly reserves to itself an opportunity to consider the record in a case like this independently from the consideration given to that record by the lower courts. However, when credibility plays as large a part in the record as it does in this case, this Court rarely can justify a reversal of the judgment of the trial court and the verdict of the jury.<sup>145</sup>

It required the separate concurrence of Mr. Justice Frankfurter to carry the day for reversal. He joined in reversal because the "psychological judgment" required of him in this type of case<sup>146</sup> led him to a conclusion of coercion in the circumstances of the situation before the Court. Citing *Ashcraft*, the double duo of Black-Douglas and Murphy-Rutledge insisted that "the ruling of the trial court and the finding of the jury on the voluntary character of the confession do not foreclose the independent examination which it is our duty to make here,"<sup>147</sup> but limited itself to the undisputed evidence in finding coercion.

Then came *Watts v. Indiana*,<sup>148</sup> to which reference has been made in concluding the section on representative jury. Announcing the judgment of the Court for reversal, Mr. Justice Frankfurter in opening his opinion asserts that:

On review here of State convictions, all those matters which are usually termed issues of fact are for conclusive determination by the State courts and are not open for reconsideration by this Court. Observance of this restriction in our review of State

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<sup>143</sup> *Malinski v. New York*, 324 U.S. 401 (1945); *Lyons v. Oklahoma*, 322 U.S. 596 (1944). The question in *Lyons* was whether the first confession, admittedly coerced, infected the second, otherwise voluntary, which was used at the trial. The passage in which the majority insist that not only the disputed facts but as well the inferences to be drawn from admitted facts are for the trial judge and the jury, *see* 322 U.S. at 602, must be read in this context. Even so, Black, Murphy and Rutledge, JJ., dissented. The *Lyons* ruling was explained in *Malinski*, another two-confession case. *Cf.* the analysis of these two cases in 14 STAN. L. REV. 328, 343 (1962).

<sup>144</sup> 322 U.S. 596 (1948).

<sup>145</sup> *Id.* at 623-24 (dissenting opinion).

<sup>146</sup> *Id.* at 603.

<sup>147</sup> *Id.* at 599.

<sup>148</sup> 338 U.S. 49 (1949).

courts calls for utmost scruple. But "issue of fact" is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights. Such standards and criteria, measured against the requirements drawn from constitutional provisions, and their proper applications, are issues for this Court's adjudication. *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 659 and cases cited. Especially in cases arising under the Due Process Clause is it important to distinguish between issues of fact that are here foreclosed and issues which, though cast in the form of determinations of fact, are the very issues to review which this Court sits. See *Norris v. Alabama* . . . ; *Marsh v. Alabama*. . . .<sup>149</sup>

This Frankfurterism, reminiscent of his opinion in *Cassell*, must have commanded the agreement of a majority of the Court; for he had Murphy and Rutledge with him, and the three dissenters, voting for affirmance "on the record before us and in view of the consideration given to the evidence by the state courts and the conclusion reached. . . ,"<sup>150</sup> differed with him in result but seemingly not as to scope of review. Mr. Justice Black concurred on the authority of *Chambers* and *Ashcraft*; Mr. Justice Douglas concurred in an anticipation of *Escobedo* and *Miranda*; Mr. Justice Jackson, concurring in *Watts* but dissenting in two companion cases,<sup>151</sup> again appears to have a premonition of judicial developments to come and remains *dubitante*.

How *Norris v. Alabama* can be cited by Mr. Justice Frankfurter in support of his statement of the proper scope of review is a mystery, as Professors Hart and Wechsler hint in their casebook.<sup>152</sup> Moreover, Professor Jaffe has observed, "at this level of constitutional controversy it seems futile to attempt to set up an absolute restriction at the somewhat elusive point where a finding is of a sort 'usually termed' an issue of fact. An occasional review of such an issue is surely no greater or more invidious an exercise of power than the re-evaluation by the Supreme Court of the 'psychological judgment' of a state court as to an allegedly coerced con-

<sup>149</sup> *Id.* at 50-51. For a comment on *Hooven & Allison*, see note 67 *supra*.

<sup>150</sup> 338 U.S. at 55-56.

<sup>151</sup> *Turner v. Pennsylvania*, 338 U.S. 62 (1949); *Harris v. South Carolina*, 338 U.S. 68 (1949). In these cases the Court "line up" was as in *Watts*, save for Mr. Justice Jackson's switch to dissent.

<sup>152</sup> H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 542 (1953).



fession. See *Haley v. Ohio*, 322 U.S. 596, 603 (1948) (Frankfurter, J.) . . .<sup>153</sup> Nevertheless, the Frankfurter rule of *Watts* held sway for the better part of a decade; various formulations of it appear in *Gallegos v. Nebraska*,<sup>154</sup> *Stroble v. California*,<sup>155</sup> and *Stein v. New York*.<sup>156</sup> But the *Watts* limitation on scope of review was no adoption of the substantial evidence test, as *Fikes v. Alabama*<sup>157</sup> shows. Here, in Chief Justice Warren's first opinion for the Court in a coerced confession case, there is no statement as to scope of review but the situation disclosed by the record was such as to call for Court judgment on undisputed facts stemming essentially from state evidence. Yet reversal of the conviction was ordered by the majority despite the fact that three dissenters could "find nothing here beyond a state of facts upon which reasonable men might differ in their conclusions as to whether the confessions had been coerced."<sup>158</sup>

A change in Court attitude emerges in the 1958 case of *Payne v. Arkansas*.<sup>159</sup> Mr. Justice Whittaker's statement for six members of the Court is an intriguing product of the jurist's art:

Enforcement of the criminal laws of the States rests principally with the state courts, and generally their findings of fact, fairly made upon substantial and conflicting testimony as to the circumstances producing the contested confession—as distinguished from inadequately supported findings or conclusions drawn from uncontroverted happenings—are not this Court's concern; yet where the claim is that the prisoner's confession is the product of coercion we are bound to make our own examination of the record to determine whether the claim is meritorious. 'The performance of this duty cannot be foreclosed by the finding of a court, or the verdict of a jury, or both.' The question for our decision then is whether the confession was coerced. That question can be answered only by reviewing the circumstances under which the confession was made.<sup>160</sup>

The first of the Court's footnotes, number 2, cites *Watts* at the pages from which appears the Frankfurter statement of partially limited review, and then suggests comparison with *Ashcraft* and

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<sup>153</sup> JAFFE 645 n.86.

<sup>154</sup> 342 U.S. 55, 60-61 (1951).

<sup>155</sup> 343 U.S. 181, 190 (1952).

<sup>156</sup> 346 U.S. 156, 181-82 (1953).

<sup>157</sup> 352 U.S. 191 (1957).

<sup>158</sup> *Id.* at 201.

<sup>159</sup> 356 U.S. 560 (1958).

<sup>160</sup> *Id.* at 562.

*Haley*, among other cases. Footnote 3 quotes only from the first of the two paragraphs in *Lisenba* in which, as we have seen, Justice Roberts restricted Court review to undisputed facts save in instances of extreme unfairness; it then directs that the reader "see also" *Brown*, *Chambers*, *Haley*, and *Watts*. While these citations are not without ambiguity, a return to the earlier view of unlimited review seems intended.

The two cases contemporaneous with *Payne*, *Ashdown v. Utah*<sup>161</sup> and *Crooker v. California*,<sup>162</sup> are of interest for the clear indication that a growing minority of the Justices, increasingly disenchanted with the Court's method of handling forced confession cases, is looking to other solutions—here denial of counsel at the stage of interrogation. Confirmation of a change in the Court's attitude on scope of review appears in *Spano v. New York*<sup>163</sup> and *Blackburn v. Alabama*,<sup>164</sup> in each of which the Chief Justice wrote the prevailing opinion. In the former of the two cases, *Norris v. Alabama* is the sole citation for the proposition that "we cannot escape the responsibility of making our own examination of the record."<sup>165</sup> Assuming correct citation of *Norris*, the statement signifies Court willingness to resolve even disputed questions as to "what really happened." Subsequently, in *Blackburn*, the Chief Justice cites *Spano* and the earlier cases of *Pierre v. Louisiana* and *Chambers v. Florida* in support of the "well established" proposition "that although this Court will accord respect to the conclusions of the state courts in cases of this nature, we cannot escape the responsibility of scrutinizing the record ourselves."<sup>166</sup> Like *Norris*, these cases stand for unlimited review; consistently, in *Blackburn* the Court went all the way by resolving for itself the conflict in the testimony of three psychiatrists, members of the state lunacy commission, who had examined the petitioner but had by deposition given varying judgments as to his sanity.

Participating in his last forced confession case, and assigned to announce the judgment of the Court, Mr. Justice Frankfurter took advantage of litigation in *Culombe v. Connecticut*<sup>167</sup> to write an

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<sup>161</sup> 357 U.S. 426 (1958).

<sup>162</sup> 357 U.S. 433 (1958).

<sup>163</sup> 360 U.S. 315 (1959).

<sup>164</sup> 361 U.S. 199 (1960).

<sup>165</sup> 360 U.S. at 316.

<sup>166</sup> 361 U.S. at 205 & n.5.

<sup>167</sup> 367 U.S. 568 (1961).

opinion of great length. In between a discourse on the problem of criminal law enforcement in a constitutional system and a detailed exposition of the undisputed facts of the case at hand and their constitutional consequences, the Justice tucked a statement on scope of review that rephrases his views in *Cassell* and *Watts*.<sup>168</sup> Save for Mr. Justice Stewart, who joined in the Frankfurter opinion, none of those concurring in reversal concurred in this statement. But judging from language in the dissenting opinion of Mr. Justice Harlan,<sup>169</sup> whom Clark and Whittaker, JJ., joined, it may be that in total he had a bare majority for his proposition.

Once again, however, the Court soon pulled away from this view in an opinion by his successor that commanded the assent of four other Justices. The case is *Haynes v. Washington*.<sup>170</sup> Mr. Justice Goldberg's full statement on scope of review included the following remarks:

It is well settled that the duty of constitutional adjudication resting upon this Court requires that the question whether the Due Process Clause of the Fourteenth Amendment has been violated by the admission into evidence of a coerced confession be the subject of an *independent* determination here. . . . [W]e cannot avoid our responsibilities by permitting ourselves to be completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding. . . . [A]s declared in *Ward v. Texas* . . . "when, as in this case, the question is properly raised as to whether a defendant has been denied due process of law. . . we cannot be precluded by the verdict of a jury from determining whether the circumstances under which the confession was made were such that its admission in evidence amounts to a denial of due process."<sup>171</sup>

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<sup>168</sup> *Id.* at 603-04.

<sup>169</sup> *Id.* at 642: "I agree to what my Brother Frankfurter has written . . . as to the factors which should guide federal judicial review of state action in this field."

<sup>170</sup> 373 U.S. 503 (1963).

<sup>171</sup> *Id.* at 515-16. The full statement merits quotation:

It is well settled that the duty of constitutional adjudication resting upon this Court requires that the question whether the Due Process Clause of the Fourteenth Amendment has been violated by admission into evidence of a coerced confession be the subject of an *independent* determination here, see, e.g., *Ashcraft v. Tennessee*, 322 U.S. 143, 147, 148, "we cannot escape the responsibility of making our own examination of the record," *Spano v. New York*, 360 U.S. 315, 316. While, for purposes of review in this Court, the determination of the trial judge or of the jury will ordinarily be taken to resolve evidentiary

The paragraphs quoted are from Part IV of the majority opinion. In Parts II and III, the majority is reviewing the record, to find coercion. By hindsight at least, one can feel the Court veering toward *Escobedo* and *Miranda*; the period of gestation is clearly drawing to a close.

*Clewis v. Texas*,<sup>172</sup> the latest relevant decision as of the time of writing, marks a continuation of the *Haynes* position on scope of review. One of the newest of the Justices wrote as follows for six members of the Court, with Black, Clark and Harlan, JJ., concurring in the judgment of reversal:

We approach this question [of voluntariness] from an independent examination of the whole record, our established practice in these cases. Our recent observation in *Davis v. North Carolina*, 384 U.S. 737, 741 (1966), applies equally here: "As is almost invariably so in cases involving confessions obtained through unobserved police interrogation, there is a conflict in the testimony as to the events surrounding the interrogations."<sup>173</sup>

Clearly, "independent examination of the whole record" means, where deemed necessary to vindication of the constitutional claim, review of facts disputed as well as undisputed. A footnote notation to this sentence of the Court cites to the paragraph of the *Davis* opinion which immediately follows that from which the Court quotes. There the Court speaks of its duty "to examine the entire record and to make an independent determination of the ultimate

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conflicts and may be entitled to some weight even with respect to the ultimate conclusion on the crucial issue of voluntariness, we cannot avoid our responsibilities by permitting ourselves to be "completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding." *Stein v. New York*, 346 U.S. 156, 181. As state courts are, in instances such as this, charged with the primary responsibility of protecting basic and essential rights, we accord an appropriate and substantial effect to their resolutions of conflicts in evidence as to the occurrence or nonoccurrence of factual events and happenings. This is particularly apposite because the trial judge and jury are closest to the trial scene and thus afforded the best opportunity to evaluate contradictory testimony. But, as declared in *Ward v. Texas*, 316 U.S. 547, 550, "when, as in this case, the question is properly raised as to whether a defendant has been denied the due process of law . . . we cannot be precluded by the verdict of a jury from determining whether the circumstances under which the confession was made were such that its admission in evidence amounts to a denial of due process."

*Ibid.*

<sup>172</sup> 386 U.S. 707 (1967).

<sup>173</sup> *Id.* at 708-09.

issues of voluntariness." Cited in support of this statement are, "e.g.," *Haynes*, *Blackburn* and *Ashcraft*. There also the Court finds it unnecessary to go into the disputed facts, the undisputed being sufficient to require a reversal of conviction, but the disposition to do so when needed is manifest.<sup>174</sup>

*Davis v. North Carolina*<sup>175</sup> reached the Supreme Court on certiorari from the Court of Appeals of the Fourth Circuit, which had affirmed a decision of the District Court of the Eastern District of North Carolina. From that court Davis had sought a writ of habeas corpus after affirmance of his conviction by the Supreme Court of North Carolina and denial of certiorari in the Supreme Court of the United States. On the original hearing before Federal District Judge Butler, the writ was denied on the basis of the state court record. Applying the guideline of the time, *Brown v. Allen*,<sup>176</sup> the court of appeals reversed, insisting that the situation called for an evidentiary hearing. Judge Butler then fully reheard the case, which involved much conflicting testimony; made thirteen findings of fact; and reconcluded that the confession had been voluntary. Sitting en banc, the Fourth Circuit affirmed, two judges dissenting.<sup>177</sup> Reviewing the *federal court* record with the latitude above indicated, the Supreme Court reversed.

Of three previous habeas cases carried to the Supreme Court under the *Brown* guideline, two resulted in affirmance, and one in reversal, of lower federal court denials of relief. The reversal was by a split Court in *Leyra v. Denno*.<sup>178</sup> The district judge had examined the full transcript and the state court opinions; using these the Supreme Court reviewed "the circumstances surrounding the confessions."<sup>179</sup> In *Thomas v. Arizona*<sup>180</sup> the district court had reviewed the transcript and briefs from the Arizona courts; to these the Supreme Court gave an "exhaustive review." *Cicenia*

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<sup>174</sup> *Davis v. North Carolina*, 384 U.S. 737, 742 (1966).

<sup>175</sup> *Ibid.*

<sup>176</sup> 344 U.S. 443 (1953).

<sup>177</sup> Citations to the several lower court opinions are given in the Court's opinion.

<sup>178</sup> 347 U.S. 556 (1954).

<sup>179</sup> The problem in *Leyra*, similar to that in *Lyons v. Oklahoma*, 322 U.S. 596 (1944), concerned the carry-over effect on later confessions of a prior confession admittedly coerced. The dissenters in *Lyra* cited *Lyons* as calling for a narrower Court review in this type of situation. See note 143, *supra*.

<sup>180</sup> 356 U.S. 390 (1958).

*v. LaGay*<sup>181</sup> found the Court making an "independent examination of the record"—apparently the record from the New Jersey litigation although this is not made clear in the opinion of the district judge. There were dissents in these two cases as well, but not, it would seem clear, on scope of review. In all three instances, unlike *Davis*, the facts were said by the Court to be undisputed.<sup>182</sup>

By contrast, many of the crucial facts were disputed in *Townsend v. Sain*.<sup>183</sup> A bare majority of the Court, observing that "The problem of the power and duty of federal judges, on habeas corpus, to hold evidentiary hearings—that is, to try issues of fact anew—is a recurring one,"<sup>184</sup> acknowledged that the guideline provided by *Brown v. Allen* had proved inadequate. In consequence, "we think that it is appropriate at this time to elaborate the considerations which ought properly to govern the grant or denial of evidentiary hearings in federal habeas corpus hearings."<sup>185</sup> And the Court made it clear by footnote that "By 'issues of fact' we mean to refer to what are termed basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators. . . ' *Brown v. Allen*, 344 U.S. 443 (opinion of Mr. Justice Frankfurter)."<sup>186</sup> *Fay v. Noia*<sup>187</sup> having set forth "the broad considerations bearing upon the proper interpretation of the power of the federal courts on habeas corpus," the majority in *Sain* declares through the Chief Justice that

The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary. Therefore, where an applicant for a writ of habeas corpus alleges facts, which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew.<sup>188</sup>

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<sup>181</sup> 357 U.S. 504 (1958).

<sup>182</sup> "But in the 'forced' confession cases the Court sometimes makes out a case of 'undisputed' testimony by ignoring all the evidence that points in the opposite direction. See, e.g., *Ashcraft v. Tennessee*, 322 U.S. 143, 157-58 (1944) (Jackson, J., dissenting)." JAFFE 645 n.86.

<sup>183</sup> 372 U.S. 293 (1963).

<sup>184</sup> *Id.* at 309.

<sup>185</sup> *Id.* at 310.

<sup>186</sup> *Id.* at 309 & n.6.

<sup>187</sup> 372 U.S. 391 (1963).

<sup>188</sup> *Id.* at 311-12. The quoted statement directly followed a review of the language of Congress and the history of the writ:

The rule could not be otherwise. The whole history of the writ—its unique development—refutes a construction of the federal courts'

The Chief Justice then turned to an enumeration and elaboration of the six type circumstances which make mandatory an evidentiary hearing in the federal district court.<sup>180</sup> In these situations, now incorporated into the recent revision of the habeas statute,<sup>100</sup> more than even unlimited review of the state record is required. Mandatory is nothing less than trial de novo. The doctrine of "constitutional fact" is indeed persistent, even in its more virulent form. It is true that this persistence is near an end in the administration of the constitutional rule against admission of coerced confessions. But this is because *Escobedo* and *Miranda* are taking over though they were ruled to apply only with full prospective-ness.<sup>191</sup> As remarked by the Court in *Davis v. North Carolina*, "Had the trial in this case before us come after our decision in *Miranda v. Arizona* . . . we would reverse summarily."<sup>192</sup> Again, it is substantive constitutional doctrines that change, not the doctrine of "constitutional fact." And in the present context the doctrinal change, unlike that with respect to due process protection of property

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habeas corpus powers that would assimilate their task to that of courts of appellate review. The function on habeas is different. It is to test by way of an original civil proceeding, independent of the normal channels of review of criminal judgments, the very gravest allegations. State prisoners are entitled to relief on federal habeas corpus only upon proving that their detention violates the fundamental liberties of the person, safeguarded against state action by the Federal Constitution. Simply because detention so obtained is intolerable, the opportunity for redress, which presupposes the opportunity to be heard, to argue and present evidence, must never be totally foreclosed. See *Frank v. Mangum*, 237 U.S. 309, 345-350 (dissenting opinion of Mr. Justice Holmes). It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues. Thus a narrow view of the hearing power would totally subvert Congress' specific aim in passing the Act of February 5, 1867, of affording state prisoners a forum in the federal trial courts for the determination of claims of detention in violation of the Constitution.

*Ibid.*

<sup>180</sup> In *Jackson v. Denno*, 378 U.S. 368 (1964), again with "substantial facts in dispute," the majority declared that "Jackson is entitled to a reliable resolution of these evidentiary conflicts. . . . At the very least, *Townsend v. Sain* . . . would require a full evidentiary hearing to determine the factual context in which Jackson's confession was given. However, we think that the further proceedings to which Jackson is entitled should occur initially in the state courts rather than in the federal habeas corpus court." *Id.* at 392-93. The explanation for this procedure in *Denno*, see 78 HARV. L. REV. 143, 211-13 (1964); 49 MINN. L. REV. 360 (1964), lies afield of the present inquiry.

<sup>180</sup> 28 U.S.C. § 2254 (1966).

<sup>191</sup> *Johnson v. New Jersey*, 384 U.S. 719 (1966).

<sup>192</sup> 384 U.S. 737, 739 (1966). See also 384 U.S. at 740.

rights, is very likely to continue in its wake Court adherence to broad review of those fewer, more easily ascertained issues of constitutional fact that will remain.

### "CONSTITUTIONAL FACT" AND SUBSTANTIVE CIVIL LIBERTIES

#### *Free Speech-Fair Trial—The Contempt Cases*

Turning from procedural to substantive guarantees, protective of personal liberty, for further testing of the persistence of the doctrine of "constitutional fact," one encounters a hybrid situation. This is the area of constructive contempt, now more commonly identified as that of conflict between free speech-press and fair trial. Against the English and early American developments adequately canvassed elsewhere,<sup>193</sup> it is sufficient for present purposes to commence inquiry with *Toledo Newspaper Co. v. United States*.<sup>194</sup> There the federal statute on contempt of court<sup>195</sup> was construed to embrace judicial penalization of newspaper criticism and ridicule of a federal district judge made not literally, but only constructively, in his presence. Moreover, the statute thus broadly construed as a matter of ordinary judicial review was deemed to be free of any abridgement of the freedom of the press. "The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests, and that freedom, therefore, does not and cannot be held to include the right virtually to destroy such institutions."<sup>196</sup> Scope of review fared no better than did the substantive constitutional claim; the Court expressed complete satisfaction with the action of the circuit court of appeals which, "not asserting the right or attempting to exert the power to review the merely evidentiary facts found by the trial court, but accepting them, [had] in express terms sanctioned the inferences of ultimate fact drawn from them by the trial court."<sup>197</sup> Although the Holmes dissent, joined by Brandeis, was written on the eve of the generative decision in *Schenck v. United States*,<sup>198</sup> there is no challenge of the majority's

<sup>193</sup> GOLDFARB, *THE CONTEMPT POWER* 77-91 (1963) [hereinafter cited as GOLDFARB].

<sup>194</sup> 247 U.S. 402 (1918).

<sup>195</sup> Now 18 U.S.C. § 401 (1964).

<sup>196</sup> 247 U.S. at 419.

<sup>197</sup> 247 U.S. at 415.

<sup>198</sup> 249 U.S. 47 (1919).



treatment of the newspaper's constitutional claim; the disagreement is over statutory meaning.<sup>199</sup>

Technically, the Court in *Nye v. United States*,<sup>200</sup> overruling *Toledo*, holds to the level of statutory interpretation.

We are dealing here only with a problem of statutory construction, not with a question as to the constitutionally permissible scope of the contempt power. But that is no reason why we should adhere to the construction adopted by *Toledo Newspaper Co. v. United States* . . .<sup>201</sup>

Yet in light of decisions occurring meantime concerning free speech and press limitations on both Congress and state legislatures, the constitutional issue could not have been far in the background. An educated guess is that perhaps at this juncture in constitutional adjudication, statutory interpretation offered greater protection to the press than did constitutional limitation. The majority position in *Gitlow*,<sup>202</sup> that the "any tendency" test applies to fix the constitutional line where a statute specifically proscribes a class of speech, had not yet been definitely set aside; *Nye* correctly treated *Toledo* as reading the federal contempt of court statute to justify judicial action where there was a "reasonable tendency" that newspaper criticism would obstruct the administration of justice;<sup>203</sup> ergo, the repudiation of that interpretation, substituting therefor the requirement of physical proximity of contumacy to courtroom, would yield the greater protection.

In any event, *Bridges v. California*,<sup>204</sup> originally argued before the decision in *Nye* but decided shortly thereafter following re-argument, brought the constitutional issue to the fore.<sup>205</sup> There ensued a historic debate between two juristic titans concerning the constitutional principle properly applicable to the question whether California courts had the power to punish for contempt Los Ange-

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<sup>199</sup> It is true that the language of the second half of the dissent has the ring of later Holmes-Brandeis application of the constitutional test of clear and present danger. But in *Toledo* this language relates to statutory meaning.

<sup>200</sup> 313 U.S. 33 (1941).

<sup>201</sup> 313 U.S. at 50. Similarly, the dissent went only to the issue of statutory interpretation.

<sup>202</sup> *Gitlow v. New York*, 268 U.S. 652 (1925).

<sup>203</sup> See the language of the *Nye* majority, 313 U.S. at 52; GOLDFARB 91-92.

<sup>204</sup> 314 U.S. 252 (1941).

<sup>205</sup> GOLDFARB 93.

les Times-Mirror for its editorial, and Harry Bridges for his telegraphic comment, on pending cases. "Clear and present danger" won the day in a Court split 5 to 4, with Mr. Justice Black writing the majority opinion for five Justices and Mr. Justice Frankfurter the dissent for four, including the Chief Justice. That the test decisive of constitutionality in this hybrid type of case would involve unruly facts and tortuous inferences was clearly foretold by the majority's summation of the essence of the test.

What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.<sup>206</sup>

Five years after *Bridges* the Court had before it, in *Pennekamp v. Florida*,<sup>207</sup> a contempt citation based upon editorial comment on cases pending in a Florida trial court. For a Court unfettered by dissent, although separate concurrences were entered, Mr. Justice Reed took little time to state the controlling test of clear and present danger. Passing quickly to the question of the scope of Court review, the Justice first made a general statement; followed this with a detailed appraisal of the two editorials in question, quoted in full in a long footnote; and concluded with elaboration of the formula for review:

The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger to the impartiality and good order of the courts or whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect. When the highest court of a state has reached a determination upon such an issue, we give most respectful attention to its reasoning and conclusion but its authority is not final. Were it otherwise the constitutional limits of free expression in the Nation would vary with state lines.<sup>208</sup>

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<sup>206</sup> 314 U.S. at 263.

<sup>207</sup> 328 U.S. 331 (1946).

<sup>208</sup> *Id.* at 335.

At this point the opinion dropped a footnote to "*Bridges v. California*. . . Compare *Chambers v. Florida* . . .; *Hooven & Allison Co. v. Evatt* . . ." Continuing at a later point,

While the ultimate power is here to ransack the record for facts in constitutional controversies, we are accustomed to adopt the result of the state court's examination. It is the findings of the state courts on undisputed facts or the undisputed facts themselves which ordinarily furnish the basis for our appraisal of claimed violations of federal constitutional rights.

The acceptance of the conclusion of a state as to the facts of a situation leaves open to this Court the determination of federal constitutional rights in the setting of those facts.<sup>209</sup>

A footnote at the end of the paragraph in this quotation again cites *Chambers* and adds *Ashcraft v. Tennessee* and *Malinski v. New York*.

*Pennekamp* was quickly followed by *Craig v. Harney*.<sup>210</sup> Convictions for constructive contempt imposed by a Texas trial court upon a publisher, an editorial writer and a news reporter were upset in an opinion from which there were three dissents. The Texas court of criminal appeals, in denying an appeal by habeas corpus, had purported to apply the proper constitutional test, but not to the satisfaction of a majority of the Court. "The court's statement of the issue before it and the reasons it gave for holding that the 'clear and present danger' test was satisfied have a striking resemblance to the findings which the Court in *Toledo Newspaper Co. v. United States* . . . held adequate to sustain an adjudication of contempt by publication."<sup>211</sup> But, as earlier seen, *Toledo* construed the federal contempt statute as supporting contempt citations whenever comment on a pending case had a "reasonable tendency" to obstruct the administration of justice. "We revisited that case in *Nye v. United States* . . . and disapproved it. And in *Bridges v. California* . . . we held that the compulsion of the First Amendment, made applicable to the States by the Fourteenth . . . , forbade the punishment by contempt for comment on pending cases . . . unless there is no doubt that the utterances in question are a serious and imminent threat to the administration of justice."<sup>212</sup>

The logic of this situation would call for full independence on

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<sup>209</sup> *Id.* at 345-46. Note use of the verb "to ransack." *Id.* at 345.

<sup>210</sup> 331 U.S. 367 (1947).

<sup>211</sup> *Id.* at 371-72.

<sup>212</sup> *Id.* at 372-73.

the part of the Court in judging the facts so decisive of constitutionality. The Court was quick to recognize this.

In a case where it is asserted that a person has been deprived by a state court of a fundamental right secured by the Constitution, an independent examination of the facts by this Court is often required to be made. See *Norris v. Alabama*, . . . *Pierre v. Louisiana*, . . . *Chambers v. Florida*, . . . *Lisenba v. California*, . . . *Ashcraft v. Tennessee*. . . . This is such a case.<sup>213</sup>

From previous discussion of the decisions on representative jury and forced confession it will be recalled that, save for *Lisenba*, the cited cases stand for unlimited review of the entire record, or nearly so. Why *Lisenba* was included in the list of citations is unclear, but there is little reason to doubt that Mr. Justice Douglas was asserting the doctrinal equivalent of *Ben Avon* and *St. Joseph*.

In the latest of the constructive contempt cases, *Wood v. Georgia*,<sup>214</sup> the contemned court, as in *Craig v. Harney*, based its exercise of the contempt power on the assertion that the contemnor's conduct presented a clear and present danger to pending proceedings. Yet this was done "without making any findings and without giving any reasons".

Thus we have simply been told, as a matter of law without factual support, that if a State is unable to punish persons for expressing their views on matters of great public importance when those matters are being considered in an investigation by a grand jury, a clear and present danger to the administration of justice will be created. We find no such danger in the record before us.<sup>215</sup>

This pronouncement by Chief Justice Warren for the majority certainly does not necessarily reassert the *Craig* view of unlimited independent examination of the constitutionally relevant facts. However, it is significant in suggesting, by implication, that the scope of review employed is broader than that called for by the substantial evidence test.<sup>216</sup> For, dissenting, Justices Harlan and

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<sup>213</sup> *Id.* at 373-74.

<sup>214</sup> 370 U.S. 375 (1962).

<sup>215</sup> *Id.* at 388.

<sup>216</sup> Paraphrase in the majority opinion, *id.* at 386, of language from *In re Sawyer*, 360 U.S. 622, 628 (1959), that "The fact finding below does not remove this Court's duty of examining the evidence to see whether it furnishes a rational basis for the characterization put upon it by the lower courts," does not on analysis mean that the Court is embracing for constitutional litigation the substantial evidence test. "We do not reach or

Clark were unable to agree "that the findings of clear and present danger are unsupported by the record."<sup>217</sup>

### *The 'Trial by Newspaper' Cases*

Two recent lines of cases tie closely to the line just considered. This is patently clear of the "trial by newspaper" line commencing with *Irvin v. Dowd*<sup>218</sup> and continuing into the near present with *Estes v. Texas*<sup>219</sup> and *Sheppard v. Maxwell*.<sup>220</sup> While not apparent on the surface as regards the libel cases that begin with *New York Times v. Sullivan*,<sup>221</sup> the earlier constructive contempt cases were concerned with defamation of the judge as well as with obstruction to the administration of justice. The former concern drops out of the cases in the *Bridges* line, to reappear in the newer *New York Times* line with respect not only to judges but other public officials and public figures as well. But although the two recent lines are judicial cousins, they contrast in the extent to which consideration is given to constitutional facts.

In none of the three trial-by-newspaper cases, two of which reached the Court via habeas corpus, is there in the opinion significant attention to the scope of review to be given by the Court. That there were reviews of the records is clear from the opinions as a whole. But in *Estes* the Court is primarily occupied with drawing the constitutional line for that type of news media involvement, and in *Sheppard* the Court's concern with the extent of newspaper "evidence" never presented at the trial, yet available to the jury, suggests a decision resting in considerable part upon the fundamental requirement that all evidence must be of record. This latter theme had been in the Court's mind in *Irvin v. Dowd*, where it

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intimate any conclusion on the constitutional issues presented." *Id.* at 627. The case involved ordinary, not constitutional, judicial review.

<sup>217</sup> 370 U.S. at 397.

<sup>218</sup> 366 U.S. 717 (1961). *Marshall v. United States*, 360 U.S. 310 (1959), had been based on the Court's supervisory power over the lower federal courts. The entire line of decisions on prejudicial publicity is excellently noted in 45 N.C.L. Rev. 183 (1966).

<sup>219</sup> 381 U.S. 532 (1965).

<sup>220</sup> 384 U.S. 333 (1966).

<sup>221</sup> 376 U.S. 254 (1964), quoted *supra* note 105 and discussed *infra*. *Beauharnais v. Illinois*, 343 U.S. 250 (1952), was of course a libel case. But because it continued the view of *Near v. Minnesota*, 283 U.S. 697 (1931); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); and *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), that libelous utterances are not within the free speech guaranty, the decision is not of the line that commences with the revolutionary *Times* case.

was observed that the jurors' "verdict must be based upon the evidence developed at the trial. Cf. *Thompson v. Louisville*, 362 U.S. 199 . . ." <sup>222</sup> Later in that opinion *Brown v. Allen* was quoted for the proposition that

the "so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge." It was, therefore, the duty of the Court of Appeals to independently evaluate the *voir dire* testimony of the impaneled jurors. <sup>223</sup>

To the extent that the Court was concerned in these cases with scope of review, this observation is the most pertinent. There must be review of mixed questions; there is no occasion to debate the issue of review of "what happened" because in this class of case the facts are essentially undisputed.

### *The Libel Cases*

By contrast, some of the adjudications in the very recent line of libel cases give overt attention to the matter of scope of review. All in the line have been concerned with the delineation of constitutional boundaries for criminal libel of public officials <sup>224</sup> and for civil libel of public officials, <sup>225</sup> of public figures, <sup>226</sup> and in public issues. <sup>227</sup> But only in the earliest case, *New York Times*, and, to date, the two most recent, *Curtis Publishing* and *Associated Press*, has the Court also dealt with the issue under analysis. Professor Kalven pithily summarized the position taken in *Times* in the sentence earlier quoted. <sup>228</sup> Basis for his statement is found in the following passage:

Since respondent may seek a new trial, we deem that considerations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment for respondent. This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally

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<sup>222</sup> 366 U.S. at 722.

<sup>223</sup> 366 U.S. at 723.

<sup>224</sup> *Garrison v. Louisiana*, 379 U.S. 64 (1964).

<sup>225</sup> *New York Times v. Sullivan*, 376 U.S. 254 (1964); cf. *Rosenblatt v. Baer*, 383 U.S. 75 (1966).

<sup>226</sup> *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

<sup>227</sup> *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

<sup>228</sup> See text at note 105 *supra*.

applied. This is such a case, particularly since the question is one of alleged trespass across "the line between speech unconditionally guaranteed and speech which may legitimately be regulated." *Speiser v. Randall*. . . . In cases where that limit must be drawn, the rule is that we "examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." *Pennekamp v. Florida*. . . . We must "make an independent examination of the whole record," *Edwards v. South Carolina* . . . , so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.

Applying these standards, we consider that the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law. The case of the individual petitioners requires little discussion. . . .

As to the Times, we similarly conclude that the facts do not support a finding of actual malice.<sup>229</sup>

In a footnote to the first paragraph of this part of the majority opinion in *New York Times*, the Court considers the bearing of the seventh amendment. It is applicable to jury-tried cases coming from the state courts as well as those from the lower federal courts.

But its ban on re-examination of facts does not preclude us from determining whether governing rules of federal law have been properly applied to the facts. "[T]his Court will review the finding of facts by a State court . . . where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." *Fiske v. Kansas* . . . See also *Haynes v. Washington* . . .<sup>230</sup>

Even the general applicability of the seventh amendment is here deemed not appreciably to cut into the requirement of independent Court review of facts decisive of constitutionality.

*Curtis Publishing* and *Associated Press*, decided together, disclose the Court in a three-way disagreement over the appropriate constitutional standard for public figures. Disentangling from this underlying issue that as to scope of review, it appears that the Chief

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<sup>229</sup> 376 U.S. at 284-86. Note the reliance on *Pennekamp*.

<sup>230</sup> 376 U.S. at 285 n.26. Note the reliance on *Haynes*—like *Pennekamp*, a forced confession case discussed *supra*.

Justice joined with Clark, Fortas, Harlan and Stewart, JJ., to constitute a bare majority on the question of application of the constitutional standard deemed controlling.<sup>231</sup> Thus he can to this extent properly be associated with those four in their statement that

Having set forth the standard by which we believe the constitutionality of the damage awards in these cases must be judged, we turn now, as the Court did in *New York Times*, to the question whether the evidence and findings below meet that standard. We find the standard satisfied in No. 37, *Butts*, and not satisfied by either the evidence or the findings in No. 150, *Walker*.<sup>232</sup>

With this method of disposition, Mr. Justice Brennan, joined by Mr. Justice White, disagreed.

The extent of this Court's role in reviewing the facts, in a case such as this, is to ascertain whether there is evidence by which a jury could reasonably find liability under the constitutionally required instructions. See *New York Times Co. v. Sullivan*. . . ; *Time, Inc. v. Hill*. . . . When, as in this case, such evidence appears, the proper disposition in this federal case is to reverse and remand with direction of a new trial. See *Time, Inc. v. Hill*, *supra*.<sup>233</sup>

Joined by Mr. Justice Douglas, Mr. Justice Black voiced more vigorous objections.

These cases illustrate, I think, the accuracy of my prior predictions that the *New York Times* constitutional rule concerning libel is wholly inadequate to save the press from being destroyed by libel judgments. Here the Court reverses the case of *Associated Press v. Walker*, but affirms the judgment of *Curtis Publishing Co. v. Butts*. The main reason for this quite contradictory action, so far as I can determine, is that the Court looks at the facts in both cases as though it were a jury and reaches the conclusion that the *Saturday Evening Post*, in writing about Butts, was so abusive that its article is more of a libel at the constitutional level than is the one by the Associated Press. That seems a strange way to erect a constitutional standard for libel cases. If this precedent is followed, it means that we must in all libel cases hereafter weigh the facts and hold that all papers and magazines guilty of gross writing or reporting are constitutionally liable, while they are not if the quality of

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<sup>231</sup> A bare majority, differently constituted and made possible by the acquiescence of Justices Black and Douglas in order to agree on some position, adhered to the *New York Times* test.

<sup>232</sup> 388 U.S. at 156.

<sup>233</sup> 388 U.S. at 174.



the reporting is approved by a majority of us. In the final analysis, what we do in these circumstances is to review the factual questions in cases decided by juries—a review which is a flat violation of the Seventh Amendment.<sup>234</sup>

From the two degrees of disagreement with the Harlan-Warren treatment of scope of review, it would seem that several of the erstwhile judicial friends of the doctrine of "constitutional fact" have abandoned it. But not so in its basic formulation. The Brennan-White view questions the propriety of the Court's "jumping the gun" by reviewing the record to end the litigation rather than allow the lower court to retry the case under the correct constitutional standard, subject to later review by the Court where necessary. This squares with *New York Times*, in which these two Justices joined; there only one result was rational on the facts, given the proper constitutional standard.<sup>235</sup> Unhappy with the "narrowness" of even the *Times* standard, Justices Black and Douglas inevitably find annoyance in the factual judgments necessitated by that rule much as the "liberal" Justices of an earlier era were annoyed by the degree of Court review which the doctrine of constitutional fact required in enforcement of uncongenial applications of substantive property due process. It will be recalled from earlier discussion that these two Justices did not castigate Court review of jury findings in the forced confession cases. Until the emergence of the new standards enunciated in *Escobedo* and *Miranda* rendered unnecessary the separation of coerced from voluntary confessions, they there pressed for enforcement of the controlling constitutional standard as the best then available, through vigorous support of broad reviewing power. Thus, their true concern is that the reach of constitutional protection be maximized, not that the scope of Court review be narrowed.

### *The Obscenity Cases*

There has been in the context of obscene utterances no such restrictive decision as that of *New York Times* in libel; "obscenity" remains without the protective umbrella of the First and Fourteenth Amendments. But with the *Roth-Alberts* determination a decade ago

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<sup>234</sup> 388 U.S. at 771.

<sup>235</sup> Cf. Mr. Justice Brennan's dissent in *Kingsley Books v. Brown*, 354 U.S. 436, 447-48 (1957) (obscenity case decided the same day as *Roth-Alberts*, discussed *infra*; jury trial not guaranteed).

that "sex and obscenity are not synonymous,"<sup>236</sup> the constitutional line is drawn at a point bound to precipitate the problem of scope of Court review. Mr. Justice Harlan saw this immediately. He found three "basic difficulties with the Court's opinion," the first of which was that:

The Court seems to assume that "obscenity" is a peculiar *genus* of "speech and press," which is as distinct, recognizable, and classifiable as poison ivy is among other plants. On this basis the *constitutional* question before us simply becomes, as the Court says, whether "obscenity," as an abstraction, is protected by the First and Fourteenth Amendments, and the question whether a *particular* book may be suppressed becomes a mere matter of classification, of "fact," to be entrusted to a factfinder and insulated from independent constitutional judgment. But surely the problem cannot be solved in such a generalized fashion. Every communication has an individuality and "value" of its own. The suppression of a particular writing or other tangible form of expression is, therefore, an *individual* matter, and in the nature of things every such suppression raises an individual constitutional problem, in which a reviewing court must determine for *itself* whether the attacked expression is suppressable within constitutional standards. Since those standards do not readily lend themselves to generalized definitions, the constitutional problem in the last analysis becomes one of particularized judgments which appellate courts must make for themselves.

I do not think that reviewing courts can escape this responsibility by saying that the trier of the facts, be it a jury or a judge, has labeled the questioned matter as "obscene," for, if "obscenity" is to be suppressed, the question whether a particular work is of that character involves not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind. Many juries might find that Joyce's "Ulysses" or Boccaccio's "Decameron" was obscene, and yet the conviction of a defendant for selling either book would raise, for me, the gravest constitutional problems, for no such verdict could convince me, without more, that these books are "utterly without redeeming social importance." In short, I do not understand how the Court can resolve the constitutional problems now before it without making its own independent judgment upon the character of the material upon which these convictions were based. I am very much afraid that the broad manner in which the Court has decided these cases will tend to obscure the peculiar responsibilities resting on state and federal courts in this field and encourage

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<sup>236</sup> Roth v. United States, 354 U.S. 476, 487 (1957).

them to rely on easy labeling and jury verdicts as a substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.<sup>237</sup>

*Kingsley International Pictures*,<sup>238</sup> decided in 1959, concerned the validity of New York censorship of the motion picture version of *LADY CHATTERLEY'S LOVER*. Joined now by Frankfurter and Whittaker, JJ., Justice Harlan delivered himself of the same view in concurring in the result:

It is sometimes said that this Court should shun considering the particularities of individual cases in this difficult field lest the Court become a final "board of censorship." But I cannot understand why it should be thought that the process of constitutional judgment in this realm somehow stands apart from that involved in other fields, particularly those presenting questions of due process. Nor can I see, short of holding that all state "censorship" laws are constitutionally impermissible, a course from which the Court is carefully abstaining, how the Court can hope ultimately to spare itself the necessity for individualized adjudication.<sup>239</sup>

Mr. Justice Black, to whom the reference was clearly directed, had his rebuttal.

[M]y belief is that this Court is about the most inappropriate Supreme Board of Censors that could be found. So far as I know, judges possess no special expertise providing exceptional competency to set standards and to supervise the morals of the Nation. In addition, the Justices of this Court seem especially unsuited to make the kind of value judgments—as to what movies are good or bad for local communities—which the concurring opinions appear to require. We are told that the only way we can decide whether a State or municipality can constitutionally ban movies is for this Court to view and appraise each movie on a case-by-case basis. Under these circumstances, every member of the Court must exercise his own judgment as to

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<sup>237</sup> *Id.* at 497-98. Professor Kalven agreed.

Is not the issue of clear and present danger, or the issue of obscenity, a constitutional fact which the reviewing court must decide for itself? This has been a troublesome and clouded point in the clear-and-present-danger cases, but the case for such an independent reviewing judgment is stronger with issues of obscenity. It seems to me clear, although the Court did not say so, that obscenity is a constitutional fact.

Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1.

<sup>238</sup> *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of N.Y.*, 360 U.S. 684 (1959).

<sup>239</sup> *Id.* at 708.

how bad a picture is, a judgment which is ultimately based at least in large part on his own standard of what is immoral.<sup>240</sup>

Believing "the end result of such decisions" to be intolerable, Justice Black opted for a constitutional rule making all prior censorship, of movies as well as newspapers and books, unconstitutional. Concurring in *Smith v. California*,<sup>241</sup> decided only six months after *Kingsley Pictures*, Mr. Justice Douglas in his separate concurrence again expressed views similar to those of Justice Black.

Yet my view is in the minority: and rather fluid tests of obscenity prevail which require judges to read condemned literature and pass judgment on it. This role of censor in which we find ourselves is not an edifying one. But since by the prevailing school of thought we must perform it, I see no harm, and perhaps some good, in the rule fashioned by the Court which requires a showing of *scienter*.<sup>242</sup>

In *Manual Enterprises v. Day*<sup>243</sup> Mr. Justice Harlan, after pronouncing the judgment of the Court and clarifying the *Roth* standard for determination of obscenity, came to "the dispositive question" on the obscenity issue.

Whether this question be deemed one of fact or of mixed fact and law, see Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 114-115 (1960), we see no need of remanding the case for initial consideration by the Post Office Department or the Court of Appeals of this missing factor in their determinations. That issue, involving factual matters entangled in a constitutional claim, see *Grove Press, Inc. v. Christenberry* (CA2 NY) 276 F2d 433, 436, is ultimately for this Court. The relevant materials being before us, we determine the issue for ourselves.<sup>244</sup>

The significance of this embrasure of the doctrine of constitutional fact is mitigated by the consideration that only Mr. Justice Stewart joined in the Harlan statement, and by entanglement of the matter of scope of review with a correct articulation of the constitutional standard itself. On the other hand, significance remains because here the Court reversed an administrative determination supported

<sup>240</sup> *Id.* at 690-91.

<sup>241</sup> 361 U.S. 147 (1959).

<sup>242</sup> *Id.* at 169.

<sup>243</sup> 370 U.S. 478 (1962).

<sup>244</sup> *Id.* at 488. For the significance of the citation to the *Christenberry* decision, see *infra* note 245.

by substantial evidence and cited to a passage in the authoritative Lockhart-McClure article which had concluded on the basis of pre-1960 Court decisions, involving not only obscenity but also areas discussed in earlier portions of this article, that

In our opinion, an independent review of the questioned material to determine whether it is "obscene" within the constitutional requirements is now the obligation of every judge and appellate court before whom the constitutional issue is raised, subject to ultimate review in appropriate cases by the Supreme Court. . . .

The Supreme Court has made it abundantly clear that where constitutional rights are at stake it will not be bound by the factual determinations of lower courts. Ordinarily, if the facts are in dispute, the Supreme Court accepts the state courts' findings on the disputed facts, though it retains freedom to review the evidence and reach different conclusions in appropriate cases. But in applying constitutional standards to the factual findings below, or to the undisputed facts, the Supreme Court exercises an independent judgment on the constitutional issue, even though it is couched in terms of a factual finding.<sup>245</sup>

A head-on collision over the proper scope of Court review marked two of the five opinions rendered in *Jacobellis v. Ohio*.<sup>246</sup> Dissenting, the Chief Justice, after reiterating his "acceptance of the rule of the Roth case," expressed the view that

. . . protection of society's right to maintain its moral fiber and the effective administration of justice require that this Court not establish itself as an ultimate censor, in each case reading

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<sup>245</sup> Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 114-15 (1960) [hereinafter cited as Lockhart & McClure]. Later in the same article, at 117-18, the authors correctly prognosticated the Harlan-Stewart view in *Manual Enterprises*; stressed the generally "strong position" elsewhere taken by the Court "concerning its obligation to exercise an independent judgment in the application of constitutional standards, even to the point of a re-examination of the evidentiary basis for state court findings"; noted that "when faced with lower courts' findings of obscenity, the Supreme Court summarily reversed the findings in three of the four per curiam decisions following Roth-Alberts," the significance of which was caught by the *Christenberry* court; and briefly discussed the positions of Black, Douglas, Frankfurter, Harlan & Whittaker, JJ., in the *Smith* and *Kingsley Pictures* cases. Earlier, at 116, the authors had pointed out that "Obscenity cases seldom involve factual disputes relating to the obscenity issue," a point of significance in evaluation of their commentary above quoted and of opinions expressed in obscenity cases on the scope of Court review necessitated by the requirement of independent judgment on facts decisive of constitutionality.

<sup>246</sup> 378 U.S. 184 (1964).

the entire record, viewing the accused material, and making a *de novo* judgment on the question of obscenity. Therefore, once a finding of obscenity has been made below under a proper application of the *Roth* test, I would apply a "sufficient evidence" standard of review—requiring something more than merely any evidence but something less than "substantial evidence on the record [including the allegedly obscene material] as a whole." Cf. *Universal Camera Corp. v. Labor Board*, 340 U.S. 474. This is the only reasonable way I can see to obviate the necessity of this Court's sitting as the Super Censor of all the obscenity purveyed throughout the Nation.<sup>247</sup>

To this view Mr. Justice Brennan took strong exception. The suggestion is appealing, since it would lift from our shoulders a difficult, recurring, and unpleasant task. But we cannot accept it. Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees. Since it is only "obscenity" that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law. See *Roth v. United States* . . . 354 U.S., at 497-498 (separate opinion). Such an issue, we think, must ultimately be decided by this Court. Our duty admits of no "substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case." *Id.*, at 498; see *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 488 (opinion of Harlan, J.)<sup>248</sup>

Justice Brennan then cites to "other areas involving constitutional rights under the Due Process Clause [where] the Court has consistently recognized its duty to apply the applicable rules of law upon the basis of an independent review of the facts of each case."<sup>249</sup> Text and accompanying footnotes are filled with citations to decisions considered earlier in this article, and to some involving other rights; *Pennekamp* is quoted, as it is above at page 263. The Justice "cannot understand why the Court's duty should be any different in the present case," nor why its function "in this sort of case should be denigrated by such epithets as 'censor' or 'super-censor'."<sup>250</sup>

Hence we reaffirm the principle that, in "obscenity" cases as in all others involving rights derived from the First Amendment

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<sup>247</sup> *Id.* at 202-03.

<sup>248</sup> *Id.* at 187-88.

<sup>249</sup> *Id.* at 189.

<sup>250</sup> *Id.* at 190.

guarantees of free expression, this Court cannot avoid making an independent judgment on the facts of the case as to whether the material involved is constitutionally protected.<sup>251</sup>

And to this assertion is appended a footnote, the second paragraph of which is of especial significance:

Nor do we think our duty of constitutional adjudication in this area can properly be relaxed by reliance on a "sufficient evidence" standard of review. Even in judicial review of administrative agency determinations, questions of "constitutional fact" have been held to require de novo review. *Ng Fung Ho v. White* . . . ; *Crowell v. Benson* . . .<sup>252</sup>

Measured by numbers the debate was a draw, Mr. Justice Clark joining with the Chief Justice and Mr. Justice Goldberg with Mr. Justice Brennan. However, it is reasonable to assign Mr. Justice Stewart to the Brennan-Goldberg side of this issue, for this was the case in which he, concurring alone, declared of hard-core pornography that "I know it when I see it, and the motion picture involved in this case is not that."<sup>253</sup> And although in dissent as to result, Mr. Justice Harlan, who also had viewed the film, agreed "with my Brother Brennan's opinion that the responsibilities of the Court in this area are no different from those which attend the adjudication of kindred constitutional questions."<sup>254</sup>

Again in dissent in the *Fanny Hill* case,<sup>255</sup> because of his two-level theory as to the proper underlying constitutional standards, Justice Harlan devoted a concluding paragraph in his opinion to the matter of scope of Court review.

A final aspect of the obscenity problem is the role this Court is to play in administering its standards, a matter that engendered justified concern at the oral argument of the cases now decided. Short of saying that no material relating to sex may be banned, or that all of it may be, I do not see how this Court can escape the task of reviewing obscenity decisions on a case-by-case basis. The views of literary or other experts could be made controlling, but those experts had their say in *Fanny Hill* and apparently the majority is no more willing than I to say that Massachusetts must abide by their verdict. Yet I venture to say

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<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 190 n.6.

<sup>253</sup> *Id.* at 197.

<sup>254</sup> *Id.* at 203.

<sup>255</sup> *Memoirs of a Woman of Pleasure v. Massachusetts*, 383 U.S. 413 (1966).

that the Court's burden of decision would be ameliorated under the constitutional principles that I have advocated. "Hard-core pornography" for judging federal cases is one of the more tangible concepts in the field. As to the States, the due latitude my approach would leave them ensures that only the unusual case would require plenary review and correction by this Court.<sup>256</sup>

Mr. Justice Clark, also dissenting, referred to the position which he and the Chief Justice had taken in *Jacobellis*; viz., "that the enforcement of this rule should be committed to the state and federal courts whose judgments made pursuant to the *Roth* rule we would accept, limiting our review to a consideration of whether there is 'sufficient evidence' in the record to support a finding of obscenity."<sup>257</sup> On the other hand, Mr. Justice Douglas in his concurrence, although asserting that "We are not competent to render an independent judgment as to the worth of this or any other book, except in our capacity as private citizens," nevertheless reluctantly realized that "If there is to be censorship, the wisdom of experts on such matters as literary merit and historical significance must be evaluated. On this record, the Court has no choice but to reverse the judgment of the Massachusetts Supreme Judicial Court, irrespective of whether we would include *Fanny Hill* in our own libraries."<sup>258</sup>

In the other two cases of the 1966 trilogy, convictions for violation of criminal obscenity statutes, one federal the other state, were, surprisingly, affirmed. The only express references to the problem of scope of review appear in dissents by the two Justices who would prefer to read the first amendment's guarantees as absolutes. In his solo opinion in *Ginsburg*,<sup>259</sup> Mr. Justice Douglas expresses uncertainty as to both the scope and the thrust of the Court's reviewing power. Citing the testimony of a Baptist minister who had found the HOUSEWIFE'S HANDBOOK ON SELECTIVE PROMISCUITY useful in his counseling, the Justice observes that

I would think the Baptist minister's evaluation would be enough to satisfy the Court's test, unless the censor's word is to be final or unless the experts are to be weighed in the censor's scales, in which event one Anthony Comstock would too often prove more weighty than a dozen more detached scholars, or

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<sup>256</sup> *Id.* at 459-60.

<sup>257</sup> *Id.* at 443.

<sup>258</sup> *Id.* at 427.

<sup>259</sup> *Ginsburg v. United States*, 383 U.S. 463 (1966).



unless we, the ultimate Board of Censors, are to lay down standards for review that give the censor the benefit of the "any evidence" rule or the "substantial evidence" rule as in the administrative law field. Cf. *Universal Camera Corp. v. Labor Board*, 340 U.S. 474. Or perhaps we mean to let the courts sift and choose among conflicting versions of the "redeeming social importance" of a particular book, making sure that they keep their findings clear of doubt lest we reverse, as we do today in *Memoirs v. Massachusetts* . . . , because the lower court in an effort to be fair showed how two-sided the argument was. Since the test is whether the publication is "utterly without redeeming social importance," then I think we should honor the opinion of the Baptist minister who testified as an expert in the field of counseling.<sup>260</sup>

Mr. Justice Black, in *Mishkin*,<sup>261</sup> once again expresses his concern over the consequences of the Court's refusal to read the first amendment as an absolute prohibition on governmental interference with speech as contrasted with conduct.

I think the federal judiciary because it is appointed for life is the most appropriate tribunal that could be selected to interpret the Constitution and thereby mark the boundaries of what government agencies can and cannot do. But because of life tenure, as well as other reasons, the federal judiciary is the least appropriate branch of government to take over censorship responsibilities by deciding what pictures and writings people throughout the land can be permitted to see and read. When this Court makes particularized rules on what people can see and read, it determines which policies are reasonable and right, thereby performing the classical function of legislative bodies directly responsible to the people. Accordingly, I wish once more to express my objections to saddling this Court with the irksome and inevitably unpopular and unwholesome task of finally deciding by a case-by-case, sight-by-sight personal judgment of the members of this Court what pornography (whatever that means) is too hard core for people to see or read. If censorship of views about sex or any other subject is constitutional then I am reluctantly compelled to say that I believe the tedious, time-consuming and unwelcome responsibility for finally deciding what particular discussions or opinions must be suppressed in this country, should, for the good of this Court and of the Nation, be vested in some governmental institution or institutions other than this Court.<sup>262</sup>

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<sup>260</sup> *Id.* at 485-86.

<sup>261</sup> *Mishkin v. New York*, 383 U.S. 502 (1966).

<sup>262</sup> *Id.* at 516-17.

But if the scope-of-review problem is not elsewhere discussed in the many opinions filed in the three 1966 cases, this does not testify to its absence. On oral argument, the Chief Justice expressed his concern:

Do we have to read all of [the books] to determine if they have social importance? I'm sure this Court doesn't want to be the final censor to read all the prurient material in this country to determine if it has social value. If the final burden depends on this Court, it looks as though we're in trouble.<sup>263</sup>

Save for Justices Black and Clark, there is little doubt but that the Justices have recently felt an obligation, however distasteful and frustrating, to make an independent judgment on the facts as to whether challenged materials are within or without the *Roth* test of obscenity.

Although the case studies made in the preceding pages do not exhaust the "evidence" available,<sup>264</sup> they are sufficient to demonstrate the persistence of the doctrine of "constitutional fact." In an earlier article the present writer made bold to offer a general justification for the insistence, in *Ben Avon* and *St. Joseph*, on *review de novo*, together with a limited support of the *trial de novo* rule of *Fung Ho* and *Crowell*.<sup>265</sup> On the analysis there presented, there is sense to the requirement of independent judgment on facts that are controlling of constitutionality, and of retrial in exceptional situations, if the Court is to be meaningfully responsible for the exercise of constitutional judicial review. Despite the great respect due Ernst Freund and John Dickinson, their attacks on the independent judgment rule<sup>266</sup> were wide of the mark. That the existence of crucial fact cannot be indisputably found or its con-

<sup>263</sup> Quoted by Magrath, *The Obscenity Cases: Grapes of Roth*, 1966 SUP. CT. REV. 7, 39-40 & n.158. This is an excellent study of the entire line of obscenity cases, with some reference to the problem of scope of review.

<sup>264</sup> See, e.g., *Elkins v. United States*, 364 U.S. 206 (1960) (repudiation of the silver platter doctrine), and cases cited by secondary authorities to which reference has been made in preceding portions of this article. And there are other cases, aside from those that have been identified, which foreclose Court review of disputed facts. See *Hoag v. New Jersey*, 356 U.S. 464 (1958); *Wolfe v. North Carolina*, 364 U.S. 177 (1960), both citing *Watts v. Indiana*.

<sup>265</sup> Strong 275-76.

<sup>266</sup> Dickinson *passim*; Freund, *The Right to a Judicial Review in Rate Controversies*, 27 W. VA. L.Q. 207 (1921). Compare JAFFE 647, somewhat modifying his earlier-expressed views.

stitutional implication incontestably determined is in itself not a sufficient reason for satisfaction with anything less than resort to the institution best qualified for these tasks. And there is a place for judicial, as well as administrative, expertise.

In the newer area of civil liberties, the "constitutional fact" doctrine has received a quite contrasting reception at the hands of commentators. Here silence as well as utterance "denotes consent." Strikingly absent has been any torrent of criticism such as greeted *Ben Avon and Crowell*, or, for that matter, any kind of extended commentary.<sup>287</sup> The major comment found has been that of Dean Lockhart and Professor McClure in their major study of censorship of obscenity. In the closing pages of that study they are most friendly to the doctrine.

The importance of independent judicial review of obscenity findings for the preservation of freedom of expression is self-evident. The constitutional standards would mean little if their only effective application were by administrators like the Postmaster General, vested with responsibility to censor, or by local administrators, judges, or juries, who are subject to the influence of local pressures and community sentiment stirred up by propaganda groups. Neither professional government censors nor local juries are likely to be sensitive to the basic values of freedom of expression that gave rise to the constitutional standards—values that must enter into applying those standards. It may be true, as suggested by Mr. Justice Black, that judges "possess no special expertise" qualifying them "to supervise the private morals of the Nation" or to decide "what movies are good or bad for local communities." But they do have a far keener understanding of the importance of free expression than do most government administrators or jurors, and they have had considerable experience in making value judgments of the type required by the constitutional standards for obscenity. If freedom is to be preserved, neither government censorship experts nor juries can be left to make the final effective decisions restraining free expression. Their decisions must be subject to effective, independent review, and we know of no group better qualified for that review than the appellate judges of this country under the guidance of the Supreme Court.<sup>288</sup>

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<sup>287</sup> For a student comment, see 8 U.C.L.A.L. REV. 634 (1961) (substantial evidence test on the record received as a whole provides an inadequate review).

<sup>288</sup> Lockhart & McClure 119.

A shorter and less recent comment by John Frank is nevertheless worthy of quotation for the attitude it displays toward that period in Court treatment of coerced confession cases when scope of review was at relatively low ebb.

In the confession cases there ought to be a rule that plainly untenable conclusions of fact as to whether a confession was voluntary should be reviewed. As I understand what the Court is presently doing, it is rejecting that point of view. The case of *Gallegos*, for example [*Gallegos v. Nebraska*, 342 U.S. 55 (1951)], seems to hold that we are not going back into the facts at all even where, as found below, they may be untenable, if we can find that they were disputed below. This becomes a go-ahead sign to prosecutors to raise a dispute as to any questionable fact and thus put it beyond the scope of judicial review.

This policy is all wrong, it seems to me. If the Court cannot review confession cases, it should look them over to see if there is anything wrong or preposterous about them. I would go further by buttressing the rule in the confession cases with a series of fixed presumptions as to what the police can do to people in their custody.<sup>269</sup>

Concededly, however, general adherence to the doctrine of "constitutional fact" can present a serious problem when coupled with constitutional limits that are the product of judicial balancing of individual right and public interest. For the consequence of that exercise in compromise of competing values appears to be constitutional lines especially demanding of factual judgment for their effective enforcement. The Lockhart-McClure article saw little need for concern with respect to obscenity litigation.<sup>270</sup> But not so a number of the Justices, more especially Chief Justice Warren, Mr. Justice Harlan, and Mr. Justice Black, who have been close to the problem since publication of the article. Professor Jaffe has made the point that the combination forty years ago of *Ben Avon* and *Smyth v. Ames* rendered ineffective attempted rate regulation of public utilities.<sup>271</sup> This dilemma is a distinct possibility in current constitutional adjudication in civil liberties. The growing complexity of the *Roth* test may have by now made of obscenity litigation a "constitutional disaster area."<sup>272</sup> And, as previously suggested, Court resort to rules enunciated in *Escobedo* and *Miran-*

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<sup>269</sup> E. CAHN, SUPREME COURT AND SUPREME LAW 53-54 (1954).

<sup>270</sup> Lockhart & McClure 119.

<sup>271</sup> JAFFE 650.

<sup>272</sup> Magrath, *supra* note 263, at 56 *et seq.*

*da* can reasonably be understood as among the first fruits of the Court's effort to avoid impalement on the horns of the dilemma.<sup>273</sup>

A year ago Mr. Justice Stewart brought the problem home to his Brothers in a new context. The occasion was Court disposition of a question arising out of the non-retroactivity of *Griffin v. California*.<sup>274</sup> Two accused, tried in California before the *Griffin* decision in the Supreme Court of the United States, had failed to take the stand and the prosecutor had commented thereon as permitted by the California constitution. Although considering appeals from conviction after *Griffin*, the supreme court of California had affirmed on the strength of California's harmless error rule. Writing for a majority of seven, Mr. Justice Black reversed. Where federal constitutional rights are denied, the seriousness of the error must be judged by a federal standard. Applying that standard here, the error cannot be said to be harmless. Mr. Justice Harlan dissented, believing the issue controlled by the adequate-state-ground rule. Alone in a concurrence in the result, Mr. Justice Stewart declared that

The adoption of any harmless-error rule, whether the one proposed by the Court, or by the dissent, or some other rule, commits this Court to a case-by-case examination to determine the extent to which we think unconstitutional comment on a defendant's failure to testify influenced the outcome of a particular trial. This burdensome obligation is one that we are hardly qualified to discharge.

A rule of automatic reversal would seem best calculated to prevent clear violations of *Griffin v. California*. . . . Prosecutors are unlikely to indulge in clear violations of *Griffin* in the future, and if they do I see no reason why the sanction of reversal should not be the result.<sup>275</sup>

In an era like the present, marked by almost continuous unearthing of new constitutional rights with consequent necessity for their delineation through "balancing", the Court is very likely to find itself "in trouble" if the doctrine of "constitutional fact" is to continue to persist. Although Justices Black and Douglas, in

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<sup>273</sup> Repudiation of *Betts v. Brady*, 316 U.S. 455 (1941), by *Gideon v. Wainwright*, 372 U.S. 335 (1963), may have been the first fruit. See *Hawk v. Olson*, 326 U.S. 271 (1945) (citing *Lisenba*), and *Hudson v. North Carolina*, 363 U.S. 697 (1960) (citing *Spano*), for Court struggle with the problem of scope of review of "constitutional facts."

<sup>274</sup> *Chapman v. California*, 386 U.S. 18 (1967).

<sup>275</sup> *Id.* at 45.

making their case for an absolute interpretation of the first amendment, primarily stress the historical evidence as to the meaning of that guarantee there is also basis for believing that another string to their judicial bow is the burden on the Court resulting from the combination of a highly fact-controlled constitutional line and felt need for independent judgment as to those facts. If significant relief cannot be found in their suggested reapproach to the drawing of the lines for the underlying constitutional doctrines, it may be necessary for the Court to work out modifications in the "constitutional fact" doctrine for those types of cases where there may be lesser degrees of danger in allowing greater leeway to fact determinations below. It has been suggested to the writer that the test might be "the gravity of the risk of error." Such a test reminds of judicial and extra-judicial expressions of conviction that courts in ordinary judicial review of administrative determinations are influenced by their estimate of the relative capacity and reliability of the administrative agencies involved.<sup>276</sup>

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<sup>276</sup> Correspondence with Dean Ivan C. Rutledge, Ohio State University, a former colleague and my decanal successor. "I'd suggest the gravity of the risk of error is an inescapable dimension, to be viewed with all the dispassionate wisdom the Court can muster, along with its estimate of the confidence to be reposed in the tribunal and its procedures."