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UNEMPLOYMENT COMPENSATION AND JUDICIAL REVIEW

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A little over three years ago no state in the union was paying, or ever had paid compensation for unemployment. Relief payments to the needy are of course no new thing. But the recognition of legal rights to stated compensation for unemployment due to lack of work is new in this country. Such payments are now being made by all but three of the states, and the District of Columbia. The compensable labor force in the country is in the neighborhood of 27,500,000.¹ In the state of New York alone, initial claims for unemployment benefits were being filed at the rate of over a quarter of a million a month in the spring of 1938.² The unemployment compensation laws are far from simple, and the standards which they set up are more frequently than not couched in terms that are anything but precise. Is a nurseryman engaged in "agricultural labor", and so excluded from benefits? What constitutes "misconduct connected with work"? And what types of work constitute "suitable employment" for a given worker? Practically all of the state laws contain the equivalent of these and many other similar problems of interpretation and application. It is thus readily apparent that there is ample room for dispute regarding the disposition of the millions of claims for benefits which will be made every year.

In recognition of this fact, the framers of state laws have universally provided a rather elaborate system for the administrative adjudication of contested cases. Contemplation of this new set of administrative tribunals immediately suggests questions regarding their

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1. Social Security Bulletin, Vol. I, No. 8, p. 29 (Aug. 1938).

2. *Id.*, Vol. I, No. 7, p. 26 (July 1938).

relationship to the ordinary courts. What relationship is provided in the laws? How will this relationship probably operate in practice? Are there important alterations that should be made? What Constitutional restrictions must be observed?

The closest parallel in American experience to the administrative task presented by unemployment compensation is furnished by workmen's compensation. And it is apparent from an examination of the state unemployment compensation laws that their provisions for the adjudication of claims have been closely patterned after workmen's compensation laws. The practical identity of wording in many cases is such as to suggest that this may have been done in a rather mechanical fashion, without careful analysis of the important differences between the two kinds of insurance systems. That there are important differences having a bearing upon the present question should be pointed out. In the first place, the comparatively small size of the unemployment compensation claims, taken together with the magnitude of their number, suggests the advisability of a summary procedure for their settlement.³ A more important difference lies in the fact that unemployment compensation laws create rights where none existed before; while workmen's compensation statutes, in general, merely substitute new rights and duties for pre-existing ones. The rights conferred by the former, but not the latter, then, might be conceived as "favors" awarded by the government at its pleasure.⁴ Genetic analysis lends additional support to this point. Thus, in the field of industrial accident compensation, the line of development has been from the common law of torts, through statutory regulations of employers' liability to employees, to the establishment of state funds, built up by levies upon employers, from which compensation is paid to injured workmen. Unemployment compensation laws not only provide benefits where there was no right to them or their equivalent previously, but also provide (as will be explained later) a much less direct relationship between assessments and the current drain upon the fund. Thus, this train of development has been marked by a decreasingly direct relationship in interest between an employer and the settlement of any particular claim. It is suggested that the development of workmen's compensation cases has been influenced by the background which has contributed a private law (and even common law) flavor to the

3. In most states the largest sum which any worker could draw within a single year is \$240. The average will of course be much lower. It may be expected that a large amount of the contested claims will grow out of "disqualifications". The guess may be hazarded that in such cases the average amount in controversy will be about \$30.

4. It is doubtless true that relief is increasingly coming to be thought of as a matter of right—perhaps particularly so in the case of unemployment. Nevertheless, there remains a distinction in this respect between workmen's compensation and unemployment compensation, and one which is in the tradition of judicial thinking in this country.

decisions for which there is not even historical justification in the case of unemployment compensation.

Furthermore, the application of judicial review to decisions of workmen's compensation commissions has been subject to serious criticism. Professor Charles Grove Haines concludes his study of the subject with the plea that judicial review of the conclusions of industrial accident boards should be strictly limited to jurisdictional questions. In fact, if it were politically practicable, he would favor the complete abolition of judicial review in such cases, following the example of the apparently successful experiment of some of the Canadian provinces.⁵

In view of such facts as these it would seem highly desirable that the subject of unemployment compensation should be given thoughtful attention at this early stage, before established practices become the accepted rule. It may be stated at the outset as an obvious fact that it is highly desirable to keep at a minimum the number of unemployment compensation cases that go to the courts. The very purpose of unemployment compensation demands that payment should be prompt. Furthermore, appeals by employers should be particularly suspect inasmuch as employers might be tempted to resort to litigation to discourage employees from insisting upon their rights.

All of the state⁶ laws with the exception of that of California⁷ make provision for judicial review of determinations as to the validity of claims for benefits after the exhaustion of administrative remedies. Any "aggrieved party" is entitled to such review.

Before we deal in detail with what are the Constitutional rights in this matter of "aggrieved parties", it would be well to examine the nature of the parties who may be "aggrieved". Clearly if anyone can be aggrieved by the settlement of a claim for benefits, it would be a disappointed claimant. Yet, as pointed out above, the claimant for unemployment compensation is not in the same position as a petitioner under a workmen's compensation statute. The latter is seeking redress for an injury which the law has long recognized as entitling the injured party to compensation, while the former is seeking a benefit from the state by reason of a condition for which no one has here-

5. Haines, *Judicial Review of the Findings and Awards of Industrial Accident Commissions*, in HAINES AND DIMOCK, *ESSAYS ON THE LAW AND PRACTICE OF GOVERNMENTAL ADMINISTRATION* (1935) 127, 170-173.

6. Here and in the pages that follow the word "state" is used to include the District of Columbia. Unlike the usage in the Federal Social Security Act, 49 STAT. 647 (1936), 42 U. S. C. A. § 1301 (a) (1) (Supp. 1938), however, it is not here extended to the inclusion of Alaska and Hawaii.

7. The California Code of Civil Procedure contains a provision which would probably be interpreted to allow judicial review in such cases if the administrative body had "exceeded [its] jurisdiction". CAL. CIV. CODE (1931) § 1068.

tofore been held legally liable or morally responsible. Consequently, courts might assimilate unemployment benefits to pensions, or other favors which governments may bestow, rather than to accident compensation. Although this would not deprive the claimants of all right to prosecute their claims in court, it would tend to dispose such tribunals to resolve all doubts in favor of the state.⁸ That is, courts would tend to accept the decisions of the administrative tribunals as final. This, of course, would not apply in the states where employee contributions are required.⁹

However, the facts that benefits are paid out of a special fund, and that this fund is obtained from taxes on employers proportioned to their payrolls, will suggest that unemployment benefits are not a mere gratuity but rather that they represent something which is owed to the recipient, and which is being paid to him, indirectly, by his employer.¹⁰

Although in practice there may be very little doubt as to the position of disappointed claimants as "aggrieved parties", the case of an employer whose erstwhile employee has been allowed benefits erroneously, as the employer thinks, is more difficult. In considering this question it is necessary to distinguish between various types of unemployment compensation laws on the basis of the relationship which those laws establish between a particular employer's contribution rate and the benefits drawn by his employees. In the first place, there are the laws that provide for pooled funds without merit rating.¹¹ Under these laws there is no special relationship between an employer's contribution rates and the employment experience of his workers. As far as the terms of the law are concerned, no employer's contribution rate could be affected by the allowance or denial of any particular claim for benefits. It might of course be argued that insofar as the allowance of a claim tends to deplete the fund out of which benefits must

8. See DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES (1927) c. X, particularly pp. 287-289.

9. ALA. CODE (Cum. Supp. 1936) § 7597 (4); CAL. CODES AND GEN. LAWS (Deering, 1935 Supp.) Act 8780d, § 44; KY. STAT. (Baldwin, May 1938 Supp.) § 4748g-7 (d); 2 LA. GEN. STAT. ANN. (Dart, Cum. Supp. 1937) § 4434.6 (d); 2 N. J. REV. STAT. (1937) tit. 43, c. 21-7 (d) (1); R. I. GEN. LAWS (1938) c. 284, § 5 (5).

10. Nevertheless, even this consideration might be modified by the fact that the Supreme Court has upheld the employers' "contributions" as ordinary taxes for the general welfare. *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495 (1937).

11. GA. LAWS 1937, Act No. 335, p. 819, § 7 (b); ME. LAWS Spec. Sess. 1936, c. 192, § 7 (a) (b), as amended by Me. LAWS 1939, c. 163, § 5; MD. LAWS Extra Sess. 1936, c. 1, § 7 (a) (b), as amended by Md. LAWS 1939, c. 278, § 7; MISS. LAWS 1936, c. 176, § 7, as amended by Miss. LAWS 1938, c. 147, § 5; N. Y. LABOR LAW (Cum. Supp. 1939) § 516; N. C. CODE (Michie, Supp. 1937) c. 131A, § 8052 (7), as amended by N. C. LAWS 1939, c. 27, § 6; PA. STAT. ANN. (Purdon, Supp. 1938) tit. 43, §§ 781-782; R. I. GEN. LAWS ANN. (1938) c. 284, § 5; VA. CODE ANN. (Michie, Supp. 1938) c. 76D, § 1887 (99). All but two of these laws, however, contemplate the likelihood of amendment to provide for merit rating after study and report by a special commission.

be paid it tends to bring about a condition which would lead the legislature to enact higher rates of contributions. Such a result, however, is highly problematical. In any particular case, there might be no foreseeable likelihood of the fund's being exhausted. Furthermore, if it should be exhausted, it is by no means certain that rates would be raised. Benefits might be decreased, or appropriations from general funds might be made to supply the deficiency.¹²

This last point is believed to differentiate the case from the situation under workmen's compensation statutes where compensation is paid from a state fund but where employer's premium payments into the fund are based upon the compensation experience of workers employed by employers in their general industrial classification. Even in such a case the right of the employer to judicial review is seriously open to question, as will be pointed out later on.¹³

Finally, it should be noted that if employers were granted the right of judicial review under these laws, there would be no particular reason why an employer should have that right as respects certain claims for unemployment benefits and not as respects others. Whether or not the claim was made by a past employee of the employer in question would have no effect on the extent to which the employer's interest (through his contribution rate) would be involved. Thus the logical conclusion from an acceptance of the contrary of the argument here contended for would be that any person liable for contributions under the act would be entitled to demand a court review of any award of unemployment benefits to any worker in the state. Such a conclusion is palpably absurd.

The other state laws, by various methods and in varying degrees, relate the employer's contribution rates to the amount of benefits that are paid out of the fund to his erstwhile employees.¹⁴ Under such laws

12. Foreign unemployment insurance schemes generally provide for governmental contributions to the fund. The Advisory Council on Social Security has already recommended that this principle be incorporated in the sections of the Federal Social Security Act providing for old-age benefits. *New York Times*, Dec. 19, 1938, pp. 16-17.

13. See *infra*, pp. 143-144.

14. Most of the laws in this category provide for "merit rating". Under such provisions, contributions are paid into and benefits paid out of a pooled fund, but an account is kept for each employer of the benefits paid to workers who have been recently in his employ, and of the contributions which he has paid into the fund. His contribution rate is based upon the ratio of the funds in this purely bookkeeping account and his average payroll over a specified period of time. The Wisconsin law provides for individual employer reserve funds. *Wis. Laws Spec. Sess. 1931-1932*, c. 20, § 108.16. The provisions regarding the rates at which contributions are to be made into these funds, however, are based on the same general principles. There would seem to be no significant difference between the two types of laws so far as concerns the point under discussion. Several laws, it should be noted, provide that employers' contributions should be paid partly into individual reserve accounts, and partly into a pooled fund. *IND. STAT. ANN.* (Baldwin, 1937) §§ 10168-7, 10168-9; *KY. STAT. ANN.* (Baldwin, May 1938) § 4748g-15; *Ore. Laws 1937*, c. 398, § 16 (c) (d); *S. D. Laws 1937*, c. 224, § 7 (d) (e). The Vermont law allows employers to elect as between the two kinds of funds. *Vt. Laws Spec. Sess. 1936*, No. 1, § 7 (d).

an employer might have a financial interest at stake in the allowance or denial of benefits to claimants whose benefits would be charged to his reserve account. The provisions of the laws are such, however, that the extent of this interest in any particular case is practically indeterminable. Indeed there might be many cases in which there would be no such interest at all, while in others it would be virtually impossible to tell whether there was or not. The employer's interest, it should be observed, bears no relation to the amount of the claim for benefits. Benefits will be paid out of a fund in which the employer has no legal interest whatsoever. His only interest is derived from the possibility that his contribution rate (on his total payroll) may be raised (or not be lowered when it otherwise would have been) as a direct legal consequence of the award of benefits. In any given case, the chances that such a result will follow are very slight. Contribution rates are related to the ratio of average payrolls to past contribution payments minus past benefit payments. But the relationship is only a rough one. In most cases there are not more than four (and often only three) possible contribution rates. The brackets, in other words, are quite broad.¹⁵ Employers in highly seasonal or otherwise unstable industries will be so hopelessly in the highest bracket, even with the most favorable application of the law conceivable, that by no stretch of the imagination could they be said to have an interest at stake in the determination of claims. Others, in very stable industries, will, after a few years, have built up such large accumulations of credits to their accounts that it is almost equally unlikely that any misapplication of the law could operate to increase their contribution rate. Even among those who are in the range where a change in the rate is not unlikely, the tendency of any particular claim to produce this effect would be so slight, as well as indeterminate, as to raise a serious doubt as to whether the employer had an interest in the case sufficient to entitle him to appear as a party.

At this point it is necessary to remark that the nature of the issue involved in the controversy over a particular claim might affect the extent of the employer's interest. If the controversy were over a matter of fact, the situation would generally be as suggested above. If, however, the question involved were as to whether or not unemployment was due to a "labor dispute", the decision might possibly affect a large number of employees of the same employer. And, conceivably, this issue might hinge upon a question of fact. Furthermore, most questions of law would be such that their decision might govern

15. See generally Pribram and Booth, *Merit Rating and Unemployment Compensation*, Social Security Board, Bureau of Research and Statistics, Washington, D. C., Oct. 1937 (mimeographed).

a great many cases involving employees of the employer in question in the future.¹⁶ In this manner it might be argued that the direct financial stake involved in the particular case would be multiplied indefinitely. This line of argument, however, is open to serious objection. It is to be observed that, insofar as it applies to an employer's interest that will arise out of claims for benefits for unemployment not yet experienced (as contrasted with other claims now pending, as in the case of a labor dispute), it is on a par with the claim of an employer who asserts an interest in the case of a worker who has never been in his employment, merely on the ground that the precedent established in this case might govern some future decision in which he was interested. In other words, an issue involved in a claim for benefits by a particular worker would as a rule be no more likely to arise in future claims against his employer than in claims against other employers. It is believed that the courts have never recognized such "derived" interests as this as a basis of jurisdiction.

Thus far this analysis has been exceedingly barren of consideration of precedents. The fact is that the situation under discussion is so novel that precedents are almost non-existent. The nearest thing to precedents which the writer has been able to discover are two workmen's compensation cases. In the case of *Crockett v. State Insurance Fund*,¹⁷ an employer appealed to the courts against a decision of the Workmen's Compensation Commission awarding benefits to one of his employees. The New York Supreme Court refused to take jurisdiction on the ground that the employer, who was insured under the state fund, had no interest which entitled him to sue. In the course of the opinion, the court remarked, "It is true that the employer has a remote interest, even though insured in the state fund, to the end that the risk which he claims not to be within the act may be so decided as affecting any subsequent premiums which he must pay. That interest, however, is too remote an interest to authorize his appeal in a matter where he is not otherwise aggrieved."¹⁸

The other case¹⁹ involved the same issue but the decision was contrary to that of the *Crockett* case. The court considered the *Crockett* case but concluded: "It is self-evident that every claim that

16. For example, suppose that an employer is gradually laying off hand cigar makers, and substituting machines. These men might not be able to get new jobs as cigar makers, but there might be jobs available for shoe machine operators at lower pay. Would the latter constitute "suitable employment" for these men, the rejection of which would disqualify them for benefits? The mixed question of law and fact involved might make a great difference in the benefits which would be charged to the account of the employer in question.

17. 170 App. Div. 122, 155 N. Y. Supp. 692 (3d Dep't 1915).

18. *Id.* at 123, 155 N. Y. Supp. at 693.

19. *Industrial Commission of Utah v. Evans*, 52 Utah 394, 174 Pac. 825 (1918).

is allowed and paid out of the insurance fund must of necessity increase the contributions of each insurer in the fund, and such insurer must therefore correspondingly increase the amount of his contributions." ²⁰ Whether or not the court would have been willing to follow this line of reasoning to its logical conclusion and give to any insured employer the right of appeal as regards any claim payable out of the fund does not appear. What does appear, however, and what needs to be taken into account in appraising the case is that it involved a self-insurer rather than one who was insured in the state fund. In such a situation it was admitted in the *Crockett* case that the right to review is clear, for the compensation must be paid directly by the employer. In the Utah case, however, the Attorney-General had argued that under the Utah law all employers, whether self-insured or under the state fund, had to be treated alike. The court expressed itself as inclined to agree with this contention and as further agreeing that it followed that there could be no right of judicial review for the employer in this case unless such a right would also exist for an employer under the state fund. Under this construction of the law, therefore, the court had to choose between upholding the right of an insurer in the state fund to judicial review and denying the right of a self-insurer to such review. It may be suspected that its disinclination to do the latter (which would have raised a serious Constitutional question) may account for its refusal to follow the rule of the *Crockett* case.

But, the question may be asked: is not the position of an employer under an employer-reserve type of unemployment compensation law analogous to that of the self-insurer? (And we have already admitted that the position of an employer under a merit-rating law is similar to that of an employer under an employer-reserve law as far as the question under discussion is concerned.) But here again the analogy between workmen's compensation and unemployment compensation is fallacious. In the former case, the liabilities of a self-insurer are exactly co-extensive with the benefits paid his workers. As has been previously pointed out, in the case of an employer under an employer-reserve type law, there is no such one-to-one relationship. Employers' contribution rates are determined by three variables in combination: the employer's past contributions, past benefits which have been charged to his account, and the average of his payrolls over the last few (generally three or five) years. In addition to this, there is in all cases a prescribed limit above which rates may not be raised, regardless of the extent of benefits chargeable to the employer in

20. *Id.* at 410, 174 Pac. at 831.

question. Finally, in most of the states which provide for automatic merit-rating, as distinguished from employer reserve accounts, there is also a minimum below which rates may not be reduced under any circumstances. The extent to which these various factors operate to diminish the correspondence between benefits and contribution rates may be indicated by the fact that it is entirely possible under any of the automatic merit rating or employer reserve laws (even the full employer-reserve account law of Wisconsin)²¹ that decreasing benefit claims may be accompanied by an increase in rates, and *vice versa*. Nor is it necessarily true that the change in the rate of claims will be reflected in a change in the contribution rate even at some future time.²²

Thus it appears that no dogmatic answer may be given to the question: who may constitute "aggrieved parties" under unemployment compensation laws? It will depend upon the type of law involved and upon the sort of question which is at issue. Nevertheless, it is clear that the law of workmen's compensation is not controlling. It is also fairly clear that disappointed claimants are "aggrieved parties" having sufficient interest at stake to be entitled to whatever Constitutional protections are afforded any interested parties. As to employers, the issue is by no means clear. It seems probable that it is only under employer-reserve and merit-rating laws that employers can legitimately claim to be "aggrieved" by decisions affecting their former employees, and it is not at all clear that even in all such cases the employers have a sufficient interest in the result to be entitled to any special protection.

Our next inquiry must be: what are the rights of "aggrieved" or interested parties? First, what rights are provided by the statutes, and second, what are their Constitutional rights? It has already been indicated that in every state there is some measure of judicial review provided for "aggrieved parties". Judicial review, however, may vary greatly in degree. One may more or less arbitrarily enumerate six types of judicial review, classified according to the type of question open for review. (1) The courts may be confined to seeing that the administrative procedure conformed to the essentials of fairness required by "due process" and was not tainted by fraud; or (2) they may also be permitted to pass upon all "questions of law"; (3) their review may be extended to so-called "jurisdictional facts"; (4) they may be entitled to pass upon all questions of law and fact on the basis of the administrative record; or (5), in addition to this,

21. Wis. Laws Spec. Sess. 1931-1932, c. 20, § 108.16.

22. For substantiation of these statements, see Pribram and Booth, *supra* note 15, at 32, 63-96.

they may be permitted to receive new evidence; (6) finally, they may be authorized to conduct a trial *de novo*.

As far as one can tell from the words of the statutes, unaided by judicial construction, most of the state unemployment compensation laws fall within the second category. The general provision is to the effect that in the absence of fraud administrative fact-finding shall be conclusive if supported by evidence.²³ There is no such provision in the New Jersey law,²⁴ and the Ohio provision permits review of "unreasonable" decisions.²⁵ The laws of Michigan,²⁶ Minnesota,²⁷ New Mexico,²⁸ Rhode Island,²⁹ Texas,³⁰ and Vermont³¹ provide for judicial review of facts in all cases. Among these, the laws of Minnesota,³² Rhode Island³³ and Texas³⁴ specifically provide that new evidence may be admitted upon judicial review. Michigan by implication confines the review to the administrative record,³⁵ and the other two acts leave the matter uncertain.

What are the Constitutional rights of interested parties? First, it would be well to examine the peculiar situation arising out of the nature of the interest, if any, which employers may have in the determination of unemployment benefits. Their interest is derived entirely from the effect of the granting of benefits upon their payroll tax rate. Thus it might be argued that their rights in the matter of judicial review are the same as those of other taxpayers in the matter of assessments. It is well known that the courts have consistently been lenient with regard to requiring judicial review of the actions of tax officers. The leading case of *Davidson v. New Orleans*³⁶ established the principle that if the procedural requirements of notice and hearing were followed, the United States Supreme Court except in very exceptional circumstances would not go further. And in *McMillen v.*

23. The wording of the Draft Bills, prepared by the Social Security Board, is as follows: "In any judicial proceeding under this section, the findings of the board of review as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of said court shall be confined to questions of law." Section 6 (i), pp. 30, 105. *Draft Bills for State Unemployment Compensation of Pooled Fund and Employer Reserve Account Types*, Social Security Board, January 1937.

24. N. J. REV. STAT. (1937) tit. 43, c. 21.

25. OHIO CODE ANN. (Baldwin, Supp. 1938) § 1345-29.

26. Mich. Acts Extra Sess. 1936, No. 1, § 38, as amended by Mich. Laws 1937, No. 347, § 38.

27. Minn. Laws Extra Sess. 1936, c. 2, § 8 (f) (g).

28. N. M. STAT. ANN. (Courtright, Supp. 1938) § 156-306 (h) (i).

29. R. I. GEN. LAWS ANN. (1938) c. 284, § 9.

30. Tex. Laws 1936, c. 482, § 6 (h) (i).

31. Vt. Laws Spec. Sess. 1936, No. 1, § 6 (g) (h) (i) (j).

32. Minn. Laws Extra Sess. 1936, c. 2, § 8 (g).

33. R. I. GEN. LAWS ANN. (1938) c. 284, § 9.

34. Tex. Laws 1936, c. 482, § 6 (i).

35. Mich. Acts Extra Sess. 1936, No. 1, § 38.

36. 96 U. S. 97 (1878).

Anderson,³⁷ the Court flatly declared that due process of law does not include the right to judicial review of assessments made by tax officers. Apparently this position is taken because if the taxpayer was "wrongly taxed", he could stay the proceedings for collection by an injunction.³⁸ If this reasoning were applied to the case of unemployment compensation, an employer could not protest a decision to pay benefits except as a defense in an action by the state to collect his payroll tax.

Before looking at the arguments which may be adduced for considering unemployment compensation payroll taxes in a different category from other taxes, it would be well to examine the case for considering them identical. The United States Supreme Court, in upholding the Alabama Unemployment Compensation Act,³⁹ upheld it as a tax. Furthermore, the Court overrode objections based upon the theory that the tax was not distributed strictly in accordance either with benefit or with responsibility (for unemployment) by holding that there was no necessity that either such relationship should exist. Even an employer who caused no unemployment and whose workers received no benefits could be made liable for the tax just as though its proceeds went into the general funds of the treasury.⁴⁰

Thus in some respects it seems that in the eyes of the law payroll taxes are just like other taxes. Nevertheless, it would appear that with respect to the question of judicial review there are important differences. In the first place, the questions at issue in the commonly cited tax cases generally had to do with the determination of the proper value of property. This is not a question of law, and it is furthermore a question about which there is generally considerable leeway for honest difference of opinion. Consequently, the case for allowing administrative discretion is very strong. The limitations on the extent to which the courts would grant this discretion full sway are suggested in the case of *S. S. Kresge Co. v. Detroit*.⁴¹ There, a tax valuation was upheld despite the fact that the court declared it did not necessarily agree with the result, saying, "We find no evidence of an intentional violation of duty on the part of the assessing officers or such reckless disregard of a taxpayer's manifest rights as would reasonably lead to an inference of intentional inequality or of a clear adoption of a fundamentally wrong principle that would make the assessment void."⁴² It is because the assessor's decision was held to be within

37. 95 U. S. 37 (1877).

38. *Id.* at 42; *cf.* *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701 (1884).

39. *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495 (1937).

40. *Id.* at 521-523.

41. 276 Mich. 565, 268 N. W. 740 (1936), 107 A. L. R. 1263 (1937).

42. *Id.* at 574, 268 N. W. at 743.

the realm of judgment that the court sustained it. Had it been a matter of the interpretation of law, the result would probably have been different.

It must also be borne in mind that the effect of postponing judicial review until the state takes steps to collect the tax by judicial process would be very different in the case of the payroll tax from that in the case of ordinary taxes. For in the former case the correct assessment of the tax may depend upon the accurate determination of the circumstances attending the taxpayer's dismissal of one or more employees several months before the tax was assessed. To postpone the judicial determination of these circumstances until months afterwards might render the remedy ineffectual.

In view of these considerations it seems highly unlikely that the courts at employers' behests will assimilate the question of judicial review of benefit awards to that of judicial review of ordinary tax assessments. It is still possible, however, that the fact that the only interest that the employer has in such awards is that of a taxpayer whose rate may be affected by the decision might influence the courts in the direction of limiting his right of judicial review.

However this may be, let us proceed with the general question of what are the Constitutional rights of interested parties—benefit claimants as well as employers—to judicial review of the determinations of benefit claims. It may be taken for granted that regardless of statutory provisions courts will afford a hearing to anyone who maintains that the administrative decision by which his interests were affected was infected with fraud, or was made by a person having a personal interest at stake.⁴³ This would also include determination as to whether the agency had acted within its jurisdiction or whether it had acted *ultra vires*.⁴⁴

Would it also include all "questions of law"? Could the legislature, in other words, vest in an administrative agency, such as a state Unemployment Compensation Commission, the final authority to interpret the unemployment compensation statute in determining individual benefit claims? It is well known that the state of American Constitutional law on the question of the extent to which courts may be barred by legislative action from reviewing the decisions of admin-

43. Cf. *United States v. Ju Toy*, 198 U. S. 253 (1905), where the Court admitted that even an alien being held at the gateway to the country, prior to admission, would have such a right with reference to the administrative agency which passed upon his right to enter the country.

44. See *Courter v. Simpson Construction Co.*, 264 Ill. 488, 495, 106 N. E. 350, 353 (1914), cited in DODD, *THE ADMINISTRATION OF WORKMEN'S COMPENSATION* (1936) 340. It was held in this case that to deny court review of the question of whether the commission had acted legally and within its jurisdiction would constitute a violation of the due process clause.

istrative agencies is highly chaotic.⁴⁵ Courts pursue various and conflicting theories on the subject and are guided, at least implicitly, by different principles depending upon the type of administrative decision being considered. One of the basic theories which is generally relied upon is that the courts will review "questions of law" but that "questions of fact" will be excluded from their purview. Unfortunately this formula tells us rather less than might be desired, for the distinction upon which it is based is hazy at best.

For present purposes, however, something may be gained from an examination of the case of *Reetz v. Michigan*.⁴⁶ In that case a state statute had given a board of registration the power to decide finally whether an applicant for the privilege of granting medical diplomas had been "legally registered under act No. 167 of 1883". The United States Supreme Court upheld this grant of authority, saying, ". . . we know of no provision in the Federal Constitution which forbids a state from granting to a tribunal, whether called a court or a board of registration, the final determination of a legal question. . . . Due process is not necessarily judicial process . . ." ⁴⁷ Considering that this is one of the most extreme statements of judicial self-limitation in this field that can be found, it is important to note the limiting factors. In the first place, it has to do with the granting of a privilege, a license; and it is generally recognized that in such cases the courts are disposed to grant a wide latitude of discretion to the administrative agency.⁴⁸ In the second place, even in this case the Court intimated that had the complainant requested and been denied a hearing a different result might have been reached. Lastly, it was not strictly true that the final settlement of a legal question was left to the administrative authority, for the Court declared that, *regardless of the terms of the statute*, the state court might have entertained an application for a mandamus to compel the board to register the petitioner.⁴⁹

*United States v. Williams*⁵⁰ was a suit to obtain a payment under the soldiers' "bonus" legislation. The claimant lost his plea on the ground that the statute made the decisions of the Secretary of War and the Director of the Veterans' Bureau final. The Court declared, "The record does not disclose the basis for [the Director's] action; but whatever it may have been his decision is final, *at least unless it be wholly without evidential support or wholly dependent upon a question*

45. See DICKINSON, *op. cit. supra* note 8, at 71, and *passim*.

46. 188 U. S. 505 (1903).

47. *Id.* at 507.

48. DICKINSON, *op. cit. supra* note 8, at 59-60.

49. *Reetz v. Michigan*, 188 U. S. 508 (1903).

50. 278 U. S. 255 (1929).

of law or clearly arbitrary or capricious.”⁵¹ This was a type of case—a petition for a gratuity or favor from the Government—in which the courts are the most liberal in allowing freedom of administrative discretion.⁵² Yet even here it is suggested that questions of law—at least pure questions of law—perhaps could not be finally committed to the decision of an administrative officer.

Since the decision of the *Williams* case, however, the Economy Act of 1933⁵³ seems to have done away with even this limited provision for judicial review. On the basis of this amendment the Circuit Court of Appeals for the Sixth Circuit has refused to review an award of the Veterans' Bureau even though it was contended that the award was retroactive and was made without notice and hearing.⁵⁴ The court cited *Smith v. United States*⁵⁵ in which the court stated that “Inasmuch as the granting of pensions and compensation allowances are mere gratuities, which may be withdrawn at will, it would seem clear that ‘Congress can impose such limitations in this connection as it may deem desirable.’”⁵⁶

Turning to the field of workmen's compensation, we find very little in the way of decided cases on this point, for the simple reason that most of the statutes provide for some measure of judicial review. The Ohio law, however, does deny the right of appeal to self-insurers except in cases where the commission, after rehearing, finds that it is without jurisdiction.⁵⁷ This act has been sustained by the Ohio Supreme Court.⁵⁸ Reference is made in the decision to the fact that if a self-insurer refuses to pay an award, the state must sue him and that in such a suit he may “challenge the correctness of the award in all respects save the amount of compensation”.⁵⁹ The case is, therefore, inconclusive, even as to the attitude of the Ohio Supreme Court.⁶⁰

51. *Id.* at 257, 258. (Italics supplied.)

52. DICKINSON, *op. cit. supra* note 8, at 59-60.

53. 48 STAT. 9 (1933), 38 U. S. C. A. 707 (Supp. 1938).

54. *United States v. Mroch*, 88 F. (2d) 888 (C. C. A. 6th, 1937). The question of whether or not notice and hearing must be granted aggrieved parties in unemployment compensation cases is omitted from discussion in this paper. Such a discussion would be purely academic, as all the unemployment compensation laws and administrative procedures provide very complete opportunities for hearing and no one has been heard to suggest or advise any departure from this practice.

55. 83 F. (2d) 631 (C. C. A. 8th, 1936).

56. *Id.* at 639. In *Lynch v. United States*, 292 U. S. 571, 587 (1934) the Supreme Court refers to the amendment in question and appears to assume its validity, by way of dictum.

57. DODD, *op. cit. supra* note 31, at 342.

58. *Pittsburgh Coal Co. v. Industrial Comm.*, 108 Ohio St. 185, 140 N. E. 604 (1923).

59. Finality of the administrative determination of the amount of compensation was recognized on the theory that it involved a mere mechanical application of the schedule provided in the law to the facts of the case.

60. Opposition to administrative finality as to questions of law and the theory behind such opposition has recently been stated by an Ohio Court of Appeals as follows: “Under the due process clauses of the State and Federal Constitutions . . . it is

If the courts see fit to assimilate unemployment benefits to veterans' pensions, legislatures might deny all right to judicial review, and even to a hearing, to both employers and claimants. We have seen that there is at least a suggestion in the precedents that denial of all judicial review might be upheld even in the case of workmen's compensation. We have also pointed out reasons for believing that the courts might consider unemployment benefits more in the nature of "gratuities" than workmen's compensation. On the other hand, unemployment benefits, unlike veterans' pensions, are paid out of special funds created for the purpose by payroll taxes. There is also the fact that general opinion is moving in the direction of considering such benefits as matters of right.

Finally, it should be pointed out that whether or not courts will allow administrative finality as to questions of law probably will depend in part upon the nature of the question of law involved. Thus it has been suggested that courts probably will never allow administrative finality as to legal questions of a sort likely to come before the courts in other proceedings.⁶¹ In this category would come legal questions governing whether or not a given worker had been employed in a "covered" employment by an employer subject to the act, which questions might arise in suits by the state to collect payroll taxes.

It might also be remarked that considerations discussed above which favor administrative finality might well move courts to allow administrative determinations of legal questions to stand in most cases even though, if it was brought to a test, they might not uphold a statutory attempt to close the door to such review completely.

As to questions of "mixed fact and law", it seems very likely, especially in view of the "gratuitous" aspect of unemployment compensation, that courts may respect the administrative decisions.⁶² Such questions would be involved in decisions as to "availability for work", "refusal of suitable employment", "discharge for misconduct", and, perhaps, unemployment "arising out of a labor dispute".

What of administrative finality as to matters of fact? We have seen that most of the unemployment compensation laws attempt to provide such finality, providing at least that findings of fact are based

beyond the power of the Legislature to confer absolute power upon an administrative board without any judicial review. The attempt to do so would lack the essential quality of a law in that no rule or standard binding upon it would be imposed. And when a rule or standard is enacted it is a part of the judicial function to determine whether the rule or standard has been followed in the transaction brought before the court by appropriate proceedings." *Schrader v. Cincinnati & Suburban Bell Tel. Co.*, 56 Ohio App. 501, 507, 11 N. E. (2d) 253, 256 (1936).

61. See Note (1938) 26 CALIF. L. REV. 683, 691.

62. The following cases deal with questions of "mixed fact and law": *Bates & Guild Co. v. Payne*, 194 U. S. 106 (1903); *United States v. Williams*, 278 U. S. 255 (1929); *DICKINSON*, *op. cit. supra* note 8, at 52-54.

upon evidence.⁶³ Such provisions are common in workmen's compensation statutes and have been generally upheld. Thus the New York Court of Appeals has held that due process does not require judicial review of the facts, in the case of the decisions of a Workmen's Compensation Commission, where there is a statutory requirement of a hearing for all interested parties.⁶⁴ This decision has been affirmed by implication (by denial of *certiorari*) by the United States Supreme Court.⁶⁵ Furthermore, the United States Supreme Court, in proceedings under the Longshoremen's and Harbor Workers' Compensation Act, has held that findings of fact by a deputy commissioner if supported by evidence are conclusive.⁶⁶

It was held of course in the *Ben Avon* case⁶⁷ that certain questions of mixed law and fact required judicial review. An attempt to apply the same line of reasoning to a workmen's compensation statute was negated by the Supreme Court of Illinois in the case of *Nega v. Chicago Railways Co.*⁶⁸ The court declared "*The Ben Avon Borough* case appears to base the right to review facts on the proposition that rate-making is a legislative function, in which questions of fact are the only issue and in which the findings are in nowise judicial in character."⁶⁹ The court went on to point out that the United States Supreme Court had upheld the ordinary distinction between law and fact with reference to judicial review in many Interstate Commerce Commission cases since the *Ben Avon* case.

Crowell v. Benson,⁷⁰ has been more upsetting to the traditional distinction between law and fact than even the *Ben Avon* case. It will be remembered, however, that in *Crowell v. Benson* the Court did not rely upon the due process clause but rather based its holding on the nature of the judicial power as set forth in the third Article of the Constitution.⁷¹ Thus the case is not controlling where state legislation is involved.⁷² Furthermore, the Supreme Court has shown a

63. *Supra* p. 146.

64. *Helfrick v. Dahlstrom Metallic Door Co.*, 256 N. Y. 199, 176 N. E. 141 (1931). Nearly all of the state unemployment compensation laws provide for a hearing in case of dispute. One or two laws, like that of California, leave the procedure for handling appealed cases to the discretion of the commission. CAL. CODES AND GEN. LAWS (Deering, Supp. 1935) Act 8780d, § 70.

65. *Dahlstrom Metallic Door Co. v. Industrial Board of N. Y.*, 284 U. S. 594 (1932).

66. *Green v. Crowell*, 293 U. S. 554 (1934) (denying *certiorari*).

67. *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287 (1920).

68. 317 Ill. 482, 148 N. E. 250 (1925).

69. *Id.* at 489, 148 N. E. at 252.

70. 285 U. S. 22 (1932).

71. *Id.* at 57. See Black, *The "Jurisdictional Fact" Theory and Administrative Finality* (1937) 22 CORN. L. Q. 349, 361, for confirmation of this interpretation.

72. It has been pointed out, however, that state courts, in states having express distributive clauses separating the legislative, executive, and judicial powers, might apply the same doctrine to workmen's compensation cases. *Ibid.* The writer has failed to discover any instance of such a development.

tendency to limit the effect of this decision. Thus it has upheld the power of Congress to give an administrative officer final power to determine whether an injury arose out of and in the course of employment, in a case where the decision of this question turned on the general nature and scope of the employee's duties.⁷³ Furthermore, as Professor Dodd has pointed out, the *Benson* case involved a law which provided for no administrative review of the initial decision, which thus became also the final determination.⁷⁴ On the contrary all the unemployment compensation statutes provide for at least one stage of administrative review of the original decision. Also in the *Crowell* case, the Court made the point that the case was one of private right between individuals. Here again is ground for distinguishing this case from that of a suit by a worker to secure benefits from the state or by an employer to prevent the payment of such benefits. Finally, it is important to note that the Court insisted (although over the protest of the dissenting justices) that the jurisdictional fact involved was also a "constitutional fact".⁷⁵ Congress could not compel payment of compensation to others than "employees"; therefore, the determination of whether or not the claimant was an "employee" involved a matter of Constitutional right. Such was the reasoning of the Court. But states may provide unemployment benefits for others than "employees", as defined in their acts, or they may confine them to certain classes of employees only. And it is not necessary that there should be an exact correspondence between the workers by whose wages the employers' taxes are measured and those who are eligible for benefits.⁷⁶ Consequently, it would seem probable that in unemployment compensation cases jurisdictional facts (for example, whether the worker worked in covered employment for a particular employer) will be treated on a par with other questions of fact.⁷⁷

Should courts in any case show a disposition to rule on jurisdictional facts for themselves, the probability is that they will do so on the record supplied by the unemployment compensation agency. If, however, any tendency to grant trials *de novo* should manifest itself, the state concerned would do well to follow the example of the Federal Government by providing in the law that in case additional evi-

73. *Voehl v. Indemnity Insurance Co. of North America*, 288 U. S. 162 (1933).

74. *Dodd, op. cit. supra* note 31, at 382.

75. "As to determinations of fact, the distinction is at once apparent between cases of private right and those which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." *Crowell v. Benson*, 285 U. S. 22, 50 (1932).

76. *Carmichael v. Southern Coke & Coal Co.*, 301 U. S. 495 (1937).

77. For a full review of the present status of the question of review of "jurisdictional facts", see *Black, supra* note 58, at 349, where it is stated that "the case material to date can not be reconciled or reduced to a logical system. . . ."

dence is permitted, following appeal of an administrative order, the court should remand the case for the taking of such evidence, and, if necessary, for the modification of the order.⁷⁸

Although the general doctrine that findings of fact by an administrative board or commission may be made conclusive upon the courts is settled, there is still room for differences of opinion as to what constitute "questions of fact". Professor Dodd, writing of workmen's compensation acts, goes even so far as to declare that "it may perhaps safely be said that the judicial attitude in states providing for final administrative determination of facts is often not different from the attitude in states which do not so provide".⁷⁹ Again he writes, "In some states where judicial review is applied to both law and fact, the courts are reluctant to reverse the administrative finding except in case of necessity; in some, where review of the facts is not expressly required, the courts limit themselves primarily to issues of law; and in those states where administrative determinations of fact are made final by statute, the courts always have the opportunity to discover an issue of law, or to determine that the administrative finding has no support in the evidence or in 'competent evidence'."⁸⁰

It is undoubtedly true that similar opportunities will present themselves in the case of unemployment compensation laws. Thus, the question of the existence of the employer-employee relationship often calls for a determination which is partly factual and partly legal. The application of the various disqualifications for benefits, such as refusal to accept "suitable employment", discharge for "misconduct", and the like also call for decisions of the border-line variety. Yet even in the case of such a jurisdictional fact as the existence of the employer-employee relationship in workmen's compensation cases, the prevailing tendency among state courts has been decidedly towards holding the commission's determination to be binding unless there is entire absence of supporting evidence or unless the facts are not in dispute and the administrative determination was purely a legal one.⁸¹

In conclusion, it should be remarked that the comparatively small stakes involved will probably prevent appeal to the courts from any

78. BIFUMINOUS COAL ACT § 6 (b) (c), 50 STAT. 85 (1937), 15 U. S. C. A. § 836 (b) (Supp. 1938); NATIONAL LABOR RELATIONS ACT § 10 (e) (f), 49 STAT. 454 (1936), 29 U. S. C. A. § 160 (e) (Supp. 1938); PUBLIC UTILITY HOLDING COMPANY ACT § 24, 49 STAT. 834 (1936), 15 U. S. C. A. § 79 (x) (Supp. 1938); SECURITIES EXCHANGE ACT § 25, 48 STAT. 901 (1934), 15 U. S. C. A. § 78 (y) (Supp. 1938).

79. DODD, *op. cit. supra* note 31, at 378.

80. *Id.* at 381.

81. Hillen v. Industrial Accident Comm., 199 Cal. 577, 250 Pac. 570 (1926); Taylor v. Blackwell Lumber Co., 37 Idaho 707, 218 Pac. 356 (1923); Ciofsky v. Industrial Comm., 290 Ill. 521, 125 N. E. 286 (1919); Franklin C. & C. Co. v. Industrial Comm., 296 Ill. 329, 129 N. E. 811 (1921); Missouri Valley Br. Co. v. State Industrial Comm., 86 Okla. 198, 207 Pac. 562 (1922); Federal Mining & Smelting Co. v. Thomas, 99 Okla. 24, 225 Pac. 967 (1924).

large number of unemployment compensation decisions. Nevertheless even a few such cases might result in hampering decisions and might seriously undermine the morale of the administrative agencies affected. Therefore it is important to do all that is possible to protect this sphere of administrative action from intervention by the courts; for it is eminently a field for expert administrative action. First of all, those state laws which permit review of facts should be amended to limit judicial review to questions of law. If this is done, the chances would seem to be good, as argued above, that the doctrine of "jurisdictional facts" may be minimized or entirely excluded as a source of expanded judicial power in this field. Furthermore, the situation would also appear favorable for leaving to the administrative agencies a large realm of independent discretion regarding so-called questions of "mixed law and fact", as in the application of the various provisions regarding disqualifications for benefits.

It is especially unlikely that suits by employers will present much of a problem, for two facts tend greatly to weaken their position. The first of these is the fact that their status as "aggrieved parties" is questionable. The other point is that insofar as employers may become "aggrieved parties", they become such by virtue of their interest as taxpayers, which is another weakness in their case. In the case of states having "pooled funds without merit rating", there appears to be no sound basis for holding employers to be "aggrieved parties" in cases of disputed benefit awards.

These good results are partly dependent upon the fulfillment of two important conditions. First, the unemployment compensation agencies for administrative review must operate in such a way as to convince the courts of their fairness and impartiality. And they must be careful to display in the record "competent evidence" in support of their findings. Second, it is important that the cases—and particularly the first cases, which may become very important as precedents—be well argued. Important among the points for counsel to stress will be the striking differences which have been pointed out above between workmen's compensation and unemployment compensation; and the fact that in case of unemployment compensation one of the parties will be either one seeking a "benefit" or a taxpayer seeking protection against a decision which carries with it the remote possibility of increasing his tax rate at some future time.