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NOTES

SEPARATION OF POWERS DOCTRINE IN NEW MEXICO

The separation of powers doctrine is necessary because of the political truth that the accumulation of all governmental powers in the same hands can lead to tyranny.¹ Properly applied, the doctrine is a valid and useful *means* of preventing the exercise of unchecked power,² and is an aid to the efficient organization of government.³ However, when the doctrine is interpreted strictly, applied mechanically, and viewed as an *end* in itself, the results can be artificial⁴ or actually harmful.⁵

Under a strict interpretation of the doctrine, each governmental function is classified as legislative, or executive, or judicial. Once labeled, the function must be performed by that branch of the government having the same name. Such a classification is untenable.⁶ There is "no high wall or demarkation between governmental departments. Necessarily they gradually merge and blend into each other."⁷ For example, the assessment of lands for tax purposes has been labeled ministerial,⁸ legislative,⁹ and judicial¹⁰ by the same court.¹¹ In the past, divorces were granted only by the legislature,¹² but now only the courts grant them.¹³ In the future, it is possible that

1. The Federalist No. 47, at 245 (Everyman's Library ed. 1948) (Madison).

2. Jaffe & Nathanson, *Administrative Law* 38 (1961).

3. *Ibid.*; see also Sharp, *The Classical American Doctrine of "The Separation of Powers"*, 2 U. Chi. L. Rev. 385, 397 (1935).

4. See Comment, 3 *Natural Resources J.* 178 (1963).

5. See Davis, *Judicial Review of Administrative Action in West Virginia—A Study in Separation of Powers*, 44 W. Va. L. Rev. 270, 371 (1938); 1 Davis, *Administrative Law Treatise* §§ 2.10, 2.12 (1958) [hereinafter cited as Davis] (unfavorable comment on State *ex rel.* Hovey Concrete Prods. Co. v. Mechem, 63 N.M. 250, 316 P.2d 1069 (1957)).

6. *In re* Beasley Bros., 206 Iowa 229, 220 N.W. 306 (1928); State *ex rel.* Hillis v. Sullivan, 48 Mont. 320, 330, 137 Pac. 392, 395 (1913) (no such thing as absolute independence). See generally 1 Davis § 1.09. *But see* Charleston & Southside Bridge Co. v. County Court, 41 W. Va. 658, 24 S.E. 1002 (1896) (court used a dictionary to label a function).

7. *In re* Beasley Bros., *supra* at 233, 220 N.W. at 308.

8. *Pittsburg, Cincinnati & St. Louis Ry. v. Board of Pub. Works*, 28 W. Va. 264 (1886).

9. *Mackin v. County Clerk*, 38 W. Va. 338, 18 S.E. 632 (1893).

10. *Wheeling Bridge & Terminal Ry. v. Paull*, 39 W. Va. 142, 19 S.E. 551 (1894).

11. See Davis, *op. cit. supra* note 5, at 273-74.

12. Jaffe & Nathanson, *op. cit. supra* note 2, at 3.

13. *Ibid.*

divorces might be granted by administrative agencies. Even if functions could be permanently and uniquely classified, it would be impractical to absolutely prohibit one governmental branch from exercising any function assigned to either of the other two branches. "Blending" of governmental functions is commonplace today.¹⁴ The truth is that a complete separation of governmental functions is an abstraction which cannot be put into practice.¹⁵

The unworkability of a strict interpretation of the doctrine is most conspicuous when applied to administrative agencies.¹⁶ In view of the complexity of modern life, administrative agencies are necessary if many governmental tasks are to be performed efficiently.¹⁷ Most agencies are effective because they do perform more than one of the three classical functions of government.¹⁸ Since agencies are necessary, they must be permitted to operate effectively. But, since most agencies combine functions, they cannot be allowed to operate under a strict interpretation of the separation of powers doctrine. In states where the strict interpretation prevails, courts

14. See *e.g.*, *State v. Illinois Cent. R. R. Co.*, 246 Ill. 188, 92 N.E. 814 (1910) (agency adjusts railroad's gross receipts); *In re Beasley Bros.*, 206 Iowa 229, 220 N.W. 306 (1928) (commission decides facts and grants bus line permit); *Craig v. O'Rear*, 199 Ky. 553, 251 S.W. 828 (1923) (legislature appoints members of school commission); *State ex rel. Hillis v. Sullivan*, 48 Mont. 320, 137 Pac. 392 (1913) (commission appoints court attendants); *Ross v. Board of Chosen Freeholders*, 69 N.J.L. 291, 55 Atl. 310 (Sup. Ct. 1903) (court appoints Public Park Commissioners); *Miami County v. Dayton*, 92 Ohio St. 215, 110 N.E. 726 (1915) (conservancy legislation upheld; quasi-legislative and quasi-judicial functions constitutional); *Fairview v. Griffee*, 73 Ohio St. 183, 76 N.E. 865 (1905) (judiciary implements statute allowing land to be detached from village); *Bailey v. Board of Pub. Affairs*, 194 Okla. 495, 153 P.2d 235 (1944) (agency reorganizes penal system); *Trybulshi v. Bellows Falls Hydro-Elec. Corp.*, 112 Vt. 1, 20 A.2d 117 (1941) (Public Service Commission performs judicial function); *Sabre v. Rutland R.R. Co.*, 86 Vt. 347, 85 Atl. 693 (1913) (statute creating Board of Railroad Commissioners constitutional); *Wheeling Bridge & T. Ry. Co. v. Paull*, 39 W. Va. 142, 19 S.E. 551 (1894); *Brinnegar v. Clark*, 371 P.2d 62 (Wyo. 1962) (fire marshal finds defendant guilty of a misdemeanor).

15. *Davis, op. cit. supra* note 5, at 369.

16. The doctrine is no longer invoked when other obvious "blendings of functions" situations arise. See, *e.g.*, *State ex rel. Chapman v. Truder*, 35 N.M. 49, 289 Pac. 594 (1930) (doctrine applies to state, not local, governments); *Annot.*, 67 A.L.R. 737, 740 (1930) (doctrine does not apply to commission or city manager type of municipal governments); *Annot.*, 50 A.L.R. 42, 44 (1927) (declaratory judgments); *Annot.*, 26 A.L.R. 399 (1923) (judicial suspension of sentence not encroachment on executive branch).

17. 1 *Davis* § 1.05.

18. "The very identifying badge of the modern administrative agency has become the combination of judicial power (adjudication) with legislative power (rule making)." 1 *Davis* § 1.09 at 68.

either declare specific agency actions to be unconstitutional¹⁹ or use legal fictions to avoid the doctrine.²⁰

Article 3, section 1 of the New Mexico Constitution provides:

The powers of government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this Constitution otherwise expressly directed or permitted.

The New Mexico Supreme Court, judging by some of its recent decisions,²¹ has strictly construed this provision to require complete separation of governmental powers and functions. However, courts in other jurisdictions have interpreted similar constitutional provisions to mean something less than complete separation.²² It seems unlikely that the New Mexico Supreme Court will abandon its interpretation. Therefore, if the state is to have a workable separation of powers doctrine, article 3, section 1 of the New Mexico Constitution should be amended.

I

HISTORICAL SUMMARY

Most authorities trace the separation of powers doctrine back to Aristotle and find support for the doctrine in the writings of Polybius, Cicero, Machiavelli, Harrington, Locke, and Montesquieu, among others.²³ It is apparent that the doctrine was well known to the authors of the United States Constitution. Madison, in what is still the best essay on the American concept of the doctrine, said that the theory

19. *State ex rel. Hovey Concrete Prods. Co. v. Mechem*, 63 N.M. 250, 316 P.2d 1069 (1957).

20. *Continental Oil Co. v. Oil Conservation Comm'n*, 70 N.M. 310, 373 P.2d 809 (1962).

21. *Continental Oil Co. v. Oil Conservation Comm'n*, *supra* note 20; *State ex rel. Hovey Concrete Prods. Co. v. Mechem*, 63 N.M. 250, 316 P.2d 1069 (1957).

22. See cases cited in note 14 *supra*.

23. See 1 Davis § 1.09, at 64; Sharp, *op. cit. supra* note 3. *But see* Parker, *The Historic Basis of Administrative Law: Separation of Powers and Judicial Supremacy*, 12 Rutgers L. Rev. 449, 451, 481 (1958), for a refreshing criticism of the attempt to trace the doctrine back to antiquity.

could amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.²⁴

It is an undisputed fact that in the United States, governmental power is divided into three major departments: the legislative, the executive, and the judicial.²⁵ The federal and state constitutions establish this broad tripartite division, explicitly or implicitly.²⁶ The constitutions of ten states follow the federal plan and do not have an explicit "distribution of powers" clause.²⁷ Four states have explicit clauses using language almost identical to the language in New Mexico's constitution.²⁸ Nineteen states' constitutions use comparable language.²⁹ Eight do not provide for exceptions to the separation of powers clause.³⁰ Two states' constitutions, while providing for exceptions, mention an "administrative" department as a part of the executive.³¹ The New York constitution is unique in that, while it follows the federal scheme of providing separately for each branch of government, it sets up something called the "Officers and Civil Departments" which might be a fourth branch.³² Rhode Island, and possibly South Dakota, are unusual in that they do not specifically prohibit the exercise of powers "properly belong-

24. The Federalist No. 47, at 247 (Everyman's Library ed. 1948) (Madison).

25. "As in other instances, it seems not unlikely that the chance preference of our branch of the race for the number three has influenced the development of the doctrine." Sharp, *op. cit. supra* note 3, at 387 n. 10.

26. Jaffe & Nathanson, *op. cit. supra* note 2, at 33.

27. Alaska; Delaware; Hawaii; Kansas; North Carolina; North Dakota; Ohio; Pennsylvania; South Carolina; Washington; Wisconsin.

28. Compare N.M. Const. art. 3, § 1, with Idaho Const. art 2, § 1; Iowa Const. art. 3, § 1; Utah Const. art. 5, § 1; and Wyo. Const. art 2, § 1.

29. Ariz. Const. art. 3; Ark. Const. art. 4, §§ 1, 2; Cal. Const. art. 3; Colo. Const. art. 3; Fla. Const. art. 2; Ga. Const. art. 1, § 2-123; Ill. Const. art. 3; Ky. Const. § 27; La. Const. art. 2, §§ 1, 2; Me. Const. art. 3, §§ 1, 2; Mich. Const. art. 4, §§ 1, 2; Minn. Const. art. 3; Mo. Const. art. 2; Mont. Const. art. 4, § 1; Neb. Const. art. 3; Nev. Const. art. 3; Okla. Const. art. 4, § 1; Tenn. Const. art. 2, §§ 1, 2; Tex. Const. art. 2, § 1.

30. Ala. Const. art. 3; Conn. Const. art. 2; Md. Const. art. 8; Miss. Const. art. 1; N.J. Const. art. 3; Vt. Const. ch. 2, § 5; Va. Const. art. 3; W. Va. Const. art. 5, § 1.

31. Ind. Const. art. 3, Ore. Const. art. 3 is substantially identical and provides:

The powers of Government shall be divided into three separate [*sic*] departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.

32. N.Y. Const. art. 5.

ing" to one branch by a co-ordinate department.³³ Massachusetts probably has the strongest worded provision.³⁴ And New Hampshire uses the most delightful, and perhaps the most sensible, language.³⁵

There is no doubt that each of the three major departments was meant to have, and does have, a central group of functions to perform.³⁶ Nor is there any doubt that the separation of powers doctrine has validity in every state. However, courts differ in applying the theory. They tend either towards the Madisonian interpretation³⁷ or towards a more mechanical, doctrinal approach (*e.g.*, New Mexico).³⁸ It is doubtful whether the particular scheme used in a state's constitution has any effect upon how its courts apply the doctrine.³⁹ Some states have no trouble with the doctrine,⁴⁰ while in other states, the courts seem to have a great deal of difficulty.⁴¹ It seems clear that the majority use the more realistic, workable Madisonian interpretation.⁴²

II

PROBLEMS IN NEW MEXICO

The strict interpretation of the separation of powers doctrine followed in New Mexico presents two immediate problems: (1) classifying functions, and (2) blending functions, *i.e.*, one branch performing functions usually assigned to one of the other two branches.

33. S.D. Const. art. 2; R. I. Const. art. 3: "The powers of the government shall be distributed into three departments: the legislative, executive, and judicial."

34. In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

Mass. Const. pt. 1, art. 30.

35. In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.

N.H. Const. pt. 1, § 37.

36. See Jaffe & Nathanson, *op. cit. supra* note 2 at 33.

37. See, *e.g.*, cases cited in note 14 *supra*.

38. See, *e.g.*, State *ex rel.* Hovey Concrete Prods. Co. v. Mechem, 63 N.M. 250, 316 P.2d 1069 (1957).

39. Jaffe & Nathanson, *op. cit. supra* note 2, at 36.

40. See Merrill, *The Administrative Law of Oklahoma*, 4 Okla. L. Rev. 286 (1951).

41. See Davis, *op. cit. supra* note 5.

42. 1 Davis § 1.05, at 44.

History, tradition, or just plain logic assigns certain functions to each of the three classical American branches of government. However,

in many instances where there is pressure for the transfer of old or the creation of new functions or for the better implementation of old ones, the logical implications of the [strict interpretation] principle are conflicting.⁴³

In other words, some new functions are difficult to classify,⁴⁴ while others should be reclassified.⁴⁵ The logical consequence of the classification process demanded by the strict interpretation would be to freeze the governmental structure and prevent any increase in efficiency through governmental reorganization.

The classification problem most often arises when the court has to reconcile the practical necessity of allowing an agency to adjudicate with the requirement of the strict interpretation principle that an agency can perform only legislative functions. For example, in *Continental Oil Co. v. Oil Conservation Comm'n*,⁴⁶ the New Mexico Supreme Court said that the protection of correlative rights was a properly delegated legislative function. A strong argument can be made that such protection is primarily the adjudication of disputes between private parties,⁴⁷ which is usually classified as a judicial function.⁴⁸ The New Mexico court used a legal fiction to label adjudication as a legislative function. But the result of the court's artificial reasoning was correct since it left the complex subject of correlative rights to an expert administrative body. In *Consolidated Gas Util. Corp. v. Thompson*,⁴⁹ an early Texas case, the court carried the strict interpretation principle to its logical conclusion. It held that where only correlative rights were involved, the dispute was between private litigants and was to be settled by the judicial branch.⁵⁰ But the result of the Texas court's logical

43. Jaffe & Nathanson, *op. cit. supra* note 2, at 38.

44. See, *e.g.*, *Continental Oil Co. v. Oil Conservation Comm'n*, 70 N.M. 310, 373 P.2d 809 (1962) (correlative rights).

45. See, *e.g.*, *State ex rel. Hovey Concrete Prods. Co. v. Mechem*, 63 N.M. 250, 316 P.2d 1069 (1957) (workmen's compensation case).

46. 70 N.M. 310, 318, 373 P.2d 809, 814 (1962).

47. See, *e.g.*, Comment, 3 *Natural Resources J.* 178 (1963).

48. See *State ex rel. Hovey Concrete Prods. Co. v. Mechem*, 63 N.M. 250, 316 P.2d 1069 (1957).

49. 14 F. Supp. 318 (W.D. Tex. 1936).

50. *Id.* at 327. *But see Railroad Comm'n v. Sterling Oil & Ref. Co.*, 147 Tex. 547, 218 S.W.2d 415 (1949) (agency can protect correlative rights).

application of the strict interpretation principle was unworkable.⁵¹ In contrast to these cases, a West Virginia court, using a more realistic interpretation of the separation of powers doctrine, has said:

The ascertainment of values for assessment purposes is a *judicial* function, strictly belonging to the *legislative* or *administrative* branch of the state government⁵²

The New Mexico court could have decided the *Continental* case without using a legal fiction by merely recognizing that the determination of correlative rights is a judicial function which can properly belong to the legislative branch. Unfortunately the court's interpretation of article 3, section 1 of the constitution prevented such a straightforward approach.

The question of blending functions is interrelated with the problem of classification. Assuming for the purpose of discussion that functions can be uniquely classified, the strict interpretation principle prohibits one branch of the government from performing any function classified as belonging to one of the other two branches. This is unrealistic and impractical. In fact, examples of blended functions are numerous.⁵³ Many municipal governments exercise all three functions.⁵⁴ The strict interpretation has never been applied to the pardoning power of the Governor (executive using judicial power);⁵⁵ or to the Legislature's adjudication of teacher tenure,⁵⁶ or to the Legislature's right to revoke a professional engineer's license.⁵⁷ Under the "distribution of powers" provision in the New Mexico constitution, the supreme court has permitted the Corporation Commission to perform all three functions.⁵⁸ The most obvious example of blending functions is the court itself, since no one can deny that much of our law is judge made.⁵⁹

Actually, the prohibition against the blending of functions is applied by the court only when reviewing the actions of administrative

51. *Railroad Comm'n v. Sterling Oil & Ref. Co.*, *supra* note 50; *Corzelius v. Harrell*, 186 S.W.2d 961 (Sup. Ct. Tex. 1945). These cases say that the Railroad Commission can issue orders based solely on correlative rights which is now Texas law.

52. *Charleston & S. Bridge Co. v. Kanawha County Court*, 41 W. Va. 658, 681, 24 S.E. 1002, 1011 (1896) (separate opinion). (Emphasis added.)

53. See the cases cited in note 14 *supra*.

54. *State ex rel. Chapman v. Truder*, 35 N.M. 49, 289 Pac. 594 (1930).

55. *State v. Magee Pub. Co.*, 29 N.M. 455, 224 Pac. 1028 (1924).

56. *McCormick v. Board of Educ.*, 58 N.M. 648, 274 P.2d 299 (1954).

57. *Halfeld v. Board of Registration*, 60 N.M. 242, 290 P.2d 1077 (1955).

58. *In re Atchison, T. & S. F. Ry. Co.*, 37 N.M. 194, 20 P.2d 918 (1933).

59. *Jaffe & Nathanson, Administrative Law* 3 (1961).

agencies. The court seems to be trapped by a syllogism based on the strict interpretation of the separation of powers doctrine. The syllogism is (a) blending of functions is prohibited; (b) if a legislative agency is allowed to perform a function, the function must be classified as legislative; and (c) therefore, a court must either limit its scope of review of agency action to avoid the danger of having the judiciary perform a legislative function, or decide that the function is judicial and not a proper agency action. This syllogism so impressed the New Mexico Supreme Court in *State ex rel. Hovey Concrete Prods. Co. v. Mechem*,⁶⁰ that it held a Workmen's Compensation Board could not adjudicate workmen's compensation cases. This decision has been criticized by administrative law authorities.⁶¹ These critics were perhaps too harsh, since they failed to appreciate that the court was caught in a syllogistic trap. In the court's view, workmen's compensation cases have to be closely supervised by the judiciary; but such supervision cannot be provided through judicial review since the necessary scope of review requires the court to substitute its judgment for that of the Workmen's Compensation Board. The court believed this to mean that the judiciary would perform a legislative function.⁶² In contrast, in *Continental*, the court apparently believed it was necessary to leave the protection of correlative rights to the Oil Conservation Commission. To satisfy the strict interpretation syllogism, the court had to use a legal fiction.⁶³

III

PROPOSED SOLUTION

In modern context the separation of powers doctrine is used to prevent administrative agencies from exercising unchecked power.⁶⁴ The court, using its general power of review, should act as a policeman to prevent the development of petty, bureaucratic tyrannies. The court can use the separation of powers doctrine as a policeman's nightstick.

60. 63 N.M. 250, 316 P.2d 1069 (1957).

61. "One state court has rendered the astounding holding that the legislature cannot confer state-wide judicial power upon a workmen's compensation commission." 1 Davis § 2.12, at 132.

62. *State ex rel. Hovey Concrete Prods. Co. v. Mechem*, 63 N.M. 250, 316 P.2d 1069 (1957) (by implication).

63. See note 47 *supra* and accompanying text.

64. See 1 Davis § 1.09, at 68.

The problems created by the separation of powers doctrine result from the court's interpretation, not from the doctrine itself. If the doctrine is properly interpreted, the

provision for keeping departments of government separate does not mean an absolute separation of *functions*; for if it did, it would really mean that we are to have no government, where as our Constitution was ordained for the establishment of efficient government⁶⁵

In other words, the doctrine does not require the absolute separation of *functions*. The strict interpretation is based on the court's failure to differentiate between a *function* and a *power*. A power is a function exercised with finality. Adjudication is a judicial function. Adjudication with finality is a judicial power. The legislative branch can adjudicate. But a proper interpretation of the separation of powers doctrine requires that only the judiciary branch of government adjudicate with finality; this it does through the established procedures of judicial review.

Recognition of the difference between a power and a function would eliminate the need for artificial reasoning. Use of labels such as "quasi-judicial," "ministerial act," and "quasi-legislative," would not be necessary. There would be no reason to engage in verbal acrobatics in order to use a euphemism for a well-known function. Such verbal contortions are as logical as calling a duck a quasi-duck and therefore a chicken in order to allow chicken merchants to handle ducks. A duck is not a chicken because it is called a quasi-duck and a judicial function is not a legislative function because it is called a quasi-judicial function.

The New Mexico Supreme Court seems to be committed to a strict interpretation of the separation of powers doctrine. It does not seem likely that the court will distinguish between a function and a power. Therefore, New Mexico will not adopt a realistic separation of powers doctrine through judicial interpretation. The surest way of arriving at a workable doctrine may be to amend article 3, section 1 of the New Mexico Constitution. Deletions appear in parenthesis and additions are italicized in the following suggested amendment:

65. *Sabre v. Rutland R.R. Co.*, 86 Vt. 347, 85 Atl. 693, 699 (1915). (Emphasis added.)

Art. III. Distribution of Powers *and Functions*. The powers *and functions* of the government of this state (are) *shall be* divided into three (distinct) departments, the legislative, the executive, and the judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise *with finality* any (powers properly belonging to) *function traditionally associated with* either of the others, except as in this Constitution otherwise expressly directed or permitted.

Obviously the suggested change is superficial. But the fact that there would be a change would be enough to allow the court to adopt a more realistic separation of powers doctrine.

CONCLUSION

New Mexico is handicapped by the court's strict interpretation of the "distribution of powers" article of the New Mexico Constitution (Article 3, Section 1). The strict interpretation principle leads to artificial or unworkable results. In the future there will probably be an increase in the number and importance of administrative agencies. The state needs the services of such expert groups. But the courts must be able to properly supervise the agencies by judicial review. The strict interpretation principle hinders both of these objectives.⁶⁶ The best way to remove this artificial, doctrinal barrier to good government is to amend article 3, section 1 of the constitution.

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66. See notes 60 & 61 *supra* and accompanying text.