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*EDITOR'S NOTE: A forceful movement for revision of the New Mexico Constitution exists in the state today. Official action includes work of the Constitutional Revision Commission which has spent several years in sustained investigations and staff research. The Commission recently made formidable reports to the New Mexico Legislature. The following Article is the second of a series on revisions of the New Mexico Constitution.*

## CONSTITUTIONAL LIMITATIONS ON THE EXERCISE OF JUDICIAL FUNCTIONS BY ADMINISTRATIVE AGENCIES

ALBERT E. UTTON\*

New Mexico has put into motion a serious inquiry into the question of revising its fundamental document—the constitution. In 1963 the Legislature authorized the establishment of a Constitutional Revision Commission<sup>1</sup> which has now made two comprehensive reports to the legislature.<sup>2</sup> At this juncture it is pertinent to review the constitutional position of the exercise of judicial functions by administrative agencies. In so doing, this paper will briefly review the doctrine of separation of powers, the practice in New Mexico under our present constitution, and the practice in other states in order to evaluate the relevant proposals of the Constitutional Revision Commission.

The two portions of the Commission's report which will thus be evaluated are Article III and Article II, § 17, which read as follows:

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

Article II, Section 17. Judicial Review of Quasi-Judicial Administrative Decisions. All quasi-judicial decisions of state administrative agencies and commissions are subject to judicial review. The scope of

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1. N.M. Laws 1963, Ch. 223 (terminating in 1965).

2. See Report of the Constitutional Revision Commission, 1964.  
See Report of the Constitutional Revision Commission, 1967.

review shall be as prescribed by law. In the absence of legislative provision the matter shall not be heard de novo upon judicial review.

These two proposed provisions are acceptable and necessary, but could be strengthened and clarified by a few minor changes.

### A. Separation of Powers

The doctrine of separation of powers is deeply embedded in Anglo-American jurisprudence. The United States Constitution implicitly provides for the separation of powers;<sup>3</sup> nearly all state constitutions contain specific sections providing for the separation of powers,<sup>4</sup> and New Mexico is no exception.<sup>5</sup>

Montesquieu fathered the American adoption of the doctrine in his treatise *Spirit of the Laws* which was published in 1748<sup>6</sup> and which influenced the founding fathers. The fear of concentrating power in a single class or group led to the doctrine of separation of powers. There was a fear of an unchecked majority, and a conviction that legislatures would be dangerous unless checked by a strong executive and judiciary. Thus, the idea of separation of powers was to provide a system of checks and balances that would prevent tyranny by any branch of government; this doctrine of separation of powers is at the heart of our constitutional system. Montesquieu in his classic statement said "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty. . . ."<sup>7</sup>

Typically, the New Mexico constitution states, "The powers of the government of this state are divided into three distinct departments,

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3. U.S. Const. art. I, § 1; art. II, § 1; and art. III, § 1.

4. The twelve states that do not include specific separation of powers in their constitutions are Alaska, Delaware, Georgia, Hawaii, Kansas, Maryland, New York, North Dakota, Ohio, Pennsylvania, Washington and Wisconsin.

5. The New Mexico separation of powers clause is contained in art. III, § 1 of the constitution:

The powers of the 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.

6. Other illustrious thinkers on the subject who preceded Montesquieu include Aristotle and John Locke. See Sharp, *The Classical American Doctrine of "The Separation of Powers"*, 2 U. Chi. L. Rev. 385, 386-93 (1935).

7. I. C. Montesquieu, *The Spirit of Laws* 174 (Nugent translation 1873).

the legislative, executive and judicial. . . ."<sup>8</sup> and goes on to say that one department shall not exercise the powers of another department. Although the U.S. Constitution does not contain an explicit separation of powers clause, it reaches the same result by granting the judicial, legislative, and executive powers to separate branches. Article III § 1 of the United States Constitution proclaims "The Judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as Congress may, from time to time, ordain and establish."

With the rise of the administrative process, the courts have struggled with the problem of reconciling the exercise by administrative agencies of adjudicatory functions with the separation of powers doctrine. This was because of the apparent absoluteness of the doctrine—separation meant absolute separation. But Montesquieu himself pointed out that the three branches of government could not be hermetically sealed from each other, and gave many instances of the blending of functions.<sup>9</sup> Madison early argued against interpreting the doctrine absolutely on the basis that government could be efficient only if it were made flexible by the blending of functions.<sup>10</sup> He perceptively concluded his observations in *The Federalist Papers* by saying:

From these facts, by which Montesquieu was guided, it may clearly be inferred, that in saying, "There can be no liberty, where the Legislative and Executive powers are united in the same person, or body of magistrates"; or, "if the power of judging be not separated from the Legislative and Executive powers," he did not mean that these departments ought to have no *partial agency* in, or no *control* over the acts of each other. His meaning, as his own words impart, and still more conclusively as illustrated by the example in his eye, can 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.<sup>11</sup>

Madison realized that a doctrinaire adherence to a dogmatic theory would impede the government, and even further, he feared inflexibility would ultimately destroy the doctrine itself.

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8. N.M. Const. art. 3, § 1, the section is quoted in full in note 5 *supra*.

9. Sharp, *supra* note 6, at 389.

10. *Id.* at 407.

11. *The Federalist* No. 46, at 335-36 (Dawson ed. 1891) (Madison).

There is no doubt that separation of powers is a touchstone of our constitutional system, and in fact, as well as theory, the government is divided into a judiciary which judges, a legislature which legislates, and an executive which carries out the laws of the land.

But when one goes beyond these general truths, he encounters two problems. One is that of classification—can a function be classified as purely judicial or purely legislative? Secondly, are the three branches exclusive of each other so that if a function can be definitely classified as judicial, for example, can any other branch perform that function?<sup>12</sup>

There is no clear classification of functions which declares universally that a function is always judicial or legislative. For example, the legislature at one time granted divorces, and it is now considered to be a judicial task.<sup>13</sup> Until 1955 in New Mexico an aggrieved taxpayer could only pay his property tax under protest and then institute court action for refund.<sup>14</sup> Now, he appeals his disputed valuation or assessment to the State Tax Commission.<sup>15</sup> Then, if necessary, the district court reviews the decision of the Commission on the record.

The granting of liquor licenses in New Mexico is done by an administrative agency,<sup>16</sup> whereas in some jurisdictions it is done by the courts.<sup>17</sup>

On occasion statutes have allowed disputes to be brought before either a court or an agency for adjudication. In these cases the question of primary jurisdiction is raised.<sup>18</sup>

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12. L. Jaffe, *Judicial Control of Administrative Action* 28 (1965).

13. J. Long, *Domestic Relations* § 218 (3d ed. 1923).

14. N.M. Stat. Ann. § 72-5-4 (Repl. 1961).

15. N.M. Stat. Ann. § 72-6-13.1 (Repl. 1961).

16. The Bureau of Revenue's Chief of the division of liquor control is charged with responsibility for handling licenses. N.M. Stat. Ann. § 46-5-19 (1953).

17. England is one such jurisdiction: *Licensing (Consolidation) Act of 1910*, 10 Edw. 7 & 1 Geo. 5, c. 24, §§ 9, 10. Until the extra session of the legislature in 1937-38, Georgia had the courts grant licenses. For an illustrative case, see *State v. Justices of the Inferior Court*, 15 Ga. 408 (1854). New Jersey required court-granted licenses until 1933. For an illustrative case, see *Van Nortwick v. Bennett*, 62 N.J. Law 151, 40 Atl. 689 (1898).

18. "The best-known example is that of reparation claims under the Interstate Commerce Act [24 Stat. 382 (1887), as amended, 49 U.S.C. § 9 (1964)] . . . Under that act, shippers seeking reparations for excessive freight may either bring a complaint to the ICC or sue in court. . . ." R. Parker, *Administrative Law* 122 (1952). Another typical provision is that contained in Ala. Code tit. 26, § 9 (1958), which deals with the functions of the board of appeals of Alabama's department of industrial relations. After the department has made a finding and issued an order that a machine, tool, equipment, or structure of an employer is dangerous, the order may be appealed to the

As Professor Jaffe points out, the distinctions between law making, law enforcing, and law judging do not fit neat logic-tight compartments. The logic of separation of powers is the "logic of polarity rather than strict classification."<sup>19</sup>

Jaffe goes on to illustrate with a taxation example:

Once the legislature has made the basic determination to tax "income" it becomes necessary, in collecting a tax, to determine whether a receipt by the taxpayer is "income". What organ may exercise this function? If the issue is one of fact, e.g., whether the receipt was on account of a bill of goods or a gift from an admirer, the determination cannot be made by the legislature. But such issues today are decided either by the executive as an incident to tax collection, or by the judiciary as a determination of an amount owing by A to B. Suppose, however, that the disputed item is the purchase and cancellation by a debtor of his debt of \$100,000 for a payment to his creditor of \$90,000. Is the \$10,000 "income"? As with the other question both executive and judiciary do decide such a question. But so may the legislature. The court will announce the result as the decision in *A v. B*. The legislature will lay down a general formula. But whichever way it is done, it will be a "rule;" and probably the legislative enactment may even reach back somewhat into the past and govern prior transactions. If the executive "executes" the law, so does the judiciary . . . . This becomes simply more evident, rather than more true, when the executive is given power not only to adjudicate but to make rules and regulations to carry out the general purpose of a statute.<sup>20</sup>

After considerable judicial wandering, the courts now have little problem in allowing administrative agencies to exercise adjudicatory functions so long as the judicial power to pass ultimately on the question of what is lawful is reserved to the judiciary so as to provide a check on the other branches and satisfy the doctrine of separation of powers. Here in New Mexico, although one case specifically ruled that the establishment of a workman's compensation board offended the separation of powers doctrine because the agency would exercise adjudicatory powers,<sup>21</sup> the New Mexico courts have

board of appeals. "Any person affected by such order may, however, as an alternative to an appeal to the board of appeals, appeal to the circuit court of the county in which such machine, tool, equipment or structure is located . . ." See *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907).

19. L. Jaffe, *supra* note 12, at 32.

20. *Id.* at 31-32.

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

been reluctant to strike down the adjudicatory functions of administrative agencies while retaining in the courts the final power of judicial review.

### *B. New Mexico Experience*

In discussing the administrative agencies of New Mexico, it is helpful to divide them into the two major divisions recognized by the New Mexico Supreme Court. The two divisions are: (1) agencies or boards created by the New Mexico Constitution; (2) legislatively-created agencies. Each of these recognized divisions will be considered separately in the material that follows.

Also, special attention will be given to the distinction articulated in *State ex rel. Hovey Concrete Products Co. v. Mechem*,<sup>22</sup> between so-called "public rights" (where the agency seeks to protect rights of the public at large) and "private rights" (where the agency determines the rights of two opposing private parties). Specifically, severe doubts will be raised as to the relevance of such a distinction.

In the Mechem case, the court specifically ruled that the legislation establishing a workmen's compensation board was unconstitutional because it would decide disputes between private individuals which must be decided by the courts. It went on to say that the only disputes with which administrative agencies could deal are those involving public rights, i.e. disputes between the public and the individual. The court gave as examples of agencies adjudicating rights under the police power for the protection of public interest in general: "boards regulating common carriers, transportation, telephone rates, Barber Boards, Medical Boards, Boards of Registration, Tax Boards, Division of Liquor Control, etc."<sup>23</sup>

## I

### CONSTITUTIONAL AGENCIES

The New Mexico Constitution creates the following boards and commissions:

1. The State Highway Commission, Art. V, § 14.
2. The State Corporation Commission, Art. XI, § 1.
3. The State Board of Education, Art. XII, § 6.
4. The State Department of Public Education, Art. XII, § 6.

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22. 63 N.M. 250, 316 P.2d 1069 (1957).

23. *Id.* at 252, 316 P.2d at 1070.

5. The Boards of Regents, Art. XII, § 13.
6. The Department of Agriculture, Art. XV, § 1.

#### *A. State Corporation Commission*

The State Corporation Commission holds the record for having been involved in more litigation than any other agency be it created by the Constitution or otherwise. Its authority and decisions have been frequently challenged in the courts. Art. XI § 7 of the Constitution gives the Corporation Commission powers to determine rates of "railway, express, telegraph, telephone, sleeping-car and other transportation and transmission companies and common carriers within the state," to require that the companies provide adequate facilities, to make rules, and to hold hearings connected with carrying out these duties. A review of the cases involving the Commission reveals that this agency has been allowed to exercise powers cutting across the three lines of governmental authority: judicial, legislative, and executive.

As an agency created by the Constitution, the New Mexico courts have ruled that the limitations on powers of government imposed elsewhere in the Constitution are not applicable to the Corporation Commission. The Constitutional basis of this commission allows it to exercise all powers, whatever their nature, in the disposition of issues related to transportation and transmission companies.<sup>24</sup> The only limitation appears to be that built into the Constitution itself: orders of the Commission are enforceable by the Supreme Court.<sup>25</sup> The Supreme Court has ruled consistently that it will enforce the orders of the Commission unless they are shown to be arbitrary, capricious, or in violation of the rights guaranteed by the United States or the New Mexico Constitution.<sup>26</sup>

As a consequence of the court interpretations of Corporation Commission powers, it is possible to view the Corporation Commission as almost a fourth branch of state government. This may be suggested because the Commission's status as a constitutional agency created at the same time as the executive, legislative and judicial elements of the government makes it *in pari materia* with the traditional branches. And in fact the Supreme Court has said as much. In

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

25. N.M. Const. art. XI, § 7 (1964).

26. *E.g.*, *State v. Mountain States Tel. & Tel. Co.*, 54 N.M. 315, 224 P.2d 155 (1950); *Ferguson-Steere Motor Co. v. State Corp. Comm'n*, 63 N.M. 137, 315 P.2d 894 (1957); *Bennett v. State Corp. Comm'n*, 73 N.M. 126, 385 P.2d 978 (1963).



a case involving another Constitutional agency, the Board of Education, the court has said that Agencies created by the Constitution are not subject to the separation of powers doctrine. The court said "All constitutional provisions have equal dignity . . . and it was within the power of the framers of the constitution to confer on this constitutional body such limited judicial powers. . . ."27

The Commission, in adherence to its constitutional duties, actually *performs* legislative acts.<sup>28</sup>

It also operates as a tribunal in determining the rights of not only the public but also of private parties.

The Corporation Commission exists to protect the public interest, but it is subject to judicial review by the courts, since it must apply to the Supreme Court to enforce its orders.<sup>29</sup> The "public interest" has been deemed to include such questions as the need for granting additional or new routes to trucking companies in competition with companies already operating over these routes. For example, in *Harris v. State Corporation Commission*,<sup>30</sup> Harris attempted to prevent the issuance of a certificate of public necessity and convenience to Dalby Motor Freight Lines. Theoretically, it was the public need that was determinative of the issue, but grave doubts arise to any supposition that private rights are not also being determined since the decision was between the applicant and the existing carrier. The already existing carrier had at least temporary success in opposing the granting of a competing certificate in *Transcontinental Bus System, Inc. v. State Corporation Commission*.<sup>31</sup> There are numerous examples in the law reports in which the Commission was considering applications that were opposed by a carrier already operating over a similar route.<sup>32</sup>

From the early days of statehood the New Mexico Supreme Court has held that the Commission's determination of rates and of facilities to be afforded is a legislative question, but the reasonableness and lawfulness of these requirements is a judicial question.<sup>33</sup>

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27. *McCormick v. Board of Education*, 58 N.M. 648, 660, 274 P.2d 299, 307 (1954).

28. *Seaberg v. Raton Public Service Co.*, 36 N.M. 59, 8 P.2d 100 (1932).

29. *State v. Mountain States Tel. & Tel. Co.*, 54 N.M. 315, 224 P.2d 155 (1950).

30. 46 N.M. 352, 129 P.2d 323 (1942).

31. 56 N.M. 158, 241 P.2d 829 (1952).

32. See *Ferguson-Steere Motor Co. v. State Corp. Comm'n*, 60 N.M. 114, 288 P.2d 440 (1955); *Ferguson-Steere Motor Co. v. State Corp. Comm'n*, 63 N.M. 137, 314 P.2d 894 (1957); *Garrett Freight Lines v. State Corp. Comm'n*, 63 N.M. 48, 312 P.2d 1061 (1957).

33. *Seward v. Denver & Rio Grande Ry.*, 17 N.M. 557, 131 Pac. 980 (1913).

Thus the court clearly recognizes the adjudicatory nature of commission deliberations.

### *B. State Highway Commission*

While the State Highway Commission, as created by Art. V, § 14 of the Constitution, has a sweeping power over road construction and maintenance in the state, it has little authority or need to exercise judicial powers. Furthermore, what powers the State Highway Commission exercises have been the subject of very infrequent law suits.

### *C. State Board of Education, State Department of Public Education, Board of Regents*

Art. XII, § 6 (as amended 1958) creates the State Department of Public Education and the State Board of Education. In contrast to the specific duties assigned the State Corporation Commission, the Board of Education is given very general duties. The State Board is directed to "determine public school policy and vocational educational policy" and is given "control, management and direction of all public schools pursuant to authority and powers provided by law."<sup>34</sup>

Among the powers given by statute to the State Board of Education is the authority "To suspend or revoke teachers' certificates for incompetency, immorality or for any good and just cause . . . after service of charges upon the accused person and hearing or opportunity to be heard shall have been given the accused."<sup>35</sup>

The most important case squarely dealing with the constitutional powers of the Board of Education is *McCormick v. Board of Education of Hobbs Municipal School District No. 16*.<sup>36</sup> In *McCormick*, a teacher whose dismissal by the local school board had been reversed by the State Board of Education successfully sought a writ of mandamus to force the local school board to obey the order of the state board. To the contention that the State Board of Education was exercising judicial powers in violation of the separation of powers clause in the Constitution, the New Mexico Supreme Court said:

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34. The 1958 amendment involved matters of membership on the board rather than changes in the powers of the board.

35. N.M. Stat. Ann. § 73-1-7 (Supp. 1965).

36. 58 N.M. 648, 274 P.2d 299 (1954).

There is no merit to this contention. All constitutional provisions have equal dignity. . . . The State Board of Education is created under Art. 12, N.M. Const., and it was within the power of the framers of the constitution to confer upon this constitutional body such limited judicial powers as it deemed proper. Such judicial powers as have been conferred upon the State Board of Education by the legislature pursuant to [N.M. § 73-1-1] fall clearly within the constitutional authority conferred upon the State Board of Education . . . Even without the assistance of the grant of power contained in the New Mexico Constitution, other states have reached the same conclusion under statutes similar to the New Mexico statute. . . .<sup>37</sup>

More clearly than in any other case the New Mexico court explained the judicial authority of administrative agencies created by the Constitution. Decisions reached by the State Board of Education are accorded the same status as those reached by the State Corporation Commission: They will not be overturned unless they are "arbitrary, unlawful, unreasonable or capricious."<sup>38</sup>

No cases have been found where the judicial powers of the boards of regents of the state educational institutions have been tested. Since Art. XII, § 13, which establishes the boards of regents, gives them "the control and management" of the respective institutions, wording similar to the authority given the State Board of Education, it is probable that in a judicial test, the regents would be found to have the judicial powers equal to those of the State Board of Education.

#### *D. State Department of Agriculture*

A cursory review of the indices to the state constitution and to the New Mexico statutes reveals that a "department of agriculture" as envisioned in the constitution has been an oasis of perversion of the constitutional intent. Article XV, § 1 of the constitution says there "shall be" a department of agriculture under control of the Board of Regents of the College of Agriculture and Mechanical Arts. The statutes delegating power to the Board of Regents give the regents supervision of the administration and enforcement of all agricultural and horticultural laws. The agricultural and horticultural laws purport to create all types of county-level agencies and

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37. *Id.* at 660-61, 274 P.2d at 307.

38. *McCormick v. Board of Educ.*, Note 27 *supra*; *Swisher v. Darden*, 59 N.M. 511, 287 P.2d 73 (1955).

agents. The Board of Regents in some cases has power to make determinations of the standards for agricultural products and to seize substandard products.<sup>39</sup> The Board of Regents has power also (1) to license fumigation companies;<sup>40</sup> (2) to register (and hold hearings in connection with refusal to register) "economic poisons";<sup>41</sup> (3) to issue "stop-sale" orders on seeds (no hearing required);<sup>42</sup> (4) to cancel fertilizer registrations (after hearings),<sup>43</sup> and (5) to appoint a director of the Cotton District Act who administers the Act, holding hearings on proposed orders.<sup>44</sup> No litigation testing these powers seems to exist.

Not related directly to the Board of Regents, but of particular curiosity is the 1957 act creating a "state grasshopper control board."<sup>45</sup> Among other powers, it has the power to "Compromise, settle or pay just claims arising from negligent operations under the Grasshopper Control Act."<sup>46</sup>

It is readily apparent that the Board of Regents under the mantle of the Constitutional provision for a Department of Agriculture is exercising far reaching judicial functions that often are related to the state's police power.

## II

### LEGISLATIVELY CREATED ADMINISTRATIVE AGENCIES

Since statehood, the New Mexico Legislature has established both temporary agencies and relatively permanent ones. Into the category of temporary grants of "legislative power" might be placed the Boundary Commission and the State Loan Board. In each case the acts of the boards were declared to be non-violations of the state constitution. In *State ex rel Clancy v. Hall*<sup>47</sup> the efforts of the Boundary Commission in attempting to settle a boundary dispute with the State of Colorado were said to be merely the delegation of power to "agents" of the legislature, while in *State v. Kelly*<sup>48</sup> the

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39. For example, pecans, under N.M. Stat. Ann. § 45-18-4 (Repl. 1966).

40. N.M. Stat. Ann. § 45-8-9 (Repl. 1966).

41. N.M. Stat. Ann. § 45-9-4 (Repl. 1966).

42. N.M. Stat. Ann. § 45-12-16 (Repl. 1966).

43. N.M. Stat. Ann. § 45-13-25 (Repl. 1966).

44. N.M. Stat. Ann. § 45-24-4 (Repl. 1966).

45. N.M. Stat. Ann. § 45-8-15 (Repl. 1966).

46. N.M. Stat. Ann. § 45-8-17(G) (Repl. 1966).

47. *State ex rel. Clancy v. Hall*, 23 N.M. 422, 168 P. 715 (1917).

48. *State v. Kelly*, 27 N.M. 412, 202 P. 524 (1921).

acts of the State Loan Board in determining claims were given as some examples of types of claims said to be administrative and not judicial.

Perhaps of most interest in an inquiry of the exercise of judicial powers by state agencies are the cases involving the Oil Conservation Commission, the Public Utilities Commission, and the Employment Security Commission.

#### *A. Oil Conservation Commission*

As early as 1909, the Territorial Legislature created a Conservation Commission. In 1935, this commission was overtaken by the creation of the Oil Conservation Commission with the "jurisdiction and authority over all matters relating to the conservation of oil and gas and the prevention of waste of potash as a result of oil or gas operations in this state."<sup>49</sup> The Commission was given extensive powers to regulate the production and storage of gas and oil, to control the use of water in production, to set limits on oil and gas pools, and to adopt safety measures in the production of oil and gas in order to prevent waste and to protect "correlative rights." The statutes include what is called "compulsory pooling" of interests in an oil or gas field.<sup>50</sup> To perform these duties, the Commission was given authority to hold hearings, make rules, and enforce its rules.

In 1962 the first case involving the powers of the Oil Conservation Commission was decided by the New Mexico Supreme Court. *Continental Oil Co. v. Oil Conservation Commission*<sup>51</sup> involved a dispute over natural gas allowables for various producers in a pool. Upon the application of one producer the Commission permitted a change in the gas proration formula. Other producers attacked the change in formula. In effect, the Commission was determining "correlative rights" of several producers in the particular gas pool, but the Commission called this a legislative function.<sup>52</sup> The Commission's order was held to be void, NOT because of constitutional limitations on the Commission, but because the Commission failed

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49. N.M. Stat. Ann. § 65-3-5 (Supp. 1965).

50. See generally, Morris, *Compulsory Pooling of Oil and Gas Interests in New Mexico*, 3 Natural Resources J. 316 (1963).

51. 70 N.M. 310, 373 P.2d 809 (1962).

52. *Id.* at 323, 373 P.2d at 818:

From a practical standpoint, the legislature cannot define, in cubic feet, the property right of each owner of natural gas in New Mexico. It must, of necessity, delegate this *legislative duty* to an administrative body such as the commission. (emphasis added).

to make the findings required by law. The court dealt specifically with the powers of the Commission to determine "the merits of any controversy":

If the protection of correlative rights were completely separate from the prevention of waste, then there might be no need in having the commission as a party; but if such were true, it is very probable that the commission would be performing a judicial function, i.e. determining property rights, and grave constitutional problems would arise. For the same reason, it must follow that, just as the commission cannot perform a judicial function, neither can the court perform an administrative one.<sup>53</sup>

However, the court's distinction does not withstand close scrutiny of the difference between proration and proration formula. Proration establishes the maximum production allowable from the field and is a legislative function. The proration formula merely divides the allowable production of the field between the various individual producers. Thus, once the maximum allowable production figure is established for the field, the "divying up" or determination of correlative rights of the individual producers is an adjudicatory function.<sup>54</sup> It is a resolution of a dispute between private parties. But it is very desirable to have the expertise of the Commission brought to bear in making this determination. So the court arrived at the right decision for the wrong reasons. It allowed the administrative agency to exercise an adjudicatory function by calling it legislative. It would be far better to recognize that there is good reason for having the initial decision made by a specialized body with expert competence in the area, but subject to judicial review by the courts. In this way, the court on review has the advantage of the expertise of the administrative agency; equally important is the consideration that the court's time is not dissipated by the initial fact finding. The judiciary is thereby better able to perform its generalist function of reviewing judicially the disputes of the entire governmental structure. The court in *Continental* accomplished these goals of utilizing the experience of a specialist body and taking the maximum advantage of its time by supervising the action of the administrative agency on review, but the court used the wrong reasons.

Since one of the duties of the Commission is to prevent waste, the

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53. *Id.* at 324, 373 P.2d at 818.

54. For a discussion of the resolution of disputes between private parties, see Comment, 3 Natural Resources J. 178 (1963).

court's decision indicates that it will allow the Commission to adjudicate correlative rights so long as the Commission remembers to make prevention of waste the basis of its decision so that the court can call it a legislative act. This fiction then not unexpectedly led the court to compound the confusion by saying the judiciary could not review by a *de novo* hearing the decision of the Commission since it would be thereby performing an administrative act. Review by the courts of administrative agency actions is the very essence of the judicial power that must be preserved under the separation of powers doctrine. Judicial review can be carried out either by a *de novo* hearing or review on the record. Theoretically either form of judicial supervision satisfies the separation of powers doctrine even though *de novo* review is not satisfactory practically. *De novo* review is a duplication of effort, burdening the courts with the fact finding chores of the agency. It robs the court of the time it could better use, and it robs the administrative agency of the responsibility that is necessary to perform in an effective fashion. If the administrative agency hearing is a mere redundancy, the hearing becomes a mere formality with neither the parties nor the agency taking it seriously. If an agency is to perform responsibly, it must be given responsibility.

In spite of the muddy reasoning, the court did exercise its judicial power by judicial review, and it did allow the administrative agency to perform its adjudicatory function of dredging up the facts and making an initial decision based on them and its specialized experience; and it avoided the wastefulness of a *de novo* hearing.

The fictional approach of the court permits the reasoning in *Continental* to be in harmony with the *Mechem* private v. private right distinction. By using the phrase "prevention of waste" to bring the determination of correlative rights under the umbrella of the public interest, the court in effect says that adjudication is between the public and an individual and not between two private parties.<sup>55</sup>

### B. Public Utilities Commission

The Public Utilities Commission was created by the legislature in

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55. The Commission had the lesson of *Continental Oil* repeated a year later in *Sims v. Mechem*, 72 N.M. 186, 382 P.2d 183 (1963). In *Sims*, the order of the Commission had been made prior to *Continental Oil* and the Commission had again failed to include the prevention of waste as a reason for its decision. The order was declared void. For a recent case explaining the *Continental* decision, see *El Paso Natural Gas Co. v. Oil Conservation Comm'n*, 76 N.M. 268, 414 P.2d 496 (1966).

1941 and given the "power and jurisdiction to regulate and supervise every public utility in respect to its rates and service regulations . . . ." <sup>56</sup> Only two cases discussing the powers of the Commission have been found, but both of these concerned the exhaustion of statutory remedies: *Smith v. Southern Union Gas Co.*, <sup>57</sup> and *Potash Company of America v. New Mexico Public Service Commission*. <sup>58</sup>

In *Smith*, the argument that the request for relief from discriminatory rates was one for the courts was answered by the statement that the role of the Public Utilities Commission in hearing rate questions merely postponed the jurisdiction of the courts; the Commission could constitutionally pass first on a charge of discrimination and award damages for charging discriminatory rates.

In *Potash Company*, the real dispute was between the potash company and the Southern Union Gas Company over a rate contract. The supreme court affirmed the trial court's dismissal of the complaint because of the potash company's failure to exhaust its statutory remedies. Speaking of the action then pending before the trial court, the New Mexico Supreme Court said that the trial court would "be called upon to render some important decisions on how far the Commission may go in changing a so-called contract rate, after the public interest has entered the equation." <sup>59</sup> This rather ambiguous language leaves it uncertain what "public interest" the court had in mind: the concern for holding the line on all rates; concern for the welfare of the Potash Company, or of the Southern Union Gas Company; or, reminiscent of *Continental Oil*, *supra*, the justification for permitting the administrative agency the power to settle disputes between two private parties. At any rate, the requirement of exhaustion of remedies made the hearing of the specialist agency meaningful, and preserved the court's role of exercising the judicial power to deter any abuse of administrative discretion.

### C. Employment Security Commission

The New Mexico Legislature created the Employment Security Commission in 1936, and established a comprehensive scheme for the determination of the validity of claims for unemployment compensation. The claimant and any interested parties can have the decision of a deputy reviewed (1) by appeal tribunals set up by the

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56. N.M. Stat. Ann. § 68-5-4 (Supp. 1965).

57. 58 N.M. 197, 269 P.2d 745 (1954).

58. 62 N.M. 1, 303 P.2d 908 (1956).

59. *Id.* at 9, 303 P.2d at 913 (emphasis added).



Commission; (2) by the Commission itself, and (3) in the courts.<sup>60</sup>

The constitutionality of the procedure stipulated for decision making and appeals has never been tested. The cases dealing with the Employment Security Commission have concerned primarily the scope of review of the courts and have assumed the constitutionality of the commission's operation in handling disputed claims.<sup>61</sup> The disposition of disputed claims frequently requires resolving conflicts between the former employee on the one hand and the former employer on the other hand.<sup>62</sup>

#### *D. State Engineer*

Although the New Mexico Constitution has a section dealing with irrigation and water rights,<sup>63</sup> it says nothing about any administration of water laws by a state officer. However, the office of state engineer pre-dates the state constitution; it was established in 1905<sup>64</sup> and incorporated as part of an exhaustive statutory plan enacted by the territorial legislature in 1907.<sup>65</sup> The law of 1907 declares:

He [the engineer] shall have general supervision of the waters of the Territory and of the measurement, appropriation, and distribution thereof, and such other duties as are required by this act.<sup>66</sup>

The New Mexico Supreme Court has held consistently that the State Engineer cannot adjudicate private water rights.<sup>67</sup> However, parties wishing to appropriate surface water are required to apply to the State Engineer for a permit.<sup>68</sup> The statutes provide that hearings may be held in connection with surface water applications.<sup>69</sup> After the hearing on an application for surface water, the State Engineer rejects the application if "there is no unappropriated water available" or if "approval thereof would be contrary to the public

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60. N.M. Stat. Ann. § 59-9-6 (Repl. 1960).

61. Two recent cases are *Parsons v. Employment Security Comm'n*, 71 N.M. 405, 379 P.2d 57 (1963) and *Wilson v. Employment Security Comm'n*, 74 N.M. 3, 389 P.2d 855 (1963).

62. Informal discussions with Commission officials.

63. N.M. Const. art. XVI.

64. N.M. Laws 1905, ch. 102, § 11.

65. N.M. Laws 1907, ch. 49, § 4.

66. *Id.* The wording of the 1907 statute is repeated almost verbatim in the current statutory powers of the State Engineer. N.M. Stat. Ann. § 75-2-1 (1953).

67. *Public Service Co. v. Reynolds*, 68 N.M. 54, 358 P.2d 621 (1960); *Reynolds v. Wiggins*, 74 N.M. 670, 397 P.2d 469 (1964); *Durand v. Reynolds*, 75 N.M. 497, 406 P.2d 817 (1965).

68. N.M. Stat. Ann. § 75-5-1 (1953).

interest."<sup>70</sup> In the case of ground waters, no hearing is required unless someone files a protest within a set time.<sup>71</sup> If a protest is filed a hearing is held in the district court and the decision is "binding on the state engineer."<sup>72</sup> Formerly the decision was made by the State Engineer himself after a hearing.<sup>73</sup>

As Professor Clark observes,

While there can be no question about the actual and final adjudicatory function being one for the courts, it is also clear that the State Engineer is charged with making the *initial and factual determinations* upon which, in large part, any adjudication will rest. As a practical matter this means that a very large number of water "rights" in New Mexico have been and are being passed on at the administrative level. This administrative decision is normally the only "determination" that is ever made of such rights.<sup>74</sup>

He goes on to say:

the essence of judicial adjudication in western water rights matters is the fixing of priorities and this question is not ordinarily raised until the supply is no longer adequate . . . . The holder of a permit from the State Engineer, and persons who have properly declared old water rights on file, have legal rights even though the quantum and priority of each right may not be determined until an eventual adjudication.<sup>75</sup>

Thus it can be said that the "Private-Public rights" distinction of

69. N.M. Stat. Ann. § 75-5-5 (1953) indirectly assumes a hearing on surface water applications:

[T]he state engineer shall determine from the evidence presented by the parties interested, . . . whether there is unappropriated water available for the benefit of the applicant.

70. N.M. Stat. Ann. § 75-5-6 (1953).

71. N.M. Stat. Ann. § 75-11-3 (Supp. 1967) provides:

After the expiration of the time for filing objections, if no such objections shall have been filed, the state engineer shall, if he finds that . . . the proposed appropriation would not impair existing water rights from such source, grant the said application . . . .

If objections or protests have been filed . . . or if the State Engineer is of the opinion that the permit should not be issued, the state engineer shall notify the applicant of that fact. . . .

72. N.M. Stat. Ann. 75-11-3 (Supp. 1967).

73. N.M. Stat. Ann. § 75-11-3 (1953).

74. Clark, *New Mexico Water Law Since 1955*, 2 Natural Resources J. 484, 540-41 (1962). (Footnotes omitted; emphasis in the original.)

75. *Id.* at 541-42. (Footnotes omitted.)

the *Mechem* case<sup>76</sup> is not offended by the statutory mandate of the State Engineer since his decisions are predicated on the public interest,<sup>77</sup> but one wonders whether in reality the public-private distinction is meaningful since the State Engineer is to deny applications that would impair existing rights<sup>78</sup>; this unavoidably puts the administrative agency in the position of deciding between two or more private parties for the same water. Whatever the theory, we, in fact, have the State Engineer deciding the issues because he is best equipped to do the job. The complex hydrologic, geologic, engineering and economic considerations require a specialist to guard this precious resource in a water-thirsty state.

And the judiciary plays its proper role of exercising the judicial power by reviewing the decision of the State Engineer. The abuse of administrative discretion is deterred by judicial review and thereby checks and balances required by the doctrine of separation of powers are provided.

Most recently *Kelley v. Carlsbad Irrigation District*<sup>79</sup> established the scope of judicial review of the State Engineer's decisions. This standard is consistent with the standards for reviewing other agencies.<sup>80</sup>

The courts in reviewing the State Engineer are to see whether he (1) acted arbitrarily, fraudulently, capriciously; (2) based his decision on substantial evidence; (3) acted within the scope of his authority, and (4) made any error of law.<sup>81</sup> The court's decisions concerning the State Engineer have woven a fine line that is consistent with the *Mechem*-private v. public rights-theory which at the same time allows the State Engineer's expertise to be used effectively and the court's time and special experience to be used most efficiently. However, clearer thinking and thus better law would result if the always tenuous and oft times illusory public v. private rights

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76. See note 22 *supra* and accompanying text.

77. This is consistent with the court's public interest "prevention of waste" rationale for approving the decision of the Oil Conservation Commission in *Continental Oil Co. v. Oil Conservation Commission* (see note 51 *supra* and accompanying text). Also, it should be noted that the State Engineer acts under the constitutional "police powers" to protect the public interest, *State ex rel. Erickson v. McLean*, 62 N.M. 264, 308 P.2d 983 (1957); *State ex rel. Reynolds v. W.S. Ranch Co.*, 69 N.M. 169, 364 P.2d 1036 (1961).

78. N.M. Stat. Ann. § 75-11-1 (Supp. 1965), quoted in part, *supra* note 70.

79. 76 N.M. 466, 415 P.2d 849 (1966).

80. See *Kelley v. Carlsbad Irrigation Dist.*, 71 N.M. 464, 379 P.2d 763 (1963). But see note 104 *infra*.

81. *Kelley v. Carlsbad Irrigation Dist.*, 76 N.M. 466, 415 P.2d 849, 852 (1966).

distinctions were dropped in favor of a candid recognition that the administrative agency exercises adjudicatory functions which are subject to the check of the judicial power exercised by courts.

### *E. Division of Liquor Control*

Under its police powers New Mexico has established numerous agencies to protect the public safety and welfare. Illustrative are the Division of Liquor Control and occupational and professional licensing boards.

The control of liquor in New Mexico is placed under the Bureau of Revenue. The statutes regulating liquor include a declaration that liquor is to be "controlled so as to protect the public health, safety and morals of every community."<sup>82</sup> To carry out this policy, the chief of the division of liquor control is authorized to issue or refuse to issue licenses and to revoke, suspend or cancel any license, not only if the licensee has violated the statutes, but also if he has violated any "valid regulation" announced by the chief or by the commissioner of revenue.<sup>83</sup> An elaborate plan for hearings on suspected violations is set out in the statutes.<sup>84</sup> An appeal to the District Court in Santa Fe is permitted. The district court can set aside a decision of the chief of liquor control if (1) it is arbitrary, capricious, or an abuse of discretion; (2) it is in excess of statutory jurisdiction, or (3) it is unsupported by substantial evidence.<sup>85</sup> This is the same scope of review accorded to decisions of other administrative agencies.

The decisions of the chief of liquor control have been called at different times "ministerial,"<sup>86</sup> quasi judicial but "essentially administrative,"<sup>87</sup> and that of a "special tribunal."<sup>88</sup> Perhaps the best pronouncement on the type of duty the chief of liquor control performs is in *Kearns v. Aragon*,<sup>89</sup> a judicial review of a license revocation because of a Sunday sale:

A proceeding before the Chief to revoke a liquor license is not a criminal proceeding; rather it is an administrative proceeding in the na-

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82. N.M. Stat. Ann. § 46-5-1 (Repl. 1966).

83. N.M. Stat. Ann. § 46-2-4 (Repl. 1966).

84. N.M. Stat. Ann. § 46-6-4 (Repl. 1966).

85. N.M. Stat. Ann. § 46-6-6 (Repl. 1966).

86. *Floek v. Bureau of Revenue*, 44 N.M. 194, 199, 100 P.2d 225, 227 (1940).

87. *Chiordi v. Jernigan*, 46 N.M. 396, 401, 129 P.2d 640, 643 (1942).

88. *Taggader v. Montoya*, 54 N.M. 18, 22, 212 P.2d 1049, 1052 (1949).

89. 65 N.M. 119, 333 P.2d 607 (1958).

ture of a civil action. [citing cases.] This is true even though the charge and ground for revocation is the violation of a penal statute. [citing cases.]

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Nor is the object of an administrative proceeding to revoke a liquor license intended as a punishment of the licensee. . . . State control of the liquor business under the police power is so great as to range from complete prohibition to lesser degrees of regulation and constant surveillance.<sup>90</sup>

In support of the broad powers given the liquor chief, the New Mexico court has consistently held that a liquor license is not a property right.<sup>91</sup>

#### *F. Other Licensing Boards*

The New Mexico Legislature has enacted statutes requiring licensing of many occupations and professions, including merchants,<sup>92</sup> real estate agents,<sup>93</sup> hotelkeepers and restaurateurs,<sup>94</sup> peddlers,<sup>95</sup> pugilists,<sup>96</sup> auctioneers,<sup>97</sup> barbers,<sup>98</sup> plumbers,<sup>99</sup> and the usual "professions" (except clergymen).<sup>100</sup> Most of the occupations are regulated by boards of commissioners or examiners. Uniformly there has been little litigation in this area.

Licensing for the operation of motor vehicles is a related area.

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90. *Id.* at 123, 333 P.2d at 609-10.

91. *Floock v. Bureau of Revenue*, *supra* note 86; *Chiordi v. Jernigan*, *supra* note 87.

92. N.M. Stat. Ann. §§ 60-1-1, -5 (Repl. 1960). The latter statute (§ 60-1-5) provides that

Every person, firm or corporation who is required to pay an occupation or license tax other than for the sale of liquors, shall, before doing business, make out an application, stating the names of the applicants, the character of the business for which the license is desired. . . .

93. N.M. Stat. Ann. §§ 60-1-2, -5 (Repl. 1960).

94. N.M. Stat. Ann. §§ 60-1-3, -5 (Repl. 1960).

95. N.M. Stat. Ann. §§ 60-2-1 to -16 (Repl. 1960).

96. The licensing comes by implication through requiring the promoter of the fight to obtain a permit from the county boxing commission. N.M. Stat. Ann. §§ 60-7-2 to -4 (Repl. 1960).

97. Strangely, it appears that the statutes require an auctioneer to be licensed only when he is conducting a jewelry auction, N.M. Stat. Ann. §§ 67-13-5 to -12 (Repl. 1961).

98. N.M. Stat. Ann. § 67-14-1 (Repl. 1961).

99. N.M. Stat. Ann. § 67-22-8 (Supp. 1965).

100. Physicians: N.M. Stat. Ann. § 67-5-12 (Repl. 1961); dentists: N.M. Stat. Ann. § 67-4-5 (Repl. 1961); architects: N.M. Stat. Ann. § 67-12-1 (Repl. 1961); public accountants: N.M. Stat. Ann. § 67-23-8 (Repl. 1961); attorneys: N.M. Stat. Ann. § 18-1-26 (Supp. 1965).

The Division of Motor Vehicles and the Commissioner of Motor Vehicles are given powers of issuing licenses and revoking or suspending licenses. Hearings preliminary to suspension or revocation are not required although the licensee does have the right to a hearing after suspension or revocation.<sup>101</sup> Appeals of the decision of the agency can be made to the district court.<sup>102</sup>

*Johnson v. Sanchez*<sup>103</sup> is one of the few cases considering the suspension powers of the division of motor vehicles, and it well could apply to all licensing boards. Lillard Johnson was appealing the six-month suspension of his driver's license. The New Mexico Supreme Court determined that the issues presented were (1) what kind of hearing in the district court was required, and (2) was the statute authorizing suspension of the license constitutional. The court held (1) the statutes were constitutional, and (2) the scope of judicial review was, essentially, the same as for other administrative agencies: that is, did the agency act on substantial evidence, within its jurisdiction, and without fraud, arbitrariness, or capriciousness.<sup>104</sup> On the nature of the action taken by the division, the court said:

We can see no great difference between the cases involving appeals from the administrative action of the corporation commission or the liquor director than those from the commissioner of motor vehicles. The suspension of an operator's license, even though perhaps quasi judicial, is purely an administrative act and not a judicial duty.<sup>105</sup>

The court has been less concerned with the exercise of judicial functions by administrative agencies when it could characterize the agency as being under the police power. This is understandable since in most "police power" agencies the dispute is generally between the state or public and the individual rather than between individuals, and is thus consistent with the Mechem distinction between private and public rights.

None the less, the agencies often exercise judicial functions which

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101. N.M. Stat. Ann. § 64-13-60 (Repl. 1960).

102. N.M. Stat. Ann. § 64-13-65 (Repl. 1960).

103. 67 N.M. 41, 351 P.2d 449 (1960).

104. Some ambiguous language concerning the scope of review is contained in *Wilson v. Employment Security Comm'n*, 74 N.M. 3, 389 P.2d 855 (1963). *Wilson* suggests that perhaps all administrative agencies are not bound by the same review standards.

105. *Supra* note 103, at 49, 351 P.2d at 454. On the question of administrative action, see generally Johnston, *The Administrative Hearing For the Suspension of a Driver's License*, 30 N.C.L. Rev. 27 (1951).

are not unlike those of a criminal court in assessing penalties for breaches of the criminal code, or civil courts adjudicating between two parties when they grant a license for a new bus route or establish the proration formula in an oilfield. The point being that agencies perform specialized tasks that often are of a judicial nature: There is nothing wrong with this if adequate review by the courts is provided. As the court said in *Johnson v. Sanchez*, "there is no denial of due process of law resulting from placing the power to revoke or suspend . . . [a driving license] in an administrative officer. . . . The licensee's right of review . . . is his sufficient protection that powers will be reasonably and fairly administered."<sup>106</sup>

Of course, if adequate review of administrative decision and procedural safeguards are not provided, abuses to the rights of individuals are likely to occur.<sup>107</sup> The courts have frequently struck down agency actions when inadequate procedural safeguards such as notice, hearing, and findings were not provided.<sup>108</sup> In so doing the courts are performing a necessary function—a check on the abuse of administrative discretion.

### G. Practice in other Jurisdictions

The doctrine of separation of powers is explicitly contained in most state constitutions, and the language used in the New Mexico constitution is similar to that in 37 states. Nine states have almost identical phraseology,<sup>109</sup> and twenty-eight others use similar language.<sup>110</sup>

106. *Johnson v. Sanchez*, *supra* note 103, at 46-47, 351 P.2d at 452.

107. For a criticism of powers exercised by the California Department of Motor Vehicles, see note, 48 Calif. L. Rev. 822 (1960).

108. See the cases collected in 1 K. Davis, *Administrative Law Treatise*, § 2.10 (1958) and pocket parts (1965); also see 1 F. Cooper, *State Administrative Law* 82 (1965).

109. The New Mexico Constitution, art. III, § 1 reads:

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 the Constitution otherwise expressly directed or permitted.

Almost identical phraseology is used in the Cal. Const. art. III, § 1; Colo. Const. art. III, Idaho Const. art. II, § 1; Iowa Const. art. III, § 1; Mont. Const. art. IV, § 1; Neb. Const. art. II, § 1; Nev. Const. art. III, § 1; Utah Const. art. V, § 1; and Wyo. Const. art. 2, § 1.

110. States using similar language are: Ala. Const. art. III, § 42; Ariz. Const. art. III; Ark. Const. art. IV, §§ 1, 2; Conn. Const. art. II; Fla. Const. art. II; Ill. Const. art. III; Ind. Const. art. III, § 1; Mass. Const. art. III, § 1; Miss. Const. art. 1, §§ 1,

Twelve state constitutions, like the federal constitution, establish the three separate branches of government, but do not have an independent separation of powers clause.<sup>111</sup> Interestingly, the New Hampshire Constitution calls for the three branches to be as separate "as the nature of a free government will admit, or as it is consistent with that chain of connection that binds the whole fabric of construction in one indissoluble bond . . ."<sup>112</sup> There are different variations in other states, but in all the separation of powers doctrine has validity and vitality.

In the early days of this century, the courts had considerable difficulty reconciling the exercise of judicial functions by administrative agencies with the doctrine of the separation of powers. Illustrative of the early probing of the problem is the Illinois case of *Courter v. Simpson Construction Co.*,<sup>113</sup> in which the court refused to review questions of law involved in the decision of a workmen's compensation commission because the court could not consider a non-judicial question, i.e., one decided by a non-judicial tribunal. A diametrically opposite approach was often taken by which the court held that an administrative agency could not make a decision because it was adjudicatory and not administrative.<sup>114</sup> So, in some instances, it was held the courts had no authority over decisions even for review purposes, because the court said decisions were administrative, while other courts said the administrative agencies had no authority over similar decisions since they were *judicial*.

This confusion was understandable since there is no genuine difference between a court's determining whether an employee was acting within the scope of his employment for purposes of ascertaining vicarious liability of an employer in a tort claim,<sup>115</sup> and the administrative agency's determining whether an accident "arose out of and was in the course of the employment of the employee,"<sup>116</sup> in applying

2; Mo. Const. art. II, § 1; N.H. Const. pt. 1, art. 37; N.J. Const. art. III, § 1; N.C. Const. art. I, § 8; Okla. Const. art. IV, § 1; Ore. Const. art. III, § 1; R.I. Const. art. III; S.C. Const. art. I, § 14; S.D. Const. art. II; Tenn. Const. art. II, § 1; Tex. Const. art. III, § 1; Vt. Const. ch. II, § 5; Va. Const. art. III, § 39, and W.Va. Const. art. V, § 1.

111. Alaska, Delaware, Georgia, Hawaii, Kansas, Maryland, New York, North Dakota, Ohio, Pennsylvania, Washington, and Wisconsin.

112. N.H. Const. pt. 1, art. 37.

113. 264 Ill. 488, 106 N.E. 350 (1914).

114. *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, 156 Pac. 491 (1916).

115. *Great Atlantic & Pacific Tea Co. v. Noppenberger*, 171 Md. 378, 189 A. 434 (1937).

116. *O'Leary v. Brown, Pacific-Maxon, Inc.*, 340 U.S. 504 (1951).



a workmen's compensation act to a particular fact situation. In either case, the adjudicating body determines the facts and interprets them in light of the relevant case or statutory law. If we think of an adjudicatory function as one a court exercises when it applies the terms of a statute to a particular set of facts as determined by a hearing so as to determine the rights of the interested parties, it becomes apparent that administrative agencies are also granted adjudicatory functions by the legislature.<sup>117</sup> Professors Jaffe and Nathanson state:

A court and a compensation board are fundamentally alike in that they determine controversies under the law upon the basis of evidence received in a hearing between the parties . . . In this sense both organs judge and both administer. They are different in that a court as we know it today is a court of general jurisdiction, the board is restricted to one subject.<sup>118</sup>

Similarly, if we think of legislative functions being exercised by the legislature when it enacts rules which prescribe approved behavior or proscribe possible disapproved behavior, then, again, it is apparent that administrative agencies exercise legislative functions in promulgating rules. The courts have come to approve such delegations of adjudicatory and legislative functions if the final judicial power to determine questions of law is preserved in the courts and the ultimate legislative control rests with the legislature.

As one authority observes:

There was a time when many state courts insisted that constitutional doctrines precluded the delegation of legislative or judicial powers to administrative agencies, and as a result many early grants or power to state agencies were held invalid. But that time has long passed. Gradually, the sheer, hard logic of the early cases retreated in the face of the felt necessities of the times. Though the old rubrics prohibiting delegation are still occasionally repeated, they no longer shape decision.<sup>119</sup>

It is at the juncture where finality of administrative action comes into question that the separation of powers doctrine becomes crit-

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117. 1 F. Cooper, *State Administrative Law* 47 (1965).

118. L. Jaffe & N. Nathanson, *Administrative Law* 134 (2d ed. 1961).

119. 1 F. Cooper, *supra* note 117, at 48. (Footnote omitted.)

ical. In order to avoid the abuse of administrative discretion, the final legislative power to change the rules must rest in the legislature. In order to correct administrative errors and provide uniformity of interpretation, the final judicial power must rest in the courts. Chief Justice Vanderbilt in 1949 pointed out that "the proper delegation of legislative power to administrative agencies within the executive department" did not violate the separation of powers clause of the New Jersey Constitution because "what the Legislature delegates it may at any time withdraw."<sup>120</sup> The court went on to say that similarly it was not unconstitutional to grant administrative agencies adjudicatory functions since "every administrative adjudication is subject to the doctrine of the supremacy of law. . . ."<sup>121</sup>

The courts have taken the position that combining legislative, executive, and judicial functions is permissible if adequate checks and balances are provided. "The mere existence of blended powers has not been a cause of concern. It is only when the blending of functions creates a danger of unchecked power that concern arises."<sup>122</sup> In interpreting state constitutions, the courts have concluded that the vesting of judicial power in the courts does not prohibit the legislatures' granting to administrative agencies' officers the powers indispensably necessary to discharge their duties—the powers to decide initially issues of fact and law.<sup>123</sup>

The state and federal courts have avoided the practical and theoretical impossibility of separating the characteristic functions of the tripartite organization into logic tight compartments; rather, they have made sure that the ultimate judicial power to say what is lawful, the legislative power to control legislation, and the executive power to execute the laws is preserved in the respective departments of government.

As a prominent authority on the subject points out :

the state courts have inclined to the view that combination of legislative, prosecutory, and adjudicatory functions in a single agency will be countenanced where a practical necessity therefor exists, but only so long as workable checks and balances (such as . . . reasonably

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120. *Mulhearn v. Federal Shipbuilding & Dry Dock Co.*, 2 N.J. 356, 66 A.2d 726, 730 (1949).

121. *Id.*

122. 1 F. Cooper, *supra* note 117, at 17. (Footnote omitted.)

123. McGovney, *Administrative Decisions and Court Review Thereof*, in *California*, 29 Calif. L. Rev. 110, 145 (1941).

broad judicial review) exist to guard against abuses of administrative discretion.<sup>124</sup>

An Alabama court probably best stated the constitutional position in holding that the separation of powers doctrine requires only that the entire power of one governmental department should not be exercised by the same body that possesses the entire power of either of the other departments. The court went on to say "an administrative commission need not be exclusively a branch of the executive, the legislative or the judicial department. It can partake of the nature and powers of all three."<sup>125</sup>

Three states have included in their constitutions provisions specifically governing the review of judicial functions performed by administrative agencies.<sup>126</sup> This is a healthy practice in that in each case the constitution realistically recognizes that administrative agencies do and must exercise "judicial functions." However, in each instance the "judicial power" to determine finally what is lawful reposes in the courts. This honesty in constitution writing is commendable; it relieves the courts from strained interpretations and fictional distinctions that do not withstand critical scrutiny.<sup>127</sup> Of the three constitutional provisions, perhaps the best is that adopted in 1961 by North Carolina.<sup>128</sup> Article IV § 3 of the North Carolina Constitution is aptly entitled "Judicial powers of administrative agencies." It goes on with simplicity and good pragmatic common sense to grant to the legislature the power to "vest in administrative agencies . . . such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created," while reserving to the courts judicial review of agency decisions.

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124. 1 F. Cooper, *supra* note 117, at 17. The courts in exercising judicial review are more likely to uphold the delegation of judicial functions to administrative agencies when familiar procedural safeguards are provided. If the statute provides for notice, hearing, findings, and judicial review, the courts have been willing to uphold the grant of judicial functions to agencies. See 1 K. Davis, *Administrative Law Treatise* § 2.10, at 115 (1958); 1 F. Cooper, *supra* note 117, at 81-82.

125: *Ex parte Darnell*, 262 Ala. 71, 76 So.2d 770, 774 (1954).

126. Mich. Const. art. VI, § 28; Mo. Const. art. 5, § 22; N.C. Const. art. IV, § 3.

127. For example the term "quasi-judicial" tends only to conceal the judicial functions that administrative agencies perform.

128. N.C. Const. art. IV, § 3: "Judicial powers of administrative agencies.—The General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created. Appeals from administrative agencies shall be to the General Court of Justice."

The simplicity and flexibility of the North Carolina approach is salutary. Although the North Carolina Constitution does have an explicit separation of powers clause, Article IV § 3 is not inconsistent.<sup>129</sup> If the distinction between the "judicial power" and "adjudicatory function" is clearly made, Article IV § 3 is perfectly compatible with the doctrine of separation of powers; even though administrative agencies do exercise judicial functions of gathering facts, holding hearings, and making initial decisions as to the lawfulness of certain types of acts (e.g. whether *X*, on these facts, exceeds his gas production quota), the judicial power to ultimately determine what is lawful is lodged in the courts.

The draft proposed by the New Mexico Constitutional Revision Commission in their 1967 Report, recommends a distribution of powers clause and a judicial review of administrative decisions clause.<sup>130</sup>

The distribution of powers clause recommended by the commission places the judicial power in the judicial branch; the proposed Article II § 17 is in accord by making "All quasi-judicial decisions of state administrative agencies and commissions . . . subject to judicial review."

Thus, the draft expressly recognizes the decision-making function of administrative agencies, but reserves to the courts the judicial power of final determinations of lawfulness. Under the proposed draft, administrative agencies could continue to perform those judicial functions reasonably required to accomplish their legislative mandates. However, in view of the *Mechem* case,<sup>131</sup> it would be desirable to include a provision similar to Article IV § 3 of the North Carolina Constitution in order to remove any lingering confusion.

#### CONCLUSIONS AND RECOMMENDATIONS

Not all decisions can be made by the three poles of government, so we have administrative agencies which in executing the will of the legislature perform not only executive functions but legislative and judicial functions as well. This intermixture has caused the courts

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129. N.C. Const. art. I, § 8: "The legislative, executive, and judicial powers distinct.—The legislative, executive, and supreme judicial powers of the government ought to be forever separate and distinct from each other."

130. 1967 Report of the Constitutional Revision Comm'n, art. III and art. II, § 17.

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

no little consternation and has resulted in the type of confusion of which the Mechem case in New Mexico is symptomatic.<sup>132</sup> The way out of the confusion lies in clearly distinguishing between the judicial power and the mere exercise of judicial functions. Even though administrative agencies exercise legislative functions in promulgating regulations and policy they do so only through authority delegated to them by the legislature. Thus, the legislative power still reposes in the legislature. Similarly, administrative agencies carry out functions which are judicial in nature—such as deciding between two contesting parties as to who on the facts is entitled to carry freight from Farmington to Gallup; but the judicial power still resides in the courts to determine ultimately the lawfulness of the decision of the administrative agencies.

The judicial power is the entire bundle of judicial functions, and ultimately is the power to make the final determination of lawfulness. Therefore, if the legislature establishes some administrative agencies which exercise limited adjudicatory functions that are subject to judicial review, the doctrine of separation of powers is not offended. It is essential that courts retain the power to review for legality so that we can have uniform principles of interpretation and to deter abuse of administrative discretion.

The courts are a group of generalists or rationalists sitting on top of the specialists. The courts deal with the important cases and thereby generalize and relate the segments of the society to each other. They provide uniformity in the interpretation of what is lawful. This is the point of *Marbury v. Madison*.<sup>133</sup> This is what the judicial power is.

Both courts and administrative agencies are concerned with the determination of facts. Facts can be divided into two types, 1) historical—was the man drowned? and 2) conclusionary facts—was the work he was doing within the scope of his employment? There is nothing to say courts have to determine all historical facts, but it is important that the courts have the judicial power to review conclusionary facts such as whether the drowning was or was not within the scope of employment because this involves an interpretation of the law by measuring the historical facts against a particular statutory expression. It is desirable to have uniformity in the interpretation of the law, and it is necessary to have the checks and balances called for by the doctrine of separation of powers. There are cogent

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132. See K. Davis, *Administrative Law Text* 43 (1959).

133. 5 U.S. (1 Cranch) 137 (1803).

reasons for taking some of the burden from the courts by using the administrative process. The line between historical facts and conclusionary facts is a sensible place to draw the demarcation. Historical facts can be dredged up by administrative agencies, but the final decisions as to conclusionary facts should not be taken from the courts. The authority for the legislature to give administrative agencies power to try historical facts is modified by the sixth and seventh amendments requiring jury trials in civil and criminal cases. In these two instances, the U.S. Constitution has made a value judgment that these cases should be tried by jury.<sup>134</sup> Professor Jaffe of Harvard, in summing up the federal law says, "even a suit involving 'private right' . . . may . . . be adjudicated by an agency provided that a court is empowered on appeal to determine the law, and provided that the matter is not one at 'common law' entitling the parties to a jury trial."<sup>135</sup>

The Mechem decision is an aberration.<sup>136</sup> One authority called it an "astounding holding."<sup>137</sup> Justice Sadler, in his dissent in Mechem, stated, "New Mexico stands alone in the hierarchy of states holding the legislature lacks power to create an industrial commission to hear and screen for final determination by the courts the myriad cases, increasing at an alarming rate, annually, under its workmen's compensation act."<sup>138</sup>

In this brief paragraph, Justice Sadler caught the essence of the argument, i.e., 1) the administrative agency might initially hear the case, but the judicial power "for final determination by the courts" was preserved, and 2) the administrative agency would screen cases so as to conserve the energy and time of the courts for its generalist duties. He later in his dissent said,

They serve a useful purpose in regulating the activities of a particular occupation or industry and save the courts the time and labor of

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134. See Parker, *Separation of Powers*, 49 Mich. L. Rev. 1009, 1032 (1951).

135. L. Jaffe, *Judicial Control of Administrative Action* 91 (1965).

136. The Mechem decision has not been followed: to do so would jeopardize the administrative process and thereby the capacity of the government to govern. The closest the court has come is in the *Southwestern Public Service Co. v. Artesia Alfalfa Growers' Ass'n*, 67 N.M. 108, 353 P.2d 62 (1960). In this case the court cited with approval an Oklahoma case that enumerated the private v. public rights distinction of Mechem.

137. K. Davis, *supra* note 132, at 47.

138. 63 N.M. at 256, 316 P.2d at 1072. It should be noted, however, that the industrial commissions in a number of states were created by the constitution, not the legislature; see, e.g., Cal. Const. art. 20 § 21 and N.Y. Const. art. I § 18.

attempting to take over management and regulation of such businesses and industries. We have the Barbers Board, the Bar Commissioners, the Medical Board, the Real Estate Board and so on ad infinitum.<sup>139</sup>

At this juncture, when revision of the constitution is being considered, the question arises, what steps should be taken to anticipate and thereby avoid confusion of the Mechem type?

The proposals of the Constitutional Revision Commission contained in their 1967 report expressly provide in proposed Article II for a separation of powers so that the judicial power to make final determination as to what is lawful is reserved to the judiciary. Then, in proposed Article II § 17, they acknowledge the judicial functions of administrative agencies. Their draft proposes "all quasi-judicial decisions of the state administrative agencies are subject to judicial review."

Article III and Article II § 17 as proposed by the Commission are acceptable and are necessary. However, small changes could strengthen and clarify these sections and the concepts that they express:

1. In order to make the distinction between the "judicial power" and adjudicatory, i.e. judicial "function,"<sup>140</sup> even clearer, Article III should be changed by simply using the words "the power" instead of "any power" so that Article III would read as follows:

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

2. Then, by following the model of the North Carolina constitution the last clear chance for confusion would be removed. This could be done by changing proposed Article II § 17 to read as follows:

The legislature may vest in administrative agencies such judicial

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139. *Id.* at 259, 316 P.2d at 1075.

140. In the Mechem case, Justice Sadler also quoted Chief Justice Vanderbilt of New Jersey: "The failure to comprehend that administrative adjudication is not judicial springs from the erroneous notion that all adjudication is judicial. This is not so and never has been so. . . ." Justice Vanderbilt had grasped the nub of the problem, and perhaps he would have made his point even more clearly if he had used the labels "judicial power" and "judicial functions."

powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created. Decisions made by administrative agencies and commissions pursuant to their judicial powers are subject to judicial review. The scope of review shall be as prescribed by law. In the absence of legislative provisions the matter shall not be heard de novo upon judicial review.

This proposal largely follows the Commission's draft for Article II § 17 and makes only judicial decisions by the Administrative Agencies subject to judicial review because there are those ministerial decisions that perhaps should not be subject to judicial review. Examples of ministerial decisions are the construction of parking facilities, location of highways, or the accreditation of schools.

It is desirable to have a simple, straightforward judicial review section. Some states, such as Missouri, have tried rather elaborate formulations in spelling out what administrative decisions shall be reviewable. For example, the Missouri provision states: "All final decisions, findings, rules and orders of any administrative officer or body . . . which are judicial or quasi-judicial and affect private rights shall be subject to direct review by the courts as provided by law. . . ."<sup>141</sup> My own taste is for the simplicity and straightforwardness contained in the North Carolina Constitution.<sup>142</sup>

The elaborate administrative review provision in the Missouri Constitution, in effect since 1945, has been construed by the courts in at least 165 cases. Such extensive litigation raises some doubt about the provision's effectiveness. Even with the mass of litigation, no case has been found that defines the constitutional phrase, "all final decisions, findings, rules and orders." Since the Michigan con-

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141. Missouri Constitution, article V, § 22.

142. Three states, Michigan, Missouri and North Carolina provide within their constitutions for the judicial review of administrative decisions. The constitutional provisions in two of these states are so new that no adequate judicial construction of the meaning of these provisions has been enunciated to date. (Michigan's Constitution was adopted in 1963; the North Carolina provision was added to the North Carolina Constitution in 1962). The North Carolina Constitution, article IV, § 3, states: "Judicial powers of administrative agencies. The General Assembly may vest in administrative agencies . . . such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created. Appeals from administrative agencies shall be to the General Court of Justice." The Michigan Constitution, article VI, § 28, reads: "All final decisions, findings, rulings, and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. . . ."



stitutional provision is an almost verbatim copy of the Missouri provision, one is left wondering if the Michigan courts will be as hounded for constructions of the provision as have the courts in Missouri.

By analogy one gains some insight by looking at constructions of statutory judicial review sections in other jurisdictions. The few helpful cases found construing the phrase "any decision" generally recognize that "any decision" is not a literal command, but is meant to include *judicial type* decisions, as contrasted with ministerial acts.<sup>143</sup>

The few useful cases found construing the phrase "final order" suggest that time is the basic element here: the administrative body involved must have done all that it can do before its decision is appealable.<sup>144</sup>

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143. Board of Comm'rs of Dearborn County v. Droege, 224 Ind. 446, 68 N.E.2d 650 (1946). The county commissioners decided that there existed a vacancy on the Board because one of its members had been committed to an institution for the insane. They appointed a replacement. HELD: The statute providing for appeal of "any decisions" made by the county commissioners means "judicial decisions and unless the action of the board was of a judicial character no appeal" was available. The act of the remaining commissioners was ministerial, not judicial. Therefore, no appeal was available.

Accord: State *ex rel.* Sink v. Circuit Court of Cass County, 214 Ind. 323, 15 N.E.2d 624 (1938) (county commissioners created an additional township in the county) and cases cited therein. ARIZONA reaches essentially the same result (at least in regard to the agriculture commission) by statutory definitions of "final decision": "any decision, order, or determination of an administrative agency which terminates the proceeding before the agency and as not meaning or including a rule or regulation issued to implement legislation administered by the agency." Ariz. Rev. Stat. § 12-901 as paraphrased in Arizona Comm'n of Agriculture and Horticulture v. Jones, 91 Ariz. 183, 370 P.2d 665, 668 (1962).

Another Indiana case: McGraw v. Marion County Plan Comm'n, 174 N.E.2d 757 (Ind. 1961). On the question of whether a recommendation of a Plan Commission was a decision capable of being appealed, the court said: when a statute says "any decision" it refers "only to judicial decisions, meaning decisions involving a judicial act. [Citing case.] Purely ministerial decisions or administrative acts are not within the concept of such terms." [Citing cases] 174 N.E.2d at 760.

144. City of Houston v. Turner, 355 S.W.2d 263 (Tex. 1962). An order of the Civil Service Commission that made future disposition of a police officer's employment status dependent upon his behavior during a probationary period was not a "final order" such as could be reviewed by the courts. To be a final order, there must be nothing left open for disposition. Where some right is made contingent upon the occurrence of some future event, the order is not final. 355 S.W.2d at 264.

Langer v. Gray, 73 N.D. 437, 15 N.W.2d 732 (1944). In a property tax dispute the question regarding timeliness of the appeal was answered: Under the rules provided for appeals the right of appeal is limited to final orders or decisions and orders or decisions substantially affecting the rights of parties. Procedural orders made during the pending of a hearing are not to be deemed final orders or orders affecting substantial rights. 15 N.W. 2d at 734.

Perhaps the whole thing boils down to a matter of taste, but I think it would be wise to avoid a Missouri type constitutional provision which has generated so much confusion and litigation. The simplicity of the North Carolina provision is appealing.

3. Then, as a final change, it will be noted that I have removed the word "quasi" from the proposal for Article II § 17. Since in making the distinction between "adjudicatory functions" and the "judicial power" we candidly admit that administrative agencies exercise judicial functions, it is not necessary to say "quasi-judicial" decisions. One must admit that the accepted usage of "quasi-judicial" as opposed to "judicial" accomplished the same result but it does so by a fictitious means. The word "quasi" means "as if" according to Webster,<sup>145</sup> thereby saying it is like adjudication but, in fact, is not. This is less than true. The determination of whether or not an employee was acting "within the scope of his employment" is called "judicial" if made by a court, but "quasi-judicial" if made by an administrative agency. An administrative agency hears the facts and measures them by a statutory formula, and thereby adjudicates. It would therefore be more realistic to discard the "quasi-judicial" language and candidly use the distinction between the "judicial power" and "adjudicatory functions."<sup>146</sup> This would lead to clearer thinking and less chance for confusion of the type the court embroiled itself in, in the Mechem case. As Professor Cooper points out, "no court ever succeeded—indeed, none seriously tried—to discover a logical basis for distinguishing between 'pure' and 'quasi' legislative or judicial powers."<sup>147</sup>

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145. Merriam-Webster New Int'l. Dictionary 1861 (3d ed. 1961).

146. McGovney, *supra* note 123, at 145-46.

147. F. Cooper, *supra* note 117, at 51.