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Administrative Hearing Commission and the Separation of Powers: A Solution to an Old Problem, The

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THE ADMINISTRATIVE HEARING COMMISSION AND THE SEPARATION OF POWERS: A SOLUTION TO AN OLD PROBLEM

State Tax Commission v. Administrative Hearing Commission[1]

The growth of administrative agencies during the twentieth century has presented Missouri courts with a difficult analytical problem. The Missouri Constitution[2] requires that "[t]he powers of government shall be divided into three distinct departments—the legislative, executive and judicial" and that no person in one governmental department "shall exercise any power properly belonging to either of the others."[3] Yet administrative agencies, which are part of the executive or legislative branch, often determine facts, apply law, and perform other duties that traditionally have been viewed as "judicial" or "legislative."[4]

A variety of approaches have been employed to resolve this conflict between the separation of powers doctrine and administrative adjudication. For Missouri courts, the most common approach is to determine whether the administrative agency's function is "judicial," as opposed to "administrative" or "quasi-judicial." If its function is deemed judicial, the agency's action is said to be unconstitutional.[5] If its function is merely "administrative" or "quasi-

1. 641 S.W.2d 69 (Mo. 1982) (en banc).
2. Mo. CONST. art. II, § 1.
3. Thirty-eight state constitutions explicitly require the separation of governmental powers. Twelve state constitutions, like the federal Constitution, establish three separate government departments without an independent separation of powers clause. New Hampshire's Constitution has a unique separation of powers clause. It calls for the three branches to be as separate "as the nature of a 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, Art. 37; *see* Utton, *Constitutional Limitations on the Exercise of Judicial Functions by Administrative Agencies*, 7 NAT. RESOURCES J. 599, 620-21 nn.109-12 (1967).
4. *See, e.g.*, Mo. REV. STAT. § 287.020 (Supp. 1983) where under Missouri's Workers' Compensation Law an administrative judge may determine such issues as whether the injured party is an employee (§ 287.020(1)), whether the injury resulted from an accident (§ 287.020(2)), whether the employee suffered an injury (§ 287.020(3)), and whether the accident arose out of and in the course of the employee's employment (§ 287.020(5)).
5. *See, e.g.*, State *ex rel.* Missouri Pac. R.R. v. Public Serv. Comm'n, 303 Mo. 212, 219, 259 S.W. 445, 447 (1924) (an award of damages by the Public Service Commission was unconstitutional because this action was a judicial function and must be assigned to the judiciary under our state government).

judicial," the agency's action is upheld as constitutional.[6] This Note examines this and other approaches used by courts to reconcile this apparent conflict and suggests an alternative approach to that used by the Missouri Supreme Court in *State Tax Commission v. Administrative Hearing Commission.*[7]

In *State Tax Commission*, the Commission circulated a letter to assessors and certain taxpayers which stated that a new formula had been adopted for determining the value of leased tangible personal property. The letter asked taxpayers who lease such property to file a revised tax return containing information consistent with the suggested formula.

Shortly after the letter was circulated, International Business Machines Corporation (IBM) filed a complaint with the Administrative Hearing Commission (AHC). The complaint asked the AHC to declare the new formula void because the State Tax Commission had issued the formula without following the rulemaking procedures set forth in Missouri Revised Statutes section 536.021.[8] After an evidentiary hearing, the AHC held that it could render a declaratory judgment[9] and found that the State Tax Commission's letter was void because it had not been properly filed.

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6. *See, e.g.*, Liechty v. Kansas City Bridge Co., 162 S.W.2d 275, 279 (Mo. 1942) (although the Missouri Workmen's Compensation Commission determines questions of a purely legal nature, its functions are constitutional because the Commission is a ministerial and administrative body with quasi-judicial powers).

7. 641 S.W.2d 69 (Mo. 1982) (en banc).

8. Mo. Rev. Stat. § 536.021 (1978). Basically, this section requires that before a state agency may make, amend, or rescind any agency rule it must first file with the secretary of state a notice of the proposed rule change. Section 536.021(2) further requires that the notice contain, among other things, the text of the proposed rule change and an explanation of the change.

9. The AHC found that Mo. Rev. Stat. § 536.050(2) (1978), when read in conjunction with Mo. Rev. Stat. § 161.333 (1978), gave the AHC the power to render declaratory judgments concerning agency rules. Mo. Rev. Stat. § 536.050(2) (1978) provides:

> The validity or applicability of any rule, regulation, resolution, announced policy, applied policy, or any similar official or unofficial interpretation or implementation of state agency authority, other than in a contested case or in a law enforcement proceeding, may be determined in an action to be brought by the filing of a written complaint with the administrative hearing commission by any interested person, or duly constituted entity, who is affected by such interpretation or implementation in a manner or to a degree distinct and different from other members of the general public. The complaint shall set forth the manner or degree in which the agency action or position affects the complainant, and the reasons for believing such action or position to be invalid or inapplicable to the complainant.

Mo. Rev. Stat. § 161.333 (1978) provides: "The administrative hearing commission shall conduct hearings, make findings of fact and conclusions of law, and issue decisions in those cases involving complaints filed pursuant to the provisions of section 536.050, RSMo." The AHC further found that the State Tax Commission's letter was a policy statement of general applicability and therefore a rule as defined under Mo. Rev. Stat. § 536.010.4 (1978). *State Tax Comm'n*, 641 S.W.2d at 72 & n.3.

On review, the supreme court vacated the AHC's decree,[10] holding that, under the separation of powers clause,[11] the AHC could not render a declaratory judgment.[12] Judge Welliver, writing for a unanimous court, stated that "[t]he declaration of the validity or invalidity of statutes and administrative rules . . . is purely a judicial function" and that "[u]nder our Constitution the lawmakers cannot vest purely judicial functions in an administrative agency."[13]

The generally accepted meaning of the separation of powers doctrine is that all government powers—legislative, judicial, and executive—are divided into three distinct departments and that each department is prohibited from exercising the others' power.[14] This diffusion of power prevents "the abuses that can flow from the centralization of power."[15] As James Madison wrote in *The Federalist Papers*: "[t]he accumulation of all powers . . . in the same hands . . . [is] the very definition of tyranny."[16] In short, the concentration of power invites autocracy; the diffusion of power promotes liberty.

Although the validity of the separation of powers doctrine has been questioned,[17] its importance is firmly entrenched at both the federal and state levels. Justice Frankfurter wrote that while the doctrine may be attacked as obstructive to effective government, it is essential to our continued freedom. "The accretion of dangerous power," he wrote, "does not come in a day. It

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10. *State Tax Comm'n*, 641 S.W.2d at 72.

11. MO. CONST. art. II, § 1. This section provides that:

> [t]he powers of government shall be divided into three distinct departments—the legislative, executive, and judicial—each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.

12. 641 S.W.2d at 76.

13. *Id.* at 75 (quoting State *ex rel.* Missouri Pac. R.R. v. Public Serv. Comm'n, 303 Mo. 212, 219, 259 S.W. 445, 447 (1924)).

14. Force, *Administrative Adjudication of Traffic Violations Confronts the Doctrine of Separation of Powers*, 49 TUL. L. REV. 84, 88 (1974); *see also* O'Donoghue v. United States, 289 U.S. 516, 530 (1933) ("The Constitution, in distributing the powers of government, creates three distinct and separate departments . . . . Its object is basic and vital, . . . namely, to preclude a commingling of . . . essentially different powers of government in the same hands."). On the history of the separation of powers doctrine see Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 U. CHI. L. REV. 385 (1935); Parker, *Separation of Powers Revisited—Its Meaning to Administrative Law*, 49 MICH. L. REV. 1009, 1011-20 (1951).

15. 641 S.W.2d at 73-74.

16. THE FEDERALIST NO. 47, at 334 (J. Madison) (H. Dawson, University ed. 1888).

17. *See, e.g.*, Fuchs, *An Approach to Administrative Law*, 18 N.C.L. REV. 183, 198 (1940) ("The dead weight of alleged separation-of-powers limitations should be cast overboard finally and definitively, bag and baggage."); Kinnane, *Administrative Law: Some Observations on Separation of Powers*, 38 A.B.A. J. 19, 19 (1952) ("The hoary old myth lives on. And it is badly in need of killing. One feels compelled to try to bury it.").

does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority."[18]

Although most state constitutions expressly prohibit one branch of government from exercising any power granted to another branch,[19] the realities of government prevent a total separation of powers. In *Massett Building Co. v. Bennett*,[20] the New Jersey Supreme Court stated that the separation of powers doctrine "has nowhere been construed as creating three mutually exclusive water-tight compartments. To do so would render government unworkable and the slave of a doctrine that has for its beneficial purpose the prevention of despotism. . . ."[21] As noted in *Rhodes v. Bell*,[22] it is not the purpose of Missouri's Constitution to create a total separation of governmental powers. Rather, each branch must interact harmoniously with the other branches.[23]

The tension between adherence to the separation of powers doctrine and the need for some "mixing" of government functions is most evident in the delegation of judicial functions to administrative agencies. Administrative law and administrative agencies are as old as the American system of government.[24] The first two agencies were created in 1789.[25] By 1900, one-third of all federal peacetime agencies were created and by 1930, another one-third had been established.[26] This tremendous growth was not unopposed. On political[27] and constitutional[28] grounds, administrative agencies faced stiff opposition. Professor Kenneth Culp Davis writes that "[t]he desire was to kill the

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18. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593-94 (1952) (Frankfurter, J., concurring).

19. *See supra* note 3.

20. 4 N.J. 53, 71 A.2d 327 (1950) (rejecting the plaintiff's argument that a New Jersey statute that allowed judicial investigations of city affairs violated the state's separation of powers requirement).

21. *Id.* at 57, 71 A.2d at 329.

22. 230 Mo. 138, 130 S.W. 465 (1910) (rejecting plaintiff's argument that the circuit court had violated Missouri's separation of powers doctrine by performing the "legislative" act of setting the time at which it would convene).

23. *Id.* at 150, 130 S.W. at 468; *see also* N.H. CONST. pt. 1, art. 37 (The branches of government should remain separate in such a way "as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.").

24. B. SCHWARTZ, ADMINISTRATIVE LAW 20 (2d ed. 1984).

25. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 17 (2d ed. 1978). Congress established the first agency by the Act of July 31, 1789. This agency was established to estimate import duties and perform other related functions. The second agency was created by President Washington to provide military pensions for those wounded in the Revolutionary War. *Id.* at 17.

26. *Id.*

27. K. DAVIS, ADMINISTRATIVE LAW: CASES-TEXT-PROBLEMS 8 (5th ed. 1973). Davis states that administrative agencies, especially the Securities and Exchange Commission and the National Labor Relations Board, were viewed by many (especially lawyers) as pro-labor and anti-management.

28. 1 K. DAVIS, *supra* note 25, at 19.

agencies, using whatever weapon would most effectively get the deed done. . . . The growing antagonism of the bar toward the administrative process was unmistakable."[29] Despite this opposition, federal administrative agencies, particularly during the New Deal, continued to grow in both number and power.

Administrative agencies also have long been a part of Missouri government.[30] Like their federal counterparts, Missouri agencies experienced rapid growth in both number and authority.[31] Before the creation of the AHC, persons involved in a dispute with an agency were bound by the procedures of Missouri's Administrative Procedure Act.[32] These procedures suffered from a basic flaw—lack of fairness. In the "classic case,"[33] the agency, after receiving a complaint, would investigate some alleged illegal conduct. Then, based on its investigation, the agency would decide whether to proceed or drop the case. If it proceeded, the agency would conduct a hearing at which its members (who had already decided that the evidence supported the allegations of illegal conduct) would re-evaluate the same evidence and render a decision. In these proceedings, the agency functioned as prosecutor, judge, and jury.[34] The person against whom the allegations were made had little or no real defenses.[35] Moreover, the statute governing judicial review of agency rulings placed a heavy burden on those challenging these rulings.[36]

The AHC was designed to eliminate the unfairness inherent in this "prosecutor-judge-jury syndrome"[37] by allowing a neutral lawyer (a commissioner) to hold a "fair and impartial hearing in compliance with due process of the law."[38] In short, the AHC was created to place an independent and unbiased decisionmaker "between agencies and those persons affected by their

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29. *Id.* at 19-20.

30. *See generally* E. Fair, PUBLIC ADMINISTRATION IN MISSOURI (1923). For example, Professor Fair notes that two of Missouri's more important administrative agencies, the Public Service Commission and the State Board of Health, were established in 1913 and 1883, respectively. *Id.* at 15, 229.

31. Symposium, *A Survey of Missouri Administrative Agencies*, 19 UMKC L. REV. 227, 230 (1951).

32. *See* MO. REV. STAT. § 536.010-.140 (1969) (revised 1978).

33. Special Project, *Fair Treatment for the Licensed Professional: The Missouri Administrative Hearing Commission*, 37 MO. L. REV. 410, 438 (1972).

34. *Id.*

35. *Id.*

36. *See* MO. REV. STAT. § 536.140.2 (1978). This section provides that the judicial inquiry may extend to a determination of whether the action of the agency:

> (1) [i]s in violation of constitutional provisions; (2) [i]s in excess of the statutory authority or jurisdiction of the agency; (3) [i]s unsupported by competent and substantial evidence upon the whole record; (4) [i]s, for any reason, unauthorized by law; (5) [i]s made upon unlawful procedure or without a fair trial; (6) [i]s arbitrary, capricious, or unreasonable; (7) [i]nvolves an abuse of discretion.

37. Special Project, *supra* note 31, at 442 (quoting then Lt. Gov. Thomas F. Eagleton).

38. *Id.* at 412.

actions."[39]

Despite the growth and general acceptance of administrative agencies, questions about the constitutional limits of their power still linger. How "judicial" or "legislative" may the acts of an agency be? In answering this question courts usually have examined the similarities between administrative proceedings and court proceedings. A few older cases concentrate on the procedural similarities.[40] These cases determined whether an agency was exercising judicial powers by considering the extent to which its proceedings resembled those of a court.[41] For example, in *Western Metal Supply Co. v. Pillsbury*,[42] the California Supreme Court held unconstitutional the delegation of judicial functions to the State Workmen's Compensation Commission, where the commission had the power to administer oaths, issue subpoenas, take testimony, and punish for contempt "in like manner and to the same extent as courts of record."[43]

An approach that focuses on procedural similarities has three serious flaws. First, it is superficial. The court arrives at its decision without examining the principles behind the separation of powers doctrine and whether the agency's action violates those principles. Second, the approach may not be an effective safeguard against unwarranted delegations of judicial power. The legislature may grant an agency "real" judicial power,[44] yet a court may not detect the unwarranted delegation because the power is exercised in hearings which do not possess the trappings of a customary court proceeding.[45] Finally, such an approach produces the peculiar result of allowing an agency, whose hearings lack the procedural safeguards of a court proceeding, to determine an individual's rights and duties while prohibiting another agency from perform-

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39. 641 S.W.2d at 75.

40. *See, e.g.*, Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 157 P. 491 (1916) (Industrial Accident Commission, which had the power to hear complaints, issue service of process, compel attendance of witnesses, determine issues, and make final judgments or awards, was vested with judicial power in violation of California's separation of powers requirement); Boyd v. Motl, 236 S.W. 487, 495-97 (Tex. Civ. App. 1921) (The Board of Water Engineers, which had the power to consider "certified filings" (i.e., pleadings) and affidavits, hear evidence, and render written decisions, was unconstitutionally vested with judicial power), *rev'd*, 116 Tex. 82, 286 S.W. 458 (1926) (power vested in Board not unconstitutional).

41. Brown, *Administrative Commissions and the Judicial Power*, 19 MINN. L. REV. 261, 268 (1935).

42. 172 Cal. 407, 156 P. 491 (1916).

43. *Id.* at 411, 156 P. at 493.

44. *See infra* text accompanying notes 72-77.

45. *See, e.g.*, State v. Hathaway, 115 Mo. 36, 21 S.W. 1081 (1893) (upholding constitutionality of State Board of Health's licensing power, quoting approvingly from United States v. Ferreira, 13 U.S. (How.) 40 (1852) in which Court stated that a territorial court did not possess judicial power because it did not exercise its power "in the ordinary forms of a court of justice[,]" in that there was no suit, no parties in the legal sense, and no process to issue). Under MO. REV. STAT. ch. 110, art. 1 § 6872 (1889) (current version at MO. REV. STAT. § 334.100 (1978)), those denied licenses by the State Board of Health had no direct judicial review of the Board's decision.

ing those same functions because that agency's hearings afford an individual important procedural safeguards.[46]

A much more common approach to resolve the apparent conflict between administrative adjudication and the separation of powers doctrine is for the court to examine the functions the agency performs.[47] Under this "functional approach," if the agency's functions are deemed "judicial" its exercise of those functions is declared unconstitutional as a violation of the separation of powers doctrine. On the other hand, if the agency's action is merely "quasi-judicial" or "administrative," the action does not violate that doctrine. For example, in *Wright v. Central DuPage Hospital Association*,[48] the court held unconstitutional a statute that allowed a medical review panel[49] to "make conclusions of law and fact 'according to the applicable substantive law.' "[50] The court stated that the application of law is inherently a judicial function. Since the statute in question allowed persons outside the judiciary to apply the law, it violated the separation of powers clause of the Illinois Constitution.[51] In *State ex rel. Missouri Pacific Railroad v. Public Service Commission*,[52] the Missouri Supreme Court struck down a money award made by the Public Service Commission because "[t]o determine whether one person is entitled to recover money from another . . . cannot be anything but a judicial question [i.e., function], and as such must be determined by the courts."[53] The court concluded that "under [the Missouri] Constitution the lawmakers cannot vest purely judicial functions" in an administrative agency.[54]

State Tax Commission is a "functional approach" case. In determining whether the AHC's action was an unconstitutional delegation of judicial power, the Missouri Supreme Court simply inquired whether the administrative act in question was a judicial function. Concluding that the issuance of a declaratory judgment is "purely a judicial function"[55] the court held that the

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46. Brown, *supra* note 41, at 269-70.

47. *See, e.g.*, Wright v. Central DuPage Hosp. Ass'n, 63 Ill. 2d 313, 318, 347 N.E.2d 736, 739-40 (1976) (statute establishing a medical review panel to hear and determine medical malpractice cases held unconstitutional as, inter alia, a violation of separation of powers); State *ex rel.* Missouri Pac. R.R. v. Public Serv. Comm'n, 303 Mo. 212, 219, 259 S.W. 445, 447 (1924) (granting a money judgment was an unconstitutional exercise of judicial power by the Public Service Commission); State v. Osborn, 32 N.J. 117, 127-28, 160 A.2d 42, 48 (1960) (statute establishing a "marine navigation court" granted certain members of the executive branch judicial functions in violation of separation of powers).

48. 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

49. The panel consisted of a doctor, a lawyer, and a judge. *Id.* at 322, 347 N.E.2d at 738.

50. *Id.* at 322, 347 N.E.2d at 739-40.

51. ILL. CONST. art. II, § 1 states that "[t]he legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another."

52. 303 Mo. 212, 259 S.W. 445.

53. *Id.* at 218, 259 S.W. at 447.

54. *Id.* at 219, 259 S.W. at 447.

55. 641 S.W.2d at 75.

AHC's action violated the separation of powers clause of Missouri's Constitution.[56]

The realities of government, i.e., that administrative agencies perform some judicial functions,[57] plus the difficulty of distinguishing between "judicial" and "non-judicial" functions,[58] have led courts applying the functional approach to establish a new category of judicial power—"quasi-judicial" power. A precise definition of this concept has proved elusive. In *Mulhearn v. Federal Shipbuilding & Dry Dock Co.*,[59] Chief Justice Vanderbilt of the New Jersey Supreme Court wrote that "quasi-judicial" refers not to the quality of the adjudication but to its origin outside the judiciary.[60] In other words, whether an act is judicial or quasi-judicial depends not on the nature of the act, but on the tribunal in which it occurs.[61] Professor Robert Force asserts that "quasi-judicial" often refers to the different purpose served by administrative adjudication.[62] For administrative agencies, adjudication is merely a means to an end.[63] While the agency may possess the power to hear and determine controversies, this "quasi-judicial" power is merely ancillary to the performance of its administrative function. Force writes that "where an agency is authorized to resolve problems between private parties (workmen's compensation), or between a private party and government (license revocation), the agency does not adjudicate merely to resolve a dispute but rather to promote some established public policy which the agency is charged to implement."[64]

The concept of "quasi-judicial" power has been harshly criticized. Critics claim that courts label an action "quasi-judicial" as a mere conclusion to support decisions that allow or disallow an agency's action.[65] In *Springer v. Phil-*

56. *Id.* at 76.

57. *See, e.g.*, Handlon v. Town of Belleville, 4 N.J. 99, 104, 71 A.2d 624, 626 (1950) ("Where the administrative tribunal's function partakes of the judicial, its exercise is styled 'quasi-judicial,' but it is the exercise of judicial power nonetheless . . . .").

58. *See, e.g.*, State *ex rel.* Williams v. Marsh, 626 S.W.2d 223, 234 (Mo. 1982) (en banc) ("[T]he boundaries which separate the powers and functions of the governmental branches are difficult to point out and . . . in some areas they may overlap.").

59. 2 N.J. 356, 66 A.2d 726 (1949) (the Division of Workmen's Compensation is not a "court" in the constitutional sense, therefore, the supreme court cannot review its judgments directly by certification.).

60. *Id.* at 365, 66 A.2d at 730.

61. Wade, *'Quasi-Judicial' and Its Background*, 10 CAMBRIDGE L.J. 216, 231-32 (1949); *see also* 1 AM. JUR. 2D *Administrative Law* § 161 (1962) (" 'Quasi-judicial is . . . used to designate a judicial function, but to indicate that it is exercised by a person other than a judge.").

62. Force, *supra* note 14, at 109-110.

63. *Id.* at 109.

64. *Id.* at 110.

65. In FTC v. Ruberoid Co., 343 U.S. 470, 487-88 (1952) (Jackson, J., dissenting), Justice Jackson wrote:

> Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion requires in order to validate their functions within the separation of powers scheme of the Constitution. The mere retreat

lipine Islands,[66] Justice Holmes noted that the Supreme Court has repeatedly upheld congressional delegation of executive, legislative, and judicial functions to administrative agencies, even though this delegation is "softened by a quasi."[67]

The "functional approach" is flawed not only because of the difficulty of distinguishing "judicial" from "non-judicial" functions, but also because the approach misinterprets the purpose of the separation of powers doctrine. For example, in *State Tax Commission*, the court stated that "the doctrine of separation . . . would be reduced to a mere shibboleth were this attempted grant of power [allowing the AHC to issue declaratory judgments concerning agency rules] sustained."[68] The court seems to suggest that the purpose of the separation of powers doctrine is to preserve for the judiciary a certain number or type of particular functions. Yet, James Madison asserted that the doctrine was designed not to distribute governmental functions but, rather, to prevent the concentration of governmental powers. In *The Federalist Papers* Madison writes "[it is only] where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department [that] the fundamental principles of a free constitution are subverted."[69] In *David v. Vesta Co.*,[70] the court emphasized that the separation of powers doctrine should not be viewed as an end in itself, but rather should be used to prevent the "concentration of *unchecked* power in the hands of" one branch of government.[71] Nowak, Rotunda, and Young write that a separation of functions concept runs counter to the system of checks and balances.[72]

The flaws of the "functional approach" stem from its failure to distinguish "judicial power" from "judicial function."[73] The Missouri Constitution,

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to the qualifying "quasi" is implicit with confession that all recognized classifications have broken down, and "quasi" is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed.

66. 277 U.S. 189 (1928).

67. *Id.* at 210 (Holmes, J., dissenting); *see also* 1 AM. JUR 2D *Administrative Law* § 161 (1962) (the term "quasi-judicial" is used simply as a convenient way of approving the exercise of judicial power by administrative agencies).

68. 641 S.W.2d at 77.

69. THE FEDERALIST NO. 46, at 336 (J. Madison) (H. Dawson, University ed. 1888) (emphasis in original). One objection to the adoption of the United States Constitution was that it allowed a blending of governmental functions. Madison, in refuting this argument, wrote that the idea that the branches of government must be separate and distinct "totally" misconceives and misapplies the separation of powers doctrine. *Id.*

70. 45 N.J. 301, 212 A.2d 345 (1965) (statute granting the Director of the Division on Civil Rights the right to hear and determine complaints does not violate separation of powers).

71. *Id.* at 326, 212 A.2d at 358-59 (emphasis in original).

72. J. NOWAK, R. ROTUNDA & J. YOUNG, HORNBOOK ON CONSTITUTIONAL LAW 136 (2d ed. 1983); *see also* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 68 (1958) ("The principle of check should guide the allocation of governmental power. . . . [t]he danger is not blended power. The danger is unchecked power.").

73. For a good discussion of this idea see Force, *supra* note 14, at 93-98.

like others, separates powers, not functions. Judicial power may be defined many ways. Chief Justice Marshall suggested that judicial power is the power "to say what the law is."[74] In *Harris v. Pine Cleaners*,[75] the court noted that judicial power is the power to pronounce and enforce a judgment.[76] However, the essence of judicial power, it is submitted, is the power to determine with finality what the law is.[77] As Professor Frank R. Strong states, "[f]inality of decision is the very hallmark of judicial action."[78]

Judicial function, on the other hand, is the capacity to act in a way that "appertains to the judicial power."[79] In this sense, it is synonymous with "adjudication" which may be defined as a determination, decision, or sentence.[80] The "judicial function" is to determine facts and apply law. The "judicial power," on the other hand, is to state with finality what the law is.

The distinction between judicial power and judicial function is crucial to the proper understanding of the separation of powers doctrine.[81] This doctrine expressly prohibits the exercise of judicial powers by the non-judicial branches of government, but it does not prohibit the other branches from exercising judicial functions.[82]

To insure that judicial power remains within the judicial branch, courts must have the power to review administrative "judicial" decisions.[83] Missouri

74. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

75. 274 S.W.2d 328 (Mo. Ct. App. 1954).

76. *Id.* at 333 (Industrial Commission possessed the power to apply principles of law to facts found, determine liability, and discharge anyone whom it finds to be not liable).

77. *See, e.g.*, Crowell v. Benson, 288 U.S. 22, 57 (1932) (to vest administrative agency decisions with finality would "sap the judicial power" of the federal courts); Force, *supra* note 14, at 97-98 ("[T]he essence of judicial power in the constitutional sense is that power to make the final determination of the constitutionality or legality of legislative and executive action."); 1 AM. JUR. 2D *Administrative Law* § 170 (1962) (if an administrative agency's action was final, it would be an unconstitutional exercise of judicial power).

78. Strong, *Judicial Review: A Tri-Dimensional Concept of Administrative-Constitutional Law*, 69 W. VA. L. REV. 249, 254 (1967).

79. BLACK'S LAW DICTIONARY 761 (rev. 5th ed. 1979).

80. WEBSTER'S NEW INTERNATIONAL DICTIONARY 27 (3d ed. 1961).

81. In Mulhearn v. Federal Shipbuilding & Drydock Co., 2 N.J. 356, 66 A.2d 726 (1949), the court stated:

> 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. . . . Were the rule otherwise and were every executive, administrative, legislative, or municipal adjudication deemed judicial and the official or body making the adjudication regarded as a judge or a court, we should be driven to treat every public official in the State . . . as a judge or a court—a conclusion so extravagant that its mere statement demonstrates its fallaciousness as well as its undesirability.

82. *Id.* at 364-65, 66 A.2d at 730.

83. Note, *Judicial Review of Agency Rule Making*, 14 GA. L. REV. 300, 303 (1980).

law insures that power.[84] The failure to distinguish judicial power from judicial function can lead to poor decisions. In *Wright v. Central DuPage Hospital Association*,[85] the court stated, "[t]he application of principles of law is inherently a judicial function . . . and article VI, section 1, of the Constitution vests the exclusive and entire judicial power in the courts."[86] Both portions of this statement are true (i.e., applying the law is a judicial function and the Illinois Constitution does give exclusive judicial power to the courts[87]) yet, because the court did not distinguish judicial power from judicial functions, it concluded that the statute in question was unconstitutional. *Wright* has been severely criticized.[88] Professor Davis contends that "[n]o state government can operate without administrative application of principles of law to the facts of particular cases."[89] He adds that *Wright* is so extreme that Illinois courts will be forced to overrule it or interpret it away.[90]

State Tax Commission presents another interesting problem. The court states that the Missouri legislature, in granting the AHC the power to render declaratory judgments regarding the validity of agency rules, attempted to elevate the AHC to the status of a constitutional court.[91] In support of this argu-

84. Missouri's Constitution provides direct judicial review of "[a]ll final decisions, findings, rules and orders of any administrative officer or body . . . which are judicial or quasi-judicial and affect private rights. . . ." Mo. CONST. art. V, § 18. In addition, section 536.100 provides that any person aggrieved by a final administrative decision who has exhausted all administrative remedies is entitled to judicial review of that decision unless otherwise provided by statute. Mo. REV. STAT. § 536.100 (1978). Section 536.150 permits indirect judicial review of administrative decisions through injunction, certiorari, mandamus, prohibition, or other appropriate action. Mo. REV. STAT. § 536.150 (1978). Clearly these provisions preserve for the judicial branch the power to finally determine the rights and duties of persons affected by administrative decisions. The respondents in *State Tax Commission* did argue that judicial review prevents the AHC from usurping the judicial function. However, the court stated that this "argument, carried to its logical conclusion, would mean that the legislative and executive branches could exercise powers constitutionally reserved to the judiciary as long as judicial review was available. Yet, it "is emphatically the province and duty of the judicial department to say what the law is.'" 641 S.W.2d at 77 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

85. 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

86. *Id.* at 322, 347 N.E.2d at 739.

87. ILL CONST. art. II, § 1 states that "[t]he legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." ILL. CONST. art. VI, § 1 states that "[t]he judicial power is vested in a Supreme Court, an Appellate Court and Circuit Courts."

88. *See* 1 K. DAVIS, *supra* note 25, at 183-84.

89. *Id.* at 185.

90. *Id.* Davis' criticism could also be applied to *State Tax Commission*; its language is very similar to that used in *Wright*. For example, the court states that the declaration of the validity of administrative rules is purely a judicial function and that the state's judicial power is solely vested in the courts. Therefore, the court concluded, it is unconstitutional for the AHC to issue declaratory judgments concerning agency rules. 641 S.W.2d at 75.

91. 641 S.W.2d at 76.

ment the court notes that section 536.050(2)[92] allows a person to file his complaint either before the AHC or a circuit court.[93] Yet, the court also states that an administrative agency is not a constitutional court even though it determines issues of a "purely legal nature," if such issues are merely incidental and necessary to the proper discharge of its administrative functions.[94] In other words, the AHC may be able to render a declaratory judgment if it is incidental and necessary to the action before it, but it may not do so if the declaratory judgment is the focus of the litigation. Thus, the anomaly arises that the same act is constitutional in one setting while unconstitutional in another.[95]

Not all Missouri cases that have addressed the constitutionality of administrative adjudication have applied a strict "functional approach."[96] In *Harris v. Pine Cleaners*,[97] the court seemed to recognize that exercise of judicial functions by an agency is not necessarily a usurpation of judicial power. In upholding the constitutionality of the Workmen's Compensation Commission, the court noted that both Missouri's Constitution[98] and its Administrative Procedure Act[99] recognize that some agency decisions are "judicial" or "quasi-judicial" and provide for court review of those decisions.[100] The court concluded that "[t]he 'judicial power of the state' as meant by the Constitution is, therefore, not usurped by the Commission, but is reserved to the courts."[101]

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92. MO. REV. STAT. (1978); *see supra* note 9.

93. 641 S.W.2d at 76. The court noted that the Report of the Select Committee on Administrative Rule Making stated that under section 536.050 "an aggrieved person would have his choice of following either the present provisions relating to declaratory judgment, [i.e., bring the action in circuit court] or of filing a petition before the Administrative Hearing Commission."

94. *Id.* at 75.

95. This result is often defended on the ground that the agency is exercising "quasi-judicial" powers in one setting (the constitutional setting) and "judicial" powers in the other. *See supra* text accompanying notes 57-64. However, as noted earlier, the quasi-judicial concept is both fraught with uncertainty and logically infirm. *See supra* text accompanying notes 65-67.

96. *See, e.g.*, State v. Weinstein, 322 S.W.2d 779, 785 (Mo. 1959) (en banc) (court, in upholding the constitutionality of actions taken by the State Highway Department, quoted with approval Davis's statement that the guiding principle in the control of administrative agencies is the principle of check); *In re* City of Kinlock, 362 Mo. 434, 440, 242 S.W.2d 59, 63 (1951) (officials who determine facts and apply law do not necessarily exercise "judicial power" in a constitutional sense); State v. Missouri's Workmen's Compensation Comm'n, 320 Mo. 893, 898, 8 S.W.2d 897, 899 (1928) (commission performs judicial functions but not vested with judicial powers in the constitutional sense).

97. 274 S.W.2d 328 (Mo. Ct. App. 1954).

98. MO. CONST. art. V, § 18 (formerly art. V, § 22); *see supra* note 84.

99. MO. REV. STAT. § 536.010-.140 (1949) (current version at MO. REV. STAT. § 536.010-.215).

100. 274 S.W.2d at 333.

101. *Id.*

In *State v. Ridge*,[102] the plaintiff contended that determination of facts by the Public Service Commission was an unconstitutional exercise of judicial power. The Missouri Supreme Court rejected this argument, stating that the plaintiff ignored the provisions of Missouri law providing for judicial review of the Commission's findings. The court added that "[i]n view of the provisions for court review, the regulation and control of public utilities by the com-misssion is not an exercise of judicial power."[103]

The Missouri Supreme Court's decision in *State Tax Commission* creates two problems. First, the decision cast the duty of issuing declaratory judgments concerning agency rules upon circuit court judges who, in general, possess less experience and expertise in administrative law than the AHC. More importantly, *State Tax Commission* creates greater uncertainty in the proper distribution of government functions. Under the approach used in *State Tax Commission*, whether a government official is exercising his proper functions depends on whether that function is deemed "purely judicial" or "purely executive" or merely "quasi-legislative." As courts have often admitted, such distinctions are often very difficult to make, and make consistently.[104]

' These problems could be avoided if the Supreme Court would distinguish a government branch's power from its functions. The functions of each branch are, to some extent, exercised by the other branches. This is a necessary reality of government. To determine the extent to which these functions may be "mixed" in the name of the separation of powers adds unnecessary uncertainty to the law. Both the spirit and letter of the separation of powers clause are upheld if each branch retains its unique and essential power. For the judiciary, that power is the authority to say with finality what the law is.

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102. 345 Mo. 1096, 138 S.W.2d 1012 (1940) (en banc).

103. *Id.* at 1102, 138 S.W.2d at 1015.

104. *See* State *ex rel.* Williams v. Marsh, 626 S.W.2d 223, 234 (Mo. 1982) (en banc) ("the functions of the governmental branches are difficult to point out and in some areas they may overlap.").