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SEPARATION OF POWERS AND ARKANSAS ADMINISTRATIVE AGENCIES: DISTINGUISHING JUDICIAL POWER AND LEGISLATIVE POWER

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I. INTRODUCTION

Article IV, section 1 of the Arkansas Constitution allocates the powers of the government of the state of Arkansas among three departments: the executive, the legislative, and the judicial.[1] Article IV, section 2 prohibits the exercise of any power belonging to one department by a person, or collection of persons, belonging to another department.[2] Article IV, section 1 vests the legislative power of the state in the General Assembly;[3] article VI, section 2 vests the executive power in the

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1. ARK. CONST. art. IV, § 1 states: "The powers of the government of the State of Arkansas shall be divided into three distinct departments, each of them to be confided to a separate body of magistracy, to wit: Those which are legislative to one, those which are executive to another, and those which are judicial to another."

2. ARK. CONST. art. IV, § 2 states: "No person, or collection of persons, being one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

3. ARK. CONST. art. IV, § 1 states: "The legislative power of this State shall be vested in a General Assembly, which shall consist of the Senate and House of Representatives." Art. V, § 1 was supplemented by amendment 7, which also vests the legislative power in the General Assembly, but reserves to the people the power of initiative and referendum.

Governor;[4] and article VII, section 1 vests the judicial power in the Supreme Court and certain inferior courts.[5]

In theory, article IV decrees an absolute, tripartite separation of the powers exercised by state government. But since the adoption of the Arkansas Constitution in 1874, state government has grown in both size and complexity, and this growth has, at times, tested the continued practicality of an absolute separation of governmental powers. The tension between theory and practice is particularly apparent in the case of administrative agencies. The General Assembly frequently grants both enforcement and rulemaking powers to an administrative agency. The Arkansas Supreme Court has never been overly concerned with the blending of executive and legislative functions found in the statutory charters of most administrative agencies.[6] In fact, it is often difficult to discern from the court's opinions whether administrative agencies are a part of the executive department, the legislative department, or some fourth department of government.[7] The court has been far more protec-

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4. ARK. CONST. art. VI, § 2 states: "The supreme executive power of this State shall be vested in a chief magistrate, who shall be styled 'the Governor of the State of Arkansas.'" Art. VI, § 1, as amended by amendment 37, provides that: "The Executive Department of this State shall consist of a Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, and Commissioner of State Lands . . . ."

5. ARK. CONST. art. VII, § 1 states: "The judicial power of the State shall be vested in one Supreme Court, in circuit courts, in county and probate courts, and in justices of the peace. The General Assembly may also vest such jurisdiction as may be deemed necessary in municipal corporation courts, courts of common pleas, where established, and, when deemed expedient, may establish separate courts of chancery."

6. In one of the few cases in which the issue of combining executive and legislative powers in a single agency was even raised, the court seemed to view the phenomenon as an accomplished fact that could not be reversed. Hickenbottom v. McCain, 207 Ark. 485, 181 S.W.2d 226 (1944). In response to an employer's contention that the act creating the Employment Security Division in the Department of Labor blended executive, legislative, and judicial powers in a single agency contrary to separation of powers, the court stated:

> In our opinion, [the act] does not offend against any of [the separation of powers] provisions. It does create an administrative agency, charged with the duty of enforcing its provisions, but it does nothing more, and we do not find in the provisions of the Constitution above referred to or elsewhere in the Constitution any inhibition against the employment of such an agency for such a purpose. To do so would greatly, and we think, unduly restrict the power inhering in the General Assembly to create agencies of this character. The General Assembly, in the exercise of its legislative power, has found it necessary to create a number of such agencies, to the functioning of which many of the same constitutional objections have been unsuccessfully interposed . . . .

Id. at 491-92, 181 S.W.2d at 229.

The exercise of executive and judicial powers by the Arkansas Legislative Council is discussed in some detail in Powers, *Separation of Powers: The Unconstitutionality of the Arkansas Legislative Council*, 36 ARK. L. REV. 124 (1982).

7. In Parkin Printing & Stationery Co. v. Arkansas Printing & Lithographing Co., 234 Ark. 697, 354 S.W.2d 560 (1962), the court held that the State Highway Department was a part of the

tive of the barrier surrounding the judicial department. Administrative agencies are clearly not a part of the judicial department of government, and the court has often invoked separation of powers when an agency is granted powers that resemble those traditionally reserved to the judiciary or when the courts are granted broad powers to review agency decisions. Although such cases occasionally require distinguishing executive power and judicial power, they are more likely to involve drawing the line between legislative power and judicial power.

The court's opinion in the 1982 case of *Ozarks Electric Cooperative Corporation v. Turner*[8] illustrates the tests frequently applied to define the respective powers of the courts and administrative agencies. The case involved the appropriate forum for resolving a dispute between a utility customer and a public utility concerning the amount charged for reconnection of electric service following a termination of service for alleged meter tampering. In *Ozarks*, the utility discovered that the meter seal and glass on a customer's electric meter had been broken and the meter was not recording electricity usage. The utility notified the customer and threatened to discontinue service unless the customer paid $1,500, the amount the utility estimated to be due for service rendered.[9] Rather than appeal the termination to the Commission,[10] the customer paid the additional charge, but he then filed suit in circuit court for malicious prosecution and the return of the $1,500. The trial judge directed a verdict for the utility on the malicious prosecution count but submitted the claim for $1,500 to the jury, which awarded the customer $1,250. The principal issue on appeal was whether the circuit court or the Public Service Commission was the appropriate forum to resolve the dispute as to the amount owed by the customer for service during the period the meter failed to measure properly the service provided the customer.

The supreme court decided the case by distinguishing legislative

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executive department. According to the dissent, this was the first time the court had ever held that any administrative agency was a part of the executive rather than the legislative department.

8. 277 Ark. 209, 640 S.W.2d 438 (1982).

9. The Arkansas Public Service Commission's Rules and Regulations Governing Utility Service permit a utility to terminate service for the "unauthorized or fraudulent use or procurement of service or tampering with wires, pipes, meters, or other utility equipment." Rules 8(A)(5) and (L)(3), Arkansas Public Service Commission, Rules and Regulations Governing Utility Service (1981) [hereinafter cited as APSC Rules]. Before reconnecting service, the utility may require a "reasonable payment for the estimated services rendered" or may refuse to reconnect service until ordered by the Commission. Rule 8(M), APSC Rules.

10. If the customer wishes to contest the termination, he may obtain a hearing before the Commission within three days of applying for relief, and the Commission must make a finding on the merits within one day after the hearing. Rule 8(J)(12), APSC Rules.

functions, which can properly be performed by an administrative agency, from judicial functions, which can not. According to the court, the appropriate line between the two functions was announced by the United States Supreme Court in *Prentis v. Atlantic Coastline*:[11]

> A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.[12]

Applying the *Prentis* test to the case before it, the Arkansas court concluded:

> There is an analogy to the present case. Here, the appellee is not questioning the rate that appellant charged—an issue that would be

11. 211 U.S. 210 (1908).

12. 277 Ark. at 211, 640 S.W.2d at 440 (quoting 211 U.S. at 226). The test announced by the United States Supreme Court in *Prentis* was not designed to distinguish judicial and legislative functions for purposes of the separation of powers doctrine. The issue before the Court in *Prentis* was whether a proceeding before the Virginia State Corporation Commission fixing railroad rates was a proceeding before a court of a state, which United States Courts were forbidden to enjoin under the predecessor of 28 U.S.C. § 2283 (1982). Based on the quoted language, the Supreme Court held that a ratemaking proceeding was legislative in character and therefore could be enjoined by a federal court. The Court expressly declined to address the separation of powers issues raised by the case and assumed that the Virginia State Corporation Commission could exercise both judicial and legislative powers.

Despite the context in which the *Prentis* test was developed, the Arkansas Supreme Court adopted the test for use in resolving separation of powers questions. In City of Fort Smith v. Dept. of Pub. Util., 195 Ark. 513, 113 S.W.2d 100 (1938), an order of the Department of Public Utilities (the predecessor of the Public Service Commission) invalidating a municipal ordinance was challenged on the grounds that the Department had acted in a judicial capacity. The supreme court applied the *Prentis* test and concluded that the Department had acted legislatively since the character of the final act (i.e., the establishment of rules and regulations governing utility service) was legislative.

The *Prentis* test was also applied in Southwestern Gas & Elec. Co. v. Town of Hatfield, 219 Ark. 515, 243 S.W.2d 378 (1951). There the court upheld the power of the Public Service Commission to determine whether a town council had approved the sale of a utility system by one utility to another since the determination was incidental to the final legislative act of determining that the sale was in the public interest.

The first case in which the *Prentis* test resulted in the characterization of a power as judicial rather than legislative was Southwestern Elec. Power Co. v. Coxsey, 257 Ark. 534, 518 S.W.2d 485 (1975). In that case a writ of prohibition was sought by a public utility to prevent a chancellor from resolving a dispute between two public utilities as to which would provide service to a particular customer. In dismissing the application for the writ, the supreme court applied the *Prentis* test and held that the allocation of territory between two public utilities was a legislative function delegated to the Public Service Commission, but the resolution of a dispute between two utilities as to which held the exclusive right to serve an existing customer under existing PSC certificates was a judicial function that could be exercised only by a court.

properly before the APSC. Nor does he challenge the power of the APSC to set the rate charged by Ozarks and to determine whether that amount is a reasonable rate. What appellee does contend is that the total amount Ozarks charged him is excessive in light of all the circumstances and that the money is being wrongfully kept by Ozarks. Appellee disputed the charge that he had tampered with the meter and he was free to show what other factors might have contributed to a lower meter reading and for what length of time the meter was recording lower than average reading. The issue was judicial in nature and appellee was entitled to have it resolved in a court of law. Were the APSC to hear this case, it would not be acting in a legislative capacity. It would not be looking to the future and making a new rule or standard affecting the public or a group generally. Rather, *it would be determining issues of fact from past actions involving a particular individual within existing laws and deciding the liabilities involved.*[13]

II. SCOPE OF ARTICLE

Ozarks illustrates a separation of powers issue that often arises in connection with administrative agencies. When an agency attempts to make factual determinations affecting the rights and liabilities of a particular person, the agency's decision may be challenged on the grounds that the agency is exercising judicial power.[14] The *Ozarks* opinion, as

13. 277 Ark. at 211-12, 640 S.W.2d at 440 (emphasis added).

14. The court in *Ozarks* tended no change in the well established rule that the character of a proceeding is determined by the final act resulting from the proceeding. *See* Southwestern Gas & Elec. Co. v. Town of Hatfield, 219 Ark. 515, 521, 243 S.W.2d 378, 382. The Court in *Ozarks* quoted the following statement from *Hatfield*: "But the effect of the inquiry, and of the decision upon it, is determined by the nature of the act to which the inquiry and decision lead up." 277 Ark. at 211, 640 S.W.2d at 439. Pursuant to this rule, an administrative agency can perform judicial type functions incidental to the exercise of a final legislative act. The court prefers to use euphemisms such as "administrative adjudication" or "exercise of quasi-judicial power" to describe the actions of the agency, but clearly persons not a part of the judicial department are exercising powers of a type historically performed by that department. In *Ozarks*, for example, the court stated: "This does not mean that quasi-judicial functions cannot be performed in the exercise of the powers conferred for the general purposes of regulating and controlling public utilities." 277 Ark. at 210-11, 640 S.W.2d at 439.

Under the rule that the character of a proceeding is determined by the nature of the final act, the court has approved the exercise by the Public Service Commission of such traditional judicial functions as determining the constitutionality of legislation, Oklahoma Gas and Elec. Co. v. Lankford, 278 Ark. 595, 648 S.W.2d 65 (1983); McGehee v. Mid South Gas Co., 235 Ark. 50, 357 S.W.2d 282 (1962); interpreting state and federal statutes, General Tel. Co. of the Southwest v. Lowe, 263 Ark. 727, 569 S.W.2d 71 (1978); McGehee v. Mid South Gas Company, 235 Ark. 50, 357 S.W.2d 382 (1962); Arkansas Elec. Coop. Corp. v. Ark.-Mo. Power Co., 221 Ark. 638, 255 S.W.2d 674 (1953); and determining questions of law and fact, Farmers Elec. Coop. Corp. v. Arkansas Power and Light Co., 220 Ark. 652, 249 S.W.2d 837 (1952); Southwestern Gas & Elec.

well as earlier opinions applying the *Prentis* tests, suggests that the appropriate response in such a case is to apply the court's definitions, classify the power being exercised by the agency as either judicial or legislative in character, and then assign that power exclusively to one department of government. Only the courts can determine issues of fact affecting the rights and liabilities of a particular person under existing laws. Administrative agencies make factual determinations that apply prospectively to the public in general or a specific group.

A second separation of powers problem that arises in connection with administrative agencies involves judicial review of agency determinations of fact. Courts are typically empowered to review the factual determinations of administrative agencies, and in some circumstances, the availability of such review is probably a constitutional imperative. But agency determinations of fact, even those affecting the rights and liabilities of a single person, sometimes involve the exercise of legislative or executive power to formulate public policy. When an agency has been granted legislative or judicial discretion, a court may encroach on powers reserved to the legislative or executive departments when it reviews the agency's factual determinations de novo and substitutes its judgment on questions of public policy for that of the agency.[15]

Co. v. Town of Hatfield, 219 Ark. 515, 243 S.W.2d 378 (1951). But in those cases in which the court has sanctioned the exercise of judicial functions by the Public Service Commission incidental to the exercise of a final legislative act, the final act was "legislative" within the restrictive definition used by the court in *Ozarks*. In other words, the final act in each of the cited cases was the adoption by the Commission of a rule or order operating prospectively and affecting the general public. Allied Tel. Co. v. Arkansas Pub. Serv. Comm'n, 239 Ark. 492, 393 S.W.2d 206 (1965), illustrates the court's insistence that the final act of the Commission be legislative in character before the court will approve the exercise of judicial type functions by the Commission. In that case, the Commission ordered a telephone utility to comply with the terms of a contract governing the routing of intrastate long distance calls. Although the court upheld the Commission's action, it was clearly bothered by the Commission's failure to couch its final act as a legislative rather than a judicial act:

> While this is a minor issue in the case, we nevertheless conclude that the Commission acted beyond its jurisdiction in enjoining Allied from the breach of a contract on the broad terms as contained in the aforesaid copied order. Of course, if there had been a finding that such rerouting of calls would result in inadequate service to the telephone using public, then the Commission would have had jurisdiction, since, under Ark. Stat. Ann. § 73-218 (1957), its duty is to see that service is adequate, etc. But there was no finding in this case that the mere rerouting of Sheridan long distance calls through Fordyce would result in any inadequate service; and the Commission is not the proper forum to enjoin a mere breach of contract.

Id. at 504, 393 S.W.2d at 213.

15. De novo review is an elastic concept. It may or may not include the right to present new evidence to the reviewing court. The term is used broadly in this article to refer to any standard of review which permits the reviewing court to substitute its judgment on factual issues for that of an administrative agency, whether or not the court may hear new evidence on the issues.

This article examines the extent to which Arkansas administrative agencies can be vested with the power to make factual determinations affecting the rights and liabilities of particular persons, and the extent to which agency factual determinations can be subjected to review by the courts.[16] The cases considered have been grouped into four categories for discussion purposes:

I. *Cases or controversies in which a particular person seeks something from government which is within the discretion of government to grant or withhold.* Examples are proceedings determining the validity of tort or contract claims against the state, proceedings determining entitlement to public benefits, proceedings granting or revoking a license to engage in a particular occupation or activity, and proceedings involving discharges from public employment or removal from public office.

II. *Cases or controversies in which government seeks something from a particular person.* Examples are proceedings involving the government's power of eminent domain, proceedings involving the government's power to regulate the use of property, and proceedings involving the government's power of taxation.

III. *Cases or controversies between two private persons in which government has a direct interest.* The prime example is an election contest.

IV. *Cases or controversies between two private persons in which the only interests at stake are those of the two parties.*

III. CONTROVERSIES IN WHICH A PARTICULAR PERSON SEEKS SOMETHING FROM GOVERNMENT

When a private party seeks "something" from the state, the power

16. Because judicial review of administrative action in Arkansas has been a fairly popular law review subject, this article does not undertake a comprehensive examination of the issue. For articles discussing judicial review of administrative decisions in more detail, see Carnes, *Administrative License Revocation in Arkansas*, 14 ARK. L. REV. 139 (1959); Covington, *Judicial Review of the Awards of the Arkansas Workmen's Compensation Commission*, 2 ARK. L. REV. 139 (1948); Davis, *Mandamus to Review Administrative Action in Arkansas*, 11 ARK. L. REV. 351 (1957); Parker, *Administrative Law in Arkansas*, 4 ARK. L. REV. 107 (1950); Wilson and Carnes, *Judicial Review of Administrative Agencies in Arkansas*, 25 ARK. L. REV. 397 (1972); Comment, *Judicial Review of Findings of the Arkansas Public Service Commission*, 2 ARK. L. REV. 67 (1947); Note, *Taxpayer Status to Challenge Administrative Actions Under the Arkansas Administrative Procedure Act*, 25 ARK. L. REV. 160 (1971).

The article focuses on separation of powers at the state level, but many of the cases discussed involve county or municipal officers or tribunals. Although the separation of powers doctrine may not apply at the local government level, these cases are instructive insofar as they characterize a particular power as judicial or legislative.

to determine whether he is entitled to that "something", based on existing laws and present or past facts, is not necessarily reserved to the judiciary. The decision to grant something to or withhold something from a particular person may be a legislative function, and the fact that the decision affects the rights or liabilities of only one person does not change the character of the decision. On the other hand, rather than retain the discretion, either directly or through an administrative agency, to determine whether or not a particular person should receive something, the legislature can create a "right" in a particular person. Once a person's interest in something is elevated to the status of a statutory right, then determining whether the person possesses that right becomes the type of question that either an administrative agency or the courts can consider.

A. *Contract and Tort Claims Against the State*

The power to resolve contract and tort claims against the state exemplifies a governmental function that can, consistent with separation of powers, be vested in either an administrative agency or the courts. The power satisfies the definition of judicial power employed in *Ozarks*. It involves "determining issues of fact from past actions involving a particular individual with existing laws and deciding the liabilities involved."[17] But the power to hear and decide the merits of claims against the state is vested in the Arkansas State Claims Commission rather than the courts.[18] Decisions of the Commission are final and are not subject to judicial review.[19]

The obvious way to reconcile the activities of the State Claims Commission with the separation of powers is to characterize the resolution of claims against the state as the exercise of legislative power.[20]

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17. The quoted language is from the court's opinion in *Ozarks*. The full quotation is set out in the text, *supra* note 13.

18. ARK. STAT. ANN. § 13-1402 (Supp. 1983). Claims arising under the Worker's Compensation Act, the Employment Security Act, or Teacher Retirement Act, or under laws providing for old-age assistance grants, child welfare grants, blind pensions, or similar law, are excluded from the jurisdiction of the Claims Commission.

19. ARK. STAT. ANN. § 13-1406 (1979).

20. The supreme court has never considered whether vesting the State Claims Commission with judicial functions violates the separation of powers doctrine. In Auditor v. Davies, 2 Ark. 494 (1840), the court stated that the State Auditor could not exercise judicial power but found it unnecessary to consider whether the approval of claims against the state was the exercise of judicial power. In Eckert, *Another Decade of State Immunity to Suit—1937-1947*, 2 ARK. L. REV. 375, 379 (1948), the author noted the possible separation of powers problem raised by the use of an administrative agency to hear claims against the state. The Alabama Supreme Court concluded that a constitutional provision similar to the Arkansas separation of powers provision did

Such a characterization is supported by article XVI, section 2 of the Arkansas Constitution, which states that the General Assembly shall "provide for the payment of all just and legal debts of the State." Incidental to the exercise of the legislative power of providing for payment of all just and legal debts of the State, the General Assembly can itself determine, or vest in an administrative agency, the power to determine what debts are "just and legal."[21]

A question that has not been authoritatively determined is whether separation of powers precludes using the courts to resolve claims against the state. If determining the merits of a claim against the state represents the exercise of a legislative power, the separation of powers article would prohibit exercise of the power by the courts. Any inquiry into the ability of the courts to hear claims against the state is hampered by the pervasive influence of article V, section 20 of the Arkansas Constitution, which provides that the state shall never be made a defendant in any of its courts. Because sovereign immunity has usually barred any attempt by the judicial branch of government to hear tort or contract claims against the state, the courts have seldom found it necessary to consider whether such a power is legislative or judicial in character. What little precedent exists indicates that separation of powers is not an obstacle to judicial consideration of the validity of claims against the state.

The Constitution of 1836 contained a separation of powers provision,[22] but it did not bar suits against the state in the courts of the state. In fact, the General Assembly was specifically authorized to direct in what courts and in what manner suits were to be brought against the state.[23] The first session of the General Assembly enacted a statute allowing suits to be brought against the state in both equity and

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not prevent the legislature from conferring jurisdiction to hear claims against the state on the State Board of Adjustment. Ballenger Constr. Co. v. State Bd. of Adjustment, 234 Ala. 377, 175 So. 387 (1937).

21. Prior to 1935 the General Assembly did discharge the function directly by passing a special appropriation to pay those claims it approved. At each legislative session between 1935 and 1943 the General Assembly established a Special Claims Commission consisting of the State Comptroller, the State Auditor, and the Attorney General, and appropriated funds to pay claims approved by the Commission. *See* Ross, *State Immunity and the Arkansas Claims Commission,* 21 ARK. L. REV. 180, 186 (1967). *See also* Eckert, *supra* note 20, at 379; Waterman, *One Hundred Years of a State's Immunity From Suit,* 2 ARK. L. REV. 353, 372 (1948). The Special Claims Commission was replaced in 1945 by a semi-permanent Board of Fiscal Control, 1945 Ark. Acts 53, and the latter agency became the present State Claims Commission in 1949. 1949 Ark. Acts. 462. The 1949 act was superseded by 1955 Ark. Acts 276.

22. ARK. CONST. of 1836, art. III, § 1.

23. ARK. CONST. of 1836, art. IV, § 22.

law courts, and providing for the transmission of any judgment to the legislature so that "an appropriation might be made to satisfy the judgment."[24] In *State v. Curran*[25] the Arkansas Supreme Court upheld the statute against the contention that the state could not be sued in its own courts. This opinion, as well as other opinions from the period, suggests that the supreme court considered the resolution of claims against the state as the exercise of judicial rather than legislative power.[26] But these early cases are of doubtful precedential value on the separation of powers question because the specific constitutional language authorizing the legislature to use the courts to determine claims against the state made it unlikely that the practice would be challenged as a violation of separation of powers.

The framers of the Constitution of 1874 included both a separation of powers provision[27] and a provision barring suits against the state.[28] In most post-1874 cases dealing with the power of the courts to resolve claims against the state, the issue of sovereign immunity has overshadowed the issue of separation of powers. There is, nevertheless, some support for the proposition that the separation of powers article does not bar the use of the courts to determine what debts of the state are "just and legal."

A 1929 act of the General Assembly illustrates legislative use of the courts to determine the validity of claims against the state.[29] The Act directed the Attorney General to bring suit in Pulaski County

24. 1837 Ark. Acts, p. 742.

25. 12 Ark. 321 (1851), *rev'd on other grounds*, 56 U.S. 304 (1853). The history of Mr. Curran's efforts to enforce his claim against the state of Arkansas is detailed in Waterman, *supra* note 21, at 354-58.

26. Many of these early suits against the State arose out of the failure of the State Bank of Arkansas and the Real Estate Bank of Arkansas. *See, e.g.*, Beers v. Arkansas, 17 Ark. 2 (1856), *aff'd*, 61 U.S. 527 (1857); Pike v. State Bank, 14 Ark. 403 (1854); State Bank v. Curran, 10 Ark. 142 (1849). Other cases suggesting that separation of powers does not prevent the courts from hearing claims against the state include Danley v. Whiteley, 14 Ark. 687 (1854); Auditor v. Davies, 2 Ark. 494 (1840).

During this period the legislature seems to have shared the view that the courts were the appropriate forum for determining the merits of a claim against the state. Even when the legislature eventually withdrew the state's consent to be sued in its own courts like any other defendant, it continued to use the circuit courts to make factual determinations regarding a claim. 1856-57 Ark. Acts, p. 153, discussed in Waterman, *supra* note 21, at 359-60.

27. ARK. CONST. art. IV, §§ 1 and 2.

28. ARK. CONST. art. V, § 20. The Constitutions of 1861, 1864, and 1868, like the Constitution of 1836, did not prohibit suits against the state. Dean Waterman suggests that art. V, § 2- was included in the Constitution of 1874 to ensure that the courts would not be used to enforce certain bonds issued by the reconstruction government. Waterman, *supra* note 21, at 361. The first amendment to the Constitution of 1874 prohibited any appropriation to pay such bonds.

29. 1929Ark. Acts 120.

Chancery Court against the heirs of a certain individual to confirm the state's title to the land purchased from the individual and imposed on the court the duty to determine the amount of unpaid purchase price and interest due the heirs.[30] The Act also appropriated $27,000 to pay any amount found due by the court. The court determined that the amount due the heirs was $27,887, and the heirs agreed to remit all amounts in excess of the $27,000 appropriated to pay their claims. In upholding the validity of the act, the supreme court stated:

> The appropriation here involved was not made in the general appropriation bill, but was, in fact, made in a separate bill, which embraced but one subject, this being an adjudication of the controversy between the state and the Urquhart heirs. *The Legislature itself might have ascertained the amount both of principal and interest, and have made an appropriation accordingly, but it elected to constitute another agency to make this finding of fact, and made an appropriation in what was assumed to be a sufficient amount to pay both the principal and the interest*, and, under the remittitur which has been entered, the appropriation is sufficient.[31]

Apparently, the court saw no problem under the separation of powers article with the legislature using a court to ascertain the amount due from the state.

A series of opinions during the 1930's involving suits against the State Highway Commission also supports the conclusion that separation of powers does not preclude the legislature from using the courts to determine the validity of claims against the state. In 1928, as part of a massive highway construction program, the General Assembly enacted a statute that appeared to authorize suits against the Highway Commission and its officers for claims related to the administration of the program.[32] The legislature also appropriated fifteen million dollars to pay for the construction program. The act prompted a number of suits

30. The history of the attempts by the landowner and his heirs to collect the unpaid purchase price is recounted in *Urquhart v. State*, 180 Ark. 937, 23 S.W.2d 963 (1930). In 1909 the legislature appropriated funds to pay the balance of the purchase price including interest and directed the state auditor to calculate and pay the actual amount due to the executor of the landowner. A dispute arose regarding the legal description of the land covered by the contract, and the executor sued the state penitentiary board to reform the contract and recover the price agreed in the contract. In *Jobe v. Urquhart*, 98 Ark. 525, 136 S.W. 663 (1911), the court dismissed the suit as one against the state. The executor then attempted by mandamus to compel the auditor to calculate and pay the amount due, but the court held that the claim was a pre-existing claim the payment of which had not been approved by a two-thirds vote of the General Assembly as required by article V, section 26 of the Constitution. Jobe v. Urquhart, 102 Ark. 470, 143 S.W. 121 (1912).

31. 180 Ark. at 943, 23 S.W.2d at 965 (emphasis added).

32. 1928 Ark. Acts 2 (Special Session).

by contractors in which the sovereign immunity issue was raised. In a series of opinions, a majority of the Arkansas Supreme Court agreed that the suits were against the state, and a different majority agreed that the state could not waive sovereign immunity, but the court nevertheless allowed the suits to proceed since two justices believed the suits were not against the state and two justices believed the state could consent to be sued.[33] The court considered the issue five times in two years without reaching a consensus on the sovereign immunity questions.[34] The stalemate finally ended in *Arkansas State Highway Commission v. Nelson Brothers*,[35] when, following a change in its makeup, the court overruled its early decisions and held that a suit against the Highway Commission was a suit against the state and that the General Assembly could not grant permission for the state to be sued in its own courts. The significance of the highway commission cases is that despite the court's long struggle to reach a consensus, no one raised separation of powers as an obstacle to judicial consideration of tort or contract claims against the state.

Ozarks and many of the court's other opinions dealing with the line between judicial power and legislative power proceed on the assumption that all governmental powers can be neatly segregated into three categories and assigned exclusively to one department of government. *Urquhart* and the highway commission cases suggest that not all governmental powers are susceptible to such treatment. Certain governmental functions are hybrid in character and can, in the discretion of

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33. The history of the highway department cases is discussed in Waterman, *supra* note 21, at 362-68. *See generally* Arkansas State Highway Comm'n v. Dodge, 186 Ark. 640, 55 S.W.2d 71 (1932); Baer v. Arkansas State Highway Comm'n, 185 Ark. 590, 48 S.W.2d 842 (1932); Campbell v. State Highway Comm'n, 183 Ark. 780, 38 S.W.2d 753 (1931); Arkansas State Highway Comm'n v. Dodge, 181 Ark. 539, 26 S.W.2d 879 (1930). *See also* Arkansas State Highway Comm'n v. Keaton, 187 Ark. 306, 59 S.W.2d 481 (1933); Bull v. Ziegler, 186 Ark. 477, 54 S.W.2d 283 (1932). Finally, in Watson v. Dodge, 187 Ark. 1055, 63 S.W.2d 993 (1933), the supreme court declared that "it is perfectly evident that it was the purpose of the framers of the Constitution of 1874 to withdraw all power and authority theretofore existing in the Legislature to grant permission for the State to be sued by individuals or corporations in her courts." *Id.* at 1061, 63 S.W.2d at 995.

34. In Arkansas State Highway Comm'n v. Dodge, 186 Ark. 640, 55 S.W.2d 71 (1932), the court was reduced to explaining its inability to reach a consensus as follows:

> It will be seen that out of the conflicting views of a majority of the several members of the court a very definite result has been reached; i.e., that in a proper case the highway commission may be sued when authority for bringing the suit may be found in the statute. Since this is the effect of our holding in both the Dodge and Baer Cases, supra, we think it is more important that this question be definitely settled than a too firm insistence be held to our individual views . . . .

Id. at 646, 55 S.W.2d at 73.

35. 191 Ark. 629, 87 S.W.2d 394 (1935).

the General Assembly, be assigned either to the courts or to an administrative agency without violating separation of powers. Because the General Assembly cannot waive sovereign immunity, it has no choice but to employ an administrative agency to determine the validity of tort and contract claims against the state.[36]

If sovereign immunity could be waived, and the General Assembly did elect to use the courts to determine the validity of tort and contract claims against the state, another type of separation of powers problem would be presented. Separation of powers requires that the legislature retain the ultimate authority to appropriate public funds for the payment of the "just and legal debts" of the state. On the other hand, the courts would be reluctant to accept the responsibility of rendering unenforceable advisory opinions to the General Assembly regarding the merits of claims against the state.[37] It might therefore be necessary to adopt a procedure similar to that employed in *Urquhart* and the highway commission cases. The General Assembly could appropriate in advance the funds from which to pay any claims determined to be valid by the courts and thereby ensure that the courts would be able to enforce their determinations.[38]

B. *Entitlement to Public Benefits*

Pursuant to its constitutional power to appropriate public funds,[39] the General Assembly may decide to make benefits available to persons meeting certain criteria. Separation of powers does not require the General Assembly to use the courts to determine whether a particular

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36. Congress has assigned the task of resolving tort and contract claims against the federal government to the district courts, which are Article III "judicial" courts, but it has also vested the Claims Court, which is an Article I "legislative" court, with the power resolve contract claims. 28 U.S.C. § 1346 (1982); 28 U.S.C. § 1491 (1982).

37. *See* Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792). *Cf.* Kirk v. North Little Rock Special Dist., 174 Ark. 943, 298 S.W. 212 (1927):

> It is the duty of the courts to decide actual controversies by a judgment or decree which can be carried into effect, but not to give opinions upon controversies or declare principles of law which cannot be executed or which cannot have any practical effect in settling the rights of the litigants under the judgment or decree entered.

Id. at 944-45, 298 S.W. at 213.

38. The General Assembly currently appropriates in advance funds from which to pay small claims (those under $2,000) awarded by the Claims Commission. *See, e.g.*, 1983 Ark. Acts 301, §§ 5, 6, 8, 9. Larger claims are paid by the state agency against which the claim is awarded, and funds are then appropriated to reimburse the agency. *See, e.g.*, 1983 Ark. Acts 20. When the State Highway Commission condemns private property, it must determine the damages to be paid the owner of the property. *See* State Highway Commission v. Partain, 192 Ark. 127, 90 S.W.2d 968 (1936).

39. ARK. CONST. art. V, § 21.

person meets the statutory criteria. It can assign the function to an administrative agency and can even make the decisions of that agency binding and conclusive on the courts.

In at least one situation the General Assembly has expressly precluded judicial review of agency action on an application for public benefits. Applications for welfare assistance are initially reviewed at the county level with a right of appeal to the State Division of Social Services.[40] The relevant statute provides that: "The decision of the . . . [Division] shall be final; nor shall any action be brought in any court having for its object the changing of a ruling of said . . . [Division] on the merits of any application."[41] No-review clauses, such as that applicable to welfare determinations, can be justified on the grounds that they permit the agency responsible for administering a benefit program to develop uniform policies consistent with the ability of the state to meet the costs of the program.[42]

Actions of the Division of Social Services cannot, of course, be shielded completely from judicial scrutiny. The courts could intervene if benefits were being dispensed in an unconstitutional manner since even purely legislative acts are subject to judicial review on constitutional grounds.[43] For example, the court of appeals has ruled that use of a gender-based classification to determine entitlement to workers' compensation benefits violates article II, section 18 of the Arkansas Constitution.[44] If the Division of Social Services denied welfare assistance on the basis of sex or race,[45] the no-review clause quoted above would not prevent judicial consideration of a constitutional challenge. In such a case, a court would not be encroaching on the exercise of

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40. ARK. STAT. ANN. § 83-135 (1976).

41. *Id.* The constitutionality of the statute has never been tested. In Hardin v. Devalls Bluff, 256 Ark. 480, 508 S.W.2d 559 (1974), the supreme court cited the statute, without questioning its constitutionality, as an example of one which precluded judicial review of agency action.

42. *See* Johnson v. Robison, 415 U.S. 361, 370-73 (1974), discussing the purposes underlying 38 U.S.C. § 211(a), which prohibits judicial review of benefit determinations by the Administrator of Veterans' Affairs.

43. In Johnson v. Robison, *id.*, the United States Supreme Court held that a no-review clause did not bar a suit challenging the constitutionality of laws providing benefits for veterans. *See also* Plato v. Roudebush, 397 F.Supp. 1295 (D.C. Md. 1975), holding that no-review clause applicable to decisions of Administrator of Veterans Affairs did not bar judicial consideration of due process questions.

44. Swafford v. Tyson Foods, 2 Ark. Ct. App. 343, 621 S.W.2d 862 (1981). ARK. CONST. art. II, § 18 prohibits the General Assembly from granting to "any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens."

45. ARK. CONST. art. II, § 3 provides that no citizen shall "ever be deprived of any right, privilege or immunity, nor exempted from any burden or duty, on account of race, color or previous condition."

executive or legislative powers. It would be discharging the traditional judicial function of ensuring adherence by the executive and legislative departments to the requirements of the constitution. But when constitutional issues are not involved, the General Assembly can preclude judicial review of an administrative determination that a particular person should receive public benefits.

Instead of giving an administrative agency the exclusive power to determine who should receive public benefits, an alternative available to the General Assembly is to create an administrative agency to make an initial determination and then provide for judicial review of that determination. An example is the Board of Review, which is empowered to determine based on present or past facts whether an ex-employee is entitled to receive unemployment benefits under the Arkansas Employment Security Act.[46] Decisions of the Board are subject to judicial review, but factual determinations by the Board are conclusive on the reviewing court "if supported by substantial evidence and in the absence of fraud" and the jurisdiction of the court is limited to questions of law.[47] Because there is no vested right to unemployment benefits,[48] the General Assembly is not obliged to provide for judicial review of determinations by the Board of Review, and it could, as it has in the case of welfare benefits, make the Board's findings conclusive on the courts. On the other hand, providing for judicial review of Board decisions does not pose separation of powers problems. The General Assembly could use the courts rather than an administrative agency to determine eligibility to receive unemployment benefits. The statutory criteria for determining eligibility for unemployment benefits are explicit, and application of the criteria does not involve the exercise of legislative discretion.[49] Applying explicit statutory criteria to present or past facts is the type of function that can be vested in the courts. If the courts can be granted original jurisdiction to determine who should receive unemployment compensation benefits, they can clearly be empowered to review the eligibility determinations of an administrative agency.[50]

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46. The Board of Review is actually at the apex of a comprehensive administrative apparatus which determines the right to receive unemployment compensation. *See* ARK. STAT. ANN. § 81-1107 (Supp. 1983).

47. *Id.* The standard of review applicable to Board determinations of fact is discussed in detail in Harris v. Daniels, 263 Ark. 897, 567 S.W.2d 954 (1978).

48. In Crossett Lumber Co. v. McCain, 205 Ark. 631, 170 S.W.2d 64 (1943), the court held that the General Assembly could retroactively modify the right to receive unemployment benefits since the right was not vested.

49. *See* ARK. STAT. ANN. §§ 81-1105, 81-1106 (Supp. 1983).

50. Once entitlement to a public benefit is "vested," the holder possesses an interest that may

C. *Licensing*

The power to issue and revoke a license to engage in a particular occupation or activity has traditionally been considered legislative in character.[51] The Arkansas Supreme Court has routinely upheld the delegation of licensing powers to administrative agencies notwithstanding the fact that issuance or revocation of a license usually involves the determination of the rights and liabilities of a particular person based on issues of fact from past actions.[52] Given the undisputed character of the licensing power, it is not surprising that most separation of powers problems in the licensing context have involved the role of the courts in the licensing process.

An applicant whose license is denied by an administrative agency or a licensee whose license is revoked by an administrative agency is entitled to judicial review of the agency decision,[53] but the scope of

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be constitutionally protected, and the ability of the General Assembly to use an administrative agency to determine eligibility becomes more limited. ARK. CONST. art. II, § 8 prevents deprivation of property without due process of law, and ARK. CONST. art. II, § 17 prohibits the passage of laws impairing the obligations of contracts. In Jones v. Cheney, 253 Ark. 926, 489 S.W.2d 785 (1973), the court held that the latter provision prevented retroactive modification of vested pension rights. Consequently, while the General Assembly can use an administrative agency to determine eligibility to receive vested rights, the person claiming a vested right protected by the constitution is entitled to have a judicial ruling on any constitutional questions. For the reasons discussed *infra* note 111, the claimant may be entitled to de novo review of agency factual determinations affecting interests protected by the constitution. In two cases involving judicial review of the right to receive vested municipal retirement benefits, the court applied an arbitrary and capricious standard of review. City of Little Rock v. Martin, 244 Ark. 323, 424 S.W.2d 869 (1968); Dunn v. Dauley, 232 Ark. 17, 334 S.W.2d 679 (1960).

51. Redfield Tel. Co. v. Arkansas Pub. Serv. Comm'n, 273 Ark. 498, 621 S.W.2d 470 (1981); Veteran's Taxicab Co. v. City of Fort Smith, 213 Ark. 687, 212 S.W.2d 341 (1948); State Medical Bd. of Ark. Medical Soc'y v. McCrary, 95 Ark. 511, 130 S.W. 544 (1910). Issuance and revocation of licenses to engage in the practice of law is a judicial power by virtue of Amendment 28 to the constitution. The courts can also be empowered to revoke a license incidental to the conviction of a criminal offense.

52. Eclectic State Medical Bd. v. Beatty, 203 Ark. 2194, 156 S.W.2d 246 (1941). *See also* Consumers Co-op Ass'n v. Hill, 233 Ark. 59, 342 S.W.2d 657 (1961). On several occasions the supreme court has prevented lower courts from interfering with the licensing process. Schirmer v. Light, 222 Ark. 693, 262 S.W.2d 143 (1953) (quo warranto issued to prevent chancellor from considering revocation of medical license since Eclectic State Medical Bd. had exclusive jurisdiction); Eclectic State Medical Bd. v. Beatty, 203 Ark. 294, 156 S.W.2d 246 (1941) (injunction dismissed for same reason).

53. The Arkansas Administrative Procedure Act defines "adjudication" so as to include licensing. ARK. STAT. ANN. § 5-701(d) (1976). An aggrieved party can obtain judicial review of an adjudication by filing a petition with the Pulaski County Circuit Court. ARK. STAT. ANN. § 5-713(a) (Supp. 1983). Technically, the petition procedure does not constitute an appeal since the decision of a nonjudicial body cannot be "appealed" to a judicial body. Prairie County v. Matthews, 46 Ark. 383, 386 (1885).

If no particular method of obtaining review is prescribed by statute, review of a licensing

review in licensing cases is limited. Most licensing decisions are tested by one or both of two standards: (1) whether the decision of the licensing agency is supported by substantial evidence; and (2) whether the agency's action was arbitrary, capricious, or an abuse of power.[54]

The limited scope of review applicable to licensing actions is consistent with the character of the decision under consideration by the court. A licensing decision typically involves making policy judgments as to what is in the best interest of the general public. A court cannot review licensing decisions de novo and substitute its judgment of the public interest for that of an administrative agency vested with legislative (or executive) discretion to issue or revoke a license. In *Goodall v.*

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decision is available by certiorari, and possibly by mandamus, or injunction. Carnes, *supra* note 16, at 146; Davis, *supra* note 16, at 353. The lack of an alternative method of obtaining review is usually a condition precedent to the availability of review by certiorari or mandamus. McCain v. Collins, 204 Ark. 521, 164 S.W.2d 448 (1942). The availability of judicial review under ARK. STAT. ANN. § 5-713(a) makes it unlikely that licensing decisions will be reviewed in the future using either of these writs. Wilson and Carnes, *supra* note 16, at 402.

If a license application is denied without an "adjudication" by an officer who has no discretion but to issue the license, it might be possible to obtain review by applying for a writ of mandamus. *Cf.* Cline v. Plaza Personnel Agency, 252 Ark. 956, 481 S.W.2d 749 (1972) (when statute gave Director of Department of Labor no discretion to deny a license to a person who met statutory requirements, circuit court could order license issued on application of writ of mandamus).

54. Under the Administrative Procedure Act, the Pulaski County Circuit Court can reverse an agency decision that is (1) in violation of constitutional or statutory provisions; (2) in excess of the agency's statutory authority; (3) made upon unlawful procedure; (4) affected by other error of law; (5) not supported by substantial evidence of record; or (6) arbitrary, capricious, or characterized by abuse of discretion. ARK. STAT. ANN. § 5-713(f) (Supp. 1983).

Prior to the adoption of the Administrative Procedure Act, when the licensing statute provided for judicial review but failed to state the standard of review, the court applied the equivalent of the arbitrary and capricious standard. State Licensing Bd. for Gen. Contractors v. Jones, 218 Ark. 188, 235 S.W.2d 547 (1951); Carville v. Smith, 211 Ark. 491, 201 S.W.2d 33 (1947).

It is not clear what the "arbitrary and capricious" standard adds to the "substantial evidence" standard. An attempt to distinguish the two standards appears in Carder v. Hemstock, 5 Ark. Ct. App. 115, 633 S.W.2d 384 (1982). *See also* Woodyard v. Arkansas Diversified Ins. Co., 268 Ark. 94, 594 S.W.2d 13 (1980). The "arbitrary and capricious" standard may allow a court to modify the sanction imposed by an agency even though there is substantial evidence to support the agency's determination that a licensing violation has occurred. *See* Baxter v.Arkansas State Bd. of Dental Examiners, 269 Ark. 67, 598 S.W.2d 412 (1980) (board's decision supported by substantial evidence but sanction was arbitrary and capricious); Arkansas State Bd. of Pharmacy v. Patrick, 243 Ark. 967, 423 S.W.2d 265 (1968) (same).

Nothing in the Administrative Procedure Act limits other means of review provided by law. ARK. STAT. ANN. § 5-713(a) (Supp. 1983). According to the survey conducted by Wilson and Carnes in 1972, there are still a number of licensing statutes on the books providing for de novo review which may not have been repealed or superseded by the Administrative Procedure Act. Wilson and Carnes, *supra* note 16, at 411. Such statutes are of questionable constitutionality after Goodall v. Williams, 271 Ark. 354, 609 S.W.2d 25 (1980), discussed in the text accompanying note 55.

Williams,[55] a successful applicant before the Arkansas Beverage Control Board challenged the constitutionality of a statute which granted citizens opposing the application the right to a trial de novo in circuit court. In granting a writ of prohibition to prevent a circuit court from trying the application de novo, the court stated:

> Under Ark. Stat. Ann. § 48-301 (Repl. 1977), the issuance of liquor license depends on the administrative determination of "public convenience and advantage." It is not a determination which is judicially cognizable since the effort to obtain a permit hinges on executive discretion. Because the right of executive discretion is constitutionally preserved, its exercise cannot be frustrated through the medium of trials de novo. We, therefore, hold that Ark. Stat. Ann. § 48-311(E) (Repl. 1977) is unconstitutional to the extent that it authorizes the circuit court to redetermine or disregard the factual basis upon which the Alcoholic Beverage Control Commission relies to issue a liquor license.[56]

The decision in *Goodall v. Williams* should apply to all licensing statutes which vest an administrative agency with the discretion to issue or withhold a license based on the agency's judgment of the public interest. It is, therefore, difficult to explain opinions issued subsequent to *Goodall v. Williams* in appeals from decisions of the Arkansas Transportation Commission involving applications for a certificate to operate as a motor carrier.[57] The issuance of a certificate requires a showing of "public convenience and necessity,"[58] a determination that seems indistinguishable from the showing of "public convenience and advantage" required of an applicant for a liquor license. When the Transportation Commission was created to assume some powers of the Public Service Commission, the supreme court ruled that appeals of Transportation Commission decisions were to be tried de novo not only in circuit court, but also in the supreme court.[59] The court has contin-

55. *Id.*

56. *Id.* at 356, 609 S.W.2d at 27.

57. ARK. STAT. ANN. § 73-1761 (1979).

58. ARK. STAT. ANN. § 73-1762 (1979).

59. *See* Fisher v. Branscum, 243 Ark. 516, 420 S.W.2d 882 (1967) and cases cited therein. It may be that the de novo review exercised in appeals from the Arkansas Transportation Commission is more limited than the broad scope of review generally connoted by the term "de novo." In *Fisher v. Branscum* the court stated that it reviewed Commission decisions de novo, but "in weighing the evidence, we do not substitute our judgment for that of the . . . Commission." *Id.* at 518, 420 S.W.2d at 884. The court ends up concluding: "In short, this court's function is to inquire whether the determination of the Commission is contrary to the weight of the evidence." *Id.* at 519, 420 S.W.2d at 885. *See also* Wisinger v. Stewart, 215 Ark. 827, 223 S.W.2d 604 (1949). Despite the court's attempt to limit the scope of review, it is difficult to avoid the conclu-

ued to adhere to this standard of review, even after its decision in *Goodall v. Williams*. In a recent appeal from a decision of the Transportation Commission denying an application for a certificate of convenience and necessity, the supreme court proceeded to try the application de novo and reverse the decision of the Transportation Commission because the Commission's findings were "clearly against the preponderance of the evidence."[60] It is impossible to reconcile this holding with the rule of *Goodall v. Williams*. The legislature has vested the Transportation Commission with the authority to formulate public policy regarding motor carrier routes. The Commission has been given the discretion either to grant or deny applications for motor carrier certificates based on its assessment of "public convenience and necessity." The supreme court or a lower court encroaches on the exercise of that discretion when it reviews the record de novo and substitutes its judgment of the public interest for that of the Commission.

Goodall v. Williams should not limit judicial review in a case where the licensing statute left no discretion in an administrative agency to deny a license to an applicant who met certain fixed statutory criteria. In *Cline v. Plaza Personnel Agency*,[61] a corporation applied to the State Director of Labor for a license to operate as a private employment agency, but the Director refused to issue the license. The licensing statute required that the applicant pay a $200 license fee and post a $1,000 bond to guarantee compliance with the terms of the statute. The supreme court affirmed the granting of a writ of mandamus compelling the Director to issue the license since the statute gave the Director no discretion to deny a license to an applicant who paid the filing fee and posted the bond. It rejected the Director's argument that statutory authority to revoke a license for cause implied a discretionary power to deny an application in the first instance. Although decided prior to the court's decision in *Goodall v. Williams*, the holding supports the conclusion that a court can be empowered to review a licensing decision de novo when the licensing agency is given no discretion to deny a license. In such a case, the General Assembly has created a fixed statutory right to a license, and the courts do not encroach on executive or legislative powers when they determine de novo whether

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sion that permitting the court to weigh independently the evidence before the Commission on the issue of "public convenience and necessity" enables the court to substitute its judgment for that of the Commission.

60. Jones Truck Lines, Inc. v. Camden-El Dorado Express Co., 282 Ark. 50, 665 S.W.2d 867 (1984).

61. 252 Ark. 956, 481 S.W.2d 749 (1972).

the statutory criteria have been satisfied.

The holding of *Goodall v. Williams* may also have limited applicability to license revocation proceedings. The opinion indicates that de novo review of an agency licensing decision is inappropriate only when the decision turns on the exercise of executive or legislative discretion. There is no inherent right to engage in a particular occupation or activity, and the General Assembly can adopt a licensing statute as a means of regulating an occupation or activity.[62] When the licensing statute provides that a license is to issue only upon a finding of "public convenience and necessity" or "public convenience and advantage," it necessarily gives the licensing agency the discretion to make policy judgments regarding the interests of the general public. The courts are not at liberty to second guess such public policy judgments. A licensing agency is seldom given the same broad discretion to make public policy judgments when faced with a decision whether to revoke a license. The licensing statute typically lists specific grounds for revocation, or, at a minimum, requires a showing of "cause" for the revocation. In effect, the right to keep a license, as opposed to the right to receive a license, is more likely to rise to the level of a fixed statutory right. Once the General Assembly elevates an interest to the status of a fixed statutory right by prohibiting termination of the interest except upon specific grounds, the courts can be empowered to determine de novo whether such grounds exist.[63]

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62. *But see* McCastlain v. R & B Tobacco Co., 242 Ark. 74, 411 S.W.2d 882 (1967), suggesting that an administrative regulation imposing an unusual and unnecessary restriction on a lawful occupation violates ARK. CONST. art. II, § 2.

63. In Goodall v. Williams, the court stated: "If the interests affected by administrative actions are constitutionally or statutorily preserved or preserved by private agreement, so that enforcement is a matter of right, de novo review by the judiciary of administrative decisions altering these interests is appropriate." 271 Ark. at 356, 608 S.W.2d at 27. *See infra* note 93 and accompanying text, regarding de novo review of civil service commission decisions.

In Scott v. Texas State Bd. of Medical Examiners, 384 S.W.2d 686 (Tex. 1964), the Texas Supreme Court upheld a statute authorizing de novo judicial review of a decision to revoke a medical license stating:

> There is a difference, legislatively recognized through the years, between an exercise of the power to examine and issue a medical license, and an exercise of the power to revoke a medical license for cause. The Legislature has not required that an appeal from acts of the Board refusing to examine an applicant and to issue a medical license shall be de novo in the full sense; it has done so with respect to the appeal from an act of the Board revoking a medical license once granted. It is self-evident that the latter does not involve a question of public policy and the determination of legislative facts . . . .

384 S.W.2d at 690.

Another licensing issue that has not yet been addressed by the Arkansas Supreme Court is the constitutionality of authorizing administrative agencies to impose fines in connection with licens-

D. *Discharge of Public Employees and Removal of Public Officers*

The Arkansas Supreme Court has also found it difficult to define the limits of judicial power and legislative power when a public employee is discharged or a public officer is removed from office. A decision to discharge an employee or remove a public officer affects the rights and liabilities of the individual involved and is usually based on a determination of present or past facts, but despite the definition of judicial power set out in the *Ozarks* opinion, a discharge or removal decision typically represents the exercise of either executive or legislative power.[64]

As in the licensing area, most separation of powers problems arising from administrative decisions to discharge an employee or remove an officer involve the extent to which such decisions are subject to judicial review. In determining the scope of judicial review, the court has, until very recently, been strongly influenced by the nature of the proceeding that led to the discharge or removal. This emphasis on the nature of the proceeding can be explained by the fact that the traditional method of seeking judicial review of an administrative decision to dis-

ing activities. The General Assembly has in fact already granted at least one administrative agency the power to impose civil fines. ARK. STAT. ANN. § 48-346 (Supp. 1983) authorizes the Director of the Alcoholic Beverage Control Division to impose civil fines for violation of liquor regulations. In some jurisdictions traffic fines are now handled entirely by administrative agencies not a part of the judicial branch of government. Force, *Administrative Adjudication of Traffic Violations Confronts the Doctrine of Separation of Powers*, 49 TUL. L. REV. 84, 98 n.48 (1974). Once it is conceded that the power to revoke a license is legislative in character, it becomes difficult to argue that there is any constitutional obstacle to giving an administrative agency the power to impose the less severe sanction of a civil fine.

64. The power to remove most state and local officers from office is specifically addressed by the constitution. The House of Representatives has the power to impeach the Governor, all state officers, judges of the supreme and circuit courts, chancellors, and prosecuting attorneys for "high crimes and misdemeanors and gross misconduct in office." Impeachments are tried by the Senate. ARK. CONST. art. XV, §§ 1, 2.

Upon joint address of two thirds of both houses of the General Assembly, the Governor can remove the Auditor, Treasurer, Secretary of State, Attorney General, judges of the supreme and circuit courts, chancellors, and prosecuting attorneys "for good cause." ARK. CONST. art. XV, § 3. The Governor is also empowered to remove members of the Game and Fish Commission and the State Highway Commission "for the same causes as apply to other constitutional officers," subject to review by the First District Chancery Court with right of appeal to the supreme court, such review and appeal "to be without presumption in favor of any findings by the Governor or trial court." ARK. CONST. amend. 35, § 5; amend. 42, § 4. In addition, the Senate can remove members of the State Highway Commission, apparently without cause and without judicial review. ARK. CONST. amend. 42, § 4. Amendment 35 was held to be self-executing in Rockefeller v. Hogue, 224 Ark. 1029, 429 S.W.2d 85 (1968).

The circuit court can remove any county or township officer from office for "incompetency, corruption, gross immorality, criminal conduct, malfeasance, misfeasance or nonfeasance in office." ARK. CONST. art. VII, § 27.

charge an employee or remove an officer was by application to the circuit court for a writ of certiorari.

Act 88 of 1873 gave circuit courts the power to issue writs of certiorari to any officer or board of officers, city or town council, or any inferior tribunal "to correct any erroneous or void proceeding."[65] In an early case interpreting the Act the supreme court concluded that the statute merely restated the common law and did not enlarge the scope of the writ of certiorari.[66] When the action of an officer or inferior tribunal is "purely legislative, executive, and administrative," it is not reviewable by writ of certiorari. But if the proceeding leading to the action by the officer or inferior tribunal is "judicial" or "quasi-judicial" then review is available in the circuit court by writ of certiorari.[67] In a subsequent case the court stated the test for the availability of certiorari as "whether the act sought to be reviewed is done in a judicial or quasi-judicial capacity, and not merely in a legislative, executive, or administrative capacity."[68]

When confronted with the question whether a public officer removed from office was entitled to judicial review, the court applied the same test. In *Hall v. Bledsoe*,[69] a superintendent of the State Hospital who was discharged by the hospital board sought judicial review of the discharge by applying to the Pulaski County Circuit Court for a writ of certiorari. The supreme court held that certiorari was available since the board acted in a quasi-judicial capacity when it removed the superintendent. The court then addressed what it perceived to be the more serious question presented by the case—the scope of judicial review. It concluded that the sole purpose of the judicial proceeding was to review the action of the board for errors of law, one of which was the legal sufficiency of the evidence supporting the board's decision. Contrary to the common law, Act 88 of 1873 specifically provided that "evidence dehors the record" could be introduced in the certiorari proceeding before the circuit court. The supreme court explained that this provision permitted the circuit court to hear evidence outside the record before the lower tribunal "in order to ascertain what evidence was

65. ARK. STAT. ANN. § 22-302 (1968).

66. Pine Bluff Water & Light Co. v. City of Pine Bluff, 62 Ark. 196, 35 S.W. 227 (1896).

67. *Id.* The issue in the case was whether a taxing ordinance of the City of Pine Bluff was subject to review by certiorari. The supreme court held it was not since the action of the council was purely legislative. *See also* Note, *The Extent to Which the Writ of Certiorari Lies to Review the Ordinances of Municipal Councils in Arkansas*, 8 ARK. L. BULL. 28 (1940).

68. State *ex rel.* Attorney General v. Railroad Commission, 109 Ark. 100, 106, 158 S.W. 1076, 1078 (1913).

69. 126 Ark. 125, 189 S.W. 1041 (1916).

heard by the inferior tribunal."[70] Its purpose was not to turn the review by the circuit court into a trial de novo in which the court was free to substitute its judgment for that of the Commission.

Hall v. Bledsoe naturally led subsequent courts to focus on the process or method by which discharge was accomplished.[71] If a public body reached a decision to remove a particular officer or to discharge an employee without going through a judicial type proceeding, then certiorari was not available to review the decision. For example, in *McAllister v. McAllister*,[72] the court ruled that a resolution of the Fayetteville City Council removing the members of the civil service commission for malfeasance in office was not reviewable by certiorari since the council had acted legislatively and not judicially. In the same year, the court held in *Jones v. Leighton*[73] that certiorari did lie to review a resolution of the West Helena City Council finding that two improvement district commissioners had not subscribed to the statutory oath of office. *McAllister* was distinguished on the grounds that the Fayetteville City Council acted legislatively whereas the West Helena City Council acted quasi-judicially when it determined "as a matter of fact" that the commissioners had not filed their oath of office.[74]

Four years later, in *Williams v. Dent*,[75] the Little Rock City Council removed a water commissioner from office by resolution. The commissioner sought review in the circuit court, which concluded that it had no power to review the decision since the council had acted legislatively. The supreme court reversed on the grounds that the city council could under state law remove only "for cause" and the resolution failed to state the grounds for removal. The opinion indicates that the court was having second thoughts about its *McAllister* decision, which in effect allowed a public body to insulate its decision from judicial review by acting legislatively rather than judicially when it removed an officer or discharged an employee.[76]

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70. *Id.* at 135, 189 S.W. at 1043.

71. Warren v. McRae, 165 Ark. 436, 264 S.W. 940 (1924) (decision of state board of elections removing county election officials reviewed by certiorari); Carswell v. Hammock, 127 Ark. 110, 191 S.W. 935 (1917) (order of city council removing improvement district commissioners reviewable by certiorari since council acted in quasi-judicial capacity).

72. 200 Ark. 171, 138 S.W.2d 1040 (1940).

73. 200 Ark. 1015, 142 S.W.2d 505 (1940).

74. *Id.* at 1019, 142 S.W.2d at 507.

75. 207 Ark. 440, 181 S.W.2d 29 (1944).

76. The court referred to its earlier opinion in *McAllister* as "inexact in that it seemingly anchored final result upon a strict legal construction of the Council's power,and upon effect to be given a resolution duly adopted, where, on the face of the resolution, statutory requirements, prima facie, were complied with." *Id.* at 446, 181 S.W.2d at 32. Later cases involving judicial

When the General Assembly established a Merit System Council to review employee terminations by certain state agencies receiving federal funds, it did not expressly provide for judicial review of Council decisions. In *McCain v. Collins*,[77] the supreme court nonetheless applied *Hall v. Bledsoe* and held that review was available by certiorari since the Council acted in a quasi-judicial capacity when it upheld the action of a state agency in discharging an employee. Consistent with its holding in *Hall v. Bledsoe*, the court restricted circuit court review to questions of law, one of which was the legal sufficiency of the evidence to support the decision of the Council, and stated that the judiciary would encroach on the authority of another department of government were it to substitute its own judgment for that of the Council.

Any suggestion in *Hall v. Bledsoe* or *McCain v. Collins* that courts could not be empowered to review administrative discharges de novo was soon laid to rest. In *City Service Commission of Van Buren v. Matlock* ("*Matlock I*"),[78] a municipal civil service commission discharged the chief of police pursuant to state civil service regulations that provided for an "appeal"[79] to circuit court in which the discharged officer was entitled to a "trial de novo." The civil service commission contended before the supreme court that the provision for an appeal and a trial de novo before the circuit court was an attempt to vest the court with "administrative" powers contrary to the separation of powers doctrine. The court concluded that if the legislature could provide for judicial review of the commission's decision by certiorari, it could likewise do so by appeal. It also saw no problem with providing for a trial de novo before the circuit court since the "legislature had the power to prescribe the mode of procedure on such appeal."[80] The dissent argued that any attempt to vest the circuit court with the power to try the matter de novo violated separation of powers.

The court elaborated on the reasons for allowing the circuit court to try the case de novo in a subsequent appeal of the same case ("*Mat-*

review of administrative discharges by certiorari include Martin v. Cogbill, 214 Ark. 818, 218 S.W.2d 94 (1949) and Fulmer v. Holcomb, 261Ark. 580, 550 S.W.2d 442 (1977).

77. 204 Ark. 521, 164 S.W.2d 448 (1942). *See also* Adams v. Cockrill, 227 Ark. 348, 298 S.W.2d 322 (1957). The Merit System Council is now called the Merit System Board. *See* ARK. STAT. ANN. §§ 12-3901 to 12-3907 (Supp. 1983).

78. 205 Ark. 286, 168 S.W.2d 424 (1943).

79. Technically, the decision of a nonjudicial body cannot be appealed to a judicial body. Prairie County v. Matthews, 46 Ark. 383, 386 (1885).

80. 205 Ark. at 289, 168 S.W.2d at 425. De novo review was subsequently applied in City of Little Rock v. Newcomb, 219 Ark. 74, 239 S.W.2d 750 (1951); Petty v. City of Pine Bluff, 239 Ark. 49, 386 S.W.2d 935 (1965); Warwick v. Civil Serv. Comm'n of Malvern, 239 Ark. 674, 393 S.W.2d 616 (1965); and City of Little Rock v. Hall, 249 Ark. 337, 459 S.W.2d 119 (1970).

lock II").[81] It stated that when the circuit court reviewed the commission's decision, "the whole matter was opened up for consideration by the circuit court, as if a proceeding had been originally brought in that forum."[82] This statement implies that determining whether sufficient grounds exist to discharge an employee or remove a public official is a hybrid function that can be vested either in a court or in a civil service commission. If a court can be vested with original jurisdiction to consider the matter, it does not violate separation of powers to vest original jurisdiction in a civil service commission but then subject the commission's decisions to de novo review by a court.

A recent decision by the court has called into question the holdings in the *Matlock* cases. In *Arkansas Livestock and Poultry Commission v. House*,[83] an employee who was fired by a state agency following a grievance hearing appealed his discharge to circuit court pursuant to the Administrative Procedures Act.[84] The supreme court ruled that the discharge was not an appealable "adjudication" within the meaning of the Administrative Procedures Act, but the language employed by the courts may have implications for future cases in which review is sought by writ of certiorari:

> It seems too obvious for serious argument that the Administrative Procedure Act, enacted in 1967, was never designed nor intended to create supervisory responsibility by the judicial branch of state government over the day-to-day actions of the executive branch, including the hiring and firing of personnel, but rather, to establish procedures for hearings and notice (which meet due process requirements) in those functions of the executive branch which are basically adjudicatory or quasi-judicial, particularly with respect to rule making, the renewal or revocation of licenses, and where, under law, an agency of the State must make orders based on the adjudication process. But it is only in the judicial functions that the Administrative Procedure Act purports to subject agency decisions to appellate review and then only as narrowly prescribed in the act. (citations omitted) *It hardly need be said that firing employees is clearly an administrative act and not a matter that involves the quasi-judicial function of an agency.* If firing is subject to judicial review then we can think of no logical reason why hiring should not be also. And if hiring is, it follows that

81. 206 Ark. 1145, 178 S.W.2d 662 (1944).

82. *Id.* at 1150, 178 S.W.2d at 665. There was later a third appeal of the same case. City of Van Buren v. Matlock, 208 Ark. 529, 186 S.W.2d 936 (1945).

83. 276 Ark. 236, 634 S.W.2d 388 (1982). *See also* Selph v. Quapaw Vocational Technical School, 278 Ark. 23, 643 S.W.2d 534 (1982).

84. ARK. STAT. ANN. §§ 5-701-715 (Supp. 1983).

promotion would also come under our purview, and so on and on.[85]

In response to the employee's contention that the agency acted in a quasi-judicial manner by appointing a fact-finding panel, giving written notice to the employee, conducting a hearing, and making findings of fact and conclusions of law, the court stated:

> By giving the appellee the right to be heard on the issue of whether he had violated the conditions of his probation, and by proceeding in a quasi-judicial fashion, the agency did not thereby subject itself to judicial review of what was so clearly an administrative act.[86]

The reach of the court's opinion is uncertain. The ruling can be read narrowly as an interpretation of the review available under the Administrative Procedure Act. In other words, the employee should have sought review by applying for a writ of certiorari pursuant to Act 88 of 1873 rather than by appealing pursuant to the Administrative Procedures Act. But the court's language is much too broad to support such a narrow reading. The opinion states that firing employees is an administrative act that does not involve a quasi-judicial function of an agency. Furthermore, the character of an act is not altered by the agency's election to proceed in a quasi-judicial fashion when it decides to discharge an employee. It is doubtful that House would have had any greater success had he sought review by certiorari.

On the other hand, *House* should not be interpreted broadly to mean that review by certiorari is no longer available following a quasi-judicial proceeding that culminates in a decision to discharge an employee. If the court had intended to overrule *Hall v. Bledsoe* and its progeny, it would surely have said so. *House* probably applies only when there is no statutory requirement that a quasi-judicial proceeding precede a decision to discharge. The General Assembly can provide by statute for a quasi-judicial hearing prior to discharge, and it can further provide for judicial review of the decision that results from such hearing.[87] To paraphrase the court in *Matlock I*, if the General Assembly can provide for judicial review of administrative discharges by appeal, it can provide for judicial review by certiorari. Act 88 of 1873 probably creates a statutory right to judicial review of a decision to discharge whenever a nonjudicial body is required by statute to conduct a quasi-judicial proceeding prior to the discharge or removal and no

85. 276 Ark. at 329, 634 S.W.2d at 389 (emphasis added).

86. *Id.* at 330, 634 S.W.2d at 390.

87. It has, for example, provided for review by appeal of a school board's decision to discharge a teacher. ARK. STAT. ANN. § 80-1266.9(d) (Supp. 1983).

alternative method of reviewing the decision is available.

Although not specifically addressed by the court in *House*, the opinion may also influence future cases in which the issue is not the availability of judicial review but the scope of judicial review. The opinion seems to vindicate the dissenting justice in *Matlock I*, who argued that permitting the circuit court to try civil service appeals de novo was an unconstitutional attempt to vest the court with administrative powers.[88] If "firing employees is clearly an administrative act," it would violate separation of powers to grant the circuit court original jurisdiction to hear discharge proceedings. Separation of powers would likewise preclude a scheme in which the circuit court, when reviewing an administrative discharge, could try the matter de novo and substitute its judgment for that of the administrative agency vested with authority to try discharge proceedings.[89]

The fact that civil service commission determinations often involve the exercise of discretion further supports the proposition that de novo review of civil service commission determinations is unconstitutional. No less an authority on administrative law than Professor Davis has stated:

> The reason for the holdings that nonjudicial functions may not be reviewed de novo is not that a court is lacking in qualification to make findings of fact from conflicting evidence but that a court may be lacking in qualification to take over the discretionary power. For instance, a typical civil service commission, which spends full time on personnel problems, may be better qualified than a typical court to exercise discretion on problems of personnel management, such as deciding whether to discharge, suspend, demote, reprimand, or warn a public employee who is found guilty of misconduct.[90]

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88. *See* note 79 and accompanying text.

89. Certiorari does not lie to review purely "administrative" acts. State *ex rel.* Attorney General v. Railroad Comm'n, 109 Ark. 100, 106, 158 S.W. 1076, 1078 (1913).

Courts in other states are split on the question whether de novo review of civil service decisions violates separation of powers. Upholding de novo review statutes are Brady v. Pettit, 586 S.W.2d 29 (Ky. 1979); Weeks v. Personnel Bd. of Review of N. Kingstown, 118 R.I. 243, 373 A.2d 176 (1977); Matanuska-Susitna Borough v. Lum, 538 P.2d 994 (Alaska 1975); and *Ex parte* Darnell, 262 Ala. 71, 76 So. 2d 770 (1954). *See also* Francisco v. Board of Directors, 85 Wash.2d 575, 537 P.2d 789 (1975) and Osborne v. Bullitt County Board of Education, 415 S.W.2d 607 (Ky. 1967) (upholding de novo review of school board decisions to dismiss teachers). Attempts to provide for de novo review of personnel decisions were held to violate separation of powers in State *ex rel.* McGinnis v. Police Civil Service Comm'n, 253 Minn. 62, 91 N.W.2d 154 (1958); City of Meridian v. Davidson, 211 Miss. 683, 53 So. 2d 48 (1951); *In re* Fredericks, 285 Mich. 262, 280 N.W. 464 (1938); and City of Aurora v. Schoberlein, 230 Ill. 496, 82 N.E. 860 (1907).

90. 4 Davis, Administrative Law Treatise § 29.10, at 185-86 (1958).

But despite its broad language in *House* suggesting that courts have no business supervising the hiring and firing of employees, the Arkansas Supreme Court does not share the view that civil service decisions involve the exercise of discretion and that de novo review of such decisions is therefore inappropriate. In its opinion in *Goodall v. Williams*,[91] which announced the "discretion" test for determining the propriety of de novo review, the court also stated: "If the interests affected by administrative actions are constitutionally or statutorily preserved or preserved by private agreement, so that their enforcement is a matter of right, de novo review by the judiciary of administrative decisions altering these interests is appropriate."[92] In support of this statement, the court cited *Matlock II*, which approved de novo review of civil service commission determinations. Apparently, the court's view is that a statute which provides that a person may be discharged only for "cause" or some similar grounds does not leave room for exercise of executive or legislative discretion. Instead, by limiting the grounds under which a person may be discharged from public employment or removed from public office, the legislature elevates that person's interest in his job or office to the status of a fixed statutory right.[93] A person may also have a "right" to his job or office pursuant to the Arkansas Constitution[94] or an employment contract.[95] When a statute or the constitution or a contract elevates a person's interest in his job or office to the status of a "right", the termination or modification of that interest by a civil service commission or similar body is no longer a matter involving the exercise of executive or legislative discretion, and de novo judicial review is permissible.

The cases discussed thus far all involve situations in which a particular person is seeking something from the state or local government—money, a license, or a job—which is within the constitutional power of the legislative department either to grant or withhold. If the General Assembly chooses not to exercise that power directly, it has considerable flexibility in the choice of the body to exercise the power. It can select an administrative agency or other nonjudicial tribunal to exercise the power, and it can confer on that agency the discretion to

91. 271 Ark. 354, 609 S.W.2d 25 (1980).

92. *Id.* at 356, 609 S.W.2d at 27.

93. *Cf.* Fulmer v. Holcomb, 261 Ark. 580, 550 S.W.2d 442 (1977); Williams v. Dent, 207 Ark. 440, 181 S.W.2d 29 (1944); Carswell v. Hammock, 127 Ark. 110, 191 S.W. 935 (1917); Lucas v. Futrall, 84 Ark. 540, 106 S.W.2d 667 (1907).

94. *See supra* note 64.

95. A public employee can enforce an employment contract to the same extent as a private employee. *Cf.* Griffin v. Erickson, 227 Ark. 433, 642 S.W.2d 308 (1982).

formulate public policy in the course of exercising the power. It can insulate the agency's determinations from judicial review, or it can subject the agency's determination to judicial review, but it cannot authorize the courts to review de novo an agency determination that turns on the exercise of executive or legislative discretion. On the other hand, the General Assembly can elevate the interest of a particular person in receiving or retaining money, or a license, or a job to the status of a right. It can still use an administrative agency or other nonjudicial body to determine whether the statutory prerequisites to the right have been satisfied, but because the determination does not involve the exercise of executive or legislative discretion, separation of powers does not preclude vesting the courts with original jurisdiction to make the determination or providing for de novo judicial review of a nonjudicial determination.

IV. CONTROVERSIES IN WHICH GOVERNMENT SEEKS SOMETHING FROM A PARTICULAR PERSON

The second major category of cases or controversies to be considered are those in which government is seeking something from a particular person. These cases, like those in the first category, may involve the exercise of legislative power, but there are constitutional limits on the power of government to take property or money from a private person, and defining and enforcing those limits are judicial functions. Thus, cases in the second category frequently necessitate defining the proper roles of administrative agencies and the courts. When can the General Assembly use an administrative agency to make determinations affecting the rights and liabilities of a particular person? To what extent are such determinations subject to judicial review?

A. *Eminent Domain*

Article II, section 23 of the Arkansas Constitution recognizes the state's power of eminent domain, and according to the Arkansas Supreme Court, the power is vested in the legislative department of government.[96] The exercise of the power of eminent domain involves two determinations that may affect the rights and liabilities of a particular person. First, a determination must be made that there is a public need for the taking of specific private property. Second, a determination must be made as to the appropriate compensation to be paid the owner

96. Young v. City of Gurdon, 169 Ark. 399, 275 S.W. 890 (1925).

of the property taken. These two determinations must be analyzed separately when defining the boundary between legislative and judicial power.

Determining whether there is a public need to take specific property would appear to involve questions of public policy and the exercise of legislative discretion. Under the cases discussed above, de novo judicial review of a legislative determination of public need would be unconstitutional. In an early, but frequently cited case, the Arkansas Supreme Court seemed to adopt such a view. The precise issue before the court in *Sloan v. Lawrence County*[97] was whether a landowner was entitled to notice and a hearing on the question of the necessity for taking his property. The court concluded that he was not and that constitutional guarantees were satisfied so long as he received notice and a hearing on the question of compensation. In its opinion the court characterized the determination of the necessity for condemnation as "a political question to be exercised by the lawmakers."[98] The court also endorsed the following statement from Cooley on *Constitutional Limitations*, which implies that there is no right to a judicial determination of the necessity for condemnation:

> On general principles, the final decision rests with the legislative department of the state; and, if the question is referred to any tribunal for trial, the reference and the opportunity for being heard are matters of favor and not of right. The state is not under an obligation to make provision for a judicial contest upon the question.[99]

Sloan seems to say that determining the public need to condemn specific property is a legislative function that need not be submitted for judicial review. Prior to *Sloan* the court had on several occasions held that the question of the need for a taking of private property could be raised in a court of equity when the property owner charged that the taking was a "fraudulent" attempt to condemn private property for private use under the guise of a taking for public use.[100] Most of these

97. 134 Ark. 121, 203 S.W. 260 (1918).

98. *Id.* at 129, 203 S.W. at 262.

99. *Id.* at 128, 203 S.W. at 262 (quoting COOLEY, CONSTITUTIONAL LIMITATIONS 777 (7th Ed.)).

100. Mountain Park Terminal Ry. v. Field, 76 Ark. 239, 88 S.W. 897 (1905); Niemeyer & Darragh v. Little Rock Junction Ry., 43 Ark. 111 (1884). In several other cases, the court reviewed the public use and purpose issue without discussion of the need to show fraud. Ozark Coal Co. v. Pennsylvania Anthracite Ry., 97 Ark. 495, 134 S.W. 634 (1911) (whether property taken for public use is a judicial question); Cloth v. Chicago, R.I. & P. Ry., 97 Ark. 86, 132 S.W. 1005 (1910) (whether property taken for public use is a judicial question); Gilbert v. Shaver, 91 Ark. 231, 120 S.W. 833 (1909); St. Louis, I.M. & S. Ry. v. Petty, 57 Ark. 359, 21 S.W. 884 (1893).

cases involved the exercise of eminent domain powers by private railway companies in which no governmental entity had verified that the taking was for a public use. The court in *Sloan* was aware of these cases,[101] but it is not clear that it considered them applicable to a case where the legislative branch of government rather than a private corporation had determined the public need for a taking.[102]

Over the years the court retreated somewhat from its statement in *Sloan* regarding judicial review of the necessity for taking private property. For example, in *Woollard v. State Highway Commission*,[103] in response to the argument that a taking was not for a public purpose, the court stated:

> Although we have suggested that the legislative determination of the necessity for taking is conclusive on the judiciary, *Sloan v. Lawrence County*, [citations omitted], the view now prevailing makes the legislative judgment subject to review in cases of fraud, bad faith, or gross abuse of discretion. . . . There being testimony by experienced engineers that a 250-foot right-of-way is needed in this instance, the chancellor was correct in holding that the Commission's decision was not arbitrary or capricious.[104]

Thus, the court in *Woollard* still considered the determination of the necessity for taking to be a legislative function, but the courts would review that determination in extraordinary cases to prevent an arbitrary or capricious abuse of legislative discretion.[105]

In its more recent opinions, the court appears to have come a full circle in its characterization of the power to determine the necessity for taking private property. For example, in the 1976 case of *Arkansas State Highway Commission v. Alcott*,[106] the court stated: "Whether or

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101. The court in *Sloan* cited Mountain Park Terminal Ry. v. Field, 76 Ark. 239, 885 S.W. 897 (1905) *and* Niemeyer & Darragh v. Little Rock Junction Ry., 43 Ark. 111 (1884) in its opinion.

102. At the close of its opinion in *Sloan*, the court made the following statement which suggests that the cases cited *supra* note 100 were not applicable to a taking by a public entity: "[A]ll that has been said in this opinion has reference solely to condemnation for strictly public uses in its broadest sense, and has no reference to condemnation for the benefit of private corporations exercising a public or quasi public function." 134 Ark. at 132, 203 S.W. at 263.

103. 220 Ark. 731, 249 S.W.2d 564 (1952).

104. *Id.* at 734, 249 S.W.2d at 566.

105. *Compare* Hogue v. Housing Authority of North Little Rock, 201 Ark. 263, 267, 144 S.W.2d 49, 52 (1940) ("Although courts have jurisdiction to determine what constitutes a public use as distinguished from a private use, or vice versa, yet in so doing it [sic] gives great weight to the declaration of the Legislature concerning nature of the Act.").

106. 260 Ark. 225, 539 S.W.2d 432 (1976). *See also* Dowling v. Erickson, 278 Ark. 142, 644 S.W.2d 264 (1983).

not a proposed use for which private property is taken is for a public or private use is a judicial question which the owner has a right to have determined by the courts."[107]

While the court's language has not always been as precise as it could be, its holdings over the years regarding the character of the power to determine the public need to take private property are reconcilable. Determining the "public need" for a taking can refer to two distinct questions. First, it may refer to the wisdom of undertaking a particular public project. Is it really in the interest of the public to build the road, or the power line, or the levee in question? Determining the public interest lies within the province of the legislative branch, or the administrative agency to which the legislature delegates the power to determine the public interest.[108] Because the decision involves the exercise of legislative discretion, a court would encroach on legislative prerogatives if it substituted its judgment of the public interest for that of the decisionmaker.

Second, determining the "public need" for a taking may refer to the question whether private property is really being taken for a public as opposed to a private purpose. Article II, section 22 of the Arkansas Constitution states: "The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor." This provision prohibits a taking of private property except for public use.[109] When a court reviews a legislative determination that particular property is being taken for a public purpose, it must independently confirm that the property is actually being taken for a public and not a private purpose. Otherwise, the court abdicates one of the most basic judicial powers—the power to interpret the constitution and ensure compliance with that interpretation by the executive and legislative departments.[110] If the court does not consider de novo a landowner's contention that his property is being taken for a private purpose, then the condemning agency is in a position to make factual

107. 260 Ark. at 226, 539 S.W.2d at 433. There was dictum to the same effect in City of Little Rock v. Raines, 241 Ark. 1071, 411 S.W.2d 486 (1967) (holding that Amendment 49 to Constitution did not authorize city to take private property for use as industrial park).

108. If Parkin Printing & Stationery Co. v. Arkansas Printing & Lithographing Co., 234 Ark. 697, 354 S.W.2d 560 (1962) is correct in holding that the State Highway Commission is a part of the executive department, then the power to determine the public need for building a state highway is executive in character.

109. Robinson v. Arkansas State Game and Fish Comm'n, 263 Ark. 462, 565 S.W.2d 433 (1978); Cloth v. Chicago, R.I. & P. Ry., 97 Ark. 86, 132 S.W. 1005 (1910).

110. *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 26 (1803).

determinations that define the constitutional limits on exercise of the power of eminent domain.[111]

The true distinction between legislative power and judicial power in connection with the determination of public use becomes apparent in those cases where it is conceded that the taking is for a public use but there is a dispute as to exactly which property or how much property should be taken to satisfy that use. In such a case, there are no "consti-

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111. The notion that certain factual determinations by an administrative agency must be decided independently by the court was first articulated by the United States Supreme Court in Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920), in which a public utility argued that a rate order issued by the state public utility commission "confiscated" its property contrary to the due process clause. The highest state court refused to exercise its "independent judgment" on the question. The Supreme Court reversed, stating:

> [I]f the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment.

Id. at 289.

The "constitutional fact" doctrine is discussed in detail in Larson, *The Doctrine of "Constitutional Fact"*, 15 TEMP. L.Q. 185 (1941).

Crowell v. Benson, 285 U.S. 22 (1932), which involved the constitutionality of a statute that vested an administrative agency with the power to make factual determinations related to the compensation of employees for work-related injuries incurred upon the navigable waters of the United States, established the proposition that there must be independent judicial review of facts which are "jurisdictional" in the sense that their existence is a prerequisite to the exercise of legislative power:

> These fundamental requirements (in this case) are that the injury occur upon the navigable waters of the United States and that the relation of master and servant exist. These conditions are indispensable to the application of the statute, not only because Congress has so provided explicitly, but also because the power of the Congress to enact the legislation turns upon the existence of these conditions.

Id. at 54.

The distinction between the "constitutional fact" doctrine of *Ben Avon* and the "jurisdictional fact" doctrine of Crowell v. Benson is that the former is based on the due process clause while the latter is related to separation of powers considerations. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 639 (1965). Because exercise of the legislative power of eminent domain is subject to the constitutional requirement that a taking be for a public use, it is probably the "jurisdictional fact" doctrine that requires independent judicial determination of the public use question. On the other hand, both doctrines appear to require an independent judicial determination of the value of the property taken. It may be that in certain situations it is impossible to distinguish "constitutional facts" from "jurisdictional facts." *See* Dickinson, *Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of "Constitutional Fact,"* 80 U. PA. L. REV. 1055, 1077-82 (1932).

It should be noted that not everyone agrees that the doctrines of "constitutional fact" and "jurisdictional fact" apply to the review of factual determinations by Arkansas administrative agencies. According to Wilson & Carnes, *supra* note 16, at 398, the status of the "constitutional fact" doctrine in Arkansas is unclear. Professor Covington questions whether the "jurisdictional fact" holding of Crowell v. Benson applies to judicial review of factual determinations by the Arkansas Workmen's Compensation Commission (now the Workers' Compensation Commission). *See* Covington, *supra* note 16, at 142.

tutional facts" or "jurisdictional facts" that must be independently confirmed by the courts.[112] Because the choice of the route or the size of a right of way easement involves the exercise of legislative discretion, the courts will not disturb the legislative determination as to route and size unless that determination was arbitrary and capricious.[113]

The appropriate allocation of powers between the courts and non-judicial bodies has also arisen in connection with the determination of the amount of compensation to be paid the owner whose property is taken pursuant to exercise of the power of eminent domain. When private property is taken by a private corporation with eminent domain powers, such as a railroad or public utility, article XII, section 9 of the Arkansas Constitution gives the owner the right to have the question of compensation "ascertained by a jury of twelve men, in a court of competent jurisdiction." Consequently, regardless of any division of powers between the legislative and judicial branches mandated by article IV, the courts and not an administrative agency must decide the compensation question in a case covered by article 12, section 9.

The constitutional right to a trial by jury on the issue of compensation is not applicable, however, when the taking is by a public entity.[114] Article II, section 22 of the Arkansas Constitution, which is set out above,[115] guarantees the landowner the right to an eventual judicial confirmation that the compensation paid for his property is "just," but neither the separation of powers article or nor any other constitutional provision precludes the legislature from using an administrative agency to make an initial determination of the amount of compensation to be paid the person whose property is taken by eminent domain.

One of the few cases in which the Arkansas Supreme Court has addressed in any detail the character of the power to determine the compensation to be paid when private property is taken for public use

112. *Cf.* Railway Company v. Petty, 57 Ark. 359, 21 S.W. 884 (1893). "When once the character of the use is found to be public, the court's inquiry ends, and the legislative policy is left supreme, although it appears that private ends will be advanced by the public user." *Id.* at 365, 21 S.W. at 885.

113. State Highway Comm'n v. Saline County, 205 Ark. 860, 171 S.W.2d 60 (1943); Patterson Orchard Co. v. Southwest Arkansas Utilities Corp., 179 Ark. 1029, 18 S.W.2d 1028 (1929). *See also* City of Little Rock v. Raines, 241 Ark. 1071, 411 S.W.2d 486 (1967); State Game and Fish Comm'n v. Hornaday, 219 Ark. 184, 187, 242 S.W.2d 342, 344 (1951) ("The Commission determines what property is needed, and if its actions do not constitute an abuse of discretion courts will not interfere.").

114. Dickerson v. Tri-County Drainage Dist., 138 Ark. 471, 212 S.W. 334 (1919); Young v. Red Fork Levee Dist., 124 Ark. 61, 186 S.W. 604 (1916).

115. *See supra* note 109 and accompanying text.

was *Town of Hoxie v. Gibson.*[116] The case involved a statute which provided for the appointment of three appraisers by the circuit court to determine the damages resulting from the opening of a city street through private property. The finding of the appraisers as to the value of the property taken was conclusive and nonappealable. The supreme court rejected the assertion by the municipality that the General Assembly could constitute a board of appraisers and delegate to such board the absolute power, free from judicial review, to determine the value of the condemned property:

> The Legislature undoubtedly has the power to determine whether the necessity exists for such condemnation, but it has no power to create a tribunal and vest it with absolute authority to condemn private property without just compensation, or upon such compensation as such tribunal may determine, and make the finding of that tribunal or board conclusive upon the issue of compensation. The jurisdiction to determine the necessity for condemnation is one thing. That is purely a legislative function which the Legislature may exercise untrammeled. The jurisdiction to determine the value of the land condemned and the compensation to be rendered the owner therefore is another thing. *The latter power is purely a judicial function, which none but the courts can exercise. If the Legislature designates a tribunal other than a common-law jury to ascertain the value of the land and the amount of compensation to be paid the owner therefor, then the finding of such tribunal on the issues of fact must be subject to review by the courts.* The right of appeal from such finding through to the court of last resort cannot be taken away. Article 7, § 4, Const. Ark. If this procedure is not followed, then the landowner is deprived of his property without judicial inquiry, i.e., without the due process guaranteed by our Constitution and the Constitution of the United States.[117]

The opinion is somewhat confusing. It characterizes determination of the value of condemned property as "purely a judicial function, which none but the courts can exercise." But the real defect in the statute under consideration was its attempt to make the findings of the nonjudicial body conclusive on the courts. The emphasized language in the quotation suggests that the court would not have objected to the use of a nonjudicial tribunal to determine the value of condemned property provided the determination was subject to judicial review.

Assuming for purposes of argument that determining the value of

116. 155 Ark. 338, 245 S.W. 332 (1922).

117. *Id.* at 343, 245 S.W. at 333 (emphasis added).

condemned property is a purely judicial function, separation of powers does not bar the use of an administrative agency to make such determinations. The United States Supreme Court has held, by analogy to the use of masters and commissioners, that administrative agencies can, consistent with the separation of powers doctrine, act as fact-finding adjuncts of the courts.[118] The Arkansas Supreme Court has implicitly approved the practice of using a group of citizens, variously called "appraisers", "viewers", or "arbitrators", to set the damages payable in a condemnation proceeding.[119] If an ad hoc group of citizens can act as a fact-finding adjunct of a court in a condemnation proceeding, an administrative agency should be able to perform the same role.[120] The procedure would not diminish the judicial powers of the courts. The factual determination of the agency would be subject to judicial review, and the scope of judicial review would not be limited to determining whether there was substantial evidence to support the agency's determination. As discussed above, the power of eminent domain is subject to constitutional limits. Not only must the taking be "for public use"; the owner must receive "just compensation."[121] The value of condemned property is a "constitutional fact."[122] Consequently, the value of condemned property fixed by an administrative agency must be subject to independent judicial determination at some stage of the condemnation proceeding to ensure agency compliance with constitutional limits on the exercise of the power of eminent domain.

It is interesting to note that although the owner whose property is condemned has a right to an independent judicial determination of the value of the property, the right is waived if not asserted in a timely fashion. In *Federal Land Bank of St. Louis v. State Highway Commission*[123] an owner whose land had been appropriated by the State High-

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118. *See infra* note 231 and the accompanying text for the quotation from Crowell v. Benson.

119. Smith v. Marianna, 89 Ark. 48, 115 S.W. 938 (1909); St. Francis Levee District v. Redditt, 79 Ark. 159, 95 S.W. 482 (1906); St. Louis Southwestern Ry. v. Royall, 75 Ark. 530, 88 S.W. 555 (1905). *Cf.* Cairo & Fulton Ry. v. Trout, 37 Ark. 17 (1877). *See* ARK. R. CIV. P. 53 (authorizing court to appoint referee, auditor, examiner, commissioner or assessor); ARK. STAT. ANN. § 34-1815 (1962) (authorizing court to appoint commissioners in partition action); ARK. STAT. ANN. § 62-603 (1971) (authorizing clerk of court to appoint commissioners to lay off homestead); ARK. STAT. ANN. § 62-711 (1971) (authorizing probate court to appoint commissioners to lay off dower).

120. This assumes that separation of powers does not require that the fact-finding adjunct be a part of the judicial department.

121. ARK. CONST. art. II, § 22.

122. *See supra* note 111 for discussion of "constitutional facts" and "jurisdictional facts."

123. 194 Ark. 616, 108 S.W.2d 1077 (1937). *See also* Tri-B Advertising v. Arkansas State Highway Comm'n, 260 Ark. 227, 539 S.W.2d 430 (1976); Bryant v. Arkansas State Highway Comm'n, 233 Ark. 41, 342 S.W.2d 415 (1961); Arkansas State Highway Comm'n v. Bush, 195

way Commission recovered a judgment against the Commission which remained uncollected on the date that the supreme court rendered its decision in *Arkansas State Highway Commission v. Nelson Brothers*.[124] The effect of the decision in *Nelson Brothers* was to void the judgment. The owner then sued the Commission to enjoin further trespass on his land. In holding that relief should be denied, the supreme court announced the following rule:

> Appellant had, therefore, the right to prohibit the Highway Commission, or any other agency of government, from taking its property until compensation had been paid. . . . But, if the property owner fails to assert this right and permits the State to take and occupy his property before compensating him, he may not thereafter coerce compensation by retaking the property from the possession of the State. He must thereafter trust the State to deal fairly with its citizens. He then has no other remedy.[125]

The moral seems clear. The owner who permits the state or its agencies to take and occupy his land without first compensating him cannot thereafter sue the state to obtain a judicial determination of the amount compensation to which he is entitled.[126] Such a suit would be one against the state, prohibited by the sovereign immunity provision. The landowner's only remedy is to seek relief from the State Claims Commission.[127] Thus, through his own inaction, a landowner can convert what was a judicial question into a legislative question.

B. *Zoning*

The Arkansas Supreme Court has also encountered difficulty drawing the line between legislative power and judicial power in zoning cases. Because zoning applies prospectively to a broad group of persons, it involves the exercise of legislative power, even under the narrow definition of legislative power used in *Ozarks*. The power has been delegated by the General Assembly to municipal governments since 1924[128]

Ark. 920, 114 S.W.2d 1061 (1938).

124. 191 Ark. 629, 87 S.W.2d 394 (1955).

125. 194 Ark. at 619, 108 S.W.2d at 1078-79.

126. To protect his right to a judicial determination on the issues of damages, the owner must require the State Highway Commission to deposit funds with the court. The procedure is described in Arkansas State Highway Comm'n v. Partain, 192 Ark. 127, 131-32, 90 S.W.2d 968, 970 (1936).

127. In Roesler v. Denton, 239 Ark. 462, 463, 390 S.W.2d 98, 99 (1965), the court stated that were it not for the relief available from the Claims Commission, the rule might violate due process.

128. 1924 Ark. Acts 6 (Third Extraordinary Session). Present statutory authority for munici-

and to county governments since 1937.[129] The courts have traditionally subjected zoning ordinances to closer judicial scrutiny than other types of county or municipal legislation, and this tendency toward "judicial zoning" has sometimes led to separation of powers problems.[130] In 1965 the General Assembly enacted a statute allowing appeals of all final zoning actions to circuit court, "wherein the same shall be tried de novo according to the same procedure which applies to appeals in civil actions from decisions of inferior courts, including the right of trial by jury."[131] This statute, which according to one commentator "virtually transfers the zoning power from cities to the courts",[132] was applied in three cases without its constitutionality being questioned.[133] But in *Wenderoth v. City of Fort Smith*,[134] the court ruled:

> By this method of appellate review de novo there is attempted to impose upon the circuit court a function of a nonjudicial character in a matter that is exclusively within the discretion and legitimate power of the city's legislative body. The result would be to substitute the judgment of the circuit court for that of a municipal law-making body. This is contrary to Article 4 of our constitution which prohibits intrusion by the judiciary upon the legislative domain.[135]

The court further held that a reviewing court was limited to determining whether a zoning ordinance was arbitrary, capricious, or unreasonable, which is the standard of review applicable generally to legislative acts.

The reasoning in *Wenderoth* is very similar to that in *Goodall v. Williams*. Zoning, like licensing, involves the exercise of legislative discretion. It is not surprising that the opinion *Goodall v. Williams* cited *Wenderoth* for the proposition that de novo review is inappropriate "if the interests affected are less than fixed and determined and their existence depends primarily upon executive or legislative wisdom."[136]

In a footnote in *Wenderoth* the court stated that it was not passing

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pal zoning is found at ARK. STAT. ANN. §§ 19-2804 to 19-2806 (1980).

129. 1937 Ark. Acts 246. Present statutory authority for county zoning is found at ARK. STAT. ANN. §§ 17-1107 to 17-1117 (1980 and Supp. 1983).

130. The tendency of the courts to subject zoning actions to particularly close review is criticized in Gitelman, *Judicial Review of Zoning Action in Arkansas*, 23 ARK. L. REV. 22 (1969).

131. 1965 Ark. Acts 134, codified at ARK. STAT. ANN. § 19-2830.1 (1980).

132. Gitelman, *supra* note 130, at 41.

133. Wright v. City of Little Rock, 245 Ark. 355, 432 S.W.2d 488 (1968); Arkansas Power & Light Co. v. City of Little Rock, 243 Ark. 290, 420 S.W.2d 85 (1967); City of Little Rock v. Leawood Property Owners Ass'n, 242 Ark. 451, 413 S.W.2d 877 (1967).

134. 251 Ark. 342, 472 S.W.2d 74 (1971).

135. *Id.* at 345, 472 S.W.2d at 75.

136. 271 Ark. at 356, 609 S.W.2d at 27.

on the constitutionality of the de novo review statute as applied to actions by a city council or other body in an "administrative or quasi-judicial capacity."[137] The statement presumably refers to action on a request for relief from application of a zoning ordinance. Under Arkansas law, a property owner can apply to the municipal or county board of adjustment for an area variance (permission to deviate from lot size or set back restrictions because of circumstances unique to the particular property), but boards of adjustment cannot grant a use variance (permission to deviate from a restriction on the use of the property).[138] Decisions by a board of adjustment on a request for variance are appealed directly to circuit court.[139] The property owner who wants to use his property for a purpose not permitted by the zoning ordinance must apply to the county or city planning commission to rezone the property.[140] Decisions of the planning commission are reviewed by the county quorum court or city council, and the action of the quorum court or council is appealable to circuit court.[141] Since *Wenderoth* involved judicial review of a rezoning ordinance, the court probably had in mind decisions of the board of adjustment granting or denying a request for an area variance when it referred to actions in an "administrative or quasi-judicial capacity."

This conclusion is buttressed by two decisions handed down on the same date in 1979, in which the court drew a distinction between de novo review of city council action on a request for rezoning and board of adjustment action on the request for a variance. In *Taylor v. City of Little Rock*,[142] which involved an appeal from a decision of the Little Rock City Board of Directors denying a rezoning request, the court applied its *Wenderoth* ruling and held that the reviewing court "does not try a city zoning decision de novo but, instead, determines whether the city's action was arbitrary."[143] In *City of Paragould v. Leath*,[144] in discussing an appeal from a decision of a municipal board of adjust-

137. *Id.* at 347, 472 S.W.2d at 76, n.1.

138. ARK. STAT. ANN. §§ 17-1113(7.7), 19-2829(b) (1980). The distinction between an "area variance" and a "use variance" is discussed in Wright, *Zoning Law in Arkansas: A Comparative Analysis*, 3 UALR L.J. 421, 448-50 (1980).

139. ARK. STAT. ANN. §§ 17-1113(7.8), 17-1115 (1980); ARK. STAT. ANN. §§ 19-2829(b), 19-2830.1 (1980).

140. Both county and municipal boards of adjustments are specifically prohibited from permitting any use in a zone that is not permitted by the zoning ordinance. *Ark. Stat. Ann.* §§ 17-1113(7.7), 19-2829(b) (1980).

141. *Ark. Stat. Ann.* §§ 17-1112(6.1), 19-2830(1) (1980).

142. 266 Ark. 384, 583 S.W.2d 72 (1979).

143. *Id.* at 388, 583 S.W.2d at 74.

144. 266 Ark. 390, 583 S.W.2d 72 (1979).

ment on a request for a variance, the court stated:

> In spite of the language of *Wenderoth v. City of Fort Smith*, . . . the act here which provides for appeals from the Board of Adjustment is not subject to those constitutional limitations applicable to City Council actions in zoning because the Board of Adjustment acts administratively, not legislatively.[145]

Although the precise issue before the court was not the constitutionality of de novo review of board of adjustment decisions, the language is consistent with the footnote in *Wenderoth* if it means that de novo review of such decisions is constitutional.

The basis for distinguishing city council action on a request to rezone from board of adjustment action on a request for an area variance is not clear. One wonders whether the court would have drawn the same distinction if Arkansas law provided for city council review of decisions by the board of adjustment, or if boards of adjustment were empowered to grant use variances. It oversimplifies the problem to assume that city councils always act in a legislative capacity. In dealing with discharges and removals, the court has recognized that a city council can act in a quasi-judicial capacity when discharging an employee or removing an officer.[146] It is likewise possible that a city council acts in a quasi-judicial capacity when it hears rezoning requests. In fact, courts in other jurisdictions have held that while the initial adoption of a zoning ordinance by a legislative body constitutes an exercise of legislative power that is subject to limited judicial review, a determination by the same legislative body changing the permissible use of specific property is quasi-judicial in character and subject to closer judicial scrutiny.[147] These other courts draw a distinction between those actions that affect the use of all property in an area (zoning ordinances) and those that affect the use of specific property under an existing zoning scheme (rezoning ordinances and variances). Although

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145. *Id.* at 393, 583 S.W.2d at 77.

146. *See* Jones v. Leighton, 200 Ark. 1015, 142 S.W.2d 505 (1940). *Cf.* Williams v. Dent, 207 Ark. 440, 181 S.W.2d 29 (1944).

147. Cooper v. Bd. of Commissioners of Ada County, 101 Idaho 407, 614 P.2d 947 (1980); Lowe v. City of Missoula, 165 Mont. 38, 525 P.2d 551, 554 (1974); Fasano v. Bd. of County Commissioners of Washing County, 264 Or. 574, 507 P.2d 23 (1973); Fleming v. City of Tacoma, 81 Wash.2d 292, 502 P.2d 327 (1972). *See also* Booth, A Realistic Reexamination of Rezoning Procedure: The Complimentary Requirements of Due Process and Judicial Review, 10 GA. L. REV. 753, 772 (1976). Other courts agree with the Arkansas Supreme Court that action on a request for rezoning is legislative in character. Hernandez v. City of Lafayette, 399 So. 2d 1179 (La. App. 1981); American Beauty Homes Corporation v. Louisville and Jefferson County Planning and Zoning Comm'n, 379 S.W.2d 450 (1964).

use of a general applicability versus specific applicability test to distinguish legislative action from judicial action finds some support in the language of the Arkansas Supreme Court in *Ozarks*, the Arkansas court has not applied the test in zoning cases. Instead, it treats rezoning ordinances, but not actions on a request for a variance, as the exercise of legislative power.

The only clue as to why the court treats a request for rezoning differently from a request for a variance is found in *Leath*. In *Leath* the court stated that the board acts "administratively, not legislatively." The court may have had in mind a line of cases which distinguish legislative acts of a city council, which are subject to referendum, from administrative acts of the council, which are not.[148] The fact that governmental action is not subject to referendum does not necessarily mean that it may be subjected to do novo judicial review. Moreover, even assuming that the board of adjustment acts "administratively" when it rules on a request for a variance, it is unclear why such a characterization makes de novo review appropriate. In the context of discharges of public employees and removals of public officers, the court has used the term "administrative" to refer to those actions of a city council or other body that are not subject to judicial review. The test for judicial review applied in the certiorari cases was "whether the act sought to be reviewed is done in a judicial or quasi-judicial capacity, and not merely in a legislative, executive, or administrative capacity."[149] In the *House* opinion, the court characterized firing an employee as "clearly an administrative act and not a matter that involves the quasi-judicial function of the agency."[150] But in *Leath*, the fact that the board of adjustment acted "administratively, and not legislatively" apparently meant that de novo judicial review was appropriate.

If *Goodall v. Williams* is any guide, the propriety of de novo judicial review of a zoning decision turns not on the character of the body making the decision (the city council versus the board of adjustment) nor on whether the decision is legislative, administrative, or quasi-judicial. The correct test is whether the zoning decision under review involves the exercise of legislative discretion. If so, then the courts encroach upon the legislative domain when they substitute their own judgment for that of the body to which the General Assembly has dele-

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148. Cochran v. Black, 240 Ark. 393, 400 S.W.2d 280 (1966); Scroggins v. Kerr, 217 Ark. 137, 228 S.W.2d 995 (1950).

149. State *ex rel.* Attorney General v. Railroad Comm'n, 109 Ark. 100, 106, 158 S.W. 1076, 1078 (1913).

150. 276 Ark. at 329, 634 S.W.2d at 388.

gated legislative discretion to determine the public interest.

When a city council enacts a zoning ordinance, it is exercising legislative discretion conferred by the General Assembly. The same can be said of a city council's action on a rezoning request. Thus, the court was correct in holding that such decisions are not subject to de novo review. Determining whether a board of adjustment has similar discretion to grant or deny a request for an area variance is more difficult. A board of adjustment is empowered to hear requests for variances "from the literal provisions of the zoning ordinance in instances where strict enforcement of the zoning ordinances would cause undue hardship due to circumstances unique to the individual property under consideration."[151] The board is to grant such requests "only when it is demonstrated that such action will be in keeping with the spirit and intent of provisions of the zoning ordinance."[152] The "undue hardship" language makes it a close question. The test is not unlike the "cause" standard that makes it possible for the courts to review civil service commission decisions de novo. But on balance, the statute seems to contemplate that the board may exercise some discretion in determining whether to grant a variance. The interest of a property owner in relief from strict compliance with the zoning ordinance in circumstances of "undue hardship," unlike the interest of a public employee in not being fired except for "cause," has not been elevated by the General Assembly to the status of a statutory right. Consequently, de novo review of board of adjustment decisions is inappropriate.[153]

C. *Taxation*

Taxation is another area in which the line between legislative power and judicial power is sometimes nebulous. The Arkansas Constitution grants broad powers to the legislative branch in the area of taxation. Article II, section 23 vests the state's power of taxation in the General Assembly. Article XVI, section 5, as amended by amendment 59, provides that all real and personal property shall be subject to taxation according to its value, "that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State."

A taxpayer may challenge the value at which his property is as-

151. ARK. STAT. ANN. §§ 17-1113(7.7(2)) and 19-2829(b)(2) (1980).

152. *Id.*

153. De novo judicial review of action on a request for a variance was held to violate the Georgia Constitution's separation of powers clause in Bentley v. Chastain, 242 Ga. 348, 249 S.E.2d 38 (1978).

sessed for purposes of imposing *ad valorem* property taxes or contend that an assessment by a local improvement district is disproportionate to the benefits conferred on his property by the improvement. If the rule of *Ozarks* were applied literally, such disputes could not be resolved by an administrative agency since their resolution necessitates a determination of present or past facts affecting the liability of the taxpayer. But the power to determine the value of property for purposes of *ad valorem* property taxes, as well as the power to determine special improvement assessments, has traditionally been regarded as purely a legislative power that can be delegated by the legislature to the county board of equalization or to the commissioners of an improvement district.[154] In fact, some early cases suggest that exercise of the power by the assessing body is not subject to judicial review except as provided by statute. The following statement appears in *Clay County v. Brown Lumber Co.*:[155]

> When legislation, in accomplishing the necessities of government, makes provision that certain officers or boards shall fix the assessment of property, it does not violate the right of due process of law. Now while, ordinarily, appeal is granted from such officer or board to some court or board of revision, yet, *when such boards of equalization are properly constituted, there is no appeal from their decision in simple matters of judgment or opinion as to values, unless appeal is specifi-*

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154. Real and personal property tax assessments are initially fixed by the county assessor and equalized throughout the county by the County Board of Equalization, which is a nonjudicial body. ARK. STAT. ANN. § 84-708 (1980). Decisions of the Board of Equalization are reviewed by the county court, which acts in an administrative capacity and not a judicial capacity when it equalizes assessments. Burton v. Harris, 202 Ark. 696, 705, 152 S.W.2d 529, 533 (1941); Missouri P. R.R. Co. v. Izard County Highway Improvement Dist. No. 1, 143 Ark. 261, 268, 220 S.W. 452, 454 (1920). Decisions of the county court are appealable to circuit court pursuant to art. VII, § 33 of the constitution.

The power of the board of commissioners of a special improvement district to fix assessments in proportion to the benefit conferred also represents the exercise of legislative power. The seminal case in this area seems to be Coffman v. St. Francis Drainage Dist., 83 Ark. 54, 103 S.W. 179 (1907), in which the court held that the only question reviewable by the court was whether an assessment was "such an arbitrary abuse of the taxing power as would amount to a confiscation of property . . . without any benefit whatsoever." *See also* McCord v. Welch, 147 Ark. 362, 227 S.W. 765 (1921); Burr v. Beaver Dam Drainage Dist., 145 Ark. 51, 223 S.W. 362 (1920); Monette Rd. Improvement Dist. v. Dudley, 144 Ark. 59, 222 S.W. 59 (1920); Bush v. Delta Rd. Improvement Dist. of Lee County, 141 Ark. 247, 216 S.W. 690 (1919). The circuit court acts in a judicial capacity and not an administrative capacity when it reviews special improvement district assessments. Missouri P. R.R. Co. v. Conway County Bridge Dist., 134 Ark. 292, 204 S.W. 630 (1918).

155. 90 Ark. 413, 119 S.W. 251 (1909). *See also* Wells Fargo & Co. Express v. Crawford County, 63 Ark. 576, 40 S.W. 710 (1897).

cally provided for by statute.[156]

The following year, the court issued *State v. Little*,[157] in which the Arkansas Attorney General and State Tax Commission sought an injunction to prevent the County Court of Miller County from reducing certain assessments. In affirming the dismissal of the complaint for want of equity, the supreme court quoted article XVI, section 5 of the constitution, which, as indicated above, provides that the value of property subject to taxation is "to be ascertained in such manner as the General Assembly shall direct," and then stated:

> Hence it will be seen that the taxing power is a legislative function, and that, subject to constitutional restrictions, the action of the Legislature is supreme. . . . The Legislature having provided the agencies for the assessment of property for taxation and the manner of its exercise, *the action of such officers is conclusive on the state in the absence of a statute to the contrary; and the courts have no power to supervise and correct the assessments made by them.*[158]

State v. Little was subsequently cited in a number of cases for the statement that "courts are powerless to give relief against erroneous judgments of assessing bodies, except as they are especially empowered by law to do so."[159]

These statements do not necessarily mean that the General Assembly can make the determinations of assessing bodies conclusive on the courts. Most of the cases involved collateral attacks in chancery court on the judgments of assessing bodies. The holdings of the cases can be justified on the narrower grounds that the taxpayer should have appealed his assessment to circuit court as allowed by law. In *Jensen v. Dierks Lumber & Coal Co.*,[160] the tax assessor made additional assessments against the taxpayer after the time within which the taxpayer could challenge the assessment before the board of equalization and county court. The supreme court held that a court of equity could grant relief from the assessment since the taxpayer obviously had no remedy at law against the illegal act of the assessor. The implication of the holding is that the statements in *State v. Little* and later cases to the

156. 90 Ark. at 417, 119 S.W. at 252 (emphasis added).

157. 94 Ark. 217, 126 S.W. 713 (1910).

158. *Id.* at 219-21, 126 S.W. at 714 (emphasis added).

159. Arkadelphia Milling Co. v. Clark County Bd. of Equalization, 136 Ark. 180, 184, 206 S.W. 70, 71 (1918); Arlington Hotel Co. v. Buchanan, 110 Ark. 34, 160 S.W. 895 (1913); State v. Kansas City & M. Ry. & Bridge Co., 106 Ark. 248, 251, 153 S.W. 614, 617 (1913); Clay County v. Bank of Knobel, 105 Ark. 450, 453, 151 S.W. 1013, 1014 (1912).

160. 209 Ark. 262, 190 S.W.2d 5 (1945).

effect that courts are powerless to grant relief from erroneous assessments are overly broad and that courts of equity do have jurisdiction to correct erroneous assessments when no provision is made for review by a court of law.[161]

The quotations set out above are also less than accurate to the extent they indicate that the availability of judicial review of the action of assessing bodies depends on express statutory authority. Pursuant to article VII, section 29 of the Arkansas Constitution, the county court has exclusive jurisdiction "in all matters relating to county taxes."[162] A taxpayer who disagrees with the value at which his property is assessed for purposes of *ad valorem* property taxes is entitled to county court review of the action of the board of equalization or any similar administrative body to which the legislature delegates the power to equalize assessments. Article VII, section 33 grants a right to appeal a decision of the county court to circuit court. The right of appeal extends to actions of the county court taken in an administrative capacity as well as in a judicial capacity.[163] Consequently, even in the absence of a statute expressly providing for judicial review of the action of the board of equalization, the taxpayer who claims that his property has been overvalued for assessment purposes is constitutionally entitled to circuit court review of his claim.

Assuming that judicial review of the action of assessing bodies is available, the scope of that review is probably limited by separation of powers. Because determining the value of property for purposes of *ad valorem* property taxes or fixing the amount of assessments for special improvements represents the exercise of purely legislative power, a reviewing court cannot constitutionally be empowered to substitute its judgment for that of the assessing body. In *St. Louis-San Francisco Railway Co. v. Arkansas Public Service Commission*,[164] the court dealt with a statute which purported to authorize a de novo trial in

161. In Raef v. Radio Broadcasting, Inc., 209 Ark. 253, 190 S.W.2d 1 (1945), which was handed down the same day as Jensen v. Dierks Lumber & Coal Co., the court ordered an equitable action dismissed because the assessment was made within the statutory period and the taxpayer could have appealed the assessment to circuit court.

A court of equity has jurisdiction under ARK. CONST. art. II, § 23 to enjoin an illegal exaction, but a taxpayer who seeks to enjoin an illegal exaction must do more than merely assert that his assessment is too high. He must contend that the tax is unconstitutional, that the property is not subject to taxation under the applicable statutes, or that he is not the person charged with payment of the tax. *See infra* note 179.

162. Burgess v. Four States Memorial Hospital, 250 Ark. 485, 465 S.W.2d 693 (1971).

163. Barker v. Wist, 163 Ark. 511, 512, 260 S.W. 408 (1924); Horn v. Baker 140 Ark. 168, 173, 215 S.W. 600, 602 (1919).

164. 227 Ark. 1066, 304 S.W.2d 297 (1957).

circuit court when a public utility appealed an order of the Arkansas Public Service Commission fixing the value of the utility's property for *ad valorem* assessment purposes. The court held that the statute did not contemplate a de novo trial similar to the de novo trial available in an appeal from a justice of the peace court to circuit court since a court has no power under the constitution to fix assessments. Instead, "the purpose of any Court appeal from an assessment or equalizing agency is to see that the assessment is neither erroneous in figures, nor arbitrary in measuring, nor confiscatory in results."[165] The court also quoted with approval a statement from *Corpus Juris Secundum* to the effect that "the court will not disturb the decision of the assessors unless it is clearly erroneous, or, unless, as required by statute, the assessment is manifestly excessive, fraudulent, or oppressive."[166] The limited scope of review announced in *St. Louis-San Francisco Railway Co.* is consistent with the legislative character of the power exercised by an assessing body and supports the conclusion that courts cannot constitutionally be empowered to substitute their judgment for that of assessing bodies.

The taxpayer who wishes to challenge a tax imposed at the state rather than the local level must also initially litigate the matter before an administrative hearing officer. Under the Arkansas Tax Procedure Act he must first apply to the Commissioner of Revenues for relief from a proposed assessment.[167] The Commissioner is required to appoint a hearing officer to conduct a hearing on the proposed assessment.[168] The decision of the hearing officer, following review and revision by the Commissioner, can be contested in the Pulaski County Chancery Court or the chancery court of the county where the taxpayer resides, but the taxpayer must either pay the tax found due or post a bond for double the tax due before seeking judicial review.[169] When reviewing a tax case, the chancery court tries the matter de novo.[170]

The Tax Procedure Act raises several questions under the separation of powers article. One is whether a hearing officer or other admin-

165. 227 Ark. at 1069, 304 S.W.2d at 299. *See also* Cook v. Surplus Trading Co., 182 Ark. 420, 31 S.W.2d 521 (1930).

166. 227 Ark. at 1069, 304 S.W.2d at 299.

167. ARK. STAT. ANN. § 84-4719 (1980). The Arkansas Tax Procedure Act, ARK. STAT. ANN. §§ 84-4701 to 84-4744 (1980), does not apply to certain types of taxes imposed at the state level. *See* ARK. STAT. ANN. § 84-4702 (1980).

168. ARK. STAT. ANN. § 84-4720 (1980).

169. ARK. STAT. ANN. § 84-4721 (Supp. 1983).

170. *Id.*

istrative tribunal can be vested with the power to make factual determinations affecting the tax liability of an individual taxpayer. Although this appears to be a judicial function under the *Ozarks* test, the question is academic so long as the taxpayer can secure de novo review of the determination in chancery court.[171] By requiring the taxpayer to pursue his administrative remedies before seeking judicial review of an assessment, the Act ensures that the Commissioner has an opportunity to correct erroneous assessments and thereby avoid needless litigation.

A second separation of powers issue raised by the Arkansas Tax Procedure Act concerns the availability of de novo chancery court review of decisions by the hearing officer. Although the cases discussed above suggest that de novo judicial review of value determinations by assessing bodies at the local level would violate separation of powers,[172] review of assessments at the state level is a different proposition. When a board of equalization determines the value at which property is to be assessed for purposes of the *ad valorem* property tax, or when the board of commissioners of an improvement district determine assessments for a special improvement, it acts in a legislative capacity. The hearing officer appointed by the Commissioner of Revenues applies existing laws to a particular set of facts. He performs functions that could have been vested originally in the courts. If the power to make such determinations could have been vested originally in the courts, separation of powers does not preclude a de novo trial in the courts upon appeal from an administrative determination.[173]

A third, and more interesting, separation of powers issue is whether the Tax Procedure Act would be constitutional if it did not provide for de novo judicial review of factual determinations at the administrative level. Because de novo review has generally been the prescribed standard, there is little direct authority on the question. In *Morley v. Fifty Cases of Whiskey*[174] the court considered a procedure pursuant to which the Commissioner of Revenues could seize liquor on which the Arkansas excise tax had not been paid. Anyone claiming an interest in the liquor could demand a hearing before the Commissioner to determine his rights to the liquor. Following the hearing the Commissioner made written findings of fact and entered an order that could be appealed to circuit court. The procedure was challenged on the

171. *See infra* note 211 and accompanying text.

172. *See* St. Louis-San Francisco Ry. Co. v. Arkansas Pub. Serv. Comm'n, 227 Ark. 1066, 304 S.W.2d 297 (1957) and text accompanying note 164.

173. *See Matlock II*, 206 Ark. 1145, 178 S.W.2d 662 (1944).

174. 216 Ark. 528, 226 S.W.2d 344 (1950).

grounds that it attempted to make the Commissioner a "court" and vest him with judicial powers. The supreme court responded by treating the Commissioner's determination as a preliminary step in the process of adjudicating a forfeiture of the liquor; the proceeding in circuit court was deemed an original proceeding which reached the court by "removal" rather than by "appeal." In support of the constitutionality of the procedure, the court cited *Matlock II*, which used similar reasoning to justify de novo review of civil service commission decisions. The opinion is vague about the weight to be given the Commissioner's determination in the court proceeding. According to the court, there is a right to a "fair and legal trial" on the issue of forfeiture but not a right to a jury trial.[175] The court's statement about a "fair and legal trial" plus its citation of *Matlock II* implies that the circuit court was to try the forfeiture issue de novo. The court might adopt a similar approach with respect to the Tax Procedure Act: the administrative hearing prescribed by the Act is but a preliminary step in the assessment process, and the taxpayer is entitled to de novo judicial review at some state in the tax proceeding.

If the court in *Morley* was referring to a statutory and not a constitutional right to a "fair and legal trial," then perhaps de novo review of administrative determinations affecting tax liabilities is not mandatory. The supreme court has held that an action by the state to collect taxes is not a common law action in which the taxpayer is entitled to a jury trial and has likened the action to one for an "intricate accounting" in which a chancery court has jurisdiction.[176] When a party seeks an accounting, chancery courts frequently rely on special masters to make factual determinations that are binding on the court unless "clearly erroneous."[177] And as discussed above, the United States Supreme Court has cited the use of special masters to support its conclusion that separation of powers does not require all factual determinations in the court to be made by the judge.[178] Arguably, the

175. *Id.* at 533, 226 S.W.2d at 346.

176. Hardin v. Norsworthy, 204 Ark. 943, 946, 165 S.W.2d 609, 611 (1942).

177. ARK. R. CIV. P. 53.

178. *See supra* note 118 and accompanying text and *infra* note 231 and accompanying text. Congress has established the Tax Court, which is an article I "legislative court," to hear petitions from taxpayers who wish to contest a federal tax liability without first paying the tax assessed. 26 U.S.C. § 7441 (1982). Decisions by the Tax Court are appealable to the circuit court of appeals where they are reviewed "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." 28 U.S.C. § 7482 (1982). Thus, factual determinations by the Tax Court must be upheld on appeal unless "clearly erroneous." Commissioner v. Duberstein, 363 U.S. 278, 291 (1960).

Arkansas General Assembly can establish an administrative tribunal to adjudicate tax controversies, and it is not obliged to provide for de novo judicial review of factual determinations by the tribunal.[179]

Cases falling into the second category further demonstrate that the power to make factual determinations affecting the rights of a particular person is not necessarily judicial in character. An agency may exercise legislative power when it makes certain types of factual determinations incidental to the taking of specific private property, imposing restrictions on the use of specific private property, or fixing assessments on specific private property.

The cases discussed in the first category (those in which a particular person seeks something from the government) and the cases discussed in the second category (those in which the government seeks something from a particular person) share a common feature. Although the rights of a particular person are at stake, the public also has an interest in the outcome of the controversy. The United States Supreme Court has long recognized that Congress may use either a judicial or a nonjudicial forum to adjudicate matters involving "public rights."[180] According to the Court, the "public rights" doctrine extends only to matters arising "between the Government and persons subject to its authority in connection with the performance of the constitutional

179. There is one other tax related situation in which separation of powers issues have been raised. An administrative agency is sometimes empowered to issue a certificate of indebtedness that has the force and effect of a judgment against the taxpayer when filed with the circuit clerk of the county where the taxpayer resides. *See* ARK. STAT. ANN. § 84-4723 (1980). This procedure has sometimes been attacked on the grounds that it vests an administrative agency with judicial powers. New St. Mary's Gin, Inc. v. Moore, 232 Ark. 24, 334 S.W.2d 683 (1960); Jones v. Crouch, 231 Ark. 720, 332 S.W.2d 238 (1960); Clay County v. Brown Lumber Co., 90 Ark. 413, 119 S.W. 251 (1909). The primary constraint on the use of summary collection of taxes by an administrative agency is ARK. CONST. art. XVI, § 13, which gives any citizen the right to seek the protection of the courts from "the enforcement of any illegal exactions whatever." On several occasions taxpayers have responded to the filing or threatened filing of a certificate of indebtedness by seeking an injunction in chancery court under art. XVI, § 13. The availability of injunctive relief depends on the character of the taxpayer's challenge. If the challenge is on the grounds that there is no tax due because the tax is unconstitutional, or that the transaction or property is not subject to taxation under the applicable statute, or that the person assessed is not the party charged with payment of the tax under the applicable statute, then the chancery court may issue an injunction under art. XVI, § 23 to prevent an illegal exaction. Hardin v. Norsworthy, 204 Ark. 943, 946, 165 S.W.2d 609, 611 (1942). But if the challenge relates only to the amount of a valid tax owed by the taxpayer, injunctive relief is not available. Hardin v. Gautney, 204 Ark. 943, 946, 164 S.W.2d 609, 611 (1942). The taxpayer's only alternative in such a case is to pay the contested tax due and then proceed in the Pulaski County Circuit Court to recover the overcharge. Scurlock v. Yarbrough, 224 Ark. 113, 271 S.W.2d 916 (1954); Cook v. Hickenbottom, 212 Ark. 768, 207 S.W.2d 721 (1948).

180. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272 (1855).

functions of the executive or legislative departments."[181]

Although the Arkansas Supreme Court has never expressly recognized the "public rights" doctrine, the doctrine seems to explain the cases discussed thus far in which nonjudicial bodies were permitted to make determinations affecting the rights and liabilities of particular persons. In virtually all these cases, the nonjudicial body was acting on matters affecting "public rights" pursuant to an express constitutional grant of power to the General Assembly. The cases discussed thus far suggest that in exercising its constitutional powers, the General Assembly has several options. It can clearly define the interest of the public by creating a fixed right in particular persons subject to its authority. If it creates a fixed statutory right, the General Assembly can use either a court or an administrative agency to determine whether a particular person possesses that right. On the other hand, rather than clearly define the public interest, the General Assembly may grant the decisionmaker the discretion to define the public interest on a case by case basis. In such a case, the General Assembly must use an administrative agency. It cannot, consistent with separation of powers, authorize the courts to make such determinations, either originally or when reviewing agency determinations.

Denying the courts the power to determine or redetermine questions involving executive or legislative discretion serves an important function underlying separation of powers. It insulates the courts from the types of influence that may be brought to bear on highly political decisions. When a decision involves determining what is in the best interest of the public, the public expects to have some input into that decision. But the judicial process, with its focus on adjudicating the rights of the parties before the court, is not amenable to input from the general public, and it is doubtful that the process should be altered to allow public input. Although it was addressing the dangers of empowering the courts to make appointments to political office, the observations of the Arkansas Supreme Court in *Oates v. Rogers*[182] are equally applicable to determinations involving the exercise of executive or legislative discretion:

> Common knowledge teaches, and experience informs us, that most people who apply for public office have the backing of influential friends, and are themselves prominently connected. Unfortunately we have not reached that ideal state where friend interested in friend will

181. Crowell v. Benson, 285 U.S. 22, 50 (1932).
182. 201 Ark. 335, 144 S.W.2d 457 (1940).

circumscribe his or her activity merely because the appointive power is judicial.

Judges should not be subjected to these experiences. . . .[183]

The same can be said of a decision granting a liquor license, rezoning or refusing to rezone a lot, equalizing property assessments, or fixing special improvement assessments. By limiting judicial review of such decisions, the separation of powers doctrine reduces the potential for judicial involvement in highly political decisions about questions of public policy.

V. ELECTION CONTESTS

A couple of principles emerge from the cases discussed thus far. First, the use of nonjudicial agencies to make determinations affecting the rights and liabilities of private parties is usually upheld when public rights are also involved. Second, courts should not become too closely involved in deciding essentially political questions. Although election contests normally involve disputes between private persons, the public has a direct interest in the outcome of the dispute. Election contests are also likely to raise political questions. In deciding the appropriate forum in which to contest an election, the supreme court has had the advantage of fairly explicit constitutional language and has not been forced to rely on cases in other areas distinguishing judicial and legislative power.

Article VI, section 5 of the Arkansas Constitution provides for contested elections for Governor, Secretary of State, Treasurer of State, Auditor, and Attorney General to be decided by the members of both houses of the General Assembly in joint session. In construing a similar provision of the Constitution of 1868, the supreme court held that the power to determine which of two candidates had been duly elected to the office of governor was vested exclusively in the General Assembly and that no court had jurisdiction to determine such a question or review the determination made by the General Assembly.[184] The same result would undoubtedly be reached under the present constitution.

Article V, section 11 of the constitution makes each house of the

183. *Id.* at 346, 144 S.W.2d at 462. It has been suggested that one consideration in determining the character of a power is whether it would "involve the judiciary in situations that might reflect on the judges' reputations for independence and freedom from politics." F. COOPER, STATE ADMINISTRATIVE LAW 27 (1965).

184. Baxter v. Brooks, 29 Ark. 173 (1874); State *ex rel.* Baxter, 28 Ark. 129 (1873).

General Assembly the sole judge of the qualifications, returns, and elections of its own members. Based on this provision the supreme court has held that the judicial branch is without jurisdiction to decide an election contest involving a seat in the General Assembly.[185] Since the respective houses of the General Assembly have the exclusive power to determine the qualification of members, they can also determine the eligibility of a person for a seat in the House or Senate, even in the absence of an election contest. Consequently, the court has refused to review a decision by the Senate to seat a convicted criminal in spite of article V, section 9 of the constitution which provides that no person convicted of an "infamous crime" shall be eligible to hold a seat in the General Assembly.[186]

The power to resolve election contests at the local level is also addressed by the constitution. Article VII, section 52 grants a right to appeal to the circuit court, where the matter is tried de novo, a decision of an inferior board, council or tribunal in an election contest involving a county, township, or municipal office. This provision necessarily implies that the General Assembly can delegate to a nonjudicial body the power to decide an election contest involving a county, township, or municipal office, but the decision of the body is subject to de novo judicial review.[187] The circuit courts are not constitutionally limited to appellate review of election contests, however, and nothing prevents the General Assembly from vesting the circuit courts with original jurisdiction to decide an election contest involving a county, township, or mu-

185. Pendergrass v. Shied, 241 Ark. 908, 411 S.W.2d 5 (1967); Parrish v. Nelson, 186 Ark. 786, 55 S.W.2d 922 (1933); Young v. Boles, 92 Ark. 242, 122 S.W. 496 (1909).

186. State *ex rel.* Evans v. Wheatley, 197 Ark. 997, 125 S.W.2d 101 (1939). *See also* Irby v. Barrett, 204 Ark. 682, 163 S.W.2d 512 (1942). The courts may enjoin a member of the General Assembly from holding dual offices contrary to art. V, § 10 of the constitution. Starnes v. Sadler, 237 Ark. 325, 372 S.W.2d 585 (1963). In Reaves v. Jones, 257 Ark. 210, 515 S.W.2d 201 (1974), the court held that it did have jurisdiction to consider whether the General Assembly was in session at the time the Senate voted to exclude a member.

There may be federal constitutional limits on the power of the respective houses of the General Assembly to judge the qualifications of members. In Bond v. Floyd, 385 U.S. 116 (1966), the United States Supreme Court held that the refusal of the Georgia legislature to seat a member because he would not take the oath of allegiance to the state violated the member's first amendment right of free speech. *See also* Powell v. McCormack, 395 U.S. 486 (1969), in which the Court held that in judging the qualifications of one of its members, Congress was limited to considering those qualifications for office prescribed by the Constitution.

187. "There is nothing in the Constitution, that we can see, which requires that the contest should be made before the county court or that restrains the Legislature from erecting some other tribunal or board for its determination; on the contrary, the power of the Legislature to establish such, if not distinctly express, is implied in section 52 of article VII." Govan v. Jackson, 32 Ark. 553, 557 (1877).

nicipal office.[188] In fact, if the General Assembly fails to provide for a specific method of contesting an election to such an office, the circuit court has residuary jurisdiction to decide the election by way of a quo warranto proceeding.[189]

Article XIX, section 24 of the constitution states that the General Assembly shall provide the mode of contesting elections in cases not specifically provided for in the constitution. This section gives the legislature much broader discretion to select the forum for an election contest involving a local office other than a county, township, or municipal office; involving a state office other than the executive offices specifically mentioned in article VI, section 4; or involving an issue rather than candidates. It can vest jurisdiction to hear such contests in either the circuit court or in a nonjudicial body. The history of contests involving school board elections illustrates the legislature's options under article XIX, section 24. Currently, exclusive jurisdiction to hear school election contests lies in the circuit court.[190] But in the past, the court has upheld statutes vesting exclusive original jurisdiction to hear such contests in the county board of education[191] and in the county court.[192]

If in a situation covered by article XIX, section 24, the General Assembly does decide to use a nonjudicial body to try an election contest, it also has considerable flexibility on the matter of judicial review of factual determinations by the body. Since it could have vested the courts with original jurisdiction to hear the contest, it can provide for de novo review on appeal. Alternatively, it may provide for a more limited standard of review, or perhaps even preclude judicial review. In *Shibley v. Fort Smith & Van Buren District 11*,[193] which involved the contest of an election on the formation of an improvement district, the court stated that: "Where the legislature has created a tribunal for the purpose of ascertaining and declaring the result of an election, its decision is conclusive, and cannot be reviewed by the courts."[194] Three years later, the court decided that this language might be somewhat

188. Sumpter v. Duffie, 80 Ark. 369, 97 S.W. 435 (1906).

189. Purdy v. Glover, 199 Ark. 63, 132 S.W.2d 821 (1939).

190. ARK. STAT. ANN. § 80-321 (1980); Adams v. Dixie School Dist. No. 7, 264 Ark. 178, 570 S.W.2d 603 (1978).

191. Attwood v. Rodgers, 206 Ark. 834, 177 S.W.2d 723 (1944).

192. Jackson v. Collins, 193 Ark. 737, 102 S.W.2d 548 (1937). In Stafford v. Cook, 159 Ark. 438, 252 S.W. 597 (1923), the office of school director was held to be a "county office," which would mean that art. VII, § 52, rather than art. XIX, § 24 was the source of legislative power to designate the forum for contesting election to the office.

193. 96 Ark. 411, 132 S.W. 444 (1910).

194. *Id.* at 424, 132 S.W. at 450.

broad. It qualified the *Shibley* statement by holding that a chancery court did have jurisdiction to correct a finding by a nonjudicial body regarding an improvement district election when it was alleged that the finding was "fraudulent."[195] Nevertheless, *Shibley* suggests that in an election contest covered by article XIX, section 24, the General Assembly could limit judicial review of factual determinations by a nonjudicial body.

VI. CONTROVERSIES BETWEEN PRIVATE PARTIES

When a controversy involves "public rights," the General Assembly can designate either a court or a nonjudicial body to make factual determinations affecting the rights and liabilities of a particular person. When the determination involves the exercise of executive or legislative discretion, use of a nonjudicial body becomes mandatory. But when there is no *direct* public interest in the outcome of a controversy, the ability of the General Assembly to use nonjudicial bodies is much more limited. The power to hear a controversy between two private persons and determine the rights of the parties is the quintessential judicial power. The fact that *Ozarks* involved such a controversy between two private parties undoubtedly explains in part the broad language used by the court. But even when "private rights" are involved, the General Assembly may still have some flexibility to use a nonjudicial body to make factual determinations affecting the rights of the parties.

A. *Property and Personal Injury Claims*

The General Assembly has occasionally attempted to vest a nonjudicial body with the power to determine the amount of damages recoverable for an injury to property or person. *St. Louis, I. M. & S. Railway Co. v. Williams*[196] involved the constitutionality of an act designed to speed the settlement of claims for livestock killed or injured by railroads. Either the owner of the livestock or the railroad could submit the question of damages to a board of appraisers by serving notice on the other party. Although the award by the board could be appealed to circuit court, which tried the matter de novo, the party taking the appeal was liable for the attorney fees of the other party if the award by

195. 106 Ark. 151, 153 S.W. 259 (1913). About the same time the court was taking the position that courts could not review the legislative determination that private property was being taken for a public use, but that equity could intervene to prevent a "fraudulent" attempt to condemn private property for a private use. *See* Sloan v. Lawrence County, 134 Ark. 121, 203 S.W. 260 (1918).

196. 49 Ark. 492, 5 S.W. 883 (1887).

the court was no more favorable to the appealing party than the award of the board of appraisers. The supreme court held that article II, section 13 of the Arkansas Constitution entitles one "to have his rights enforced, his wrongs redressed, and his liabilities determined in the courts."[197] It therefore invalidated the statute on the grounds that the provision for payment of attorney fees penalized a party who chose to assert his constitutional right to a jury trial and his right to a remedy in the courts.

St. Louis, I. M. & S. Railway Co. v. Williams was cited with approval in *Grimmett v. Digby*,[198] in which a state trooper who had been sued by a motorist for injuries suffered in a collision with the trooper's state owned vehicle argued that the State Claims Commission possessed exclusive jurisdiction to hear personal injury claims against state employees related to their official duties. In rejecting this contention, the supreme court stated that any attempt to vest a commission or administrative agency with the power to adjudicate personal injury claims would violate the rights of the injured to a trial by jury, as guaranteed by article II, section 7 of the Arkansas Constitution, and to a certain remedy in the law, as guaranteed by article II, section 13 of the Arkansas Constitution.

B. *Employment Related Injuries*

The Worker's Compensation Commission is the premier example of an administrative agency vested with the power to make factual determinations affecting the rights of private parties. Amendment 26 to the constitution authorizes the General Assembly to provide the "means, methods, and forum" for adjudicating the amount of compensation to be paid by employers for injuries or death of employees. This comprehensive grant of power to the General Assembly is the most obvious way to reconcile the functions of the Commission with separation of powers as well as the other constitutional limits on the power of the General Assembly to vest fact-finding functions affecting private rights in a nonjudicial body. In fact, in *Grimmett v. Digby*, the court stated in

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197. *Id.* at 498, 5 S.W. at 885. Art. II, § 13 provides that:

> Every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character; he ought to obtain justice freely, and without purchase, completely, and without denial, promptly and without delay, conformably to the laws.

The opinion quotes art. II, § 13, in its entirety. It also states that appellant had a right to have damages assessed by a jury, but it does not refer specifically to art. II, § 7, which guarantees a right to trial by jury.

198. 267 Ark. 192, 589 S.W.2d 579 (1979).

dictum that the right to a jury trial guaranteed by article II, section 7 and the right to a legal remedy guaranteed by article II, section 13 made it necessary to adopt amendment 26 before a valid workmen's compensation law could be enacted.[199]

This dictum is contradicted by the court's opinion construing the workmen's compensation statute passed after the adoption of amendment 26. In *J. L. Williams & Sons, Inc. v. Smith*[200] the Commission awarded damages to an injured employee based on conflicting medical testimony as to the extent of the employee's work related injuries. The award was appealed to the circuit court, which reversed the finding of the Commission based solely on the court's evaluation of the evidence before the Commission. The supreme court reversed citing the statutory provision which made the findings of fact by the Commission conclusive and binding on the courts. Although the compensation act was passed pursuant to amendment 26 to the constitution, the court went out of its way to observe that the amendment was not essential to the constitutionality of the act:

> The nature of the claimant's cause of action is such that he has no right to insist upon any judicial review except that which the legislature saw fit to provide. The cause of action of one claiming under the workmen's compensation act is purely statutory. The legislature could, *even in the absence of the constitutional authority to provide the forum for adjudicating such claims*, have attached to the creation of the claim the condition that such a claim could be enforced only before a commission whose decision on question of fact should be final.[201]

In support of this statement, the court cited cases involving the state's wrongful death act.[202] While the cases cited do stand for the proposition that the legislature can establish conditions to the enforcement of rights that it creates, the conditions imposed by the wrongful death act do not include a requirement that the right be determined in a forum other than a court. The opinion also glosses over the fact that the legislatively created right to compensation for work related injuries was not an entirely new cause of action, without a common law counterpart. Instead, the workmen's compensation act abolished the common law right of an employee to recover from his employer for negli-

199. *Id.* at 194, 589 S.W.2d at 581.

200. 205 Ark. 604, 170 S.W.2d 82 (1943).

201. *Id.* at 608, 170 S.W.2d at 84 (emphasis added).

202. Anthony v. St. Louis I. M. & S. Ry. Co., 108 Ark. 219, 157 S.W. 394 (1913); Earnest v. St. Louis M. & S. E. Ry. Co., 87 Ark. 65, 112 S.W. 141 (1908).

gence. Nevertheless, *J. L. Williams & Sons, Inc.* suggests that in 1943 the Arkansas Supreme Court would have approved the use of administrative agencies as fact-finding adjuncts of the courts, even when the rights of private parties were involved, so long as the rights were created by the General Assembly.

In the *J. L. Williams & Sons, Inc.* opinion, the court also stated: "It can be argued that if the legislature had not provided for court review, then the courts could not have considered such cases at all, except for questions of due process under the federal constitution."[203] Although subsequent opinions have questioned the validity of this statement,[204] the applicable statutes have always provided for judicial review of Commission decisions, and it has never been necessary to test the limits of the legislature's power to insulate Commission decisions from judicial review. In one instance, when the legislature passed a statute making Commission decisions final unless acted upon by the circuit court within sixty days, the supreme court invalidated the statute as an encroachment on judicial power.[205] Consequently, the power of the General Assembly to limit judicial review of Commission decisions may not be as unrestricted as *J. L. Williams & Son, Inc.* indicates.

The scope of judicial review of Commission decisions is somewhat unique. The applicable statute provides that findings of fact by the Commission are "conclusive and binding" on the courts.[206] This language seems to place purely factual determinations by the Commission beyond the scrutiny of a reviewing court. The courts have not adopted this construction, but they do give greater deference to factual determinations by the Commission as compared with factual determinations of other administrative agencies. Whether the Commission's action is supported by substantial evidence is a question of law that can be consid-

203. 205 Ark. at 607, 170 S.W.2d at 83.

204. Ward School Bus Mfg., Inc. v. Fowler, 261 Ark. 100, 547 S.W.2d 394 (1977).

205. Sands v. Albert Pike Motor Hotel, 245 Ark. 755, 434 S.W.2d 288 (1968).

206. Commission decisions are now appealed directly to the Court of Appeals. ARK. STAT. ANN. § 81-1325 (Supp. 1983). The statute provides as follows with respect to standard of review:

> Upon appeal to the Court of Appeals no additional evidence shall be heard and, in the absence of fraud, the findings of fact made by the Commission, within its power, shall be conclusive and binding upon said Court . . . . The Court shall review only questions of law and may modify, reverse, remand for rehearing, or set aside the order or award, upon any of the following grounds, and no other:
>
> (1) That the Commission acted without or in excess of its powers.
>
> (2) That the order or award was procured by fraud.
>
> (3) That the facts found by the Commission do not support the order or award.
>
> (4) That the order or award was not supported by substantial evidence of record.

ered by the courts,[207] but Commission findings on issues of fact are given the same weight as a jury finding on a controverted issue of fact.[208] Decisions will not be reversed unless the proof is so nearly undisputed that fair-minded men could not reach the conclusion arrived at by the Commission.[209]

The possibility that certain factual determinations by the Commission may have constitutional implications has never been considered by the court. Amendment 26 authorizes the General Assembly to enact compensation laws "prescribing the amount of compensation to be paid by employers for injuries or death of employees." Unless the relationship of employer and employee exists in a particular case, the Commission lacks jurisdiction to consider a claim for compensation. If the findings of the Commission on the issue of the employment relationship are conclusive and binding on the courts, then the Commission is in a position to define the constitutional limits on its own jurisdiction. For this reason, it can be argued that whether the employment relationship exists in a particular case is a "jurisdictional fact" that must be determined de novo by the courts.[210]

C. *Contract Rights*

The use of nonjudicial officers to adjudicate private contract rights was considered by the supreme court in *Thornbrough v. Williams*.[211] At issue was an act of the General Assembly which authorized the Commissioner of Labor to resolve wage disputes between an employer and an employee. The wage resolution procedure could be initiated by either the employer or the employee and provided for a hearing before the Commissioner followed by written findings of fact and an award. Instead of providing for an appeal of the Commissioner's determination to a court, the Act stated that: "If either employer or employee shall fail to refuse to accept the findings of the commissioner, then either shall have the right to proceed at law as now or hereinafter provided."[212] An employer whose employees had filed wage claims with the Commissioner pursuant to the Act obtained an injunction against

207. Cummings v. United Motor Exch., 236 Ark. 735, 368 S.W.2d 82 (1963).

208. Clark v. Peabody Testing Serv., 265 Ark. 489, 579 S.W.2d 360 (1979).

209. *Id.*

210. *See supra* note 111 for discussion of Crowell v. Benson and "jurisdictional facts." Covington, *supra* note 16, at 141-44, criticizes the holding of Crowell v. Benson and argues that judicial review of Commission findings of fact should be limited, even if the facts are "jurisdictional facts."

211. 225 Ark. 709, 284 S.W.2d 641 (1955).

212. ARK. STAT. ANN. § 81-312 (1976).

the Commissioner on grounds that included the assertion that the statute was an unconstitutional attempt to delegate judicial power to a nonjudicial officer. The supreme court disagreed, citing two saving features of the Act. First, the procedure before the Commissioner was not compulsory since one of the parties had to first request that the Commissioner settle the dispute. Second, once the Commissioner made a finding, either party could refuse to accept the finding and institute an original action in a court.

The effect to be given the Commissioner's finding in the legal action was unclear. The statute stated that his findings were presumed to be the amount due the employee. The employer challenged the constitutionality of the procedural burden imposed by this provision and thereby presented the court with the opportunity to determine whether the employer's right to a jury trial and/or a remedy in the courts precluded the use of the Commissioner of Labor as a fact-finding adjunct to the court. The court found it unnecessary to rule on the employer's contention until the issue had been presented to the court below.

These cases, while few in number, demonstrate that the General Assembly does have some flexibility to use an administrative agency rather than the courts to resolve disputes between private parties. The constraints within which the General Assembly may exercise this discretion are article II, section 7 (right to trial by jury), article II, section 13 (right to a legal remedy), and article II (separation of powers).

Clearly, article II, section 7 limits the power of the General Assembly to vest fact-finding functions affecting private rights in an administrative agency. When the right to trial by jury applies, the legislature cannot use an administrative agency either as a forum or as a fact-finding adjunct of a court. But the right to a jury trial applies only in those instances in which the right existed at the time the constitution was adopted.[213] Consequently, when the General Assembly creates a new right or new cause of action, it is not required to provide for a jury trial with respect to the right or cause of action.

If *St. Louis, I. M. & S. Railway Co. v. Williams*[214] and *Grimmett v. Digby*[215] are correct in concluding that article II, section 13 guarantees every person "his day in court," then that constitutional provision also limits the power of the General Assembly to use administrative agencies to adjudicate private rights. The section entitles every person "to a certain remedy in the laws for all injuries or wrongs he may re-

213. *See* Jones v. Reed, 267 Ark. 237, 590 S.W.2d 6 (1979) and cases cited therein.
214. 49 Ark. 492, 5 S.W. 883 (1887).
215. 267 Ark. 192, 589 S.W.2d 579 (1979).

ceive in his person, property or character." *Williams* and *Grimmett* equate "a remedy in the laws" with "a remedy in the courts." They never explain why a remedy before an administrative agency fails to satisfy the constitution.[216] Even if article II, section 13 does entitle a person to a remedy in the courts "for all injuries and wrongs," the right, like the right to a jury trial, probably applies only in those circumstances in which the right to a remedy in the courts existed at the time the constitution was adopted. Statutes abolishing or limiting common law causes of action have often been attacked as violative of the provision. The court has ruled that article II, section 13 protects only those rights of action that were well established when the constitution was adopted, and that it does not limit the power of the General Assembly to enact remedial legislation.[217] When the General Assembly passes a statute recognizing a new type of "injury" or "wrong" (i.e., it creates a new right or remedy), it can constitutionally provide for the right or remedy to be enforced in a forum other than a court.[218]

A final constitutional obstacle to using an administrative agency to adjudicate disputes between two private parties is the separation of powers article. *Thornbrough v. Williams* is the only case discussed above in which the issue was specifically raised, and it is difficult to draw conclusions about the status of Arkansas law from that one opinion. The question was considered recently by the United State Supreme Court in *Northen Pipeline Construction Co. v. Marathon Pipe Line.*[219] At issue was the constitutionality of the Bankruptcy Reform Act, which extended the jurisdiction of bankruptcy judges to "all civil proceedings arising under Title 11 (the Bankruptcy Code) or rising in or related to cases under Title 11." Article III of the United States Constitution vests the judicial power of the United States in the Supreme Court and such inferior courts as Congress shall establish. Because bankruptcy judges did not enjoy the life tenure or protection from salary diminution provided by Article III of the Constitution, they were

216. *Cf.* Alcorn v. Bliss-Cook Oak Co., 133 Ark. 118, 201 S.W. 797 (1918) (statute authorizing levee inspectors to levy assessments which became a lien on property did not deny landowner its "day in court" since owner had opportunity to appear before inspectors and contest assessment levied against its property); State Medical Bd. of Ark. Medical Society v. McCrary, 95 Ark. 511, 130 S.W. 544 (1910) (due process or "law of the land" was not synonymous with a judicial proceeding).

217. *See* Hardin v. City of Devalls Bluff, 256 Ark. 480, 508 S.W.2d 559 (1974) and cases cited therein.

218. *Compare* the quotation from J. L. Williams & Sons, Inc. v. Smith, 205 Ark. 604, 608, 170 S.W.2d 82, 84 (1943). *See supra* note 201 and accompanying text for the quotation.

219. 458 U.S. 50 (1982).

not Article III judges. Hence, the question before the Court was whether judicial power could be exercised by judges who did not enjoy the protection of Article III. According to the Court, two principles determine the extent to which Congress can vest nonjudicial tribunals with the power to adjudicate "private rights:"[220]

(1) When Congress creates a substantive federal right, it has substantial discretion to determine the manner in which the right is to be adjudicated and can constitutionally assign some fact-finding functions related to such adjudication to non-Article III tribunals.

(2) The fact-finding functions assigned to non-Article III tribunals must be limited in such a way as to ensure that the "essential attributes" of judicial power are retained in an Article III court.

The bankruptcy court system failed both tests. The rights subject to adjudication were not created by Congress, and all "essential attributes" of judicial power were vested in the bankruptcy court. A majority of the Court in *Northern Pipeline Construction Co.* did not view the assignment of fact-finding functions to non-Article III tribunals as an exception to the separation of powers doctrine. Instead, the use of nonjudicial tribunals as fact-finding "adjuncts" to Article III courts was entirely consistent with the constitutional vesting of judicial power in Article III courts so long as the "essential attributes" of judicial power were retained in Article III courts.[221]

There is precedent in the opinions of the Arkansas Supreme Court that would permit using administrative agencies to adjudicate private rights when the two principles discussed in *Northern Pipeline Construction Co.* are satisfied. The dictum from *J. L. Williams & Sons, Inc.* supports the first of the two principles: when the General Assembly creates a remedy, it can attach to the remedy the condition that it be enforced before an administrative agency.[222] In *Oates v. Rogers*,[223] which involved a statute that vested judges with appointment powers reserved to the executive branch, the Arkansas Supreme Court endorsed a separation of powers rule similar to the second principle. The court adopted as the "true construction" of the separation of powers article the rule that: "A statute is not invalid as improperly conferring executive powers where the actual power of the executive department is not really diminished."[224] Likewise, a statute is not invalid as improp-

220. *Id.* at 80-81.
221. *Id.* at 77 n.29.
222. 205 Ark. 604, 170 S.W.2d 82 (1943).
223. 201 Ark. 335, 144 S.W.2d 457 (1940).
224. *Id.* at 339, 144 S.W.2d at 459.

erly conferring judicial powers where the actual power of the judicial department is not really diminished. And the actual power of the judicial department is not diminished when an administrative agency adjudicates private rights so long as the essential attributes of judicial power are retained by the courts.

If the courts are to retain the essential attributes of judicial power in a system where administrative agencies make determinations affecting private rights, then the decisions of those agencies must be subject to judicial review. Thus, we can reject at the outset the suggestion in *J. L. Williams & Sons, Inc.* that the General Assembly could insulate from judicial review administrative decisions affecting legislatively created private rights.[225] If judicial review is available, then the courts will have the final say on questions of constitutional and statutory construction as well as other questions of law. Such questions must be decided independently by the courts, and there is no reason to give the conclusions of an administrative agency on issues of law any particular weight.[226]

A more difficult problem is the effect to be given factual determinations by an administrative agency that affect private rights. If such factual determinations are subject to de novo review by a court, then clearly the essential attributes of judicial power are retained by the judicial branch. The availability of de novo review was primarily responsible for the supreme court's willingness in *Thornbrough v. Williams* to sanction the use of a nonjudicial officer to decide rights under a private employment contract.[227] Similarly, in *Morley v. Fifty Cases of Whiskey*,[228] which involved factual determinations affecting public rights, the availability of de novo judicial review mooted any separation of powers problems. What is not clear from the Arkansas decisions is whether the power of the judiciary is "really diminished" when the applicable statute provides for anything less than de novo review of fac-

225. *See supra* note 203 and accompanying text. The supreme court later indicated that the statement in *J. L. Williams & Son, Inc.* regarding judicial review was probably untenable. Ward School Bus Mfg., Inc. v. Fowler, 261 Ark. 100, 547 S.W.2d 394 (1977).

226. *See* Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n, 267 Ark. 550, 593 S.W.2d 434 (1980):

> It is not for the courts to advise the commission how to discharge its functions in arriving at findings of fact or in exercising its discretion. . . . On the other hand, it is clearly for the courts to decide the questions of law involved and to direct the commission where it has not 'pursued' its authority in compliance with the statutes governing it or with the state or federal constitutions.

Id. at 557, 593 S.W.2d at 439.

227. 225 Ark. 709, 284 S.W.2d 641 (1955).

228. 216 Ark. 528, 226 S.W.2d 344 (1950).

tual determinations by a nonjudicial tribunal.

The United States Supreme Court does not require that factual determinations by an administrative agency affecting private rights be subject to de novo judicial review. The use of administrative agencies as fact-finding adjuncts of Article III courts was first approved in *Crowell v. Benson*,[229] which involved the constitutionality of a statute that vested the United States Employees' Compensation Commission with the power to make factual determinations related to the compensation of employees for work-related injuries incurred upon the navigable waters of the United States. Orders of the Commission were appealable to the courts where they could be set aside if "not supported by the evidence." The employer in *Crowell v. Benson* challenged an award of the Commission on several grounds including the contention that the statute represented an unconstitutional attempt to vest the judicial power of the United States in a non-Article III tribunal. After discussing the "public rights" exception to the requirement that judicial power be vested in Article III courts,[230] the court turned to the case before it:

> The present case does not fall within the categories just described but is one of private right, that is, of the liability of one individual to another under the law as defined. But in cases of that sort, there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges. On the common law side of the Federal courts, the aid of juries is not only deemed appropriate but is required by the Constitution itself. In cases of equity and admiralty, it is historic practice to call to the assistance of the courts, without the consent of the parties, masters and commissioners or assessors, to pass upon certain classes of questions, as, for example, to take and state an account or to find the amount of damages. While the reports of masters and commissioners in such cases are essentially of an advisory nature, it has not been the practice to disturb their findings when they are properly based upon evidence, in the absence of errors of law, and the parties have no right to demand that the court shall redetermine the facts thus found.[231]

229. 285 U.S. 22 (1932).

230. *See supra* note 180 and accompanying text.

231. 285 U.S. at 51-52. The United States Supreme Court has since applied the same reasoning to other situations. *See* United States v. Raddatz, 447 U.S. 667 (1980); Atlas Roofing Co. v. Occupational Safety Comm'n, 430 U.S. 442 (1977). In *Raddatz* the Court upheld the use of a magistrate to adjudicate constitutionally created rights, but the findings and recommendations of the magistrate were subject to de novo review by the district court.

A similar argument can be made under the Arkansas separation of powers article. The use of nonjudicial tribunals as fact-finding adjuncts of the courts does not really detract from the judicial power of the courts even when the findings of fact are subject to less than de novo review by the courts. In fact, if the analogy to masters and commissioners is accepted, the argument that de novo review is unnecessary becomes quite compelling. Arkansas courts are empowered to use masters, commissioners, or assessors to make findings of fact in cases involving private rights to which the right to a jury trial does not apply.[232] The court must accept such findings of fact "unless clearly erroneous."[233] While a "clearly erroneous" standard might result in too much weight being given to the factual determinations of the nonjudicial tribunal,[234] perhaps a less deferential standard, such as whether the determination is "supported by substantial evidence," would suffice to prevent any real diminution in the judicial power of the court.

VII. SEPARATION OF POWERS AND THE PUBLIC SERVICE COMMISSION

At this point, it should be apparent that the supreme court's opinion in *Ozarks* oversimplifies the actual allocation of powers between the courts and administrative agencies. Administrative agencies can, in certain situations, be empowered to "investigate, declare, and enforce liabilities as they stand on present or past facts and under laws supposed already to exist."[235] Separation of powers does not necessarily preclude an administrative agency from determining "issues of fact from past actions involving a particular individual within existing laws and deciding the liabilities involved."[236] Agency jurisdiction is not limited to "looking to the future and making a new rule or standard affecting the public or group generally."[237]

It may be unfair, though, to treat the *Ozarks* opinion as a comprehensive statement of the standards to be used to allocate powers between the courts and administrative agencies. The tests that were used

232. ARK. R. CIV. P. 53.

233. ARK. R. CIV. P. 53(e)(1).

234. In Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), the application of a "clearly erroneous" rather than a "substantial evidence" standard to factual determinations of the bankruptcy court was one of the reasons the court held that the Bankruptcy Reform Act failed to retain the "essential attributes" of judicial power in an Article III court. 458 U.S. at 85.

235. *See supra* note 12 and accompanying text for the complete quotation.

236. *See supra* note 13 and accompanying text for the complete quotation.

237. *Id.*

in *Ozarks* have been applied most often in cases involving the Arkansas Public Service Commission,[238] and the court may have been referring solely to limits on the powers of that agency when it made or endorsed the statements quoted above. The Commission is a part of the legislative department,[239] and many of its functions, such as setting rates[240] and allocating service territories,[241] are clearly legislative in character, even under the restrictive definition of legislative power employed by the court in *Ozarks*.[242] But, in accordance with the cases and principles discussed above, the Commission can also make factual determinations affecting the rights and liabilities of a particular person.

A. *Eminent Domain Proceedings*

Before undertaking certain types of new construction, public utilities are required to secure a Commission determination of the "public necessity" or "public need" for the construction.[243] Once a utility has obtained a construction certificate from the Commission, it can then proceed in circuit court to condemn private property in connection with the construction.[244] The Commission's determination of the need for new construction, as well as the site or route of the construction, obviously affects the particular property owners whose land may be taken

238. *See supra* note 12.

239. Although it is not always clear whether a particular administrative agency should be assigned to the executive department or the legislative department, the Public Serv. Commission has traditionally been treated as a part of the legislative department. *See* Dept. of Pub. Util. v. Arkansas Louisiana Gas Co., 200 Ark. 983, 142 S.W.2d 213 (1940); Dept. of Pub. Util. v. McConnell, 198 Ark. 502, 130 S.W.2d 9 (1939).

240. ARK. STAT. ANN. §§ 73-117, 73-202a, 73-218 (1979); ARK. STAT. ANN. § 73-217 (Supp. 1983).

241. ARK. STAT. ANN. §§ 73-240, 73-241 (1979).

242. *See also* Southwestern Bell Tel. Co. v. Arkansas Public Serv. Comm'n, 267 Ark. 550, 593 S.W.2d 434 (1980) (ratemaking is a legislative function); Southwestern Elec. Power Co. v. Coxsey, 257 Ark. 534, 518 S.W.2d 485 (1975) (allocation of service territories is a legislative function).

243. ARK. STAT. ANN. § 73-240 (1979) provides: "No new construction or operation of any equipment or facilities for supplying a public service, or extension thereof, shall be undertaken without first obtaining from the Commission a certificate that public convenience and necessity require, or will require, such construction or operation . . . ." The Utility Facility Environmental and Economic Protection Act, 1973 Ark. Acts 164 codified at ARK. STAT. ANN. §§ 73-276 to 73-276.18 (1979) requires utilities to obtain a certificate of environmental compatibility and public need before undertaking the construction of a "major utility facility."

244. *See* ARK. STAT. ANN. § 73-276.15 (1979), which applies to eminent domain proceedings following the issuance of a certificate of environmental compatibility and public need with respect to a major utility facility. *See also* ARK. STAT. ANN. § 35-201 (1962) (telegraph and telephone companies); ARK. STAT. ANN. § 35-305 (1962) (light and power utilities); ARK. STAT. ANN. § 35-405 (1962) (water and electric utilities supplying municipalities); ARK. STAT. ANN. § 35-602 (1962) (oil and natural gas pipelines).

or damaged in connection with the construction. An owner can intervene in the administrative proceeding before the Commission and appeal the Commission's determination to the courts,[245] but the typical case he is not entitled to have the courts determine (or redetermine) the "public necessity" or "public need" for the proposed construction. The "public necessity" or "public need" considered by the Commission refers to the utility's need for the new facilities in order to provide adequate utility service to the public. Any right to judicial review of such a determination is a matter of legislative grace.[246] While it is true that the landowner has a right to an independent judicial determination that his property is being taken for a public and not a private purpose, the public versus private question is seldom presented when a utility applies for a certificate to undertake new construction.[247] In the event a landowner did contend that a public utility was attempting to take his property for a private rather than a public purpose, he would be entitled under article II, section 22 of the Arkansas Constitution to de novo judicial review of the Commission's determination on the question. But the Commission's determination that a particular facility or transmission line is needed in order to assure adequate utility service to the public, as well as its determination of the exact site of the facility or the route of a transmission line, involves the exercise of legislative discretion, and a court is not free to substitute its judgment for that of the Commission.

The Commission can also be empowered, in certain cases, to decide the amount of damages to be paid in a condemnation proceeding. As discussed above, the landowner whose property is taken by a public utility is constitutionally entitled to have a jury determine the compen-

245. Any person residing in a county or municipality in which a major utility facility is to be located may intervene in a proceeding to issue a certificate of environmental compatibility and public need. ARK. STAT. ANN. § 73-276.6 (1979). There is no statutory requirement that landowners be permitted to intervene in a proceeding under ARK. STAT. ANN. § 73-240 to issue a certificate of public convenience and necessity for new construction, but Commission rules permit such an intervention. *See* Rule 3.04, Arkansas Public Service Commission Rules of Practice and Procedure (1981).

246. *See* the quotation from Sloan v. Lawrence County, 134 Ark. 121, 203 S.W. 260 (1925) in the text accompanying note 99. Any party to a proceeding before the Commission can obtain judicial review in the Circuit Court of Pulaski County of a Commission determination of "public necessity" or "public need." ARK. STAT. ANN. §§ 73-229.1, 73-276.10 (1979). Review is limited to determining "whether the Commission's findings [of fact] are . . . supported by substantial evidence, and whether the Commission has regularly pursued its authority, including a determination of whether the order or decision under review violated any right of the petitioner under the laws of Constitution of the United States or of the State of Arkansas." ARK. STAT. ANN. § 73-229.1(b) (1979).

247. *See supra* note 109 and accompanying text.

sation question, and the legislature could not delegate this function to the Commission.[248] But a public utility whose property is condemned by a municipality is not entitled to a jury trial on the question of compensation,[249] and the General Assembly can, and has, assigned this function to the Commission rather than the courts.[250] Despite language in *Town of Hoxie v. Gibson*[251] suggesting that fixing the amount of compensation is a judicial power, allowing the Commission to exercise this power does not violate separation of powers. The amount of compensation to be paid when a municipality condemns privately owned utility property affects the future rates of customers thereafter served by both the municipal utility and the privately owned utility. The public interests at stake on both sides, as well as the expertise of the Commission in determining the value of utility property, justify using the Commission rather than the courts to resolve the controversy.[252] The judicial power of the courts is not really diminished by the procedure. The Commission's determination on the compensation question is subject to judicial review, and since the determination involves "constitutional facts," the appropriate standard of review is de novo rather than the substantial evidence standard generally applicable to Commission decisions.[253]

B. *Election Contests*

In at least one situation, it might be desirable to vest the Public Service Commission with the power to decide election contests. Act 324 of 1935[254] requires that any municipal city council decision to acquire the property of a privately owned utility be ratified at a general or

248. ARK. CONST. art. IV, § 9.

249. *See supra* note 114.

250. 1935 Ark. Acts 324, § 49, codified at ARK. STAT. ANN. § 73-247 (1979).

251. 155 Ark. 338, 343, 245 S.W. 332, 333 (1922).

252. In City of Helena v. Arkansas Util. Co., 208 Ark. 442, 186 S.W.2d 873 (1945), the court held that 1935 Ark. Acts 324, § 49 did not repeal an earlier act allowing municipalities to condemn a privately owned waterworks system in a circuit court. In response to the utility's contention that the Utilities Commission (a forerunner of the Public Service Commission) was better equipped than a circuit court jury to determine the value of utility property, the court said:

> While, as appellee contends, the Utilities Commission might be better equipped to determine values of the component parts of such a system than would a jury of 12 men, this is an argument that might be addressed to the Legislature with more success than to the courts, as the Legislature may provide the procedure for the condemnation of private property for public use within constitutional bounds.

208 Ark. at 449, 186 S.W.2d at 786.

253. *See supra* note 111 for discussion of constitutional facts.

254. ARK. STAT. ANN. § 73-245 (1979).

special election. The appropriate forum for contesting a ratification election is probably the circuit court.[255] Since the Commission is empowered to determine the compensation paid the privately owned utility, condemnation proceedings would be expedited if the Commission were granted general jurisdiction over the proceedings, including jurisdiction to resolve any dispute regarding the ratification election. Such a jurisdictional grant would not violate separation of powers. As explained above, article XIX, section 24 of the Arkansas Constitution permits the General Assembly to designate a nonjudicial tribunal, such as the Commission, to hear election contests in cases not specifically provided for in the constitution.

C. *Territorial Disputes Between Utilities*

The Commission is empowered to issue certificates of public convenience and necessity that allocate to utilities the exclusive right to serve customers in particular geographical areas.[256] When it grants or revokes a certificate of public convenience and necessity, the Commission clearly acts in a legislative capacity.[257] In *Southwestern Electric Power Co. v. Coxsey,*[258] the supreme court applied the same tests as in *Ozarks* to distinguish judicial power from legislative power and held that chancery court was the appropriate forum for resolving a controversy between two utilities as to which was entitled to provide service to a particular customer under existing certificates from the Commission. The opinion is not clear as to whether the chancery court's jurisdiction was exclusive or only concurrent with the jurisdiction of the Commission. Under the principles developed above, there is no constitutional obstacle to vesting the Commission with the power to resolve such disputes despite the judicial nature of the inquiry. The Commission would be adjudicating a dispute between two private parties, but the claim or interest under consideration was created by the Commission. Neither party would be entitled to a jury trial under article II, section 7, nor to a remedy in the courts under article II, section 13. Moreover, the supreme court acknowledged in its opinion in *Southwestern Electric Power Co. v. Coxsey* that an adverse judicial decision interpreting rights under the certificates already in existence "would not prohibit any interested party from seeking legislative action by the (Public Ser-

255. *Cf.* Purdy v. Glover, 199 Ark. 63, 132 S.W.2d 821 (1939).

256. ARK. STAT. ANN. §§ 73-240, 73-241 (1979).

257. Redfield Tel. Co. v. Arkansas Pub. Serv. Comm'n, 273 Ark. 498, 621 S.W.2d 470 (1981).

258. 257 Ark. 534, 518 S.W.2d 485 (1981).

vice Commission) to reallocate the territory."[259] The courts should not adjudicate the rights of two parties when either party is free to seek modification of the court's decision in an administrative proceeding. If the Commission can not only adjudicate rights under existing certificates but also prospectively modify those rights, it would be far more efficient to require utilities to litigate such questions, at least initially, before the Commission.[260]

D. *Disputes Between Utilities and Customers Concerning Entitlement to Utility Service*

Although as a general proposition, a utility is required to provide service to all customers residing in the territory allocated to the utility, the Public Service Commission has adopted rules which specify when a utility can refuse to provide service to a potential customer[261] or terminate service to an existing customer.[262] Does the Commission have jurisdiction to resolve a dispute between a utility and a potential or existing customer regarding the application of these rules? If the definition of judicial power used in *Ozarks* were applied, the answer would be in the negative because the controversy involves the application of existing rules to a particular factual situation in order to determine the rights and liabilities of two private parties. But the right to utility service was created by the General Assembly and refined by the Commission. Clearly, there is no right to a jury trial on any factual issues underlying the customer's claim. According to *J. L. Williams & Son, Inc. v. Smith*, when the legislature creates a right, it can attach to that right the condition that it be enforced only before an administrative agency.[263] The Commission should therefore be allowed to resolve a dispute concerning entitlement to utility service.[264]

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259. *Id.* at 537, 518 S.W.2d at 487.

260. In order to promote uniformity of regulation, federal courts will often defer to an administrative agency pursuant to the doctrine of "primary jurisdiction." *See* Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907). *See also* Convisser, *Primary Jurisdiction: The Rule and Its Rationalizations*, 65 YALE L. J. 315 (1956); Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037 (1964).

261. Rule 7, APSC Rules.

262. Rule 8, APSC Rules.

263. *See supra* note 201 and accompanying text.

264. ARK. STAT. ANN. §73-1816 (1979) requires every telephone company doing business in the state to provide service to all applicants within its territory within ten days of a written demand for service. Although the right created by the statute was enforceable at one time by civil action in circuit court, the statute was amended in 1955 to transfer jurisdiction to the Public Service Commission. 1955 Ark. Acts. 120. For the reasons stated in the text, this is not unconstitutional delegation of judicial power to the Commission.

Entitlement to utility service can also be analogized to entitlement to public benefits. When the legislature decides to confer benefits such as welfare assistance or unemployment compensation, separation of powers does not preclude the use of an administrative agency to determine whether a particular person qualifies for the benefits. Likewise, the General Assembly can delegate to the Public Service Commission rather than the courts the power to determine whether, under existing laws and rules, a particular person should receive utility service.[265]

It can even be argued that determining whether a utility should be required to serve a particular customer involves the exercise of legislative discretion. For example, a potential customer may live a considerable distance from a utility's existing distribution system. Whether the utility should be required to extend its lines to serve that customer may involve questions of public policy such as the extent to which the capital costs of extending service should be paid by the customer who desires service and the extent to which they should be paid by the remaining customers of the utility. Such public policy questions should be decided by Public Service Commission, and a court may be encroaching upon legislative perrogatives when it attempts to determine the conditions upon which a customer is entitled to service.

E. *Billing Disputes Between Utilities and Customers*

Ozarks involved a dispute between a privately owned utility and one of its customers concerning the amount due the utility for utility service. The principal constitutional constraints on the power of the General Assembly to use an administrative agency to adjudicate controversies between two private parties are the right to trial by jury guaranteed by article II, section 7, and the right to a remedy in the courts guaranteed by article II, section 13. The right to a jury trial on issues of fact probably applies to all actions for the recovery of money.[266] It is doubtful that the General Assembly could empower the Public Service Commission to adjudicate controversies in which the remedy sought, whether by a customer or by a utility, was the recovery of money. The customer in *Ozarks* was entitled to have his claim adjudicated in circuit court, not because the inquiry was exclusively judicial

265. *See supra* note 39 and accompanying text.

266. *See* Waddell v. State, 235 Ark. 293, 357 S.W.2d 651 (1962) (right to a jury trial applied to a bastardy proceeding since the action was one for the recovery of money). *See also* ARK. STAT. ANN. § 27-1704 (1979): "Issues of fact, arising in action by proceeding at law for the recovery of money, or of specific real or personal property, shall be tried by a jury unless a jury trial is waived."

in character, but because only the circuit court could offer him the jury trial guaranteed by the constitution.[267] The supreme court was correct when it held in *Ozarks* that the circuit court was the only forum in which the customer could litigate his claim, but it could have based that holding on narrower grounds than separation of powers.

Determining the appropriate forum for resolving a billing dispute is more problematical when there are no factual questions underlying the dispute, and the only question to be resolved is the interpretation of a Commission approved tariff. Neither the utility nor its customer is entitled to have a jury interpret and apply Commission approved tariffs. The "right" to be served under a particular tariff is a Commission created right, and when the right to a jury trial is inapplicable, separation of powers does not preclude the Commission from resolving a dispute between a utility and one of its customers concerning the interpretation of a Commission approved tariff or concerning which of several Commission approved tariffs applied to the customer. This last statement is supported not only by the language of *J.L. Williams & Son, Inc.*[268] but also by a recent supreme court decision.

In 1979 the Attorney General instituted an action before the Commission asserting that a utility had misinterpreted a Commission order when it applied a fuel adjustment clause. The Commission agreed and ordered the utility to refund nearly eight million dollars to its customers. In *Arkansas Power & Light Co. v. Arkansas Public Service Commission,*[269] which was issued shortly before its decision in *Ozarks*, the supreme court affirmed the Commission's order. There is no suggestion in the opinion that the Commission lacked the power to interpret and apply its own rate order because such an inquiry was judicial in character. The *Arkansas Power & Light Co.* action was instituted on behalf of all utility customers and involved the interpretation of a Commission rate order rather than a Commission tariff, but these aspects of the case are not significant for separation of powers purposes. If a single customer instituted an action before the Commission asserting that a utility had misinterpreted a Commission approved tariff and seeking a refund of amounts previously paid the utility, the separation of powers doctrine should not preclude the Commission from resolving the

267. The fact that the customer in *Ozarks* joined an action for malicious prosecution with his action to recover the $1,500 previously paid the utility strengthens the argument that the circuit court was the appropriate forum. Clearly, the Public Service Commission could not have awarded damages for malicious prosecution.

268. *See supra* note 201 and accompanying text.

269. 275 Ark. 164, 628 S.W.2d 555 (1982).

dispute.[270]

The opinion in *Ozarks* implies that under no circumstances could the Commission hear a dispute of the type involved in that case. This is contrary to the court's conclusion in *Thornbrough v. Williams*.[271] The latter case teaches that an administrative agency can adjudicate a dispute between two private parties, even a common law action to which the right to a jury trial applies, so long as either party can refuse to accept the finding of the agency and institute an original action in court. The Commission offers a relatively inexpensive, expeditious, and expert forum for resolving billing disputes which both customers and utilities may find preferable to the courts.[272] Pursuant to the holding of

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270. In Kansas City S. Ry. v. Tonn, 102 Ark. 20, 143 S.W. 577 (1912), a railroad contended that the Interstate Commerce Commission had sole jurisdiction to determine whether the rate charged an Arkansas shipper was reasonable. The supreme court held that the Arkansas courts had jurisdiction to consider the action since they were determining which tariff applied to the shipper, not whether the tariff was reasonable. The holding is not inconsistent with the argument made in the text. It simply illustrates that the courts and the Arkansas Public Service Commission may have concurrent jurisdiction to adjudicate disputes involving the interpretation and application of Commission approved tariffs to a particular customer.

Courts in other jurisdictions are split on whether a public utilities commission may adjudicate disputes between a customer and a utility concerning the application of tariffs. North v. City of Burlington-Elec. Light Dept., 125 Vt. 240, 214 A.2d 82 (1965), upheld the power. *See also* Delaware Coach Co. v. Pub. Serv. Comm'n of State of Del., 265 F. Supp. 648 (D. Del. 1967). The Missouri Supreme Court treats the matter as a contract dispute between private parties that can be resolved only by the courts. Wilshire Constr. Co. v. Union Elec. Co., 463 S.W.2d 903 (Mo. 1971). *See also* Katz Drug Co. v. Kansas City Power and Light Co., 303 S.W.2d 672 (Mo. Ct. App. 1957); May Department Stores Co. v. Union Elec. Light & Power Co., 341 Mo. 299, 107 S.W.2d 41 (1937).

271. 225 Ark. 709, 284 S.W.2d 641 (1955).

272. The current procedure for resolving billing disputes is set out in Rule 8(J) of the APSC Rules. A customer who disputes his liability for utility service and who is unable to reach a satisfactory settlement with the utility may seek informal review of the matter by the complaints section of the Commission. Rule 8(J)(2), APSC Rules. The complaints section contacts the utility and conducts an informal investigation which may include an informal conference with the parties or their representatives. Rule 8(J)(5), APSC Rules. The complaints section must issue a written informal decision "affirming, modifying, or reversing the utility's resolution of the dispute" within fourteen days of receipt of the response from the utility or within ten days of the date of an informal conference, whichever is sooner. Rule 8(J)(6), APSC Rules. Either party may appeal the informal decision to the Commission, which then conducts a full-blown hearing on the matter at Commission expense. Rule 8(J)(9) and (10), APSC Rules. The Commission's decision is subject to judicial review as provided by law. Rule 8(J)(10)(f), APSC Rules. The customer is not required to pay any filing fees in order to seek either informal or formal review of a billing dispute. At both the informal conference before the complaints section or the formal hearing before the Commission, the customer is entitled to representation by counsel or "another person" of his choice. Rule 8(J)(5)(a) and (10)(a), APSC Rules.

When a customer disputes a threatened termination of utility service, termination is postponed until "all investigations and hearings regarding the complaint are ended." Rule 8(J)(11), APSC Rules. If service has already been terminated, the customer can obtain a hearing before the Commission within three days and a decision within one day after the hearing. Rule 8(J)(12), APSC

Thornbrough v. Williams, the proceeding before the Commission might be little more than a nonbinding arbitration, but doubtlessly many customers and utilities would accept the findings of the Commission and not insist on relitigating the matter before a court. If it were made clear, by statute or possibly by Commission rule, that submitting a billing dispute to the Commission constituted a waiver of a party's right to a jury trial, the way would be open to giving the Commission's factual determinations some weight in a subsequent court proceeding.

VIII. CONCLUSION

The increased use in recent years of administrative agencies to discharge the functions of state and local government has at times strained the tripartite separation of governmental powers incorporated into the Arkansas Constitution. On the one hand, administrative agencies have been delegated powers that resemble judicial powers and that, in many instances, could have been delegated to the courts. On the other hand, the courts have been given the power to scrutinize agency decisions more closely than is generally the case with other types of legislative and executive action. If the spirit of a tripartite separation of powers is to be preserved, the Arkansas Supreme Court should concentrate on developing appropriate standards of judicial review of administrative action.

In dealing with the problem of administrative agencies that exercise judicial powers, the supreme court should forego its efforts to develop workable definitions of judicial and legislative power. Many of the powers currently being exercised by state and local government cannot be neatly classified as either exclusively judicial, exclusively legislative, or exclusively executive in character. Clearly, there are certain powers that, either through historical precedent or by virtue of express constitutional language, are assigned exclusively to one department of government, and no one would quarrel with strict enforcement of separation of powers when dealing with such powers. But the three departments of government are at best only power centers. As Professor Louis Jaffe, who has written extensively on the subject of separation of powers and administrative agencies, has observed, the logic of separation of powers is the "logic of polarity rather than strict classification."[273] As

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Rules.

273. L. Jaffe, *supra* note 111, at 32. The same thought has been expressed by a number of commentators on the subject of separation of powers:

> Honest appraisal of the matter demonstrates that the doctrine of separation of powers involves the *broad* division of powers among the legislature, the executive, and the judi-

one moves outward from the three power centers, there is often no sharp line demarcating the boundary between one department of government and another. Instead, there are "gray areas" in which some blending of powers is inevitable. The Arkansas Supreme Court seems to have accepted the blending of executive and legislative powers that characterizes many administrative agencies.[274] It can likewise sanction some blending of judicial and legislative powers without sacrificing the basic purposes underlying the separation of powers doctrine.[275]

Separation of powers was designed to allocate governmental powers among the three departments so that no one department became too powerful at the expense of the other two.[276] This basic purpose is not

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> ciary, but with no expectation of complete separation. There is, in fact, a blending of powers with no purity of any branch.

Ingram, *The Executive*, 7 NAT. RESOURCES J. 267, 273 (1967).

> The fear of power concentrated in the hands of any single class or group has, among other things, influenced the doctrine of separation of powers among the various organs of government. It is not that there is always a clear-cut distinction between the functions of legislation and administration, between legislative, executive, and judicial 'powers.' Nor is it supposed that the functions of government can or should be distributed in any perfectly systematic way to different organs.

Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 U. CHI. L. REV. 385, 385-86 (1935).

> It has been concluded that governmental functions do not lend themselves to rigid classification as purely judicial or purely legislative, and that, even if they did, the three branches of government are not so exclusive of each other so as to preclude a function classified as judicial from being exercised by either of the other branches.

Force, *supra* note 63, at 97.

274. *See* Hickenbottom v. McCain, 207 Ark. 485, 181 S.W.2d 226 (1944).

275. It is only fair to note that the Arkansas Supreme Court has on at least one occasion expressly rejected the argument that the practicalities of government necessitate some blending of powers. In Oates v. Rogers, 201 Ark. 335, 144 S.W.2d 457 (1940), the court was asked to approve the following conclusion from the dissent in Springer v. Phillippine Islands, 277 U.S. 189, 209, 211 (1928):

> The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other. . . . It does not seem to need argument to show that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments. . . .

The Arkansas Supreme Court stated that this conclusion regarding the implicit separation of powers at the federal level did not apply to the express separation of powers mandated by the Arkansas Constitution and that the Arkansas "system, providing as it does for distinct separation of departments, did not in its inception contemplate a blending of authority." 201 Ark. at 346, 144 S.W.2d at 462.

276. The author with the most influence on the American doctrine of separation of powers was probably Montesquieu. *See* Sharp, *supra* note 273, 390-91; Utton, *Constitutional Limitations on the Exercise of Judicial Functions by Administrative Agencies*, 7 NAT. RESOURCES J. 599, 600-04 (1967). In commenting on Montesquieu's classic statement of the justification for separation of powers, Madison, who was one of the principal American exponents of the doctrine, stated:

jeopardized when an administrative agency exercises powers lying in the gray area between the judicial and legislative departments so long as, to use the terminology of the United States Supreme Court, "the essential attributes of judicial power" are retained by the courts,[277] or, to use the terminology of the Arkansas Supreme Court, "the actual power of the judicial department is not diminished."[278] There is little danger that administrative agencies will exercise the *essential* attributes of judicial power or diminish the *actual* power of the judicial department so long as the courts have the ultimate power to review and control agency action. The courts must ultimately interpret and apply any constitutional and statutory provisions limiting or otherwise affecting agency action. The courts must ultimately determine all questions of law related to agency action, including the legal sufficiency of the evidence supporting agency determinations of fact. The courts must act as the ultimate guardians against arbitrary and capricious agency action.[279]

Focusing on judicial review of agency action is also critical when dealing with the second type of separation of powers problem. Separation of powers serves the salutory purpose of preventing judicial entanglement in policy decisions that should be resolved by the political processes of the legislative and executive departments. If the court is concentrating on the problems of judicial review of agency action, rather than attempting to develop definitions that neatly distinguish judicial power and legislative power, it less likely to be lulled into al-

> 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 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.

THE FEDERALIST NO. 47, at 314 (J. Madison) (Earle ed. 1937). The drafters of the Arkansas separation of powers article were surely aware of the historical justification for separating governmental powers among the three departments of government.

277. *See supra* note 220 and accompanying text.

278. The statement is a paraphrase of the "true construction" of the Arkansas separation of powers provision as adopted by the Arkansas Supreme Court in Oates v. Rogers, 201 Ark. 335, 144 S.W.2d 457 (1940). *See supra* note 224 and accompanying text for the court's actual statement.

279. *See* Force, *supra* note 63, at 97-98. *Cf.* Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n, 267 Ark. 550, 593 S.W.2d 434 (1980).

lowing lower courts to decide questions involving the exercise of executive or legislative discretion.