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OUR CONSTITUTION provides that "all legislative Powers" shall be vested in Congress;[1] "the executive Power" in the President;[2] and then Article III states: "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." This grant of power received a very thorough analysis by the Supreme Court in 1816. The Court of Appeals of Virginia had refused to obey a mandate on the ground that "the appellate power of the Supreme Court of the United States does not extend to this court, under a sound construction of the constitution of the United States." This required a thorough investigation of the meaning of the words used in Article III.

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Justice Story, speaking for the Supreme Court, said: "The object of the constitution was to establish three great departments of government; the legislative, the executive and the judicial department. The first was to pass laws, the second, to approve and execute them, and the third, to expound and enforce them. Without the latter, it would be impossible to carry into effect some of the express provisions of the constitution."

Justice Story then asked: "Could Congress have lawfully refused to create a Supreme Court, or to vest in it the constitutional jurisdiction?" He answered that question by stating that the language of the Article throughout was mandatory upon the legislature. "Its obligatory force" was "imperative." Congress could not "without a violation of its duty, have refused to carry

[1] U. S. CONST. Art. I, §1.

[2] U. S. CONST. Art. II, § 1.

it into operation." And he added: "It is a duty to vest the whole judicial power . . . . It would seem, therefore, to follow, that Congress are bound to create some inferior courts, in which to vest all that jurisdiction which, under the constitution, is exclusively vested in the United States, and of which the Supreme Court cannot take original cognizance."[3]

The Court was aware that it was dealing with questions which would affect "the very foundation of our government and the extent and character of the grant of judicial power." The Court affirmed that "Upon their right decision rests some of the most solid principles which have hitherto been supposed to sustain and protect the constitution itself." After holding that it was an imperative duty of the Congress to provide a Supreme Court and inferior courts in which the judicial power should vest, the court then said that "it cannot be denied that when it is vested, it may be exercised to the utmost constitutional extent. . . . And as there is nothing in the constitution which restrains or limits this power, it must, therefore . . . subsist in the utmost latitude of which, in its own nature, it is susceptible."[4]

Early in our history it was also decided that the Constitution should be interpreted in the light of English and Colonial history and the history of our jurisprudence. In the case mentioned, it was held that judicial power should be construed in the light of practice familiar "in courts acting according to the course of the common law." In subsequent cases the Court recognized that "the Constitution of the United States was ordained . . . by descendants of Englishmen who inherited the traditions of English law and history,"[5] and that "the interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history."[6]

As Judge Hutcheson has said, the Founders planted here "English notions of the rights of Englishmen." He insisted that to understand the Constitution truly, "one must know and understand what went into it and made it up, the springs from which it welled, the sources, the spirit of it all."[7]

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[3]Martin v. Hunter's Lessee, 1 Wheat. (14 U.S.) 304, 328, 329, 330, 331 (1816).

[4]*Id.* at 324, 337, 338.

[5]Hurtado v. California, 110 U. S. 516, 530, 4 Sup. Ct. 111, 118 (1884).

[6]Smith v. Alabama, 124 U. S. 465, 478, 8 Sup. Ct. 564, 569 (1888).

[7]HUTCHESON (JOSEPH C.), LAW AS LIBERATOR 63, 65 (1937).

The influence of judicial power in English history can hardly be over-estimated. The practical operation of constitutionalism was developed in the Middle Ages.[8] The great jurists and scholastics who had been trained in the Civil Law of Rome and the Canon Law of the Church studied the philosophy of law and examined the purpose and function of kingship, the State, in the light of classical humanism and Christian ethic. They discarded the theory of absolute sovereignty and the divine right of kings. They acknowledged that positive law was supported by and subject to the higher, or Natural, law. The ministers of state and justiciars, because of the independence and security of their positions as officers of the Church, could for the first time in history give practical effect to the theory of government subject to law. An Archdeacon who had served twenty years as a judge (Bracton) wrote the famous words *Rex non debet esse sub homine, sed sub Deo et lege,* which Coke three hundred years later quoted to King James. No one familiar with the history of the conflict between the Court of Common Pleas and the Crown courts, such as the Court of Requests, the Star Chamber, and the Court of High Commission, can be unmindful of the contribution of the judges of England to the implementation of the rights and immunities which we now find crystallized in Magna Charta, the Petition of Right, the Bill of Rights, and finally in the Declaration of Independence and our own Constitution. All our basic freedoms were forged and formed by the judicial process.

The great difficulty is, however, that in spite of the magnificent accomplishments of the judicial power, there is still wanting a general or popular appreciation of its place and purpose. Although the judicial function is the very source and guaranty of our basic rights and security, the popular tendency is to think of the judicial process as only a restraint on liberty. The general trend, therefore, toward ever greater freedom (the "popular vortex", as Madison called it) tends continually to weaken the judicial power. Subversive agents, moreover, who know the effect of judicial power, try to undermine it.

The general effect of our political evolution during recent years has been to strengthen the legislative and the executive departments of government at the expense of the judicial department. Because of the very nature of the judicial department, it

[8] WILKIN (ROBERT N.), THE JUDICIAL FUNCTION AND INDUSTRIAL AND INTERNATIONAL DISPUTES, pt. 1, pp. 12, 13 and authorities there cited (1947).

being without initiative and burdened by a self-imposed reluctance and sense of propriety, its judiciary refrains from self-assertion and generally defers to other departments. In recent years, moreover, many judges, moved by a false sense of liberalism, have been reluctant to defend the judicial function and have imposed upon it unwarranted limitations. Thus the courts themselves have contributed to the erosion of the judicial power.

It is high time to consider again the purpose and function of this department of government. That there has been, and is still, a gradual decadence of judicial power is quite apparent; but the trouble is that there is no understanding of the significance of such change by the people generally, or even by lawyers generally. The need for some re-appraisement is made apparent by occurrences of the day and by what is being written by able jurists and scholars.

In the daily newspapers there is revealed a widespread effort to traduce and discredit the judicial office. Counsel representing the defendants on trial in New York on a charge of conspiracy to teach and advocate the forcible overthrow of the Government of the United States, have tried to dissipate and defeat the regular judicial processes in order to bring the trial to an inconclusive termination. Evidently they have sought to repeat the debacle of the espionage trial in Washington. That trial, after three months of bullying and bickering, terminated in the death of the judge. In another city a prominent newspaper recently had false entries inserted into a court's file in order to show that a divorce could be obtained by improper means. Such an act was of course a most extraordinary and outrageous contempt of court, but the most appalling revelation was the reaction of many people to the incident. They seemed to rejoice over what they thought had discredited the court or exposed it to ridicule. Too many people have no realization that the effect of such occurrences is the demoralization of the very source and security of their freedom.

The legislative hearings with reference to the repeal of the Taft-Hartley Act reveal an unwarranted suspicion and dread of the judicial process, on the part not only of labor leaders, but also of many legislators. In spite of the fact that the right to do collective bargaining was first recognized in a court of law,[9] and in spite of the record of satisfactory accomplishment by the judicial

[9]Commonwealth v. Hunt, 4 Metcalf (45 Mass.) 111 (1842).

[10]WILKIN, *op. cit. supra* note 8, at 62.

process wherever it has been employed with reference to industrial disputes,[10] courts are still mistrusted. That process which is resorted to for the settlement of all other controversies continues to be spoken of as an evil in labor-management relations. The legislators of our state and national governments failed to pass laws against economic oppression and bad practices, and then when the resentment against such oppression and practices resulted in open violence, and courts were called upon to maintain peace and order by injunction, the legislators became voluble about the futility of the injunction for the settlement of labor problems.

Instead of enacting general laws for the regulation of labor-management relations and the prevention of imperialistic practices, the tendency of legislatures for many years has been merely to restrict the power of courts to issue injunctions; *cf.* the Norris-LaGuardia Act, the Clayton Act, and the Sherman Anti-trust Act.

A further exemplification of legislative efforts to restrict the judicial power are found in the Act creating the Emergency Court of Appeals,[11] the law restricting appeals from the orders of the National Labor Relations Board,[12] and other limitations upon the right of citizens to resort to the ordinary trial courts of their community for the protection of their rights and immunities.

Paragraph I of Section 2 of Article III of our Constitution provides that "The judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." And paragraph 2 defines the "original jurisdiction" of the Supreme Court, and then provides: "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction both as to Law and Fact, with such Exceptions and under such Regulations as the Congress shall make."

The exceptions and regulations which the Congress has made and the Supreme Court has accepted have now engendered a very

[11] 56 STAT. 32 (1942), 50 U.S.C. APP. § 924 (Supp. 1945).

[12] 61 STAT. 146 (1947), 29 U.S.C. § 160 (f).

grave apprehension that the appellate power of the Court may become a nullity. The American Bar Association has recommended an amendment to the Constitution in order to preserve the appellate power of the Court and place it beyond the reach of destructive legislative influence.[13] Justice Roberts has spoken and written very convincingly in support of such an amendment.[14]

The Supreme Court has itself contributed to the delimitation of judicial power. It has so restricted the power of courts to punish for contempt[15] that one of the judges of our United States District Courts has said: "A District Judge must be able to show powder burns, if he expects to be upheld in a contempt proceeding."[16] But even more alarming is the tendency of the Supreme Court to impose other restrictions and prohibitions upon the exercise of judicial power. The Court's acceptance of the power of Congress to define the territorial jurisdiction of the inferior courts and to specify their jurisdiction as to subject-matter cannot be questioned. But it is a grave question whether the Congress ever had any authority to qualify or delimit the judicial power which courts should exercise after the territory and the subject-matter of their jurisdiction had been fixed. If Congress has the right to say that courts shall not issue injunctions in certain cases, there is no reason why it cannot forbid courts to employ other remedies, such as Specific Performance, Quo Warranto, Reformation, Cancellation, or otherwise direct the judicial processes. The holding of the Court in *Lockerty v. Phillips*[17] that the Constitution does not require Congress to confer equity jurisdiction on any particular inferior federal court seems in direct contradiction of the Constitution as interpreted in the case of *Martin v. Hunter's Lessee.*

In the recent case of *Lockerty v. Phillips,* Chief Justice Stone, speaking for the Court, said:

> All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to "ordain and establish" inferior courts, conferred on Congress by Article III, Section 1, of the Constitution. Article III left Congress free to establish inferior federal courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies

[13]34 A.B.A.J. 1072-1073 (1948).

[14]35 A.B.A.J. 1 (1949).

[15]Bridges v. California, 314 U.S. 252, 62 Sup. Ct. 190 (1941); Nye v. United States, 313 U.S. 33, 61 Sup. Ct. 110 (1941).

[16]McCOLLOCH (CLAUDE), NOTES OF A DISTRICT JUDGE (1948).

[17]319 U.S. 182, 63 Sup. Ct. 1019 (1943).

> afforded by state courts, with such appellate review by this Court as Congress might prescribe. *Kline v. Burke Construction Co.,* 260 U .S. 226, 234, and cases cited; *McIntire v. Wood,* 7 Cranch 504, 506. The Congressional power to ordain and establish inferior courts includes the power of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good. . . . [cases cited]. In the light of the explicit language of the Constitution and our decisions, it is plain that Congress has power to provide that the equity jurisdiction to restrain enforcement of the Act, or of regulations promulgated under it, be restricted to the Emergency Court, and, upon review of its decisions, to this Court. Nor can we doubt the authority of Congress to require that a plaintiff seeking such equitable relief resort to the Emergency Court only after pursuing the prescribed administrative procedure.[18]

As a matter of constitutional interpretation, and as a matter of public policy, in the full light of Anglo-American history, some of these general statements may well be doubted. As Professor Corwin said with reference to the case of *Yakus v. United States,* the Supreme Court confused jurisdiction and judicial power.[19] If such legislative power is to be upheld, it would better be placed on, and limited to, the war emergency, as suggested by Justice Roberts.

Evidently the Court itself had some misgivings, for the opinion in the *Lockerty* case closed with the following statement:

> Since appellants seek only an injunction which the district court is without authority to give, their bill of complaint was rightly dismissed. We have no occasion to determine now whether, or to what extent, appellants may challenge the constitutionality of the Act or the Regulation in courts other than the Emergency Court, either by way of defense to a criminal prosecution or in a civil suit brought for some other purpose than to restrain enforcement of the Act or regulations issued under it.

But this reservation was modified by the opinion in the *Yakus* case. Justice Rutledge in his dissenting opinion in that case presented the "crux" of the problem:

> . . . whenever the judicial power is called into play, it is responsible directly to the fundamental law and no other

[18] *Id.* at 187, 188, 63 Sup. Ct. at 1022, 1023.

[19] See McCOLLOCH (CLAUDE). NOTES OF A DISTRICT JUDGE 18 (1948).

> authority can intervene to force or authorize the judicial body to disregard it. The problem therefore is not solely one of individual right or due process of law. It is equally one of the separation and independence of the powers of government and of the constitutional integrity of the judicial process. . . . [20]

That some of our most respected students of constitutional history consider it high time to stop and assess again the true purpose of the judicial power is evident in recent publications. Charles C. Simons, Judge of the United States Court of Appeals for the Sixth Circuit, recently discussed "Judicial Powers: Their Exercise Without Constitutional Safeguards", and pointed out the extent of the dispersion of judicial power among administrative agencies. He said:

> Upon a number of occasions I have observed that many if not most of the great controversies that vitally affect the social and economic interests of the American people are no longer determined by the exercise of the constitutional grant of judicial power, but are in a realistic sense decided with finality by administrative boards and commissions, the personnel of which is not secured against political, economic and geographical influences by the safeguards which the constitutional grant throws about judges to insure the independent judgment of the Courts upon which they sit.[21]

Professor Edwin S. Corwin has recently written a book[22] on the evolution of *liberty* as a *judicial concept.* The distinguished author discusses "the rise, development, and decline" of that American use of the word *liberty* which treats it as a constitutional limitation, enforcible by courts against acts of the legislative branch of government. After guiding us through the labyrinth of decisions by the U. S. Supreme Court on liberty under the Constitution, he closes on a note of warning: "It is easy to imagine in the light shed by current ideologies that the demands upon the legislative power, national and State, might so multiply in behalf of 'the common man', whose century this is said to be, that the notion of liberty against Government and its implement, judicial review, would be gradually but inexorably crowded to the wall."

The preservation of judicial power in Canada is in striking contrast to its disintegration in this country. A recent report to the

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[20]Yakus v. United States, 321 U.S. 414, 468, 64 Sup. Ct. 660, 688 (1944).

[21]34 A.B.A.J. 907 (1948).

[22]CORWIN (EDWIN S.), LIBERTY AGAINST GOVERNMENT (1948). See generally, Ben W. Palmer's discussions of dissents, A.B.A.J., July, 1948 to March, 1949.

Canadian Bar Association as to judicial review of administrative acts said:

> By careful selection of the proper writ, in a manner strangely reminiscent of common-law pleadings, a lawyer today may sometimes compel a dilatory official to exercise his statutory powers. A lawyer may also persuade a court to squash a decision of an authority who has acted with more haste than good judgement. Technically, of course, the basis of "review" must be that the authority has acted beyond his powers, but the practical result of the cases is to give a right of review where the authority has exercised an apparently unlimited discretion unreasonably or where he has followed what the court considers improper procedure, which it calls a "denial of justice".[23]

If the judicial power is ever to be restored to its proper place in our government and jurisprudence, there will have to be a restoration of Natural Law[24] to the place which the Founding Fathers accorded it.[25] It was the very source of constitutionalism in the Middle Ages, as stated above. Later, James Otis, the Father of the Revolution, Thomas Jefferson, the Author of the Declaration, and James Madison, the Father of the Constitution, made it the foundation of their principles. Since our "unalienable rights" are not granted by any temporal power, their source must be in Natural Law;[26] and only through the enforcement of that law by independent courts can such rights be maintained. If government itself is to be subject to law, then there must be a judiciary consecrated to that law and free from the policies and pressures of other agencies of government. Moreover, conditions arise—as they have from *Bonham's Case*[27] to *Tumey v. State of Ohio*[28]—for which the positive law is inadequate. Courts must be able to resort to Natural Law concepts if the administration of judicial power is to be reasonable and conscionable and litigants are to be relieved of conflicting regulations and commandments impossible of per-

[23]35 A.B.A.J. 53 (1949).

[24]For a clear discussion of the term *Natural Law*, see Adler, *The Doctrine of Natural Law Philosophy*, 1 NATURAL LAW INSTITUTE PROCEEDINGS, 1948, 65 (U. Notre Dame, College of Law).

[25]C. E. MANION, *The Natural Law Philosophy of Founding Fathers*, 1 NATURAL LAW INSTITUTE PROCEEDINGS, 1948, 3 (U. Notre Dame, College of Law).

[26]CORWIN, *op. cit. supra* note 22, c. ii.

[27]8 Coke 118a.

[28]273 U. S. 510, 47 Sup. Ct. 437 (1927).

[29]Barnard v. Carey, 60 F. Supp. 539 (N.D. Ohio 1945).

formance.[29] Only by such administration of the judicial power can respect for law be maintained.

In recent years a "dry rot has afflicted our jurisprudence" which Harold R. McKinnon has thus described with insight and precision:

> The habit of viewing laws as ultimately grounded in norms inherent in the nature of man and society gave way to analytical jurisprudence, which views laws as pure facts wholly disconnected from morals; to historical jurisprudence, for which the ultimate source of laws is evolving custom; and to positivism of many varieties but all of them united in the concept that under the ever changing stream of fact there is no intelligible abiding substratum and therefore no truth superior to the transient findings of experimental science.[30]

This led to a form of modern positivism which concluded that it was "completely senseless" to say that courts have to "administer justice . . . . There is no justice. Neither is there any objective 'ought' . . . . Thus the entire legal ideology—including rights and duties, wrongfulness and lawfulness—goes up in smoke."[31]

Such legal sophistry of course leads not to judicial power but to judicial impotence.

If our balance of government is to be maintained and our Bill of Rights preserved, there must be a revival of that sound philosophy upon which they were originally founded. And the judicial power must be kept intact. As Justice Story said: "The original or appellate jurisdiction ought not, therefore, to be restrained, but should be commensurate with the mischiefs intended to be remedied, and, of course, should extend to all cases whatsoever."[32]

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[30]Harold R. McKinnon, *Natural Law and Positive Law*, 1 NATURAL LAW INSTITUTE PROCEEDINGS, 1948, 85, 87 (U. Notre Dame, College of Law).

[31]Vilhelm Lundstedt, *Law and Justice: A Criticism of the Method of Justice*, INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES, ESSAYS IN HONOR OF ROSCOE POUND, 450, 451 (1947).

[32]Martin v. Hunter's Lessee, 1 Wheat. (14 U.S.) 304, 335 (1816).