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Some Random Thoughts On Judicial Restraint*

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SOME RANDOM THOUGHTS ON JUDICIAL RESTRAINT*

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But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.[1]

No more than a casual interest in current events, editorials, speeches, and the ever present public opinion polls indicates a growing, if not general, uneasiness in the public mind as to a certain lack of restraint on the part of the judiciary. The matter is brought to my immediate attention by a proposed constitutional amendment to make future federal judges responsible.[2] The amendment takes the form of requiring reconfirmation every eight years, both for members of the Supreme Court and for inferior federal courts. While it may be argued that Senator Byrd's description of life tenure for the federal judiciary as being the subject of "widespread dissatisfaction . . . under which some judges are exercising dictatorial powers," may be exaggerated, that point of view is more and more often expressed and deserves the thoughtful consideration of scholars and the bench and the bar, as well as the public. It is unfortunate that, as have all attempts to limit the independence of the judiciary, the amendment comes at a time of domestic tumult. A significant part of the country, for example, is up in arms over the abortion cases, and no sooner does

*This article is not designed to be, and is not, a model of definitive research. Even if time and energy permitted, the few pages allotted by me to this most engrossing subject would not half cover the introduction. I have tried to express and to some extent explain a feeling I believe to be in the air and which may not be ignored. I hope it is just the restlessness of the times, but I fear it is not. Any characterization I have made of Supreme Court opinions ought not to be taken as critical, for such could properly be considered impudence. Rather, it reflects my idea of their holdings and predicted requirements, an occupational hazard for all inferior federal judges. My heavy reliance on dissenting opinions is not accidental. Dissenters rarely ride the current.

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[1]THE FEDERALIST No. 51 (J. Madison) (Mentor ed. 1961).

[2]S.J. Res. 13, 93d Cong., 1st Sess. (1973). *See also* Introductory Remarks of Senator Harry F. Byrd, Jr., 119 CONG. REC. 4 (daily ed. Jan. 9, 1973).

that subject disappear from the front pages than the impeachment proceedings take its place. Both, of course, are highly emotional issues and impossible to divorce from politics. And I refer to politics both in the partisan sense and as a subject which is susceptible of political resolution. But in tranquil times, I submit, the public is not too concerned with who governs, so long as they govern. It is during times of discord that the imposition of will by public officers strikes raw nerves. And this is particularly true when the will is exerted by officers who are not responsible, for those who have been the object of the will exerted are for practical purposes unable to strike back.

Reference to *The Federalist* and the other political papers of the time indicates that Montesquieu's proposition that the judiciary ought to be a separate branch of government had grown to an article of faith in the colonies by the time of the American Revolution. Undoubtedly influenced by the discharge of Lord Coke by James I, the Act of Settlement of 1688, supported by George III's granting of tenure beyond the life of the King making the appointment, had established tenure during good behavior as the standard for British judges. The colonial judges, however, served at the pleasure of the King, and this became one of the specific complaints in the Declaration of Independence: "He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries."

Against this background (perhaps too abbreviated as stated), and of course in times quite as tumultuous as those in which we now live, the Constitutional Convention at Philadelphia deliberately chose to make the judiciary independent, its judges having life tenure subject only to removal for want of good behavior.

While it has been argued that the doctrine, or custom, or theory, however it may be called, of judicial restraint has its historical antecedents in the common law, on the one hand, and in the separation of powers on the other, I think, so far as the theory applies to American courts, it can only fairly be said its historical antecedents are in the common law as well as in the Constitution; and not only in the Constitution as it separates the three parts of government into separate branches, but also as it establishes our federal system of separate national and state governments. Both the separation of powers of the departments of the national government and the separation of powers between the national and the state governments were considered by the Framers as checks on the abuse of power. "This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs,

private as well as public. . . . In the compound Republic of America, the power surrendered by the people is first divided between two distinct governments and then the portion allotted to each subdivided among distinct and separate departments. Hence, a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself."[3]

It must be remembered that not all the plans of government submitted at Philadelphia provided for branches of government as separate as practically possible. Nor did all of the plans provide for the federal system as we know it. Randolph's Virginia Plan, for example, provided for a council of revision made up of "the Executive and a convenient number of the National judiciary . . . with authority to examine every act of the national legislature before it shall operate, and every act of a particular legislature, before a negative thereon shall be final; and the dissent of the said council shall amount to a rejection, unless the act of the national legislature be again passed, or that of a particular legislature be again negatived by____ of the members of each branch."[4] Hamilton's plan provided that "the Governor or President of each State shall be appointed by the general government, and shall have a negative upon the laws about to be passed in the State of which he is Governor or President."[5] Charles Pinckney's plan provided, in certain instances, that "the legislature of the United States shall have the power to revise the laws of the serveral states that may be supposed to infringe on the powers exclusively delegated by the Constitution for Congress, and to negative and annul such as do."[6] Patterson's New Jersey Plan was less of a revision of the Articles of Confederation with more powers reserved to the states.[7] The plans of Patterson, Pinckney, and Hamilton contained express supremacy clauses, and Randolph's one of a sort which was to be exercised by the legislature. All four plans, however, in identical language, provided that the tenure of office for members of the national judiciary should be "to hold their offices during good behavior."

So, the life tenure of federal judges was no historical accident. And neither was the relationship between the branches of the national government and the relationship between the states and the nation. All were methodically and seriously considered at Philadel-

[3]THE FEDERALIST No. 51 (J. Madison).
[4]I ELLIOT'S DEBATES 144 (1937).
[5]*Id.* at 180.
[6]*Id.* at 149.
[7]*Id.* at 175.

phia, and each is a part of the fiber of government of the United States.

As nullification and interposition were disposed of by Jackson in 1832, and ultimately at Appomattox, so a national government with little or no restraint was earlier rejected at Philadelphia. Nowhere is the proper relation between the national government and the states better expressed than by Mr. Justice Black: "The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our national government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both state and national governments, and in which the national government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."[8]

The Framers were concerned about concentration of power in one hand and were convinced such concentration could lead only to tyranny. Madison, calling upon Jefferson, puts it this way: "All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating of these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one. . . .[t]he legislative, executive, and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time. * * * The conclusion which I am warranted in drawing from these observations is that a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficent guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands."[9] Hamilton expressed the same fear that a constitution violates "the fundamental principles of good government" when it "united all power in the same hands."[10] Eldridge Gerry's remark at Philadelphia, in opposing the "question for joining the judges to the executive in the revisionary business," while more pungent and less philosophical, was quite to the point. He "thought the executive, while standing alone, would be more impartial than when he could be covered by the

[8]Younger v. Harris, 401 U.S. 37, 44 (1971).

[9]THE FEDERALIST No. 48 (J. Madison).

[10]THE FEDERALIST No. 71 (A. Hamilton).

sanction and seduced by the sophistry of the judges."[11] John Dickenson was of opinion that a joining of the executive and the judiciary "involved an improper mixture of powers." "Secrecy, vigor, and dispatch," he said, "are not the principal properties required in the executive. Important as these are, that of responsibility is more so, which can only be preserved; by leaving it singly to discharge its functions."[12]

And since the judiciary was deemed to be the weakest of the three branches of government, possessing neither the purse nor the sword, it had to be able to protect itself, and life tenure was the considered answer. Hamilton put it this way: "That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the executive or legislative, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity to justify a reliance that nothing would be consulted but the Constitution and the laws."[13] Madison was equally as emphatic: "Why was it determined that the judges should not hold their places by such a tenure? [Appointment by the legislature] Because they might be tempted to cultivate the legislature, by an undue complaisance, and thus render the legislature the virtual expositor, as well as the maker of the laws?"[14] Life tenure as the assurance of the independence of the judiciary was thus agreed upon at Philadelphia in as studied a manner as was the separation of powers of the branches of government and the separation of powers of the state and national governments. It was not finally accepted, however, without some misgivings. Dickenson was not satisfied "as to the power of the judges to set aside the law." At the same time, he was "at a loss what expedient to substitute," and warned "the justiciary of Arragon. . . .became by degrees the law giver."[15] And his motion to replace tenure during "good behavior"

[11]J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 80 (Ohio Univ. 1966) [hereinafter cited as MADISON'S NOTES].

[12]*Id.* at 81.

[13]THE FEDERALIST No. 78 (A. Hamilton).

[14]MADISON'S NOTES at 311.

[15]*Id.* at 463.

with the words "provided that they may be removed by the executive on the application by the Senate and House of Representatives"[16] was defeated. Similar doubts along the same lines were expressed in the debates on ratification. Mason asked: "After having read the first section. . .what is there left to the State courts? Will any gentleman be pleased, candidly, fairly, and without sophistry, to show us what remains? There is no limitation. It goes to every thing. The inferior courts are to be as numerous as Congress may think proper. They are to be of whatever nature they please. Read the 2d section, and contemplate attentively the extent of the jurisdiction of these courts, and consider if there be any limits to it."[17] Spencer, of North Carolina, voiced doubts which reverberate today: "There will be, without any manner of doubt, clashings and animosities, between the jurisdiction of the federal courts and of the state courts so that they will keep the country in hot water. It has been said that the impropriety of this was mentioned by some in the convention."[18] Such doubts from responsible critics were uniformly answered by assurances that the courts created under the Constitution would be courts of limited jurisdiction, and the tenor of the replies is they should be models of restraint. Hamilton: "The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body."[19] Madison: "Now, sir, if there will be as much sympathy between Congress and the people as now, we may fairly conclude that the federal cognizance will be vested in the local tribunals. . . . I have observed that gentlemen suppose that the general legislature will do every thing mischievous they possibly can, and that they will limit to do every thing good as they are authorized to do. If this were a reasonable supposition, their objections would be good. I consider it reasonable to conclude that they will as readily do their duty as deviate from it . . . ."[20] Spaight, of North Carolina: "Mr. Chairman, the gentleman insinuates that differences existed in the federal convention respecting the clauses which he objects to. Whoever told him so was wrong; for I declare that, in that convention, the unanimous desire of all was to keep separate and distinct the objects of the jurisdiction of the federal from that of the state judiciary."[21]

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[16]*Id.* at 536.
[17]III ELLIOT'S DEBATES 521 (1937).
[18]IV ELLIOT'S DEBATES 136-37 (1937).
[19]THE FEDERALIST No. 78 (A. Hamilton).
[20]III ELLIOT'S DEBATES 536 (1937).
[21]IV ELLIOT'S Debates 139 (1937).

It was also successfully argued that the judiciary, having neither force nor will, must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments, and that the republican principle demanded that the deliberate sense of the community should govern the conduct of those to whom they entrust the management of their affairs.[22] This latter argument sounds not unlike Holmes' dictum that the taste of any public is not to be treated with contempt,[23] and Learned Hand's observation, concerning lawyers, that democracy is quick to understand those who respond to its fundamental feelings and ruthless to cast aside those who seek cover behind the protection of the written word.[24]

With the background of a branch of government of limited powers within a government of limited powers, and being represented as courts of judgment with neither force nor will, where has the difficulty arisen? The problem is not new. It existed at the time of the adoption of the Constitution as it exists today, and all attempts thus far to limit the independence of the judiciary have generally failed.

The principal difficulty, I conceive, is the settled doctrine that a federal judge has an equal duty to decide a case over which he has jurisdiction with the duty not to decide the case if he does not have jurisdiction.[25] In the context of today, the rule is brought to daily public attention by Madison's statement that "the security for civil rights must be the same as for religious rights."[26] The Constitutional Convention rejected the council of revision as it rejected review by Congress of the legislative acts of the states, and consciously threw the matter of conflicting interests into the laps of the courts. This is shown by Hamilton in No. 78 of *The Federalist.*

From this as a starting point, I will briefly mention some of the doctrines which, sometimes by other names, I believe have contributed to the uneasy feeling on the part of many that the day-to-day affairs of government are more properly conducted by responsible officials rather than those enjoying life tenure. They are the doctrines of substantive due process; the hands-off rule of the courts as they may hear political questions; and the extension of the federal power to regulate every petty local official as a result of the construction of 42 U.S.C. §1983. I speak not to the merits of the decisions themselves for they are already on the books. Taken together, though, whether right or wrong, they show a drift toward judicial intervention which may not be ignored.

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[22]THE FEDERALIST No. 78 (A. Hamilton).

[23]Bleinstein v. Donaldson Lithographing Co., 188 U.S. 239, 252 (1903).

[24]Hand, *The Speech of Justice*, 29 HARV. L. REV. 617 (1916).

[25]Cohens v. Virginia, 19 U.S. 264, 404 (1821).

[26]THE FEDERALIST No. 51 (J. Madison).

In a number of earlier cases decided under the Fourteenth Amendment, the Supreme Court had, with some regularity, invalidated state laws, substituting in the name of due process what some have called its own notions of public policy for legislative choices in social and economic legislation.[27] But, in 1963, the Court, in *Ferguson v. Skrupa,*[28] purported to sound the death knell for the doctrine of substantive due process. Justice Black stated it: "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."[29] In so doing, the Court gave credence to Holmes' earlier admonition that "the Constitution is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."[30]

But recent examples of judicial intervention in matters of legislation appear to signal a return to the principles of substantive due process discarded in *Skrupa.* In 1965, the Court held, in *Griswold v. Connecticut,*[31] that a Connecticut statute forbidding the use of contraceptives by married couples violated a constitutional right to privacy. And in two cases decided in 1973, *Roe v. Wade*[32] and *Doe v. Bolton,*[33] the court imposed such severe limits on permissible legislation that no abortion law in the United States remained valid. In each of these cases, the Court, in varying degrees, gave substantive content to the term "liberty" in the Fourteenth Amendment's due process clause in protecting what it termed fundamental values, although not specifically stated in the Bill of Rights. In so doing, however, did not the Court significantly increase the risk of the Third Branch substituting its judgment for that of the legislature in determining what is wise public policy? Again, turning to Holmes: "I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the state, and that courts

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[27]*See, e.g.,* Adkins v. Children's Hosp., 261 U.S. 525 (1925); Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908); Allgeyer v. Louisiana, 165 U.S. 578 (1897).

[28]372 U.S. 726 (1963).

[29]*Id.* at 730.

[30]Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

[31]381 U.S. 479 (1965).

[32]410 U.S. 113 (1973).

[33]410 U.S. 179 (1973).

should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular court may happen to entertain."[34] Indeed, even the 1972 opinion in *Furman v. Georgia*,[35] which held the death penalties of forty states invalid, might be mentioned in this context. Although a majority of the Justices relied on the Eighth Amendment prohibition against cruel and unusual punishment, the result was a substitution of its own opinion of the morality and efficacy of the death penalty for that of the legislatures. And the case may as easily have been decided under the label of substantive due process. As Justice Powell observed: "In terms of the constitutional role of this court, the impact of the majority's ruling is all the greater because the decision encroaches upon an area squarely within the historic prerogative of the legislative branch—both state and federal— to protect the citizenry through the designation of penalties for prohibitable conduct. It is the very sort of judgment that the legislative branch is competent to make and for which the judiciary is ill-equipped."[36] Surely, judicial self-restraint is an implied condition of the Constitution's grant of judicial review. But, as recent opinions tend to indicate, this implied condition may be honored of late as much in the breach as in its observance.

Concededly, from its earliest opinions, the Supreme Court has recognized that certain disputes, regarded as "political questions," do not lend themselves to judicial standards and judicial remedies. To classify an issue as falling within the definition of political questions, however, as Justice Frankfurter notes, is more a form of stating a conclusion than revealing of analysis.[37] In determining whether a question falls into that category, "the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations."[38] One commentator has probably too broadly defined as political "[a]ll those matters of which the court, at a given time, will be of the opinion that it is impolitic or inexpedient to take jurisdiction . . . questions so bitterly contentious as to be, for the moment, incapable of resolution."[39] And another has concluded that the non-justiciability of a political question is founded primarily on the doctrine of separation of powers and

[34]Tyson & Bros. v. Banton, 273 U.S. 418, 445-46 (1927) (Holmes, J., dissenting).
[35]408 U.S. 238 (1972).
[36]*Id.* at 418 (Powell, J., dissenting).
[37]Baker v. Carr, 369 U. S. 186, 281 (1962) (Frankfurter, J., dissenting).
[38]Coleman v. Miller, 307 U.S. 433, 454 (1939).
[39]Finklestein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338, 344-45 (1924).

the policy of judicial self-restraint.[40] In this vein, Justice Frankfurter once noted "[t]he court's authority—possessed neither of the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements."[41]

The antecedents of the political question doctrine lie in the common law. In a major case, the *Duke of York's Claim to the Crown,*[42] in 1460, the style of which is descriptive of the subject matter, English courts refused to decide a case they considered basically political. The doctrine thus enunciated by English courts was inherited in this country and articulated in *Marbury v. Madison,* Chief Justice Marshall observing that "[q]uestions in their nature political, or which are, by the Constitution and laws, submitted to the executive, can never be made in this court."[43] And in 1839, Justice McLean, in *Williams v. Suffolk Insurance Co.,* made a similar pronouncement "that the action of the political branches of the government in a matter that belongs to them, is conclusive."[44]

The first important case to apply the doctrine of judicial noninterference to political questions was *Luther v. Borden.*[45] The issues in that case arose out of Dorr's Rebellion in Rhode Island in 1841-42. Thomas W. Dorr had apparently been elected governor under a government organized by a popular assembly without regard to the existing charter government. The existing government was then sued for trespass by one of Dorr's supporters for acts done in pursuance of its declaration of martial law. Excitement ran high, and the issue divided the country. Daniel Webster served as counsel for the charter government. In order to decide the case on its merits, the Supreme Court was called upon to determine which of the two governments properly represented the State of Rhode Island. But the Court refused to decide the question, stating that, under Article IV of the Constitution guaranteeing to each state a republican form of government, it rests with Congress to decide which government is established in a state.[46]

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[40]Wright, FEDERAL COURTS § 14 (2d ed. 1970).

[41]Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

[42]5 Rotuli Par. 375 (1460), *reprinted in* WAMBAUGH, CASES ON CONSTITUTIONAL LAW 1 (1915). *See also* Nabob of the Carnatic v. East India Co., 1 Ves. Jr. 370 (1791), 2 Ves. Jr. 56 (1793).

[43]1 Cranch 137, 170 (1803).

[44]13 Pet. 415, 420 (1839).

[45]7 How. 1 (1849).

[46]*Id.* at 45.

It has been said that what is and what is not a political question defies classification. But it is important that courts have felt that, like the legislatures, they have been given a mandate, and they must act within its scope.

Recent years have witnessed a gradual erosion of the political question doctrine, and a decline in the policies of judicial self-restraint which underlie it. Most notable is *Baker v. Carr*[47] which, in 1962, overturned earlier precedents, including *Colegrove v. Green,*[48] which had held congressional redistricting controversies nonjusticiable. In *Colegrove,* the Court had reasoned "that the Constitution has conferred upon Congress exclusive authority to secure fair representation by the States in the popular House and left to that House determination whether States have fulfilled their responsibility. . . . Whether Congress faithfully discharged its duty or not, the subject has been comitted to the exclusive control of Congress. . . . Courts ought not to enter this political thicket."[49] But in *Baker v. Carr,* the Court found the same controversy justiciable as it applied to the legislature of a state, relying not on the guarantee of a republican form of government, but on the equal protection clause of the Fourteenth Amendment. As a practical matter of fact, as Justice Frankfurter contended in dissent, *Baker* was nonetheless a Guarantee Clause claim masquerading under a different label.[50] In all events, the considerations of federal-state relationships and the separation of powers, found controlling in *Colegrove,* were finally discarded in favor of judicial intervention in matters of legislative redistricting. Similarly, in *Powell v. McCormack,*[51] decided in 1969, the Court brushed aside a number of substantial political question objections and held that Congressman Adam Clayton Powell, Jr., had been unlawfully excluded from the House. The Court found that in judging the qualifications of its members, as contrasted with excluding them, Congress is limited to the standing requirements of age, citizenship and residence contained in Article I, §2 of the Constitution. The importance of the ruling in *Powell,* of course, is that the Court forbade the House to decide whether it was acting in excluding a member or failing to seat him. And it equally forbade the House to decide the meaning of the clause that "[e]ach house shall be the judge of the . . . qualifications of its own members . . . ."[52] Does *Powell* have unarticulated

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[47]369 U.S. 186 (1962).
[48]328 U.S. 549 (1946).
[49]*Id.* at 554, 556.
[50]369 U.S. at 297.
[51]395 U.S. 486 (1969).
[52]U.S. CONST. art. I, §5.

holdings of vast and far-reaching political consequences which do not appear on the surface of the opinion? Is it a necessary holding that the House does not have jurisdiction to determine its own jurisdiction,[53] without which power no court could operate? Assuming such is not the holding of *Powell,* is it then a necessary holding that the determination by the House of its own jurisdiction is subject to judicial review, thus treating the House in the same manner as an inferior court rather than as a part of a coordinate branch of government? Does reaching the merits in *Powell* indicate there is no subject exclusively entrusted to a coordinate branch of government which is not subject to judicial review?[53.1] The explosive consequences of articulated answers to these questions may easily make the controversial decisions of the court for the last twenty years seem like a Sunday School picnic. Whatever the merits of *Baker* and *Powell,* by requiring a consideration of them the court has shown a tendency to get rid of its historic reluctance to consider matters which had been thought by many to have been the exclusive prerogative of another branch of the national government or of the governments of the States.

The Civil Rights Acts were passed shortly after the Civil War to insure the protection of recently freed slaves. 42 U.S.C. § 1983 prohibits any person, under color of state law, from denying to another his constitutional rights, and was rarely used for access to the federal courts until the dam was burst by *Monroe v. Pape.*[54]

In *Monroe,* the City of Chicago and thirteen policemen were sued for allegedly breaking into petitioner's home during the early morning hours. The family was ousted from bed at gunpoint. Monroe was forced to stand naked in the living room while the entire house was ransacked, whereupon he was taken to the police station, held incommunicado for ten hours, never arraigned before a magistrate, and was ultimately released with no charges against him. All this was done without a search or arrest warrant. The Court held that the City of Chicago was not a "person" under § 1983, and so affirmed dismissal as to the city, but held the conduct of the named police officers, even though contrary to state law, was state action within the meaning of the Fourteenth Amendment and violated the due process clause. This despite the fact that plaintiff could have sued in a state court for assault, battery, false arrest, or false imprisonment.

The court listed the three main aims of the act as: (1) overriding certain kinds of state law; (2) providing a remedy when state law is inadequate; and (3) providing a remedy when the state recourse is

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[53]Texas & P. Ry. v. Gulf, C. & S. F. Ry., 270 U.S. 266, 274 (1926).

[53.1]*Cf.* U.S. v. Nixon, ___ U.S. ___, 94 S. Ct. 3090 (1974). See Addendum at the end of this article.

[54]365 U.S. 167 (1960).

adequate in theory but unavailable in practice.[55] Three years later, in *McNeese v. Board of Education,*[56] a fourth purpose was added, to provide a federal court remedy supplementary to any state court remedy.

Since *Monroe,* as pointed out in a fine law review article by Judge Aldisert of the Third Circuit,[57] there has been a rush to the federal courts at the expense of state courts, for it is clear that state court remedies need not be exhausted before suing in federal court.[58] The Court, in 1972, also extended the reach of § 1983 by overruling *Hague v. CIO,*[59] which had limited the "rights, privileges, or immunities" protected by § 1983 to those involving personal liberty. In *Lynch v. Household Finance Corp.,*[60] the Court abolished the *Hague* distinction between rights of property and personal liberty; furthermore, the Court resolved any doubt as to a conflict between the jurisdictional statute for § 1983, 28 U.S.C. § 1343(3), and the general federal question jurisdiction provision, 28 U.S.C. § 1331, by saying that §1343(3) is compatible with the latter, but is more narrow and applies only to alleged infringements under "color of state law."[61] The net result is that plaintiffs suing under § 1983 do not have to meet the $10,000 jurisdictional limitation of the general statute. Thus, *Monroe* and the cases following, as Judge Aldisert rightly has noted, have transformed many nickel-and-dime torts, traditionally pursued under state law, into Fourteenth Amendment deprivations, at least insofar as jurisdiction is concerned.

The Supreme Court again broadened the effect of § 1983 when it resolved a conflict among the circuits[62] and held in *Mitchum v. Foster*[63] that § 1983 was an express statutory exception to the federal anti-injunction statute, 28 U.S.C. § 2283. Following *Mitchum,* in a suit filed alleging injury under color of state law, the inferior federal courts may no longer consider the anti-injunction statute as a bar to federal court interference by way of injunction in state proceedings,

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[55]*Id.* at 173-74.

[56]373 U.S. 668, 672 (1963).

[57]Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload,* 1973 ARIZ. ST. U.L.J. 557.

[58]Wilwording v. Swenson, 404 U.S. 249 (1971); Damico v. California, 389 U.S. 416 (1967).

[59]307 U.S. 496 (1939).

[60]405 U.S. 538 (1972).

[61]*Id.* at 547.

[62]*Compare* Cooper v. Hutchinson, 184 F.2d 119 (3d Cir. 1950) (§1983 is an "expressly authorized" exception), *with* Baines v. City of Danville, 337 F.2d 579 (4th Cir. 1964) (§1983 is not an "expressly authorized" exception).

[63]407 U.S. 225 (1972).

but must consider the merits of each case, and either grant or deny injunctive relief depending on whether the certain exceptional circumstances set out in *Younger v. Harris*,[64] and its allied cases, have been met. I think it apparent that this construction of the anti-injunction law for suits sounding in §1983 has made the federal judicial presence more frequently felt in the state courts, and the more often felt, albeit discretionary, the greater chance for resentment, whether justifiable or not.

I have touched on only three of the many facets of the ever expanding federal jurisdiction and paused at each only long enough to highlight the problems each brings to mind as it may respect judicial restraint. Where have the decisions led us, and where are they leading us? A concentration of power in one hand, which must be considered amoral according to our principles of republican government, was not only noticed in the early days of the republic but also has been taken account of in quite recent years. Mr. Justice Douglas, in his concurring opinion in *Flast v. Cohen*,[65] noted the danger but brushed it aside: "A contrary result in *Frothingham* in that setting (the "heyday of substantive due process") might well have accentuated an ominous trend to judicial supremacy."[66] And, in his dissenting opinion in the same case, Mr. Justice Harlan argued, without avail, the same point: "It seems to me clear that public actions, whatever the constitutional provisions on which they are premised, may involve important hazards for the continued effectiveness of the federal judiciary. Although I believe such actions to be within the jurisdiction conferred upon the federal courts by Article III of the Constitution, there surely can be little doubt that they strain the judicial authority. There is every reason to fear that unrestricted public actions might well alter the allocation of authority among the three branches of Federal Government."[67] In his dissent in *Baker v. Carr*, Mr. Justice Frankfurter sounded a similar warning: "Such a massive repudiation of the experience of our whole past in asserting destructively novel judicial power demands a detailed analysis of the role of this Court in our constitutional scheme. Disregard of inherent limits in the effective exercise of the court's 'judicial Power' not only presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been and now is determined. It may well impair the

[64]401 U.S. 37 (1971).

[65]392 U.S. 83 (1968).

[66]*Id.* at 107. Justice Douglas referred to Frothingham v. Mellon, 262 U.S. 447 (1923).

[67]392 U.S. at 130.

Court's position as the ultimate organ of 'the supreme Law of the Land' in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court most pronounce."[68]

While it is true that the substantive claims in the cases letting down the historic barriers may appear attractive on their face to substantial segments of the community and thus reaching their merits, to many, seems justified, I do not think a continued trend in this direction may be sustained without accounting in any way to the expressions of philosophical suspicion so ably voiced by Madison and Hamilton and Holmes, and Douglas and Harlan and Frankfurter. Certainly, whether or not we may agree with the ideology of any one of them, we can all agree that few deeper thinkers upon the system of government of this compound republic of America have ever lived. And the fact that the suspicion of each has been aroused by a concentration of the power of government in one hand should give us pause.

Is there a solution? Of course. But the solution is not to say that the federal courts must avoid all the hard, or unpleasant, or distasteful questions. Again, Hamilton makes this clear in *The Federalist,* No. 80. And courts may not, in all questions of public import or interest, simply enter an order consistent with the feelings of the times. They may not succumb "whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing Constitution."[69]

But the inferior federal courts are courts of limited jurisdiction, and if it is the considered sense of Congress that they are exercising will instead of judgment, which seems to me to be a fair statement of the general complaint, Congress may as easily strip them of their jurisdiction as it has established them. This is a constitutional course which has been advocated quite recently by knowledgeable men in at least one controversial field.[70] Certainly the regulation by Congress of the jurisdiction of the federal courts was within the contemplation of the framers.[71] And such limitations on the powers of the federal courts are frequent, some of the better known being the anti-injunction provisions of the Norris-LaGuardia Act[72] and the Internal

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[68]369 U.S. at 267.

[69]THE FEDERALIST No. 78 (A. Hamilton).

[70]See S.R. 3833, 92d Congress, July 24, 1972, by Senators Hruska and Scott, which would drastically limit the procedural rulings of Fay v. Noia, 372 U.S. 391 (1963). *Fay* is the case which opened the door to the now widespread collateral attacks on state convictions in federal district courts.

[71]III ELLIOT'S DEBATES 536 (1937).

[72]29 U.S.C. § 104.

Revenue Code,[73] not to mention the Anti-Injunction Act.[74]

But this may not be the complete solution. In company with others, I am aware there is a feeling in a substantial part of the community that the courts are simply not being as reserved as the public expects them to be. Whether or not the feeling is justifiable or a majority may be debated, but the fact that the feeling is there is undeniable, and the fact that it does exist, as contrasted to the reasons for its existence, may itself forecast heavy sailing in the days ahead for the Article III judges. Trying to track down the feeling is like hunting a will-o'-the-wisp, and I have concluded it is impossible. But it has to do with the fact that there is a good deal of talk among the public, and particularly among the lawyers, which may be expressed as a feeling that recurrences to fundamental principles[75] are too infrequent, or something along that line. The matter not only defies definition; it very nearly defies description. A good bit of the feeling I believe has been brought about without the fault of anyone by our age of instantaneous communication. The immediacy of a television news broadcast and its impact on the people may not be overstated. When this is coupled with the extensions of federal jurisdiction (both by the courts and Congress), the modern rush to class actions, the increasing propensity to litigate, and the ease of access into the federal district courts, it is apparent that the effect of court decisions on the general public, which only a few years ago would take months or years to filter down, or never be felt personally, now is felt by millions of members of the public the day the order is entered. Thus, the controversial position of the courts is today exposed, where before it was hidden, and being in a controversial position as public officers, the judges have and ought to share criticism for their acts the same as any other person employed by the public.

The alteration of the terms of the judges of course, as a long range effect, could only make them less independent. It is radical surgery and a pronounced, deep and far-reaching change in our constitutional plan. Whether it is justified or not is a political question of which the public, the States, and the Congress must be the ultimate judges, as they were at Philadelphia.

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[73]26 U.S.C. § 7421.

[74]28 U.S.C. § 2283 (1970).

[75]The phrase is found at least as early as article 13 of the Virginia Declaration of Rights in 1776, and article XIX of the Constitution of Massachusetts in 1779.

ADDENDUM*

The recent case of United States v. Nixon, ___ U.S. ___, 94 S. Ct. 3090 (1974), held that the President of the United States has no absolute privilege even for his personal conversations, upon a claim of "generalized" need for confidentiality in presidential communications, as perhaps distinguished from military, diplomatic, or national security matters. While recognizing the presumptive existence of a qualified privilege, the Court flatly held that the judiciary, and not the executive, has the final say as to whether or not the claim of privilege is valid. The Court stated in part: ". . . the 'judicial power of the United States' . . . can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the judiciary the veto power." *Id.* at 3106. The background of this dispute is at least as old as the trial of Aaron Burr. *See* United States v. Aaron Burr, 25 Fed. Cas. 30 (No. 14,692 d) (C.C.D. Va. 1807).

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*See note 53.1 *supra*.