Border Lines of Judicial Power

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All we have of freedom—all we use or know—
This our fathers bought for us, long and long ago.
Ancient Right unnoticed as the breath we draw—
Leave to live by no man's leave underneath the Law.
—Rudyard Kipling.

Montesquieu's oft-cited theory that a separation of government into three distinct departments of magistracies of the executive, legislative and judicial, laid the foundation of English liberty, is said by some writers to be the inspiration of the tripartite scheme of government which characterizes our federal constitution as well as most state constitutions.

Observance of this familiar doctrine has frequently served as an effective check against the adoption of foolish fads and the mischievous projects of aggressive fanatical blocs or persistent self-serving "pressure groups;" but there is nothing in the constitution of the United States which requires such a system in the individual states. Some of the latter contain no such provision in their fundamental law.¹ Great Britain and the other autonomous members of the British Commonwealth of Nations, now prefer a system of responsible government which unites the legislative and executive branches; and there still survives at Westminster, a union of legislative and judicial power in the persons of the law lords, of the House of Lords; and for over a century there has been a joinder of judicial and executive power in the membership of the judicial committee of the Privy Council. In our own land, plurality of office-holding seems to have been taken as a matter of course, during the lifetime of the Founders of the Republic, regardless of classification. Even the punctilious John Marshall, who had worked hard for the ratification of our Federal Constitution, once held the incompatible offices of Secretary of State and Chief Justice of the United States, simultaneously.² This idea of incompatibility of offices is very modern, for in England, whence so many jurisdictions derive their legal systems, there was once a time when "all the functions of the state were exercised by a single institution—the curia regis." From this group

²Beveridge, Life of John Marshall, 358 (1919). In all fairness it should be noted that General Marshall drew but one salary during the period that he held the two offices.
there have derived many institutions, among them the "High Court of Parliament" and the courts of common law and equity. As pointed out by Sir William Holdsworth, the common law courts supervised and controlled the activities of subordinate courts and local officials by use of the prerogative writs of certiorari, mandamus, prohibition and quo warranto, amongst other means. At present, "many cases assert that courts cannot control by injunction or any other writ the exercise of a purely legislative or executive power." The soundness of the public policy underlying this principle of judicial limitation is unquestionable, for obviously the activities of any one of the three magistracies in the lawful exercise of its own granted or inherent powers should not be subjected to domination by either of the other branches of government. It may be remarked at this juncture, that legal history and social experience have played a far more important part in pricking out the boundaries between justiciable and non-justiciable fields of influence, than that which has been the outcome of excogitation. Indeed, struggles on questions of governmental powers, which are now looked upon as firmly settled, have not always been restricted to debate. Oliver Cromwell, as is well known, imprisoned Sir Harry Vane, for writing a book in which the position was taken that the army should be subordinate to parliament. In at least one instance, American judges have been impeached for refusing to enforce an unconstitutional enactment.

Of necessity every branch of the government of a free people is a judge in the first instance of its own powers, otherwise it could not function; and in order to perform its duties with efficiency and despatch, it is frequently empowered to employ methods of procedure which captious people might say appertain to other branches of government. Thus, for illustration, the executive frequently enacts orders, rules and regulations for the transaction of the business which it is its duty to attend to, and, of necessity, is constantly required to make adjudications upon claims and other questions in the course of exercising its inherent or delegated powers. Some of these necessary, desirable, incidental, ancillary or inherent powers generally are embodied in written constitutions. A striking example of this is found in the legislative power of approving or disapproving statutes, which affords the President or a governor a suspensive power of perusing proposed legislation which it might thereafter become his duty to enforce. In recognition of this participative power in legislation, many writers have classed the chief executive as the "third legislative house." A number of commentators go further and term courts of law a fourth legislative chamber because of their power and duty of interpreting legislation, as well as what some of these writers consider a power of annulment of statutory law.

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9Some Makers of English Law, 41 (1938).
1Among these "subordinate courts" were the old ecclesiastical courts of England, to which we owe so much of the probate law and the marriage law of today. McKean, Canon Law in American Jurisdictions, 39 Dickinson Law Review, 75 (1935).
2Smith v. Myers, 109 Ind. 1, 6 (1886).
3Trevett v. Weedon, R. I. 1786, Thayer, Cases on Constitutional Law, 73.
It is believed that there is little foundation for such an eccentric designation of judicial tribunals. On the contrary, if there be any American institution capable of being recognized as a fourth legislative chamber, it is the authority whereby a written constitution is ordained or amended. It is this power which revealed itself in the recall of a court decision in the case of *Chisholm v. Georgia* by the adoption of the 11th Amendment; and it is the same power which was strikingly evidenced by the passage of the 21st Amendment which repealed the 18th Amendment. In short, it is the same supreme power which formulates the paramount law of the land, to which all American governments are subject. Aside from these considerations, the very narrow limits within which courts in common law and civil law jurisdictions are empowered and expected to solve jural problems for which applicable precedents or statutes are lacking, hardly justify the numerous writings of those who unqualifiedly assert that courts legislate. Probably the fairest comment on this particular point, is that of the late Mr. Justice Holmes, who, with a characteristic neatness of phrase, stated in one of his opinions that courts legislate "interstitially." In other words, the so-called legislation by courts of law, in modern times, is relatively trivial, as may be perceived by any one who realizes that there are numerous limitations which restrict judicial activity. For instance, it is observable that nowhere in jurisdictions where English or derivative systems of law obtain, do we find courts of law possessing the legislative power of abrogating thoroughly established doctrines or principles of the common law. They have no right to pass upon the wisdom or expediency of legislation, and should not presume to censor enactments because of the motives of the legislators who had voted for their passage. It is likewise well established that no tribunal possesses authority to inquire into the righteousness of constitutional statutes. In other words, if a court should take it upon itself to inquire into the necessity for enacting a statute, it would thereby "pass the line which circumscribes the judicial department and . . . tread on legislative ground." A very apposite suggestion in

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72 Dall. 419 (U. S. 1793); 3 Dall. (U. S. 1798).
9REx v. Wheatley, 2 Barr. 1125 (Eng. 1761); Rex v. Wilkes, 4 Burr. 2527 (Eng. 1770); Rex v. Pedley, 1 Leach 242, (Eng. 1782); MODERN WOODMEN OF AMERICA v. INTER-
11People v. Johnson, 288 Ill. 442 (1919); COMMONWEALTH v. MIXER, 207 Mass. 141 (1910); People v. Hattinger, 174 Mich. 333 (1913); state v. Corbett, 57 Minn. 345 (1894); COMMONWEALTH v. MOIR, 199 Pa. 534 (1901); State v. Harrington, 68 Vt. (1896).
relation to this point, is Chief Justice Waite's maxim, "For protection against abuses by legislatures the people must resort to the polls, not to the courts."

The utmost that it is permissible for the judicial interpreter to do in dealing with valid legislation which appears to be unjust or unwise, is to resort to the rebuttable presumptions against inconvenience or unreasonableness, as canons of interpretation; but an attempt to strain these presumptions against the plain mandates of a statute would be ultra vires in all common law jurisdictions. Nevertheless, the United States Supreme Court has felt it necessary to remind us that whether legislation is needed, whether it is harmful, is solely a matter of policy. And it must not be overlooked that policy is a political question, and consequently is not, in itself, a subject of judicial review. We have seen that it is not the habit of courts to question the policy of valid enactments. It is equally manifest that it would be inadvisable for legislative bodies to divest themselves of official responsibility by delegating the performance of duties within their exclusive province. Such an attempted abdication of its governmental functions by an elective representative body, whether to executive, judicial or administrative officers of the government would be futile in the long run, by reason of the due process principle of American constitutions. In the words of Chief Justice Gibson, of Pennsylvania, "Under a well-balanced constitution the legislature can no more delegate its proper function than can the judiciary."

Many limitations upon the activities of the different branches of government, including those already specified in this article, are the resultant of numerous considerations, such as comity, sense of duty, fitness and propriety, reasonableness, necessity and practicability. Above all it is highly desirable in the best interests of decency and order, that each branch of the government shall recognize and fulfil its duty to presume that another has acted legally, and not to assume otherwise, except in very clear cases. Accordingly, with a view to avoid anarchical friction, as well as with a desire to refrain from usurpative encroachment upon the domain of a co-ordinate branch of the government, courts will not pass upon the constitutional validity of legislation except where essential to the determination of a case. Occasionally this oft-stated rule has been overlooked or ignored. In consequence of such neglect cases are sometimes found in the law reports in which an appellate court has made a ruling that it has no power to proceed in the premises, and then, by way of dictum (sometimes cited as authoritative decision, by commentators and others), set forth a view that an action or statute attempted to be

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14 License Tax Case, 5 Wall. 462 (U. S. 1866).
16 Arkansas-Louisiana Gas Co. v. Department of Public Utilities, 304 U. S. 61, 64 (1938); First Trust Co. of Lincoln v. Smith, 277 N. W. 762 (1938 Neb.); Lins' Petition (No. 1) 37 Pa. Super. Ct. 625 (1908); Rr Dickinson, 2 B. C. 262 (1892); I Cooley, Constitutional Limitations, 338 (8th ed. 1927).
attacked is unconstitutional. A striking instance of this is illustrated by the case of
Perry v. United States,\textsuperscript{17} where the court held that the plaintiff had failed to prove
damage to its satisfaction (and was thereby disqualified from maintaining suit); but
did not hesitate to state its belief that a joint resolution of Congress, attacked in
said case, was unconstitutional in parts affecting certain government obligations so
far as such resolution assumed to repudiate certain promises contained in said pledges
of the government's faith. A few years later the same tribunal ruled that courts
will not decide questions until the necessity for such decisions arises in the record
before them.\textsuperscript{18}

Unquestionably many unconstitutional laws and practices flourish without let
or hindrance for appreciable periods of time, where it so happens that circum-
stances do not arise which might render justiciable the determination of their in-
validity. A statute may be invalid as applied to one state of facts and yet prove
to be valid as applied to another condition of affairs.\textsuperscript{19} Or, as was pointed out by
Mr. Justice Holmes, in one of his opinions, "Laws frequently are enforced which
the court recognizes as possibly or probably invalid if attacked by a different interest
or in a different way."\textsuperscript{20} Even the unconstitutionality of a statute is not within
the purview of court decision, except where the question is properly raised.\textsuperscript{21} It
follows that a punctilious court will not anticipate a question of constitutional law
in advance of the necessity of deciding it, and will not formulate a rule of con-
stitutional law broader than is required by the precise facts to which it is to be
applied.\textsuperscript{22} To summarize briefly: A court has no authority to pass upon the
constitutionality of legislation unless the question is properly raised in a bona fide
proceeding at law or in equity, and even then, only where a substantial right of a
party thereto is actually threatened or affected. Besides these considerations the
presumption of constitutionality is an important factor when dealing with con-
troversies of that character, for "a court by force of its own reasoning or by reason
of the diversity of sentiment among its own members may often conclude that,
while according to what it deems the correct view, an act is void, still there is
another view that is permissible that would support the act. As legislators the
judges would be bound to follow their own judgment, but as a court they must
accord that same right to those in whom the constitution has reposed it.\textsuperscript{28} Legis-
lative judgment is one of expediency and policy, a resultant which may prove to be
a composite of personal sentiment, political or religious belief, economic theory,
social affiliations, together with many other considerations of like nature. All
such matters may appeal to legislative judgment and play their part in influencing

\textsuperscript{17}294 U. S. 330 (1935).
\textsuperscript{18}Arkansas Fuel Oil Co. v. Louisiana, 304 U. S. 197, 202 (1938).
\textsuperscript{20}Quong Wing v. Kirkendall, 223 U. S. 59, 64 (1912).
\textsuperscript{21}Southern Railway Co. v. King, 216 U. S. 524 (1910).
\textsuperscript{22}First Trust Co. of Lincoln v. Smith, 277 N. W. 762 (Neb. 1938).
\textsuperscript{28}Attorney-General v. McGuinness, 78 N. J. L. 346, 373 (1910).
the exercise of legislative discretion; but, in themselves, they are not elements
which enter into the exercise of judicial discretion. The judiciary apply existent
law to a fixed state of facts. They declare what the law is and not what they
would like it to be.24

Many writers rashly assume that in American jurisdictions the bulk of legisla-
tion is subjected to a species of judicial censorship which they term "annulment." According to an advertisement of a few years ago, a journalist had written a book referring to the United States Supreme Court as "The Nine Men above the Con-
stitution." This would have been a shocking averment had it proved to be well-
founded. Not to mince the matter, it must be acknowledged that these censorious
commentators are not entirely to blame for this assumption, when we recall that
the term "annul," and its derivatives, have sometimes been employed by courts of
law and equity when jurisdictional facts force a conclusion that certain legislation
is violative of the requirements of constitutional law. As far back as the year
1795, we find a federal judge saying, "if a legislative act oppugns a constitutional
principle . . . it will be the duty of the court to declare it null and void."25 This
ascription of a power of annulment is in reality such an oversimplification of
phraseology as amounts to exaggeration. A judge has no power to act in a case
until a party to an action or some one interested therein, invokes his judgment in
some legal manner.26 Again, "much which is harmful and unconstitutional may
take effect without any capacity in the courts to prevent it, since their whole power
is a judicial one."27 Moreover "annulment" of a statute would be the exercise of
a legislative power, and clearly ultra vires if attempted by a court of law or equity.
In other words since "neither of the three great departments of government . . .
can encroach upon the domain of another, (it follows that) the function of the
judicial department, with respect to legislation deemed unconstitutional, is not
exercised in rem but always in personam. The Supreme Court cannot set aside a
statute as it can a municipal ordinance. It simply ignores statutes declared un-
constitutional."28 For the most part, a court has no jurisdiction to pass upon the
constitutional validity of legislation unless it appears that an enactment brought in
question affects a party attacking it injuriously and actually; and even then the
scope of the decision should not be wider than that raised by the facts.29 Further-

24PROWSE v. ABINGDON, 1 Atk. 485 (Eng. 1738); ASHFORD v. THORNTON, 1 Barn. & Ald.
404, 460 (Eng. 1818).
25VANHORNE v. DORRANCE, 2 Dall. 304, 309 (U. S. 1795).
26UTAH ASSOCIATION OF CREDIT MEN v. BOWMAN, 38 Utah, 326 (1911); WEEKS v. BOYNTON,
37 Vt. 297, 301 (1864).
27Thayer, American Doctrine of Constitutional Law, 4 Harv. L. Rev. 129, 137 (1893).—
STATE v. CARROLL, 38 Conn. 449, 472 (1871) accord.
28ALLISON v. CORKER, 67 N. J. L. 596, 601 (1902).
29MASSACHUSETTS v. MELLON, 262 U. S. 447, 488 (1923); CORRIGAN v. BUCKLEY, 271 U. S.
323, 329 (1926); ESTATE OF JOHNSON, 139 Cal. 532 (1903); CURTIS PUBLISHING CO. v. CHICAGO,
273 Ill. 373 (1916); STATE v. ROBERTS, 74 N. H. 476 (1908); BENEDETTO v. KERN, 2 N. Y. S.
(2d) 844 (1936); SAYLES v. FOLEY, 38 R. I. 484, 491 (1916); VINKELST CONSTRUCTION CO. v.
GALLES, 204 Wis. 96, 101 (1931). See also authorities cited in note 15, supra.
more, even where such jurisdictional requirements prove to be fully satisfied it is noticeable that an authoritative declaration of constitutionality or of unconstitutionality, for all that it may be concededly correct in a given case, does not necessarily preclude a different judgment in the future. How can a law be "null" when we realize its constitutionality may depend upon environmental facts? The answer seems obvious that such a conception of nullity would be erroneous; for it has been authoritatively decided that a law valid when enacted may be rendered invalid through later change of circumstances; and conversely it has been held that a statute invalid at one time may become valid under a change of conditions taking effect subsequent to a prior determination of unconstitutionality.80 Today it is well settled that if a statute is directed to a legitimate end, and its provisions are an appropriate means to such an end, the legislative decision as to the necessity for the adoption of such means is final81 and obviously not within the sphere of judicial review.82 American laws are graduated from the federal constitution downward; and, as pointed out by the learned and clear-sighted Mr. Justice Lumpkin in the case of *Flint River Steamship Co. v. Foster,*83 "it is the peculiar province of the courts to ascertain and declare when any two of . . . several species of law conflict with each other; and then it follows, as a matter of course, that the less must yield to the greater."

A vast amount of litigation has arisen from time to time where there has been insidious encroachment upon constitutional guarantees. In themselves such indirect encroachments or infringements are seldom found to be a legal concern of the judiciary. "It will not do to say that the exercise of an admitted power of congress conferred by the constitution is to be withheld, if it appears or can be shown that the effect and operation of the law may incidentally extend beyond the limitations of the power. Upon any such interpretation the principal object of the framers of the instrument in conferring the power would be sacrificed to the subordinate consequences resulting from its exercise. These consequences and incidents are very proper considerations to be urged upon congress, for the purpose of dissuading that body from its exercise, but afford no ground for denying the power itself, or the right to exercise it."84 It is submitted that the same rule should be applied to state legislation.

Once in a while the law reports disclose unsuccessful efforts by parties litigant to persuade courts of law to exercise an obsolete power to supply a *casus omissus* or otherwise amend defective legislation. If judges should yield to such opportunities, their compliance therewith would trench upon matters which are the sole concern of the legislators; and consequently such encroachment upon the authority

82*German Alliance Insurance Co. v. Lewis,* 233 U. S. 389, 414 (1914).
of the law-makers would be *ultra vires* and violative of the constitutional mandate to be guided by the principles of due process of law. Furthermore, it is fundamental that the legislature has no power to shift the burden of the responsibility which it owes to its constituents by authorizing anyone, even such a body of experts as a code commission, to amend legislation.\(^8\) Notwithstanding all this, and in flagrant disregard of the constitutional curbs upon legislation by courts, previously referred to, we find an extraordinary assertion in a majority opinion of the United States Supreme Court, that the effect of a case therein cited was such that, "Its precept became a part of the Constitution."\(^9\) We should remember, however, that even Homer nods at times, and possibly the writer of that opinion meant no more than that the doctrine of the case cited was so clearly implied in the Constitution as to be embraced in its language. Not only is officious overactivity on the part of courts discountenanced by an overwhelming majority of members of the judiciary; but in addition it is elementary that any neglect or oversight of duty, such as is technically known as abuse of discretion, is a subject for remedial action by upper courts.\(^7\) On the other hand, it is the bounden duty of all courts to act when properly appealed to.\(^4\) And while it has been picturesquely remarked that courts have neither the power of the purse nor of the sword, judicial tribunals are not altogether helpless to act in response to the call of duty; for one does not require the encyclopedic erudition of Macauley's mythical schoolboy to realize that courts of justice possess and exercise considerable power of control over marshals, sheriffs, constables and other peace officers engaged in the enforcement and execution of judicial process.

In a juridical sense, and to a marked degree so far as courts are concerned, the legislative power of a state is supreme except in so far as it is limited and restricted by fundamental law;\(^4\) and wherever it can be shown that a legislature has authority to create new courts, it is permissible for it to relieve courts named in its Constitution of some of their powers in apportioning jurisdiction.\(^4\) Somewhat similarly, it has been recognized from a very early date in our national history that Congress has unrestricted discretion to determine the number, the character and the territorial limits of the courts among which it distributes judicial power, with certain, determinate exceptions as respects the Supreme Court. This legislative power to alter or amend the judicial system has made such a deep impression upon

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\(^8\)Cohen v. Virginia, 6 Wheat. 264, 404 (U. S. 1821); Wilcox v. Consolidated Gas Co., 212 U. S. 19, 40 (1909).

\(^9\)White v. City, 225 Ala. 646 (1932); Gillespie v. Barrett, 368 Ill. 607, 615 (1938); Laughlin v. City, 111 Me. 486 (1914); Bank of Chenango v. Brown, 26 N. Y. 467 (1863); Poor District Case (No. 1), 329 Pa. 390, 399 (1938); State v. Henderson, 4 Wyo. 535, 545 (1895).

\(^4\)Gerlach v. Moore, 243 Pa. 603, 609 (1914).
certain commentators that they keep reminding us that in the year 1801, the Federalists changed the number of Federal judges for partisan political purposes. Compared with high-ranking tribunals of the individual states of the Union, the Supreme Court of the United States has an extremely limited original jurisdiction. Even its appellate jurisdiction is subject to such exceptions and under such regulations as may be required by Congress. This constitutional authority of the national legislature, which empowers it to regulate the jurisdiction of the highest forum of justice in the land, has been strikingly exemplified in the history of the leading case entitled Ex parte McCordle, in which the appellate jurisdiction under a habeas corpus act was repealed, after proceedings thereunder were argued in the Supreme Court and taken under advisement. The court submitted to be divested of its authority to proceed to judgment in the case before it, saying, inter alia, "Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the case." Since that momentous decision was handed down it has been firmly established that "appellate review is not essential to due process of law but is a matter of grace." Another extensive field of legislative supremacy is likewise disclosed in the recognized legislative power of conferring or withdrawing judicial authority to take cognizance of suits against the government which is a corollary of the familiar maxim that no one can sue the government without its consent. In all likelihood the most singular instance of waiving governmental immunity from suit, in legal history, is the consent of an American State to be sued by another State "which is given by its admission into the Union." As previously noted, it has been remarked with great frequency that we Americans have a tendency to look upon our Federal Supreme Court as a tribunal endowed with plenary power to censor legislation conceived to be unconstitutional. An illuminating comment upon this popular fallacy may be found in the leading case of Massachusetts v. Mellon, where the court advanced the significant reminder that "since the formation of the government . . . a large number of statutes appropriating or involving the expenditure of moneys for nonfederal purposes have been enacted and carried into effect." The only present-day check upon such improper and unconstitutional activities, is that of public opinion "It is a well-settled doctrine that political questions are not within the province of the judiciary, except to the extent that power to deal with such questions has been conferred by express constitutional or statutory provisions." Briefly stated, all matters committed to the legislature or executive for final determination and dis-

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427 Wall. 506, 514 (U. S. 1868).
43Luckenbach Steamship Co. v. United States, 272 U. S. 533, 536 (1926).
44Virginia v. West Virginia, 206 U. S. 290, 319 (1907).
45Note 29, ante, p. 487.
posal in accordance with their sense of public duty are deemed political questions and non-justiciable. When it comes to determining whether a question be political and non-justiciable, 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.

It follows from these considerations that American courts have no supervisory control over the political branches of their governments, acting within the limits of constitutional authority but are conclusively bound by the actions of the executive or legislature within the spheres of duty entrusted to them by fundamental law. It is partly owing to this principle, that courts of law and equity lack the competence to assume or control the legislative function of deciding what is required by the public interest. Manifestly political discretion is not a matter with which legal tribunals have a right to concern themselves. As previously noted in this article, history and social experience have played a more important part in pricking out the boundaries between justiciable and non-justiciable fields of influence than that which has been the outcome of excogitation. In our own federal system, it is not to be anticipated that a state which existed prior to the formation of the United States, with a chief executive known as a president, should have identical political and juridical organization with that of a state which has been subsequently admitted to the Union with naturally different traditions. Politics, (in the widest sense of the word the science of civil government), like all other spheres of social activity, is in a state of flux and development. For this and other reasons there is an occasional diversity of theory to be found among our multiplicity of American jurisdictions when dealing with public as well as with private rights and obligations. In cases involving the action of the political branches of an American government pertaining to what are known as political questions, it is virtually horn-book law that the judiciary is conclusively bound to recognize the finality of such action.

The political branches of the government, as is well recognized, are those which primarily administer the affairs of the state or nation as differentiated from that which judicially disposes of cases and controversies properly referred to it for adjudication. For the most part the personnel of the executive and legislative departments of governments are endowed with greater facilities and experience for dealing with public affairs than those which are at the command of courts of justice; and consequently have actual as well as legal competence to act in such matters.

As might be anticipated, the category of political questions is more a product of practical experience than the result of scientific analysis. In American jurisdictions it includes many constitutional powers whose enforcement is deliberately withheld.

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48WILSON v. SHAW, 204 U. S. 24, 32 (1907).
50PHILLIPS v. PAYNE, 92 U. S. 130 (1875).
from the province of the judiciary. Among the questions which have been adjudged to be political and not of judicial cognizance may be mentioned: the ratification of a constitution or amendment thereof; the wisdom and expediency or necessity of the means adopted by a legislative body to effect a legitimate object; the recognition of a foreign sovereign or government; the guarantees to the States of a republican form of government; the establishment of military government at a certain date; and the exclusive and final jurisdiction of a legislative body which tries an impeachment. It has thus been shown that courts of law and equity are conclusively bound by official executive or legislative action upon political questions. The doctrine of non-encroachment likewise prohibits judicial interference in legislation. An emphatic illustration of this principle is the familiar rule that the judiciary is powerless to enjoin the enactment of laws alleged to be unconstitutional. However the doctrine of non-encroachment does not forbid courts to interpret or pass upon the constitutional validity of legislation under well-defined conditions and restrictions previously referred to in this article. "The legislature in determining what shall be done, what it is reasonable to do, does not divide its duty with the judges, nor must it conform to their conception of what is prudent or reasonable legislation. The judicial function is merely that of fixing the outside border of reasonable legislative action, the boundary beyond which the taxing power, the power of eminent domain, police power, and legislative power in general, cannot go without violating the prohibition of the constitution or crossing the line of its grants."

It has been found necessary at a comparatively recent date to reiterate the principle that "a court cannot assume to substitute its discretion for the discretion of administrative or legislative bodies." Such transcending of the limits of judicial authority would, in itself, be an abuse of discretion. It follows, as a matter of course, that so far as executive and administrative officers are concerned, courts are not empowered to require any government officer to forsake his duty to exercise his own judgment in accordance with a discretion reposed in him by law. After the officer has exercised such judgment, courts would have no power of review except in cases of abuse of discretion such as a mistake of law, finding of fact with no substantial basis of evidence, or fraud or imposition, none of which factors could be reconciled with a concept of lawful discretion. There is authority for

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63 Thayer, Legal Essays, 27 (1923 ed.).
64 Wallace v. Feehan, 205 Ind. 522, 334 (1934).
65 Gaines v. Thompson, 7 Wall. 347 (U. S. 1868); Virginian Ry. v. United States, 272 U. S. 636, 663 (1926); Borghis v. Falk, 147 Wis. 327 (1910).
the position that even the exercise of judgment in expounding laws under which a government official's duty requires him to act, cannot be controlled by a court. But this well-founded principle should be carefully measured by its *ratio legis*, which is conceived to be abstention from encroachment tending to obstruct or impede the orderly conduct of government business. Consequently it would be *ultra vires* for a ministerial official to take the position that a statute under which he is required to act, is unconstitutional. However, as was once said by the painter, Ingres, "to follow a principle blindly is to abuse it"; and it would seem that there is an exception to this last-stated rule, when such officer raises a question of unconstitutionality because of a personal stake in the matter brought before him.57

In virtually all cases having to do with governmental activities, courts are closely restricted to questions of power and not concerned with matters of policy. Moreover "judicial power as contradistinguished from the power of the law has no existence. Courts are the mere instruments of the law, and can will nothing." Hence courts have no competence to initiate suits or prosecutions; and, as previously noted, have no authority to raise or decide questions of constitutionality of their own motion. Considerations of expediency, utility and comity may serve as useful guides in determining whether it is lawful to attempt to exercise a power whose character is not the same as that of the authority possessed. Furthermore, if it appear to be impossible to carry through undertakings foreign in their nature to those primarily imposed upon particular officers of the government, it would seem obvious that such undertakings are outside of their respective legal spheres of action. This latter reason accounts in part for the rule that executive officers have no right to pass upon the constitutionality of statutes, which is exclusively a matter for courts. The right to raise a question of unconstitutionality where there is a personal stake in the matter is not an infringement of a duty to refrain from deciding the same. Impracticability and inexpediency constitute contributory reasons for the corresponding rule of non-encroachment which forbids judicial tribunals to weigh legislative questions of policy, or usurp the powers of public prosecutors, or other executive officers. At the same time it should be borne in mind that the fundamental principle of necessity comes into play wherever the transaction of public business reasonably demands the exercise of functions which, at first blush, may seem to pertain to other branches of government. Almost needless to say, this doctrine is available to all departments of government. Primarily it is the duty of all government officers to read and apply statutes which they are required to enforce. This proposition is clear if we recognize that as a corollary to the maxim that public officers are presumed to do their duty, there is in logical sequence a

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60 Expert advice and assistance in coping with difficult problems in the transaction of public business, is almost invariably accessible to government officers.
presumption that public officials know the laws prescribing the performance of such duty. At any rate the primary right and duty of public officials to interpret the law which they are sworn to observe, is impliedly recognized by the courts which frequently employ executive or administrative construction of statutes as a canon of interpretation within well-established limits of the ancient and at the same time modern rule, Communis error facit jus.\textsuperscript{61} As a general rule neither the legislative department nor the executive department of an American government can be curbed in its action by the judicial branch, although such action when completed, may be reviewed by courts of law, in such cases as may be properly justiciable. In action is another matter, for superior courts are empowered to enforce the performance of ministerial duties by executive officers and inferior judges and courts, by means of the writ of mandamus. Ministerial duties, it may be observed in passing, are those which do not demand the exercise of discretion, such as the performance by court clerks of prescribed duties;\textsuperscript{62} or the levying of execution by sheriffs or constables;\textsuperscript{63} suit by a party entitled to the performance of a ministerial duty against an official charged with its execution is not accounted a suit against such official's government.\textsuperscript{64}

At the same time it should not be overlooked that the fundamental principle of non-encroachment restrains courts from taking jurisdiction where administrative remedies are available and there has been failure to use the same.\textsuperscript{65} Likewise an evasion of executive jurisdiction may disentitle a complainant to a judicial hearing.\textsuperscript{66} In exceptional cases where an executive officer exceeds an authority conferred upon him by law, in promulgation of an ultra vires order under color of his office, the judicial authority will enjoin him from carrying such illegal order into effect.\textsuperscript{67} It is not always easy for an administrative officer to steer his course between the Scylla of anarchical inefficiency and the Charybdis of unconstitutional autocracy, with satisfactory results. In such a case, as that just outlined, there is no judicial interference with the administrative action in drafting the order—which would be highly improper and would go beyond the verge of judicial authority—for it cannot be stressed too often that no branch of the government is to be hampered in the exercise of its primary functions. On the other hand, it should not be overlooked that the jurisprudence of English-speaking people lays especial emphasis upon the importance of safe-guarding the individual against governmental or community oppression, as well as against attempted wrong-doing by individuals. When necessity demands it, this protection will be accorded by means of that branch of the law of remedies which is known to our system of laws as equity. This traditional solicitude for human rights is so deeply rooted in American jurisdictions

\textsuperscript{61}McKean, Communis error facit jus, 34 Dickinson L. Rev. 34, 43.
\textsuperscript{62}Russel v. Davis, 99 N. C. 115 (1888).
\textsuperscript{63}Freudenstein v. McNeil, 81 Ill. 208 (1876).
\textsuperscript{64}Houston v. Ormes, 252 U. S. 469 (1920).
\textsuperscript{66}Chin Bak Shan v. United States, 186 U. S. 193, 201 (1902).
\textsuperscript{67}Work v. Louisiana, 269 U. S. 250, 254 (1925).
that we even find equity powers exercised to enjoin the threatened enforcement of an unconstitutional statute "whenever it is essential, in order to protect property rights and the rights of the person against injuries otherwise irremediable." Historically this valued heritage of our race dates back to the days when feudal law worked out the principle that the government is below the law, a doctrine recognized by Bracton, Magna Carta, and American constitutions, which has been aptly summarized in the pithy maxim, "No man is above the law." The seemingly antithetical saying that the king can do no wrong, is taken to mean that a government cannot authorize wrong. Assuredly "nothing better becomes authority than that it should live by the laws."

At this point, it is interesting to observe that both the fifth and the fourteenth articles of amendment of the constitution of the United States guarantee the protection of due process of law against any violation of human rights by any form of governmental activity, whether through legislative, executive or judicial agency. So far as this particular guarantee relates to the exercise of judicial power, it may be stated that no judgment of a court of law or equity satisfies the requirements of due process of law, if a single jurisdictional fact be lacking.

President Cleveland's well-known maxim that public office is a public trust, formulates a thought which among other considerations is conducive to the very proper reluctance of courts of justice to subject a chief executive to judicial process; and thereby bring about a state of affairs which might halt, or at least hamper, the transaction of public business. Imagine the devastating mischief and chaos which might easily ensue were the President or a governor, while in office, to be at the beck and call of anyone who might feel a desire to drag a chief executive before a court of justice. An immunity from judicial process, during tenure of office, (which is unquestioned in the case of the President, and should not be disputed in the case of the governor of a state), is not a violation of the maxim that no man is above the law, for a chief magistrate is answerable to a political tribunal, a court of impeachment, which is the constitutional forum in which a chief executive may be tried for offences sufficiently serious to require that he be put on the defensive for maleficient acts. Furthermore, this politic and sensible exemption of a chief executive from judicial process does not leave a private citizen utterly helpless, for the latter may resort to the protection of the courts of law and of equity where ultra vires executive activities specifically violate his property or personal rights.

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69Longford v. United States, 101 U. S. 341 (1879); Feather v. The Queen, 6 B. & S. 257, 295 (Eng. 1865).
70Bracton, De Legibus, xvi sec. 3.
71Cf. Scott v. McNeal, et al., 134 U. S. 34 (1894). One marked difference between the fifth and fourteenth amendments, is that the former contains no guarantee of equal protection of the law.
Such court decisions upon the validity of executive acts do not amount to unwarrantable intrusion upon the domain of a political branch of the government, but, in our American system, would constitute the exercise by judicial tribunals of their right and bounden duty to judge the law and apply it when properly and legitimately appealed to. A vast majority of State jurisdictions recognize the constitutional fitness and propriety of the immunity of a chief magistrate from judicial process, a principle which, as is well known, was emphasized by President Jefferson, who settled the question when he successfully disputed the validity of a subpoena issued to him by Chief Justice Marshall.

It is regrettable that federal courts have permitted themselves to be employed as agencies to molest chief magistrates of American States, instead of recognizing and acknowledging the seemliness and propriety of according to governors an official freedom from judicial process. The recent recognition by the United States Supreme Court of "sovereignty of the States," is noticeably incompatible with toleration of federal court interference with State governments. An American chief executive is entrusted with the duty of taking care "that the laws be faithfully executed," and undoubtedly the discharge of this obligation is his most important official function. So important is this responsibility for law enforcement that the head of the executive branch of an American government, State as well as Federal, is vested with the office and powers of commander-in-chief in order that the military as well as the civil arm may be employed by him in time of stress or emergency. There is authority for contending that a chief executive has power to interfere in criminal cases so far as to cause the abandonment of prosecutions in order to terminate such proceedings and procure the discharge of the accused; but interference by a chief executive with judges is not allowable. The official freedom of a chief executive from judicial process, previously referred to, is no protection to his subordinates seeing that the rule that officers or other agents of the government are answerable for the consequences of their trespasses or other illegal acts although committed in obedience to the commands of a superior is so all-inclusive that it covers the case where subordinates have obeyed an illegal order of the President.

From time to time it has been sought to extenuate the seeming harshness of this wholesome rule, which exists for the protection of the private citizen, by observing that public office is accepted *cum onere;* but inasmuch as American legisla-

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78 RICE v. THE GOVERNOR, 207 Mass. 577 (1911); SUTHERLAND v. THE GOVERNOR, 29 Mich. 320 (1874); DONNELLY v. ROOSEVELT, GOVERNOR, 259 N. Y. S. 355 (1932); HARRANFT'S APPEAL, 85 Pa. 433 (1877).
74 UNITED STATES v. PINK, 62 Supreme Court Reporter, 552, 567 (1942); PENN-DAVIES v. MILK CONTROL COMMISSION, 63 id. 617, 621 (1943), ACCORD.
77 IN RE KAINR, 14 How. 103, 140, 141 (U. S. 1852).
78 WISE v. WITHERS, 7 Cranch 331 (U. S. 1806); MITCHELL v. HARMONY, 13 How. 15 (U. S. 1851); LOWRY v. ERWIN, 6 Robinson, 192, 205 (La. 1843).
79 LITTLE v. BARREMI, 2 Cranch, 170 (U. S. 1804). Furthermore, anyone who is illegally arrested by the executive order of the President, is entitled to discharge on habeas corpus, EX PARTE OROZCO, note (72), SUPRA.
tures have unquestioned authority to recognize and discharge the moral obligations of their respective governments, they may be looked to for appropriate action in alleviation of unmerited hardship which might follow where public officers are mulcted for obeying the commands of their superiors. But regardless of what action might be taken by the legislative authorities, it is not to be overlooked that a "government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work."

The constitutional doctrine that the federal government is restricted to powers specifically enumerated in the constitution, or implied from enumerated powers, applies only to internal affairs. This canon of interpretation is so rigid that the United States government is not permitted to profit by unconstitutional activity of its officers or agents. External affairs are on a different footing from that of internal affairs, for they are entrusted to the President "in subordination to the applicable provisions of the (federal) constitution." An important resultant of this principle is the military duty of the President as Commander-in-Chief of the armed forces to set up provisional governments (including courts), in occupied enemy territory, in order to ensure the security of persons and property, and provide an adequate and satisfactory administration of justice. This power, vested in the President, extends so far as the laws of war permit, except where restrained by the pledges of the government or in cases limited by Congressional action. At this point it might seem supererogatory to remark that officers and agents of the government, should carefully avoid making promises beyond the scope of their delegated authority; were it not a matter of history that, at one time, an eminent army officer made a pledge of citizenship to the inhabitants of an invaded West Indian Island, which assurance was repudiated by the United States government. Briefly summarized, a president's political decisions are non-justiciable, and his liability for his behavior, while occupying his high office, is to a court of impeachment alone, although his non-political acts may be passed upon by judicial authority. But it must not be overlooked that a president's agents and other officers are subject to judicial process for infractions of law, and furthermore, it is a matter of every day observation that Congress has power to prescribe the routine duties of a president's subordinates. At the same time it should not be overlooked that there is no legislative or judicial check upon a chief executive's important power to approve or disapprove an enactment, for that function is personal, a high prerogative, and non-delegable.

82Silverthorn Lumber Co. v. United States, 251 U. S. 385 (1920).
83United States v. Curtiss-Wright Export Corp., note (81), supra.
84Cross v. Harrison, 6 How. 164 (U. S. 1853); The Grapeshot, 9 Wall. 129 (U. S. 1869); Planters Bank v. Union Bank, 16 Wall. 483 (1872); Herrera v. United States, 222 U. S. 558 (1911).
85Eckles v. Fox, 300 U. S. 82 (1937). See also cases cited in notes 72, 77, 78 & 80, supra.
It is almost axiomatic that there would be no vitality in law, were conscientious and efficient administration found to be lacking; for, at all times, much of the procedure by which governments are carried on has been administrative or executive. Administrative law is not of such recent origin as many commentators seem to think. Just as there was a law of quasi-contracts before Professor Keener classified it and gave it a name, so there has been administrative law, centuries before its systematic study in the last decades of the 19th century. So far back as the reign of Henry III, of England, there was a commission of sewers, in Romney Marsh.

The most famous administrative officials in the history of English law and institutions, are the justices of the peace, originally "conservators of the peace," "statutory officials having no traditional or common law powers," as phrased in Jenks' Short History of the Common Law. Amongst numerous duties, these functionaries settled questions of order, roads and bridges, prices and wages, and fixed the rates to be charged by common carriers. Most of these undertakings have now been transferred to administrative tribunals. While the law of justices of the peace is exclusively statutory in England, there is authority for considering such statutes, as may be deemed applicable, to be "common law" in American jurisdictions.

Practically all administrative power is derived from statutory enactment; and it is a matter of elementary observation that a statute has three parts, viz., declaratory, directory and vindicatory. Standards and other limitations of administrative activity are directory, and their fixation is legislative, and non-delegable.

Here it may be noted that there are two main divisions of legislative power; that which is delegable and that which is not delegable. Such primary functions as exclusively pertain to supreme legislative power, mainly lawmaking, policy-making and taxation are non-delegable.

Exercise of the policy-making function occasionally leads to legislation descending into minute details, especially where the legislators are dissatisfied with the attitude of administrative officers; but ordinarily, matters of detail are left to the discretion of other agencies such as courts, executive officers, administrative boards, commissions, etc., where some statutory standards, rules, or other limitations fix ascertainable bounds to the authority conferred.

Matters which historically and traditionally have been of such an ambiguous character as to be exercised by the legislature at pleasure, or be entrusted to other branches of the

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873 Bl. Com. 329 n. t.
90Wayne v. Southard, 10 Wheat. 1, 42 (U. S. 1825); Field v. Clark, 143 U. S. 649 (1892); Monongahela Bridge Co. v. United States, 216 U. S. 177, 192 (1910); State v. Traveller's Insurance Co., 73 Conn. 235, 262 (1900); Locke's Appeal, 72 Pa. 491 (18 ); In re Appointment of Revisor, 141 Wis. 592 (1910).
government uncurbed by hampering restrictions, are clearly delegable. To repeat an oft-quoted maxim, familiar to readers of Holmes on the COMMON LAW, the life of the law has not been logic, it has been experience." There are many governmental usages and practices so firmly established as to constitute due process of law, and be implied as such in American constitutions. This principle naturally follows from a canon of interpretation that resort may be had to the common law, and British statutes and institutions, as an aid to elucidation of the language of an American constitution. Ignorance of the teachings of the past sometimes occasions disastrous blunders. Returning to the topic of delegated powers, a legislature may if it so desires, enact by-laws for municipal corporations; or at its option, it may empower such subordinate governing bodies to draft and enforce their own local ordinances, under proper limitations and restrictions. It also has the option of enacting statutes covering the subject of legal procedure, or of leaving much of its detail to be governed by rules of court. Power "to fill up details" is not an ultra vires delegation of legislative power. Hence it is not considered an invalid exertion of legislative power, for a court to decide in a litigated case, whether particular acts come within a generic statutory provision. In relation to generic statutory provisions, an exceedingly interesting and perhaps extreme instance of legislative delegation of power authorizing courts of law to "fill in details" is afforded by the famous Statute of Westminster I, under which much of the law of torts and quasi-contracts was developed.

On the general subject of power, Sir William Holdsworth's succinct phrasing may be quoted, at this point. It is as follows, "The existence or non-existence of a power or duty is a matter of law and not of fact, and so must be determined by reference to some enactment or reported case." From the days when William the Conqueror's Norman officials employed inquests as fact-finding agencies, fact-finding has not been deemed an exclusively judicial function. Hence courts have power to delegate to masters, auditors and similar agents to conduct hearings on disputed or intricate matters, and report their conclusions thereon to the judge or bench appointing them.

This inherent power does not extend so far as to permit a judge to delegate a judicial duty or subdelegate a judicial function. At the same time the performance of sundry acts considered by courts of law to be exercises of administrative

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96 Standard Oil Co. v. United States, 221 U. S. 1 (1911).
913 Edw. 1 c. 24 (1285).
98 Briggs v. Reynolds, 176 Ill. App. 420 (1912); State v. Noble, 119 Ind. 350 (1888); McCoy v. Able, 131 Ind. 417 (1891); Van Slyke v. Fire Insurance Co., 39 Wis. 390 (1876).
functions may be delegated to courts, although not accounted judicial when performed by them. A very familiar group of such deputed activities includes, the appointment of members of park commissions and school boards; the licensing of private detectives and inn-keepers; officiating at civil marriages; and approval of corporation charters. It is surmised that the discharge of many of these duties, by American courts, has historic antecedents in the practice of the old English Courts of Quarter Sessions of the Peace; in addition to the demands of the social convenience and administrative necessities of sparsely settled communities of American pioneers. All tribunals, administrative and judicial alike, lack the power to require testimony, except in cases where the investigation concerns a specific breach of the law. Even then, there is no such thing as contempt of a subordinate administrative body. However an order of court based upon an issue of law, such as a refusal to present evidence in such a body may be used by a court of law as a basis for contempt proceedings in the event that its mandate be uncomplied with.

Where duties of an ambiguous character are imposed upon a judicial officer, by legislative enactment, any doubt will be resolved in favor of the validity of the statute, and the power held to be judicial. There is a similar presumption in the case of duties imposed upon executive or administrative officers. All of this follows from the fundamental principle that every intendment is in favor of the constitutionality of a statute. It is a matter of practical and urgent necessity that something be left to the judgment and discretion of administrative officers to accomplish, in detail, that which is authorized or required by law phrased in general terms. But it should never be overlooked that such activities are limited by the fundamental principle of Anglo-Saxon governments, that the rights of men are to be determined by the law itself, and “not by the let or leave of bureaus.” At all events, any unnecessary impairment to the point of practical destruction of a right safeguarded by an American constitution is invalid, whether effected by legislative enactment or by executive or judicial administration, as being violative of fundamental law. Consequently the right to carry on a lawful business or occupation cannot be made to depend upon the arbitrary will, whim or caprice of any man or board, in an English-speaking community. Some standard established by law is indispensable, and the fact of compliance or non-compliance therewith may then be determined by legally constituted authority. So far as courts of law are concerned, an unabused exercise of administrative or executive discretion in the discharge of lawfully delegated powers, is deemed non-justiciable. In addition to this limitation upon judicial power, it should be noted that it would be an act of usurpation

100INTERSTATE COMMERCE COMMISSION v. BRIMSON, 154 U. S. 457, 489 (1894).
101STATE v. BATES, 96 Minn. 110, 116 (1905).
102BATES & GUILD CO. v. PAYNE, 194 U. S. 106 (1904); PETITION OF STATE ex. rel. ATTORNEY GENERAL AND OTHERS, 220 Wis. 25 (1936); See also cases cited in note 94 supra.
103Cf. cases cited in note 55 supra.
for a court to review an administrative act from an administrative standpoint.\textsuperscript{104} This principle is so deeply rooted in our system of jurisprudence, that even legislation authorizing a judicial tribunal to modify an administrative order, lacks constitutional validity.\textsuperscript{105} In non-technical language, courts decide whether administrative or executive officers have overstepped the limits of delegated authority, but do not rewrite administrative orders, although they may affirm or reverse the same; and in the latter case courts of law have the constitutional power of exonerating a party from an order that exceeds the law.\textsuperscript{106}

In determining whether an order of an administrative body or official would be suspended or set aside, there are three major points worthy of consideration:\textsuperscript{107}

1. All relevant questions of constitutional power or right. Thus: a denial of an opportunity for a hearing;\textsuperscript{108} abuse of discretion, such as arbitrarily and unreasonably refusing to receive important additional testimony adduced without undue delay,\textsuperscript{109} or findings of fact which are without evidence, contrary to the indisputable character of the evidence, inadequate or arbitrary in any respect\textsuperscript{110} would be subject to judicial review as violations of fundamental law.

2. All pertinent questions whether or not the administrative order was within the scope of delegated authority, under which it purported to be made.\textsuperscript{111}

3. Whether, though formally the order be correct, it had been arrived at in such an unreasonable manner as not to be within the scope of delegated authority.\textsuperscript{112}

To recapitulate: Where an \textit{intra vires} order of an administrative official has reasonable grounds for its promulgation, it is conclusive;\textsuperscript{113} for administrative process of the customary sort is as much due process as any other kind.\textsuperscript{114} This is


\textsuperscript{106}Bacon v. Rutland Railroad Co., 232 U. S. 134 (1913).


\textsuperscript{108}Morgan v. United States, 304 U. S. 1 (1938); Ballard v. Hunter, 204 U. S. 241 (1907).

\textsuperscript{109}Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197 (1938).


\textsuperscript{111}United States v. Allen, 261 U. S. 317 (1923); Board of Education v. Rice (1911) A. C. 179 (Eng.); Cart, Administrative Law; 51 Law Quarterly Review, 58, 66 (1935).

\textsuperscript{112}Borgnis v. Falk, 146 Wis. 327 (1911).


not surprising if we stop to consider, that English equity originated as an administrative system, and that the prerogative writs of common law began as administrative orders. At the present time, findings of fact of administrative tribunals bear a close analogy to those of a chancellor, which, as is well known, have the force and effect of a verdict. Furthermore, matters of expert technical knowledge, which it is not practical to present in court by testimony, with any degree of clarity are generally considered the sole responsibility of an administrative tribunal, entrusted to its discretion, and not subject to judicial review. However, the interpretation of statutes by administrative officers is a matter of law, usually considered jurisdictional, and in consequence is subject to judicial review. At the risk of undue repetition, it may be here stated that all non-political questions of governmental power, are justiciable. And it is not to be presumed that any court would exceed its own jurisdiction, unless it appears plainly that it has done so. "It must act judicially in all things, and cannot then transcend the power conferred by law." Specifically, "All courts, even the highest, are more or less limited in their jurisdiction: they are limited to particular classes of action . . . . or to particular modes of administering relief . . . . or to transactions of a special character . . . . or to the use of particular process in the enforcement of their judgments." Consequently, "It is important . . . . that in a free country . . . . those entrusted with its administration . . . . confine themselves within their respective spheres, avoiding in the exercise of the powers of one government to encroach upon another." Nevertheless, "If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the constitution designates."

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115United States v. Lane, 250 U. S. 549 (1919); Williams v. United States, 281 U. S. 206 (1930).
117Anonymous, 10 Mod. 71 (Eng. 1711).
119Ibidem.
120Washington's, Farewell Address, Sept. 17th, 1796.
121Ibidem.