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A FINAL WORD ON THE DOCTRINE OF THE HODGES CASE

KENNETH C. DAVIS*

Mr. Donley's reply to my article of last June is especially welcome because it again directs attention to a West Virginia problem which deserves more extensive recognition and because it contributes to the discussion a point of view which is widely at variance with that of the original article. The difference of opinion is so fundamental that Mr. Donley's substantial agreement with one of my conclusions may be of particular significance: that *if* the West Virginia court follows the interpretation given the separation-of-powers clause in four recent cases, a large portion of all existing West Virginia legislation setting up administrative agencies will be found unconstitutional.¹ Of course, I believe that the prospect of such wholesale invalidation of our laws on supposed constitutional grounds serves only to emphasize that the court's interpretation is unduly strict and that the recent decisions should be limited or overruled.

Unlike Mr. Donley, I believe that the separation-of-powers clause should not be interpreted as if it were a provision of a contract or a deed.² I envy Mr. Donley's ability to classify all functions of government into three rigid categories; I do not have that ability.³ But even if all governmental powers were easily classifiable, I could never agree that the principle of separation of powers, without more, is the proper tool for creating law

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¹ The four cases are *Hodges v. Public Serv. Comm.*, 110 W. Va. 649, 159 S. E. 834 (1931); *Baker v. County Court*, 112 W. Va. 406, 164 S. E. 515 (1932); *Danielley v. City of Princeton*, 113 W. Va. 252, 167 S. E. 620 (1933); *Staud v. Sill*, 114 W. Va. 208, 171 S. E. 428 (1933). Even Mr. Donley flatly disagrees with the Baker case. Of six existing statutes I chose as examples (all of which I believe to be unconstitutional *if* the court follows its four decisions, but all of which in my opinion *should* be upheld), Mr. Donley finds five unconstitutional, in whole or in part, if the court follows all four of its decisions, including the Baker case. See my discussion (1938) 44 W. VA. L. Q. 270, 366-69.

² I wonder whether Mr. Donley realizes that a literal interpretation of the separation-of-powers clause would render invalid nearly every municipal charter in West Virginia.

³ Compare Holmes, J., dissenting in *Springer v. Philippine Islands*, 277 U. S. 189, 211, 48 S. Ct. 480, 72 L. Ed. 845 (1928): "It does not seem to need argument to show that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments, were it ever so desirable to do so, which I am far from believing that it is, or that the Constitution requires,"

governing the extent of review of administrative action. In my view, the problem is intensely practical and cannot be solved by application of logic to abstractions. I believe that the extent of review should depend upon comparative qualifications of judges and of administrators to decide each question—upon quality of administrative personnel, upon adequacy of procedural safeguards and upon political susceptibilities of particular agencies, upon the nature of the issues to be determined, upon specialization of judges and of administrators, and upon relative judicial and administrative biases.⁴

But for Mr. Donley and me to argue about the substantive law involved is futile.⁵ Our difference is much deeper. Indeed, Mr. Donley's underlying philosophy seems to me almost unbelievably extreme. He apparently thinks that principles of law exist for their own sake. In one especially revealing sentence he sets forth the essence of his view: ". . . the statement that the answers to twentieth century questions must be found in modern experience . . . is a counsel of conscious intellectual hypocrisy."⁶ He even goes so far as to accuse Mr. Justice Holmes⁷ and Mr. Chief Justice Hughes⁸ of this "conscious intellectual hypocrisy", for no better reason than the willingness of those judges to look

⁴ Mr. Donley tries to shift the ground of the argument by making it appear that I am favoring judicial review and that he is arguing for administrative finality. He apparently fails to appreciate the distinction between advocating judicial review and advocating constitutionality of legislative provisions for judicial review where the legislature, on grounds of policy which it finds sufficient, sees fit to permit or to require judicial review.

The paradox is that anyone with Mr. Donley's general point of view should declare himself in favor of administrative finality.

⁵ Because of such a fundamental cleavage between Mr. Donley's views and mine, I choose to ignore what I believe to be his misinterpretations and misunderstandings concerning numerous details. In the light of all his strictures, I would now change only one word of what I have written: Mr. Donley deserves full credit for pointing out that in one place I erroneously said "circuit" court instead of "supreme" court.

⁶ Page 299.

⁷ In criticising the "cult of modernity" for being "essentially hypocritical", he says at p. 298: "It says one thing and does another. The Constitution does not mean today what it meant yesterday, nor the day before. It shifts and changes under the skillful manipulation of the skin-of-a-living thought school of jurisprudence." The reference is to a statement of Mr. Justice Holmes in *Towne v. Eisner*, 245 U. S. 418, 425, 38 S. Ct. 158, 62 L. Ed. 372 (1918): "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

⁸ In denouncing the opinion of the Chief Justice in *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. 413 (1934) Mr. Donley uses even more caustic language. He says the opinion is "a neat example of the judicial method of having your cake and eating it too", that

beyond the printed word in interpreting the Constitution.⁹ He seems to say that "bending" a principle in order to reach a desirable result is "dishonest".¹⁰ In his view, the law is a closed system of logic wholly divorced from reality.¹¹

To me, a mere summary of such views constitutes a refutation. True, similar notions may have been prevalent at one time in the history of the development of law. But I regard the Donley view as a vestige of a false dogma, long rejected, especially in the realm of public law. Advocacy of logomachy "without regard to the result reached" is the kind of lawyers' thought which does and should bring the legal profession into disrepute.

Mr. Justice Holmes, in a passage with which I emphatically agree, summarizes the "hypocrisy" which Mr. Donley finds so repulsive:

" . . . when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."¹²

the reasoning is circular, and that "Chief Justice Hughes' words were mere lip-service: the high priest repeating the ritual which he did not follow in practice." I think these epithets are unjustified.

⁹ Before the Hodges case, the West Virginia court usually construed the separation-of-powers clause liberally to make it workable. Thus, Judge Brannon, in *Maekin v. County Court*, 38 W. Va. 338, 348-49, 18 S. E. 632 (1893) spoke of "facility", "necessity", "expediency", and "usefulness". Apparently Mr. Donley regards all such cases as "conscious intellectual hypocrisy". He makes no analysis of the decisions prior to the Hodges case but says flatly of them (p. 303-4): ". . . previous interpretations were unsound and the question may be determined without reference to them."

¹⁰ Mr. Donley's sentence is: "It is preferable that a principle of law be honestly misinterpreted or misapplied without regard to the result reached, than that an expedient result be had through a dishonest bending of the principle to justify it." (p. 299).

¹¹ Compare CARDOZO, *NATURE OF THE JUDICIAL PROCESS* (1921) 46: "The misuse of logic or philosophy begins when its method and its ends are treated as supreme and final."

¹² *Missouri v. Holland*, 252 U. S. 416, 433, 40 S Ct. 382, 64 L. Ed. 641 (1920).