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THE LIVING CONSTITUTION

1787 : 1937

In this year of grace, 1937, and the one hundred-fiftieth since the Constitution went forth to the States seeking adoption by the people as their fundamental law, it seems fitting to pay tribute to it as a living Constitution. In 1835 De Tocqueville wrote:

"The Supreme Court is placed at the head of all known tribunals, both by the nature of its rights and the class of justiciable parties which it controls. The peace, prosperity and very existence of the Union are placed in the hands of judges."

When De Tocqueville wrote this a century ago, the Supreme Court had only once pronounced upon a law of Congress. This was in the Marbury case in 1803. The nationalizing tendency and the "expounding" by Marshall, or the relation of the Court to the federal system, seem to have been the main thoughts in De Tocqueville's mind. In 1937, Professor Henry W. Edgerton, of the Cornell University Law School, writing in the Cornell Law Quarterly 1 on The Incidence of Judicial Control Over Congress, gives a detailed

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1 12 CORN. L. Q. 137. The author states: "I am concerned only with the practical effects and tendencies of the nullifying decisions . . . This paper . . . deals for the most part with direction rather than distance . . . It is not a study of the Court, but of one of its functions."
and informing study of the actual effects of judicial review. By the clear light of Professor Edgerton’s study it is evident there is need of revising much of our constitutional history. However this may be, to this day the great De Tocqueville’s words stand; and, in interpreting the Constitution under the principle of judicial review, the Court has given evidence in a socio-economic age that the organic law under which we live is not an abstract thing. It has become a living letter governing actions and determining positive relations among men. In this our day a Cardozo on the bench makes clear that the courts must be furnished with available data on human relationships involved in cases before them, in order to arrive at wise conclusions; and that “some of the errors of the courts have their origin in imperfect knowledge of the economic and social needs to which a decision will respond.” Thus, an economic interpretation of the Constitution admits of the deduction that the law has no reality when separated from social and economic factors by which it is in part conditioned and in turn helps to condition. Under an economic interpretation of the Constitution by the Court, the legalistic method is said to break down; and though the Court applies legal rules of construction, these rules admit of contradictions. These contradictions are pointed out by Professor Rand- dall, of the University of Illinois. He asks: “What has be-

For a new interpretation of Marshall’s doctrine on judicial review in the Mar- bury case, 1 Cranch 137 (1803), see Bowers, Jefferson’s Powers, most especially pp. 168ff.

2 See Beard, An Economic Interpretation of the Constitution of the United States 12. See, also (when it appears), McCarthy, The Federal Constitution, An Historical and Textual Commentary.

come of the Court’s rule of Construction?” And answers:³

“When one reads the hundreds of pertinent cases involved in pursing this inquiry he finds that the adjustment of certain practical interests—it may be those of a bank or a steamship company or a grain elevator corporation or a railroad—and the safeguarding of public interest in connection with these adjustments, have induced a modification here and a restatement there until the Court’s rules have been flattened into broad doctrines that permit an expansive and flexible interpretation. The Court says in sweeping phrase that the Constitution must be construed as to promote its broad purposes. It deals in general language and must not be given the literal interpretation suitable to a legal code. While enumerating the powers of Congress, it does not attempt to define them. To state the meaning of any one of the enumerated power is judicial function to be performed in the light of reason. Thus the Court struggling with its task of applying this and that part of the Constitution, is led by the continual modification of its rules of construction to a situation in which almost no line of interpretation is absolutely fixed; for at all points the Court reserves to itself a large freedom of judgment in attuning its decisions to changing conditions of society. The very process of finding solutions for ‘legal questions’ in a practical world leads to their social and economic relationships.”

The highest tribunal not infrequently overrules its own decisions, modifying its rules of construction by the light of a changing society. An example of this is found in the ruling of the Court in Farmers’ Loan & Trust Company v. Minnesota, decided in 1930,⁴ which overruled a case decided twenty-five years earlier—Blackstone v. Miller.⁵ In the case of Blackstone v. Miller the Court sustained an assessment tax by the State of New York upon the transfer of credits declared to have taxable situs within the borders of the State of New York under the will of a citizen of the State of Illinois. This ruling in 1903 supported double taxation of intangibles. In 1930, in Farmers Loan & Trust Company v. State of Minnesota, it was held that, in general, intangible property may be properly taxed at the domicile of the owner and should enjoy immunity against taxation at more than

⁴ 280 U. S. 204 (1930).
⁵ 188 U. S. 189 (1903).
one place, similar to that immunity accorded tangibles. This ruling rested on the fact that by 1930 the country had reached a complex socio-economic stage in its development and that under those conditions intangible property had become a source of revenue to the states. Double taxation was therefore burdensome. The Court said primitive conditions had passed; business was at the time transacted on a national scale; that a very large part of the country’s wealth was invested in negotiable securities whose protection against discrimination, unjust and oppressive taxation, was a matter of the greatest moment. Thus, while in the opening decade of the twentieth century the Court had held that double taxation of intangibles by the states was not contrary to the due process of law clause of the Fourteenth Amendment; by the third decade of the century it construed the due process clause to protect intangible property because of the changes in economic conditions.

Overruling at times its own decisions and modifying its rules of construction, the Court thereby asserts that the organic law must be construed as an expression of organic society. Since the Constitution is an expression of the living organism of society it cannot be fettered by precedent in the same way as can private law. It would thus appear that the rule of stare decisis is to be little relied upon in the domain of constitutional law. From this it is to be deduced that, in

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6 To the time of this ruling in 1930, a fiction indulged in had been that in the instance of intangible property, the situs is where the owner is, mobilia sequuntur personam. The question raised was, “Where is the owner?” In the Farmers’ Loan & Trust Company case, Note 4 supra, the Supreme Court pointed out in its opinion that there would be four theories of situs of intangible property: (1) The domicile of the owner; (2) The domicile of the debtor; (3) The place where the evidences of indebtedness were to be seen; (4) The place where the owner had caused the property to become an integral part of the localized business. With each state free to adopt any one of the four theories as the situs of intangibles, it would be clear that the same property could be taxed at four places at the same time.

7 Accorded tangibles in Frick v. Pennsylvania, 268 U. S. 473 (1925). In this case it was held that a state statute that required stocks in corporations in other states to be included at full value in assessing a transfer tax without deducting the tax paid to those states, deprived the owner of property without due process of law in view of the Fourteenth Amendment.
our present complex social and economic living the task of the Court interpreting and construing the organic law is not light. Professor Frankfurter states that this task is uncommonly heavy, namely, the "task of legal logic, of penetrating insight, of balanced judgment, of inventions of formulas of democratic justice working," as today, "under the pressure of unscrupulous . . . economic interests in a period when economic, social and class origins and implications of law and justice are scrutinized and challenged as never before."  

The noted jurist, Charles Warren, asserts that a great duty counsel owes to the Court is "to insist that the doctrine of *stare decisis* can never be properly applied to decisions upon constitutional questions"; he holds with other legal thinkers that "however the Court may interpret the Constitution it is still the Constitution which is the law and not the decision of the Court; that to the decision of an underlying question of constitutional law no finality attaches; that to endure it must be right." Hence "any citizen whose liberty or property is at stake has an absolute right to appear before the Court and challenge its interpretations of the Constitution, no matter how often they may have been promulgated, upon the ground that they are repugnant to its provisions." Another contemporary constitutional authority states this constitutional right thus: "A decision of the Court is *res adjudicata* only in respect of parties involved in the particular action." It is binding upon no others. The decision of the Court on constitutional questions is not the law. The Constitution

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9 2 Warren, *The Supreme Court in United States History* 749.

10 For sidelights on the doctrine of stare decisis, see Boudon, *The Problem of Stare Decisis In Our Constitutional Theory*, 8 N. Y. L. Q. Rev. (1931); Chamberlain: *The Doctrine of Stare Decisis As Applied To Decisions of Constitutional Questions*, 3 Harv. L. Rev. (1889).

11 See: The National Prohibition Cases, 253 U. S. 350 (1920). In these cases the Eighteenth Amendment was held valid. A dissenting state which had not been a party to an action involving the validity of that Amendment could and did raise the issue anew, compelling the Court to hear its argument. For a complete treatment of the constitutional right herein quoted, see Stevenson, *The Eighteenth Amendment, A Violation of the Constitution*, 28 Current History (July, 1928).
whence the Court derives its power is the law.” In this intricacy of judicial interpretation and construction, and in view of a shifting from legal justice to social justice in a capitalistic age, Dean Pound observed: “In periods in which the law is growing . . . it is of the greatest consequence that juristic and judicial thinking be touched with the best lay thought of the time.” It is conceded so to have been touched; and continues to be. The professional public in this our day who are constitutionally-minded, readily admits that our great Justices on the Supreme Bench of the land are men “thoroughly alive to the necessity of intellectual contact with new conditions and theories.”

A noted legalist is quoted saying that something like ‘sociological interpretation’ began in this country and a progressive liberalization in the Supreme Court’s decisions was manifested after 1905. The Court often asserts that the

13 The Supreme Court makes decisions, not by unanimous concurrence of all the justices, but by an alignment in so-called Conservative and Liberal grouping. It is a question how these alignments should be described. Conservatives are sometimes viewed as defending capitalistic, or so-called ‘property’ rights, or the assumed rights to exhorbitant profits, excessively high rates of interest, a holding of a preponderance of industrial power, all at the sacrifice of the wage earner who belongs to the weaker economic group. Property rights doctrine grew out of the theory of economic individualism in 18th century industrial England, where under laissez-faire theory it was held that it was immoral for the state to interfere with man’s ‘natural right’ to make money any way he could under “liberty of contract.” Liberals are supposed to champion the ‘human rights’ of the worker, depriving him through social law, if need be, of his pathetically so-called liberty of contract with his employer; giving him law-regulated hours, good conditions of labor, and a living wage. The line of demarcation between Liberals and Conservatives on the Supreme Bench appears to lie in the degree of tolerance either is willing to extend to legislative enactments. Professor Cushman has remarked that Justice Holmes was a Liberal in the sense that he was willing to let the legislatures make more mistakes than the rest of the justices, and that he did not regard it his business to interfere nearly so quickly as his brethren, on the bench.
14 The historian, interested in this turn by the Court toward a sociological interpretation of the Constitution, looks for the cause of an effect, so manifested. The cause lies back in the beginnings of the capitalist system in this country. After the War of 1812 through the years to 1873, laissez faire doctrine prevailed. The common law fellow-servant and assumption-of-risk theories held in the relation of employee to employer. The Civil War came in 1861. In its wake after 1865 the country was swept by an economic and industrial revolution. There was large-scale production based on huge capital; railroads cut across state lines and linked markets from coast to coast; there was the abiding presence of a capitalist class and a
Constitution must be construed as an expression of organic society; that it must not be given a literal interpretation suitable to a legal code. The Court's sociological interpretation of the Constitution and the judicial attitude toward the question of the validity of social and economic legislation are strikingly set forth in the following cases:

In the early twentieth century the New York State legislature passed a labor statute limiting the hours of work of bakery employees. The law was passed on the assumption that confining conditions in that industry were of such a nature as to justify State intervention in behalf of employees. In wage-earner class. Necessity for "invention of formulas of democratic justice" in a pulsating industrial age found its underlying cause in the due process clause of the Fourteenth Amendment, adopted in 1868. In view of the "privileges and immunities clause" of the Fourteenth Amendment the Court for the first time interpreted that Amendment in the Slaughterhouse Cases, 1873. The Court in its majority opinion forecast that probably rarely if ever would the due process clause be invoked except to protect the Negro, for whom, it judged, the clause was primarily adopted. At the same time the Court held that the due process clause was not a limitation on the police power of the States. Prior to this ruling the states had not dreamed of confronting laissez faire, (in the relations between employer and employee) with a general welfare program that would embody social legislation passed by the states in favor of labor over against capital. But after the Slaughterhouse Cases, 1873, States passed social laws regulating hours; conditions of labor. Capital viewed such favoring of a special class, Labor, as an interference with its property right of liberty of contract. Over against the states, socially-minded, Capital begged the state courts to pronounce upon such laws in view of the due process clause of the Fourteenth Amendment. This state courts did not do until after the argument by Roscoe Conkling in a tax case for a railroad company before the Supreme Court in San Mateo County v. Southern Pacific Railway Co., 116 U. S. 138. This great corporation lawyer proved with documentary evidence that the due process clause was incorporated into the Fourteenth Amendment to protect not alone the freed man but every person in his property. From his argument before the Court it was clear that the states had not only disturbed by statutes the relations of laissez faire between employer and employee, but had passed menacing and arbitrary tax laws, and when the Fourteenth Amendment was adopted individuals and corporations were appealing to congressional protection against State and local confiscatory tax laws. Pressure thus brought upon the Court in a capitalistic age—ultimately that tribunal, much to the wish of capitalistic classes seeking security in their property—held that the Fourteenth Amendment did impose judicially enforceable restrictions on social legislation passed by the States. The state courts, thereafter besieged by Capital to void such laws, appeared willing in most instances to be of a mind to do so: "Reacting to the problems that arose in the light of the background of their legal training, prevalent at the time, and economically individualistic in character." This individualistic interpretation of the due process of law found a principle to rest upon in the doctrine of "liberty of contract". As to the Supreme Court's attitude toward social laws, great outstanding rulings treated supra will reveal.
Lochner v. New York, decided in 1905, a majority on the Court ruled the statute unconstitutional in view of liberty of contract under the due process of law clause of the Fourteenth Amendment. The decision, of course, was in favor of the employer, supporting him, under "State, Let-Alone" theory over against the general-welfare doctrine for the employee. In dissenting opinion Justice Holmes satirized the ruling in the Lochner case. "The Fourteenth Amendment did not enact Herbert Spencer’s Social Statics," he contended; and "a constitution is not intended to embody a particular economic theory, whether of paternalism . . . or of laissez faire. It 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."

Subsequent to the Lochner ruling the Court, through legal briefs, became more informed of the economic and social conditions which State legislatures were attempting to regulate through social legislation, and it came about that the Court sustained two Oregon statutes regulating hours of labor for industrial employees.

In Adkins v. Children’s Hospital, or the so-called Minimum Wage Law Case, decided in 1923, the Court in a five-to-four decision retreating from the liberal position it had taken toward social laws in the two Oregon labor law cases took a conservative attitude similar to that taken in the Lochner case in 1905. In the Adkins case a minimum wage statute for women and children in the District of Columbia was held unconstitutional in view of liberty of contract under the due process of law clause of the Fifth Amendment. Prior

15 198 U. S. 45 (1905).
16 Muller v. Oregon, 208 U. S. 412 (1908) (sustaining a ten-hour law for women); Bunting v. Oregon, 243 U. S. 426 (1917) (upholding a ten-hour statute covering all industrial employees).
to the ruling in the *Adkins* case, the Supreme Court of Washington upheld a minimum wage law of that State, and Washington Court refused to regard the ruling in the *Adkins* case as determinative. The Washington Court, moreover, demanded the Supreme Court of the United States to re-examine the *Adkins* case. The Supreme Court deemed that a re-examination of the case was not only appropriate but imperative, in view of economic conditions which had supervened, by the light of which conditions, the Court said, the reasonableness of the states’ protective power merited consideration. After reconsideration of it the Supreme Court concluded that the *Adkins* case should be, and is, overruled, sustaining at the same time the Washington minimum wage law for women and minors. This was in a decision that was handed down on March 29, 1937.\(^7\) The opinion in this case gave evidence of the highest tribunal’s intellectual contact with existing conditions in our technically-wrought industrial society of today. The Court said in part:

> “Reasonableness of the exercise of the protective power of the State through the enactment of minimum wage laws, must be determined in the light of economic conditions; and in view of the fact that exploitation of a class of workers casts direct burden for their support on the community, the community may direct its lawmaking power to correct the abuse which springs from the employers’ selfish disregard of public interest. Liberty safeguarded by the Fourteenth Amendment is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, and welfare of the people.”

In conclusion, De Tocqueville’s words are recalled: Without the active cooperation of the Court “the Constitution would be a dead letter.” In view of the foregoing commentaries on the Court, the Constitution has become, indeed, a *living* letter. In the shifting from legal justice to social jus-

\(^7\) *Adkins v. Children’s Hospital* (Minimum Wage Law Case), 261 U. S. 525 (1923); *West Hotel Company v. Parrish* (the Washington State Minimum Wage Law Case), 57 S. Ct. 579 (1937), overruling the *Adkins* case.
tice over these thirty-odd years of the twentieth century, the organic law is said to have come down to the market-place. In this, its magnificent descent, it was said: "To an ever-increasing audience it became apparent that the law is merely a form of social and economic expression, changing with the technology and processes of society and to be understood in connection with the living tissue of which it is a part." 18

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18 2 Beard, Rise of American Civilization 762.