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RECENT CONSTITUTIONAL LAW IN THE SUPREME COURT

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THE word "recent" in the title is intended to carry back to January, 1934, the date of the Minnesota Mortgage Moratorium case, the first of several decisions of the Supreme Court of the United States which made conservatives stare and gasp. From that time to March, 1936, 67 statutes, state and federal, have been tested, in whole or in part, by that court, of which 26 were held unconstitutional and 41 constitutional. Forty-six of the 67 were state statutes, and of these 16 were held unconstitutional and 30 constitutional. Twenty-one of the 67 were federal statutes, and of these 10 were held unconstitutional and 11 constitutional.

Charles Warren, in the last edition of his book, "Congress, the Constitution and the Supreme Court," states that up to June, 1935, the court had held only 73 federal statutes unconstitutional in about 146 years of its existence, an average of one every two years. Obviously the proportion of rejections has vastly increased of late, and the overthrow of state statutes is also extensive. When one scans the last seven volumes of Supreme Court reports, two reasons for this leap to the eye. One is the multiplication of ill-devised tax laws, whereby honestly puzzled or thievishly spendthrift legislatures have cast about for untapped sources of revenue, but more important is the mass of novel and experimental enactments, state and federal, designed for the relief of debtors, the regulation of business in matters heretofore left to individual initiative, the equalizing of wealth, or the creation of prosperity by statute. These well-meant measures have often been framed without regard to the basic liberties of the citizen under the constitution, or the equally basic duality of our system with specifically limited powers in the federal government and all the residue in the states. Such legislative encroachments were foreseen by Thomas Jefferson when he wrote:

> "The executive, in our government, is not the sole, it is scarcely the principal object of my jealousy. The tyranny of the legislatures is the most formidable dread at present, and will be for many years. That of the executive will come in its turn, but it will be at a remote period."

Through this welter the court has moved with its usual impartiality, but with less than its usual accord. During the last two years it has been unanimous in the great majority of cases involving general law, but not in the tax cases or the constitutional cases, and this is due both to the close and difficult questions presented and to the inborn qualities of the judges themselves. In Gilbert and Sullivan's "Iolanthe," the sentry, as he stalks up and down before the palace, sings:

> "How every little boy or gal
> That's ever born into the world alive
> Is either a little liberal
> Or else a little conservative."

This is a universal cleavage of human kind, often widened by heredity, environment, education and experience of life. Hence it is natural to find the present Supreme bench composed of four reliable conservatives, three equally dependable liberals (both terms only loosely descriptive), and two unpredictables, the Chief Justice and Mr. Justice Roberts, who are found as often in one camp as in the other. There has seldom been a better balanced court. In the great cases of the recent past the liberals tend to favor social measures against the assertion of individual rights. Also, to them the voice of the legislature is the voice of the people, and therefore the voice of God. They recognize, of course, the dominance of constitutional restrictions, but would rather loosen than contract them, and especially in considering state statutes they tend to give such wide and prevailing effect to the state police power that anyone who attacks a statute under the "due process of law" or "equal protection of the laws" clause of the 14th Amendment is likely to have a bout of bad luck. In all this they are frequently supported by the two free-lances. The conservatives tend toward a more literal construction and stricter application of the constitution. It is there that they hear the voice of the people, authoritative through generations of experience. They constantly invoke it to defend individual liberty against the exactions and restrictions of the legislature and this is very noticeable in tax cases, where their regular tendency is to protect the taxpayer wherever possible. It thus appears that both lines of constitutional interpretation are ably represented: now one, now the other prevails accord-

ing to the merits of the case, and justice is attained as substantially and as uniformly as can ever be hoped for in a fallible world.

The *Literary Digest* reports that Judge Manton of the 2nd C. C. A. recently attacked the conservative wing of the court for, as he said, thrusting its "pet economic or social theory" into the constitution. If this criticism is correct, which I do not believe, exactly the same is true of the liberals, and of late there have been many critics of both wings of the court, such as the man, Raymond Clapper, who daily strews our breakfast tables with the sweepings of the Washington press-rooms.

None of us likes to have his preferences thwarted, and probably each of us, from the radical to the reactionary, would have preferred some of the late decisions to have gone the other way; but when you read, not merely one or two, but the entire recent series of great constitutional opinions, including the dissents, where there were dissents, you cannot fail to be impressed by the straight course the court has steered through troubled waters, and by the honesty and earnestness with which all the judges without exception have applied their very high abilities to doing absolute right as they severally saw it.

Representative Zioncheck recently said in Congress: "I do not believe that the judges of the Supreme Court are gods; in my opinion only three of them are gods," and yet these three, with their well-known liberal views, joined in rejecting the Frazier-Lemke Mortgage Act, the NRA itself, and a number of minor enactments, and two of them joined in the rejection of the so-called "hot oil" Act. The man who says, as many are saying, that the Supreme Court is in politics, or that it has decided cases to suit the social or economic prejudices of its members, is either an ignoramus or a blinded partisan or a hired propagandist and I believe that every honest lawyer, from the conservative to the communist, should repel such slanders whenever heard. The essential nature of the men leads one set to feel that a strict constitutional construction is right and the other set a free construction, but you have only to read their opinions to see that beyond this inherent

quality their minds are bent solely on the legal qualities of the statute before them, as tested by the constitution.

What, then, has the court actually decided in the last two years?

With 67 cases before us we can choose very few and touch those very lightly. Decisions on state statutes are quite as instructive as those on federal statutes, although less sensational, and there is one group which I am impelled to mention. As you all know, there is no constitutional ground on which state statutes are more frequently attacked than the 14th Amendment, forbidding the state to deny due process of law or the equal protection of the laws, expressions which are very wide and indefinite and leave much room for diversity of opinion among judges. It is worth while to notice the Supreme Court test as illustrated by the New York milk cases, which are as interesting economically as legally. They show what happens when a state attempts to fit ordinary business to a legislative bed of Procrustes. There are seven or eight of these milk cases, so that my attempt will be merely to do a little skimming.

New York state suffered from an overproduction of milk. Farmers complained that they did not make expenses. Dealers complained that there was price-cutting and competition destructive of their profits. Consumers were not complaining, but who pays any attention to consumers? The legislature undertook to remedy the situation by fixing a minimum price of 5 cents a quart to be paid by dealers to farmers and a minimum of 10 cents a quart to be charged to consumers by dealers who made delivery, or 9 cents a quart by dealers selling over the counter. A small Italian grocer sold two quarts for 18 cents and gave a 5-cent loaf of bread as a bonus (suggesting, incidentally, the size of the profit which dealers were making under the artificial price). He had to go to jail for that, and in *Nebbia vs. New York,* 291 U. S. 502, the Supreme Court by a 5-4 decision left him there. The question was whether the state had the right to fix prices of an ordinary commodity, or whether its price-fixing power was limited to public utilities or to a business directly affected with a public interest. Mr. Justice Roberts says for the majority that, as the state may protect free competition and pro-

hibit monopolies, so equally it may restrict competition if it thinks it wise; that it is for the legislature to decide what trade or business needs control for the public good, and that when it controls it, by price-fixing or otherwise, the law "is unconstitutional only if arbitrary, discriminatory or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarrantable interference with public liberty." The four conservatives observed that the decision went beyond anything previously held by the court and paved the way for legislative despotism.

The next step was taken by consumers. Deprived by law of cheap milk, they naturally tried to get the best milk for their money, and turned to Borden's and similar reliable and well-known brands. Thereupon, the wise milk board, deeming that Borden et al. were getting too much business, to the detriment of less-known dealers, passed another regulation providing that dealers "having a well-advertised trade name" must charge 1 cent more per quart to consumers than more obscure vendors. This also was upheld by a 5-4 decision (*Borden's Farm vs. Ten Eyck*, 56 Sup. Ct. Rep. 453), on the ground that the state power to regulate business includes the power to equalize it. The four conservatives, or, to my thinking, liberal dissenters, considered the law grossly arbitrary and oppressive, as penalizing the man who becomes well-known and successful through wide and honest dealing and depriving him of the equal protection of the laws.

The next point in this object lesson in the economics of artificial high prices was raised by a new set of dealers—I do not say a set of New Dealers. Observing the opportunity of profit in the 100 per cent spread between the price at which dealers must buy and must sell, they rushed into the New York market, to the disturbance of the unstable equilibrium artificially created. Thereupon the milk board, in a desperate attempt to maintain its theory of equalized trade, issued a new ukase to the effect that any dealer entering the business after a certain date must sell for not less than Mr. Borden and others with famous trade names; i.e., must sell at a higher price than the ordinary dealers already in business. This was carried up on the same clauses of the 14th Amendment, and at last the worm turned. The badgered court, in *Mayflower Farms*

vs. Ten Eyck, 56 Sup. Ct. Rep. 457 (Feb. 10, 1936), held that this in effect prohibited any new dealer from entering the business and considered the classification to be arbitrary, oppressive and a denial of the equal protection of the laws. The three so-called liberal judges dissented.

Earlier in time, but the final stroke in the economic picture, came *Baldwin vs. Seelig,* 294 U. S. 511, a good illustration of the lengths to which a legislature may be driven in bolstering up an attempt to make economic adjustments by fixing prices. A dealer, not satisfied with the law-made 100 per cent spread between his buying price and selling price, began importing milk from Vermont where there was no price control and where farmers would sell for less than 5 cents per quart. The milk board countered by totally prohibiting the sale in New York of milk imported from other states if it had been bought there for less than the New York price to farmers. The Supreme Court, however, unanimously enjoined this as a restriction of commerce between the states and as an attempt to neutralize price advantages prevailing in the state of origin by what amounted to a customs barrier errected by one state against another. Thus we see New York, starting with more milk than it knew what to do with, and ending by bringing in an additional flood of milk from other states, all by its own regimentation. *Sic semper tyrannis!* The court, of course, sedulously avoids any opinion as to the wisdom or policy of any of the measures before it, but even the court, while sustaining one of these milk laws, could not refrain from saying:

> "The present case affords an excellent example of the difficulties and complexities which confront the legislator who essays to interfere in sweeping terms with the natural laws of trade or industry."

The upshot of these cases is that a state statute will be upheld against the 14th Amendment if it relates to any matter of public welfare and is not glaringly arbitrary. To be set aside, it must either have a private rather than a public bearing or it must involve such gross inequality or do such unnecessary damage to individuals as to shock the conscience. Here the difference between the two lines of thought in the court is very clear. The conservatives try to preserve individual rights against undue statutory interference; the liberals treat

the legislative power as almost unlimited in any possible field of public interest, and decline to apply the constitutional restrictions unless the lawmakers have acted as "arbitrary despots" (Cardozo, J.). The old wing emphasizes individualism, the other collectivism. There is logic on both sides and the majority may be moving with the times, but it seems to me that the constitution concerns itself very specially with individual liberty, and that the alternative to individual liberty is collective tyranny. Here again Mr. Jefferson says:

"It would be a dangerous delusion if our confidence in the men of our choice (i. e., the legislators) should silence our fears for the safety of our rights. * * * In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the constitution."

Following this great authority, I think that the courts are the last, and often the only defense of liberty, and that it is a pity when they stretch the constitution to uphold the passing crotchets of legislatures such as we all have known.

However, this is merely an idle reflection, since the Supreme Court thinks otherwise. In the days of that outstanding and dominant personality, Grover Cleveland, there was a popular song about him, the refrain of which ran:

"And when the old man says a thing,
Why, that's the thing that goes;
For the old man says so,
And the old man knows."

So of the Supreme Court.

The famous cases of the recent past, sustaining or overthrowing acts of Congress, are fresh in your memory, and are far too massive for summary treatment. Only the gold cases and the Triple A case seem to me to present any legal novelty. With the others the novelty is not in the constitutional law announced by the court, but in the measures to which that law was applied. This struck the court itself, since the majority opinion in the Triple A case, after instancing many fantastic laws which might follow if the Triple A were upheld, adds:

"It cannot be said that they envisage improbable legislation. The supposed cases are no more improbable than would the present act have been deemed a few years ago."

These recent cases cannot well be classified, for Congress is now seen casually handing over its law-making power to Tom, Dick, Harry or Franklin, and now arrogating that power over fields belonging to the states, or to individuals. The only qualities common to most of the questioned acts are a purpose to help the less fortunate by reforming national economy, and the assumption of unlimited power to do so, including the power to transfer power. Several of these acts rather candidly embody the idea of taking one man's property and giving it to another, which still remains a legislative solecism. The existence of a supreme law, restraining Congress, as well as the rest of us, is ignored, and the fact that some of these measures do fall within the constitution seems almost accidental. Assuming a constitution, the court's rejection of the others was inevitable. Time allows a mere mention of some of the more spectacular cases. In *Panama Refining Co. vs. Ryan,* 293 U. S. 388, the court, standing 8-1, rejected the clause of the NIRA authorizing the president to prohibit or not, as he pleased, the movement in interstate commerce of oil produced or taken from storage in excess of the amount allowed by the state of origin. This for the elementary reason that Congress, to which the constitution gives "*all* legislative power," had made no law regulating the transit of oil, but virtually gave the president the right to legislate regarding it to suit himself.

In *Railroad Retirement Board vs. Alton R. R.,* 295 U. S. 330, the Railway Pension Act was overthrown by a 5-4 decision. In speaking of it to a railroad attorney I said that in the majority opinion Mr. Justice Roberts first tore the act into shreds, and then stamped and spat on the shreds, which I think is a fair summary of the decision. The dissenters thought that if a few extreme clauses were rejected the bulk of the act might stand, and especially urged that the majority went too far in holding that no railway pension act lay within the interstate commerce power. It would not surprise me if a fairer and more moderate bill were some day passed and sustained.

In *Louisville Land Bank vs. Radford,* 295 U. S. 555, the Frazier-Lemke amendment to the Bankruptcy Act in favor of farmer mortgagors was unanimously held unconstitutional.

Congress under the bankruptcy power may discharge the debtor's personal obligation, but it cannot take the creditor's secured rights in specific property. To do so would be to take one man's property and give it to another, and if public necessity should require such result, it could be legally done only under the eminent domain power and on payment of just compensation. This act has been redrafted by lawyers holding this decision in one hand and the Minnesota mortgage case in the other, and the lower federal courts are already at variance as to the validity of the new act.

As to the three gold cases in 294 U. S. (*Norman vs. B. & O. R. R.*, p. 240; *Nortz vs. U. S.*, p. 317; *Perry vs. U. S.*, p. 330), the syllabi alone cover seven pages; the cases themselves 140 pages; they touch the very foundations of government; how can one discuss them here? They are unusual because it is seldom that the court has to construe the power of Congress "to coin money, *regulate the value thereof*, and of foreign coin." Under this section the Court, by a 5-4 decision, upheld the various acts devaluing the dollar, calling in gold, and authorizing the payment of gold obligations, public or private, in the depreciated currency, dollar for dollar, but with one important qualification. Congress could not repudiate the promise to pay in gold, set forth in government bonds. To do so would destroy the faith and credit of the United States, pledged for these bonds, and might at some critical time result in the overthrow of the nation itself. The promise to pay in gold was that of a greater than Congress, viz.: the sovereign people, besides which, the 14th Amendment provides that "the validity of the public debt of the United States * * * shall not be questioned." However, said the court, if the treasury had paid gold to the holder of a government bond he would have had immediately to turn it back, and the currency he actually received was worth as much in purchasing power as gold, for any purpose for which he could lawfully use gold. Therefore, he sustained only nominal damages.

The conservatives considered this a quibble, and maybe it was. If the bondholder had been a nonresident foreigner and had been paid in depreciated currency, not circulating in his own country, instead of the gold his bond called for, he would have sustained a very substantial loss. It is worth

noting that Congress paid the Philippine government an extra amount in devalued currency so as to equal the actual loss sustained by the inflation, and has recently done the same thing with the Republic of Panama.

However, under the necessities of the case it is hard to see how the decision could have been otherwise. If the holders of many billions of bonds, public and private, could have enforced payment in current money of $1.69 for each $1.00 of their bonds, the new economic structure of the nation might have been totally wrecked. This is not a legal argument, but courts do not ignore such facts.

Few cases could be of greater public importance than the NRA decision (*Schechter Poultry Co. vs. U. S.*, 295 U. S. 495); yet the law involved was simple and the rejection of the act inevitable. So thought a unanimous court. Mr. Justice Cardozo filed a concurring opinion in which he flayed the act more cruelly than the others did. It is dead and gone now, and we need only note that it rested on two glaring errors. (1) Congress attempted to hand over its law-making power, first to various undefined trade groups or associations, and finally to the president, giving these delegates power to make codes having the force of law, although Congress had not defined what such law should be; (2) it empowered the president to assume complete control of every detail of trade and industry throughout the nation in a way that would have completely extinguished the reserved power of the states over their domestic affairs. It thus struck at the very foundation of our dual system. Even the chief justice, always moderate, was stirred by so unprecedented a measure, and asks whether anyone ever supposed that Congress could hand to any one man a roaming commission to dictate laws for all the industries of the United States.

If you care to read the act (48 Stat. L. 195) and the opinion you can decide for yourselves whether it was framed in ignorance of the constitution or in defiance of it. There used to be plenty of lawyers in Congress not without repute before they joined that body.

The next great case is that of Triple A (*U. S. vs. Butler*, 56 Sup. Ct. Rep. 312), usually called the Hoosac Mills case,

where the Agricultural Adjustment Act was held invalid on a 6-3 division, the three regular liberals dissenting. None of the recent decisions is more important legally and I wish there were time to analyze it. It is also novel, because the court has seldom had to consider the limits of the power of Congress under Art. 1, Sec. 8, of the constitution authorizing it "to levy and collect taxes, duties, imposts and excises, to pay the debts and provide for the *general welfare* of the United States." No term could be wider than "general welfare." Are there any bounds to what Congress may do within it through the medium of a tax with which it can buy or coerce obedience to its will?

Here the government urged that agriculture was essential to the general welfare and that therefore it could levy a tax to foster it. Plaintiffs contended that Congress' right to act in any direction was restricted to its specifically enumerated powers; in other words, that these powers covered and limited the general welfare for which it could tax and spend. The court rejected both views, holding that the power to tax is wider than the enumerated powers, yet is not unlimited. The cardinal and fundamental feature of our system is the dual government of state and nation, and the wide right to tax for general welfare is limited by the still wider restriction that Congress must not invade the reserved powers of the states. Powers not expressly granted to Congress are prohibited to it. No power is granted to regulate agricultural production; therefore, that power remains in the states and Congress may not assume it. Also, if Congress could do this with agriculture, it could equally control every field of trade or activity throughout the nation, and exact money from one branch of an industry in order to pay it to another.

There was a vigorous dissent and a lawyer whom I asked what he thought of the case replied that he had read the opinion and the dissent and thought they were both right. The gist of the dissent is that, admitting that Congress may not use tax money to *coerce* action in matters within state control, yet it is not debarred from *influencing* such action; that it has often done so under the interstate commerce and other powers, and that here the coercive effect of the act is not established but rests only on a process of speculative reasoning. It is evi-

dent that the majority felt that the vague authority to levy taxes to provide for the general welfare had to be defined and restricted. A broad interpretation of the words would allow Congress to do anything and everything. It might reduce or increase production, fix wages or hours, define conditions of employment, distribute the industrial population, raise or lower prices, regulate the professions or do anything whatsoever that it pleased by the simple device of levying a tax in such a way as either to purchase or compel compliance with its will. Thus it could destroy the police power of every state by occupying the field itself. Here again the decision was compulsory. There was a choice between rejecting the act or renouncing our dual system of government. It is interesting to note that abuse by Congress of the taxing power under this section was attacked in veto and other messages by presidents as diverse as Monroe, Jackson, Tyler, Polk, Pierce, Grant, Arthur, Cleveland and Harding.

The Tennessee Valley Authority case, *Ashwander vs. T. V. A.*, 56 Sup. Ct. Rep. 466 (Feb. 17, 1936), promised to be one of the first importance and was expected to decide the right of the federal government to go into business in competition with private light and power companies. However, the decision fell within narrow bounds and left this undetermined. It expressly states that no opinion is passed on the governmental power to operate distribution systems, or to build the three other dams now under construction, or as to what the government might do with the water power therefrom or as to the validity of the TVA act itself. All that it decides is that when the government builds a dam under the war clause and the commerce clause and generates thereby more electric power than it needs for war or commerce purposes, it can sell that power, under Art. 4, Sec. 3, of the constitution, authorizing Congress to dispose of the property of the United States, and since it can sell it, it can acquire transmission lines to carry it to market. The majority here was 8-1.

We know that the purpose of the TVA is to build other dams and create a vast system of generation and distribution in competition with private companies. The opinion is so carefully worded as to give little clue to the probable fate of the scheme when it comes before the court.

As you have noticed, many of these vital cases ring with dissent, and it would be interesting to know—what we never shall know—what takes place in the conference room. Occasionally the language of an opinion gives some hint. For example, in one of the New York milk cases Judge Cardozo, dissenting, describes part of Judge Roberts' opinion as "a juggling with words," and in the Triple A case Judge Stone, dissenting, says that part of the majority's reasoning "hardly rises to the dignity of argument." Of the present bench, Judge Cardozo commands the most picturesque English and is at times diffuse in its use. In one instance where he delivered the florid and very lengthy majority opinion, Judge McReynolds commenced his dissent with the curt remark: "This case has been greatly obscured by verbiage." Thus judges themselves remind us that they are human.

It was said earlier that dissent in the court is frequently due to the conflicting trends of thought of the different judges. This might be expanded a little. It is elementary that every intendment must be made in favor of the constitutionality of a statute. It must be accepted if by any reasonable construction of it or of the constitution it can be brought within the scope of that instrument. The court constantly announces this rule, and never more punctiliously than when about to declare a statute unconstitutional. Now, when a doubtful case comes before the court, I believe the conservative attitude is something like this:

"After all, the final responsibility is ours. This court is the designated interpreter of the constitution and the last resort of the people. If, by reason of some scintilla of doubt, we uphold an act which, on balancing reasons, we feel to be unconstitutional, we shirk our duty, and subject the people to an act of tyranny, for any act which Congress had no power to pass is necessarily such. We are bound, therefore, to reject the act, and leave Congress to pass another, clearly within constitutional limits."

The liberals, I think, reason somewhat as follows:

"'Congress which passed this act, and the president who signed it, are presumed to have judged it constitutional after due deliberation. To substitute our judgment for theirs, except in a perfectly clear case, is a usurpation of power. They, not we, represent the people; the responsibility for the act is theirs, not ours. The duty to refrain from thwarting the will of the people, as voiced by their representatives, is so impera-

tive, and the presumption of constitutionality is so controlling that, if we have any doubt whatsoever, we must uphold the act."

You see that both views are entirely reasonable and yet that, in a close case, they must inevitably clash.

However, when one reads these great cases together and not at long intervals as they appear, they fall into line, and form a straight course of singularly level-headed and even-handed adjudication. With our constitution as it is, it is hard to see how any one of the cases involving federal statutes could have been decided otherwise than it was. It is a small matter, but worth notice, that in only two of the great cases was there a 5-4 decision—the gold group where the act was sustained, and the railway pension case, where it was rejected. We have nine honest, resolute and very able men, representing the two main attitudes of human thought and constitutional construction, so evenly divided that the best reason can always command a majority over any unconscious bias. We are indeed fortunate in a time of popular ferment that the last word as to our rights rests with so sane and impartial a body.

In all this I am taking the constitution for granted. Whether it should be changed or not is another question, but how well the present instrument has served its intended purpose is seen from the vigorous words of John Randolph. Inquiring into the need of a restrictive constitution, and how the people had come to assent to it, he said:

"It was because of the radical depravity and original sin of their nature, which called for wholesome restraint. In a lucid interval, they had wisely determined to tie up the hands, not only of their agents, but themselves, that, when the hour of passion should come, barriers might be opposed to their inconsiderate rashness."

PERIODS DURING WHICH JUDGES WILL SIT—1936

June 29 to July 11, Inclusive.....Judge Robert W. Steele
July 13 to July 25, Inclusive.....Judge Otto Bock
July 27 to August 8, Inclusive.....Judge Frank McDonough, Sr.
August 10 to August 22, Inclusive.....Judge Charles C. Sackmann
August 24 to September 5, Inclusive.....Judge J. C. Starkweather
All Return September 8 (Day After Labor Day)

CRIMINAL DIVISION: Judge Calvert to July 18; Judge Dunklee, July 20 to September 8.