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# The Constitution and Dynamic Sociology

Victor Arthur Miller

in anticipation of compacts between the States similar to that involved in the Colorado River situation; sixth, and finally, the organization would design to derive the advantage of the specialist and expert through committees on special subjects as for example "taxation."

V. A. M.

# *The Constitution and Dynamic Sociology*

By VICTOR ARTHUR MILLER, of the Denver Bar

IN pursuance of the policy of the RECORD to afford opportunity for discussion by the members of the Denver Bar Association on topics controverted or otherwise, the colleagues of the writer on the board have afforded this opportunity for the expression of certain views of his own stimulated by the recent celebration of Constitution Week.

It is not the function of this article to indulge in eulogy upon the Constitution nor to attempt any instruction or analysis upon any of the great precepts of Federal organization. Such expression, if directed to a group of lawyers , would be a work of supererogation.

It is proposed to discuss, and that not particularly in accordance with any traditional treatment, the single, greatest and most characteristic feature of the fundamental organ of our government. The one preeminent principle in the American Constitution, the one consideration for which, above all others, it is worshipped by its friends and execrated by its enemies, is its militant protection of individual man.

Few would disagree with Dean Pound that the authorship of the constitutional principle in our polity which protects the individual is in the alliance of the Puritan and Pioneer with the classic economic and social philosopher of the eighteenth Century, the proponent of the laissez faire doctrine. Certainly, so far as argument can proceed in personam, no truth was ever discovered in a happier atmosphere than the mental background of the three characters thus named. The Puritan and particularly the American Puritan, Burke's "Essence of Dissent" was, as is agreed by all historians of the frontier, concentrated to a selective type of an even higher order in point of courage, brains and energy as he pushed settlement to the West. He was therefore the very cream of the cream of all ancestral stock on earth and to his iron virtues of enterprise, self-reliance, thrift, and endurance was added the humanitarian thought of the intellectual giants of a humanitarian era—blending in the authorship of the Constitution.

Nor can the most vigorous opponent of the individualist policy of the American Constitution deny to it, its external effect in times past as a beneficent, if not vitally necessary element, in developing our country and protecting it from the tribulations of other lands at other times. It cannot be doubted from a historical standpoint that unrestrained power over the individual vested in any kind of government has through all the centuries proven to be an abysmal failure. This is true whether the government was an absolute monarchy or an absolute democracy an oligarchy or mob rule. From the massacre by ballot of the Athenian generals after the battle of Aegospotamos through the religious persecutions of Louis XIV and James II, an unbridled legal authority of man over man has resulted in governmen-

tal oppression, robbery, and assassination and, as Macaulay has said, filled the jails with men and women of whom the world was not worthy. It is unnecessary to multiply facts on this historical generality, we take it that it would be admitted to be true beyond denial or dispute. Further, historically speaking, we believe that it would probably be undisputed likewise that, from an economic standpoint, the development of our own country—at any rate to anything approaching its present proportions—would have been impossible except for the sheltering arm of a fundamentally individualistic form of government.

Narratively speaking, therefore, impartial history, the unanimity of belief in individualist tenets in American habits of thought together with support in the more obvious economic phenomena of current existence have, by great men past, always been regarded as ample justification for fixing an individualistic character on the highest law of the land and making that character of constitutional limitation a practical protection against oppression by any form of government whether or not supported by a majority of voters and whether or not backed by immediate popular opinion and in the teeth, if need be, of alleged social demand.

The Constitutional view of the individualist has been epitomized by the great Judge Mathews in defense of the despised Chinese in the memorable language:

> "The fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth 'may be a government of laws and not of men.' "

Now it was never to be doubted that a system which professedly aims to exact a full measure of individual justice irrespective of the popular viewpoint would sooner or later incur the displeasure of some people.

It is believed that these people fall roughly into three classes. The first class is composed of the revolutionaries who openly oppose and desire the subversion of the Constitution. In the second, there are many good citizens of an acerbic classification who cannot be bothered with the Constitution and hence ignore it. Some of these persons are constituted of a simple and fortunate mental condition of appetite untroubled by scruple. They would not steal their neighbor's horse because of the police, they would not openly oppose the Constitution, because it would be an unpopular view and too much trouble; but if they can affiliate their lust for neighbor's horse with an alleged societary demand, steal it safely, comfortably and by vote they are more than well content. Another portion of this group entertains a sincere conscientious respect for neighbor's property in the horse; but their mental limitations are such that they cannot conceive him wronged unless the horse be taken by direct robbery vi et armis. The slightest obliquity and particularly the governmental cloak in the form of the pillage, from a moral standpoint, alters the whole situation with them.

Neither of these classes can be regarded as particularly impressive enemies of individual rights. The former lacks volume and the latter lacks force. But there is a third class of opponents of the rights of the individual under the Constitution who have

force and can muster the whole volume of the last named contingent. They are the professional type of intellectuals. They neither oppose nor ignore the Constitution but compass and imagine the evisceration of Constitutional limitations on so-called "social grounds."

They must, therefore, be properly recognized as the most efficient antagonists of the individualistic character of American law.

Nor should this inherent hostility of idea and ideal be doubted because of a kiss they occasionally bestow upon traditional constitutional principles as a matter of history. The school of present abstract intelligentia proclaims that man was made for the state, the constitutionalist that the state was made for man.

In a warfare of these ideas there is no quarter. It must follow either that our fathers were right in regarding certain principles of right and wrong to be eternally and universally binding on government with only their correct application as a proper subject for controversy; or else so-called social interest is the real end of government. In the latter case the founders of the Constitution were wrong; that document was only an historical incident—inspiring but past; and our present form of government is inferior to those under both British and Continental Jurisprudence, but particularly the latter.

In view of the enormous intellectual reputation of some of the luminaries in the van of the societary school it would certainly be presumptuous in the writer of this article to venture into the lists against such Goliaths armed only with the sling shot of a simple traditional education. He certainly entertains no purpose of such temerity. Nearly all arguments of this phase of governmental philosophy attempt a comprehensive demonstration but end by proving nothing so conclusively as Schopenhauer's suggestion that after all "the intellect is only the foreign minister of the will." In recognition of which we point out, as regards the pedagogic attack, that not one of its leaders, brilliant though they are, ever had the practical experience of measuring a dollar in terms of sweat or risk of enterprise.

It is not to be attempted either to convert or refute these doctrinaires but simply to examine their doctrines from the standpoint of old line thought.

Since the particular societary doctrine we have under discussion is, in its present state of exposition, found in the expression of numbers of persons it is peculiarly adaptable from our standpoint to inductive treatment.

We are interested in its legal and particularly its constitutional concepts. They appear most frequently in the judicial opinions, magazine articles and lectures of the judges and law professors who are its proponents. To be understood they should be followed through.

1. The anti-individualistic approach to the constitutional question from which we learn

2. The anti-individualistic expression of the relation of (1) supra to human collectivity as variously denominated "Society," "the Community," "the Public" and its resultant phenomena, the "State" and "Public Opinion;" whence appears

3. The anti-individual belief as to the nature of municipal law. On this occasion space will permit the consideration only of the first.

Constitutionalists approach a question on the Constitution like any other legal question of interpretation and construction—reading it by context, history and analogy to decided cases through logical processes aided by traditional ethics. The societarian pro-

ceeds from a totally different angle. The following expressions are characteristic of Mr. Justice Holmes, the most eminent judicial exponent of the deconstitutionalizing doctrine under discussion:

In one case:

> "I think that the word "liberty," in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law . . . . . 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."

And in one of his most recent opinions:

> "The constitutional requirement of compensation when property is taken cannot be pressed to its grammatical extreme . . . . police power often is used in a wide sense to cover and, as I said, to apologize for the general power of the legislature to make a part of the community uncomfortable by a change.
>
> I do not believe in such apologies. I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain."

These expressions are dulcet, assured, precise and plausible. Let us make some attempt at analysis. The party claiming constitutional rights is told in substance in the first statement:

1. That no law is unconstitutional if supportable to a fair man upon the criterion of tradition.

2. That no law is unconstitutional though shocking to a judge from the standpoint of tradition.

and in the latter statement

3. That no law is unconstitutional unless it violates the letter of the Constitution.

4. That the Constitution is not to be interpreted grammatically by letter.

If anyone regards this as a mere verbal dilemma his mind will be readily disabused by studying its application. Constitutional "tradition" is a veritable chameleon in the hands of a judge determined to sustain the validity of some guise of sovereign oppression. If the particular eruption, however iniquitous, has any semblance of precedent, it is conclusively saved by "tradition." If it is an outrage on all precedent, its "shocking" novelty is not to be permitted to weigh in the mind of the judge. A few years ago, in a literally ex parte civil suit, a westerner was despoiled of several hundred thousands of dollars of property constituting all his worldly possessions without a vestige of a hearing in fact or theory by a hideous quirk in the Delaware "attachment" law so malodorous that the legislature itself repealed it on the strength of the case. It was judicially sustained on some extremely ancient rules of the city of London, i. e. "tradition."

On the other hand the rent regulations of a few years ago were an exact logical counter-part of the Colonial stay laws judicially damned as an ele-

mentary fact of constitutional history and tradition and against which the "impairment" clause was directed by express language and known historical intent of the framers. These traditional considerations were as less than nothing in the mind of the Jheringist jurist.

Much the same may be said of the convenience of the "express" character of constitutional limitations. As regards either example above put, neither the manifest lack of "due process" in the one case, nor the admitted "taking of property for public use without compensation" in the other, is, it appears, to allow enforcing the express language to "its grammatical extreme." Yet if it was suggested that the Delaware law was plain robbery under forms of procedure and the other a recognizable form of political jobbery designed to make the state the professional foot-pad for the noisy exponents of an electorally important class —unsound on the most elementary economic theory and more immoral and unjust than petty larceny because more cowardly, the same learned jurist would say that no ethical or economic view could be read into the express language of the Constitution.

The anti-individualistic constitutional expression in individual rights is summed up, therefore, in the old stanza

> "You will if you will, you will if you won't;
> Your damned if you do, and damned if you don't."

And so much is this true that the brainiest lawyer in the United States of any creed of doctrine is defied to express a priori and in terms of legal principles the view of the societarian judge on any constitutional question. He knows, to be sure, that the constitutionality of almost any act will be sustained; but he cannot tell why in casual language intelligible to the profession.

Space will not permit an extended discussion of other characteristic attributes of the collectivist approach to the constitutional question, further than to state that like the one last discussed they are all elaborately calculated to prevent, in the alleged interest of so-called "society" a control of judicial determination by concepts previously known.

With this view their expressions almost invariably woo the general and the abstract and shun the concrete. As a corollary to this few cases are cited and none subjected to close analysis. And indeed, in view of the other aspects of the matter any other course would and does lead to some surprising situations.

For instance, in the rent cases, vent was given to the concrete comparison that since the legislature might limit the vertical dimension of a building it should have the right to regulate the rents in the building.

The astonishing conception of the learned judge seems to be that the sovereign interest inheres ipso facto in the subject of height. If a sign board is high and rents are high and they can take down the height of the sign board they can take down the height of rents. In this view the first legislator must have been Procustes.

The somewhat novel view may not be undeserving of serious consideration. It certainly opens interesting vistas for future legislative activity on the subject of Snakes Hips, and Women's Dresses.

Another characteristic of the anti-constitutional approach is the petitio principii on a major scale. It is unfortunate that this particular characteristic cannot be developed at some length but by way of exemplification one may direct attention to a statement by Dean Pound in his lectures on the Spirit of the Common Law:

"The conception of law as a securing of interests or a protecting of relations has all but universally superseded the individualist theory."

The attitude of finality in this generality must leave one with a traditional education actually gasping.

As a mere fleeting instance of the same argumentative aspect in the same work, Judge Steven J. Field is referred to as a leader in a "belated individualist crusade."

This is reminiscent of nothing so much as the modus arguendi of the great Parliamentarian Thadeus Stevens in his references to "the late Andy Johnson."

A last aspect of the social approach is its preference for an adjudication wherein the Judge as a person consciously makes and molds the law than for one where the Court as a theoretical entity purports to find it.

Extreme as these characterizations appear to be it is thought that they do not overstate the processual doctrines of the class under discussion as appears by explicit statement in its own expressions. We understand it to be not only designed on the part of the societarian but to be recognized as designed and openly proclaimed by teachers of that school, who look with great complacency upon the policy as an important prerequisite to social experiment.

In cutting loose from theories of a preexisting state of law and avowedly, or in effect, establishing a new law predicated upon current judicial instinct, Dean Pound professes to sense one of the most beneficent legal institutions of the present day which he frankly and unblushingly designates "Judicial Empiricism." The adjective "empirical" is normally used in a somewhat derogatory connotation. But in this case it is simply another of the numerous paradoxes we have already encountered.

In fairness to the harbingers of social reform it should be said that attempt is made to substantiate the experimental character of judicial empiricism in current practice by a number of specific instances. In fairness to the contrary view it should be said that the probative force, from all angles, of the incidents elucidated has yet to be subjected to analysis and attack.

Since, however, the collectivist himself does not attempt to justify upon traditional standards, the procedural as distinguished from the substantive basis of his views but allows his procedure to be dictated by supposed policies of "social interest" as its only ground, we may perhaps in conclusion, and without offence roughly delineate the procedural rules of anti-individualistic adjudication as requiring that it should, on principle, be meaningless as precedent and cultivate judicial know nothingism as conscious policy. Nor is it a style to be scorned as a forensic weapon. It has all the fighting qualities of Uncle Remus' Tar baby. It may have to yield at every point of concentrated attack but when judicially announced it still can stick and smear.

Judicial empiricism expects the judge to "snatch a grace beyond the reach of art" in supposed "social interest". Ancient good and economic principles might run counter to "the dominant opinion" as to the needs of society and hence the judge cannot know as law either the ten commandments or the operations of supply and demand. A learned societarian has jestingly remarked that he was once likened to Pontius Pilate. But in this at least the comparison has a semblance of merit: "He asked, "What is Truth?", but would not stay for an answer."