University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

VOLMUE 82 FEBRUARY, 1934 No. 4

MORATORIUM OVER MINNESOTA

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Under the style of *Home Building and Loan Association v. Blaisdell,*[1] the good old melodrama "When the Mortgage Came Due" was reënacted in the Supreme Court last month, the Chief Justice taking the rôle of *deus ex machina* and Justice Sutherland being cast as villain.

In April of last year the Minnesota legislature passed an act which, declaring the existence of an emergency, provides that the time within which existing mortgages may be redeemed in that state shall be extended. The extensions are to be for such periods as a proper court may deem reasonable, but in no case are they to run beyond May 1, 1935, when the act itself comes to an end. The issue in the *Blaisdell* case was the validity of this act in relation to the "obligation of contracts" clause of the United States Constitution. The act was sustained by a vote of five justices to four, Chief Justice Hughes speaking for the Court and Justice Sutherland for the minority. The actual issue between the two sides appears on first consideration to have been a rather narrow one, but under closer examination it broadens into a quarrel of real significance, especially for issues that will be apt to arise out of the New Deal.

Let us first note the points as to which there was agreement on both sides. These were, first, that the obligation of a contract comes from the law under which it is made; secondly, that the essential attributes of the sovereign power which is vested in a state legislature comprise a part of the law of each state and hence of each contract; thirdly, that it is an essential attribute of the said legislative power to provide for emergencies—that is to say for *some* emergencies.

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[1] U. S. L. W., Jan. 9, 1934, at 381.

For it is at this point precisely that the split comes. The majority holds that the present financial and industrial depression falls within the conception of "emergency" which the legislative power of the state is empowered to meet by the type of measure which was before the Court; and the minority denies this. Why the difference? Surprisingly enough, there seems to be no quarrel at all between majority and minority as to the *seriousness* of the emergency which the Minnesota act is designed to alleviate. The minority does not, any more than the majority, traverse the recitation of facts in the preamble of the Minnesota act, to the effect that property values have fallen radically, that credit is almost unobtainable, that unemployment is general; that debtors are consequently unable in large numbers either to meet their obligations or to refund them, and so on. Nor is there any disposition on the part of the minority, any more than that of the majority, to challenge the ability of the state legislature, whose members "come from every community of the state and from all the walks of life" and are "familiar with conditions generally in every calling, occupation, profession and business of the state", to make a finding with respect to economic conditions which is entitled to the serious consideration of the Court.

No; the position of Justice Sutherland and his adherents is simply this, that the "obligation of contracts" clause was made exactly to prevent this type of legislation in this type of emergency; and it has to be added that, so far as historical investigation is to be relied upon in such a matter he is unquestionably right. The Revolution was also followed by a period of severe depression, in which debtors found themselves in serious plight; and in meeting this situation the legislatures in most of the states resorted to measures to some of which the Minnesota statute bears a strong family resemblance. And it was undoubtedly the discontent of creditors with such measures that dictated the "obligation of contracts" clause and secured its acceptance by the Convention which framed the Constitution on almost its last day, when everybody was in a hurry to get home. Furthermore, when the state legislatures again got busy following the great panic of 1837, the Supreme Court interposed its veto on certain statutes very like the Minnesota statute, in the name of the "obligation of the contracts" clause.[2]

How, then, does the Court meet this position? Unfortunately the Chief Justice, who ordinarily wields a very capable dialectic, appears to be a trifle shy of his own argument with the result that it is not quite so clear-cut at all points as that of his adversary. In general, however, his answer to Justice Sutherland amounts to this: the Constitution was made for a changing society, and consequently to be adapted to the needs thereof; and social changes since 1789 make the type of emergency with which the Minnesota

[2] Bronson v. Kinzie, 1 How. 311 (U. S. 1843); McCracken v. Hayward, 2 How. 608 (U. S. 1844).

statute deals a matter of public concern. The entire passage, however, which these two statements sum up is so relevant to constitutional issues likely to come before the Court in the near future that it should be quoted:

> "It is manifest from this review of our decisions that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare.
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> "The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.
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> "It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation.
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> "It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—'We must never forget that it is a constitution we are expounding' (McCulloch v. Maryland, 4 Wheat. 316, 407)—'a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs'. Id., p. 415.
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> "When we are dealing with the words of the Constitution, said this Court in Missouri v. Holland, 252 U. S. 416, 433, '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. . . . 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'." [3]

In other words, the emergency met by the Minnesota statute is *not* the same type of emergency which the Convention of 1787 had in mind, and for the simple but irresistible reason that the *social environment has essentially changed since then.* But, Justice Sutherland urges in refutation, the Constitution must be construed according to "the intention of its founders". The answer is twofold: First, that the Constitution's founders could never have

[3] *Supra* note 1, at 387.

had an intention as to something—social conditions of 1933, to wit—which they could not have imagined or foreseen; secondly, that their broader intention was that the Constitution should, as Marshall phrased it, "be adapted to the various crises of human affairs", this being the condition of its survival.

It follows that the Court's work of construing the Constitution can never take the form solely of an historical inquiry into the supposed intention of the framers regarding something as to which they could not possibly have had any intention—at least, without pretending to divine omniscience. It must also involve recognition of the facts of present everyday living. To such facts the Constitution simply *must be* and *will be* adapted sooner or later, and the only question is one of method. But having gradually appropriated the vast indefinite powers, which it today possesses over the Constitution, the Court has at the same time appropriated a commensurate responsibility to see to it that its reading of the Constitution shall avoid social catastrophe. Justice Sutherland himself admits that the Court has this responsibility with regard to the common law; and constitutional law is just as much judge-made as the common law. In it the Court has hold of a live wire and can let go thereof only if and when the current of its own power is cut off.

But Justice Sutherland objects: "A provision of the Constitution, . . . does not admit of two distinctly opposite interpretations. It does not mean one thing at one time and an entirely different thing at another time." [4]

The fact of the matter is, however, that the Constitution must mean different things at different times if it is to mean what is sensible, applicable, feasible. Indeed, Justice Sutherland himself mentions two instances in which the meaning of the Constitution has clearly undergone alteration. Thus, he admits that "it is not probable" that founders of the Constitution had any other purpose in mind for the "obligation of contracts" clause than the protection of creditors; but that in the *Dartmouth College Case* [5] it was given "a wider application"—which is putting it mildly. He also writes, in a footnote to his opinion, of the "commerce clause":

> ". . . When that was adopted its application was necessarily confined to the regulation of the primitive methods of transportation then employed; but railroads, automobiles and aircraft automatically were brought within the scope and subject to the terms of the commerce clause the moment these new means of transportation came into existence, just as they were at once brought within the meaning of the word 'carrier', as defined by the dictionaries." [6]

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[4] *Id.*, at 388.

[5] 4 Wheat. 518 (U. S. 1819).

[6] *Supra* note 1, at 389. Justice Sutherland seems to be implying here that the Constitution construes itself. Why, then, should we not do away with judicial review? Note also his distinction—a purely verbal one—between the *meaning* and the *application* of the Constitu-

And what would Justice Sutherland have to say regarding the "due process" clause, and that construction of it which today underlies the judicial review of state legislation?

We return to the Chief Justice's opinion. Early in it occurs the following passage: "Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved." Yet in face of this declaration the ensuing decision goes on to hold, as we have seen, that Minnesota had the power to enact the statute under review because of an emergency, although otherwise it would not have had the power to do so! One is reminded of a curious opinion of Chief Justice White's a few years ago in which he demonstrated (?) that the Sixteenth Amendment could not have been intended to bestow on Congress any power of income taxation which it previously had not had since, forsooth, its power was already "plenary"![7] Surely our judges ought to relinquish the idea that the judicial robe invests them with Humpty-Dumpty's facile prerogative over words.[8]

On the other hand, the Court's reliance on the emergency concept in this case and its insistence on the temporary character of the Minnesota statute do not imply that it will not be prepared eventually to sustain the *N. I. R. A.* as a permanent measure. The emergency concept has before this provided the Court a dignified, unhurried retreat to newer positions after older ones had proved untenable.[9] Besides, who could be certain that the emergency would not recur if the measures taken to remedy it were withdrawn or stricken down? There are emergencies and emergencies. An earthquake, a riot, a war, a housing shortage can perhaps be authenticated by a court without a too great strain on the normal judicial function; but what of a nation-wide depression—and just how depressed does it have to be? The emergency concept is important as illustrating the inherent ability of governmental power under the Constitution to expand to meet new necessities. But it does not signify that the only necessities which may be met by power thus expanded must be merely temporary. Whether they turn out to be temporary or otherwise will be determined by forces external to constitutional law.

Has the decision in the *Blaisdell* case any very broad significance, particularly for the New Deal? It is not unreasonable to think so. What can be ventured, at least, is that the two opinions present two points of view from

tion. This idea of self-interpreting law is, of course, an old one. Constantine, at the Council of Nicea, enthroned the Bible as "the Infallible Judge of Truth"—with the eventual result of making the Papacy its final interpreter.

[7] Brushaber v. Union Pacific R. R., 240 U. S. 1, 36 Sup. Ct. 236 (1916).

[8] "When *I* use a word", Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is", said Alice, "whether you *can* make words mean so many different things."

"The question is", said Humpty Dumpty, "which is to be master—that's all."

LEWIS CARROLL, THROUGH THE LOOKING GLASS.

[9] Hepburn v. Griswold, 8 Wall. 603 (U. S. 1869); Knox v. Lee, 12 Wall. 457 (U. S. 1870); Juilliard v. Greenman, 110 U. S. 421, 4 Sup. Ct. 122 (1884).

which widely divergent lines of constitutional law may be imaginably projected. Justice Sutherland is the unconvinced, unconvincible, rugged individualist. It is amusing, the unction with which, in quoted passages, he harps on such themes as "individual distress . . . should be alleviated only by industry and frugality, not by relaxation of law" (just how frugal and industrious a family the Blaisdells are is unfortunately a topic not dealt with in either opinion); "debtors instead of seeking to meet their obligations by painful effort, by industry and economy, began to rest their hopes entirely upon legislative interference"; "virtue and justice", "general prudence and industry", "high standards of business morale". Then he adds this highly un-Technocratic homily on his own account:

> "The present exigency is nothing new. From the beginning of our existence as a nation, periods of depression, of industrial failure, of financial distress, of unpaid and unpayable indebtedness, have alternated with years of plenty. The vital lesson that expenditure beyond income begets poverty, that public or private extravagance, financed by promises to pay, either must end in complete or partial repudiation or the promises be fulfilled by self-denial and painful effort, though constantly taught by bitter experience, seems never to be learned; . . ." [10]

Finally, he produces this shot from his locker: "If the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned." [11] Here speaks the stern unflinching spirit of a truly Spartan jurisprudence: it craves a Constitution that pinches—the other fellow!

The outlook of the Chief Justice's opinion is very different, as we have seen. One sentence in it deserves repetition: "Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected; and that the question is no longer merely that of one party to a contract against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends." [12] This, and the invocation of Marshall's canon of adaptative construction, make the Chief Justice's opinion something whose future should be worth watching.

In brief, the issue between the Chief Justice and Justice Sutherland is purely one of *approach* to the constitutional problem before the Court. The latter treats the Minnesota statute *as if* it had been enacted contemporaneously with the Constitution; while the former treats the Constitution as contemporary with the Minnesota statute, that is, with today. It may be added that most constitutional issues *are* determined by the Court's *approach* to them, and that the Court is usually a perfectly free agent in choosing its approach.

[10] *Supra* note 1, at 393.
[11] *Id.* at 395, as corrected at 401.
[12] *Id.* at 387.