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THE INTENT THEORY OF CONSTITUTIONAL CONSTRUCTION

WHENEVER the United States Supreme Court has felt itself called upon to announce a theory for its conduct in the matter of constitutional interpretation, it has insisted, with almost unimterrupted regularity, that the end and object of constitutional construction is the discovery of the intention of those persons who formulated the instrument or of the people who adopted it.[1] Thus, Justice Sutherland, dissenting in the *Blaisdell* case,[2] declared: "The whole aim of construction, as applied to a provision of the Constitution, is to discover the meaning, to ascertain and give effect to the intent, of its framers and the people who adopted it." In those constitutional cases in which this doctrine is not expressly stated, it is usually inferentially hypothesized as a basis for the judicial process employed.[3] With this end avowedly in mind, the Court has espoused four methods in its attainment; first, it has used the language of the document itself as evidence of the formulative or effectuative intent;[4] second,

*This is the fifth of a series of articles on the subject of extrinsic aids with particular reference to the intent theory of constitutional construction appearing in the *Review*. The author plans further articles on other phases of the subject. The earlier installments appear in (1938) 26 CALIF. L. REV. 287, 437, 664 and (1939) 27 CALIF. L. REV. 157.

1 Calder v. Bull (1798) 3 U.S. (3 Dall.) 386; McPherson v. Blacker (1892) 146 U.S. 1; Knowlton v. Moore (1900) 178 U.S. 41; *Ex parte* Grossman (1925) 267 U.S. 87; Ohio *ex. rel.* Popovici v. Agler (1930) 280 U. S. 379; Smiley v. Holm (1932) 285 U.S. 355; United States v. Flores (1933) 289 U.S. 137; Williams v. United States (1933) 289 U. S. 553; 1 COOLEY, CONSTITUTIONAL LIMITATIONS (Carrington's 8th ed. 1927) 124; MILLER, LECTURES ON THE CONSTITUTION OF THE UNITED STATES (1893) 102; PATTERSON, THE UNITED STATES AND THE STATES UNDER THE CONSTITUTION (1904) 236; SEDGWICK, THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW (2d ed. 1874) 193; 1 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (4th ed. 1873) § 400; SUTHERLAND, STATUTORY CONSTRUCTION (Lewis' 2d ed. 1904) § 234; Machen, *The Elasticity of the Constitution* (1900) 14 HARV. L. REV. 200, 205.

2 Home Bldg. & Loan Ass'n v. Blaisdell (1934) 290 U.S. 398, 453.

3 See for example Sturges v. Crowninshield (1819) 17 U.S. (4 Wheat.) 70, 106-107; Cohens v. Virginia (1821) 19 U. S. (6 Wheat.) 120; Cherokee Nation v. Georgia (1831) 30 U.S. (5 Pet.) 1; Rhode Island v. Massachusetts (1838) 37 U.S. (12 Pet.) 464.

4 Sturges v. Crowninshield, *supra* note 3; Ogden v. Saunders (1827) 25 U.S. (12 Wheat.) 135, 191; Craig v. Missouri (1830) 29 U.S. (4 Pet.) 249, 265); Briscoe v. Bank of Kentucky (1837) 36 U.S. (11 Pet.) 207, 275; Prigg v. Pennsylvania (1842) 41 U.S.

the debates and proceedings of the framing and ratifying conventions have been utilized for the same purpose;[5] in the third place, the history of the times of the Philadelphia meeting, the causes, controversies, and events leading up to its calling, and the circumstances surrounding the adoption have all seen duty as indicators of the original will;[6] and finally, contemporary exposition by commentators, early congresses, and Supreme Court justices who had attended the Federal Convention have been freely resorted to as a means of accomplishing the same object.[7]

This, then, is the intent theory of constitutional construction, and these are the various judicial instruments which are incidental to its invocation. But, thus nakedly stated, its full significance is scarcely manifest. As worked out by the Court, it possesses two corollaries which proceed from it with logical inevitability and which reveal its fundamental nature. They are: (1) the doctrine that in searching for the original intent the vantage point of the present should be abandoned and that of contemporary times adopted; and (2) the changelessness of the meaning of the Constitution. Each of these doctrines demands more particular attention.

(1) Acceptance of the intent theory of constitutional interpretation seems also to involve necessarily acceptance of the idea that the intent of the framers is to be determined not from the viewpoint of present day conditions, attitudes and events, but in the light of the situation as it existed at the time of the formulation. In other words, the intent to be sought can only be exactly discovered if the searcher is surrounded by the same intellectual and factual worlds as those in which the intent was conceived, for those worlds are themselves constituent elements of that intent. So far as the practical purposes of government are concerned, intent is not some metaphysical specter, totally divorced from reality as known to the intender, but is rather a decision with respect to facts perceived by the person making it. Accurately speaking, intent never can be known with completeness and precision by another, because some of its factors are internal to the possessor, *e.g.*, his mind, disposition and emotional endowments.

(16 Pet.) 345, 403; Lake County v. Rollins (1889) 130 U.S. 662, 670; McPherson v. Blacker, *supra* note 1, at 11; Fairbank v. United States (1901) 181 U.S. 283, 307-308; United States v. Sprague (1931) 282 U.S. 716, 730-732, and cases there cited.

[5] tenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction* (1938) 26 CALIF. L. REV. 437, where the cases are collected and discussed.

[6] *Ibid.* at 664.

[7] *Ibid.* (1939) 27 CALIF. L. REV. 157.

The nearest approach that one can make to the realization of another's intent is achieved by immersing himself in the external facts that presumably were within the contemplation of the intender and by divesting himself, so far as that is humanly possible, of all the influences in his own life which are different from and tend to distort the picture as seen by the intender. This was the position adopted by the Court in *South Carolina v. United States*.[8] Justice Brewer there said, "It must also be remembered that the framers of the constitution were not mere visionaries, toying with speculations or theories, but practical men, dealing with the facts of political life as they understood them, putting into form the government they were creating, and prescribing in language clear and intelligible the powers that government was to take."[9] "To determine the extent of the grants of power, we must, therefore, place ourselves in the position of the men who framed and adopted the Constitution and inquire what they must have understood to be the meaning and scope of those grants."[10] Earlier, Justice Miller had expressed the same thought. He said: "It is never to be forgotten that, in the construction of the language of the Constitution here relied on, as indeed in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument."[11]

(2) Another closely associated idea, which also follows inescapably from the intent theory of constitutional construction, is that the meaning of the Constitution never changes. If constitutional meaning and formulative intent are taken to be the same, then the meaning of the Constitution is forever fixed as established in 1787, for the intent then born was a certain and definite thing which, like a Platonic universal floating through all the ages to come, remains immutable in form and unalterable in character.[12] The only thing that in the future might vary with respect to it would be the views of expositors as to what that intent was. Granting the assumptions here requisite, this latter subject is the only matter of any practical importance, but this leaves unaffected the theory as set forth by the

[8] (1905) 199 U.S. 437, 449.

[9] For a similar statement see Justice Sutherland's dissent in the Blaisdell case, *supra* note 2, at 453.

[10] South Carolina v. United States, *supra* note 8, at 450.

[11] *Ex parte* Bain (1887) 121 U.S. 1, 12.

[12] This was the view of Cooley, *loc. cit. supra* note 1: "The meaning of the Constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it."

Court. That theory was comprehensively stated by Justice Sutherland in his dissent to the *Blaisdell* case:[13] "A provision of the Constitution, it is hardly necessary to say, 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. If the contract impairment clause, when framed and adopted, meant that the terms of a contract for the payment of money could not be altered *in invitum* by a state statute enacted for the relief of hardly pressed debtors to the end and with the effect of postponing payment or enforcement during and because of an economic or financial emergency, it is but to state the obvious to say that it means the same now. This view, at once so rational in its application to the written word, and so necessary to the stability of constitutional principles, though from time to time challenged, has never, until recently, been put within the realm of doubt by the decisions of this court."[14] In a frequently quoted passage, Chief Justice Taney enunciated the same doctrine in *Dred Scott v. Sandford*,[15] saying, "No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race [the negroes], in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to

[13] *Supra* note 2, at 448.

[14] The same idea was expressed in *Ex parte* Milligan (1866) 71 U.S. (4 Wall.) 2, 120-121, where it was said, "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism. . . ." To the same effect is the language in Twitchell v. Blodgett (1865) 13 Mich. 126, 139-140, which Justice Sutherland has twice quoted in recent years, once in his dissent to the Blaisdell case, *supra* note 2, at 451, and again in his dissent to West Coast Hotel Co. v. Parrish (1937) 300 U. S. 379, 402-403. In Twitchell v. Blodgett it was said, "But it may easily happen that specific provisions may, in unforeseen emergencies, turn out to have been inexpedient. This does not make these provisions any less binding. Constitutions cannot be changed by events alone. They remain binding as the acts of the people in their sovereign capacity, as the framers of government, until they are amended or abrogated by the action prescribed by the authority which created them. It is not competent for any department of the government to change a constitution, or declare it changed, simply because it appears ill adapted to a new state of things. . . . Restrictions have, it is true, been found more likely than grants to be unsuited to unforeseen circumstances. . . . But, where evils arise from the applications of such regulations, their force cannot be denied or evaded; and the remedy consists in repeal or amendment, and not in false constructions."

[15] (1856) 60 U.S. (19 How.) 393, 426.

interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day."[16]

The foregoing paragraphs, indicating the nature and extent of the intent theory of constitutional construction, summarize a development in the rhetoric of the Court. As thus presented, these statements represent the Court's dominant mode of describing what it does in constitutional cases. That this judicial explanation, *i.e.*, the intent theory of constitutional interpretation, is an after-the-fact rationalization merely characterizes it as a theory; but not so lightly to be disregarded are the facts that the intent falsely describes what the Court actually does, and that it is unreasonable and insupportable as a theory, even if its accuracy as a description be conceded.

There are several points at which the accuracy of the intent theory as a description of the actual judicial process in constitutional cases may be attacked.

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[16] The same line of reasoning was adopted by Cooley: "A cardinal rule in dealing with written instruments is that they are to receive an unvarying interpretation, and that their practical construction is to be uniform. A constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. . . . a court or legislature which should allow a change in public sentiment to influence it in giving to a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty; and if its course could become a precedent, these instruments would be of little avail." 1 COOLEY, *op. cit. supra* note 1, at 123-124.

BLACK, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW (1895) 66: "The construction of a constitutional provision is to be uniform. The constitution cannot he made to mean different things at different times. Its interpretation should not fluctuate according to the changes in public sentiment or the supposed desirability of adjusting the fundamental rules to varying conditions or exigencies. The meaning of the constitution is fixed when it is adopted, and afterwards, when the courts are called upon to interpret it, they cannot assume that it bears any different meaning."

(a) The intent theory inverts the judicial process, as it actually occurs; that is, it describes a decision of the Court as being determined by the outcome of a judicial search for the formulative intent, whereas, in fact, the intent discovered by the Court is most likely to be determined by the conclusion the Court wishes to reach.[17] The intent theory as a description is thus inaccurate because it involves fundamental misconceptions of the nature of the judicial process, at least in the kinds of cases which are here being studied; namely, that the Court approaches the investigation of the formulative intent entirely uninfluenced by outside considerations and entirely unprejudiced by predilections and biases, and that the justices, once having discovered the true will of the fathers by the methods of pure historical research,[18] substitute that will for their own; that that will has within it some mysterious power of compulsion which forces Supreme Court justices to follow and effectuate its exactly determined dictates, destroying in them that volition which would permit them to do otherwise, assuming that they had the desire. When thus bluntly stated in the light of its postulates and ultimate premises, the intent theory of constitutional interpretation makes of the Supreme Court justice a mindless robot whose task is the utterly mechanical function of measuring constitutionality by the yardstick of conformity to the original intent. Nothing could be further from the facts! Rightly or wrongly, Supreme Court justices do exercise powers of independent judgment and do indulge in a reasoning process. Essentially, questions of constitutionality are as much studies in personnel and in judicial psychology as they are problems in law.[19]

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[17] For some interesting discussions on the point that judges work backwards from predetermined conclusions, see FRANK, LAW AND THE MODERN MIND (1930) 101; Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decisions* (1929) 14 CORN L. Q. 274. In *Judicial Review in Action* (1926) 74 U. OF PA. L. REV. 639, 657, Professor E. S. Corwin says: "Nor has the Court usually made law at the expense of the rules of logic. Champions of the idea that the judges ought to make law seem sometimes to think that Courts are unduly bampered by logic, and that the law would be improved if the judges, taking courage of their convictions, would only thumb their noses at Aristotle. This is sad nonsense. The judicial function is essentially a syllogistic one, and 'freedom of judicial decision' is something far more important than freedom to argue badly from accepted premises. It is, in truth, freedom to choose, within limits, the premises themselves; and asserts itself, accordingly, not *after* but *before* the technical grounds of a decision are determined upon. The rules of formal logic are, therefore, its instrument, not its enemy."

[18] See *infra* note 76.

[19] See McGovney, *Reorganization of the Supreme Court* (1937) 25 CALIF. L. REV. 389. At 394, Professor McGovney says, "These decisions on minimum wage laws are the clearest proof that liberalism or conservatism of the members of the Court at the

(b) In the second place, even if the original intent when discovered was controlling, this assumption does not obviate the practical impossibility of finding out with certainty what that intent was. I have discussed elsewhere the weaknesses of most of the instruments utilized by the Court in ascertaining the will of the Constitution fabricators; thus convention debates and proceedings are too particular, ungeneralizable and superficial;[20] the history of the times is too vague and rests on the improbabilities of a double inference;[21] and contemporary exposition is generally both presumptive and purposive.[22] None of these methods leads by a process of inexorable reasoning to an incontrovertible conclusion, but all are intermediately and finally susceptible of dual and diverging interpretations. Consequently, since the object sought is almost never precisely ascertainable, and since with respect to much of the Constitution the framers were entirely without specific purpose,[23] the intent theory

particular time a statute comes before it determines whether it will be held to be 'unreasonable,' and unconstitutional." Professor C. G. Haines in his *Judicial Review of Legislation in the United States and the Doctrine of Vested Rights and of Implied Limitations of Legislature* (1924) 3 TEX. L. REV. 1, 33, states: "The change in the interpretation of the Fourteenth Amendment, whereby a content was declared involved therein which the majority of the Supreme Court had repeatedly held was not intended in its adoption, was the result of the reasoning of many justices, though a few of this number bore the brunt of the controversy which turned the tide toward a broad judicial review of legislation.

"Three justices seem to have determined, in large part, the trend of the opinions of the Supreme Court, in the cases changing the meaning and content of the term, due process of law, and in ushering in a period characterized as a 'carnival of unconstitutionality' which perhaps was at its height between 1890 and 1910. They were Justices Field, Harlan, and Brewer. Certain peculiarities and characteristics of these justices made a distinct impression upon this unique feature of modern American constitutional law."

"Until some due-process issue is authoritatively settled, one who would make a constitutional prophecy or a constitutional argument should be familiar with the outlook and the temper of the judges by whom the issue is to be decided. In cases of any considerable novelty, few reasons can be so compelling as to meet with universal acceptation. The determination of closely-controverted constitutional issues depends, therefore, in large part upon the composition of the court of last resort at the particular time when the issue comes before it." Powell, *The Judiciality of Minimum-Wage Legislation* (1924) 37 HARV. L. REV. 545, 546.

[20] tenBroek, *op. cit. supra* note 5, particularly at 451 *et seq.*

[21] tenBroek, *loc. cit. supra* note 6.

[22] tenBroek, *loc. cit. supra* note 7.

[23] Justice Cardozo's generalization about interpretation of statutes is equally true of constitutional interpretation. "Interpretation is often spoken of as if it were nothing but the search and the discovery of a meaning which, however obscure and latent, had none the less a real and ascertainable pre-existence in the legislator's mind. The process is, indeed, that at times, but it is often something more." CARDOZO, NATURE OF THE JUDICIAL PROCESS (1921) 14-15.

of constitutional construction falsely describes what the Court actually does, for the intent theory hypothesizes a mathematically exact technique of discovery and a practically inescapable conclusion.

(c) Any theory which characterizes the Constitution of the United States as changeless in meaning is flying in the face of recent cases showing that the meaning of the Constitution varies, even in the absence of formal amendment.[24] More than that, the situation seems to be just the reverse of Justice Sutherland's portrayal of it; a provision of the Constitution does admit of "two distinctly opposite interpretations." It does mean "one thing at one time and an entirely different thing at another time." Wholly aside from the matter of the gradual case by case development of the meaning of various constitutional clauses,[25] there is the unavoidable number of decisions in which the High Court has directly reversed previous holdings. A recent example is a case in which Justice Sutherland elaborated the

[24] Holmes, J., in Lochner v. New York (1905) 198 U. S. 45, 76, said: ". . . the word liberty in the Fourteenth 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."

[25] In *Implied Powers and Implied Limitations in Constitutional Law* (1919) 29 YALE L. J. 137, W. F. Dodd pointed out some illustrations of this technique. At page 144, he says, "With respect to 'admiralty and maritime jurisdiction' the growth of new forms of navigation has increased the number of things to which national power applies, but it is perhaps clear also that the content of the power itself was enlarged by judicial action. Under the case of *The Thomas Jefferson* this jurisdiction was said to extend only to tidal waters. This position was later expressly rejected, and admiralty jurisdiction held to apply to all navigable waters. Perhaps an accepted legal theory might say that the earlier view never was law and that the later view was law from the beginning, but however this may be, the fact of importance here is that a narrow view of the court at one time was replaced by a broader view at another, and that the accepted extent of the power results from this broader and later judicial construction.

"The national power of taxation furnishes another illustration of the possible extension of the content of constitutional language. The taxing power of the national government has from the beginning been regarded as one that may incidentally accomplish purposes other than that of producing revenue. But in *McCray v. United States* a tax was sustained the purpose of which was to accomplish under the guise of taxation a result not directly within the power of Congress; and this decision has been responsible for several laws (tax laws in form) intended not to raise revenue, but to destroy or regulate particular industries: the tax upon phosphorous matches, of April 9, 1912; the cotton futures tax, of August 18, 1914; the act for the control of traffic in habit-forming drugs, of December 17, 1914; and the act taxing articles manufactured by the use of child labor, of February 24, 1919. Under each of these laws, the purpose is not to raise revenue, but under the guise of a taxing power belonging expressly to Congress to exercise a control over matters not otherwise within national power. It may be said that this is not an extension of congressional power through judicial action, yet the *McCray* case is the basis for the power."

intent theory of constitutional interpretation by way of dissent, namely, *West Coast Hotel Co. v. Parrish*,[26] in which a Washington State minimum wage law for women was sustained, notwithstanding that the *Adkins* case,[27] where the same issue was presented, had held contrariwise.[28] Surely, here was a situation in which the Constitution meant one thing at one time (before March 29, 1937) and precisely the opposite at another. Any explanation of this phenomenon on the ground that the old construction had been a judicial misapprehension as to the true meaning, which was later revealed, is the merest sophistry,[29] for all practical men know that at any given time the Constitution means what the Supreme Court says it means;[30] and,

[26] *Supra* note 14.

[27] Adkins v. Children's Hospital (1923) 261 U.S. 525.

[28] See also Morehead v. New York *ex rel.* Tipaldo (1936) 298 U.S. 587.

[29] See Swift v. Tyson (1842) 41 U.S. (16 Pet.) 1, where Justice Story said at page 12, "In the ordinary use of language, it will hardly be contended, that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not, of themselves, laws. They are often re-examined, reversed and qualified by the courts themselves, whenever they are found to be either defective or ill-founded, or otherwise incorrect. CARDOZO, *op. cit. supra* note 23, at 124-125: "The theory of the older writers was that judges did not legislate at all. A pre-existing rule was there, imbedded, if concealed, in the body of the customary law. All that the judges did, was to throw off the wrappings, and expose the statue to our view."

"The attribution of supremacy to the Constitution on the ground solely of its rootage in popular will represents, however, a comparatively late outgrowth of American constitutional theory. Earlier the supremacy accorded to constitutions was ascribed less to their putative source than to their supposed content, to their embodiment of essential and unchanging justice." And again, *"There are,* it is predicated, *certain principles of right and justice which are entitled to prevail of their own intrinsic excellence, altogether regardless of the attitude of those who wield the physical resources of the community. Such principles were made by no human hands; indeed, if they did not antedate deity itself, they still so express its nature as to bind and control it. They are external to all Will as such and interpenetrate all Reason as such. They are eternal and immutable. In relation to such principles, human laws are, when entitled to obedience save as to matters indifferent, merely a record or transcript, and their enactment an act not of will or power but one of discovery and declaration."* Corwin, *The "Higher Law" Background of American Constitutional Law* (1928) 42 HARV. L. REV. 149, 152. See HOLLAND, ELEMENTS OF JURISPRUDENCE (11th ed. 1910) 19-20, 32-36; DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF THE LAW (1927) 85-86.

"If this discovery comes to us as a great disillusionment, it is only because our minds are tinged from infancy with the hoary superstitution of the absolute. We say, 'If this great law is not always true, what becomes of our other exact laws?' But can we have no reverence for any institution without making the childish assumption of its infallibility? Can we not see that exact laws, like all other ultimate or absolutes, are as fabulous as the crock of gold at the rainbow's end?" LEWIS, THE ANATOMY OF SCIENCE (1926) 154.

[30] See CARDOZO, *op. cit. supra* note 23, at 124-125; RADIN, THE LAW AND MR. SMITH (1938) *passim*. See also the statement of Chief Justice (then Governor) Hughes in an address delivered in 1907: "We are under a Constitution, but the Constitution is what the judges say it is. . . ." ADDRESSES AND PAPERS OF CHARLES EVANS HUGHES (1908) 139.

of the impractical men, some, mostly persons who are informed in the field of public law, think that the Constitution means what *they* say it means. Another recent example of the fact that the Constitution may, at different times, have "two distinctly opposite" meanings, is offered by *Erie Railway Co. v. Tompkins*[31] which held constitutionally invalid a judicial course of conduct found not to be repugnant to the fundamental law in the earlier case of *Swift v. Tyson.*[32]

These changes in the meaning of the Constitution did not result from altered judicial views as to the original intent; they came rather from a different prevailing attitude in the Court with respect to economic, social, and political policy. Justice Sutherland, in his dissent to the *West Coast Hotel* case,[33] emphatically insisted that "the meaning of the Constitution does not change with the ebb and flow of economic events." He made this statement although the decision then being handed down was the clearest kind of refutation of the fact he asserted. Chief Justice Hughes argued that "the economic conditions which had supervened"[34] since the *Adkins* case[35] made it necessary to re-examine the constitutionality of minimum wage laws and "has brought into a strong light"[36] the social need for such legislation. He made it clear that economic events were primarily responsible for the change in the meaning of the Constitution.[37] He said, "The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue

31 (1938) 304 U.S. 64.

32 *Supra* note 29. The Propeller Genessee Chief v. Fitzhugh (1851) 53 U.S. (12 How.) 471, by holding that the federal maritime jurisdiction extended to all navigable waters reversed the decision in the Thomas Jefferson (1825) 23 U.S. (10 Wheat.) 186, which restricted that jurisdiction to waters in which the tide ebbed and flowed. See also cases cited in Brandeis' dissent in Burnet v. Cornonado Oil & Coal Co. (1931) 285 U.S. 393, 405, and Helvering v. Mountain Producers Corp. (1938) 303 U.S. 376.

33 *Supra* note 14, at 402.

34 *Ibid.* at 390.

35 *Supra* note 27.

36 West Coast Hotel v. Parrish, *supra* note 14, at 399.

37 Chief Justice Hughes sought to derive additional sanction by a use of the dissenting opinions of Chief Justice Taft and Justice Holmes in the Adkins case, *supra* note 27.

to an alarming extent despite the degree of economic recovery which has been achieved. It is unnecessary to cite official statistics to establish what is of common knowledge through the length and breadth of the land."[38] The *Tompkins* case[39] similarly exhibits the influence upon the Court of factual developments, although here, it is true, the factual developments were not so strictly economic in character nor so far reaching in importance. Justice Brandeis, who spoke for the Court, opened his opinion with a classic statement: "The question for decision" he said, "is whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved."[40] The use of the word "disapproved" instead of the expression "found unconstitutional" gives a striking connotation to this whole introductory sentence, for it obviously suggests that Supreme Court disapproval and constitutional invalidity are one and the same thing. The word "disapproval" also suggests the part that the judgment and feeling of the justices is to play, whereas the expression "constitutionally invalid" gives an impression of impersonality, of unfeeling absoluteness, of cosmic inevitability. The word "disapproved" further insinuates that the Court intends to evaluate a policy after an experience with its operation and to judge it accordingly, and not on any alleged basis of original intent. In this spirit of blunt realism Justice Brandeis proceeds: "Experience in applying the doctrine of *Swift v. Tyson,* had revealed its defects, political and social; and the benefits expected to flow from the rule did not accrue. Persistence of state courts in their own opinions on questions of common law prevented uniformity; and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties.

"On the other hand, the mischievous results of the doctrine had become apparent.... *Swift v. Tyson* introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under

[38] *Supra* note 36. A similar importance was given to economic facts by Justice Cardozo speaking for the Court in Charles C. Steward Machine Co. v. Davis (1937) 301 U.S. 548. On part of the constitutional issue there involved, he said, at 586, "To draw the line intelligently between duress and inducement there is need to remind ourselves of facts as to the problem of unemployment that are now matters of common knowledge." Note that Justice McReynolds in his dissent spoke (p. 599) of Justice Cardozo's reference to the fact as an "ostentatious parade of irrelevant statistics." Justice Cardozo's method in Helvering v. Davis (1937) 301 U.S. 619, was not substantially different from that in the Steward Machine Co. case.

[39] *Supra* note 31.

[40] *Ibid.* at 69.

the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law."[41] Accordingly the doctrine of *Swift v. Tyson* was "disapproved" because, after experience in applying it, the Court found that its expected benefits had not accrued and that it resulted in confusion, lack of uniformity, and unjust discrimination.[42] Hence, the facts of its operation, as perceived by the Court, came in the end to determine the invalidity of this doctrine and change the meaning of the Constitution. No very noticeable effort was made in the case to discover the original intent and no concern was shown over the corollary which stipulates the changelessness of the meaning of the Constitution.

We must conclude that any theory which describes the meaning of the Constitution as changeless, which understands that constitutionality is decided by the outcome of a judicial search for the original intent, which makes of a constitutional issue only an historical question, which denies the proper influence of the altering factual world upon the meaning of the document—any theory which does all these things—is an utterly false portrayal of what the Supreme Court actually does.

Such a theory is also a misrepresentation of what the Court ought to do, if speculation upon that matter is regarded as worth while. Can it be denied that exclusive concentration on the condition of things at the time of the framing would tend to cast modern constructions in the mold of a factual world that has been superseded; that the pretense of a disinterested search for the original intent is judicial hokum; that the meaning of the Constitution and the formulative will are not necessarily the same at all? The meaning of the Con-

[41] *Ibid.* at 74.

[42] Frederick Judson points out another example of a change in the meaning of the Constitution by influences other than the intent theory when he says: "The change in public opinion influencing constitutional judicial construction may result not only from economic or social changes but from changes in the moral standards of public opinion. This was forcibly illustrated in the lottery cases where the decision was *based on a distinctly moral ground* that lotteries were recognized public nuisances: while at the time of the adoption of the constitution lotteries were a recognized means of raising money for public, education and charitable purposes. It would have appeared strange indeed to the framers of the constitution that the federal power could ever be successfully exerted to prohibit interstate traffic in lottery tickets." Quoted in Leacock, *The Limitations of Federal Government* in 1 SELECTED ESSAYS ON CONSTITUTIONAL LAW (edited by Association of American Law Schools, 1938) vol. 1, 328.

stitution is to be discovered from the examination of a considerable number of factors, each of which is and ought to be recognized by the Court as imponderable and dependent in its influence, and each of which separately considered ought to be an insufficient basis to warrant a conclusion. One of these factors that ought to be considered is the original intent, in so far as it is ascertainable with reasonable certainty. Another is the general situation of which the particular problem before the Court is illustrative, viewed in the light of its historical development and in the light of the history of the country. Still a third is the previous decisions of the Court which construe the relevant clause of the document, for a minimum consistency and long range views of operation are to be allowed some weight. Something also should depend on the previous actions and present attitude of other departments of the government both with respect to the general question of meaning and to past practices in this and similar problems. Furthermore, the views of the Court as to justice,[43] expediency, policy, social need, economic and political theory, ultimate consequences, and the predilections and biases of individual members of the Court all ought to be regarded as material to the question of constitutional meaning.[44] Above all else, questions should be considered in the light of present day conditions as they actually exist, not in the near darkness of the world as it surrounded the framers, nor yet in the dimming illumination of things as they were in the youth of the justices. These things all together comprise the meaning of the Constitution. That meaning is not alone found in original intent but original intent is only one of the elements that go to make it up.[45]

[43] For a study of the part the "moral emotion" plays in the judicial process see Professor Max Radin's article, *The Chancellor's Foot* (1935) 49 HARV. L. REV. 44.

[44] "There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James's phrase of 'the total push and pressure of the cosmos,' which, when reasons are nicely balanced, must determine where choice shall fall. In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own. To that test they are all brought—a form of pleading or an act of parliament, the wrongs of paupers or the rights of princes, a village ordinance or a nation's charter." CARDOZO, *op. cit. supra* note 23, at 12.

[45] Chief Justice Hughes speaking for the Court in the Blaisdell case, *supra* note 2, said, at 443: "When we consider the contract clause and the decisions which have expounded it in harmony with the essential reserved power of the States to protect the security of their peoples, we find no warrant for the conclusion that the clause has been

Now of course, these views destroy the source of what Cooley called "a principal share of the benefit expected from written constitutions."[46] When Justice Sutherland said that the intent theory was "necessary to the stability of constitutional principles,"[47] he apparently thought that constitutional stability is synonomous with constitutional fixity and unbending rigidity.[48] This idea is fundamentally a mistaken and harmful conception. Constitutional stability does not

warped by these decisions from its proper significance or that the founders of our Government would have interpreted the clause differently had they had occasion to assume that responsibility on the conditions of the later day." Thus Chief Justice Hughes is here suggesting that one means of testing whether a determination is in accord with the intention of the framers might be to decide what those framers would themselves have done if they were rendering the judgment surrounded by the conditions of the present day. It is submitted that if the intent theory is to be adhered to, this doctrine would be a much more satisfactory employment of it than the older forms, and, it might he added, since the Court's action in the latter case is in fact quite free, this shift would not necessarily impose greater restrictions on the judicial performance. However, this doctrine has seldom received expression in the cases, though it bas not been entirely neglected elsewhere. Gray in his *Nature and Sources of the Law* (1921 ed.) says, at 173, "The fact is that the difficulties of so-called interpretation arise when the Legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the Legislature did mean on a point which was present to its mind, but to guess what it would bave intended on a point not present to its mind, if the point had been present." In (1916) 1 MASS. L. QUART. (no. 2) 13, at 15, Mr. Justice Hughes said, "The intent of the Legislature is sometimes little more than a useful legal fiction, save as it describes in a general way certain outstanding purposes which no one disputes, but which are frequently of little aid in dealing with the precise points presented in litigation." Corwin, *op. cit. supra* note 17, at 657-658: "That judicial interpretation cannot leave the law unaffected is proved by its every existence. The most ancient maxim of statutory interpretation is that the will of the makers of the statute should govern. Yet were this clear for all situations, as undoubtedly it may be for many, there would be no necessity for interpretation. In theory, the law-maker had a definite intention respecting every case; in fact, he had no intention at all respecting most of the cases that get into court, and that is why they get there. And as regards the Constitution, this consideration has unusual force, first, because its makers deliberately left many questions to the hazards of interpretation; and secondly, because of the lapse of time since then—a period abounding in social and industrial developments which could not possibly have been foreseen in 1787." It is instructive to note that the French courts in dealing with the Code Napoleon have employed the doctrine above expressed by Hughes by inquiring not " 'what the legislator willed a century ago, but what he would have willed if he had known what our present conditions would be.' " Powell, *The Logic and Rhetoric of Constitutional Law* (1918) 15 JOURNAL OF PHILOSOPHY, PSYCHOLOGY AND SCIENTIFIC METHOD 645, at 655.

[46] *Loc. cit. supra* note 1.

[47] See the part of Justice Sutherland's dissent to the Blaisdell case quoted in text following note 13, *supra*.

[48] It was apparently some such notion of constitutional rigidity that led Herman Finer to say, in his *Foreign Governments at Work* (1921) at 57: "Never before in the history of the world has there been such a change in social purpose as the last 140 years have witnessed; yet, in its essence, the American Constitution, made at the beginning

mean absolute changelessness. It means change concomitant with the changing society of which it is a part. It means movement at a given ratio to other developments, a proportional alteration. Constitutional stability means maintenance of a relative position, and, since the things to which that position is related are rapidly changing, the Constitution, too, must change or its stability as the organ of a living society will turn into the landmark of a soon forgotten past. This is the meaning of constitutional stability if the Constitution is "to be kept a commodious vehicle of the national life and not made the Procrustean bed of the nation."[49] This doctrine will not abrogate "the judicial character" of the Supreme Court, for there is no constitutional stability if that Court is not "the reflex" of at least long range changes in conditions and public feeling,[50] if not of the "popular opinion or passion of the day."[51]

These views as to the meaning of the Constitution and methods of ascertaining it are not to be found only in non-judicial sources. In the cases of the United States Supreme Court, there are two lines of development which substantially embody them. One of these lines of development does so within the formal framework of the intent theory of constitutional construction, while the other bluntly abandons even this pretense.

(1) The United States Supreme Court has sometimes indulged the fiction that, although the meaning of the Constitution remains

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of that 140 years, the embodiment of now outworn ideals, faded hopes, old fears, primitive economic and social facts—that arrangement of society still dominates and cramps and arrests the vital, toiling ideal of a mighty people."

[49] CORWIN, JOHN MARSHALL AND THE CONSTITUTION (1919) 144.

[50] Holmes, *The Path of the Law* (1897) 10 HARV. L. REV. 457, 466: "We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind." In dealing with the narrower and more particular problem of the influence upon constitutional meaning of a specific part of the general public attitude, *i.e.*, adverse public criticism, Professor McGovney (*op. cit. supra note* 19, at 393) says: "Soon after these Supreme Court decisions [the Lochner and Adair cases] the Court of Appeals of New York held the first New York Workmen's Compensation Act invalid as an unreasonable interference with the employer-employee relations. This New York and other similar state court decisions met with wide public condemnation, culminating in the advocacy by the Progressive Party in 1912 . . . of the so-called 'recall of judicial decisions.' . . . While this proposal was directed at State courts only, public criticism also condemned the *Lochner* and *Adair* decisions by the Supreme Court, and the healthy airing given to the fallacy that judges have a constitutional warrant for setting up their judgment of what is good for society as opposed to legislative judgment brought about a temporary liberalism in the courts." Later at page 399, it is again said: "Widespread public criticism of illiberal constitutional interpretation, in 1912, led as we have seen to a temporary liberalization of the courts."

[51] See the quotation from Chief Justice Taney in Dred Scott v. Sandford in text following note 15, *supra*.

unchanged, the number and variety of things included within that meaning are not subject to the same rules of constancy and may have greatly increased.[52] Whether the extent of variation allowed within the old forms has not in fact been tantamount to a change in character and hence a change in constitutional meaning is the point at which this procedure is most susceptible to challenge. This fact illustrates the limit to which the intent theory is stretched to make it explain a process for which it was poorly designed and ill adapted. It illustrates, too, the psychological foundation of the tendency to dress up the new and the different in the old, accepted attire, no matter how fundamentally unsuited the latter may be therefor.

This fiction has been utilized by the Court in a considerable number of cases. Thus, in *South Carolina v. United States*[53] it was said that the Constitution, "Being a grant of powers to a government its language is general, and as changes come in social and political life it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning. Those things which are within its grant of power, as those grants were understood when made, are still within them, and those things not within them remain still excluded."[54]

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[52] FRANK, *op. cit. supra* note 17, at 27. The author offers an explanation of this technique: "Lawyers use what the layman describes as 'weasel words,' so-called 'safety-valve concepts,' such as 'prudent,' 'negligence,' 'freedom of contract,' 'good faith,' 'ought to know,' 'due care,' 'due process,'—terms with the vaguest meanings—as if these vague words had a precise and clear definition; they thereby create an appearance of continuity, uniformity and definiteness which does not in fact exist."

[53] *Supra* note 8, at 448-449.

[54] This doctrine was explained in other terms in Pensacola Tel. Co. v. Western Union Tel. Co. (1877) 96 U.S. (6 Otto) 1, where Chief Justice Waite said at page 9: "The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth." See also for the same idea, International Textbook Co. v. Pigg (1910) 217 U.S. 91; The Pipe Line Cases (1914) 234 U.S. 548; Neiswonger v. Goodyear Tire & Rubber Co. (N.D. Ohio 1929) 35 F. (2d) 761. Thus also in *In re* Debs (1895) 158 U.S. 564, it was said at 591: "Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation

Now the striking thing about this statement, and most of those which are patterned after it, is not the clear view which it gives of the unadjustability of the intent theory to the fact of the changing meaning of the Constitution, but the flagrant begging of the question and subterfuge of words in which the Court indulges when seeking to force a process of constitutional development into the confines of a theory which describes it as fixed and static. The exact theoretical problem in each constitutional case is one of constitutional meaning; namely, whether the particular matter before the Court does or does not fall within the meaning of the language used in the document. This problem cannot be solved by saying that the Constitution "embraces in its grasp all new conditions which are within the scope of the powers in terms conferred" or by urging that the powers granted apply "to all things to which they are in their nature applicable" because the precise inquiry is whether the matter before the Court is or is not "within the scope of the powers in terms conferred" or whether the powers granted are "in their nature applicable" to it. In the progress of that inquiry, it must not be forgotten that a word or expression possesses no intrinsic significance; the meaning of a word or expression is the thing or things to which it refers. And in deciding whether or not the new matter before the Court is a referent of a constitutional clause, that constitutional clause is being redefined and its meaning changed.[55] The matter, being new, could not have been a referent of the clause as understood by the framers. Thus, for example, in holding that telegraphic messages[56] and radio transmissions[57] sent across state boundaries were subject to the regulatory power of Congress as being included within the commerce clause, the United States Supreme Court was changing the meaning of that clause, both because of the very newness of the telegraph and radio

on land was by coach and wagon, and on the water by canal boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad and train and the steamship. Just so it is with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates to-day upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."

55 Jerome Frank (*op. cit. supra* note 17, at 124-125) quotes Oliver Wendell Holmes as saying: "We must think things not words, or at least we must constantly translate our words into the facts for which they stand if we are to keep to the real and the true. . . . *A generalization is empty so far as it is general. Its value depends on the number of particulars which it calls up to the speaker and the hearer.*"

56 Pensacola Tel. Co. v. Western Union Tel. Co., *supra* note 54.

57 Fisher's Blend Station, Inc. v. Tax Comm. of Washington (1936) 297 U. S. 650.

and because of their unpredictable and novel character. The older referents of the commerce clause were only usable by way of analogy.

Justice Sutherland, in the two recent dissents before referred to,[58] sought to give the doctrine of the *South Carolina* case[59] its most elaborate statement. That statement was equally as question-begging as its predecessor, and perhaps more apparently so. Justice Sutherland said, "The provisions of the Federal Constitution, undoubtedly, are pliable in the sense that in appropriate cases they have the capacity of bringing within their grasp every new condition which falls within their meaning. But, their *meaning* is changeless; it is only their *application* which is extensible."[60] It is submitted that, on any rational theory of the use and meaning of words, this statement is a manifest self-contradiction. The meaning of terms cannot be changeless if their application is extensible because their meaning is not only determined by, but is the extent of their application. It is most patently self-apparent that the provisions of the Constitution "bring within their grasp every new condition which falls within their meaning." All will agree to that. But the point is that in determining what new conditions fall within their grasp, the Court is defining their meaning, and by including or excluding new referents, changing their meaning.

Approaching the matter from the aspects of one of its corollaries, Justice Sutherland elsewhere repeated the same fallacy, but in slightly different terms. He said, "We frequently are told . . . that the Constitution must be construed in the light of the present. If by that is

[58] Dissents to the Blaisdell case, *supra* note 2, at 448, and the West Coast Hotel case, *supra* note 14, at 402.

[59] *Supra* note 8.

[60] Home Bldg. & Loan Ass'n v. Blaisdell, *supra* note 2, at 452. In these two dissents Justice Sutherland used the quoted language in protest to a change in the meaning of the Constitution then being set forth by the majority of the Court. In a somewhat earlier case, Justice Sutherland, now speaking for the majority, employed this identical language in justification of a change in the meaning of the Constitution. That earlier case was Euclid v. Ambler Realty Co. (1926) 272 U.S. 365, which upheld the validity of zoning legislation. Justice Sutherland said, at 387: "Such regulations are sustained, under the complex conditions of our day, for reasons analagous to those which justify traffic regulations, which, before the advent of the automobile and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guarantees never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the *meaning*, but to the *application* of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution of course, must fall."

meant that the Constitution is made up of living words that apply to every new condition which they include, the statement is quite true. But to say, if that be intended, that the words of the Constitution mean today what they did not mean when written—that is, that they do not apply to a situation now to which they would have applied then—is to rob that instrument of the essential element which continues it in force as the people have made it until they, and not their official agents, have made it otherwise."[61] By the first of these two sentences, Justice Sutherland adds nothing to the substance or to the mode of expression of the idea stated in his earlier dissent and in the *South Carolina* case.[62] But by the second of them, he slightly alters the connotation of the language of the latter decision. In that case, the statement was that those things which were within or without the provisions of the Constitution as understood when framed are still so. Justice Sutherland puts the same idea in a much stronger light; he says that it would amend the Constitution to now exclude from its provisions something which would at the time of framing have been included. Aside from the implications of the expression "they *would* have applied," we may say that the general trend is just the opposite of that exampled by Justice Sutherland; that is, the provisions of the Constitution are now frequently held to include what might before have been excluded.

Before concluding the discussion of this fiction, it should be added that there is no difference in substance between changing the meaning of the Constitution by bringing newly created instrumentalities within the scope of its provision and by the judicial extension of the original content of the language used.[63] In both instances, the process consists merely in altering the kind or increasing the number of referents of the particular terms in question. The meaning of "admiralty and maritime jurisdiction," for example, has thus been expanded to include instruments and modes of conducting marine commerce unknown to the Constitution makers and to cover not only tide waters, as the formulators thought, but all navigable waters as well. In the first case, the change in meaning resulted from the need for accommodating the Constitution to the newly invented machinery and methods of maritime traffic, and in the second from the need for adapting it to the new economic conditions of national life. But the difference in motivating reasons does not modify the essential

[61] West Coast Hotel Co. v. Parrish, *supra* note 14, at 402-403.

[62] *Supra* note 8.

[63] Dodd, *op. cit. supra* note 25, at 137.

fact that in both cases the Court was an active force changing the meaning of constitutional language by altering its referents. The suggestion, sometimes made, that in the former case the Court is a mere mechanical contrivance automatically recording the effects of new physical developments is not founded in any fundamental distinction but arises rather from the fact that the Court is more readily made aware of the existence of newly created instrumentalities than of newly created economic and social conditions. Justice Cardozo avoided involving himself in this pseudo-metaphysical controversy by devising an expression which precisely describes the fact and yet ought to be acceptable to both sides. He said simply that the old forms were subject to enlargement.[64]

(2) Emerging coincidentally with the intent theory of constitutional construction, there is a body of rhetoric to be found in the cases of the United States Supreme Court which openly espouses the doctrine that the Constitution is adaptive in character, that the instrument was framed and the ratification procured on the understanding that it should be without significance in the abstract but should gain its meaning from continuing adjustment to situations as they developed. Under this doctrine, by a practically unmodified delegation of discretion, the intention of the formulators that the Constitution should be adapted to time and circumstances is to be effectuated, but not their specific intent. Better according with the realities of judicial operation than with popular notions of constitutional immutability, this doctrine is more frequently expressed in the Court's performance than in its language. There are, however, instances when fact and phraseology were at one in the cases of the Supreme Court and, from among these, I select the three most notable for illustrative reproduction here.[65]

First of all, of course, there is Chief Justice Marshall's famous prophetic warning: "... we must never forget that it is a *constitution* we are expounding .... a constitution intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs."[66] Then there is the equally well known and certainly

[64] Charles C. Steward Machine Co. v. Davis, *supra* note 38, at 579.

[65] For other judicial rhetoric of similar import see Davidson v. New Orleans (1877) 96 U.S. 97; Hurtado v. California (1884) 110 U.S. 516, 528-529; Holden v. Hardy (1898) 169 U.S. 366, 389; Orient Ins. Co. v. Daggs (1899) 172 U.S. 557, 564; The Employers' Liability Cases (1907) 207 U.S. 463, Justice Moody's dissent, 521-522; Weems v. United States (1910) 217 U.S. 349.

[66] McCulloch v. Maryland (1819) 17 U.S. (4 Wheat.) 159, 200, 203.

more striking analogy drawn by Justice Holmes in *Missouri v. Holland*:[67] "... when we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism .... The case before us must be considered in the light of our whole experience and not merely in the light of what was said a hundred years ago." Finally Chief Justice Hughes has provided the most recent general pronouncement on this subject: "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 to-day, 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, this statement carries its own refutation."[68] Later in the same opinion in speaking of the Court's interpretation of the obligation of contracts clause, Chief Justice Hughes justifies it as being "a growth from the seeds which the fathers planted."[69]

It is hard to imagine a more mixed metaphor than that of the last sentence;[70] but the quoted passages show, both in their wording and in their tendency to rely upon the organismic analogy, a clear adoption of the theory of the adaptive character of the Constitution.[71] That theory, I submit, is an inseparable part of all instruments that are designed to operate in the indefinite future because they require a readier and more continuous revision than any process of formal amendment can give.[72] In a sense, this doctrine, which is implicit in

[67] (1920) 252 U. S. 416, 433.

[68] Home Bldg. & Loan Ass'n v. Blaisdell, *supra* note 2, at 442.

[69] *Ibid.* at 444.

[70] If the Constitution makers were planters of seeds, why were they not farmers instead of fathers? If they were fathers then, following the perception of Justice Holmes, they should rationally be spoken of as "begetters." But in the latter event, where does the planting of seeds come in?

[71] Some question might be raised as to whether the doctrine of constitutional adaptability, which was expressed by Chief Justice Hughes in the Blaisdell case, is not in conflict with the doctrine which he also there expressed that emergencies do not create power but may furnish the occasion for its exercise. See his discussion of the latter point in Home Bldg. & Loan Ass'n v. Blaisdell, *supra* note 2, at 426.

[72] Of course it does not follow that the courts necessarily possess a never completely exercisable monopoly over the adaptive function, but American history has settled that issue for the people of the United States.

the theory and unavoidable in the practice of written constitutions, is itself a fundamental and irreconcilable contradiction of the idea behind such documents; they are thought to be an allocation of and a restraint upon power which may not be modified except in a prescribed way.[73] This latter was a belief which Professor Plucknett expressed when writing on *Bonham's Case and Judicial Review*.[74] He said, "The adoption of the practice of setting up written state constitutions was soon to render Coke's doctrine unnecessary. Common right is vague at the best, and cannot compare with a well-drawn constitution as a check upon legislative action." But, in point of logic, under the doctrine of constitutional adaptability, the necessity for Coke's doctrine is not destroyed by the presence of a written constitution; and, in point of fact, practice under the Constitution of the United States bears this out,[75] for, even premising the intent theory of constitutional construction, the Court's unrestrained resort to extrinsic aids is a constant refutation of the accuracy of Professor Plucknett's statement. Written constitutions, no matter how well drawn, when considered in relationship to the nature of the judicial process and the practical requirements of government, are not less vague than common right, at least so far as important questions of power and function are concerned,[76] for some notion of natural right

[73] See the statement on this subject by Justice Sutherland in his dissent to the West Coast Hotel case, *supra* note 14, at 402-403.

[74] (1926) 40 HARV. L. REV. 30, 68.

[75] Professor E. S. Corwin presents evidence casting doubt on Plucknett's proposition for other reasons in his *Basic Doctrine of American Constitutional Law* (1914) 12 MICH. L. REV. 247. See also Corwin's study of *The Doctrine of Due Process of Law Before the Civil War* (1911) 24 HARV. L. REV. 366, particularly at 375, where he says, "But how was criticism upon legislative power converted into effective constitutional law? The answer is to be found in the doctrine of *vested rights*, which is the foundational doctrine of constitutional limitations in this country, and which in turn rests, not upon the written constittution, but upon the theory of fundamental and inalienable rights."

Professor C. G. Haines concurs with Professor Corwin in this view. He says: "It is not so much, then, the original language or intent of written constitutions that is responsible for the unique character of the practice of judicial review of legislative acts in the United States, as compared with a similar practice in foreign countries, as it is the judge-made constitutional doctrines supported by the conservative groups of the country and fostered by the extreme individualism of leaders of industry and finance who, while busily engaged in securing governmental favors, were solicitous to make sure that popular assemblies might not be permitted to regulate too freely their property or contract rights." Haines, *op. cit. supra* note 19, at 40.

[76] In speaking of the two opposing canons of constitutional interpretation, *i.e.*, the historical and the adaptive, Professor Corwin makes the following interesting observation: ". . . it will be generally found that words which refer to governing institutions, like 'jury,' 'legislature,' 'election' have been given their strictly historical meaning, while

is the bedrock of all political reasoning, if not of all ethical thought. And thus the very realism of the doctrine of constitutional adaptability makes of the intent theory of constitutional interpretation, with its dogma of organic immutability and its retrogressive aspects, with its misapprehension of the facts of judicial operation and with its weakness of theory, one of the fundamental doctrinal fallacies of the Supreme Court of the United States.

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words defining the subject-matter of power or of rights like 'commerce,' 'liberty,' 'property,' have been deliberately moulded to the views of contemporary society. Nor is the reason for this difference hard to discover. Not only are words of the former category apt to have the more definite, and so more easily ascertainable, historical denotation, but the Court may very warrantably feel that if the people wish to have their governmental institutions altered, they should go about the business in accordance with the forms laid down by the basic institution. Questions of power or of right, on the other band, are apt to confront the Court with problems that are importunate for solution." Corwin, *op. cit. supra* note 17, at 659-660.