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## Constitutional Law- Precedents - Proposed Amendments

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## NOTES

### CONSTITUTIONAL LAW—PRECEDENTS—PROPOSED AMENDMENTS.—

Two recent decisions of the United States Supreme Court have disclosed the sterile influence of the doctrine of precedent in the field of constitutional law. A constitutional amendment apparently must be adopted to permit the states or the federal government to tax personal incomes received as salaries or interest payments from other governmental units. And a constitutional amendment must be adopted to permit any state to enact minimum wage legislation. One of these decisions, popularly described as the New York *Minimum Wage Case*,<sup>1</sup> has received comment and criticism from editorial writers all over the country. The other one, the *Municipal Bankruptcies Case*,<sup>2</sup> has been accepted with little editorial comment. Both cases are incidentally illustrative of the same trends.

There is not much that can be said about the "legal" problems involved in the *Minimum Wage Case*. The Chief Justice just about covered the ground, as far as "legal" criticism is concerned, when he pointed out wherein the statute in the New York case was different from the statute considered in the earlier leading case-precedent, *Adkins v. Children's Hospital*,<sup>3</sup> and indicated how the court might give lip service to the doctrine of precedent while distinguishing the second case from the first.<sup>4</sup> Mr. Justice Stone came out for "overruling" the earlier decision and thereby used a language technic also familiar to constitutional lawyers likely to be concerned about precedents, although in principle he was ready to admit that the Court should state its position, regardless of precedent, as to the effect of the due process clause on state minimum wage legislation.<sup>5</sup>

There are several developments probable in the more or less immediate future. The device of judicial supremacy may be scrapped, probably through a constitutional amendment. Lawmen generally hope that such will not be the case.<sup>6</sup> As a political device judicial supremacy has worked well. It serves to protect the community against temporary majorities. The constitution may be amended specifically to permit state legislatures to adopt particular kinds of social legislation.<sup>7</sup> The process of amending is cumbersome. The more particular the amendment is in

<sup>1</sup> *Morehead v. New York ex rel. Tipaldo*, (U.S. 1936) 80 L.ed. 921.

<sup>2</sup> *Ashton v. Cameron County W. I. Dist No. One*, (U.S. 1936) 80 L.ed. 910.

<sup>3</sup> 261 U.S. 525, 43 Sup. Ct. 394, 67 L.ed. 785 (1923).

<sup>4</sup> *Morehead v. New York ex rel. Tipaldo*, *supra* note 1 at 931 et seq. The legislation in this case prescribed a scheme for the working out and enforcement of minimum wage legislation for women in different industrial groups. It is apparently conceded, as the Chief Justice indicates by inference at least, that minimum wage legislation for men would be unconstitutional. There are too many "precedents" against it. See Donovan, *The Constitutional Authority of Several States to Deal Jointly with Social and Labor Problems* (1936) 20 MARQ. L. REV. 78, 80-84. The discussion in the text above is based upon the premise that there is no reason other than precedent for distinguishing between men and women in regard to minimum wage legislation.

<sup>5</sup> *Morehead v. New York ex rel. Tipaldo*, *supra* note 1 at 937 et seq.

<sup>6</sup> See Note (1936) 17 CHICAGO BAR RECORD 170.

<sup>7</sup> Candidate Landon made this suggestion to the Republican party after he had received notice of his nomination and after he had read the party platform. See (June 20, 1936) 7 NEWS WEEK, No. 25, p. 10.

form, the more likely it is to be the kind of policy choice which a legislature, a deliberative body, should make.<sup>8</sup> To avoid future difficulties of interpretation and conflict between this one and other existing general provisions in the constitution it would be necessary that the amendment be specific in its references to the due process clause in the Fourteenth Amendment.<sup>9</sup> Finally, and it maybe noted that this suggested development is less probable than either of the others, lawyers may be ready to accept the proposition that the theory of precedent has no place in the field of constitutional law. This thesis has been set out elsewhere in an article in this Review.<sup>10</sup> It is enough now to suggest that the due process clauses, the bill of rights, and the device of judicial supremacy are sufficient to give courts the power to protect individuals against the enforcement of ill-considered and socially or morally dangerous legislation.

Lawyers do not like to admit, nor does the Court itself like to do so, that the Court frequently must exercise a political function when it makes certain policy choices.<sup>11</sup> Whenever the Court finds it necessary to determine whether an act of Congress is within the scope of the commerce clause, or whether particular state legislation affects interstate commerce adversely, the Court is effecting a balance between state and federal agencies in carrying on the functions of government. There is and there ought to be no guide in these cases, or in the due process cases, other than what the justices as intelligent and disinterested umpires feel is good for the community, what they are satisfied will be necessary to permit governmental agencies to function effectively, what they feel is sufficient to insure protection to the personal integrity of the individuals in the community. It is absurd to propose that when the Court makes an adjustment in one generation it has acted to fix irrevocably, unless there is a subsequent amendment, a political balance which must continue in spite of changes in the industrial and social life of the country.<sup>12</sup> It makes little difference whether the Court's opinions

<sup>8</sup> As illustrative of the type of amendment which is comprehensive and intended to cover and to authorize specific future policy choices by Congress and intended to permit thereby the readjustment of the political balance between the states and the federal government in carrying on the functions of government, see the amendment proposed by Professor Bunn in *Production, Prices, Incomes, and the Constitution* (1936) 11 WIS. L. REV. 313, 322. It would seem, however, that even this proposed amendment, as worded, would not permit Congress, or the state legislatures, to hurdle the due process clauses of the Fifth and Fourteenth Amendments.

<sup>9</sup> Certainly the interstate compact provides no outlet from the "no-man's land" of the due process clauses. Cf. Donovan, *supra* note 4.

<sup>10</sup> *Restatement of the Law of Agency* (1936) 20 MARQ. L. REV. 141, 143, n. 7. See Llewellyn, *The Constitution as an Institution* (1934) 34 COL. L. REV. 1.

<sup>11</sup> See Roberts, J., in *Railroad Retirement Board v. Alton R. R.*, 295 U.S. 330, 346, 55 Sup. Ct. 758, 79 L.ed. 1468 (1936) and in *United States v. Butler*, 56 Sup. Ct. 312, 318, 80 L.ed. 287, 293 (1936). See also Sutherland, J., in *Carter v. Carter Coal Co.*, (U.S. 1936) 80 L.ed. 749, 761. But on the other side, see Stone, J., dissenting in *United States v. Butler*, 56 Sup. Ct. 312, 324, 328, 80 L.ed. 287, 301 (1936) and in *Morehead v. New York ex rel. Tipaldo*, (U.S. 1936) 80 L.ed. 921, 937, 938. See also Powell, *Commerce, Pensions, and Codes* (1935) 49 HARV. L. REV. 1, 193; Haines, *Judicial Review of Acts of Congress and the Need for Constitutional Reform* (1936) 45 YALE L. J. 816.

<sup>12</sup> In the NRA case, *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 Sup. Ct. 837, 79 L.ed. 1570 (1935), the Court was required to do more than to effect a division of functions between the states on the one hand

are filled with citations and references. The particular decision represents a political choice and depends on the will of the judges, guided in every case by what their ideas of morals and good sense tell them they should do. There are few literal prescriptions in the federal constitution.<sup>13</sup> The device of judicial supremacy is abused if the Court permits itself to fix its policy choices permanently into the constitutional scheme.

In the *Municipal Bankruptcies Case*<sup>14</sup> the immediate problem with which the legislature, Congress, sought to cope does not now in retrospect seem to have been particularly acute. There is perhaps little danger of the appointment of receivers in case municipalities or other administrative subdivisions of the states fail to pay their maturing obligations.<sup>15</sup> The working out of political schemes to solve the problems attendant on the piling up of tax delinquencies and municipal insolvencies are problems for political scientists. These schemes should be criticized from the point of view of administrative practicability and with respect for the interests of those persons resident in the communities affected by the carrying out of the proposed schemes. Whether the several plans proposed as necessary to solve the existing problems can be worked out more effectively through state or through federal agencies must also be considered. Discharge from indebtedness after compromise with creditors, even in the case of municipalities, can be worked out only through a combination of bankruptcy administration and consent by the units affected. That is what Congress sought to bring about through Sections 78, 79 and 80 of the Bankruptcy Act.<sup>16</sup> That is what the Court refused literally to consider on its merits. Mr. Justice McReynolds, speaking for the Court, fell back upon *M'Culloch v. Maryland*<sup>17</sup> and *Collector v. Day*.<sup>18</sup> This power assumed by Congress under the bankruptcy clause, he suggests, is comparable to the power to tax; Congress may destroy the state governments if it can tax the agencies of the state, or if it can provide for the supervision through federal agencies of adjustments between state units and their creditors. There is little hope that our states and the federal government may escape the bogey of tax exempt incomes without amendment when

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and the federal government on the other. There was an important procedural problem, also political, covered by the "delegation of authority" language. The regulatory devices used to carry out the administrative features of the NIRA, but vaguely outlined in the language of the statute, were in the minds of every member of the Court unsafe political schemes. Tested from the angle of political policy the choice of the unanimous bench was probably wise. See Vold, *The NRA and the AAA Experiments in Government, Economics, and Law* (1936) 14 NEB. L. BULL. 417.

<sup>13</sup> See, for example, U. S. CONST. ART. I, §§ 2, 3, ART II, § 1.

<sup>14</sup> *Ashton v. Cameron County W. I. Dist. No. One*, (U.S. 1936) 80 L.ed. 910.

<sup>15</sup> Cf. *Meriwether v. Garret*, 102 U.S. 472, 26 L.ed. 197 (1880); Fordham, *Methods of Enforcing Obligations of Public Corporations* (1933) 33 COL. L. REV. 28, 53.

<sup>16</sup> 48 STAT. 798 (1934), 11 U.S.C.A. §§ 301, 302, 303 (1935).

<sup>17</sup> 4 Wheat. 316, 4 L.ed. 579 (1819).

<sup>18</sup> 11 Wall. 113, 20 L.ed. 122 (1871).

*M'Culloch v. Maryland* and *Collector v. Day* are such potent forces with the present Court.<sup>19</sup>

There has been some suggestion that the constitution need not be amended to permit legislatures, states and federal, to function more effectively. But Professor Corwin in his "Twilight of the Supreme Court" missed his guess. The cause, however, is not lost. The President has alluded recently to the probability that in spite of precedents the agencies of government, federal and state, may be permitted to function in expanding fields.<sup>20</sup> The general declaratory and restrictive provisions of the constitution do not necessarily preclude it. Hope for the future lies in a bench made up of men who are not only impartial, not only honest, but men who are also statesmen.

VERNON X. MILLER

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TORTS—NEGLIGENCE—COMPARATIVE NEGLIGENCE STATUTE.—The Wisconsin Legislature in 1931 enacted the following legislative act: "Contributory negligence shall not bar recovery in an action by any person or his legal representative, to recover damages for negligence resulting in death or injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished by the jury in the proportion to the amount of negligence attributable to the person recovering."<sup>21</sup>

This Act is now commonly known as the Comparative Negligence Law. However, previous to 1931 there were in Wisconsin two comparative negligence acts. It is true that they were strictly limited, but the principle of comparative negligence was applicable in both. Section 192.50 (3) of the Wisconsin Statutes (1935) still reads as follows: "In all actions hereafter brought against such railroad company, under or by virtue of any of the provisions of this section to recover damages for personal injuries to any employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

Section 192.29 (6) of the Wisconsin Statutes (1935) reads as follows: "ACTION FOR DAMAGES, ORDINARY CARE. In any action brought by any person or his legal representatives against a corporation operating a railroad in this State, to recover for personal injuries or death, if it appear that the injury or death in question was caused by the negligent omission of such corporation to comply with the requirements of this section, the fact that the person injured or killed was guilty of a

<sup>19</sup> It is not the particular choice of policy which the Court made in the *Ashton* case that is meant to be criticised. It must be conceded that the earlier cases are enlightening and ought to be considered. It is the approach to the problem that is criticized herein, the idea that decisions in earlier cases preclude an examination of an existing controversy on its merits.

<sup>20</sup> Roosevelt, "Every Member of the Legal Profession" (1936) 2 VITAL SPEECHES 579. This is the address the President delivered at the Arkansas Centennial Celebration at Little Rock, June 10, 1936.

<sup>1</sup> Wis. Laws (1931) c. 242; WIS. STAT. (1935) § 331.045.