The United States Constitution
And
Supreme Court Interpretations

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1. Introduction.

The people who crafted the Constitution (Founders) were, for the most part, educated men who had read many of the major historical and political works relevant to social order. Their task at Philadelphia in the summer of 1787 was to construct a form of government that would allow as much individual freedom privacy as possible while protecting the rights of the community, maintaining social order, and sufficient national cohesion to work together for the common good. As we will see, maintaining the delicate balance between individual and community rights is a difficult task that leads to much controversy. Can people live together in peace and harmony based on mutual respect and cooperation, or do they require a strong, centralized political authority that makes laws and enforces them as a sovereign power? How much of this authority should be at the national level, at state level, at local level? If there must be political authority, how are the authorities to be chosen? Can the masses be trusted to select the right people, and can the chosen officials be trusted to exercise their authority in the interest of the people rather than for their own selfish purposes? As we know, the Founders were uncertain about the answers to those questions.

2. Human Nature.

The consensus of the Founders was that people are basically selfish and subject to emotional decisions not grounded in rational thought and reason. The socialization process can modify this basic nature to some extent by the principal institutions for this modification, i.e., the family, church, and schools. If these institutions worked well, people would, to a certain extent, put the interests of the community above their self-interest and use reasoned judgment. If the socialization process worked well, there would be little need for an oppressive government. Some of the Founders were more confident than others that people could be taught enough citizenship "virtues" to permit democracy to work reasonably well. All agreed that *some* modification of inherent selfish behavior could be achieved. Therefore, they recognized the need for religion and a strong school system to supplement the family in achieving this goal. Even so, both the ordinary citizenry and political authorities would still need political checks on their selfish behavior. There was a need for a nation of laws to govern certain behavior, but there was also a need for restraints on behavior of government officials who make those laws.

3. Political Structure.

The most fundamental task was to determine the form of government compatible with their concept of human nature. Some argued for a monarch or other sovereign selected by a process other than by the rank and file people, i.e., by hereditary succession, or chosen by an aristocratic elite. This, after all, had been the practice throughout history. Those who took this position did not have confidence that ordinary citizens would be able to select the right kind of leaders. On the other hand, they had seen how hereditary and aristocratic power arrangements

had resulted in tyranny. In the end, they decided to break with tradition and allow citizens, up to a point, to choose their leaders. How to implement such a radical notion was a problem. Would this be an open invitation to anarchy? As we know, the end result of the debate was a modified form of democracy. Certain specified citizens, e.g., white, male, adult property owners, would elect some officials (House members) who would represent them in the national government. The State governments would select other officials (Senators)* and a group of "aristocrats" (Electoral College, chosen as specified by State Legislatures) would select the President. The President, with the consent of the aristocratic Senators, would appoint the Judiciary members. In essence, the Founders wanted to have safeguards against the whims of the masses. Let ordinary people (*some* of the people) select part of the national government, but have the other officials selected by people of means, i.e., aristocrats.

Even with these safeguards to select the right people to run the country, there needed to be structural safeguards against the selfish behavior of the aristocracy themselves and elected officials. The Founders therefore provided for "checks and balances" between the branches of the national government. That this might be inefficient and sometimes create gridlock was a small price to pay for the protection it would give against tyranny. In addition to these horizontal safeguards, they also created vertical checks by dividing sovereignty between the States and the National Government. As we know, this resulted in a vague and ambiguous division that has led to endless arguments over "States Rights" and "State Sovereignty". Nevertheless, these arrangements were specifically designed to diffuse power.

4. Constitutional Intent.

What did the Founders at the 1787 Convention want the new country to be, that is, what was its reason for being? Some wanted it to remain a loose confederation of sovereign states as existed under the Articles of Confederation; others wanted something else. The dominant members of the delegates often referred to the Declaration of Independence, written by Thomas Jefferson and its lofty rhetoric about the dignity of man, equality, etc. In that vein, they wrote a "Preamble" to the Constitution. It, too, has lofty rhetoric about forming a more perfect union, promoting the general welfare, and ensuring justice for all. Although these words in the Preamble have no legal authority or binding effect, they are often viewed as a visionary statement of what the Framers wanted the country to become. However, the words are vague and ambiguous and are interpreted differently by people with different political/social philosophies. For example, some interpret the "promotion of the general welfare" to imply an active Federal Government role in promoting welfare, to include such things as affirmative action and justice in the economic realm. Others dispute such an interpretation and insist that the unregulated "marketplace" is the proper means to determine economic justice. Over the years, especially since the "New Deal" era, most people have come to accept an active government role; the debate is about where the line should be drawn. This issue is perhaps the most significant dividing line between the major political parties today, with the Democrats favoring a more active role for the government.

In addition to administrative and structural matters, the body of the Constitution, particularly Article I, contains a great deal of specific content related to what the various levels of government, national and state, can and cannot do. Sections 8 and 9 enumerate what Congress can and cannot do, both substantively and procedurally, regarding such matters as taxes,

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- This was changed in 1913 by the 17th Amendment, which provided for direct election of senators.

regulation of commerce, and Writs of Habeas Corpus. Section 10 specifies what States cannot do. The Founders realized that the original Constitution did not go far enough in protecting individual rights and in the first session in 1789, Congress proposed twelve amendments, ten of which were ratified in 1791 and are often referred to as the "Bill of Rights". The tenth amendment attempted to clarify the spheres of sovereignty allocated to the Federal Government and the States. **"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"**. Some argued to put the word "expressly" before "delegated", as was done in the Articles of Confederation, but that was rejected. As we know, the resulting language did not succeed in clarifying the dual sovereignty issue.

Some thought that the "Bill of Rights" applied to the States as well as the Federal Government, but the consensus was that they placed limits only on the National government. Chief Justice John Marshall confirmed that these rights are protected only from infringement by the Federal Government—the States are not bound. (Baron v. Baltimore, 1833). Constitutional scholars have argued over this interpretation, since Article VI of the Constitution clearly states that the Constitution is "the supreme law of the land". In 1868, Congress attempted to rectify this situation by enacting the Fourteenth Amendment. This amendment, which guaranteed certain "equal rights" and "due process" of law to all *United States citizens*, has generally been used to extend the Bill of Rights to the States. In effect, it put United States citizenship above State citizenship when it comes to the Bill of Rights. The interpretation of this amendment to apply to States has been an evolutionary process that is still ongoing—and is controversial. This extension was slow in coming, however. For example, in 1883 the Court (Hurtado v California) said the 14th Amendment did not require states to abide by the 4th, 5th, 6th, and 8th Amendments. It was not until the 20th century that courts began to require states to grant specific rights guaranteed by the Bill of Rights (Gitlow v New York, 1925). Many of these applications have been labeled as "judicial activism".

5. Constitutional Constraints.

The Founders decreed (Art. VI) that the Constitution was the "supreme law of the land", notwithstanding what the people, executives, legislators, or judiciary bodies, national or state, might decide—in 1787 or in the future. But they realized that changing times and circumstances would require modification of the basic document to meet those changes. What was the best way to provide this flexibility? They could have made it easy to amend the Constitution, but this would open the door to popular whims, constant flux, and political instability. If amendments only required a simple majority of the Congress and presidential approval, amendment would be as easy as passing any piece of legislation. The door would be open for that majority tyranny which they feared. Therefore, they made it difficult to amend the document. Two-thirds of Congress or the States would be necessary to *propose* an amendment and then three-fourths of the states would have to vote to *ratify* the proposal. This is indeed a high hurdle. What arrogance! Who were these people to presume to know what principles would endure through the centuries ahead? If they truly believed in power to the people, why not leave it to the people to elect representatives who could pass whatever laws they deemed appropriate for the times? They simply did not trust the people to do this wisely. They wanted to ensure that there would be no "tyranny of the majority".

The difficult process of amending the Constitution clearly protected the Republic from majority whims, but it had the potential of creating a rigid, inflexible document that would

become outdated, especially if it were interpreted literally and narrowly. Therefore, they made the document sufficiently vague and ambiguous to allow different interpretations as changing conditions required. But they did not specify who would do the interpretation. If this authority were given to the national legislators, we would be right back to square one in our need to protect the Republic from the whims of the people. Certainly this power could not be concentrated in one person, the president. There was no clear statement in the document to give such authority to any branch, but in an 1803 landmark case, the Supreme Court settled the matter. In Marbury v Madison, the court said **it** had the constitutional authority to say which laws were, or were not, constitutional. In essence, the Supreme Court assumed the authority, by means of judicial review, to say what the Constitution meant. (There was historical precedence for this and some comments in the Federalist Papers alluded to the right of the courts to judge the constitutionality of specific legislation).

The assumed authority of the Supreme Court to decide what is, or is not, constitutional, has worked quite well in the sense that it has provided the necessary flexibility for Constitution/legislation interface. Whether this was the intent of the Founders is open to debate. The Founders provided for lifetime appointments of Federal judges/justices so that they would be above the whims of the people. Is this where the locus of power should be? Potentially, it leaves a lot to the "whims" of nine (present composition) people appointed for life. To lessen the chances for ideological bias in the Federal Judiciary, they arranged for the aristocratic Senate to have veto power over the appointment of these people. The assumption was that the Senate would represent a spread of political philosophy sufficient to keep balance in the Judiciary system. The system itself has adopted procedures to provide stability by such practices as respecting previous decisions (precedence). .

Although many presidents, starting with Thomas Jefferson have expressed displeasure with this assumed power of the Supreme Court, no one now seriously questions this authority. Nonetheless, some (e.g., Justice Scalia) do not agree with how it has been exercised. Scalia, and other critics decry "judicial activism" by which the Court usurps the power of the executive and legislative branches, both at the national and state levels. These critics have been labeled "strict constructionists", arguing that the Court should take the Constitution as it is written and not interpret it to reflect their own philosophy (Scalia says he is a "reasonable" constructionist). Some argue that whether a court is practicing judicial activism depends on the issue at hand. When the Court declared laws regulating economic activities unconstitutional (Lochner v New York, 1905, or the New Deal legislation in the 30s) conservatives thought that was proper conduct; liberals (notably FDR) railed against the Court. When the Warren and Burger courts dealt with civil rights issues, the tables turned. Conservatives railed while liberals applauded.

The role of the Supreme Court as guardians of the Constitution's meaning has worked reasonably well. The Senate has rejected few nominees for the Supreme Court. The few times that body has perceived a nominee to be outside the ideological limits, e.g., Robert Bork, they have sent a message that it will not allow a president to form an ideologically-skewed Court. This does not mean that Justices must be free of philosophical beliefs; this is impossible. However, it is important that the American public have confidence that the Court is nonpartisan. Although there have been several historical instances where the Congress has changed the number of Justices for political purposes (e.g., in the late 1860s) and FDR tried to "stack the Court", by and large the system has worked well and the public still trusts the Supreme Court. The most serious test came in 1876, when members of the Court awarded the presidency to Rutherford Hayes. The controversial decision in Bush v Gore (2000) raised the issue again.

Although the public has not shown a serious reaction to the Bush v. Gore decision, constitutional scholars and law professors have expressed concern because of its political overtones.

There are many lessons to be learned by the history of how the country has adapted the Constitution to changing conditions. There are two basic ways to change the Constitution: 1) by formal amendment under Article V, or 2) by judicial interpretation. The fact that the Constitution has been amended only 17 times since 1791 speaks volumes for an "activist" court that uses interpretation to adapt to new conditions. Of course, this gives a great deal of power to "nine old lawyers" who do not have to answer to the public. On the other hand, we saw what happens when the formal amendment process is used—backed up by legislation to enforce the amendments—and the Court does not go along. The 14th Amendment and 15th Amendments; and the numerous civil rights acts of the 1860s-1870s, were largely ineffective until 1954, when the Warren Court said they should be implemented (Brown v Topeka Board of Education). Even then, not much was done until a new president and Congress got behind the effort. Therefore, we can conclude that it takes a cooperative effort of all three branches of government to make revolutionary changes.

And we do have safeguards against a "runaway" court. The President nominates Federal judges/justices, but the Senate must confirm. While there have been instances where presidents have tried to stack the courts with ideologues, that practice has not been too successful. Since the Roosevelt appointments (where he had a large majority in the Senate) only Reagan seemed to make a concerted effort to radically change the ideological balance of the Court. After appointing a moderate conservative justice (O'Connor) in 1981, in 1986 he appointed two doctrinaire conservatists—Rehnquist (already on the court) as Chief Justice and Scalia as a justice. In 1987 he nominated Robert Bork, another doctrinaire conservative, but the Democrats had regained control of the Senate and Bork was rejected. Reagan then moved to a moderate conservative—Kennedy. Although the current court is composed of five conservative and four liberals, there has been little success in undoing the economic and social philosophy of the New Deal. Bush I appointed one doctrinaire conservative (Thomas) and one moderate liberal (Souter). It is doubtful that he would have been successful with getting Thomas confirmed by the Democratic Senate if Thomas had not been Black. Clinton appointed two moderate liberals—Ginzberg and Breyer. Bush II appointed two doctrinaire conservatives—Roberts and Alito. Obama has appointed Sotomayor and Kagan to replace Souter and Stevens. From all indications, this will not change the ideological balance of the Court.

Attached Essays:

1. Civil Rights, pp 6-13.
2. Regulation of Economic Activities, pp 14-17
3. Individual Rights pp 18-21
4. Public Schools and Religion, pp 22-26

Civil Rights and the Constitution

"The right of every American to first-class citizenship is the most important issue of our time." An American icon, Jackie Robinson, spoke these words as he fought for civil rights in his own quiet, dignified, but forceful manner. The issue of civil rights is also one of the most interesting studies of how the Constitution has evolved over the life of that document. It also illustrates a critical feature of the Constitution: How it works depends on cooperation among the three branches of government at the national level, state governments, and the people. As we go through this essay, note how each of these elements of our society took stands on the issue only to be thwarted by one or more of the other elements. In the end, it took all of them pulling together to make meaningful progress.

While "civil rights" now applies to many minority groups and, to be sure, all citizens, this paper will focus on African Americans, primarily because the *original* purpose of the 14th Amendment and the ensuing civil rights legislation in the late 1800s were focused on extending constitutional rights to African Americans.

As we know, the original Constitution referred to African Americans as property, not citizens (it referred to "all others", but did not mention them by race). Slavery was recognized as a legitimate institution. African Americans enjoyed none of the rights guaranteed by the Constitution because they were not citizens as defined by the Constitution. All the rhetoric about "all men are created equal" in the Declaration of Independence and the lofty words in the Preamble to the Constitution about "Justice" "General Welfare", and Blessings of Liberty" did not apply to African Americans. Much has been written and speculated about the personal views of the Founding Fathers regarding the horrid institution of slavery. There is too much contradictory evidence for me to sort it out here. For example, many of the Founders were slave owners, e.g., Washington and Jefferson. And yet, Jefferson's original draft of the Declaration of Independence condemned the practice. In early 1787 Congress had passed the Northwest Ordinance, which banned slavery in the Northwest. Clearly, many at the Constitutional Convention in 1787 wanted to have slavery banned by the new Constitution, but as a practical matter, knew the Constitution would never be ratified if that provision was included. Such expediency in the "politics of the possible" is still an emotional and controversial issue and I will not address it further. The purpose of this essay is to trace how the original Constitution has evolved, sometimes by formal amendment and sometimes by judicial interpretation, to extend the benefits of the Constitution to all.

The quest for "liberty and justice for all" has not been easy and is still ongoing. It is easy to forget that the civil rights legislation of the **1960s** was designed to do basically what the civil rights legislation of the **1860s** and **1870s** tried to do. To understand this anomaly better, it is useful to go back to the first section of this paper, where we discuss the Constitution as a living document. In that section, we saw that it takes all three branches of the national government working together to effect real change to the Constitution. And, as stated above, the States and people must also cooperate if the changes are to affect everyday life. Let's take an historical journey and see how this occurred during the past two hundred years. In order to keep this reasonably short, many details will be omitted; this will run the risk of over simplification and perhaps distortion, but I will risk that. Additionally, the reader must keep in mind the highly controversial and emotional nature of this issue. This essay will endeavor to present a balanced account of the issue from a constitutional perspective, realizing that people have strong

differences of opinion about what the Constitution means, Supreme Court decisions, and how legislation has been applied in specific areas, e.g., affirmative action.

The matter of slavery was fundamentally an issue between the North and South, although slavery had many supporters in the northern states. At the 1787 Convention, the compromise included the provision that slaves would be counted as three fifths of a person for purpose of representation in the House of Representatives. This ensured that the more populous North (Whites only) would not dominate the South in congress. This "balance of power" was maintained as the first few states were added to the Union. As new states were added to the union, the Mason and Dixon Line and the Ohio River acted as boundaries to decide which states would be free or permit slavery. This worked quite well until 1818 when the territory of Missouri applied for statehood. At that time, there were 11 free states and 11 slave states, ensuring a balance in the senate even though the free states, by virtue of population, controlled the House. The Mason and Dixon Line, however, did not extend to the new territory acquired by the Louisiana Purchase. When the Missouri Territory applied for statehood, there were already about 10,000 slaves in the territory. Part of Missouri was north of the Ohio and part was south. The pro-slavery bloc wanted slavery to be allowed in the new territories; the anti-slavery bloc wanted it outlawed. They reached a compromise in what came to be known as the Missouri Compromise, which: 1) Authorized Missouri to choose in their State Constitution a position on slavery; 2) banned slavery from the Louisiana Purchase north of the southern boundary of Missouri (exempting Missouri from this restriction). The people of Missouri approved slavery in their new constitution and forbade any free African Americans from entering the state. Before Congress would admit the state, however, the legislation was amended to require Missouri not to deny **free** African Americans their constitutional rights.

The controversy over slavery in the Western territories continued and intensified as new territories were opened, e.g., the Northwest, California and annexation of territory from Mexico. In 1848, Congress passed the Oregon Territory Act, which prohibited slavery in that territory (it was north of the line specified in the Missouri Compromise). The debate continued until two new territories—Kansas and Nebraska were proposed. Senator Stephen Douglas introduced the bill to establish these two territories and included a provision to allow the two territories to decide for themselves whether they would have slavery (the theory of "popular sovereignty"). The anti-slavery bloc fiercely opposed the bill, but President Franklin Pierce supported it and it passed. The Kansas-Nebraska Act, passed in 1854, superseded the Missouri Compromise and opened the new territories to slavery. It also reopened the bitter quarrel over the expansion of slavery. However, the Act had provisos that indicated the Supreme Court should ultimately determine the constitutionality of slavery in these new states. This added fuel to the friction between the North and South over "States Rights", which had been a constant issue since the founding of the Republic.

The Executive and Legislative Branches had, in essence, spoken in favor of expanding slavery to the new states, but indicated that they would like for the Supreme Court to say if this was constitutional. The Supreme Court, led by Chief Justice Roger Taney, took the challenge in the historical case Dred Scott v. Sanford (1857). Scott had sued in the Missouri courts claiming that he should be freed because he had been in a free state (Illinois) with his master and therefore was emancipated. The Missouri Court denied his suit, but his lawyers took it to the Federal Courts. When it got to the Supreme Court, many on both sides of the issue, including Abraham Lincoln welcomed the opportunity to have the Court settle the slavery issue. Originally, the majority of the Court wanted to dodge the issue of slavery in the territories by declaring that the

Missouri courts had spoken on this specific case and let it go at that. Political pressure was building, however, for the Court to settle the slavery issue in the new Territories and States. In conference, five of the Justices (all from slave states) voted to have the Court address all issues related to the slavery question and, in the words of the spokesman for the group, Justice Wayne, "put an end to all further agitation on the subject of slavery in the territories". (As a judge in Georgia, Wayne had declared that there was no possibility that even free African Americans "can be made partakers of the political and civil institutions of the states, or the United States").

In a 7-2 decision, the court held, among other things that: 1) Negroes, even those who were free, were not and could not become citizens of the United States in the meaning of the Constitution; 2) The Missouri Compromise itself was unconstitutional because Congress did not have authority to exclude slavery from the new territories; and 3) the States could not confer citizenship on people excluded by the Constitution.

So much for the Judiciary settling the slavery issue! The gist of the decision: African Americans can never be citizens and Congress cannot interfere with slaveholding in the territories and States which choose to have it. The rationale for this decision left no doubt what African Americans could expect under the Constitution as interpreted by this court. Chief Justice Taney asserted that legislation as well as practice "shows, in a manner not to be mistaken, the inferior and subject condition of that race at the time the Constitution was adopted and long afterwards". Moreover, he said, Western countries had held such a position for over a hundred years before the Constitution was written. As an inferior class of beings, Negroes* had no claim to be citizens. He went on to say that it was difficult, for him personally, to understand how such an institution could be deemed moral. However, he said, it was not the Court's duty to second guess the founders, but to interpret and administer the Constitution according to its true intent and meaning when it was adopted. Some consider this "apology" to be nothing more than a politically expedient "Pontius Pilate" dodge.

Many scholars consider the Dred Scott decision to be the catalyst that made the Civil War inevitable. Lincoln, who had debated Senator Douglas since the Kansas-Nebraska Act opened slavery in the territories, was disappointed. The Judiciary had joined the Executive and Legislative Branches in validating slavery. Lincoln's debates with Douglas, much of it focusing on the slavery issue, earned him enough support to enable him to win the newly formed Republican Party's nomination for the presidency. He won, but with less than 40% of the vote. Sensing the vote to be somewhat less than a mandate, and given the views of Lincoln regarding slavery, South Carolina announced in December 1860 that it was leaving the Union. Ten other Southern States eventually joined South Carolina and formed the Confederate States of America.

The slavery issue was central to the Southern States' action, but there were other factors involved. South Carolina had threatened to secede in the early 1830s when its legislature had declared a Federal Act (having to do with tariffs) null and void and said if the President (Andrew Jackson, an erstwhile "states' righter") tried to enforce it they would leave the Union. With some rather strong language, Jackson told South Carolina through his famous Proclamation (1832) that they best not do that. In private, he told Vice President John C. Calhoun (a South Carolinian who supported the South Carolina nullification act) to tell his friends that if they tried to defy the national law he would "hang them from the nearest trees". Compromises were made on both sides and South Carolina backed off—for the time being.

The issue of States' Rights had been burning all along in the South, where the Anti-Federalist sentiment was strongest, but the Civil War was first and foremost about slavery. The

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*I use the term used by the Court at that time.

Southern States were growing more concerned because the number of free states had increased faster than slave states and the Senate was now dominated by the free states. The evidence strongly supports the view that Lincoln did not intend to abolish slavery when he was elected. In fact, he stated that he would accept slavery if it would mean holding the Union together. Moreover, he said, the Constitution did not allow him as president to abolish it. Even during the first part of the war he indicated that southern states could retain slavery if they ceased their rebellion. As the war progressed, however, he was determined to end slavery as an outcome of that war. His Emancipation Proclamation in 1863 clearly signaled his intent, but it had no legal standing. Since the Supreme Court had maintained the Constitution did not allow Congress to outlaw slavery, then the Constitution needed amendment. It took the 13th Amendment (1865) to outlaw slavery. "**Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."**

The 13th Amendment was followed by the 14th (1868), the 15th (1870), and a series of Civil Rights acts to implement those amendments. The story of how the Republican-dominated Congress got the Southern members (solidly Democratic) of Congress to go along with these amendments and secure ratification by the Southern States (a total of 11 of the 37 States) is too complex to cover here. Suffice it to say that they bent Article V of the Constitution to do it, because that article requires three fourths of the States to ratify an amendment and clearly the 11 Southern States opposed the amendment. Although President Andrew Johnson had supported the 13th Amendment, he objected to the 14th Amendment and urged the Southern states to oppose ratification. The Senate coerced him into supporting the amendment by threat of removal from office after the House had impeached him (on what amounted to a trumped-up charge).

The 14th Amendment is one of the most important parts of the Constitution—and one of the most controversial. What the authors of the amendment meant it to do has been hotly debated. In the end, it was left to the Supreme Court to interpret it over the years. On the face of it, Section 1 seems to be straightforward:

1. **All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.**
2. **No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;**
3. **nor shall any State deprive any person of life, liberty, or property, without due process of law;**
4. **nor deny to any person within its jurisdiction the equal protection of the laws.**

The 15th Amendment followed in 1870: **"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude".**

Each of the amendments gave Congress the power to enforce the articles. One would think the three amendments and the numerous civil rights acts in the 1860s and 70s would have settled the issue once and for all and given African Americans the full benefits of the Constitution. This was not the case. Let us see why.

The Supreme Court, in Baron v Baltimore, 1833, had said the Bill of rights did not apply to the States. Many interpreted the 14th Amendment as an effort to correct that decision and

extend the Bill of Rights to apply to the States. However, in spite of the several civil rights acts that were passed in the 1860s, 1870s, and 80s, "Jim Crow" was present throughout the South. When the Jim Crow practices were challenged in the Federal Courts, African Americans did not get a friendly response. In the landmark "Civil Rights Cases" in 1883, the Court invalidated the 1875 Civil Rights Act on the ground that the 14th Amendment's guaranty of equal protection applied only to state actions and did not prohibit discrimination by private hotel and restaurant owners. The nail in the coffin of the civil rights legislation was Plessey v Ferguson (1896), where the Court upheld segregation in public facilities (transportation). From the 1870s to the mid 1950s, other than Truman's 1948 executive order to desegregate the Armed Forces, little headway was made for advancing civil rights. Even that action took several years to implement, often over strong objections of military leaders, especially in the National Guard. This period of history illustrates another feature of our constitutional system of government: Not only does change require cooperation of the three branches of the Federal Government; it requires cooperation of the States and the people. The Southern States, backed by conservative courts, administrations, and congresses, refused to make significant changes in the condition of African Americans.

The Brown v the Topeka Board of Education decision* (1954) in effect overruled the 1896 Plessey decision. Some consider this decision to be one of the two or three most important decisions ever rendered. It is worthwhile to give a brief background to the decision. When the Court considered the case in 1953, all 9 Justices were Democrat-appointed and four were from the Deep South, including the Chief Justice, Fred Vinson. It appeared the decision might uphold Plessey. But some of the justices asked that the case be reargued in the next term. Vinson died in the fall of 1953 and was replaced by Earl Warren, former Governor of California. Warren is credited with creating a different climate on the court. In discussions before firming opinions, he asked the justices to consider social science research regarding the effects of segregated schools. Hugo Black, a former Ku Klux Klan member from Alabama, said one did not need to be a social scientist to know that segregation was wrong. Moreover, he said, the only justification for continued segregation would be to state flatly that the Negro race was inferior. That tossed the gauntlet! Chief Justice Warren personally wrote the decision. In his draft, he wrote this passage: **"To separate them from others of their age in school solely because of their color puts the mark of inferiority not only upon their status in the community but also upon their little hearts and minds in a form that is unlikely ever to be erased".** On the day the decision was read, Justice Robert Jackson, who was critically ill, left his hospital bed to attend in order to show solidarity. Some reporters noticed the unusual presence of several of the Justices' wives. When Warren announced the unanimous decision, visible emotion swept the room. One Justice had tears streaming down his face.

The 9-0 Brown decision said separate schools could not be equal under any circumstances. It ordered States to desegregate the public schools "with all deliberate speed". But the decision had little immediate impact in the South. Some school districts closed the public schools rather than desegregate them. Others simply ignored the court decision. Congress and the Executive branch in the 50s did very little to force States to heed the decision, although President Eisenhower sent the U.S. Army to integrate a Little Rock high school when Governor Faubus

* The Brown decision was followed by other decisions (e.g., Mapp v Ohio, 1961 and Griswold v Connecticut, 1965) that had the effect of changing the way the court interpreted the Constitution. Today the 14th amendment is interpreted to have extended the Bill of Rights to apply to the state and local laws (as well as to the private sector), not only for Blacks, but also for all citizens.

refused to enforce a court order. The situation changed in the 60s. All three branches cooperated in telling the Southern States "enough is enough". This time, the Court enforced their decision, stating that "it is no longer open to question that a State may not constitutionally require segregation of public facilities". Another round of civil rights legislation was passed, the President sent federal troops to force integration, and the Supreme Court, tiring of the failure of States to act in "all deliberate speed", ordered active measures to end segregation. In Green v County School Board (1968) it ordered school boards to develop plans that promise realistically to work now. When school officials still dragged their feet, in 1969 it ordered forced busing to end segregation.

The approach taken in the 1860s to advance civil rights can be contrasted with the evolution of government intervention in economic affairs, discussed in another essay. Roosevelt chose the route of judicial interpretation and eschewed formal constitutional amendments, largely because the amendment process takes so long and the outcome is uncertain. The sweeping changes in constitutional meaning regarding economic affairs, as interpreted by the courts, are no less profound than in the civil rights area, which was done by amendment *plus* court decisions. It is doubtful, however, that judicial decisions, even with cooperation of the Legislative and Executive Branches, could have made significant changes in the status of African Americans. Thus, the three amendments, 13th, 14th, and 15th, were necessary. But even those amendments were not sufficient. Let us look at some of the other factors.

A combination of factors began working in tandem in the middle of the 20th century to break the inertia of the previous seventy years. The catalyst was perhaps WWII. This event changed the world in many profound ways, not least of which was the status of African Americans. Although segregation and Jim Crow existed in the Armed Forces during the war, neither Black nor White members came back with the same views toward racial matters. In essence, it broke the "cake of custom." In the late 1940s, Truman ordered that the Armed Forces be integrated. The Korean War accelerated the process and while the U.S. military still has a way to go, it has led the nation in this area. Many African Americans took advantage of the "G.I. Bill" to get an education, buy homes, and start a new life.

The Brown decision came about the time activists in the civil rights movement were energized. Rosa Parks refused to take a back seat on a bus in Montgomery. Students demanded to be served in White Restaurants. Martin Luther King and other Black leaders, mostly by non-violent means, mobilized the Black community and gained more and more support from Whites. The forces came to convergence in the 1960s, culminating in a series of civil rights legislation that reiterated the principles in the 1800s legislation. The difference now was that the Courts, Congress, the President, and the public were ready to act together. Not all greeted this movement with enthusiasm. When LBJ signed the 1964 Civil Rights Act, he commented "this will cost the Democrats the South for a generation." (Currently, the South is strongly Republican and moving further in that direction). The legislation was immediately tested when a hotel in Atlanta refused to accommodate African Americans, claiming that, at root, they were an intrastate business and thus not subject to the Civil Rights Act (in spite of the fact that the majority of their guests were interstate travelers). In Heart of Atlanta Hotel v United States (1964) the Supreme Court held that the hotel was subject to the Act.

Recent Events.

A very controversial feature of the civil rights movement is what has come to be known as "affirmative action". This refers to actions taken to actively promote equal opportunity and end discrimination. Based on solid evidence that many segments of society were discriminating

against African Americans in spite of legislation and court orders, affirmative action policies required tangible evidence. Among other things, administrators looked at numbers as proof of equal opportunities. As with all efforts to use quantifiable data, this opened the policies to charges of “quotas”. Also, some felt that African Americans were being promoted, hired, or admitted to schools over more qualified whites, leading to “reverse discrimination”. Undoubtedly, some of this occurred, but there is much controversy about where the line should be drawn in achieving “justice” and “equality” versus reverse discrimination. Recently, there have been glaring instances where “racial profiling” has resulted in harassment of African Americans. While there may be justification to assume some imbalance of criminal behavior among races, some data leave little room for doubt about racial discrimination.

History shows that constitutional rights have not come easy for African Americans (and for that matter, women, Native Americans, homosexuals, and other groups). Most social analysts agree that there comes a time when pressure must be applied to show tangible results, not just “good intentions”, which are often no more than excuses for stalling. This more often than not leads to measurable indicators, which *can* imply quotas. While there must be flexibility for judgment, quantifiable measures have a place in the equation.

What can we say about where the nation stands regarding “establishing justice for all”? It depends, of course, on one’s perspective. Opinion polls consistently show that Whites see a much rosier picture than do African Americans. This is true even in the U.S. military, the institution often cited as the standard bearer for equal opportunity for African Americans and other minorities (except homosexuals, where it ranks near the bottom). Consider the stark contrast in the reaction of African Americans and Whites to the O.J. Simpson verdict. Only 13% of African Americans thought he was probably guilty compared to 65% of Whites. Similarly, only 9% of African Americans think there is equality in the criminal justice system compared to 52% of Whites. African Americans (73%), compared to Whites (16%), believe the CIA has imported cocaine for distribution in the Black community. These examples illustrate the wide discrepancy in the way those groups view justice and suggest how difficult it is to get a consensus on where we are on civil rights.

In the final analysis, we go to the Courts to judge what constitutes “justice”. Forced busing was used by the Courts to end segregation, but the Courts are now recognizing that such measures did not solve the problem and are now allowing a reversal of that policy. Many African Americans, Whites, and other groups support the reversal of policy on busing. But the problem of desegregated schools and substandard educational opportunities for African Americans still exists. Quotas for admission to higher educational institutions have found disfavor, but pressure to include race as a factor in selection is O.K. (Bakke v UC-Davis Medical School, 1978). Clearly, the Court will be the final arbiter on these matters, as it is on other matters. Thus, we will continue to have strong and emotional differences over what constitutes justice for African Americans.

Recent decisions of the Supreme Court on controversial issues, often sharply divided, indicate how the composition of the Supreme Court will be critical in the resolution of these issues. For example, affirmative action advocacy groups recently settled out of court a claim of reverse discrimination brought by a New Jersey teacher. They settled rather than take the case to the current Supreme Court, which they perceived as conservative and likely to throw out almost all affirmative action policies. Many analysts believe that the most important issue in the 2008 presidential election was who would nominate new judges and Supreme Court Justices. McCain

said his favorite Justices were Scalia and Thomas; Obama said he preferred the four liberal Justices.

It is significant that Obama's first choice for the Supreme Court, Sonia Sotomayor, was a central figure in the latest affirmative decision by the Court. On 29 June 2009, the Court, in a 5-4 decision (Ricci v DeStefano), overruled a decision by the 2nd Circuit Court of appeals regarding reverse discrimination. A White new Haven Connecticut firefighter brought suit against city officials based on a claim that his civil rights were violated. He claimed that he was denied promotion because less-qualified Black candidates were selected. In brief, a written test was thrown out by the city based on a judgment that it had been culturally biased against Blacks; no Blacks had passed it. A three-panel decision by the 2nd Circuit upheld the city's action; Judge Sotomayor was on that panel.

Senate Republicans argued that the fact that the Court had over turned the 2nd Court's decision meant that Sotomayor was unqualified to sit on the Court. Other appeals courts had decided affirmative action cases similar to the 2nd Court's decision, based on previous Supreme Court decisions, which defined the law. Carried to its logical conclusion, the reasoning of the Republicans would mean the four dissenting Justices in the Ricci case are also unqualified to sit. This is normal political posturing, practiced by both parties.

Given the current Supreme Court's ideological makeup, the Ricci decision indicates affirmative action will be further curtailed. This trend will likely continue until one of the five Justices in the majority is replaced with someone with a social philosophy more akin to those in the minority in this decision.

Another case to watch is Fisher v. University of Texas, which is likely to come before the Supreme Court in the next term. In a 2003 case, Grutler v. Bollinger, the Court narrowly ruled in favor of allowing race to be taken into account for college admission. However, as Sandra Day O'Connor wrote, "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." O'Connor has been replaced by Samuel A. Alito and it will interesting to see how the Court rules if it Fisher is appealed.

Other government policies that benefit lower-income groups are often characterized as "welfare" programs and could in one sense be classified as affirmative action. Both parties have favored home ownership for the masses, rich and poor. The creation of Freddie Mac and Fannie Mae, however, specifically targeted the lower class. The beneficiaries of this policy aren't limited to minorities, but there is a perception by many that they are in effect affirmative-action programs. As of this writing, these policies are targets of the budget knife.

The full promise of the American dream, however, will come only when there is a concept of justice internalized in the hearts and minds of the people. This is a work in progress that requires open and candid communication between all segments of the population. The welfare of the nation rests on how well we deal with this issue. Each of us has a responsibility to do our part.

Regulation of Economic Activities

For the first 150 years of the Republic, the American political process adopted what was basically a laissez-faire policy regarding economic activities. Private property was sacred and owners could do pretty much as they pleased. This was not total freedom, however. In Trustees of Dartmouth College v. Woodward, 1819, Justice Marshall said corporations were “artificial beings, invisible, intangible, and existing only in the contemplation of the law.”Andrew Jackson supported this view somewhat, as did the Supreme Court under Chief Justice Taney (1837-1864), but their efforts had little impact. The vast majority of Justices appointed during the period 1865-1935 came from the corporate sector. “Liberty of contract” became part of the Constitution. Even though legislation was passed in the late 1800s to curb monopolies, the courts did little to enforce the laws. Invoking the “rule of reason,” the Justices left it to them to decide what constituted a “monopoly.”

In order to understand recent Court decisions regarding the right of corporations to engage in political campaign financing—a recent Court decision—it is useful to review the actions of the Court in the last three decades of the 19th Century and the early part of the 20th Century. The language used by the Court decisions during that period reveals the ideological divide that is manifest between Republicans and Democrats today. The first issue before the Court was whether or not the 14th Amendment clauses of equal protection and due process applied to corporations as well as individuals. If those clauses did in fact treat corporations as individuals, then corporations would be protected from government regulation in such matters as “liberty of contract” and other restrictions of “free enterprise.” In short, could government restrict laissez-faire economic activities? In Santa Clara County v. Southern pacific Railroad Company (1886), Chief Justice Waite declared: “The court does not wish to hear argument on the question of whether the provisions of the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all in agreement that it does.”

Court decisions thereafter implied acceptance of the Waite view. The second issue involves what corporate activities can be constitutionally regulated by government. In an earlier decision (Munn v. Illinois, 1877), Waite cited Lord Hale’s 17th Century dictum, “When private property is affected with public interest, it ceases to be ‘juris privati’ only.” The Marshall and Taney courts had held that view also. The real issue has been the balance between public interest and corporate “rights.” Until the 1930s, corporate rights were roughly equivalent to laissez-faire capitalism. Courts often cited the work of Herbert Spencer, who advocated “Social Darwinism.” His 1851 book, “Social Statics,” was published in the United States in 1865 and found a receptive audience among several justices. Spencer preached a stern ideology akin to the Puritans. “The poverty of the incapable, the distresses that come upon the imprudent, the starvation of the idle, and those shouldering aside of the weak by the strong,” he wrote, “are the decrees of a large, far-seeing benevolence.” In other words, survival of the fittest is best for humanity in the long run. As Shakespeare put it, In order to be kind, I must appear to be cruel.

Modest efforts by the States to regulate corporations got little support from the courts. For example, in a landmark case in 1905, Lochner v New York[1], the Supreme Court struck down a New York *State* law that sought to regulate working conditions in bakeries. In a 1918 case,

[1] For those interested in getting an insight into the ideological climate regarding government regulation of economic activities in the early 20th Century, read the majority and dissenting opinions in this case.

Hammer v Dagenhart, the court, citing the Tenth Amendment restriction of Federal authority, struck down a *national* law that prohibited products from child labor to be involved in interstate commerce. The court said "…the commerce clause was not meant to give to Congress a general authority to equalize…conditions". Workers had no rights to speak of. It has been estimated that 35,000 workers were killed on the job in 1914 and employers had no liabilities.

Although the Founders had moved away from the State-centered Articles of Confederation, they had not clearly established the supremacy of national over States sovereignty, or primacy of national over State citizenship. The Civil War and the Reconstruction acts resolved the citizenship question in a legal sense (this was not put into practice until the latter half of the 20th Century). The issue over the limited power of the national government to intervene in economic affairs was left to the 1930s for resolution. The New Deal legislation, with eventual Court concurrence, decisively repudiated the notion of limited national government power in economic and social matters deemed to be "in the general welfare". It took all three branches of government working together to make this historical transformation of the Constitution.

The "New Deal" era brought sweeping changes to the Constitution. FDR asked for emergency powers to deal with the economic crisis and Congress went along with his request. Among other measures, the Administration decided to go off the gold standard. When it appeared the Supreme Court would not go along with this idea, FDR prepared a scathing radio address. He intended to tell the American people that he refused to "…permit the decision of the Supreme Court to be carried through to its logical, inescapable conclusion". He would cite a statement in Lincoln's first inaugural: **"…if the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, … the people will have ceased to be their own rulers."** *How is that for decrying "judicial activism?"* Chief Justice Charles Hughes managed to get a 5-4 decision upholding the decision (Gold Clause Cases, 1934). Hughes, acknowledging that the framers would consider this decision to be unconstitutional, rejected the claim "…that the great clauses of the Constitution must be confined to the interpretations that the framers, with the conditions and outlook of their time, would have placed upon them."

The 1934 Court decision avoided a constitutional crisis for the time, but it did not forecast future attitudes towards the New Deal agenda. When the National Industrial Recovery Act (NIRA) was challenged, the 2nd Appeals Court upheld the law. On appeal the Supreme Court, in a 9-0 decision, struck it down (Schechter Poultry Corporation v U.S., 1935). In this case, Hughes cited the tenth amendment regarding what powers were given to the Federal Government. FDR was not prepared to go to the wall on this one, partly because the NIRA had become increasingly unpopular. Instead, he took a different approach. He framed the issue as one involving the role of the Federal Government in solving the nation's problems. He had this to say in a radio address:

> "It is infinitely deeper than any partisan issue, it is a national issue; yes, and the issue is this: Is the United States going to decide, are the people of this country going to decide, that their Federal Government shall in the future have no right under any implied power or any court-approved power to enter a national economic problem, but that that economic problem must be decided only by the States?
>
> The other part of it is this: Shall we view our social problems—and in that I bring employment of all kinds—shall we view that from the same point of view

or not, that the Federal Government has no right under this or following opinions to take any part in trying to better national social conditions? Now that is flat and simple the issue."

The Supreme Court declared several New Deal acts unconstitutional in the period 1935-37. How, then, was FDR to handle this conflict? Was he to seek Constitutional amendments to give the Federal Government authority to regulate economic activities? A number of amendments were proposed by Congress to do precisely that. Mindful of the lengthy and uncertain process of amendment, however, FDR chose to turn to a more "enlightened" court to reverse the Hughes court. After sweeping the 1936 election, Roosevelt tried to "pack" the court by raising its membership to 15 so that he would have a sympathetic majority, but Congress balked. While the bill was debated in Congress, the Court began reversing earlier decisions; this has been referred to as "the switch in time that saved nine." Other historians say the Court heard the people loud and clear. In any event, the packing scheme died and the Court continued to reverse earlier decisions.

In a 5-4 decision in 1937, the court upheld the National Labor Relations Act (NLRB v Jones and Laughlin Steel). In another case (U.S. v Carolene Products, 1938) the court said *in a footnote* that only if the regulatory intervention by the national government lacked all "rational basis" would the Court consider it to be unconstitutional. In 1941, laissez faire economics was dealt a mortal blow a few days after the last of the *Lochnerian* jurists had retired. The Court, in a *9-0* decision (U.S. v Darby), upheld the 1938 Fair Labor Standards Act. This act made it a crime to ship any goods in interstate commerce that were manufactured either by children or by workers making less than the national minimum wage. The Darby decision laid Lochner *and* Hammer to rest and they were never again cited in Supreme Court decisions. An activist Federal Government in economic activities had now become part of the Constitution.

The laissez faire ideology that had dominated public philosophy since the Founding was gone and the Tenth Amendment and Commerce Clause were given new meaning. This era saw the decline of the judicial philosophy that gave protection of corporate behavior under the 14th Amendment due process and equal protection clauses. Since then, the debate has not been about whether or not the Federal Government has authority to regulate economic activities, but how far it should go *as a practical matter*. During WWII, we had, in effect, a "command economy" with unlimited powers to dictate economic production and regulation.

One can contrast FDR's approach to changing the Constitution with that of the Republicans during Reconstruction. The Republicans formally amended the Constitution with the 13th, 14th, and 15th amendments, whereas FDR chose to "amend" it through court decisions. By and large, all courts since the New Deal era have been "activist" courts, much to the chagrin of jurists such as Scalia and Anti- Federalists in general. The concept of a "living document" that can be re-interpreted by "nine old lawyers" is anathema to this group.

The New Deal legislation and the Supreme Court endorsement of a more expansive role for the Federal Government in regulating economic affairs laid the groundwork for the "Great Society" activities under President Johnson and the occupational safety and environmental protection activities of recent administrations. These activities have continued under both Republican and Democratic regimes. The Nixon administration was one of the most active in promoting government involvement in these activities, having established EPA and OSHA. Another Republican president, Teddy Roosevelt, had had the foresight to establish national parks, having done so over the objections of his party. Reagan attempted to roll back the clock

on the New Deal, the Great Society, EPA, OSHA, etc., but was largely unsuccessful. Moves to do away with, or weaken, Social Security have run up against the political "third rail" and gone nowhere. The latest strategy is to "privatize" the program. Many consider this to be a first step in killing the program.

One of the latest controversial economic issues to surface is the court decision (Kelo v. New London, 2005) to uphold a local use of the power of eminent domain to condemn private property and allow it to be used by other private enterprises to develop businesses and upscale housing that would benefit the entire community. Previously, the exercise of this power has been limited to the use of the condemned property for public projects such as roads, airports, etc.

The jury is still out, however, on whether or not the laissez-faire ideology of our first 150 years will make a comeback. Marginal retrenchment may occur, but it is doubtful that there will be any significant return to the unfettered laissez faire economic philosophy. The "Warren" and "Burger" courts (both Chief Justices were appointed by Republican presidents) continued the "activist" tradition of the "Roosevelt" court. Rehnquist came to the court dedicated to reversing this trend, but even after he was elevated to the Chief Justice position, his court failed to undo any of the major decisions of the Warren and Burger decisions. Only Scalia and Thomas shared his ideological views. How these decisions will stand is debatable, now that Bush has transformed the court to a certain degree with his two appointments. The replacement of Rehnquist by John Roberts doesn't appear to have made much difference, since both are similar in their judicial philosophy. The replacement of O'Connor with Alito is another matter. While one can never predict with certainty how a Justice will vote once he or she is on the Court, all indications are that Alito will shift the balance toward the Scalia/Thomas philosophy. So far, both Roberts and Alito have sided with that wing of the Court. George Bush declared in his campaign that he wanted more Justices like Scalia and Thomas and he seems to have delivered on that pledge.

As stated earlier, the appointment of Sotomayor and Kagan does not indicate that the balance of the Court will be changed from the 5-4 conservative composition. With Kennedy as the "swing" vote, it is likely that many of the decisions on how far the government can go in regulating the economy will be decided on a 5-4 vote. Given the Obama agenda for an expanded role of government in economic affairs, the Court will have a leading role in where we go as a nation. The most interesting case to watch for is the challenge to the Health Care Reform Law. As of this writing, two district judges (Republican appointees) have declared parts of it unconstitutional and two (Democrat appointees) have declared it constitutional. Of course ideology had no role in these decisions; judges make their decisions based on the Constitution and law, not their political ideology! The interesting part of this process is what it means for other government "mandates, e.g., Social Security, Medicare, minimum wages, workers compensation, etc.

Individual Rights

<u>Introduction</u>.

The U.S. Constitution was designed to minimize the role of government in personal lives. In general, it is designed to "promote the general welfare" while guarding privacy and individual freedom--points well articulated by the Founders and several Supreme Court decisions. The intent is to leave much of how people want to live to their individual consciences and moral customs. The first ten amendments, the "Bill of Rights," enumerated many of these protections. In addition to the specific enumerated rights, the ninth amendment left the door open for other "implicit" rights. In the beginning, these rights were protected from governmental intrusion only regarding the Federal Government. Through a slow judicial process, the courts have extended them to State activities. The process continues to this day.

The rights covered in the first ten amendments are too numerous to cover in this short course. I have chosen the following only to illustrate the fact that the Constitution is written in general terms that invites differing interpretations. These are some of the issues that are currently being debated and usually have political overtones based on one's ideology.

Abortion

<u>Abortion as a Legal Issue</u>

Clearly, many moral issues in the diverse U.S. culture are defying consensus, e.g., homosexuality, same-sex marriage, pornography, prayer in the schools, abortion, and assisted suicide, just to name a few. In essence, the Constitution, **as interpreted by the courts**, says government (Federal, State, local) can step in to regulate behavior only if the behavior adversely affects the general welfare; they must show a "compelling government interest". As we know, the Supreme Court has the final decision on whether governments overstep their authority in regard to a specific law. For example, several states have passed legislation regulating private sexual behavior. In the early part of this century, Connecticut passed a law prohibiting the use of contraceptives, even among married couples. In the case of <u>Griswold v Connecticut</u> (1965), the Supreme Court ruled that the law violated constitutional guarantees of privacy and individual freedom.

With respect to abortion, the Supreme Court addressed a rather restrictive Texas law that was challenged in <u>Roe vs. Wade</u> (1973). The general question before the court was whether abortion was of sufficient harm to the public good to warrant laws that prohibited it (under the circumstances specified by the law). The court ruled that the Texas law went too far, and declared it unconstitutional. The court decision then went on to articulate "rights to abortion" that states cannot take away. Subsequent court decisions have nibbled at Roe, but have not overturned it. The main point to be understood is that the courts judge if specific legislation violates the Constitution, which looks for that delicate balance between individual rights and the "public good." The Constitution is the basis of their decisions. In that regard, it is useful to quote the opening of the Court decision, written by Justice Blackmun:

"We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's

personal experiences, one's exposure to the raw edges of human experience, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.

Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection." (U.S. Reports, Vol.410, p.113)

Note that the issue is addressed as a *constitutional* question even though the court recognized that religious beliefs and other values color the way people look at the issue.

With respect to whether or not the fetus could be considered a person and hence warrant the protection of a citizen, the court reviewed common law, the Constitution, and religious teachings. It concluded that the Constitution did not mention the subject, that under common law fetuses were not considered persons, and religious doctrine varied widely. The court decision was thus based on two essential holdings: 1) The right of privacy, however based, is broad enough to cover the abortion decision; therefore, there is a **fundamental** right to an abortion and 2) where fundamental rights are involved, limiting those rights may be justified only when there is a "compelling State interest" to restrict the individual behavior. Another issue was whether there was a compelling state interest in protecting the health of the woman. The court decided there was little danger involved during the first trimester, so abortion during this period could have little restriction. During the second trimester, there was greater threat to the health of the mother, and the State could increase regulation for therapeutic reasons. Thus, the first two trimesters focused on health issues. But, the court said, a woman's right to have an abortion is not unlimited. At some point, they said, the State's interest in preserving the potential life of the unborn child overrides any individual interests of the woman. They agreed that the third trimester met that standard. In summary, the Supreme Court, using the constitutional measurement free of emotion and ideological predilection, concluded the following:

> The State's interest in protecting the health of the woman does not become "compelling" until the end of the first trimester of pregnancy. Thus, the State can protect the health of the woman during the second trimester. The State's interest in protecting the "potentiality of human life" becomes "compelling" only after viability, which was considered to be the beginning of the third trimester.

The Court modified Roe in Casey v. Planned Parenthood (1992) to say there must be no "undue burden" on exercising the right to abortion. The Court defined that as a substantial obstacle to abortion seekers in a large fraction of cases. In Ayotte v. Planned Parenthood (2005), the Court upheld a New Hampshire law requiring a 48- hour notification of parents for minors unless the abortion is needed to prevent the death of the pregnant woman. Judges can by-pass the law under certain circumstances. The various laws prohibiting what has been called "partial-birth abortion" are awaiting court action.

Several other State laws restricting abortion procedures have been struck down by the Supreme Court, e.g., Nebraska, while others have been upheld. This will continue to be a controversial legal issue and its outcome will depend to a large extent on the composition of the Supreme Court, as on other issues.

Abortion as a Moral Issue

The national debate on abortion reflects values and beliefs based on a mixture of theology, philosophy, and medical science; thus, the debate transcends the "constitutional measurement" used by the Supreme Court. As noted by the court, some people take an absolutist approach, others a contingency approach, e.g., population growth, poverty, etc. While absolutist views tend to reflect a theological point of view, this is not always the case; one may have an absolutist belief based on secular ideology. However, the absolutist position based on religious doctrine tends to be the most resistant to modification because such beliefs are based on faith in a "divine law." Thus, if one believes that all life is "sacred" because theology says it is, a certain position necessarily follows. This is one argument of those who oppose abortion under any circumstances. If one takes the absolutist point of view that human life begins at conception and that any destruction of that living organism (egg, zygote, fetus) is murder, there are several implications. For example, under that definition the use of an IUD constitutes murder, since it prevents the fertilized egg from attaching to the wall of the uterus. The circumstances of conception (rape, incest, or if the fetus is determined to be severely deformed, e.g., Siamese twins, Spina Bifida, Tay Sachs, Anacephalism) are irrelevant; there is no justification to abort. In other words, consequences of not aborting are irrelevant to the issue. Surveys indicate that about 5% of the population holds this view. While most people who take this position base it on religious beliefs, this is not always the case. Others argue that any exception leads down the "slippery slope".

Anything other than the absolutist view calls for judgment based on certain conditions, circumstances, consequences, and situations. Whether one labels these approaches to moral judgment "situational," "consequentialist," "utilitarian," or some other term, judgment depends on variables. Thus, "shades of gray" appear and people differ on when they justify abortion. In essence, people who take this view have some form of "moral calculus" which weighs consequences of continuing a pregnancy against terminating a living organism. There are too many variables to discuss here, but they include rights of parents, society, degree of deformity, medical costs, etc. Also considered by some is the maturity of the egg/zygote/ fetus. The Supreme Court considered some of these variables in the Roe decision. Surveys show that the vast majority of people take a position somewhere along this "shades of gray" spectrum. On the extremes, a small percentage support the right to abortion without qualification and a small percentage is against abortion in any circumstances. Polls indicate that the majority of Americans see abortion as wrong in many instances, but accept it as the lesser of evils considering consequences of not aborting in some circumstances. In essence, that is the position taken in the Supreme Court's Roe decision.

The purpose of the discussion of abortion is to illustrate the difficulty in dealing with highly emotional ethical issues. How does a democratic society solve such a controversial issue embedded with emotion and ideological beliefs? The short answer, of course, is "with great difficulty." In a pluralistic society with diverse values and beliefs, there is a need for tolerance of such diversity. It is extremely difficult to find this tolerance on issues where bumper sticker slogans on different sides of an issue reduce the argument to categorical assertions of right and wrong, heavily laden with emotional appeals and based on ideological beliefs.

My experience in teaching Ethics over the past 15 years is that 95% of students are able to address the issue of abortion in a rational, reasoned way, although often clouded with emotion. They do not necessarily change their position on the issue (though some do), but they generally demonstrate a tolerance for opposing views. The abortion issue illustrates ethical principles that

apply to a wide range of health care issues such as life-support systems for terminally ill patients and assisted suicide. These issues are somewhat analogous to the abortion debate in the sense that they often involve the "dignity of life" theme and emotionally colored beliefs.

The central point of this discussion of abortion is that the Constitution establishes the process for resolving these controversial issues in a peaceful manner. It is the **process** public officials have sworn to uphold in spite of their personal beliefs. Former Surgeon General C. Everett Koop exemplified that loyalty by complying with Roe vs. Wade in his duties as Surgeon General even though he personally opposed abortion.

Freedom of Speech.

The Patriot Act is now being debated to determine if it will be extended. It is basically a non-partisan issue; some of both parties support it and some of both parties oppose it. There are mixtures of conservatives and liberals in both camps. Concurrently, there is much debate about what should be done about leaks of government documents. This is a classic case of the need for a balance between the rights of individuals and protecting the general welfare.

In spite of the first amendment protection of free speech, there is always a tendency to restrict the right during times of crises. Totalitarian States use it frequently and for indeterminate periods, e.g., Egypt's "state of emergency" that has existed for 30 years. In the United States, this has been largely confined to wartime, but not always. The Patriot Act blurs the distinction and is controversial.

John Adams' administration used the Alien and Sedition Acts to curb criticism of the government during the 1790s. The rationale was that constant criticism of our foreign policy (regarding our policies toward England and France) was harmful to our national well-being. These acts have been labeled as "infamous." Lincoln declared martial law and suspended habeas corpus. Restrictions were imposed in WWI (Espionage Act of 1917). One of the most restrictive acts was the Smith Act (1940) which was used to prosecute suspected communist and other individuals into the 1950s. The Supreme Court upheld this law (Dennis v. United States, 1951) citing a "clear and present danger." Perhaps the most egregious example of setting aside the Constitution was the internment of Japanese-Americans. (Korematsu v. United States, 1944).

In Citizens United v. Federal Elections Commissions (2010), the Court held that corporations have a First Amendment right to spend unlimited amounts of money supporting candidates for public office. This has been interpreted by some to mean that the Court is reversing the views held since the late 1930s. The issue of corporate rights goes back to the decisions regarding the rights of corporations under the 14th amendment's due process and equal protection clauses. The decision appears to overturn an earlier case, Austin v. Michigan Chamber of Commerce (1900), which held that the Constitution does not grant corporations the same rights to spend money to advocate the election or defeat of candidates as citizens have. What is uncertain is whether this decision will imply that corporations have the right to avoid regulations as they did prior to the late 1930s. If so, it will mark a tectonic shift in government/business relations and be a big victory for proponents of laissez-faire economics.

Another area of free speech has to do with the leaking of government documents, classified and unclassified. The WikiLeaks issue. We will have to await this verdict. Past courts have been ambivalent on these kinds of issues.

Public Schools and Religion

Introduction.

There is perhaps no aspect of the Constitution more controversial than that relating to the relationship of "church and state". This is a nation wherein the vast majorities of people profess a belief in a supreme being and most attend church at least periodically. Homage to God is a regular feature on our money, in our pledge of allegiance, in courts, congress, etc. On the other hand, the Supreme Court has said public schools cannot promote religion in public schools. For many adults, who remember prayer as a regular feature in the classrooms, at graduation ceremonies, and other school functions, this is puzzling.

Most of the arguments related to the relation of church and state focus on the First Amendment. This amendment is short: **"Congress shall make no law respecting an establishment of religion, or prohibiting the free speech thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for redress of grievances."** It is short, but as we know, not so simple in meaning.

This essay is designed to elaborate on the religious aspect of the "Establishment Clause" of the First Amendment and will focus specifically on religious activities in schools. The controversial nature of this clause is reflected in the many 5-4 Supreme Court decisions concerning religion. These differences are reflected in the people; polls indicate the public supports such activities as prayer in schools. States repeatedly pass legislation to test how far they can go in putting prayer and "creationism" courses in the schools, hoping to avoid language that will be unacceptable to the court, or hoping a more conservative court will reverse earlier decisions.

Historical Background.

As pointed out in other essays in this series on the Constitution, one needs to place interpretations of the Constitution in historical context. What was the intent of the framers when they made this the first item in the Bill of Rights? Many were learned men who were students of history. They knew that throughout history governments had allied themselves with churches to maintain power. The recent experience in England at the time of the founding of this nation was one of bitter religious conflict and persecution. Many settlers had fled Europe to escape persecution and to have the freedom to worship as they pleased. As we know, in many colonies and later in States, the people established their own State religions and did not allow religious freedom. Intolerance often turned to violence against non-conformists. Most state constitutions at the time the Constitution was approved had established official state religions—usually Congregational in the northern states and Episcopal (Church of England) in the southern states. Consider the following provisions in state constitutions:

> **South Carolina: "…no person shall be eligible to a seat in the said senate unless he be of the Protestant religion."**
>
> **Delaware: "…I do profess faith in God the Father, and in Jesus Christ His only Son and the bible as divinely inspired."**

Other states had similar provisions. Public funds were routinely used to support the clergy and church schools.

Some of the delegates at the 1787 Convention wanted to address the religious issue in the original Constitution. Earlier that year Congress (under the Articles of Confederation) had debated the issue during consideration of the Northwest Ordinance and decided to omit provisions for governmental support of religion in the Northwest Territory, which had been proposed by some representatives. Many of the delegates to the Constitution believed that no specific rights need be included in the Constitution and religion was not mentioned. During ratification, however, the issue of religion came up along with other individual rights. Thomas Jefferson and James Madison played critical roles on this issue. Both had fought for religious freedom in Virginia. Jefferson had tried to include religious freedom in the original Virginia Constitution in 1776, but was unsuccessful. Madison had visited Culpepper, VA and was disturbed to find Baptists in jail for practicing that faith. While Jefferson was in France as our Minister, James Monroe was able to get Jefferson's proposal passed as the Virginia Statute of Religious Liberty in 1786. Jefferson later said that this was one of three things for which he wanted to be remembered. When Jefferson reviewed the original Constitution, he initially opposed it, largely because it lacked provisions to protect individual rights. In a letter to Madison, he suggested clear language in a bill of rights be included to ensure freedom of religion.

Not all founders shared the views of Jefferson and Madison regarding separation of church and state, nor did all interpret the amendment to do that. Moreover, the amendment only prohibits *Congress* from making laws establishing a religion; it said nothing of States authority to do such. Indeed, State constitutions continued to do just that. When Vermont was admitted to the Union in 1791, its constitution required the following oath by officials: "I do believe in one God…and acknowledge the scriptures of the Old and New Testament to be given by divine inspiration, and own and profess the Protestant religion." Many other new states had similar provisions. Massachusetts had an established State church well into the 19th century. Nonetheless, many historians believe Madison and Jefferson, along with several other key founders, intended to establish a "firewall"[*] between church and State and by 1787 when the Constitution was written, the framers knew that it was necessary to build a wall between church and State. Others of course, disagree with that interpretation (see Justice Rehnquist's comments in Wallace v Jaffree, 1985). In any event, the issue was mute until well into the 20th century. States were allowed to do whatever they chose. This was due largely to the earlier court decision that the Bill of Rights did not apply to the States (Baron v Baltimore, 1833). As we know this interpretation was reversed by later court decisions.

Recent History.

The relationship of church and state has arisen in the last 50 years largely due to the reinterpretation of the Constitution. We have covered in other essays in this series the fact that the 14th Amendment has been interpreted to extend the Bill of Rights to the States, such as on criminal matters (Mapp v Ohio, 1965). Since the first ten amendments now clearly apply to the States, the 1st Amendment and the religious issue have come to the fore. This was made quite clear in Cantwell v Connecticut (1940), where the court said the 14th Amendment had rendered

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[*] This term was used by Jefferson in a letter to the Danbury Baptist association in 1905, in response to accusations that he was anti-religion. In that letter, he also said: "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

the legislatures of the States as incompetent as Congress in evading the Establishment Clause. In Engel v Vitale (1962) the court ruled that mandated prayer in the public schools was unconstitutional. New York had composed a prayer that was designed to be denominationally neutral and was to be recited by students in public schools at the beginning of each school day. The court said that even if students were allowed to remain silent or leave the room, the activity was coercive and prohibited by the 1st Amendment. In another case in 1963 (School District of Abington v Schempp), the court ruled that the state cannot require readings from the bible or recitation of the Lord's Prayer at the beginning of the school day.

Another landmark case was Wallace v Jaffree (1985) which dealt with an Alabama law that required a minute of silence at the beginning of the school day for "meditation or voluntary prayer". The District Court found the law unconstitutional, but was reversed by the Circuit Court, which, among other findings, said the state could promote religion, i.e., the 1st Amendment did not bind the states. The Supreme Court, in a 6-3 decision, reversed the Circuit Court and affirmed that the 14th Amendment had made the 1st Amendment Establishment Clause binding on the states. Further, it declared that "the 1st Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion". It mattered not that no specific religion was being advanced. Governor Fob James (then the Alabama governor) acknowledged that the intent was to advance religion, but maintained the right of Alabama to do that.

When the Supreme Court ruled on the issue, Chief Justice Burger and Justice Rehnquist dissented. They pointed out that their court had just that morning said a prayer at the opening and the Congress across the street had done the same. They said the Alabama law amounted to "benevolent neutrality", which should be the standard for judging such practices. They went on to say "It is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful school children—even if they choose to pray". Rehnquist made an argument, citing many sources that the framers intended the Establishment Clause to apply solely to the national government. The Court majority rejected these arguments.

In the case of Lee v Weisman (1992), the Court, in a 5-4 decision, ruled that a prayer given by a Rabbi at a school function violated the Establishment Clause of the 1st Amendment even though the Rabbi had been instructed to make it non-sectarian. The Court said that as a minimum, a government may not coerce anyone to support or participate in religion or its exercise or otherwise act in a way which establishes a religion or religious faith, or tends to do so. They went on to say that prayers in elementary and secondary schools carry a particular risk of indirect coercion since adolescents are often susceptible to peer pressure that amounts to coercion. Also, the argument that Congress and the Courts say prayers does not hold. Such practices are among adults, who can come and go as they please and there is little social pressure to conform.

In the far-reaching decision of Santa Fe Independent School District v Doe (2000), the Court, in a 6-3 decision, struck down a Texas law that allowed student-led prayer at sports events. The decision expanded previous decisions prohibiting clergy-led prayers at school functions such as graduations and applies the prohibition to sports events. It matters not that the students had elected the particular student who gave the prayer; that does not alter the fact that the school district was the actual sponsor of the activity. For the majority: "The religious liberty protected by the Constitution is abridged when the state affirmatively sponsors the particular religious practice of prayer".

In brief, the court decisions have added up to the position that public funds cannot be used to promote religion in schools. Thus, when public schools introduce, or encourage, prayer, the courts are likely to say that they violate the separation of church and state. Again, states try to find language that will circumvent the court rulings and will continue to do so. Public opinion seems to favor the position of the effort to "put prayer back into the schools". For the most part, the Supreme Court has been sharply divided on specific cases, but has consistently upheld earlier decisions that there must be separation of church and state. Where the line is to be drawn, however, is murky. Certain Justices, such as Scalia and Thomas, have consistently criticized these majority decisions, which they claim represent an active opposition to religion. The majority opinion "bristles with hostility to all things religious in public life", wrote Rehnquist for the minority in the Santa Fe case. In a related case, the Court, in another 6-3 decision, let stand a lower court decision that struck down a Louisiana school board policy requiring teachers to tell students that the teaching of evolution was not intended to influence or dissuade the biblical version of creation or any other concept. Rehnquist, Scalia, and Thomas also dissented in this case. From all indications, Alito may be inclined to follow in this tradition; Roberts is more problematic.

None of these decisions prohibits individuals praying on their own in school, before a meal and at other times. Groups of students also can meet for worship on school grounds as long as other student groups have equal privileges. Other court decisions have indicated that public funds can be used for various purposes, e.g., transportation, computers, non-religious textbooks, vouchers, etc., in religious schools. Critics point out that such use of public funds frees up funds for religious activities and thus amounts to public support of religion. Both Gore and Bush support these practices and the trend is to allow more and more public funds for religious schools. Polls suggest there is wide support for breaking down the wall between "church and state". Whether that support translates into a constitutional amendment is problematic.

The Bush administration significantly challenged the "firewall" by implementing "faith-based" programs. Approximately $2 billion a year was funneled to religious organizations to be used for services to the public. It remains to be seen if these programs will be upheld by the Supreme Court, which is now considering a challenge brought by a group of tax payers. Analysts believe the new court, with Roberts and Alito on it, will back the Bush policies. Obama seems to be favorably inclined toward this program.

Evolution and Creationism.

Another area of controversy has to do with teaching the theory of evolution, and the absence of teaching "creationism", in our public school system. The most noted case involving this issue is the 1925 "Scopes" trial in Tennessee. The State had passed a law prohibiting the teaching of Darwin's theory of evolution and prosecuted a high school teacher for violating that law. The teacher was found guilty, but on appeal, the conviction was reversed. The reverse was on a technicality, however, so the constitutionality of the law was not determined. Tennessee kept the law on the books until the 1960s, although it was not enforced. Several states have attempted to restrict the teaching of evolution (e.g., the Kansa Board of Education in 1999) or require the teaching of creationism. In general, courts dealing with this issue will prohibit the explicit teaching of a specific version of creation, e.g., the Christian version, but will allow the teaching of various versions of creation as an academic analysis. The problem comes from the

attempt by most legislation or school policy to teach the Christian version, which is clearly the intent of most policies.

What can we expect in the future? Given the general public support for religion and the sharply divided court decisions, we can expect states to continue to test how far they can go in circumventing the court decisions applying the Establishment Clause of the 1st Amendment. There have been attempts to amend the Constitution to allow prayer in the public schools. There appears to be widespread support for this among the population, but not enough support in Congress. Some fringe groups advocate amending the Constitution to establish Christianity as the national religion. Such an action would, of course, allow public support of Christian churches and religious activities in public schools, a policy that exists for other religions in some countries, especially Islamic theocracies. There appears to be little support for such a drastic action.

There is also the composition of the Supreme Court as a means for putting religion back into schools. A swing of one or two votes on the Court could change the recent rulings dramatically. George Bush expressed displeasure with the recent decisions on school prayer and stated that his favorite justices were Scalia and Thomas—the two most ideologically opposed to the majority opinions. He believed he had accomplished that with the appointments of Roberts and Alito. Candidate McCain expressed similar preferences, although not in regard to Church/State issues. There is a good chance that many of the recent decisions prohibiting religious activities in schools, to include prayer, will be reversed under a court dominated by the Bush appointees. Working through the courts to reinterpret the Constitution appears to be the most likely approach to change the relation of Church and State. Thus, the outcome of the 2008 election may have had long term consequences for this controversial issue. It is unlikely that the Obama appointees of Sotomayor and Kagan will change the ideological composition of the Court, since they are on the liberal side and this issue seems to reflect the conservative/liberal divide. But, as noted, Obama seems to view this issue much as did Bush.