Session 2
The United States Constitution
And
Supreme Court Interpretations

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30 August 2010

1. Introduction

In the most general sense, the Constitution is a blueprint that establishes a legal framework that allows us to work together to resolve conflicts and cooperate to achieve common goals. The Founders realized that a diverse nation represents conflicting beliefs and ideologies that need to be managed in a civil manner. The Constitution is designed to maximize individual liberty and freedom with a minimum of government control; and yet, it seeks to create social order and promote the common good. This delicate balance can be achieved only if there is a basic moral order that allows most conflicts to be worked out among the people based on mutual respect for differences of opinion. The semi-democratic process (We are a Republic) puts ultimate power in the hands of the people, but protects society from the "tyranny of the majority." In the final analysis, the government we have reflects the will of the people as expressed through the political process established by the Constitution.

I have included a copy of the Constitution on the website, but it is really a difficult document to read. Rarely do the legal experts who occupy the nine seats on the Supreme Court agree on what it means, so I offer this summary of how the Court has interpreted it over the years. Each reader can judge when the Court has practiced "judicial activism" by over-riding the "will of the people." I have done my best to summarize the specific cases in a non-partisan way. If you have doubt about my summary, please go to the Supreme Court website and read the original case and we can discuss that case in class.

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 and they differed among themselves.

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. **Among those virtues was the willingness to make sacrifices for the common good.** All agreed that *some* modification of inherent selfish behavior could be achieved. Therefore, they recognized the need for religion and education 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 of the founders 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. (A basic question is: when does the "will of the people" become "tyranny of the masses?" As we shall see, this dilemma is at the heart of what is referred to as "judicial activism.")

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 powers 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.

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

4. Constitutional Content.

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 guided by an "invisible hand" is the proper means to determine economic justice. The latter philosophy governed the nation's policies for the first 150 years. 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, 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 Chief Justice John Marshall declared 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. 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. Fortunately, 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(Marbury v Madison) 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 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. Justice 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. So one might conclude that judicial activism depends on whose ox is being gored.

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 when 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) has 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 conservatives—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). Clinton appointed two moderate liberals—Ginzburg and Breyer. Bush II appointed two doctrinaire conservatives—Roberts and Alito. Obama has appointed two liberals (Sotomayor and Kagan) but since they replaced two liberals (Souter and Stevens), the balance on the Court did not change. The biggest effect will be in the appellate courts, where Obama will have an opportunity to shift the balance significantly. This is important, because this is where most decisions stop (the Supreme Court hears only about 80 cases each term).

For those who wish to read more in depth about how the Court has interpreted the Constitution in different areas, Go to my website www.nsijjohns.com. Since we will discuss the economic issue in a later session, the following summary is included here.

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. Andrew Jackson deviated from this ideology 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." More modest efforts by the States also 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, 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.

[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.

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."

In all, the Supreme Court declared nine 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, he chose to wait for 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. 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*. 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 and 14th 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—except, that is—when the Court decides in their favor.

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 (slums) 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 that existed prior to the New Deal. 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 transformed the court to a certain degree with his two appointments. The replacement of Rehnquist by John Roberts didn't appear to make 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 has shifted the balance toward the Scalia/Thomas philosophy. The two appointments by Obama will not likely change the orientation of the Court, since they replaced justices who were on the liberal side..

It is too early to predict how the Roberts Court will react to the measures taken by Obama to cope with the current economic crisis. For example, some States are seeking to "nullify" certain features of the Health Reform Bill by challenging in Courts the constitutionality of these features. If it is unconstitutional to mandate health insurance, does this mean that the mandate to participate in Medicare is also unconstitutional? If so, what about the mandate to save for retirement, e.g., Social Security? Since the Court has upheld the constitutionality of these programs for 75 years, constitutional scholars seem to give these latest challenges little credence, but who knows how the Roberts Court will rule?