Supreme Court Interpretations

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Overview

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 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" 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. 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 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 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) 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 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 nominated Sotomayor to replace Souter. From all indications, this will not change the balance of the Court.

Attached Essays:

1. Civil Rights
2. Regulation of Economic Activities
3. Abortion
4. Public Schools and Religion