

WTN U Class 6 Handout: Prof. David Fowler

Bill of Rights - Judicial Supremacy

Purpose of the Bill of Rights:

1. Limit on federal government only and on government action only

Samuel Adams -

to see a line drawn as clearly as may be between the federal powers vested in Congress and distinct sovereignty of the several states upon which the private and personal rights of the citizens depend. Without such distinction there will be danger of the Constitution issuing imperceptibly and gradually into a consolidated government over all the states ...

Thomas Jefferson -

[T]aking from the States the moral rule of their citizens, and subordinating it to the general authority [federal government] would ... break up the foundations of the union. ... I believe the States can best govern our home concerns, and the general [federal] government our foreign ones.

Applied only to FEDERAL government actions AND applied only to federal GOVERNMENT action.

Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833) established a precedent on whether the United States Bill of Rights could be applied to state governments.

Writing for a unanimous court, Chief Justice John Marshall held that the first ten "amendments contain no expression indicating an intention to apply them to the State governments. This court cannot so apply them."

"These amendments demanded security against the apprehended encroachments of the General Government -- not against those of the local governments." Barron v. Baltimore, 32 U.S. 243.

Mr. Barron not without any remedy; look to state for remedy.

2. Examples of distinction between original bill of rights and rights under state constitutions.

Let me give you an example of what I'm talking about that will show what has happened.

A. Second Amendment right to bear arms now applies to states BUT, the constitution of TN of 1870 reflected that, what the federal government might not be able to do, the state could do:

Section 26. That the citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime.

B. Religion. First Amendment clearly said that "Congress" should not make a law establishing a religion or inhibiting the free exercise thereof. And the constitution says there shall be no religious test.

Originally that only applied to the federal government, allowing TN's constitution in Article IX, Section 1 to say:

Whereas ministers of the Gospel are by their profession, dedicated to God and the care of souls, and ought not to be diverted from the great duties of their functions; therefore, no minister of the Gospel, or priest of any denomination whatever, shall be eligible to a seat in either House of the Legislature.

This provision was struck down by the US Supreme Court when Hamilton County pastor was barred from running to be member of a state constitutional convention.

### 3. What changed?

What changed all this was the constitutional amendments flowing out of the Civil War. And, in particular, the tool the courts used to expand the bill of rights to state action and upset the notion of federalism was the 14<sup>th</sup>.

A. Context of those amendments:

13<sup>th</sup> Amendment adopted in 1865: purpose - abolish slavery

But states said they may be free but that doesn't mean we have to extend to them the same civil rights afforded others (race-based denials of civil rights)

14<sup>th</sup> Amendment adopted in 1868:

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. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In the historical context, the 14<sup>th</sup> “ was designed to ensure that all former slaves were granted automatic United States citizenship, and that they would have all the rights and privileges as any other citizen.” to guarantee privileges & immunities against race based restrictions. IT was not to upset the whole notion of federalism in virtually every conceivable way.

And then the 15<sup>th</sup> Amendment adopted in 1870 to guarantee the right to vote. - Poll taxes were being used and eventually those were barred by the 24<sup>th</sup> amendment adopted in 1964.

#### B. Procedural Due Process

Then, in the early 1900's, using fact that 14 Amend. referred to the states, the Supreme Court began interpreting the 14<sup>th</sup> amendment's "due process" clause so as to allow the court's to "incorporate" various "procedural" provisions of the Bill of Rights into the 14<sup>th</sup> amendment which made those "incorporated" parts of the Bill of Rights applicable to the states.

#### C. Substantive Due Process

In a power grab, the US Supreme Court came up with the idea of "Substantive Due Process" which is what allowed them to incorporate more substantive rights, like the First Amendment's protection for speech and the press and apply them to states. Idea was that no amount of fair process could justify infringing on certain fundamental substantive liberties.

This neutered states rights, specifically it neutered half of the powers that historically belonged to the states.

Under the Constitution and original Bill of rights States could give more rights than were accorded citizens under the US Bill of Rights OR they could give them less rights - take for example gun rights and the rights of ministers to hold state office in TN constitution.

Today we're taught US Constitution sets a floor for people's rights, not a ceiling, meaning a state cannot give fewer rights than are given under the US Constitution but it can give more.

Substantive Due Process gives the federal courts unqualified discretion to decide what substantive rights are protected under Due Process and how extensive that protection is. There are two ways the Supreme Court does this:

#### D. Judicial Supremacy

In 1958, in *Cooper v. Aaron* Sup. Court asserted that its interpretation of the Constitution was supreme in importance to the constitutional interpretation of the other two branches of government, and that this judicial supremacy. Said this idea was a "permanent and indispensable feature of our constitutional system."

Judicial Supremacy operates on the assumption that a Supreme Court decision on constitutional interpretation is final for all branches of government unless the Court reverses itself in the future, or a constitutional amendment is passed.

But if Supreme Court decisions can only be overturned by a subsequent court decision or by constitutional amendment, then that would mean that that a Supreme Court decision interpreting the Constitution has the force of a constitutional amendment.

This is the exact opposite of what our founding fathers envisioned.

#### E. Historical truth about Judiciary Supremacy - Checks and balances

Thomas Jefferson warned that "the germ of dissolution of our federal government is in the constitution of the federal judiciary, an irresponsible body...working like gravity by night and day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief, over the field

of jurisdiction, until all shall be usurped from the States, and the government of all be consolidated into one.” (Letter from Thomas Jefferson to C. Hammond, 1820, in the Jeffersonian Cyclopaedia (Funk and Wagnalls 1900) (P. 131))

This judicial supremacy is what many of the anti-federalists’ feared, but the federalist believed, and it was said in the federalist papers, that the three branches of government were separate but equal, but the Supreme Court was the weakest branch in terms of power to affect its decisions. In Federalist 78, he called the judiciary ““beyond comparison the weakest of the three departments of power” and the one that could “never attack with success either of the other two”.

Founders believed that the legislative and executive branches would have ample abilities to check a Supreme Court that exceeded its powers.

Why do we only talk about checks and balances relative to Executive and legislative but not judicial? ‘Cause other branches caved in.

Remember: President and each member of Congress takes an oath to defend the Constitution; if they believe that the judicial branch is acting contrary to the Constitution, then they have an obligation to use their Constitutional powers to check and balance the judicial branch.

Forgotten distinction between the Constitution and Constitutional law.

US Attorney General Edwin Meese said,

“Once we understand the distinction between constitutional law and the Constitution, once we see that constitutional decisions need not be seen as the last words in constitutional construction, once we comprehend that these decisions do not necessarily determine future public policy, once we see all of this, we can grasp a correlative point: constitutional interpretation is not the business of the Court only, but also properly the business of all branches of government.” (SOURCE: Meese speech at Tulane University, October 21, 1986, in Calabresi, Steven, Originalism: A Quarter Century of Debate (Regnery 2007) (P. 105))

## 1. Congressional Check

One of the “checks” that our Founders envisioned Congress having when the Supreme Court did something crazy and which, according to Alexander Hamilton is what made the Court the “least dangerous branch,” was the impeachment

power.

Hamilton further noted in Federalist 81,

“There can never be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body entrusted with it, while this body was possessed of the means of punishing their presumption by degrading them from their stations.”

In fact, Hamilton said

Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system. This may be inferred with certainty, from the general nature of the judicial power, from the objects to which it relates, from the manner in which it is exercised, from its comparative weakness, and from its total incapacity to support its usurpations by force. And the inference is greatly fortified by the consideration of the important constitutional check which the power of instituting impeachments in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department. This is alone a complete security.

## 2. Presidential Checks - Presidents at one time “checked” Court.

Jefferson -first American president to confront a hostile judiciary. The Federalists had used the federal judiciary to enforce the Alien and Sedition Acts of 1798 to imprison Jeffersonian activists. After the Federalists lost the election of 1800, they had from November until March 1801 (back then inauguration did not occur until March) to try to slow down the emerging Jeffersonian majority. The Federalists more than doubled the number of federal circuit judges, picked the judges, and had their departing Senate majority approve the new Federalist judges. Thus the Federalists prepared to give up power confident they had boxed in the new majority.

Jefferson and the new Congress abolished over half the federal judgeships and reorganized the federal judiciary with their repeal of the Judiciary Act of 1801 and their passage of the Judiciary Act of 1802.

Abraham Lincoln said, after the Dred Scott Decision:

At the same time, the candid citizen must confess that 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 instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal. (Lincoln's First Inaugural Address, March 4, 1861)

President Franklin Roosevelt stood up to the Court. In 1942, eight spies sent by Nazi Germany to commit sabotage in the United States were captured on U.S. soil. A military commission was established. Upon learning that the German saboteurs had petitioned the Supreme Court to intervene in the military commission trial, President Roosevelt communicated to the Chief Justice of the Supreme Court that he did not care what the Court had to say and that he would ignore any order of the Court directing him to release the prisoners of war.

Another "check" is Article III, section 2, clause 2 provides that "the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make". Section 1 says that judicial power is in "one Supreme Court, and in such inferior courts as the congress may from time to time ordain and establish." Don't have to have any lower courts! This power, along with Congressional power to create and abolish all lower federal courts, provide for a powerful check on the judiciary that no one uses.