

Notes on The History of Constitutional Law in the US Supreme Court Daniel JH Greenwood

We are here to discuss Constitutional Law in the Supreme Court in 1 hour. So I'll use broad strokes and a few cases.

In particular, I'm not going to give the usual story of the Supreme Court as hero—defending the rights of minorities and the oppressed, running from Abrams and the First Amendment, through the McCarthy Era, Brown, the Right to Counsel and the voting cases, and on to Roe and its backlash. Instead, I've chosen cases that I think better reflect the actual, and quite mixed, history of our peculiar system of sending our most important issues to the judiciary.

1st, the biggest picture:

We live in a Federal System with 3 major types of law, and many lawmakers:

Common law – judge made law, descended from English practices and changed from time to time by the judges in accordance with their understandings of the precedents and the needs of the time. Sometimes this law has been quite stable, but often not so. For example, in the last half of the nineteenth century, courts aggressively changed the rules of tort and contract to make the legal system more friendly to large industrial enterprise. The key to judge made law, however, is that judges are always required to base their decisions on prior law—especially judicial precedents—and they make their decisions by interpreting the prior law. That is, the question they ask is, “what do the authorities before me mean,” or “how can I best make sense of them” or “what decision would be most consistent with what has gone before”? Of course, you can't do this without considering what would be best for the country in some sense, but they never explicitly ask that question, and it is never proper for a court to write an opinion that says, “in my view, this is what the people want” or “in my considered opinion, this is what the country should do”.

Statutory law – what you usually think of as law, actual statutes passed by a legislature and signed by the executive. In a few states, especially CA, also by referendum. A good deal less important than you might think. Can be either Federal or State (or often municipal, tribal, etc.) . Statute statutory law is still the most important in most areas, and was almost exclusively so before the creation of the peace-time military after Second World War.

Legislatures, in this country at least, rarely ask the court question. Instead of looking to the past, they either look to the polls (the will of the people), to what will get them reelected (some combination of the voters, the contributors and the lobbyists) or to what they think is best for the country (the interests of the people or the ideology of the party).

Constitutional law. Constitutions are typically written more broadly and more aspirationally than statutes, often stating broad principles – free speech, trial by jury, equal protection – without much detail. Constitutions, like statutes, can be state or federal, with the important difference that most state constitutions can be (and are) amended fairly easily, usually by a referendum in addition to the usual statutory process.

The Federal Constitution, in contrast, is extremely difficult to amend, and more often than not we've changed it by simply ignoring the text or radically changing how we read it.

– the biggest example is the war powers, where we simply ignore the requirement that the Congress declare war, the bar on standing armies, and the absence of any authorization for something like the Pentagon.

2nd, the role of the Supreme Court.

Until after the Civil War, the Supreme Court was the final say on Common Law and on conflicts between State law and US law, but it rarely spoke on conflicts between the US Constitution and US law. In fact only two significant opinions like this:

1. **Marbury v Madison** (1803), in which President Adams had, as his last act before leaving office in the first partisan presidential election, issued a bunch of “midnight appointments” – but hadn't actually delivered the papers in time. The new president refused to do it. The court first held that Marbury was entitled to his commission and a five year appointment, and that a common law court could order the new administration to do it by mandamus, but then held that Constitution does not give the Supreme Court the power to issue a writ of mandamus in a case where it doesn't have original jurisdiction and the statute saying otherwise is therefore unconstitutional.

A bit mind numbing, and I've simplified it.

The key is to understand this: The court did exactly what the current administration wanted, and only held that its OWN power was limited, but also said this:

“The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part, be true then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.”

That much has seemed incontestable to most people on this side of the Atlantic, but it's actually somewhat irrelevant. The real question is who gets to decide what the Constitution means: Should that be decided by the political process, as was done in England until recently, or by judges, or both, as is common in much of the democratic world? Marshall's answer is:

“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the court must decide on the operation of both.”

This is the foundation of judicial review in this country. Marshall understands from the very system of courts and written constitutions that the court must have the right to declare a law unconstitutional. Note however, that he never suggests that the courts have the ONLY right to do that.

Indeed, for the next 100 years, Constitutional debate was almost exclusively in the CONGRESS and the EXECUTIVE. The **Alien and Sedition Acts** were found unconstitutional by a newly elected CONGRESS. The debate on the constitutionality of the Bank of the United States was almost entirely political – Congress and the Executive,

not judicial. (*McCulloch v. Maryland* holds that a state can't overrule the decision of Congress, but doesn't say whether the Congress or the Court decides whether the Bank is constitutional).

We've lost that today: Now it is much more usual for legislatures and administrators to say that their job is to do what they want to, or what they think is good for the country, and the courts are the only enforcers of the Constitution. After 9-11, the Congress and President enacted the so-called Patriot Act, including, for the first time, indefinite imprisonment without trial and secret searches of individual houses and records, and they didn't even bother to discuss whether this could possibly be constitutional in a free republic.

The next time the Court overturned a US statute was when it held the Missouri Compromise unconstitutional. (**Dred Scott**) Not an encouraging start for judicial review.

But its record in general is not much better. Here is one important example of the Supreme Court in its role as arbiter of federalism, determining where state authority ends and Federal begins:

Prigg v. Pennsylvania (1842): Pennsylvania made it illegal for a slave owner (or his agent, Prigg) to kidnap escaped slaves – instead they had to apply for a judicial certificate, something less than an extradition process for a criminal, but more than just force. The Supreme Court found that this violated the Fugitive Slave Act of 1793.

This case is still cited for the idea that sometimes Federal law “fills the field” so that any state regulation is invalid – it is why, for example, a state cannot give you more protection against your insurance company or more protection for your pension, or stronger environmental law than the US does.

Dred Scott v. Sandford (1857): Dred Scott's master brought him from Missouri (a slave state) to Illinois (free) and Wisconsin Territory (free by federal law under the Missouri Compromise), for 4 years, where he married. After the master died, Scott sued for freedom for himself, his wife and his children.

The court held: (1) The Congress has no power to outlaw slavery (and therefore the Missouri Compromise, which had already been repealed, was unconstitutional), (2) slaves are property and the Fifth Amendment's due process clause, instead of protecting the slave (or former slave), protects the slaveowner: Congress therefore can't “deprive a [slaveowner] of his property without due process” although it can deprive the slave of his liberty and property (and although it isn't discussed, his right to marriage), (3) no African American can be a citizen of the United States.

We fought a Civil War to overturn it.

On the third issue, Chief Justice Taney's logic is simple: The Constitution says it is made by the people of the United States and its citizens and people have certain rights – inalienable ones, according to the Declaration of Independence. So either slavery and racism are wrong, or some people are not people.

Taney decided the latter. Discrimination has a long history in the United States. So, he said, not only aren't slaves entitled to the rights of citizens, but even free Americans with some African blood must be the sort of people who aren't people and can't be citizens.

The argument is basically what is called today “original intent”: when the Constitution says “people” it must mean something else, because otherwise its authors would have been admitting that they were doing something wrong.

Today, there are people who argue on the same grounds that when the Fourteenth Amendment required that all citizens—now defined to include “every person born or naturalized in the US”—be given equal protection of the laws, it couldn’t have meant what the words say, because schools were segregated at that time, the Black Codes were being enacted and Jim Crow was starting, women didn’t have the vote, and so on.

Taney’s argument is that faced with words that require equality, we should ignore the noble words and look instead to the fairly degraded reality in which the words were enacted. The Constitution should never be read to require that we be any better than our worst moments.

After the Civil War, the Constitution changed dramatically—the Thirteenth Amendment reversed Dred Scott and went further, fully outlawing slavery; the Fourteenth Amendment overturned Dred Scott’s citizen ruling in its first sentence and then says:

“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.”

This is the source of most modern Constitutional law. The court quickly decided that citizens have virtually no privileges or immunities, and that was accepted, so the key debates have been over due process and equal protection. These phrases, for example, have been used to extend almost the entire Bill of Rights, which originally applied only against the Federal government, to the states, and therefore are the reason why the First Amendment protects your speech against states and not just the Federal government.

Surprisingly, though, the Fourteenth Amendment turned out mainly to protect corporations and not African Americans or even people generally.

I want to focus here on two cases that are absolutely central but not as well known as **Plessy v. Ferguson (1896)**, which upheld Jim Crow on the bizarre ground that there is nothing unequal or discriminatory about segregation, **Brown v. Board of Ed.**, which finally, in 1957 began to dismantle the American system of Apartheid, and **Loving v. Virginia** in 1967 (!) which knocked down laws barring so-called mixed marriages (upheld in *Pace v Alabama* 1883), that had been defended on the ground that they hurt whites and blacks (defined as anyone with an African, Asian or Indian ancestor unless the Indian was Pocahontas) equally.

First, the **Civil Rights Cases** (1883), held the 1875 Civil Rights Acts unconstitutional on the ground that the Fourteenth Amendment didn’t give the Congress power to outlaw discrimination – only discrimination by the GOVERNMENT.

The argument was that the text says “no state shall deny ...” so it must mean that the state may PERMIT private people, companies, railroads and so on, to deny equal

protection and due process, even if they do so using contracts, threats of trespass actions and call on the police to help them do so.

This remains good law. The modern Civil rights acts are enacted as regulations of INTERSTATE COMMERCE, and recently the court has held some unconstitutional – like the Violence Against Women Act (US v Morrison, decided under the Civil Rights Cases), and the Gun-Free School Zones Act (US v Lopez, also decided under the Civil Rights Cases) – on the ground that violence against women or guns in schools don't affect interstate commerce.

Second, **Santa Clara County v. Southern Pac. RR. (1886)** held, with no explanation at all, that corporations are persons for purposes of the Fourteenth Amendment—just one sentence, in the “syllabus”, the summary before the case, noting that Chief Justice Waite announced from the bench:

“The court does not wish to hear argument on the question whether the provision in 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 of opinion that it does.”

This, too, is not based on a reading of the text, or for that matter, on any understanding of what the authors, who presumably were thinking about the rights of African Americans and perhaps other Americans, rather than the rights of railroads, were thinking about.

But the consequences are more important.

The combination of these two cases means that you have no constitutional rights against corporations – As far as the Constitution goes, they may discriminate against you, violate your rights to speech, search you without process and so on. Some of these have been barred by statute, but notice that an employer may read an employee's mail, search his desk, order her to advocate political positions, regulate his clothing and hairstyle, often may fire her with no process at all, and so on.

In contrast, corporations have Constitutional rights against you. So, sometimes courts have thought that taking away some of those rights corporations have against us might even be unconstitutional interferences with the property, speech or contract rights of the corporation. More clearly, we can't bar corporations from lobbying or using corporate money to change the law. The Constitution restricts the kinds of restrictions we can put on corporate advertising—we can bar high alcohol beer, but if we legalize the beer, we can't bar advertising it. We can't send inspectors into factors or meat processors without warning. While we could insist that a government agency do all its work in public or open all its records to us, we can't do this for a business corporation. We could abolish the UTA tomorrow if we elected a legislature that was opposed to mass transit, but no majority, however strong, is permitted to vote to decide that the continued existence of General Motors is bad for the country.

It is not that it would necessarily be a good idea to start closing corporations down or searching them without warning—it is, instead, that we decide whether we can do those by constitutional interpretation, by reading a text that was written before modern corporations were even invented, rather than by debating about corporations, having elections and so on. The Supreme Court has fossilized these highly controversial

political issues, insulating them from a debate about what the right way to regulate corporations might be.

These contract and corporate rights reached their peak in a famous case called **Lochner v. New York**, one of a long series of cases in which the Court held that various economic regulations were unconstitutional violations of the Contracts Clause. In *Lochner*, the court held that bakers had a constitutional right to work 14 hours a day even if the flour in their lungs was likely to kill them, and the state could not impose maximum working hours. This case came to symbolize hundreds of others in which the court held that the Constitution prevented states and the federal government from protecting workers and consumers, including the cases that held the first New Deal acts unconstitutional.

In 1938, the Court changed its mind, and added the Contracts clause and Economic Due Process to the list of topics (along with foreign policy, immigration and the military) where it generally was going to “presume” that whatever the Congress and Executive do, is constitutional. There isn’t a single case, but rather a series – *Nebbia*, *Carolene Products* and *Williamson Optical* are the most commonly cited – that stand for the “**switch in time that saved nine**” – the Supreme Court’s capitulation and reversal, allowing the second New Deal to stand.

The last case I want to mention, then, is **US v. Carolene Products** (1938), an utterly unmemorable case except for its Footnote Four, which set the course for what the court **would** do after its New Deal retreat:

First, the court basically decided that it would defer to Congress on issues of commerce and economic regulation. In other cases, it has also added military, foreign policy, the army and immigration. In all these areas, from 1938 until very recently, the Court now takes the position that Constitutional arguments must be made to the Congress and the President, not to it. So the court won’t intervene. For example,

That the Constitution requires open accounting doesn’t invalidate the secret CIA budget;

The Constitution requires that war be declared by the Congress –specifically because the King had the authority to run wars in Britain—and that no army be funded for more than 2 years and doesn’t provide for an air force or marines, but the court won’t hear challenges to current practices: no war since Korea has been declared by the Congress, Pentagon funding is essentially permanent and includes long term supply contracts, and the President now claims inherent security powers;

And until about 10 years ago, anything the Congress said it was regulating in the name of commerce was essentially free of Court review.

The Court, instead, said that it would restrict itself to procedural matters—especially the right to vote and to speak that are the foundation of a political democracy—and the Bill of Rights:

“There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten

Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. ...

“It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see [Nixon v. Herndon, 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759](#); [Nixon v. Condon, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984, 88 A.L.R. 458](#); on restraints upon the dissemination of information, see [Near v. Minnesota, 283 U.S. 697, 713--714, 718--720, 722, 51 S.Ct. 625, 630, 632, 633, 75 L.Ed. 1357](#); [Grosjean v. American Press Co., 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660](#); [Lovell v. Griffin, supra](#); on interferences with political organizations, see [Stromberg v. California, supra, 283 U.S. 359, 369, 51 S.Ct. 532, 535, 75 L.Ed. 1117, 73 A.L.R. 1484](#); [Fiske v. Kansas, 274 U.S. 380, 47 S.Ct. 655, 71 L.Ed. 1108](#); [Whitney v. California, 274 U.S. 357, 373--378, 47 S.Ct. 641, 647, 649, 71 L.Ed. 1095](#); [Herndon v. Lowry, 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066](#); and see [Holmes, J., in Gitlow v. New York, 268 U.S. 652, 673, 45 S.Ct. 625, 69 L.Ed. 1138](#); as to prohibition of peaceable assembly, see [De Jonge v. Oregon, 299 U.S. 353, 365, 57 S.Ct. 255, 260, 81 L.Ed. 278](#).

“Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, [Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, 39 A.L.R. 468](#), or national, [Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042, 29 A.L.R. 1446](#); [Bartels v. Iowa, 262 U.S. 404, 43 S.Ct. 628, 67 L.Ed. 1047](#); [Farrington v. Tokushige, 273 U.S. 284, 47 S.Ct. 406, 71 L.Ed. 646](#), or racial minorities....; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. [Cases omitted]”

In my judgment, we are today in a state of transition, with a newly active court, willing to limit Congressional and State authority to regulate the economy and to fight discrimination, using both Constitutional and statutory interpretation to limit regulations intended to empower market losers, and to expand the rights of corporations. Footnote 4 is being eroded, and *Lochner* is returning, although more often today in the guise of commercial speech (almost any economic regulation can be re-described as regulation of a corporation's speech, so *Santa Clara* is terribly important today).

It continues, with some retreat, the post-War pattern of upholding certain basic individual freedoms, such as speech, private sexual relations, and so on, but not so-called positive rights such as education, housing, jobs and so on.

It has utterly abandoned any pretense of enforcing fundamentally fair political procedures, partly because it had trouble outlining what fundamental fairness requires, but even in circumstances where it really isn't very hard to see something is wrong. Thus, while the one person one vote cases stand, the court has more recently concluded that gerrymandering is non-justiciable except when it helps African Americans; has declined to see anything wrong in newer versions of the poll tax that exclude large numbers of people from voting on functionally (but not formally) race and partisan grounds, and then intervening itself to decide the last Presidential election in an entirely unprecedented manner.

And of course, I haven't discussed the vicissitudes of the right to speech (which protects your right not to have the state slogan on your license plate, your right to wear armbands and vulgar t-shirts (but not in school), corporate rights to advertise and break guild or professional restrictions, but does not protect the right to bring in a distinguished foreign speaker who belongs to a western Communist party), the right to privacy in the bedroom that gave us contraceptive and abortion rights and now limited rights to unusual sex, the rights of high school students, the right to die or not, the right not to say the pledge of allegiance, the status of the Bible in the schools and so on...

Your turn.