Duquesne Law Review

Volume 26 | Number 1 Article 3

1987

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Volume 26 Fall 1987 Issue 1

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*The Honorable Joseph F. Weis, Jr.**

We celebrate the two hundredth anniversary of the Constitution this year confident that it will survive for at least another hundred years. As is true of many things American, the observance of the occasion has devoted more than enough attention to the historic days of 1787 when the document was drafted. We have been treated to fascinating bits of trivia about the personalities of the men who attended the convention and, I fear, exaggerated appraisals of the original draft.

We know that it is the oldest written national constitution still in effect, but we are not really surprised it has continued to be viable thus far. Perhaps that is due to an almost childish confidence that the American people have in the Constitution—at least today.

It does not diminish our deep regard for the Constitution, as it emerged in 1787, to admit that it had serious failings. It was, after all, a product of 200 years ago and some concepts that were acceptable, or at least tolerated at that time, are no longer so today. The Constitution's condonation of slavery, for example, comes to mind.

It is also not disrespectful to point out that the 1787 draft of the Constitution basically looked to the interest of the propertied class. A stable central government, sound currency, a unified foreign policy and freedom of trade between the states were essential if the new

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nation was to prosper economically. And it was to these ends that the Constitution primarily addressed itself.

It was not an easy task—even at the convention the divergent interests of the predominantly agricultural class were pitted against the emerging industrial sector; the entrenched political forces in the small colonies fought vigorously and successfully against the more populous and powerful larger colonies. To resolve these conflicting forces, compromises were an absolute necessity, and, by and large, they have proved workable, although at times, even today, questionable.

That is not to say, however, that the implementation of the Constitution has gone smoothly and without a struggle. The successful struggle for ratification did not quiet all opposition and did not guarantee success to some of the delicate compromises reached before 1789. Those who ardently championed the sovereign prerogatives of the individual states reacted with suspicion to the new central government and were ever alert to protest its increasing power—an attitude which the federalist articles cited as an argument for ratification.

But the Constitution did not stop growing in 1789. It has been augmented and enlarged, mostly in the courts, although some significant amendments have been added over the years. The role of the courts should not be surprising because the provisions and ambiguities of the Constitution had to be interpreted and applied. That is the task of the courts.

The Constitution of today, in reality, consists not only of the original text but of significant court decisions over the years. To gain some understanding of what is meant by constitutional rights today requires a review of some of the important cases. In the limited time available that process will necessarily be cursory, but I believe will give some sense of the development that has occurred in the last two hundred years.

Obviously, too, we cannot explore all the areas in which constitutional law has played a decisive role so I will focus on the shift from the courts' early emphasis on property rights to the later attention to what might be called personal rights that will largely be a historical and chronological review rather than a philosophical one. Too often today the importance of the historical antecedents have been overlooked and misunderstood. This is simply another example of the adage that to understand the present it is necessary to know what happened in the past.

The first case of real significance was not long in reaching the Supreme Court. In 1793, just four years after the Constitution was

ratified, in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), the Supreme Court permitted a suit against an unwilling state in the federal courts. The opposition from the states was swift and vociferous, and within two years the eleventh amendment prohibiting such suits was ratified. Those who had predicted the incursion of federal law and federal courts into state sovereignty had rallied quickly to stop the trend at the outset.

Not surprisingly, commercial interests were the subject of a number of the early cases in the Supreme Court. *Gibbons, v. Ogden,* 22 U.S. (9 Wheat.) 1 (1824), denied a state the right to interfere with state commerce—in that case a steamboat plying the Hudson River. In *McCullough v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819), the Court, under Chief Justice Marshall, barred a state from imposing a heavy tax on the bank of the United States, a federal institution.A sound currency had been threatened by state action and the Court moved decisively to assert federal supremacy in this vital field. In *Martin v. Hunter's Lessee,* 14 U.S. (1 Wheat.) 304 (1816), the Court overruled a state court which had not properly respected treaty obligations to honor the title of English landowners.

These cases had a common thread—strengthening of the powers of the federal government in matters of particular interest to the concepts of sound currency, interstate commerce, and obligations under treaty even when they involved our former enemy.

During this era, too, the famous case of *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803), established the right of judicial review, the power of federal courts to declare statutes unconstitutional. This case was tremendously important in establishing the separation and distribution of power within the federal government.

Today, when people speak of constitutional rights, they generally refer to the Bill of Rights, the first ten amendments. They enumerated such rights as personal liberty, freedom of the speech, press, religion, entitlement to due process, and jury trials. In this area, the focus during the early years was on the states and the state courts.

In the case of *Barron v. Baltimore,* 32 U.S. (7 Pet.) 243 (1833), Chief Justice Marshall declared that the fifth amendment prohibition against taking of property without compensation applied only to the federal government and not to the states. He said that the Constitution was established by the people for themselves, for their own government, and not for the government of individual states. As he read it, the Bill of Rights contained no expression indicating an intent to apply them to the state governments.

Thus, during the time that the Court was steadily increasing the power of the federal government in trade, industry, and commerce,

it refused to expand individual rights under the federal constitution, leaving those interests within the states' supervision.

But some of the conflicts which had been papered over, or should I say parchmented over, in 1787-89 continued to fester— slavery, state autonomy, and resistance to a central government— and they could not be resolved by the courts.

The refusal of Georgia to accept Supreme Court orders to respect Indian Territory in the 1820's, South Carolina's resistance to the Tariff Act in the 1830's, and refusal by the Northern states to honor the Fugitive Slave Act, particularly in the 1850's, were indications of the smouldering fires beneath.

In 1857, Lord Macaulay, the English historian, wrote in a letter to an American:

> It is quite plain that your government will never be able to restrain a distressed and discontented majority. For with you, the majority is the government, and has the rich, who are always a minority, absolutely at its mercy. The day will come when in the state of New York, a multitude of people, none of whom have had more than half a breakfast, or expect to have more than half a dinner, will choose a legislature. Is it possible to doubt what sort of a legislature will be chosen? On one side is a statesman preaching patience, respect for vested rights, strict observance of public faith. On the other, a demagogue ranting about the tyranny of capitalists and usurers, asking why anybody should be permitted to drink champagne and to ride in a carriage. Which of the two candidates is likely to be preferred by a working man? There is nothing to stay you. Your Constitution is all sail and no anchor. As I said before, when a society has entered on this downward progress, either civilization or liberty must perish. Either some Caesar or Napoleon will seize the reins of government with a strong hand; or your Republic will be a fearfully plundered and laid waste in the twentieth century as the Roman Empire was by barbarians who came from without, and that your Huns and Vandals will have been engendered within your country by your own institutions.

But Macaulay's prediction was wide of the mark. He was correct in foreseeing a constitutional crisis. But it came, not from the problems to which he had cited to, but the ones I have mentioned which exploded into the Civil War. What the courts and the Constitution could not resolve was finally settled by a bloody conflict just as we were about to enter into the Constitution's second century.

The original text of the Constitution grew out of war—the Revolution, and the second significant phase was also the result of armed conflict—the bloody civil war. The changes brought about in the second hundred years were almost as radical as those of the first.

The most immediate result of the Civil War was the enactment of the thirteenth amendment abolishing slavery in the United States,

and Congress' passage of the Civil Rights Act of 1866, destined through a series of modifications to become a far ranging source of federal power 100 years later.

The Reconstruction era was a controversial one. The radical politicians of the North were not inclined to be conciliatory and the Southerners reacted with bitterness. The newly freed Black slaves were abused by Southern whites and the carpetbaggers from the North were treated with violence. The Southern states appeared unable or unwilling to enforce the laws and the Klu Klux Klan ruled by terror.

Congress reacted by drafting the fourteenth amendment. It is the most sweeping of all those modifying the Constitution, and one which would forever alter the balance of power between the states and the federal government. As you will see, the words of this amendment are quite important and I will cite just a few clauses:

> 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.

Just what these provisions would mean in practice would take years to determine.

Although the language is broad, the fourteenth amendment's first test in the Supreme Court resulted in a narrow interpretation that disappointed its avid supporters. In 1873, the Court decided the *Slaughterhouse* cases, 83 U.S. (16 Wall.) 36 (1873), a controversy arising out of a Louisiana statute granting a monopoly to one company operating a slaughterhouse in New Orleans. It is interesting that this significant case did not involve civil rights as we think of them today but was concerned with a purely economic question—the right to conduct a business in a free enterprise system.

The companies which had been denied the right to compete complained that the Louisiana law deprived them of their right to the privileges and immunities and equal protection of the law as guaranteed by the fourteenth amendment. The Supreme Court rejected that argument and decided that the fourteenth amendment applied only to national citizenship and not to the rights granted by state law.

The rights which the Court considered to be federal in character were such fundamental matters as the right to petition the federal government, the use of seaports and navigable waters, access to the federal courts, to the writ of habeas corpus, as well as protection

on the high seas and on foreign soil. But for protection of the bulk of individual liberties, a person had to look to the states and state law, not the federal constitution. This very conservative reading of the fourteenth amendment put off for many years the move to give the federal government and the federal courts a dominant role in safeguarding individual rights.

In 1882 and 1883, in two cases, the Supreme Court further restricted the ability of the federal government to move into the civil rights field. In the *Civil Rights Cases,* 109 U.S. 3 (1883), and *United States v. Harris,* 106 U.S. 629 (1882), the Court decided that the Public Accommodations Act of 1875 passed by Congress was unconstitutional because it applied to private acts of racial discrimination. The Court concluded that the fourteenth amendment authorized Congress to act only when the state itself was guilty of discrimination or enacted discriminatory legislation.

But there was a portent of things to come. In 1880, in the case of *Strauder v. West Virginia,* 100 U.S. 303 (1880), the Court held that racially-based discrimination in the selection of a jury in a state court was unconstitutional. Thus, the Court intervened in applying federal constitutional provision in a trial conducted in a state court enforcing the state criminal law.

There was another straw in the wind—this time in a solitary dissent by Justice Harlan, the grandfather of John Harlan who served on the Supreme Court in modern times. The elder Harlan, argued in 1884 that the fourteenth amendment incorporated the provisions of the Bill of Rights. He contended that by virtue of the fourteenth amendment, the first eight amendments to the federal constitution had been made applicable to the states. Consequently, any abridgement of those rights by the states would become violations of the federal constitution.

We shall come to the so-called incorporation theory some fifty years later. But, in the late nineteenth century, Harlan was the sole member of the Supreme Court to take that stand as it applied to personal or individual rights. It is worth noting, incidentally, that the case in which Harlan first advanced his theory was *Hurtado v. California,* 110 U.S. 516 (1884). The criminal defendant there argued that the provisions of the sixth amendment providing for indictment by a grand jury had not been observed by the state. Incidentally, that case is still good law today.

But although Harlan had been in dissent in urging federal supervision of personal liberties in the states, he was successful some thirteen years later in persuading his colleagues that protection of

property rights was part of the fourteenth amendment. *Chicago Burlington & Quincy Railroad v. Chicago,* 166 U.S. 226 (1897). In that case, the Court held that abridgement of property rights was subject to the requirements of due process and a $1 judgment in favor of the railroad for loss of its property could not be sustained.

Harlan's most widely known dissent, however, had occurred in the preceding year in *Plessy v. Ferguson,* 163 U.S. 537 (1896). In that case, a majority of the Court upheld a Louisiana statute which required that white and black passengers occupy different cars in a railroad train. The Court approved the separate but equal doctrine which was to survive for the next fifty years.

Harlan dissented, arguing that the Constitution was color blind and "neither knows nor tolerates classes among citizens." An interesting side light is that Harlan, the sole Southerner on the Court, was from Kentucky and had been a slaveholder at one time. The majority opinion for the Court was written by Justice Brown, a graduate of Harvard and Yale, born in Massachusetts, and a resident of Michigan. So much for indications of how a particular justice will decide a case based on background.

Further developments giving constitutional protection to racial minorities had to wait for another day.

By and large business interests fared well in the Court around the turn of the century. However, in 1896, a Utah law imposing an eight hour day for copper miners was upheld as a valid exercise of the state's police power. *Holden v. Hardy,* 169 U.S. 366 (1896). And an Oregon statute limiting women's work to ten hours a day was also sustained. *Muller v. Oregon,* 208 U.S. 412 (1908). *Cf. Lochner v. New York,* 198 U.S. 45 (1905) (ten-hour day for male bakers unconstitutional as violating freedom of contract).

Thus, the first years of the Constitution's second century had not resulted in any startling changes in the approach that had been taken earlier. The thirteenth amendment, of course, had abolished slavery, and the fourteenth had granted rights which the courts had construed very narrowly. The fifteenth amendment had purported to expand the right to vote, but again in practice had not accomplished much for the Black race. The federal government still operated on the theory that protection of individual rights was primarily the obligation of the states.

But the modern era was upon us. World War I and the sixteenth amendment permitting direct taxation of the people by the federal government through the income tax established dominance by the federal government. These years would also show a change in the Supreme Court's attitude toward individual liberties.

Justice Harlan's incorporation of the Bill of Rights into the fourteenth amendment theory was adopted almost imperceptibly and on a piecemeal basis in a backhanded and uncertain way. In *Gitlow v. New York,* 268 U.S. 652, 666, (1925), the Court wrote: "For present purposes, we may and do assume that freedom of speech and of the press" listed in the first amendment "are among the fundamental personal rights and liberties protected by the due process clause of the fourteenth amendment from impairment by the states."

This case is often referred to as one which began the process of incorporation of an amendment by amendment process. Yet, it only "assumed" that process for purposes of discussion. That is strange language for a decision announcing such a far reaching doctrine. Yet, two years later, the Court made no comment about *Gitlow*'s "assumption" and proceeded to treat incorporation of the first amendment guarantee of free speech as an accomplished fact. *Fiske v. Kansas,* 274 U.S. 380 (1927). Six years later, *Gitlow*'s assumption had become settled law. *Stromberg v. California,* 283 U.S. 359 (1931).

In 1932, the famous Scottsboro Boys case, *Powell v. Alabama,* 287 U.S. 45 (1932), applied the sixth amendment right to counsel in state criminal felony cases under the due process clause of the fourteenth amendment. The religion clauses of the first amendment had come within the fourteenth amendment, some years earlier, in 1922. *Meyer v. Nebraska,* 262 U.S. 390 (1922), and freedom of assembly followed in 1937, *De Jonge v. Oregon,* 299 U.S. 353 (1937).

You may be surprised perhaps to learn the incorporation theory, however, has never been applied across the board to all elements of the Bill of Rights. In 1937, Justice Cardozo in the case of *Palko v. Connecticut,* 302 U.S. 319 (1937), said that double jeopardy was not an incorporated right. He limited the fourteenth amendment to rights which were "of the essence of a scheme of ordered liberty" or could be called "fundamental."

It is interesting that these cases which brought the federal government into oversight of civil liberties and increasingly in conflict with state policies were decided by the same men who regularly set aside much of Franklin Roosevelt's New Deal legislation. The same "nine old men" who were the subject of his court packing plan, although conservative in economic measures, had moved the Court toward a path of increasing concern with individual liberties.

In that era, too, another significant decision was the forerunner of developments in the area of discrimination in education. In *Missouri ex rel. Gaines v. Canada,* 305 U.S. 337 (1938), the Court ordered the state of Missouri to admit a black student to the Missouri

University Law School. That precedent was followed in two other university admittance denials in 1950, *Sweatt v. Painter,* 399 U.S. 629 (1950), and *McLaurin v. Oklahoma State Regents,* 339 U.S. 637 (1950). It may be seen that the groundwork for the landmark case of *Brown v. Board of Education* 347 U.S. 483 (1954), the 1954 decision prohibiting discrimination in public school education, had been laid years before. *Brown*'s significance was that it moved into the broad field of primary education.

In the field of criminal law, the Supreme Court, beginning in the late 1950's and early 1960's, handed down a series of decisions intended to improve the procedures used in the states both by police and the courts. *Miranda v. Arizona,* 384 U.S. 436 (1966); *Escobedo v. Illinois,* 378 U.S. 478 (1964); *Gideon v. Wainwright,* 372 U.S. 335 (1963); and *Mapp v. Ohio,* 367 U.S. 643 (1961), are all familiar names of decisions in which the Court required suspects in custody to be advised of their rights, be given access to counsel, and to have protection against unconstitutional searches.

Although these rights were not new, the remedies the Court adopted for their violation stirred wide controversy. If a confession was obtained and the defendant had not been advised of his rights, the confession would be suppressed. Similarly, if as a result of an unconstitutional search evidence was uncovered, it could not be used by the prosecutor at the defendant's trial.

This was the Exclusionary Rule which had been criticized by Justice Cardozo in the 1930's in the pithy phrase, "because the constable blundered, the guilty go free." Although the Exclusionary Rule led to widespread criticism, most objective observers agreed that procedures in state criminal matters were much in need of reform and that the intervention by federal courts had become a necessity.

It is helpful, though, to recall the words of Justice Jackson written in the course of a dissent in 1949, that we need not "convert the constitutional Bill of Rights into a suicide pact." *Terminello v. Chicago,* 337 U.S. 1, 37 (1949).

In 1965, the Court invoked the idea of the the penumbra or emanations from the Bill of Rights to announce a constitutionally protected right of privacy. *Griswold v. Connecticut,* 381 U.S. 479 (1965), was the first of a series of decisions removing much of the regulation of sexual conduct from governmental oversight. It culminated in the still highly controversial 1973 decision of *Roe v. Wade,* 410 U.S. 113 (1973), which severely limited the power of states to prohibit abortions. *Eisenstadt v. Baird,* 405 U.S. 438 (1972); *Carey v. Population Services International,* 431 U.S. 678 (1977).

Just five years ago, in *Youngberg v. Romeo,* 457 U.S. 307 (1982), the Supreme Court announced that retarded persons were entitled to constitutional protections under the liberty clause of the fourteenth amendment. The Court said that an involuntarily-confined mentally retarded person is entitled to safe conditions, personal security and freedom from unwarranted bodily restraint. Thus, the Court recognized the right to human dignity of individuals who are handicapped through no fault of their own and who are dependent upon the state for the basic needs of life.

Time does not permit an extended discussion of the many causes which expanded the reach of the fourteenth amendment in the last thirty years, both in the criminal and civil liberties field. The litigation has been explosive in its growth, unmatched in any other area of our constitutional history.

A case decided in 1961 and virtually unknown outside of legal circles has had the most dramatic effect in revolutionizing civil rights litigation. *Monroe v. Pape,* 365 U.S. 167 (1961), was a civil suit for damages by a family whose home had been subjected to an unjustified and unconstitutional search by Chicago police. In addition to the intrusion, the homeowners were subjected to beating by the officers and the family was harassed and humiliated by the police. Before *Monroe v. Pape* was decided, such suits were brought in the state courts where they were given generally inhospitable treatment.

In *Monroe v. Pape,* however, the Supreme Court agreed that by virtue of a statute enacted shortly after the Civil War, now known familiarly to federal judges as section 1983, such suits could be brought in the federal courts. That statute had been dormant for almost one hundred years but now its potential revolutionized the federal court dockets. A brief review of the statistics will make the point.

The number of suits brought in reliance on that statute before 1960 was infinitesimal. In that year, there were 280 such suits in the United States courts; in 1970, 3586; and in 1985, 19,851 cases. (Federal judicial workload statistics, Administrative Office of the United States Courts).

A look at the subject matter of Supreme Court's opinions is also revealing. In the 1935-36 docket, only two of a total of 160 opinions dealt with basic human freedoms. In 1979-80, 80 of 149 cases fell into that category.

Charles Evans Hughes was quoted as saying that the Constitution means what the judges say it does. To a great extent that is true. The Constitution is always being elaborated on, always being ex-

plained. And so the text of that brief original document has been so enlarged that understanding it takes years of study. It is unrealistic to think that the constitutional law which governs us now is the same as it was in 1787.

No longer does the federal constitution take a hands-off attitude toward personal rights and liberties and leave those matters to the states. Whatever your belief as to the desirability of that shift in power, however, it is undeniable that it has occurred and it isn't all bad. At the same time, however, we should not forget that the framers of the Constitution believed that one way to prevent the abuse of power was to disperse it.

Although we read in the Federalist of fear that the states might overwhelm the central government, the opposite has come to pass. When the states proved unwilling or unable to handle some problems of government, the federal government stepped in and filled the vacuum. In the past century, that movement has been particularly marked in the field of civil rights.

I wonder if now it isn't time for the state governments to reclaim some of the leadership they have lost in this field. Personal rights are everybody's business, and the Constitution can be enforced in state courts as well as federal forums, and we tend to forget that we have state constitutions which guarantee human liberties.

Although I have emphasized a dichotomy between personal and property rights, both are guaranteed by the Constitution. Property rights are human rights too, and there is a fundamental interdependence between the two.

May I conclude by reminding you once again of the difference in roles of the legislative and judicial branches of the government, a distinction that is particularly striking when considering constitutional matters.

Justice Jackson once wrote, "The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the realm of majorities and officials, and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elelctions." *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 638-42 (1943).

May I close by quoting from a toast given by Chief Judge Gibbon, of our court, at a dinner of all the federal judges in the Third Circuit on Constitution Day, September 17, 1987.

The Constitution of the United States; symbol of the sovereignty of a free people comprising one great nation; not perfect, for mankind's handiwork is at best only perfectable; but still the greatest framework of government for free people yet to be devised.