Constitution Class Handout
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Lesson 08

Judicial Branch

Establish Justice

The United States Constitution was written to establish a federal government for the United States of America. Article III establishes the federal court system. Article I, Section 8 gives the Congress the power to "constitute tribunals inferior to the supreme Court." Given the power to establish these courts, Congress also has the authority to do away with any of these inferior courts. This power of Congress is repeated in Article III, Section 1 during the first sentence.

When reading Article III, one must keep in mind the fact that the article was specifically written to affect the federal court system, not the state courts. The authorities contained within this article, and the restrictions thereof, are to be applied to the federal courts, not the state courts. One must also bear in mind, as one reads this article, the additional limits placed on the federal courts by the 11th Amendment. *No case against a state by citizens of another state, or by the citizens or subjects of a foreign state, shall be heard by a federal court.*

In other words if citizens of a State sues a State, or foreign government sues a State, the case can't go to the federal courts. The highest that case can go is the State Supreme Court. These limitations placed upon the court system by the 11th Amendment were proposed by the people (House of Representatives) and the States (Senate), and finally ratified by the States, in order to better control a federal court system that was attempting to compromise State Sovereignty. Judges, the lesson of the 11th Amendment shows us, are not the wielders of the rule of law. They are not the powerful men of honor when it comes to the law. The guardians of the rule of law are the people, and the States. The courts had proven that they can become an enemy of the law, proclaiming that their rulings are the rule of law, but as the 11th Amendment reminds us, the judges are merely men, and their system is the rule of man attempting to manipulate the law

through their rulings. For their bad behavior, the people and the States judged them, and further limited them with a new constitutional amendment.

Good Behavior

The conventional understanding of the terms of federal judges is that they receive lifetime appointments because no time restriction is placed upon them in the Constitution. The only limitation on term placed upon the judges can be found in Article III, Section 1 where the Constitution states that judges, both of the supreme and inferior courts, "shall hold their offices during good behavior." Conventional wisdom dictates that bad behavior is defined as unlawful activities.

The definition of bad behavior is not limited to only illegal activities. Judges take an oath to preserve, protect, and defend the United States Constitution, which is the Law of the Land. Bad behavior, then, from the point of view of the Founding Fathers, may also include unconstitutional actions, or failure to preserve, protect, and defend the Constitution.

Impeachment by Congress may be used if a judge acts in bad behavior. If a judge refuses to attend the hearing at the behest of the United States Senate, the federal marshall may be used to retrieve the judge, and compel them to stand before Congress to answer for their bad behavior. Congress is the check and balance against the courts, not the other way around.

Limits

The powers of the federal courts "shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their authority."

The federal courts, in other words, may hear all cases that fall within their authority. These cases are regarding those in which the federal government has authority, be it by laws passed within the authorities granted to the federal government by the Constitution, or regarding issues related to treaties made that have been signed by the President and ratified by the U.S. Senate. The

courts may not hear cases that are regarding issues not within the authorities of the federal government.

A recent example would be the flurry of federal court rulings against State laws defining marriage as between a man and a woman. In California, the State's attempt to protect the government definition of marriage was with Proposition 8. The proposition changed the State Constitution to read that marriage is between a man and a woman. Marriage is not an issue that falls under the authorities of the federal government as expressly granted by the Constitution, nor is the issue of marriage prohibited to the States. Therefore, as per the authorities granted, and not granted, in line with the 10th Amendment, the government authority over marriage is reserved to the States. Since the issue of marriage is a State issue, the case should not have gone beyond the State Supreme Court. The federal courts hearing the case regarding Proposition 8, or any of the State laws regarding marriage, are acting unconstitutionally. The governors of these States, whose marriage laws were overturned by an activist federal court system, have the right to disregard all rulings by the federal courts on this issue. The action of ignoring the rulings is a type of nullification, and States have the right to nullify unconstitutional laws or actions by the federal government..

Other limitations have been placed upon the federal courts as well. The 11th Amendment changed the intent of Article III. As limited as the courts were supposed to be, the Founding Fathers realized the courts weren't limited enough, and as a result, the 11th Amendment wound up being ratified in 1795. The 11th Amendment was encouraged by a federal case called *Chisolm v. Georgia* (1793).

Chisolm v. Georgia (1793)

An increasing problem with federal intrusion on the States via the federal court system culminated in the case of *Chisholm v. Georgia* in 1793, which eventually led to the proposal, and ratification, of the 11th Amendment. A citizen of South Carolina sued the State of Georgia for the value of clothing supplied by a merchant during the Revolutionary War. After Georgia refused to appear, claiming immunity as a sovereign state, as per the Constitution (Article III, Section 2) the federal courts took the case. The judges in the court system tended to embrace a nationalist view of the federal government, and their nationalist point of view encouraged the judges to deem that in the *Chisolm v. Georgia* case, Georgia was not a sovereign state, therefore the Supreme Court entered a default judgment against Georgia. What ensued was a conflict between federal jurisdiction and state sovereignty that reminded the anti-federalists of their fears

of a centralized federal government consolidating the states, and destroying their right to individual sovereignty.

Realizing that the clause in Article III gave the federal courts too much power over state sovereignty, Congress immediately proposed the 11th Amendment in order to take away federal court jurisdiction in suits commenced against a State by citizens of another State or of a foreign state. This is the first instance in which a Supreme Court decision was superseded by a constitutional amendment, and evidence that the founders saw the legislative branch, and the States, as being a more powerful part of government over the federal judiciary.

Authorities

The 10th Amendment to the Constitution of the United States of America states that *the powers not delegated to the United States by the Constitution, or prohibited by it to the States, are reserved to the States respectively, or to the people*. The federal courts are included in that, as being a part of the United States federal government. As a result of the nature of how federal authorities are granted, the federal court system can only hear cases that fall within the constitutional authorities for the federal government.

When one understands the importance of protecting state sovereignty, and that the courts are supposed to be very limited in their scope and power, Article III becomes much simpler to understand.

As stated earlier in this section, the first sentence of Article III, Section 2, reads: The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States (which are only supposed to be passed if they are within the authorities granted by the Constitution), and Treaties made . . .

Notice the phrase, "arising under this Constitution." If the case is not involving the federal government as one of the parties, or is not regarding an issue that falls under the authorities of the U.S. Constitution, the federal courts can simply not take the case. The State Supreme Court, in those cases, is the highest court the case can go to.

Judicial Review

Federal judges maintain that the federal courts have the power of ***judicial review***, or the power to determine the constitutionality of laws. In response to the judicial urgings for the powers to judge the extent of the federal government's powers, in the Kentucky and Virginia Resolutions of 1798, Thomas Jefferson and James Madison warned us that giving the federal government through its courts the power of judicial review would be a power that would continue to grow, regardless of elections, putting at risk the all important concept of the separation of powers, and other much-touted limits on power. The final arbiters of the Constitution are not the courts, argued the Founding Fathers who supported the foundation of limiting principles of the U.S. Constitution. The power of the federal government must be checked by State governments, and the people. The States and the People are the enforcers and protectors of the U.S. Constitution.

In today's society it is commonly accepted that one of the roles of the federal court system is to interpret the Constitution, and issue rulings determining the constitutionality of laws. The Constitution does not grant this authority. The power of Judicial Review was given to the courts by themselves.

The first attempt to establish "Judicial Review" as an authority to the federal court system was through the Judiciary act of 1789, but the authority allowing the United States federal courts to hear a civil case because the plaintiff has alleged a violation of the United States Constitution, federal law, or a treaty to which the United States is a party, was limited to only the United States Supreme Court. The lower federal courts, at this point, were not allowed hear cases questioning the federal government's "federal question jurisdiction." Anti-federalists, and Jefferson Republicans immediately railed against the legislation, arguing that legislation cannot determine authorities granted.

The Federalists, in an attempt to allow the lower courts to wield the power of judicial review, briefly created such jurisdiction in the Judiciary Act of 1801, but it was repealed the following year. Unable to establish the federal court system as the final arbiters of the United States Constitution through legislative means, the Federalists turned to the courts themselves to drive into place the controversial authority.

During John Adams' final moments in the presidency, he appointed a whole host of "midnight judges" (appointing 16 Federalist circuit judges and 42 Federalist justices of the peace to offices created by the Judiciary Act of 1801) in the hopes of retaining federalist control of the courts as Jefferson's Democratic-Republicans gained control of the Congress, and Jefferson himself accepted the presidency.

Thomas Jefferson's Democratic-Republicans were appalled by the appointment of the Midnight Judges, recognizing the stacking of the courts as a desperate attempt by the Federalists to try and continue Federalist influence despite their election loss. In Jefferson's view, the Federalists "retired into the judiciary as a stronghold . . . and from that battery all the works of Republicanism are to be beaten down and destroyed."

While Adams was still in office, most of the commissions for these newly appointed judges were delivered. However, unable to deliver all of them before Adams' term expired, some of them were left to be delivered by the incoming Secretary of State, James Madison. Jefferson ordered them not to be delivered, and without the commissions delivered, the remaining new appointees were unable to assume the offices and duties to which they had been appointed to by Adams. In Jefferson's opinion, the undelivered commissions were void.

One of those appointed judges was a man named William Marbury. He sued, and the case worked its way up to the Supreme Court. After all of the dust settled, on February 24, 1803, the Court rendered a unanimous (4-0) decision that Marbury had the right to his commission, but the court did not have the power to force Madison to deliver the commission. Chief Justice Marshall wrote the opinion of the court, and in that opinion he wrote that the federal court system has the power of judicial review. Rather than simply applying the law to the cases, Marshall decided, based on case law and precedent, that the courts have the authority to determine the validity of the law as well. This opinion, however, went against all of the limitations placed on the courts by the Constitution.

One of the most obvious fundamental principles of the Constitution is the limitations it places on the federal government. The Constitution is designed not to tell the federal government what it can't do, but to offer enumerated powers to which the authorities of the federal government are limited to. The powers are granted by the States, and any additional authorities must also be approved by the States through the ratification of any proposed amendments. It takes 3/4 of the States to ratify an amendment. The congressional proposal of an amendment, with the ratification of that amendment, in the simplest terms, is the federal government asking the States for permission to a particular authority.

The power of Judicial Review, or the authority to determine if laws are constitutional, was not granted to the courts by the States in the Constitution. The courts took that power upon themselves through Justice Marshall's opinion of *Marbury v. Madison*.

The federal courts are a part of the federal government. The Constitution was designed to limit the authorities of the federal government by granting only a limited number of powers. Judicial Review enables the federal government, through the courts, to determine if the laws that the federal government made are constitutional. In other words, the federal government, through Judicial Review, can determine for itself what its own authorities are.

The idea that the federal court system has the authority to interpret the Constitution, and can decide if a law is constitutional or not, is unconstitutional, and is simply an attempt by those that believe in big government to gain power, and work towards a more centralized big federal governmental system.

Original Jurisdiction

In Article III, Section 2, Clause 2 the Constitution reads: "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have ***original Jurisdiction***."

What this means is that in all of those above listed cases, the federal appellate courts cannot take the case. Such cases must bypass the federal appellate system, and go straight to the Supreme Court. Since one of those stipulations is in regards to cases "in which a State shall be a Party," that means that the case "*U.S. v. Arizona*" where the federal government sued Arizona to block the State's immigration law, was unconstitutional. It was unconstitutional for the inferior federal courts to hear the case. The Supreme Court had original jurisdiction. Therefore, when the district court ruled in July of 2010 on the case, and struck down parts of the Arizona immigration law, not only did that court not have jurisdiction to hear the case in the first place, but the very act of striking down portions of the law was unconstitutional. After all, Article I, Section 1 grants the legislative branch all legislative powers, and those powers would include the ability to strike down law. The courts were not vested with any legislative powers, and therefore cannot strike down laws, or portions of laws.

Trial by Jury

Article III, Section II, Clause 3 sets up the right to a trial by jury, except in the cases of impeachment.

This clause also requires that a trial must be held in the state where the crime was committed. If the crime was not committed in any particular state, then the trial is held in such a place as set forth by the Congress.

Treason

Article III, Section 3 defines ***treason***, as well as the granting of the power by the Congress to declare the punishment. When the Constitution says that "no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attained," it means that the punishment cannot be inherited or passed down (***corruption of blood***), nor shall the person be denied due process (attainder).

Corruption of blood also means that all inheritable qualities are destroyed, and the Founding Fathers did not believe this English practice should be an American one.

No forfeiture meant that despite treason, the properties of the person could not be forfeited to the government. The property would remain as property of the individual, or remain with family. Even when it came to the despicable act of treason, the founders believed that the individual should be able to retain certain rights.

Terms:

Corruption of Blood: Punishment inherited or passed down, all inheritable qualities are destroyed.

Judicial Review: The unconstitutional authority of the federal courts to review law, interpret the Constitution regarding laws, and then determine the constitutionality of laws.

Original Jurisdiction: In the Constitution the Supreme Court has original jurisdiction on some cases, which means the case must proceed directly to the Supreme Court, and the high court must make a determination on whether or not to accept the case.

Treason: Levying war against the States, or adhering to the enemies of the States, giving aid and comfort to the enemy.

Questions for Discussion:

1. How would life in the United States be different if there was no federal court system?

2. Why did the Founding Fathers limit the authorities of the federal courts?

3. How has Judicial Review changed our system of government?

4. Why do you think the Supreme Court has Original Jurisdiction over some cases?

5. In what ways is the presence of a Judicial Branch important?

Resources:

Draft of the Kentucky Resolutions (Jefferson's Draft), Avalon Project, Yale University: http://avalon.law.yale.edu/18th_century/jeffken.asp

Madison's Notes Constitutional Convention, Avalon Project, Yale University: http://avalon.law.yale.edu/subject_menus/debcont.asp

Virginia Resolution - Alien and Sedition Acts, Avalon Project, Yale University: http://avalon.law.yale.edu/18th_century/virres.asp