A USER'S GUIDE TO THE CONSTITUTION – PART V

THE CONSTITUTION AND THE NEXT THIRTY YEARS

I. Summary

The Executive Branch: "All" policymaking is vested in Congress. (Art. I, sec. 1). This is one of the few occasions in the word "all" is used in the Constitution. Our modern society is technical and complex, however, so in 1946 Congress delegated rulemaking power to the Executive branch. While the APA was necessary, inasmuch as administrative rules are equally as enforceable as Congressional legislation, rulemaking is misaligned with the separation of powers principles of the Constitution because administrative rulemaking contains none of the checks and balances that accompany lawmaking.

Executive Orders, while never properly policymaking, have the appearance in a divided society of policymaking. A tactically sound Executive Order, for example, addresses an issue in a way that has popular support (*i.e.*, consensus), which makes it difficult to undo. *See, e.g.*, DACA.

There are two additional difficulties with the growth of the apparatus of the central government. The first is that the governmental "ecosystem", that is, government and the private sector with which it does business, has become increasingly self-absorbed and self-interested, rather than selflessly representative. The result is that the "us/them" dynamic is between: (a) the Government securing funding for its interests and, (b) the citizenry seeking representative governance. This problem is exacerbated by public sector unions and their ability to engage in political speech, endorse candidates, and donate to political candidates. For example, is the push to "defund the police", who are represented by one public sector union, really about spending less on public safety, or is it, rather, about transferring some services currently provided by law enforcement to an agency whose employees are represented by, for example, the SEIU?

The Judicial Branch: The appointment of Justice Coney Barrett in 2020 appeared to end the decades-long struggle for ideological control of the Supreme Court in favor of conservatives by a tally of 6-3. But the 'victory' is likely more pyrrhic than actual as the contest severely destabilized SCOTUS, whose primary authority comes from the respect citizens have for it. (moral suasion). The result may be that SCOTUS will find it difficult to undo its most socially controversial decisions, in which it enumerated new foundational individual rights, sometimes by a bare majority vote of 5-4. How did this occur? Who can fix it and how?

II. Where Should Policy Be Made?

(a) *In Congress or by an Administrative Agency?*

> "All" legislative power is vested in Congress. (*Const., Article I, Sec. 1*). The size and complexities of modern society, however, have resulted in the growth of a substantial bureaucracy within the Executive Branch. Policymaking can occur there via delegated rulemaking power.

- Administrative Procedures Act, *5 U.S.C. 500 et seq. (1946):*

authorizes agencies *within the Executive Branch* to make rules using power delegated to them by Congress; usually in policy areas that require technical, specialized knowledge, *e.g.,* environmental. *See* generally about delegation, *Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825)(Marshall, CJ).*

- when is Congress's delegation of rulemaking power overbroad?

in theory, when the delegation is without standards or criteria to channel rulemaking power. In practice, an improper delegation is rarely found. *See, Misretta v. United States, 488 U.S. 361 (1989),(see also, discussion therein by Scalia, J., at 415-416).*

- the difficulty posed by a large rulemaking bureaucracy is that bureaucrats are not elected, have long careers and are not otherwise directly accountable to the people.

See, www.MadisonCoalition.org, seeking to amend the Constitution to add a 'Regulation Freedom Amendment', requiring Congressional review of regulations in certain circumstances in order to "curb the power of un-elected federal regulators." Organization's motto is to: "End Regulation Without Representation".

- the Supreme Court may have begun to reign in the scope of agency rule-making. In *West Virginia v EPA, __ U.S. ___ (2022)(Sup. Ct. No. 20-1530, (6/30/22),* the Court reversed a sweeping regulation of the EPA about carbon emissions from fossil fuel power plants. The Court applied the so-called 'major questions doctrine' to reverse the rule. The doctrine provides that an agency must point to clear congressional authorization whenever in order to properly issue a rule which will have a major social or economic impact. The major questions doctrine is itself rooted in the separation of powers doctrine and judicial review of legislative acts. Justice Gorsuch wrote a concurrence, the first nine pages of which gives a good overview of the separation of powers doctrine applied to the administrative area.

(b) *By Congress or by the President*?

Executive power "shall be vested" in the President. *(Const., Article II, Sec. 1)*. The President "shall take Care that the Laws be faithfully executed". *(Const. Article II, Sec. 2)*. Presidents since George Washington have issued Executive Orders to carryout their responsibilities. An Executive Order is a formal directive to the agency within the executive branch charged with implementing a law. While not policymaking strictly speaking, an Executive Order can have the same effect as a federal law. Congress can pass a law to override the Executive Order, but the law is subject to a Presidential veto. A succeeding President can also revoke, alter or amend an Executive Order.

Examples of Executive Orders:

*Ex Parte Merryman, 17 F. Cas. 144 (1861)(*Suspension of Habeas Corpus by

President A. Lincoln during Civil War; ruled unconstitutional by Chief Justice Taney, sitting as a federal Circuit Judge.

Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952) (*see also*, at p. 634, concurrence by Justice Jackson discussing the executive power to issue Orders) (during the Korean War, President Truman put steel mills under federal control to avert a strike; Executive Order ruled unconstitutional).

In our time, notice how often gridlock in Congress results in the use of an Executive Order or agency rulemaking to 'fill the void'. When, if ever, should Congress's failure to act be considered its' "policy" to accept the 'status quo'?

III. The Judicial Branch: Is Enumerating New Foundational Liberties Policymaking in Disguise?

1 (a) Enforcing the Bill of Rights and the Wrinkle of the Fourteenth Amendment: The Selective Incorporation of the Bill of Rights into the Fourteenth Amendment.

- Originally, SCOTUS' judicial review of the Bill of Rights and the Ninth Amendment applied only to the federal Government. SCOTUS' power of judicial review did not apply to the States. Barron v. Baltimore, 32 *U.S.* 243 (1933).

- After the Civil War, it was necessary to make the legal status of former slaves that of fully political equal citizens. That is the initial purpose of the Fourteenth Amendment. To give the Amendment teeth, the federal judiciary was given the power of judicial review over *State* law. (*Ibid*.: "No State shall" deny privileges and immunities of citizens, nor "…shall any State" deprive its citizens of due process of law or of equal protection.).

- The Supremacy Clause, Art. VI, makes the Constitution the supreme law of the land and requires every state judge to enforce federal law.

- The Fourteenth Amendment remained linked to its post-civil war role until the early 1960's when SCOTUS used the Fourteenth Amendment to incorporate most but not all of the Bill of Rights into the Amendment's Due Process Clause. (Selective Incorporation). This had the effect of centralizing foundational rights under the Federal Government at the expense of the states and standardizing nation-wide the constitutional *minima* for the incorporated rights. (State Supreme Courts may give more rights than the federal constitutional *mimina*, but they may not give less.)

(b) SCOTUS' Further Expansion of Rights Jurisprudence over the States: Substantive Due Process.

- SCOTUS next used the Due Process Clause of the Fourteenth Amendment to identify formerly unenumerated rights as "fundamental." The legal theory is that

the Clause expresses 'substantive' as well as 'procedural' rights. When a substantive fundamental right is found in the Due Process Clause, it invalidates a duly-enacted State law to the contrary.

- Notably, SCOTUS did not use the Ninth Amendment to declare these newly enumerated rights. Why? Because due to *Barron v. Balitmore supra*, the Ninth Amendment only applies to the federal government. The Fourteenth Amendment, however, gave SCOTUS oversight over the laws of every State in conflict with the newly enumerated right.

(c) Enumerated Rights: How Should SCOTUS Decide if a Right is Fundamental?

- It has been recognized since the Declaration of Independence that unenumerated unalienable rights exist. The Constitution is silent, however, on how SCOTUS should go about determining what those unenumerated rights are. The Constitution is equally silent on the sources of authority the Court should use to enumerate a fundamental right. SCOTUS filled the vacuum itself in a way that gave it the broadest latitude to declare formerly unenumerated rights.

- Recall that Jefferson based the right to rebel upon natural law:

> "[w]hen in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which *the Laws of Nature and of Nature's God* entitle them, a decent respect to the opinions of mankind requires that they should declare the cause which impel them to separation'. [Declaration of Independence (emphasis added)].

The Supreme Court has never confined itself to natural law as the principled source to identify a fundamental right. This broadened the range of rights that could be declared 'fundamental'. (*e.g.*, natural law does not recognize abortion as a fundamental human right).

Examples:

Brown v. Board of Ed., 347 U.S. 483 (1954)(unanimous court, (9-0) rules 'separate but equal' state laws unconstitutional. Ruling based on grounds that the 14th Amendment accords all equal civil and political rights and that, as applied to public schools, 'separate but equal' is inherently unequal, expressly overruling *Plessy v. Ferguson, 163 U.S. 537(1896*). (Strikes down state laws of Kansas, South Carolina, Virginia and Delaware).

Roe v. Wade, 410 U.S. 113(1973) (7-2 ruling, including 3 concurring opinions)(relying on "medical and medical-legal history" about attitudes towards abortion, invalidates Texas law criminalizing abortion, based upon substantive Due Process Clause of the Fourteenth Amendment). (Overruled

by *Dobbs v. Jackson Women's Health Org., 597 U.S. ____ (Sup. Ct. No. 19-1392, (6/24/22)*).

Oberfell v. Hodges, 576 U.S. 644 (2015)(5-4 ruling relying upon principles and traditions about marriage, invalidates the laws of Michigan, Kentucky, Ohio and Tennessee, based upon substantive Due Process and Equal Protection Clauses of the Fourteenth Amendment).

(d) What is the Impact of SCOTUS' Power to Declare New Enumerated Rights on the Optimal Ability of the Political Branch to Obtain Consensus on Social and Cultural Issues?

- Supreme Court rulings are enforceable nationwide and are zero sum. Whenever the Court uses the Fourteenth Amendment to enumerate a new unalienable right, it blocks the policymaking processes of the federal and state legislatures from reaching consensus on a contentious issue, as the Court's ruling removes the topic from the policy-making sphere altogether. (Regulation is at the margins only.)

- The problem is particularly acute when the Court uses the Fourteenth Amendment to strike down a duly-enacted State law. Ours is a big country with regional differences. Policymaking on the local level tailors governance to local conditions. (The virtue of federalism is that it is the mechanism that accommodates local preferences.) That benefit is lost when the Supreme Court imposes policy nationwide, often about a contentious issue, and often by a bare majority vote. The result is a growing division, discontent and restlessness that federal, state and local political processes cannot readily address, as their only recourse is a hard-to-achieve national constitutional amendment.

- Theoretically, enforcement of the Bill of Rights by SCOTUS is designed as a check against an overbearing majority enacting laws that take away the liberty of the minority. This is the Court's appropriate and noble task. Declaring new fundamental rights changes the calculus, however. If the right was not declared fundamental, the individual's course of action would be to advocate for it in the political arena. Bearing in mind that policymaking is designed to be a search for consensus, the advocate for a 'right' can use the political process the same way as every other advocate for a minority interest: seek consensus, seek to persuade and obtain legislation.

- When SCOTUS enumerates a new fundamental right, however, the 'will' of the minority is imposed on the majority, nationwide. Moreover, from the standpoint of the right's proponent, litigation is a far easier alternative than trying to enact a law in fifty states. (Statutes overruled using the Fourteenth Amendment are on topics beyond the federal government's policymaking power due to the limitations of Art. I, sec. 8). This is inconsistent with federalism and with the Founder's design to make policymaking the heart of the self-governance. (*See, e.g, Const. Art. I, Sec. 1:* "[a]ll legislative powers" vested in Congress).

(e) What Is Moral Suasion and Why Does It Matter to the Stability of the Court?

- SCOTUS is notable in that it has *no power* to enforce its own rulings; that is an Executive Branch function. The Court depends on the respect that it has as an institution, called 'moral suasion' to ensure compliance. Judicial abuse of power reduces the public's respect for its rulings; which in turn diminishes the power of the Court.

- The impact of the SCOTUS's expansive use of the Fourteenth Amendment in a zero-sum environment is that all the energies of adherents on either side of a contentious issue shifted from the consensus-building, policymaking sphere to the process of confirming judicial appointments. One side wanted Justices who would uphold a right; the other wanted Justices who would overturn the right. This shift began with the Bork nomination, which was blocked, and intensified with the Thomas and Kavanaugh nominations. There, the nominations were not blocked but each Justice was discredited, reducing the moral suasion of SCOTUS, and especially of these Justices. (In our time, is the threat of judicial impeachment used as a sword of Damocles to constrain judicial independence?).

- The Coney Barrett appointment does not dissipate the adversarial energy, because the underlying contention abides. So, notwithstanding the current conservative advantage on the Court, the Court is likely entering a new phase of attacks on its legitimacy from the left. Consider what occurred (pre-Coney Barrett) in a recent case involving a restrictive NYC gun regulation.

  The Court granted certiorari in Jan., 2019. Thereafter, NYC changed its regulation to loosen the restriction and to avoid the Court's merits review by making the dispute 'moot'. Several Senators signed an *amicus* brief in support of NYC's effort to moot out the case.

  The brief was written by U.S. Senator Sheldon Whitehouse, (D-R.I.) and joined by Senators: Hirono (D-Hi.); Blumenthal (D-Ct.); Durbin (D-Mi.); and Gillibrand (D-N.Y.) In it, Senator Whitehouse suggested SCOTUS may be changed by outside forces:

  > "Today, fifty-five percent of Americans believe the Supreme Court is "mainly motivated by politics" (up five percent from last year); fifty-nine percent believe the Court is "too influenced by politics"; and a majority now believes the "Supreme Court should be restructured in order to reduce the influence of politics". To have the public believe that the Court's pattern of outcomes is the stuff of chance (or "the requirements of the law") is to treat the "intelligent man on the street" as a fool.

> The Supreme Court is not well. And the people know it. Perhaps the Court can heal itself before the public demands it be "restructured in order to reduce the influence of politics." Particularly on the urgent issue of gun control, a nation desperately needs to heal." [*Ibid.*, at p. 17-18 (internal citations omitted)].

See, Amicus brief: *NYS Rifle & Pistol Assoc., Inc. v. City of NY, NY, S.Ct., 590 U.S. ___ (2020)*

But see in response, the August 29, 2019 letter of the Senate Majority Leader and every Republican Senator about the above-quoted language:

> "But our colleagues did more than raise legal arguments in favor of mootness. They openly threatened this Court with political retribution if it failed to dismiss the petition as moot.
>
> …
>
> For our part, we promise this: While we remain Members of this body, the Democrats' threat to "restructure[ ]" the Court is an empty one."

The Court heard argument on the merits and on the mootness question on the same day. It then, in April 2020, dismissed the case as moot and did not reach the merits issue. Did the Court surrender?

- Court packing and the use of Congressional power are under active consideration. The Biden Administration has appointed a group to study the issues. If nothing else, the message to SCOTUS is to maintain the *status quo* regarding its newly-recognized enumerated rights – or else. For these reasons, the Court's ability to act in this area is circumscribed, even if it were inclined to do so. What, if any, will be the impact on SCOTUS because it overruled *Roe*?

2. What Can be Done and Who Can Do It? Can Meaningful Checks and Balances Be Introduced to Prevent SCOTUS from using the Fourteenth Amendment to Overreach?

a. OPTION A: *SCOTUS Uses Existing Judicial Doctrines Or Creates New Doctrines to Steer Clear of the Political Arena*

- Justiciability: Prudential court doctrine not to rule on matter over which the federal courts otherwise have jurisdiction. *See, e.g,, Rucho v. Common Cause, 588 U.S. ___ (2019)(S.Ct. Dkt. No. 18-422)* ('partisan' gerrymandering cases beyond the reach of the federal courts).

- Decisional Case Law? The Court has the power to identify and restrict the sources of authority from which a principled finding of a fundamental right can be made, as well as the authority to develop a test to determine whether the right is found. This

is the essence of appellate decisionmaking and gives the public and policymakers predictability in the discernment of as-yet undeclared fundamental rights.

- Court Rule or Internal Practice? The Court has the power to adopt a Rule or internal practice requiring that any case declaring a fundamental right through the Due Process or Equal Protection Clauses of the Fifth or Fourteenth Amendments must be by a unanimous (*i.e*., 9-0) vote. Note that the Court defines its Certiorari jurisdiction, *see, S.Ct. Rule 10*, and by internal practice, requires a vote of four Justices to add a case to its docket.

b. OPTION B: Constraints externally imposed on SCOTUS:

- By Congress or By Constitutional Amendment Per Art. V? A law or Amendment setting forth the sources of authority SCOTUS must use and/or the test SCOTUS must follow to ascertain the existence of substantive fundamental rights? As to congressional power *See*, *Const. Art. III, Sec.2*: "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*. (emphasis added). *See also*, *28 U.S.C. 2071 et als*. *But consider*, separation of powers obstacle?

- A law or Amendment requiring that such rights be established only by the Court's unanimous vote? *See, e.g, Brown v. Bd. of Ed., 347 U.S. 483 (1954)(unanimous decision).* The value of forbidding the enumeration of any new unalienable right absent a 9-0 SCOTUS ruling is that a 9-0 vote represents such consensus along SCOTUS' ideological spectrum that it best approximates consensus in the political spectrum as well. It also signals solidarity from the bench.