The Centralization of American Power and the Loss of State Sovereignty

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Ever since the 1787 Constitutional Convention, the federal government has progressively increased its authority over the states. This began after the supremacy of states sovereignty under the Articles of Confederation was subverted through the development of the U.S. Constitution. Congress, acting under the authority of the Articles, had only authorized revision to the Articles creating the confederation of states (Levin, 2005, p. 207) and not authorized development of completely new system of governance. Once the Constitution was ratified, there was still a presumption of state sovereignty, other than certain powers which were delegated to the new federal system, which was intentionally divided into three distinct branches, legislative, executive, and judiciary, that were supposed to keep each other in check through a balance of power. It will be demonstrated that there was an initial historical understanding of a limited federal government that favored the rights of the several states, and that through usurpation of judicial powers, and also executive authority, rights were stripped from the states and assumed by the federal government.

It is most obvious that the founding fathers of the United States did not intend for any one branch to be more powerful than another. But in the 1803 ruling in the Supreme Court cases Marbury v. Madison, (5 U.S. 137) the court authorized itself the ability to examine laws to determine constitutionality. This power has become known as judicial review. Mark Levin states in his book Men in Black that “… if the framers had wanted to empower the judiciary with a legislative veto, they could have done so. They did not. …It was the clear intention that no one branch would be subsumed by any other” (2005, p 26). Supportively, Thomas Jefferson in a letter to Edward Livingston (in 1825) wrote of the judiciary, “This member of the Government was at first considered as the most harmless and helpless of all its organs. But it has proved that the power of declaring what the law is… by sapping and mining slyly and without alarm the
foundations of the Constitution, can do what open force would not dare to attempt.” (Levin, 2005, p. 23). This power to say what the law means and how it may be applied is as immense as it is unintentional. Two major issues arise from this, the first is that judges usurp the function of declaring and making law, which is a power enumerated to the federal legislature; the second is, that by taking on that role, there is no accountability for laws that they generate. Federal judges, through being appointed for periods of “good behavior,” are insulated from the possibility of the public opinion affecting their job, as it does with elected officials. They declare law without the consent of the governed (see U.S. Declaration of Independence, para 2). The only Constitutionally valid method of removal for not being on “good behavior” is impeachment, as stated in Article III section 1 of the U.S. Constitution. The definition of “good behavior” is left open to interpretation. Since the founding of the United States, “Sixty-one federal judges or Supreme Court Justices have been investigated for impeachment, of whom thirteen have been impeached and seven convicted” according to David Barton (2002, para. 2). It is uncommon to successfully impeach a judge, so essentially, appointments are for life. This shields judges and encourages them to rule according to their conscience or ideology, as so often is seen.

In Barron v. Baltimore 32 U.S. 243 (1833), it was made explicit, that the Bill of Rights was designed to protect American citizens from the federal government, and not from their respective state governments, which had constitutions already to govern their conduct. The opinion of the Court stated,

These amendments demanded security against the apprehended encroachments of the general government -- not against those of the local governments. In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required
majority in congress, and adopted by the states. These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them. We are of opinion that the provision in the Fifth Amendment to the constitution, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states. We are therefore of opinion that there is no repugnancy between the several acts of the general assembly of Maryland, given in evidence by the defendants at the trial of this cause, in the court of that state, and the constitution of the United States. This court, therefore, has no jurisdiction of the cause; and it is dismissed (Barron v. Baltimore) (emphasis added).

In this case, the Court showed restraint, denying its jurisdiction over the state in this matter. The Court had already assumed its right of judicial review (in 1803) and yet after using that authority, determined that the Bill of Rights, applied to the federal government solely, and therefore also the Fifth Amendment, which this case hinged specifically upon.

State and federal courts operated under the precedent of Barron prior to the American Civil War. The notion that the Union was nobly trying to free the slaves that the Confederacy wanted to keep could actually have been dealt with during the Dred Scott case which came before the Supreme Court as Scott v. Sanford 60 U.S. 393 (1857). At issue was the free status of a slave (Dred Scott) who lived in Minnesota while following his owner who was an army surgeon. The owner died and the widow (who inherited Scott) was in New York. Scott brought suit to win his freedom and the Circuit Court of St. Louis decided in his favor. Congress had passed a law making slavery illegal in the Territories, where Scott lived for a number of years.
On appeal to the Supreme Court, Chief Justice in the opinion of the court ruled that Congress could not make a law regulating slavery in the territories (as it violated due process rights of slave owners) and that negroes were not citizens and therefore could not bring suit in that court. The Circuit court decision granting Scott freedom was reversed. Justice Curtis wrote a dissenting opinion pointing out that several states provided for citizenship to negroes in their state constitutions, to include New Hampshire, New York, and New Jersey (*Scott v. Sandford*). So under the New York constitution, had Scott been considered a New Yorker, he would have been a citizen and hence been able to have standing to bring the suit in federal court. Justice Curtis wrote:

> The conclusions at which I have arrived on this part of the case are:
> First. The free native-born citizens of each State are citizens of the United States. Second. That as free colored persons born within some of the States are citizens of those States, such persons are also citizens of the United States. Third. That every such citizen, residing in any State, has the right to sue and is liable to be used in the Federal courts, as a citizen of that State in which he resides. Fourth. That as the plea to the jurisdiction in this case shows no facts, except that the plaintiff was of African descent, and his ancestors were sold as slaves, and as these facts are not inconsistent with his citizenship of the United States, and his residence in the State of Missouri, the plea to the jurisdiction was bad, and judgment of the Circuit Court overruling it was correct.

> I dissent, therefore, from that part of the opinion of the majority of the court, in which it is held that a person of African descent cannot be a citizen of the United States; and I regret I must go further, and dissent both from what I deem
their assumption of authority to examine the constitutionality of the act of Congress commonly called the Missouri Compromise Act, and the grounds and conclusions announced in their opinion (Scott v. Sandford, dissent of Mr. Justice Curtis, para. 73-74).

The Court should have acted in this case by either affirming the lower court, or refusing to grant certiorari. Rather, the court declares that negroes aren’t citizens and so have no standing for the suit. Taney overruled Congress’ right to enact laws in the territories, exercising its judicial review powers. This merely added fuel to the fire between the so-called free and slave states. Although the slave states liked the ruling, it was clear that the court did not have that authority, adding dissent to their already grumbling populations, upset over high protectionist tariffs that gave Northern States an unfair economic advantage (DiLorenzo, 2003, p. 63). The Dred Scott decision has been argued to have been a major cause of the Civil War and is where the first instance of substantive due process enters the American scene. “It seemed that the Missouri Compromise, which had stood for thirty-seven years, was unconstitutional. Congress could not restrict slavery anywhere. By doing so, Congress had denied slaveholders ‘due process of law’” (Keeling, 2003, para. 5). The ruling of the court directly contradicted comments by Alexander Hamilton in 1787, “The words ‘due process’ have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; they can never be referred to an act of legislature” (Hamilton, February 6, 1787).

Lincoln advocated not expanding slavery to the western states, and slave states became a minority in the Congress, which would inevitably allow passage of laws against their economic institution of slavery, and eventually devastate their economy. (Wikipedia Online Encyclopedia, “American Civil War”). Several states eventually seceded from the Union and form the
Confederate States of America. Finally, South Carolina fired on Fort Sumpter to regain what it considered was her fort, and President Lincoln sent in troops to put down the revolt. The fact that Lincoln sent in troops to stop a state’s secession, which was considered a right of a state by many (even in the north), sparked several others to secede as well, to keep the federal government from usurping state authority and power. In Thomas DiLorenzo’s book The Real Lincoln, he documents Lincoln’s targeting of dissenters and other civilians, including print newspapers in the North such as *New York World* and *Journal of Commerce* (DiLorenzo, ch. 6) in May 1864. This is another indicator of Lincoln’s philosophy of federal rights over personal rights as well as states’ rights. In violation of the First Amendment’s free speech clause, Lincoln imprisoned the editors of those newspapers (DiLorenzo, p. 130). There is even some evidence that after Lincoln suspended habeus corpus, and Chief Justice Roger Taney disagreed with that power as an executive branch power absent congress’ approval (see *Ex Parte Merryman*, 17 F. Cas. 144, 1861) Lincoln attempted to arrest Taney (Adams, 2004).

After the War Between the States\(^1\) ended and Reconstruction began in the South, Congress eventually passed the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution to counteract the precedent set by the Dred Scott decision, by declaring slavery illegal, guaranteeing due process and equal protection under the law, and right to vote for blacks. The Fourteenth Amendment was passed in the South only after military occupation (Reconstruction Act of 1867) and threat of prohibiting congressional representation until the lower ten states ratified it (DiLorenzo, p.207-08).

Then with *In Re Slaughter-House Cases*, 83 U.S. 36 (1872), the understanding of the due process clause of the newly enacted Fourteenth Amendment was tested. A consolidation of

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\(^1\) This is the official title of the war as per an official Congressional resolution declaring that in the 1920’s. (Wikipedia Online Dictionary).
several suits were brought from Louisiana to the Supreme Court alleging that by New Orleans creating a monopoly in the slaughterhouse business, that the owners of other slaughterhouses were denied due process and equal protection and the Fourteenth Amendment should be construed broadly to cover corporations as well as freed slaves. The opinion of the Court states,

The adoption of the first eleven amendments to the Constitution so soon after the original instrument was accepted, shows a prevailing sense of danger at that time from the Federal power. And it cannot be denied that such a jealousy continued to exist with many patriotic men until the breaking out of the late civil war. It was then discovered that the true danger to the perpetuity of the Union was in the capacity of the State organizations to combine and concentrate all the powers of the State, and of contiguous States, for a determined resistance to the General Government. Unquestionably this has given great force to the argument, and added largely to the number of those who believe in the necessity of a strong National government. … our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights -- the rights of person and of property -- was essential to the perfect working of our complex form of government… (In Re Slaughterhouse Cases) (citations deleted).

Again, the Court rules in favor for the states power regarding civil rights, albeit a divided court. The Bill of Rights is not extended to the states at this time. But the prevailing modern understanding of civil rights had its origins in the dissent by Justice Field (Wikipedia, “Slaughterhouse Cases”).
In 1914, the Court in *Weeks v. U.S.*, 232 U.S. 383 (1914), found that a law enforcement officer who obtains evidence in violation of federally recognized rights (in that case the 4th Amendment) may not utilize that evidence against the accused, thus providing a special protection. The court also says that “The Fourth Amendment is not directed to individual misconduct of state officers. Its limitations reach the Federal Government and its agencies. (*Boyd v. United States*, 116 U.S. 616).” (*Weeks*, para 9). This so-called exclusionary rule was argued as a right by extension from the Fourth Amendment, in that, without the exclusion of illegally obtained evidence, that amendment is useless.

In *Nardone v. U.S.* 308 U.S. 308 (1939), Justice Felix Frankfurter popularized as a legal term, “fruit of the poisonous tree” to represent illegally obtained evidence; specifically in this case, information obtained during an unauthorized wire tap. The exclusionary rule was upheld but still only for federal investigations. Then in *Wolf v. Colorado*, 338 U.S. 25 (1949) the Court ruled in favor again of only extending the exclusionary rule to the federal courts. The argument against this stated that “Security of one's privacy against arbitrary intrusion by the police, which is at the core of the Fourth Amendment, is basic to a free society and is therefore implicit in the concept of ordered liberty, and as such enforceable against the states through the due process clause” (*Wolf*, Headnote 3). This decision did incorporate the Fourth Amendment, via the Fourteenth to the states, but nonetheless the exclusionary rule did not apply (*www.landmarkcases.org*: “*Mapp v. Ohio*”).

Historically, what is occurring behind the scenes is unprecedented in American history. President Roosevelt introduced his New Deal legislation in 1933 creating a massive federal bureaucracy. In 1936, the Supreme Court began weakening the New Deal, ruling it parts of it unconstitutional, as it did in *Railroad Retirement Bd. v. Alton Railroad Co.*, 295 U.S. 330 (1935).
The court wisely concluded that the legislation “is an attempt for social ends to impose by sheer
fiat non-contractual incidents upon the relation of employer and employee, not as a rule or
regulation of commerce and transportation between the States, but as a means of assuring a
particular class of employees against old age dependency. This is neither a necessary nor an
appropriate rule or regulation affecting the due fulfillment of the railroads' duty to serve the
public in interstate transportation” (Railroad Retirement Bd.). The declarations by the Court
made Roosevelt rather unhappy (Levin, 2005, 132-33). After the rulings, Roosevelt wanted to
get New Deal advocates on the bench to support his “constitutional philosophy” (Ulmer, 1981, p.
204). He initially tried to appoint 6 more justices to alleviate the pressure on the six justices over
70 years old. This failed in congress. Having been elected four times to the office of the
presidency gave Roosevelt an extraordinary amount of time (12 years) to appoint Justices to the
Supreme Court. By the time of Roosevelt’s death, he’d appointed a total of nine justices to the
Court (Wikipedia, “Franklin Delano Roosevelt”). These justices set the stage, either by presence
or by precedent, for the soon to come more liberal interpretations of the constitution based on the
concept of substantive due process and federal authority.

Finally in 1961, the Supreme Court made the exclusionary rule applicable to the state
courts in Mapp v. Ohio, 367 U.S. 643. Dollree Mapp refused entry into her residence to several
police officers. They eventually forced their way in, produced a supposed search warrant and
refused to let Mapp read it. During the search of the house, they located “obscene materials” in a
truck which were proscribed by Ohio law. Mapp was arrested for that offense and found guilty.
On appeal, the case went to the Ohio Supreme Court where Mapp’s attorney argued that the

2 Other cases had the same result, such as Schechter Poultry Corp. v. U.S., 295 U.S. 495 (1935) and Carter v. Carter
Coal Company, 298 U.S. 238 (1936).

3 The justices FDR appointed include Black, Reed, Frankfurter, Douglas, Murphy, Stone, Burnes, Jackson, and
Rutledge.
evidence was illegally obtained and should be excluded in accordance with the federal law. The Ohio Court stated that “this court has held that evidence obtained by an unlawful search and seizure is admissible in a criminal prosecution, *State v. Lindway*, 131 Ohio St. 166, and the Supreme Court of the United States has held that the Constitution of the United States does not usually prevent a state court from so holding. *Wolf v. Colorado*, 338 U.S.” (*State of Ohio v. Mapp*, 170 Ohio St. 427 (1960)).

Regarding the exclusionary rule, though the Supreme Court inferred the concept from the Fourth Amendment via the Fourteenth, this rule is exceedingly controversial, probably the most controversial issue within policing writ large (Siegel & Senna, 2004, p. 192). This was not the only option available to the court. The court could have allowed this type of evidence to stand (as it would in an inquisitorial system. The truth is that Dollree Mapp possessed the illicit material. The court need not exclude items, but can punish officers administratively or criminally if state searches without a warrant are determined to be unlawful. Allow the accused to sue the officer for violation of state rights, if they exist.

This case marks what is essentially the federal government’s complete domination of the states. There is little question now, as to whether a federal court ruling is incorporated to the states, requiring adherence to that precedent. This liberal interpretation of the Constitution has led to two major issues facing the justice American courts provide; 1) the subjection of the states to federal scrutiny, and 2) the development of substantive due process. Once the states are beholden to federal regulation, the process of social engineering can begin. Essentially, substantive due process in practice violates procedural due process, as the Court declares new rights that everyone is compelled to believe and obey. This is the job of the legislative branch according to the constitution. Although *Mapp* was focused on procedural due process, the end
goal is the same; to make American law and society in the image that the Justices have molded. There has been a Fabian incrementalism that has taken its toll on America’s courts, who are now creating new and strange rights that were extrapolated from “penumbras, formed by emanations from those guarantees that help give them life and substance” (see *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

It is clear that the lack of a judicial veto in the Constitution makes the self-granting of the right to judicial review unconstitutional. The founding fathers provided a clear conceptualization of a limited federal government that favored the rights of the several states. It is solely through the demonstrated usurpation of judicial powers, and also executive authority under Lincoln, that rights were stripped from the states and assumed by the federal government. The unfettered power of the Supreme Court justices is troubling, since the entire political basis of the Constitution was to provide a balance of power. More troubling is the social engineering project that they have made themselves part of. There is little recourse for those citizens that do not want to live in their brave new world.
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