THE PERFECT UNION – A THEORETICAL AND LEGAL ANALYSIS OF THE CONSTITUTION’S BOLD AIM

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The US Constitution’s preamble explicitly states the desire that a ‘more perfect union’¹ will form from the governmental order that it provides for. Thomas Paine once remarked that a government unable to preserve the peace is ‘no government at all’.² Peaceful government requires public acceptance. In flexibly accommodating ‘new responses to new challenges’,³ whilst balancing respect for differing ideologies, the Constitution created the ‘perfect union’ desired.

Catalyst for Enacting the Constitution

Abraham Lincoln stated that the ‘more perfect union’ sought is not possible if the country does not stay together.⁴ Therefore, in order to achieve the aim stated, the federal government must exercise its power in a way that continually maintains national unity. The Articles of Confederation were unsatisfactory. The lack of central regulation meant that there was a fear of potential trade barriers causing economic conflict.⁵ The country was also very weak financially, due to Congress’s inability to raise money and enforce taxes.⁶ The potential for conflict was present, and the Constitution was, in part, formed to pragmatically deal with this weakness.⁷

Interests Pursued by Constitutional Founders

Strong obedience to one sole political principle did not occur. Those who drafted and ratified the Constitution acted upon both ideological and selfish grounds. Silvia notes

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¹ Thomas Gordon, Newcastle University (LLB Law) twgordon91@gmail.com
² U.S. Const. preamble.
⁷ ibid.
⁸ ibid.
that until 1913, when Beard explained otherwise, people thought that idealism alone drove the Founders to form the new Constitution. There are strong philosophical commitments within the document. The Constitution strongly adheres to the separation of powers. Congress, the Executive Branch, and the Judiciary are all given different obligations under Articles I, II and III respectively. This was to prevent the potential dangers inherent in the dominance of the legislatures seen under the Articles of Confederation. The Constitution formed a government built around federalism. Central government has only enumerated powers, the rest being reserved by the States or by the people themselves. Federalism is seen as necessary to protect individual liberty, as there is a fear that if local powers are disregarded, citizens would exercise less control over their elected representatives, thus potentially ‘subverting the foundation of a free government’. However, the national government was made to be stronger than it was before, so that it could survive to protect such liberties. Most importantly, it was given a taxing power, and a power to regulate commerce. Both are vital to securing economic stability, and preventing attritional state conflict.

As well as these ideological motives of limiting central governmental interference in citizens’ lives, the Founders voted for the Constitution in order to further their own interests. Charles Beard was the first to put forward this economic theory. His exact explanation is not supported nowadays, as empirical evidence has shown that the distinctions that he drew were too simplistic. However, McGuire has demonstrated that a direct link existed between Founders’ personal circumstances, and their manner of voting. For example, at the North Carolina ratifying convention, the likelihood of delegates from non-commercial areas voting favourably was 0.002, as opposed to

10 ibid, 374-375.
11 U.S. Const. amend X.
12 Bond v United States 564 US (2012), slip op at 10 (opinion of the Court).
14 U.S. Const. art I, §8, cl 1.
15 U.S. Const. art I, §8, cl 3.
17 Silvia (n 8) 3.
0.753 for delegates residing in commercial areas. Additionally, at the Virginia ratifying convention, the chance of an affirmative vote was almost doubled by the delegate not being a slave-owner.

McGuire and Ohsfeldt state that the trend was clear. Those who would have economically benefitted from the increase in centralised control under the new Constitution, in contrast with the Articles of Confederation, were more likely to vote in favour of its ratification. This is not to say that the Constitution was a document designed wholly with interstate trading capitalists in mind. Both federalism and the separation of powers, liberal political tools to limit state control, are key features of the Constitution.

The above discussion displays a wide range of concerns that the Founders had. To answer the title statement, there was not a single driving impulse amongst the Founders. However, the above discussion displays that the Constitution’s aim can be stated as the accommodation of liberal enlightenment values under an effective system of government, aiming to rectify key weaknesses found under the Articles of Confederation. The political balance sought by the Constitution has been effectuated over time by judicial manipulation of the ‘penumbra of doubt’ surrounding the constitutional provisions, as contemporary governance has necessitated. This can be seen in the history of the Commerce Clause’s interpretation by the courts.

The Commerce Clause and Constitutional Interpretation

The Constitution states that Congress shall have the power to ‘regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes’. This transferred power to the national government, to enable centralised economic control in a manner that the Articles of Confederation did not allow for. The Federalist Papers noted the potential for hostility between the States under the

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18 McGuire (n 5).
19 ibid.
22 U.S. Const. art I, §8, cl 3.
previous Constitution. States’ economic protectionism, it was feared, would ‘beget discontent’. Unity of government therefore required unity of commercial interests. Unsurprisingly, those with commercial interests were more in favour of this clause than those without such interests. The original draft of the Commerce Clause stated that such legislation could only be passed by 2/3rds of each Congressional House. Bare majorities would not be enough. Those at the Philadelphia Convention who were merchants in interstate or international commerce unanimously opposed the 2/3rds requirement. Those from less commercial areas voted more favourably. It is not surprising that that capitalist class supported the provision allowing for more centralised economic control. This is because capitalists require a constant expansion of their market. Trade barriers cannot, therefore, be sustained in the long term under such an economic system.

The Commerce Clause provides for effective government, but importantly imposes limits upon that power, thus respecting federalism. It is therefore reflective of the balancing act that the whole Constitution strives for. The debate over the correct outer limit of national governmental power over commerce has led to two centuries of jurisprudential oscillation.

Hopes of extremist state-centric application of the Commerce Clause were scuppered very quickly by United States v The William. In this case, Congress used the Commerce Clause to justify a trade embargo that it had placed for political reasons. The embargo harmed commerce. It was held that the commerce power could be exercised at the discretion of the national government. The fact that commerce was affected negatively was held to be irrelevant. This shows a large shift of power away from the states.

27 ibid.
28 ibid.
30 28 F.Cas. 614.
31 ibid at 621 (District Judge Davis).
In 1824, Chief Justice Marshall in *Gibbons v Ogden*[^32] laid down many of the doctrinal foundations utilised by the courts subsequently. In a very broad reading of the Commerce Clause, Marshall held that commerce was ‘intercourse’[^33] affecting ‘more states than one’.[^34] Congress can therefore regulate matters occurring solely within one state. However, it cannot exercise control over activities that are wholly intrastate in their effect. In such situations, the states’ residual police power would prevent national action.[^35] This interpretation was very lenient compared with later decisions. Importantly, though, Chief Justice Marshall placed emphasis upon the federal structure of government. The accommodation of different concerns was clear.

Between *Gibbons*, and the New Deal, the courts developed more restrictive tests to determine the balance between national and state power. Lack of a sufficiently ‘direct’ link between the regulated interest and interstate commerce[^36], and the relevance of the activity being part of the ‘current’ of interstate commerce[^37], were doctrines used to limit Congress’s power. This was reflective of a time when big government was seen more suspiciously than it was post-1937.

Franklin D Roosevelt won great public support for his Keynesian economic plan to rescue the country after the Great Depression.[^38] This required greater centralised power. Responding to the court-packing crisis, the Justices changed tack.[^39] *United States v Darby*[^40] displayed greater deference to Congress than was shown before, as the Court ignored the previously mentioned restrictive doctrines. Congress’s power was most widely stated in *Wickard v Filburn*,[^41] where a federal statute that regulated a farmer who was producing wheat for his own consumption was held to be

[^32]: 22 U.S. 1 (1824).
[^33]: 22 U.S. 1 (1824) at 189 (Marshall CJ).
[^34]: 22 U.S. 1 (1824) at 194 (Marshall CJ).
[^35]: 22 U.S. 1 (1824) at 205 (Marshall CJ).
[^36]: *Carter v Carter Coal Co.* 298 U. S. 238 (1936) at 307 (Sutherland J).
[^37]: *Swift & Co v US* 196 U.S. 375 (1905) at 399 (Holmes J).
[^40]: 312 U.S. 100 (1941).
[^41]: 317 U.S. 111 (1942).
constitutional. All that was required was that the aggregate\textsuperscript{42} of the particular activity had a ‘substantial … effect’\textsuperscript{43} on interstate commerce.

The politically influenced judicial fluctuation is clear. This trend exhibits a tendency that is crucial to the existence of the ‘more perfect union’ under the Constitution. The idea that the Constitution is a fixed document, to be applied consistently throughout the ages, is clearly false. It is not that the judges can make up whatever they want. On the contrary, they are constrained by the language of the Constitution itself.\textsuperscript{44} However, the differing interpretations of the same provision over time, especially the very sharp changes seen in the late 1930s, show that the Constitution’s interpretation is an act, reflective of and influenced by, contemporary politics.\textsuperscript{45} Accepting the normative force of this reality is to be a proponent of the Living Constitution.

Originalists disagree, and believe that the Constitution ought to be given the meaning that it had when created.\textsuperscript{46} The reasoning for this philosophy is superficially attractive.\textsuperscript{47} Constitutional acts of lawmaking are required to make the Constitution’s provisions, and therefore the ‘words should be interpreted in accordance with the … [meaning that they] had when they became law’.\textsuperscript{48} Interpreting the Constitution by reference to its original meaning therefore prevents usurpation by the judges of values that society regards as fundamental.\textsuperscript{49} The appropriateness of this test is often justified by reference to the ‘apogee’\textsuperscript{50} of Living Constitutionalism, \textit{Dred Scott} v \textit{Sandford}.\textsuperscript{51} Meese said that this, the ‘most infamous’\textsuperscript{52} Supreme Court case of all time, displays the danger of treating the Constitution as an ‘empty vessel’\textsuperscript{53} into

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  \item \textsuperscript{42}317 U.S. 111 (1942) at 127 (Jackson J).
  \item \textsuperscript{43}317 U.S. 111 (1942) at 125 (Jackson J).
  \item \textsuperscript{45}ibid, 33.
  \item \textsuperscript{48}ibid.
  \item \textsuperscript{49}Antonin Scalia, ‘Originalism: The Lesser Evil’ (1988-89) 57 Uni Cinn L Rev 849, 862.
  \item \textsuperscript{50}William H. Rehnquist, ‘The Notion of a Living Constitution’ (1975-76) 54 Tex L Rev 693, 700.
  \item \textsuperscript{51}60 U.S. 393 (1857).
  \item \textsuperscript{52}Dennis J Goldford, \textit{The American Constitution and the Debate Over Originalism} (Cambridge University Press 2005) 92.
\end{itemize}
which each generation can pour its prejudices. However, in light of the above evidence, that the Founders formed the Constitution largely out of self interest, the moral justification for the originalists’ approach loses its cogency. Additionally, in refusing to apply the original meaning when stare decisis would make it impracticable to do so,\(^\text{54}\) such judges are, in reality, as free as other judges.\(^\text{55}\) This is because the approach taken will depend upon the particular judge’s view as to what would be acceptable.

Originalism is merely a thin veil for achieving socially conservative results.\(^\text{56}\) The originalist Supreme Court judges are Justices Thomas and Scalia. Both frequently reach decisions that limit centralised power, and increase states’ power. This can be seen in *National Federation of Independent Business v Sebelius, Secretary of Health and Human Services*,\(^\text{57}\) where they hyperbolically stated that allowing the individual mandate, under the Patient Protection and Affordable Care Act 2010, would signal an end to limited government.\(^\text{58}\) They held that it exceeded federal power because the Commerce Clause only related to commercial activity, not inactivity.\(^\text{59}\) This was also the reasoning that Chief Justice Roberts used.\(^\text{60}\) The effects-based jurisprudence that had developed over the past 70 years was thus ignored. The pendulum has swung; federal power is now increasingly seen with suspicion.\(^\text{61}\)

The conservative Justices in *Sebelius* rhetorically denied how ‘novel’\(^\text{62}\) the doctrine that they declared was, by attempting to ex post facto rationalise previous case law.\(^\text{63}\) The inventiveness of the court on this occasion achieved a result reflective of the conservative political time that the country is currently in. There is a retreat from the big government of the New Deal era.\(^\text{64}\) Advocates of Living Constitutionalism are correct in describing the fluctuation of the Constitution’s interpretation. Most of them,

\(\text{\footnotesize \(^{55}\) Dorf (n 47) 2034.} \)
\(\text{\footnotesize \(^{56}\) Dorf (n 47) 2045.} \)
\(\text{\footnotesize \(^{57}\) 567 U.S. (2012).} \)
\(\text{\footnotesize \(^{58}\) 567 U.S. (2012) op cit at 12 (Scalia, Kennedy, Thomas and Alito JJ dissenting).} \)
\(\text{\footnotesize \(^{59}\) 567 U.S. (2012) op cit at 12-13 (Scalia, Kennedy, Thomas and Alito JJ dissenting).} \)
\(\text{\footnotesize \(^{60}\) 567 U.S. (2012) op cit at 20-21 (Roberts CJ).} \)
\(\text{\footnotesize \(^{61}\) Tom Frost, "Our People in General Have a High Degree Of Freedom" (2013) Liverpool Law Review (forthcoming) 16.} \)
\(\text{\footnotesize \(^{62}\) 567 U.S. (2012) op cit at 18 (Ginsburg J).} \)
\(\text{\footnotesize \(^{63}\) 567 U.S. (2012) op cit at 24-27 (Roberts CJ).} \)
\(\text{\footnotesize \(^{64}\) Frost (n 61) 16.} \)
as liberals,\textsuperscript{65} would dislike the restrictive reading of the Commerce Clause in \textit{Sebelius}. However, they would support such judicial moulding of constitutional text in order to make it acceptable to the modern day political environment.

\textit{Conclusion}

The range of impulses that the Founders had when creating the Constitution explains the relevancy of discussing the Constitution’s interpretation. The Constitution accommodated a variety of commercial and ideological impulses to enable effective governance, thus delivering unity. Many of the Constitution’s terms enable flexible interpretation.\textsuperscript{66} As President Obama recognised in his second inaugural address, new challenges require new responses.\textsuperscript{67} Stephen Breyer described flexible judicial interpretation as enabling a document, made for 4 million people 200 years ago, to remain effective for modern day America’s society of 300 million people.\textsuperscript{68} The history of the Commerce Clause has shown this to be true. By remaining attuned to the times, the Constitution has remained useful, maintained respect and support, and thus preserved the Union.

\textsuperscript{65} Dorf (n 47) 2045.
\textsuperscript{67} Klein (n 3).
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