Constitutional Politics in Civil War Era, with some Insights for Today

Michael Les Benedict
Professor Emeritus, History, The Ohio State University and Visiting Scholar, OSU Moritz College of Law

[SLIDE 1: TITLE] Let me begin with some background to my project of recovering the history of constitutional politics in the United States. When I earned my Ph.D. in American constitutional history and came to Ohio State almost fifty years ago, I was unusual in that I had actually attended law school for a year as part of my training. At that time, constitutional history had been written by historians, rather than members of law school faculties, and while legally knowledgeable, few of those historians had been legally trained.

It was no accident that I took law classes as part of my graduate training. I entered graduate school at the height of the Warren Court era. A Constitution that the courts had made a bastion of conservatism had become the foundation of economic and social liberalism. The Warren Court's decisions not only put the Constitution squarely on the side of the growing Civil Rights Movement, it knocked the constitutional pins out from under McCarthyism, recognized freedom of expression and privacy as core constitutional values, reconfirmed broad power in the federal government to regulate the economy, and altered the political landscape by mandating that legislative districting respect a principle of one-person, one-vote.

The role that the Supreme Court played in this constitutional transformation confirmed the centrality of that court, and courts in general, to the American constitutional system. It convinced liberals and progressives that the core values of the Constitution were under the special protection of the Supreme Court, which must have the final say in interpreting them. [SLIDE 2: PREAMBLE, W/SUP CT BUILDING AND LEGAL SCALES OF JUSTICE SUPERIMPOSED] My decision to take that a year of classes reflected that understanding. In the decades since, the field of constitutional historian has proved far more attractive to law professors than history professors.

This focus on the courts, especially the Supreme Court of the United States, as the main site of conflict over the Constitution is reflected in current journalism and political analysis, as well as in most constitutional analysis coming from law faculties. The present struggle over

Supreme Court nominations is so intense because we live in an age when the justices claim, and most Americans seem to concede, that the Supreme Court has the ultimate say in deciding what the Constitution means and therefore what it commands and forbids.

Judicial supremacy in constitutional interpretation is legitimated by the idea that constitutional law lies outside the realm of politics. In this view, the considerations that go into legal analysis are different from those that determine political outcomes. The legal process is distinct from the political process, and judicial independence insulates judges from political pressure. The common view, especially among lawyers, is that the judicial branch of the government sets the constitutional boundaries within which the political branches can act. Within those boundaries politicians can do whatever they think the public welfare requires, influenced by the constellation of political forces to which they respond. When they transgress those boundaries, the courts are there, or should be there, to stop them. Member of Congress and the president are obligated to obey the Constitution, but that means the Constitution as the Supreme Court has interpreted it.

Events have been dissolving this stark distinction between politics and law. It now seems commonplace to acknowledge that justices represent different political and constitutional philosophies, and that the political system plays a role—now more explicitly than ever—in determining which philosophy will prevail. [SLIDE 3: JUSTICES WITH DESIGNATINS A REPUBLICAN ELEPHANTS OR DEMOCRATIC DONKEYS] But choosing justices who reflect a particular constitutional philosophy depends on gaining popular support for that constitutional philosophy. So there is renewed attention to the articulation of constitutional issues in the public sphere and in the non-judicial branches of government. Constitutional historians now speak of constitutional regimes, of which courts and their decisions are a constituent part—well within the political system rather than outside it. But despite the obvious relevance of this notion to recent American politics, it is still only dimly understood by journalists and political pundits, and—I dare say—by most historians, who still focus on the Supreme Court as the final arbiter of disputes over the application of the Constitution to American life.

Salmon P. Chase began as an ambitious, young lawyer who, a few years after moving to Cincinnati, more or less fell into defending fugitive slaves and abolitionists in court. [SLIDE 4: SALMON P. CHASE IN EARLY MIDDLE AGE] In the process, he urged state and federal

judges to interpret the Ohio constitution and the Constitution of the United States in ways that promoted freedom rather than the property rights of slaveholders. The Constitution, he insisted, was designed to carry out the principles of the Declaration of Independence—to create a government that would protect the natural rights of all human beings to life, liberty, and property. The framers conceded the right of the states to establish slavery by positive law, but the concession was minimal. Slavery was a *state* institution that had nothing to do with the federal government, which the framers had dedicated to freedom. Chase's slogan became "Freedom national, slavery local."

Chase cut his teeth in the antislavery cause by arguing in court that the Fugitive Slave Act of 1793 was unconstitutional. The Fugitive Slave Clause of the Constitution required only that states return fugitives from bondage to their owners, by methods consistent with due process. The Clause did not authorize the federal government, which was dedicated to freedom, to do the job itself. He lost. State and federal judges, like most Americans at the time, interpreted the Constitution as a bargain by which Americans secured a stronger union with a stronger federal government in exchange for guarantees that this stronger union would protect rather than threaten the property rights of slaveholders.

Chase believed deeply that his interpretation of the Constitution was right and that the judges were wrong. He believed in the rule of law. But that meant accepting the outcome of each case. It did not mean that judges had the final say over what the Constitution meant. "Upon questions . . . which partake largely of a moral and political nature," he told the Supreme Court, "the judgment, even of this court, cannot be regarded as altogether final. The decision . . . must, necessarily, be rejudged at the tribunal of public opinion . . . ."[1]

Salmon P. Chase lived in an age when constitutional politics took priority over constitutional law. He knew that constitutional issues were not reserved to the courts. Anyone who looks at antebellum congressional debates will be struck by that reality. As a constitutional historian who studied them has observed, "Virtually everything" discussed in Congress "became a constitutional question—from great controversies like those over the national bank and the president's removal power to ephemera of exquisite obscurity."[1] That is why so many

1. David P. Currie, *Prolegomena for a Sampler: Extrajudical Interpretation of the Constitution, 1789–1861*, *in* CONGRESS AND THE CONSTITUTION, *supra* note 7.

congressmen were lawyers—over 50% throughout the nineteenth century, and around 75% during the Civil War era. [SLIDE 5: HENRY CLAY SPEAKING IN CONGRESS. NOTE COURT-LIKE ENVIRONMENT] Congressmen themselves pleaded cases before the Supreme Court, often on the same constitutional issues they had debated in Congress and with the same arguments. When the issues were important enough, they published their oral arguments and broadcast them to the public. Constitutional debates did not take place only in Congress and the courts. Newspapers, pamphleteers, speakers and resolutions committees at public meetings all weighed in. Politicians made constitutional arguments in stump speeches on the hustings.

Constitutional issues were central to partisan politics. The Democratic party restated its commitment to state rights, strict construction of federal power, and constitutional opposition to national banks, protective tariffs, and federally funded internal improvements in almost identically worded planks in its first five national platforms. Nearly all newspapers were explicitly partisan in those days, and the Democratic ones hammered the party's constitutional principles home in editorial after editorial, blasting its opponents as representatives of hated "Federalism"—meaning the centralizing, big government constitutional principles advocated by John Adams, Alexander Hamilton, and their intellectual descendants. Whig papers, on the other hand, blasted the constitutional usurpations of aggressive Democratic presidents, who followed the example of the despotic Andrew Jackson. [SLIDE 6: "KING ANDREW"] Stump speakers re-echoed the themes. John A. Bingham, the author of the first section of the Fourteenth Amendment after the Civil War, recalled that his first political experience was a debate in which he accused President Martin Van Buren of constitutional usurpations. "Almost everything was reduced to a Constitutional question in those days," he remembered.[2]

Americans regularly decided great constitutional issues in ways that have profoundly affected what we have understood the Constitution to mean. A hard-fought struggle over constitutional principles culminated in the election of 1800—when Thomas Jefferson and his Jeffersonian Republican supporters defeated the Federalist party of President John Adams and Alexander Hamilton. Jeffersonian Republicans had blasted Federalists' unconstitutional exercises of federal power which benefited the wealthy, "aristocratic" class. In response, to the criticism, Federalists had passed a Sedition Act making such "false" accusations punishable crimes. In effect, tried to suppress constitutional politics outside of Congress. The Jeffersonian Republicans

defended freedom of expression. They did not challenge the Sedition Act in the Supreme Court. They took the issue to the American people. With their victory in 1800, their state, rights strict-constructionist views became the basis for public policy, and mass-based constitutional politics became the rule.

Congress had no Supreme Court precedents to guide it when its members struggled over the admission of Missouri as a slave state from 1819 to 1821. They debated Congress's constitutional power to demand that Missouri adopt a free-state constitution, to bar slavery from the territories, whether states could forbid the entry of African-American citizens of other states, as Missouri's proposed constitution did, and whether free blacks were citizens at all. The resulting Compromise of 1820 would not be tested in the federal courts for over twenty-five years, until the disastrous Dred Scott case. Amazingly by modern standards, neither were state laws restricting African-American immigration. Today such laws would be challenged in court in a heartbeat.

A generation after the "Revolution of 1800," Americans decided a similar constitutional conflict over the scope of federal power. A younger generation of Jeffersonians had enacted many of the same programs to develop the economy that their forbears had opposed—a national bank, national sponsorship of roads and canals, protective tariffs. The Supreme Court had sustained the broad interpretation of federal power that such activist legislation relied on. Purists denounced these violations of Jeffersonian principles. In 1828 they harnessed the popularity of Andrew Jackson to gain power. As president, Jackson vetoed the renewal the of the national bank's charter, vetoed the road and canal-building measures, and set Congress on the path to eliminating protective tariffs. Jackson's ally and successor Martin Van Buren organized the Democratic party to sustain these constitutional positions and for most of its three-decade-long dominance, public policy conformed to them.

What of the courts? The Supreme Court did not have its own, big marble building like it does today. It met on the ground floor of the capitol, in a small chamber the U.S. Senate had outgrown. [SLIDE 7: OLD SUP CT CHAMBER] French aristocrat Alexis de Tocqueville exaggerated when he reported in 1835 that "scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[3] It never happened with the protective tariff, a great constitutional issue throughout the nineteenth century. Nor did the Court weigh in on Nullification. It did not address secession until after the question was settled on the

battlefield. Tocqueville misled his readers when he said that the courts were the institution "by which the legal profession is enabled to control the democracy."[4] *Congress and the state legislatures* were the institutions through which lawyers exercised their influence over democracy.

But Tocqueville knew that the role of the judges in establishing constitutional principles was limited by popular authority. He believed that Americans *ought* to defer to judicial interpretations of the Constitution. He considered refusals to be a rejection of the rule of law. But he did not doubt the finality of the popular will. The judges "must be statesmen, wise to discern the signs of the times," he acknowledged. They could not defy "the current when it threatens to sweep them off."[5] All Tocqueville had to do was look at the inability of the Supreme Court to protect the Cherokee nation from the depredations of their Georgia and Alabama neighbors in 1830 and 1832 to see how powerless the Court was to counteract the will of a substantial majority. It was the job of government, especially state governments and local authorities, to provide protection of the laws. If the legislature, governor, and local officials refused to do it, as in the case of Mormons, for example, there was not much the courts could or would do. You could flee the state, like the Mormons, American Indian tribes, and some number of free black Americans did. Or, as in the case of abolitionists and most black Americans, you could try to change public opinion. Until you did, you could not expect much help from the courts. Before the Civil War, the Supreme Court, like other courts, was not a counter-majoritarian institution. It did not see its business to be protecting minorities from majorities. The Court's most famous, or infamous, effort to protect minority rights came in the Dred Scott decision, in which it attempted to secure the right of slaveholders to hold human beings as property in the territories of the United States. That is hardly what we think of as protecting in individual or minority rights. And the effort failed in the face of dissenting public opinion.

How were individual and minority rights to be protected in a society without a counter-majoritarian institution to do it? By majorities themselves. In 1849 the great chief justice of the Massachusetts Supreme Court, Lemuel Shaw, refused to rule Boston's segregated schools a violation of the state's bill of rights. "The proper province of a declaration of rights and constitution of government," he wrote, ". . . is to declare great principles and fundamental truths, to influence and direct the judgment and conscience of legislators in making laws, rather than to

limit and control them, by directing what precise laws they shall make."[2] Of course that took longer and was more difficult than having judges enforce the constitution. Yet only six years after Shaws' decision, an antislavery Massachusetts legislature passed a law desegregating schools throughout the state.[3]

Ohio too had oppressive "black laws" on its books from its founding in 1803 until Chase and his antislavery allies were able to repeal many of them in 1849. Even after that, black Ohioans were not entitled to public education until 1853, when Ohio authorized segregated schools for their children. In 1884 Ohio banned discrimination in inns, hotels, and similar public facilities. Only in 1887 did the state ban segregated schools.[4] All of this was done through legislation. None of it was done by the courts.[5]

In Chase's time, the Supreme Court's opinions were part of a conversation about what the Constitution demanded and forbade. They were part of a more general constitutional politics. The Court applied the constitutional positions Americans were arguing in the political arena to specific legal controversies, restating them in the form of constitutional law. Their decisions and the opinions sustaining them were cited in congressional debates and constitutional arguments made out of doors. They were strong authority, but as Chase's observation that I quoted earlier indicated, they were not binding authority.

Chase devoted his career to persuading the American people to re-judge the decisions they and the Supreme Court had made to establish a proslavery Constitution. There were abolitionists who conceded that the Constitution was the proslavery document the courts said it was. It was, in the view of the coterie around William Lloyd Garrison and his journal the *Liberator*, "a covenant with death and an agreement with hell." For the Garrisonians, constitutional politics consisted of trying to convince New Englanders to leave a Union that bound them to slaveholders. Other abolitionists took the polar opposite position. They said that the Constitution made state laws upholding slavery unconstitutional. But most abolitionists conceded that the Constitution, even if

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[2] Roberts v. City of Boston, 59 Mass. (5 Cush.) 198, 206-207 (1849).
[3] See Michael Les Benedict , *Constitutional Politics, Constitutional Law, and the Thirteenth Amendment*, 71 MD. L. REV. 163 (2011).
[4] Paul Finkelman, *Race, Slavery, and Law in Antebellum Ohio*, in 2 THE HISTORY OF OHIO LAW 748-781 (Michael Les Benedict and John F. Winkler eds., 2004); Frederick M. Gittes, *Paper Promises: Race and Ohio Law after 1860*, id. 782-833. See Robert Lionel Rowe, State Response to the Civil Rights Issue, 1883-1885 (Ph.D. diss., Portland State University, 1974).
[5] See Benedict, *supra* note 22.

viewed as an antislavery document, left the question of slavery to the states. However, the Constitution did require the federal government to enact measures against slavery wherever it had the constitutional power to do so—in Washington, D.C., for example, in the territories not yet states, on army bases, and in interstate commerce. Chase phrased it differently Having focused his constitutional fire on the federal Fugitive Slave Law, Chase was more concerned with what the federal government could not do than what it could. It could not pass a Fugitive Slave Law, he insisted. It was not among the powers delegated to Congress and its provisions violated the Bill or Rights. Congress could not establish slavery in the territories. Doing so would be inconsistent with the federal government's purpose of securing liberty. He did not stress Congress's power to abolish slavery in Washington, D.C. He denied it ever had the power to recognize it there.

Chase helped antislavery advocates organize the Liberty Party in Ohio. He wrote the constitutional planks of its platforms and prepared its addresses to the people, which reflected his constitutional views. [SLIDE 8: PROCEEDINGS OF THE FREE TERRITORY CONVENTION] He stumped for its candidates and established connections with antislavery politicians around the country. Because he was more concerned with what the federal government could not do to promote slavery than what it could do to promote freedom, he felt more of a kinship with the strict-constructionist Democratic party than with the broad-constructionist Whigs. The Democrats also were the party of "equal rights," while he thought that the Whigs tended to distrust democracy. If he could persuade northern Democrats to extend the principle of equal rights to all Americans rather than only to white ones, it would be the natural party of antislavery. He thought there was real potential in the more radical wing of the party.

In 1848 he saw his first real chance. That year radical Democrats bolted their party's pro-southern nominee to back former President Martin Van Buren for the presidency on a platform that backed a law to ban slavery in the territories. The bolt succeeded in electing the Whig candidate president, and in Ohio it led to the election of enough antislavery Liberty Party candidates to hold the balance of power in the state legislature. Over the objection of most of their antislavery colleagues, Chase's allies made a deal with the Democrats. The deal gave Democrats control of the legislature in return for repealing the laws that most egregiously discriminated against black Ohioans and for electing Chase himself to the United States Senate. (Senators were elected by the state legislatures in those days.) From that position he continued to articulate his

antislavery constitutionalism and ultimately joined other antislavery politicians in organizing the Republican party. Six of the nine planks of the first Republican national platform, in 1856, made constitutional arguments—five against slavery and one claiming constitutional sanction for federally funded internal improvements. Another backed construction of a continental railroad, a clear exercise of broad federal power. [SLIDE 9: PAMPHLET CIRCULATING THE REPUBLICAN NATIONAL PLATFORM 1856] They knew their platform was inconsistent with the Supreme Court's Dred Scott decision. But they were appealing to the people. [SLIDE 10: SUGGESTIONS REGARDING THE PLATFORM] Democrats in turn reiterated their oft-stated commitment to strict construction, insisted that the Constitution gave no power to Congress to interfere with slavery or take "incipient steps" towards doing so, like banning slavery in the territories. "The preservation of the Union under the Constitution" was the "paramount issue" and "repudiating all sectional parties and platforms concerning domestic slavery" was essential to that end, Democrats urged.

This was the kind of political rhetoric that characterized the entire Civil War era through Reconstruction after the Civil War. It was constitutional politics through and through. When the southern states seceded, it was, they claimed, because northerners had violated the constitutional understandings that had protected their rights as slaveholders. During the war Democrats blasted the Lincoln administration's infringements of civil liberty, its unconstitutional policy of drafting civilians into the armed forces, its invasion of state rights, and its Emancipation Proclamation. [SLIDE 11: SOCY FOR THE DIFFUSION OF POLITICAL KNOWLEDGE ON THE CONSTITUTION] Throughout his administration president Lincoln took special care to avoid letting a Supreme Court still dominated by Democrats review the actions of his administration. The majority of the Supreme Court justices took equal care to avoid doing so.

During Reconstruction Democrats and white southerners at first denied that the federal government had any power to impose conditions on southern states as they resumed their place in the Union. Then they backed President Andrew Johnson's claim that the president alone had the constitutional authority to imposed such conditions. Republicans spent immense amounts of energy discussing the constitutional basis for congressional authority over the subject, and for federal power to define citizenship and protect its associated rights. They constantly worried that the Supreme Court would weigh in against them and took steps to warn the justices of dire

consequences if they tried. After Chase was confirmed as chief justice, he played the key role in making sure they didn't, and he finally was able to author a great opinion justifying the suppression of secession and recognizing federal power over Reconstruction.

In the end Republicans wrote federal power to protect civil and political rights into the Constitution itself, through the Thirteenth, Fourteenth, and Fifteenth Amendments. The Amendments transformed the United States from the slaveholding republic it was before the Civil War to the free republic that has unfolded since. The Fourteenth Amendment did more. It was worded expressly to encourage the courts to protect rights against state infringement, to take the job they had avoided under the proslavery Constitution. The Amendments embodied the decision Americans had made through constitutional politics and, one might say, constitutional violence. It was constitutional politics that made constitutional law.

Chase played an important role in all this. As Lincoln's Secretary of the Treasury he took the lead in nationalizing the American banking and financial system—reinstating the system of national banking that Jacksonian Democrats had destroyed. He was a persistent and public advocate for using the war power of the federal government to abolish slavery. He urged Americans to recognize the citizenship of African Americans and their equal civil and political rights. In 1864 some radical Republicans argued that he would better represent antislavery principles than the more conservative Lincoln. Chase let them boom his name for the presidency. Lincoln was displeased to say the least, accepting Chase's resignation from the Cabinet. But when Chief Justice Taney died, Lincoln recognized that no one was better suited to incorporate antislavery constitutionalism into law than Chase. He was appointed chief justice precisely because he was the best representative of antislavery constitutionalism. [SLIDE 12: CHASE AS CHIEF JUSTICE]

We live in a different constitutional world now—one in which the Supreme Court is conceded a much greater role in defining the American constitution, and much more aggressively reviews government action to see that it conforms. We attend to constitutional law more than to constitutional politics. But it would be better if we understood that the Supreme Court is *part* of our constitutional politics and not outside of it. The Republican party wants to have it both ways. It expects a more conservative Supreme Court to uphold, as a matter of constitutional law, what Republicans deem correct conservative views of the Constitution. It applauds when Supreme

Court nominee Brett Kavanaugh insists that the justices are mere nonpartisan empires, eschewing particular outcomes, and simply enforcing the Constitution as they see it. But the Republican party has engaged in a vigorous political battle to establish its view of the Constitution and nominating Supreme Court justices who "see" the Constitution the same way has been central to the effort. They want the Court to accomplish through constitutional *law* what the party has not yet been successful in accomplishing through constitutional *politics*.

Insofar as Republicans convince Americans that theirs is the correct conception of the Constitution, appointing justices to apply that conception in law conforms to our long history of constitutional politics. An activist Supreme Court can push popularly endorsed constitutional philosophies beyond what the people conceived when they endorsed them. That is what the Warren Court did. But if an activist Court tries to impose a *different* constitutional philosophy than the one that has triumphed in constitutional politics, there *will* be a constitutional crisis. To avoid such a crisis, it would be well to make constitutional philosophies explicit rather than implicit in our politics. It takes two to debate a constitutional philosophy. Republicans have been fulfilling that responsibility, making their constitutional philosophy clear in their party platform and political rhetoric. Democrats have not. One can glean the outlines of a constitutional philosophy from their positions on a variety of issues, but they have not made that philosophy explicit.

Antislavery lawyers and politicians like Salmon P. Chase spent their lives building an alternative constitutional argument to the one that supported slavery. There *is* a progressive alternative to conservative constitutional philosophy. Liberals and Democrats ought to articulate it and give the *American people* the opportunity to decide what the Constitution enables the government to do and what it forbids. In fact, they fail their obligation to constitutional democracy when they fail to do so. In the end, the Supreme Court will turn a decision made through constitutional politics into constitutional law. Whether they realize it or not, the justices need that guidance. It is dangerous to encourage them to cling to the illusion that *they* have final authority to determine what the Constitution means by failing to bring those issues explicitly to the American people.

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[1] Salmon P. Chase, *Reclamation of Fugitives from Service: An Argument for the Defendant, Submitted to the Supreme Court of the United States . . . In the Case of Wharton Jones vs. John Vanzandt* (Cincinnati: R.P. Donogh, 1847)

[2] Walter Shotwell, *Driftwood: Being Papers on Old-Time American Towns and Some Old People* (N.Y.: Longman's, Green, and Co., 1927), 81.

[3] Alexis de Tocqueville, *Democracy in America*, trans. Henry Reeve (3d Am. ed., New York: George Adlard, 1839), 1: 279.

[4] Ibid., 278.

[5] Ibid., 147.