

**“AMERICAN HISTORY AND AMERICAN PRINCIPLES”
FIVE LECTURES BY PROFESSOR ROBERT P. GEORGE**

**Lecture No. 5
“The Judicial Transformation of America
and the Clash of Orthodoxies”**

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This is the last lecture in this series on “American History and American Principles.” It has been a special honor to give a series of lectures named for Dr. Dougherty. I want to thank him and Mrs. Dougherty for their kindness towards me during my visits to the Hill School. I also wish to thank the administrators, faculty, and students who have attended my lectures. I am grateful for your warm hospitality, your courtesy, and your attention. I have been especially deeply impressed by the ease with which the students at this distinguished school have grasped even the most challenging concepts and arguments I have set before

them. Dr. Dougherty, you and your administrative staff and faculty are rightly proud of these young men and women. Finally, it is a great pleasure to acknowledge my debt of gratitude to Mr. Lewis Lehrman for his generous support of these lectures.

I will spend almost all of this session on developments in constitutional jurisprudence. I do so because the judicial function is the least understood, and because the impact of judicial decisions on our country is far greater than most of us recognize.

After the end of World War One – the “Great War” – Americans yearned to return to what President Warren G. Harding called “normalcy.” For awhile, they got what they yearned for. The economic expansion of the 1920s brought unprecedented prosperity to more American families than ever before.

Herbert Hoover's election in 1928, however, brought economic policy changes that proved ruinous. A right-wing Progressive, Hoover promoted tax increases on business and labor, high tariffs on imported products, and high interest rates. These policies caused stock markets to panic in 1929 and helped to provide the conditions for a global Depression.

By the early 1930s unemployment rates in the United States reached 25 percent. A despairing Germany turned to Adolf Hitler and National Socialism. Americans repudiated Hooverism and voted for Franklin Roosevelt and his promised "New Deal."

What the "New Deal" was to be was not clear, but it certainly meant the national government would take an aggressive role in managing the national economy and regulating economic activities. Roosevelt promised relief,

recovery, and reform: welfare programs for the unemployed; policies to reignite the economy; and long-term changes to move the economy away from business control and *laissez-faire* toward national government direction by powerful administrative agencies staffed by professional experts. The Depression was the equivalent of a wartime emergency, Roosevelt said. Government's powers must expand to meet the challenge.

Roosevelt's lopsided Democratic majority in Congress enacted a breathtaking series of interventions in his first hundred days:

- The Agricultural Adjustment Act was to control farm product prices, raise farmers' purchasing power, and prevent farm foreclosures.

- The Federal Emergency Relief Act gave grants to the states for direct unemployment relief, and set up a Federal Emergency Relief Administration.
- Creation of the Tennessee Valley Authority involving national planning for a complete river watershed extending over many states and requiring immense government land ownership and control measures.
- The National Industrial Recovery Act compelled businesses to collaborate in setting retail prices, work hours, and wage rates to stop 'unfair' competition and 'overproduction.' This bill created the National Recovery Administration to regulate these provisions.

There were many other measures, not all well designed, but intended to work together as a great

experiment in government direction to lift the country out of depression.

Roosevelt flattened his political opposition. It would take generations for the Republican Party to recover from his thrashing of them. Still, one high barrier to the triumph of Roosevelt's Progressive reforms remained: the Supreme Court. We must now turn back to decades of developments that terminated in the constitutional crisis of 1937.

Western states in the 1870s, under pressure from farmers, enacted so-called "Granger" laws to regulate prices charged by railroads and grain elevator storage costs. Owners protested that these price limits unfairly deprived them of legitimate profits. An 1877 Supreme Court case said that under the old common law, some businesses are private property of a certain type—that is, private businesses "affected with a public interest" that *may*, therefore, be

regulated by states for the common good. Whether they **should** be regulated, the Court held, is a political question for the people acting through their elected representatives to decide; it is not a question for the courts.

But growing business corporations protested that, in practice, legislatures could regulate and destroy legitimate profit-making just by declaring private property to be “affected by a public interest.” If the courts withdrew from the field, they argued, constitutionally protected property rights would be nullified by legislative action in the states. Courts should, they insisted, review whether regulations imposed by legislatures are “reasonable” interventions in private economic decisions. Thus was born the theory known as “substantive due process.” In an 1890 opinion, the Supreme Court moved in the direction of adopting this theory. The Supreme Court held that a law under which a state agency set railroad rates could be reviewed by the

courts for its “reasonableness.” In other words, the courts have an indefeasible power to review the “reasonableness” of economic interventions such as price regulations.

The Court dealt itself into the debate about economic regulation under this idea of “substantive due process.” A long series of cases followed in which judges appealed to a few constitutional clauses to prevent states from excessive regulation, usually the Interstate Commerce and Impairment of Contracts clauses. In what would become the landmark case, however, the case of *Lochner v. NY*, in 1905, the Court invoked the Due Process clause of the Fourteenth Amendment, holding that a New York law limiting the weekly hours of bakery workers violated contractual freedom because it interfered with the right of bakery workers and employers to agree on their wages and work conditions. New York claimed the states’ police power to protect health.

On the other hand, the bakers' union pushed for the law in order to raise wages.

The courts had little problem disposing of state laws that interfered with free markets. In *Hammer v. Dagenhart*, a 1918 5 to 4 decision, the high court struck down a *federal* child labor law because it violated the Tenth Amendment. The Justices did not say that children should not be protected; but it insisted that the states alone have the constitutional power to do the protecting.

As long as the judiciary mostly focused on state regulation, most Americans apparently were satisfied with "substantive due process" jurisprudence. From the 1880s through the 1920s Republican Presidents and Congresses who named these judges to the federal bench were re-elected and the courts were not a decisive electoral issue.

National prosperity justified economic liberty in the minds of many. Then came the Great Depression.

The child labor decision and one or two others showed that the Justices were willing to strike down national legislation that violated property rights and free markets. After 1933 the Court faced a nation desperate for united action to end the Depression. The first New Deal law to be tested by the Court was the National Industrial Recovery Act. A unanimous Supreme Court killed it in *Schechter Poultry Corp. v. U.S.*, the “sick chicken” case. A Brooklyn NY butcher sold chickens slaughtered on premises at a penny or two more than the NRA price limit. He was charged with a federal crime of selling unfit chickens. The Court decided that the NRA was unconstitutional because it regulated commerce within a state rather than between states, and the Depression did not excuse Congress in going beyond its limits.

In the 1936 case, *U.S. v. Butler*, the Court held that a complicated tax provision of the Agricultural Adjustment Act that limited farm production violated the Tenth Amendment because agriculture is a matter that falls under state jurisdiction which Congress has no power to regulate.

Over three years, some twelve New Deal programs were struck down. Roosevelt's reform agenda was stymied. But this was the Supreme Court's last ditch stand to defend liberty of contract and free markets against a national majority determined to address a national economic problem.

From 1933 until early 1937 Roosevelt did not have a single new Supreme Court appointment. With an overwhelming re-election victory in 1936 and a veto-proof Democratic Congress, Roosevelt announced a plan to

reform the Court by naming up to five new Justices. These would, presumably, be judges who favored the New Deal and opposed the jurisprudence that had impeded it.

Roosevelt's "court-packing plan" raised the prospect that whenever a popular majority was frustrated by the Supreme Court, Presidents would simply place enough new members on the bench to break the opposition. Judicial independence would be fatally compromised.

Soon after FDR proposed his "court-packing" plan, the Court, by 5 to 4, upheld a major New Deal reform, the National Labor Relations Act. One Justice—Owen Roberts—switched from his earlier opposition and formed a New Deal majority. Roosevelt's court packing plan died in Congress, but his audacious statesmanship subdued the Court and won the struggle for a generation.

By 1942 Roosevelt had placed eight ardent New Deal Justices on the Supreme Court. They were there precisely because they were ardent New Dealers. He never had a problem applying a so-called “litmus test.” Consider a 1942 case named *Wickard v. Filburn*. An Ohio farmer raised a small amount of wheat to feed to his own cattle and was convicted of violating the Second Agricultural Adjustment Act. The newly shaped Court decided that raising wheat for your own use affects commerce among states, so Congress had authority under the Interstate Commerce clause to enact the law. The legislature decides what “commerce” means, said the Court, and judges should not second-guess the lawmakers. Congress was now authorized to establish new administrative agencies at will by defining whatever they regulate as “commerce.” Thus the national administrative welfare state was constitutionalized. That was the end of “substantive due process”—for awhile.

. In the twenty years after the crisis, the Court overruled only four federal laws. But judicial review was not dead. Since the end of the 1950s the Supreme Court has ruled two or three or more federal measures unconstitutional every year.

The Framers were concerned that popular majorities would threaten the right of the talented and industrious to acquire property and earn profits by their enterprise. They created barriers to check this threat. They wanted an independent judiciary to withstand pressures from the other branches in order to defend minority rights in cases implicating natural rights. When the Supreme Court surrendered to the New Deal majority, it abandoned the protection of property rights in the traditional sense. The Justices claimed that “natural law” and “natural rights” – which the Framers made the foundation and purpose of the Constitution – are not linked to the Constitution in any way

that would authorize the courts to review legislation for its reasonableness or justice. The so-called “natural rights” jurisprudence of the “Lochner era,” they insisted, was just an imposition by the courts of the policy preferences of the judges. The proper role of the judge, they said, was not to make substantive judgments about the reasonableness or rightness of the laws enacted by the people’s representatives, but to ensure that constitutionally specified “procedures” were followed. But you might respond: why defend procedural rules if they do not provide just or reasonable outcomes? What is so important about whether a “process” is a *due* rather than an *undue* process? In other words, aren’t just or reasonable results implicit in “due process”? Can a judge be indifferent to injustices that result from “due process of law”?

Now let us return to civil rights, the other line of decisions I discussed in my last lecture. You remember that

the Supreme Court overturned strong federal civil rights measures but refused to intervene when states enforced “separate but equal” laws.

Consider both lines of development together through the 1920s. The same Justices that were so eager to protect economic freedom seemed opposed to protecting minority rights. But it’s not that simple.

The greatest nineteenth century defenders of black Americans, such as Abraham Lincoln, Frederick Douglass, and Booker T. Washington, believed that the most critical need for the former slaves was to acquire work disciplines, trade arts, and entrepreneurial skills. Hard discipline and social usefulness were the keys to integration and full and active citizenship. They feared much economic regulation because it tends to reduce opportunity and put those with

few skills at a disadvantage. Booker T. Washington put it in the following way:

It is important and right [he said] that all privileges of the law be ours, but it is vastly more important that we be prepared for the exercise of these privileges. The opportunity to earn a dollar in a factory just now is worth infinitely more than the opportunity to spend a dollar in an opera-house....

Until there is industrial independence it is hardly possible to have a pure ballot...

Where so large a proportion of the people are dependent, live in other people's houses, eat other people's food, and wear clothes they have not paid for, it is a pretty hard thing to tell how they are going to vote....

Character, not circumstances, makes the man. It is more important that we be prepared for voting than that

we vote, more important that we be prepared to hold office than that we hold office, more important that we be prepared for the highest recognition than that we be recognized.

The Justices agreed. When the Court invoked “substantive due process” to minimize economic regulation, the economic and social inclusion of the ex-slaves was a factor in their judicial prudence. To maximize freedom and opportunity for all, they opposed government enforcement of either commercial regulations or civil rights.

Some such as W.E.B. Du Bois disagreed. They formed the NAACP to demand voting and civil rights for black Americans, arguing that voting rights were needed before economic opportunity could be secured. These two opposed views – whether economic improvement precedes legal rights or vice versa – reflected the debate within Progressive

historicism. They split African American political thought to this day.

The Supreme Court under pressure from the NAACP did pay attention to minority exclusion from the vote. The problem burdening actions to establish minority voting rights came from federalism, because the Constitution allows the states largely to determine voting qualifications and conditions. Literacy tests and poll taxes were applied in many states to enforce the system of white supremacy, and some remained in place until Congress finally intervened to abolish them in 1965. Beginning in the 1920s, the Justices required that African Americans not be disenfranchised – first in general elections, later in primary elections.

Some Southern states repealed their primary laws, freeing the parties to select candidates while excluding all but whites in the process. The real problem was that after

Reconstruction, the South became a one-party region; whoever was chosen by the Democratic organization was guaranteed election in November. In many places in the old Confederacy there was no Republican Party at all. If African Americans were excluded from the Democratic organization, they were virtually excluded from voting. The Supreme Court demanded that all primaries—under state law or not—be open to African Americans. In 1953 the Court ruled that even “pre-primaries” held by a private club could not exclude voters on the basis of skin color. For the most defensible of purposes, the Supreme Court intruded on, to the point of practically abolishing, the concept of purely private political organizations.

In the area of public education, the Court at the end of the 19th Century in *Plessy v. Ferguson* had thrown the mantle of constitutional legitimacy over state-sponsored racial segregation. The Supreme Court found ways to limit

the “separate but equal” rule, but almost sixty years of decisions reaffirmed the central ruling of *Plessy*. A formally unanimous 1954 decision in *Brown v. Board of Education* finally overthrew the *Plessy* “super-precedent” and held that separation by race was “inherently unequal,” though it was never clear precisely what this term meant. The Justices asserted that education had become too important compared to the 1860s when the same Congress that enacted the Fourteenth Amendment segregated the schools of Washington. Yet after *Brown*, the Court struck down local ordinances segregating parks, beaches, and water fountains. The entire opinion would read simply: “Reversed. See *Brown v. Board*.” The segregation laws in all of these areas were demeaning, humiliating, and morally indefensible, but did the Court mean that playgrounds and beaches were as important for young citizens as schools? The Court did not explain exactly what the basis of its rulings

was because the Justices were unwilling to define the “common good.” We will come back to this shortly.

Brown was the opening salvo in a long struggle to desegregate American society. In 1958, in *Cooper v. Aaron*, the only case in history in which all nine Justices individually signed their names, the Court enforced desegregation in the schools of Little Rock, Arkansas, against the state government. In *Cooper* the Justices for the first time asserted that the Supreme Court was supreme and final in the interpretation of the Constitution. Any official who defies the Court “wars on the Constitution.” The Court assumed the highest political and moral authority it has ever held. Courts went on in the 1960s and 70s to imposed busing orders forcing children in white communities to travel miles to minority schools and vice versa, all in the effort to achieve de facto, and not merely de jure, racial integration. These

orders were resisted, sometimes violently, not only in the South but famously in Boston.

From the abolition of slavery forward, real estate in some neighborhoods had “racial covenants” in deeds restricting their sale to whites. In 1947 and 1953 the Supreme Court voided these clauses on the ground that registering and suing to enforce them are state actions that deny Equal Protection.

The effect of these desegregation cases of the 1940s and 50s was to speed up so-called “white flight” to the suburbs while older cities became minority-dominated ghettos. The courts’ intention was to create a racially integrated society. The effect to some extent was to increase racial division even though the legal basis of segregation was abolished.

There isn't time to examine the line of cases in civil liberties, but we find somewhat similar difficulties. The Supreme Court first claimed in the 1920s that First Amendment liberties which had limited only the national government now limited state governments as well. The Supreme Court turned the Bill of Rights upside down when it claimed – with no *argument* to justify it – that the Fourteenth Amendment “incorporated” its amendments against state governments. This was revolutionary. It meant that states and local governments found it ever more difficult to enforce laws against pornography, obscene speech, desecration of the flag, and advocacy of violence against the government.

The expression of religion in the public arena underwent a similar revolution. With the “incorporation” theory, the Court imposed new limits on religious expression by state and local governments. It asserted that the Constitution built a “wall of separation” between Church and

State, even though there is no language remotely like that. Beginning in the 1960s the Supreme Court ordered states not to allow denominational or nondenominational prayer in public schools, or scripture reading, or Ten Commandments displays. The Court marginalized religious expression in public institutions and on public property in an apparent effort to “privatize” religion in America, as if the Founders had not promoted civic prayer to the Almighty to shower His blessings upon this democratic nation. Whereas the Founders wanted no official religion to interfere with religious exercise because they saw a close connection between democracy and religious faith, the Supreme Court constructed a high “wall of separation” between religion and democracy, as if they were opponents.

The Court has widened its action against religion to cast suspicion on legislation embodying traditional ideas of virtue and moral rectitude. A federal case in Florida held

that public schools can read the Old Testament but not the New Testament because the former is “history,” the latter is “religion.” Here, I would argue, we come full circle. The Supreme Court’s jurisprudence of religion in effect re-establishes an official federal religion which the Framers thought they banished with the First Amendment—a religion of secularism.

The modern Supreme Court has rejected the “natural law/natural rights” basis of the Constitution in the principles of the Declaration of Independence. It has turned to a very different source for its opinions: the idea of “individual autonomy.” According to this view, every human being has a “right” to make laws for himself or herself. Society or government has no right to “impose” a moral law on this “autonomous self.” As set forth in the 1992 abortion case of *Planned Parenthood v. Casey*, the universe is a “mystery” to be deciphered by each “self” according to its own lights and

preferences. The Court has transformed the constitutional word “liberty” into individual “autonomy,” historically and philosophically a quite different concept. At bottom the Court has decreed that the moral order cannot be known as an objective reality. Each “self” must “create” its own meaning. Government cannot interfere as long as the “equal right” of other “selves” to “create” their own meanings is respected. This fundamentally relativistic way of thinking accounts for a series of controversial decisions intervening deeply in profound moral conflicts, from *Roe v. Wade* in 1973 recognizing a constitutional right to abortion, through *Lawrence v. Texas* in 2004 which held that homosexual sodomy is a constitutional right. The *Roe* decision struck down laws in all 50 states in one stunning blow even though the Justices insisted that they were not deciding the central issue: whether “human life” begins at conception. It is not ideological or partisan to notice the fact that *Roe* is the most controverted case in American history, under increasing

challenge in courts, legislatures, and elections for 33 years now.

Let's consider judge-made law at a deeper level. Abraham Lincoln said in his first debate with Stephen Douglas: "In this and like communities, public sentiment is everything. With public sentiment, nothing can fail; without it nothing can succeed. Consequently he who moulds public sentiment, goes deeper than he who enacts statutes or pronounces decisions. He makes statutes and decisions possible or impossible to be executed." Lincoln was referring to governments that rule by consent, democracies. The judicial branch was designed as the least democratic, the most distant from sudden changes in popular opinion. The Supreme Court needs that independence because it has been entrusted with explaining to the citizens what our fundamental law, the Constitution, means. But judges cannot decree their decisions despotically, with no regard for

consent. Judges must give *arguments* that are logical and persuasive. They must *justify their judgments*. The Supreme Court, as Lincoln said, should shape public opinion to accept its interpretation of America's principles. If it fails, its decisions will lack credibility and instead of solving social divisions will enflame them.

The much noticed and widening partisan gap between left and right in America is fundamentally not due to differences over foreign policy, taxes, or the size of government. It is partly due to the consequences of Progressivism and the administrative state. But above all it is due to a judiciary that has tried to effect a transformation upon American society without persuading the American people that these changes promote the common good. Perhaps they don't try to persuade us because they think there is no such reality as an objective "good" and because autonomous "selves" have nothing in "common."

Let me return to our theme. Today the founding principles are believed by many but are contested. We face what I have called a “clash of orthodoxies.” Our differences are about morality, philosophy, and faith. We differ over the question of whether there is an objective moral order and a source of that order under whom we as individuals and as a people stand in judgment. We differ over whether our guiding public philosophy should be founded on belief in objective moral truth or on the principle of individual subjectivity on matters touching fundamental justice and the meaning of life.

There is a classic expression of the subjectivist view in the main opinion in *Planned Parenthood v. Casey*.

[M]atters, involving the most intimate and personal choices a person may make in a lifetime, choices

central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

The view of moral objectivity that contrasts with it derives from the Western tradition of both faith and reason, and was, according to its supporters, the view at the heart of the Declaration of Independence. It holds that each human being has moral dignity and equal natural rights given by God, man's Creator, and that these words have intelligible content. The source of legitimate government is popular consent, and its mission is to secure the God-given natural rights and support the equal rights and dignity of each human person. Rights are an essential part of the picture,

but so are moral duties—duties to do what is morally right and avoid what is morally wrong.

There are powerful arguments for these competing orthodoxies. You already know some of them. You will encounter others as your education proceeds here at the Hill School and then in college. You may be tempted to look for a position somewhere between them. Many have. But it seems, at least to this observer, that there is no middle ground. Certain compromises are surely possible, but at bottom these orthodoxies do not admit of differences that can be split. As persons and citizens we are, in the end, forced to choose between them. Let us do our best to choose well.