

The Consequences of Ideas

Lesson 16: Shifting Foundations of The Law

Consider the foundation of the Constitution as laid on this ground: That "all powers not delegated to the United States, by the Constitution, nor prohibited by it to the States, are reserved to the States or to the people." To take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition. Thomas Jefferson 1791

I. The Importance of the Law

- a. The definition of "Law" is: a binding custom or practice of a community: a rule of conduct or action prescribed or formally recognized as binding or enforced by a controlling authority.
- b. Laws are imposed by a local, state or federal authority and the obligation of obedience is on the part of all subject to that authority or who fall within its jurisdiction.
- c. Those who write the laws control those who are subject to them and what happens in the law will ultimately touch virtually every area of one's personal life including economics, religion, politics, science and health.
- d. Laws created by the federal government (by Senate and House) are constitutionally limited to those things which will serve the states and the people. The chief Law of the Land is the U.S. Constitution.
- e. The government (the political party in power) has goals and objectives of its own, often in conflict with Constitutional rights. These are often issued through policies and Executive Orders.
- f. Invariably, laws flow out of philosophical ideas or world-views which will shape the direction of the laws, regulations, and policies of those who have the power to issue them.
- g. While the people may have all the rights (the Constitution specifically says so), the government has all the power. When the rights of the people and the government's goals are in conflict, the people generally lose.

II. The Constitution: A Living Document?

- a. The founding fathers established the Constitution to do just two things:
 1. Establish a federal government for the United States of America
 2. Delegate to the federal government certain, limited (and enumerated) powers.
- b. The Constitution was ratified by the thirteen original states. The federal government created by the states, via the Constitution, exists to serve the states and the people who reside therein.
- c. Until the states delegated some powers to the new federal government, those powers belonged to the states. The states are, in effect, the "boss" of the federal government!
- d. Today, the government sees no practical limits on its power. In the event that a law is found to be unconstitutional by the Supreme Court, Congress just reworks the text and then passes essentially the same law again.
- e. When government's own goals override individuals' rights, government is acting unconstitutionally. Government often states that these violations of citizens' rights are necessary "for the good of society."
- f. Our Bill of Rights curbs all three branches of government. It subjects all departments of government to a rule of law and sets boundaries beyond which no official may go. This ideal is under constant assault.
- g. It is the interpretation of the Constitution that is under assault. The strict constructionist view argued by Chief Justice Marshall, in Marbury v. Madison says "All laws which are repugnant to the Constitution are null and void."
- h. However, some argue that the Supreme Court's interpretation of the Constitution should change with the times. If so, that would dismantle the rule of law. The Court's job is to interpret the law, not make it.
- i. Those who claim that the Constitution is a living instrument, that it evolves or changes as the peoples' wants or needs change, do so because they are seeking justification for its violation.
- j. They will call it outmoded, old-fashioned, antiquated, archaic, etc., trying to convince us that the Founders could not have foreseen the peoples' needs so long ago. This is the Progressive ideal.

III. The Progressive Ideal

- a. In Canadian law and much of Europe, the Doctrine of Progressive Interpretation prevails. This means that the Constitution cannot be interpreted in the same way as an ordinary statute.
- b. Rather, under this doctrine, the constitution must be read within the context of present-day society to ensure that it adapts and reflects society's changes.
- c. If constitutional interpretation adheres to the Framers' Intent and remains rooted in the past, they fear that the constitution would not be reflective of society and would eventually fall into disuse.
- d. How judges view the constitution has a tremendous impact on their judicial decision making.

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IV. How Judicial Decision Making is Changing

- a. In the U.S., the Legal Model of **STARE DECISIS** "to stand by that which is decided" is the prevailing principle that ought to guide the courts. Basically, all but the Supreme Court are to adhere to decided cases.
- b. This policy is based on the assumption that certainty, predictability and stability in the law are the **major** objectives of the legal system. It is the Supreme Court that overturns decided Federal cases.
- c. However, even this principle is under assault by those who would **secularize** American law. Since 1870, coincidental with the academic movement in American law schools, Blackstone has been under attack.
- d. In 1870, the secularizers embraced Enlightenment evolution and anti-religious sentiment; they began pushing religion to the periphery of major institutions and **shifted** the way legal decisions were made.
- e. Scientific rationality became the norm in judicial decision making because it was viewed as the only possible form of a reasoned view of the world. Law became **autonomous** from religion and its morality.
- f. Once religious and metaphysical worldviews had been eliminated as a justification for law, law was legitimated not by the Bible, but because men say so; the law was **self-legitimated**.
- g. This prepared the way for the Supreme Court to become a policymaking institution, similar to legislatures and administrative agencies. Decision making then began a shift away from settled law to judicial **attitudes**.
- h. The Attitudinal Model hypothesizes that a judge's political ideology will predict the way that the judge decides cases. His or her world-view rather than settled case law **determines** the legal outcome.
"I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life," said Judge Sotomayor
- i. Whereas American law in the 1950's and 60's was slow to adapt to social changes, the pendulum has now swung to the other side. The notion that the law presents any real limits on political action is **nearly lost**.
- j. As if the Attitudinal Model of judicial decision making was not enough to circumvent the Constitution, and the rule of law, another approach to judicial decision making is emerging called "the new **institutionalism**".
- k. Under this scheme the judge **integrates** a concern for legal doctrine and rules with other social sciences like economics, psychology, and even resorts to the use of legal precedents established in other countries.
- l. This integration between law and the social sciences introduces "a new category" of basic **rights** which ground claims in a more just distribution of social wealth and a more effective protection from socially produced ills.
- m. When applied to international law, this approach abandons the traditional and almost universal reliance on notions of National **sovereignty** as a normative justification for choice of law rules.
- n. Instead it focuses on the welfare of the parties **affected** by the ruling. When taken in the context of international law almost any ruling can have global implications.
- o. This approach focuses the decision on the welfare of the **greatest** number of individuals and this type of analysis identifies policies that can lead to more efficient international regulation.
- p. It begins with the view that the objective of a choice of law regime should be to be to provide a legal ordering that goes as far as possible toward maximizing **global** welfare. The greatest good for the greatest number.
- q. The implications of this approach are staggering **beyond** belief and are catastrophic to any notion of a Sovereign United States of America or any other sovereign nation for that matter.
- r. Thus, if the protection of the environment is an important concern, a case could be brought against a polluter and the choice of applicable law would be determined by whichever law could procure the greatest global **welfare**.
- s. If the most globally efficient result is to be achieved, therefore, it is necessary for individual nations to find a way to **align** national interests with those of the global community.
- t. Getting rid of national sovereignty is an essential step if man is to bring about a one world government ...and it is already **being taken**.

V. Application

- a. The recent Copenhagen Climate Change conference in which Cap and Trade legislation on a global scale was to be implemented would have fit precisely into the legal decision making scheme outlined above.
- b. One world thinking, planning and legal decision making are happening NOW!!!
- c. Additionally, secularization of the law is the surest and most efficient way of marginalizing Christians. When Christians are marginalized, Biblical morality is obliterated and the voice of righteousness is stopped.
- d. The same could be said of us as believers: Psalm 11:3 declares: "*When the foundations are being destroyed, what can the righteous do?*" NIV
- e. When the Bible as our personal rule of law is overtaken by cultural practices in us, our foundations are being destroyed and our personal holiness is tainted. How are you doing?