THE NEW CONSTITUTIONAL ORDER AND AGLOBALIZATION

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I'm in agreement with prof. Tushnet that the election of Mr. Ronald Reagan as the President of the United States in 1980 can be viewed as a watershed in American constitution-making; and that the processes and contents of the new Constitutional order transcended the republican administrations of Messrs. Reagan and Bush, and flourished in the Clinton administration. In these brief comments, I want to explore the contributions of external issues and factors to the creation and nurturing of the new constitutional order. Unlike prof. Tushnet, I shall emphasize *not* the centrality of Supreme Court decisions but of politics and the decisions of the political branches to the new constitutional order. This latter emphasis is important because, in my view, of course, it more accurately reflects the reality that a constitutional order isn't simply the product of the pronouncements of the judicial oligarchy, but rather, at least if it is to be stable (and I believe the new order now is), it must be the product of the entire polity, acting primarily through its representative institutions, the Congress and the Executive Branch.

I. *The International order and the Making of the New Deal Constitutional Order*

As a non-constitutional scholar, but one who is interested in the processes of governance, I've always been struck by the relative lack of use that legal scholars of the American Constitution make of the rich history of the interplay between foreign ideas and practices, on the one hand, and the creation and perpetuation of American government on the other. Historians like Bailyn, Woods and Poccock, have of course documented (as indeed do the Federalist Papers) the extensive intellectual debts the founders of this Republic have to Eighteenth Century European thought. Similarly, many of the early cases the defined the new nation state either arose out of or were decided against the backdrop of international events. The Justices decision to avoid issuing advisory opinions, the establishment of federal criminal jurisdiction, the supremacy of the federal treaty power over state law, the obligation of state court judges to enforce federal rights, and indeed the doctrine of sovereign immunity were early examples in which the articulation of constitutional law doctrines were influenced as much by external events and ideas as by any purely domestic concerns. But, in teaching and writing about these doctrines, American Constitutional law scholars rarely explore the significance of these external influences to the ultimate shape and form that the doctrines took.

The view among legal scholars that the American Constitutional Order should be understood within the terms of a self-contained United States is perhaps no better illustrated than in the treatment of two sets of post-Civil War decisions that were crucial in structuring the Anew federalism. In *Pennoyer v. Neff*, the Supreme Court held that a state of the Union lacked the power to assert jurisdiction over a nonresident defendant unless that Defendant happened to be present within the state at the time of the assertion of jurisdiction. In explaining the rationale of the holding, the Court relied explicitly on doctrines developed in the area of international law, namely that the power of a court to exercise jurisdiction over a litigant is one that is grounded exclusively on the concept of

territoriality. In *Hans v. Louisiana* (and several other Civil War Bond cases, many of which were brought by foreigners against states of the former confederacy), the Supreme Court interposed the eleventh Amendment as a bar of the right of individuals to enforce in federal courts their federally protected interests in the non-impairment of their contractual rights by states. The generic sovereign immunity doctrine, on which the court relied, was not only a legacy of the common law, but also of natural law, a philosophy that had shaped much of the development of international law. Scholarly treatments of these doctrines, however, tend to be immunized from engagement with their international law sources.

By the time federal courts embarked on rationalizing the jurisprudence of the New Deal Constitutional order, it was no longer fashionable for them to rely on international legal principles or norms to tame domestic conflicts. The Constitutional Order of the New Deal was of course a response to the privations of the Great Depression and the conflagrations of World War II. Those privations were not unique to the United States. A seminal feature of the Great Depression, for example, was the erection of a wall of high tariffs to insulate the United States from the contagion of overproduction in Europe. The prohibition of the acquisition of gold by United States residents like the high tariff walls both symbolically and practically marked the opting out by the United States from the international economic system which such well known United States businessmen and financiers as Carnegie, Melon and Morgan had been instrumental in constructing. And then, there was the failure of the United States to join the active waging of war; that is, until it was attacked by Japan, and Germany declared war on it.

The Atlantic Charter, the San Francisco Treaty, the Bretton Woods arrangements, and the Universal Declaration of Human Rights, were all United States-led responses and counters to the shortcomings of the Great Depression and the ensuing World War. These responses by the political branches of the Government suggested the reintegration of the country into a multilaterally oriented world order. Judicial decisions were ambivalent about this reorientation. On the one hand, the courts were timid to enforce individual rights flowing directly from these new webs of international engagements. The doctrine of self-executing treaties emerged to express this ambivalence. United States courts would permit the direct enforcement of only those rights that clearly and unambiguously stated in a treaty as those of the individual, qua individual, and which are not simply derivative of the individual's membership in the community of states. Rights under the Bretton Woods arrangements were thus viewed as non-self-executing. Along the same lines, courts were extremely deferential to the political character of legal rights, so that even where a right was acknowledged to be otherwise available to the individual, the enforcement of that right could be terminated by a representation from the executive branch that the enforcement of such a right would be in conflict with the foreign interests of the United States. The doctrines of sovereign immunity and of the act of state fell into this class.

But this willingness to subject the enforcement of individual rights to the vicissitudes of political compromises ran right up against another value of the New Deal Constitutional order, namely the protection of individual liberty interests from subjugation in the name of social utilitarianism. This conflict was particularly evident with regard to the rights of military personnel in service of the global role that the United States armed

forces had come to play in the era of the cold war. Frequently, the Executive Branch, in advancing what it considered to be in the national interest, all-too-readily sacrificed even the most basic rights of individual military persons. The court's response was to draw a dichotomy between the rights of citizens, on the one hand, which remained essentially protected against governmental suppression even outside of the United States, and the rights of others which were protected only while within the sovereign territory of the United States. In this way, it was possible for the U.S. to balance both aspects of its new deal philosophy: deference to the political branches in their areas of special expertise and the protection of the liberty interests of individuals. But it did so by making central a distinction that hitherto had been observed, if at all, only at the margins.

II. Viet Nam, Watergate and the End of the New Deal Constitutional Order

It is impossible to understand the emergence and contents of the New Constitutional Order that now enfolds us with reference to the twin and related events of the Viet Nam war and the aftermaths of the Watergate crisis. In the international arena, the Viet Nam war represented the effective challenge to the political and military powers of the United States by an otherwise wretched society. The oil crises of the 1970s, and the ensuing financial debacles of the West suggested that the military and political losses in Viet Nam were not aberrational. As if to confirm this view, the forced resignation of the President of the United States, and the revelations of the post-Watergate investigations suggested a floundering political system. Throughout the late 1970s, stagflation, it seemed, had become endemic to western economies, generally, and the U.S. economy in particular. Presidential leadership, whether under Gerald Ford or Jimmy Carter was both tentative and uninspiring. And there was, of course, the Iranian hostage crisis.

Nor was the sense of powerlessness unique to the United States. In the United Kingdom, financial crises and short-lived governments were routine. The labor unions, rather than 10 Downing Street or Westminster seemed to run the country. Although somewhat less obvious, similar crises were playing themselves out in other West European countries, notably France, Germany and the Netherlands. The only Western country that seemed able to take its own fate in its own hands was Israel, which epitomized in the raid to rescue passengers of an El Al flight in Entebbe, lifted up, however temporarily, the depressive morale of the West.

By contrast, the non-Western world seemed positively upbeat. It seemed able to form cartels for all of the essential raw materials needed by Western industries and to dictate the price at which they would be sold. Using their numbers at the United Nations, they seemed able to rewrite the international rules in a variety of subject areas, including the ownership and control of foreign investments. They nationalized or expropriated Western property, and seemed to decide what, if any compensation ought to be paid.

In short, there seemed to be afoot a significant and substantial shift in the international distribution of power. While Rolls Royce and Lockheed were on the verge of bankruptcy, Arab sheikhs and governments were buying up Iowa farmlands, Harrods Department Stores and shares in Daimler Benz and Volkswagen. This was the setting that gave rise to the new order.

III> *Neoconservatism and the Making of a New Constitutional Order*

President Ronald Reagan's election was the crystallization of the reaction the failings evidenced by the institutions and governance of the post-Viet Nam era. If there was a single characteristic of those failings, it was the weakness shown by the political leaders of American society, in particular, but of Western societies generally. The basic doctrine of the reaction was that power matters. Those capable of and willing to use power were to be preferred and advanced over those who sought to promote egalitarianism. Proponents of this world view have come to be known as Aneoconservatives, and they were and are to be found as readily in the United States as in Europe. It is neoconservatives and their world view that have shaped the ANew Constitutional Order. What the elements of the order?

Besides approval of and a commitment to the use of power as a valid tool of governance, the new constitutional order has remarkably few commitments to particular principles. It is almost always the end, not the means that counts. What needs to be identified is the particular end that one seeks, and virtually any means adopted to achieve that end can be defended. An end is almost always to be preferred if it strengthens the wielder of power. And since the status quo already reflects allocation of power within society, it almost always will follow that this principle enriches the current beneficiaries of preexisting power distributions. Unlike classical conservatism, the Neoconservative Constitutional order does not decry the use of governmental power. What it wrestles with is in whose favor that power ought to be deployed.

This explains why the Constitutional Order of the Clinton Administration does not constitute a break with that which prevailed during the Reagan-Bush Administrations. The Clinton era was to neoliberalism what Reagan-Bush was to neoconservatism. The specific ends sought by neoliberalism might vary in its particulars from those of neoconservatism; but in focusing on ends rather than means as the primary determinant and validation of policy, both neoliberalism and neoconservatism approximate each other and are quite different from the New Deal Constitutional Order.

IV. *State Sovereignty, Supreme Court Supremacy and the new Constitutional Order*

I enter this debate with a lot of trepidation; but perhaps in order to earn my dinner, I ought at least to try to apply the sweeping generalizations that I made in the previous section to a recognizably legal doctrine. Many have noted the seeming paradox in the Supreme Court's state sovereignty decisions under which it has held that Congress has

only heavily circumscribed powers to abrogate state sovereign immunity, while arrogating to itself a considerable amount of power to review the rectitude and substantiality of the information on the basis of which Congress purports to be acting. If one focuses on the ends in question, and the status quo power distribution to the group being benefited by Congressional action, this apparent paradox is greatly diminished, if it is not entirely overcome. It is also notable that virtually all of these decisions have continued to generate the same 5-4 voting patterns, with none of the dissenters apparently willing to give in to stare decisis. Again, this justifies an ends-orientation as an explanation for these decisions. And, might it be that the willingness of the Court to view its exercise of power in quite different light from Congressional exercise of power reflects its perception that it is more likely to exercise its power consistently and less spasmodically than Congress is?