THE UNPREDICTABLE CONSTITUTION

edited by NORMAN DORSEN

Richard S. Arnold

Martha Craig Daughtrey

Harry T. Edwards

Betty B. Fletcher

Ruth Bader Ginsburg

A. Leon Higginbotham, Jr.

Lord Irvine of Lairg

Jon O. Newman

Sandra Day O'Connor

Richard A. Posner

Stephen Reinhardt

Patricia M. Wald

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EDITED BY

Norman Dorsen

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N.D.

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Introduction

Norman Dorsen

It would have been hard to foretell, or even to imagine, a more startling constitutional event than the Supreme Court decisions in *Bush v. Gore*, which were rendered as this book was being prepared for press. The rulings determined the 2000 presidential election, in a scenario that was almost unthinkable to those familiar with the Court's history and practices. The case is a perfect prelude to a book dedicated to the "unpredictable" Constitution.

It was not merely that the case was "political" in the sense that it decisively affected the political direction of the country for at least the next four years. Nor merely that the Court's intervention lacked judicial precedent. But also that the rationales provided by two separate parts of the five-person majority—one resting on the asserted requirements of the electoral college provision of the Constitution and the other on "problems" under the equal protection clause of the Fourteenth Amendment—were so novel in their constitutional backing that many observers were persuaded that the opinions were driven by an unswervable desire to reach a particular result.

The four-person minority was also divided in its reasoning, two justices acknowledging the equality problems but unconvinced that they required judicial intervention and the others concluding that there was no federal question in the case and therefore it should have been left to the Florida courts to decide.

My purpose here is not to present a full analysis of *Bush v. Gore*, but rather to point to the case as a way of underscoring the Constitution's unpredictability.

This was the pattern from the beginning. *Marbury v. Madison*,[1] the first case in which the Court, in 1803, invalidated a congressional statute, seemed

to present merely a narrow issue of entitlement to a federal judgeship rather than the momentous issue of the power of judicial review. And it would have been a bold seer who would have predicted, prior to the 1856 decision in *Dred Scott v. Sandford*,[2] the second time the Supreme Court struck down a federal law, that it would intervene so aggressively (and futilely) in the hypercharged political dispute whether to extend slavery to America's western territories.

An important reason that Supreme Court decisions such as these are so hard to predict is that, unlike other institutions, the Court can react only to controversies that are brought to it by the parties and must do so in the form in which they are presented.

The early cases are matched in their unpredictability by more recent rulings. While *Brown v. Board of Education*[3] was foreshadowed by a series of earlier desegregation cases involving higher education, the other leading Warren Court initiatives—such as the legislative apportionment,[4] criminal justice,[5] and school prayer decisions[6]—came to many as bolts from the blue, as did *Roe v. Wade* a few years later.[7] More recently, the Rehnquist Court has reversed sixty years of precedent by curbing congressional power based on a narrow reading of Congress's authority under the Commerce Clause[8] and by imposing federalism-related limits on legislation that seeks to regulate certain activities of the fifty states.[9]

We can be confident that further surprises are in store, that the only certainty is that there cannot be certainty about the constitutional course of the country. Among other things, the terrible events of September 11 surely will spawn novel constitutional questions that the Supreme Court will have to resolve, often no doubt in unpredictable ways.

It is therefore appropriate that the James Madison lectures presented in this volume address issues that underscore the pivotal role of the courts and suggest new directions that the judiciary may take. Four of the essays concern the administration of justice. Judge Jon O. Newman in writing about the enforceability of the "reasonable doubt" standard of proof in criminal cases and Judge Harry T. Edwards in examining the "harmless error" doctrine in criminal law both take big cuts at these two important and perplexing questions. New judicial pronouncements on these matters, whether or not "predictable," would have momentous consequences for the criminal justice system.

Judge Betty B. Fletcher and Judge Stephen Reinhardt write on the death penalty in the United States. Judge Fletcher addresses the narrowing avail-

ability of habeas corpus review in capital cases and the always present danger of executing innocent people; she concludes that the "system has it backward" by expending immense resources during appellate review but too often failing to provide adequate representation to defendants at trial. As if to prove Judge Fletcher's thesis, Judge Reinhardt's lecture provides a firsthand and searching account—literally a case study—of the execution of a man without a prior criminal record, although there was substantial doubt about his guilt. Despite these powerful testaments, it is not likely that the Supreme Court will invalidate the death penalty in the near future even though the United States is virtually isolated among developed countries in permitting this form of punishment.

Four articles consider issues of discrimination. The late Judge A. Leon Higginbotham, whose lecture was delivered in 1986 before the South African apartheid regime was dismantled, compares the American and South African experiences of racial bias within their judicial systems and suggests ways in which South Africa through enlightened statesmanship and civil rights activism could alter its oppressive system—a development that came sooner and more comprehensively than anyone could imagine at the time.

Three essays of varying types address women's rights and, more broadly, sex discrimination, as a natural sequel to popular movements supporting gender equality. Justice Sandra Day O'Connor provides a moving and perceptive glimpse of the legal world she witnessed as an honors graduate of Stanford Law School who could gain employment only as a legal secretary. She also questions the validity of a "new feminism" that posits that women and men have particular ways of looking at the world, regarding it as a throwback to the "myths we have struggled to put behind us." Justice Ruth Bader Ginsburg, who was the leading women's rights lawyer in the country while litigating for the American Civil Liberties Union, examines *Roe v. Wade* from the perspective of "judicial voice," concluding that the sweeping opinion in that case should be contrasted with the more restrained approach in contemporaneous decisions involving explicitly gender-based discrimination. And Judge Martha Craig Daughtrey traces the history of the women's rights movement and the Equal Rights Amendment from its passage by Congress to its eventual failure in the state ratification process, and she analyzes the parallel development of an equal rights jurisprudence based on the Equal Protection Clause of the Fourteenth Amendment.

Three lectures introduce additional elements to this book. Judge Richard S. Arnold explores the subject of constitutional interpretation as practiced

by James Madison, showing how Madison often refused during later controversies to rely on his own formative contributions to the Constitution but nevertheless developed a consistent, yet flexible, view of interpretation that can still enlighten today's constitutional debates. Judge Richard A. Posner, in sharp disagreement with two recent Supreme Court decisions safeguarding the rights of women and homosexuals, criticizes constitutional theorists who conceal normative goals in vague and unworkable principles of interpretation. He argues that the two opinions lack the empirical support crucial to sound decision making. And Judge Patricia M. Wald questions when a state which provides numerous governmental programs for the benefit of its citizens and denies access to such a program to particular individuals can be held constitutionally accountable. Judge Wald focuses on cases involving the provision of welfare services to an abused child and a death row defendant's challenge to the composition of the jury that sentenced him to death, but her analysis has broader implications, such as in current cases in which a government seeks to withdraw support for art museums because of the content of some of their pictures.

The final essay departs from the norm. Until the lecture in October 2000 delivered by Lord Irving of Lairg, the Lord Chancellor of Great Britain, all Madison lecturers were either a justice of the U.S. Supreme Court or a judge of the U.S. Court of Appeals. In commemoration of the fortieth anniversary of the James Madison lectures and in recognition of the increasingly global nature of law, including constitutional law, it was decided to invite a distinguished foreign jurist to deliver a lecture.

Lord Irvine did not disappoint us. He shows in vivid detail how the American system of constitutional supremacy and judicial review shares many common features with the British unwritten constitution's emphasis on parliamentary sovereignty without judicial review. He concludes that both systems translate substantially identical commitments to popular sovereignty into distinct, yet related, approaches to constitutionalism.

The James Madison Lectures were inaugurated at the New York University School of Law "to enhance the appreciation of civil liberty and strengthen the national purpose." The first four lectures were published in book form in 1963, in *The Great Rights*, edited by the first director of the series, Edmond Cahn. It contained lectures by Supreme Court Justice Hugo Black, Justice William J. Brennan, Jr., Chief Justice Earl Warren, and Justice William O. Douglas on the general philosophy of constitutional liberty. It also included a perceptive essay on "The Madison Heritage," by the histo-

rian Irving Brant, which reminded us of Madison's many contributions to the principles of liberty, including the drafting of the Bill of Rights itself.

Fourteen of the succeeding lectures were published in book form in 1987 (paperback in 1989) under the title *The Evolving Constitution*.[10] The book included a masterful introduction by Archibald Cox, "Storm Over the Supreme Court," in which Professor Cox examined earlier controversies that had enveloped the Court, discussed the changes in doctrine and role that took place in the years following *Brown v. Board of Education*, and related these events and ideas to the disputes swirling around the Court in the late 1980s.

Despite the broad range of subjects they have canvassed, the thirty-two James Madison lecturers have not exhausted the opportunities for creative approaches to civil liberty, on matters as diverse as the rights of gays and lesbians, campaign finance reform, the religion clauses of the First Amendment, the decriminalization of certain narcotic drugs, the protections accorded poor people in our society, and constitutional problems associated with immigration, cyberspace, and the rise of terrorism. In each of these areas the unpredictable is waiting to happen and to be digested in thoughtful Madison lectures to come.

NOTES

1. 5 U.S. 137 (1803).
2. 60 U.S. 393 (1856).
3. 347 U.S. 483 (1954).
4. See *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964).
5. E.g., *Mapp v. Ohio*, 367 U.S. 643 (1961); *Gideon v. Wainright*, 372 U.S. 335 (1963); *Miranda v. Arizona*, 384 U.S. 436 (1966).
6. *Engel v. Vitale*, 370 U.S. 421 (1962); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963).
7. 410 U.S. 113 (1973).
8. E.g., *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison* 120 S.Ct. 1740 (2000).
9. E.g., *Printz v. United States*, 521 U.S. 898 (1997); cf. *Alden v. Maine*, 119 S.Ct. 2240 (1999) (constitutional doctrine of sovereign immunity bars private actions against nonconsenting states in state courts).
10. The James Madison Lectures that have been published in the previous books and in this book have all appeared in the *New York University Law Review*, to which grateful acknowledgment is made for permission to republish.

Chapter 1

Government Benefits
A New Look at an Old Gift Horse

Patricia M. Wald

Tonight I am going to talk about an old problem in constitutional law: the volatile relationship between constitutional rights and government benefits. In my view, the jury-rigged doctrine of rights and benefits we are now living with deserves serious reconsideration. One aspect of that doctrine—unconstitutional conditions—may still be in flux but is moving swiftly backwards; another—fourteenth amendment procedural due process rights—seems static for the moment, mired in unattractive premises. In the current climate, many civil libertarians dread the idea of unsettling precedent. They would, in Hamlet's words, "rather bear the ills we have, than fly to others that we know not of."[1] Yet that attitude may be too timorous. As we pass through the bicentennial and enter the twenty-first century, we should not be afraid to propose changes in law or doctrine we believe are necessary—we must not accept as irreversible the battles we have lost in the past.

I begin with two recent Supreme Court decisions. The first, decided in the 1989 term, is *DeShaney v. Winnebago County Department of Social Services*,[2] a suit for damages under section 1983.[3] The facts were these:[4] infant Joshua DeShaney, placed in his father's custody after his parents' divorce, was physically beaten so regularly and so badly that he suffered permanent brain damage. Officials of the county Department of Social Services regularly received distress calls from neighbors and emergency room attendants

This lecture was delivered on October 26, 1989, and appeared in 65 N.Y.U.L. Rev. 247 (1990).

that Joshua was being abused by his father. At one point the Department temporarily placed the boy in custodial care, but shortly returned him to his father. His social worker kept orderly records of the calls and of suspicious conditions in the home but did not again try to remove the boy. "I just knew," she said later, "the phone would ring someday and Joshua would be dead."[5] After his final beating, Joshua's mother sued the county, its Department of Social Services, and various department employees, contending that Joshua had been deprived of his liberty in violation of the due process guarantee of the fourteenth amendment.

The Supreme Court affirmed the trial court's dismissal, holding that Joshua's loss of liberty could not be attributed to any unconstitutional action by the state.[6] The due process clause, the Court announced, "is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security."[7] The Court reasoned that, since the county had no obligation to provide child welfare services in the first place, it could not be held liable when the Department of Social Services failed to provide protection to the child, no matter how vulnerable he was known to be or how inevitable the tragedy. The county's sin was inaction, not action. It simply failed to do something helpful for Joshua; it did not do anything injurious to him, and that difference, the Court said, made all the difference for constitutional purposes.[8]

The second case, *Ross v. Oklahoma*,[9] decided the Term before *DeShaney*, involved a death row defendant's challenge to the composition of the jury which had sentenced him to death. The trial court had declined to excuse for cause a prospective juror who stated during voir dire that he would vote for a death sentence if the defendant were convicted; the defense instead had to use one of its nine peremptory challenges. The defendant contended on appeal that the trial court's error deprived him of one of his scarce peremptory challenges in violation of the fourteenth amendment.[10]

The Supreme Court unanimously agreed that the trial court had erred in failing to strike the juror for cause, but a majority of the Court held that the error had no constitutional significance.[11] Since the challenged juror did not sit on the panel which convicted and sentenced the defendant, the majority reasoned, the only injury to the defendant lay in the loss of a peremptory challenge; and "[b]ecause peremptory challenges are a creature of statute and are not required by the Constitution, it is for the state to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise."[12] The defendant, in the Court's words, had "received all that Oklahoma law allowed him,"[13] and that in turn

was all that the Constitution guaranteed. He had, in short, only been denied a benefit the state could have withheld in the first place.

Though the link between these two cases may not be immediately apparent, *DeShaney* and *Ross* were decided on common premises for due process purposes: both presumed that the denial or dilution of a mere privilege (as opposed to a right) properly can be characterized as government inaction, not action, and that there is a fundamental distinction between government inaction and government action that affirmatively harms an individual—that puts her in a worse position than she would have been in had government not acted. In *DeShaney,* that distinction was explicit: the Court said that the state's failure to protect a child—even one it knew was in danger—did not constitute a deprivation of liberty. "While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them."[14] The *Ross* Court's reliance on this distinction was less obvious, but no less real. Since the state was not constitutionally required to allow peremptory challenges, the defendant simply had been denied a gratuitous state benefit when he was forced to use a peremptory challenge to remedy an erroneous ruling on a challenge for cause.

In both *Ross* and *DeShaney,* the Court, critically, characterized the benefit the state failed to provide as a "gratuity" rather than a right. Thus, whether it is a "gratuitous" benefit or service that the state denied, or failed to provide, appears today to be the litmus test for whether constitutional harm has occurred. This mode of analysis has profound implications for our jurisprudence.

Over the years, the courts have developed several different verbal formulations for framing the issue. Sometimes it has been posed in terms of "rights" and "privileges": a constitutional difference exists between the state's power to infringe upon a right and its power to deny a mere privilege.[15] The same distinction appears at other times under the rubric of "burden" and "benefit": is the challenged government action a burden on the exercise of a citizen's right or just a restriction on a benefit the government was not compelled to bestow?[16] For certain kinds of benefits, the touchstone is "unconstitutional conditions": was the individual's access to government benefits conditioned upon his renunciation of constitutional rights?[17]

Whatever the verbal formulation, the premise remains the same: the Constitution enters at the point where the state constricts the individual's freedom to pursue protected private activity. But when the state simply declines to confer a benefit upon an individual, it is far less clear when or if

constitutional principles apply. An example: it is obvious that my first amendment rights are not violated if the government refuses to provide me with a copy of *Ulysses*. Even if I am indigent, no one else will give me the book, and the government's refusal has the practical effect of denying me the opportunity to read it. The result will be no different even if the state institutes, then discontinues, a program of "*Ulysses* for the poor"; the mere fact that the government decides to provide a particular benefit does not create any vested right to its continued availability.

Yet, it is frightening to think that because something is a discretionary benefit in the first place, its denial on any grounds or in any circumstance has no constitutional significance. The Constitution, after all, imposes virtually no affirmative obligations upon the states.[18] A state is probably required to establish a judicial system, and perhaps to provide police protection, but that is about it. Virtually every other service that government offers could be characterized as a privilege, in the sense that the government could withdraw it entirely. If the characterization of a government program as a privilege or gratuity removes it entirely from constitutional scrutiny, then government possesses almost infinite power to control and manipulate every aspect of our daily lives.

In fact, as government expands its role in the lives of citizens—supplying food, jobs, travel, communication, information, housing, student loans—it can no longer plausibly be contended that their loss is simply the loss of a "windfall." Questions concerning the dispersal of government largesse that once were at the periphery of constitutional adjudication today lie at its core.

My worry is that the Supreme Court, especially in recent years, has dealt with these issues in mechanical, even casual, ways, that cumulatively could significantly diminish our constitutional protections from arbitrary or even malevolent government action or inaction. In two groups of cases—those in which the Court considers alleged "unconstitutional conditions" that have been imposed on the delivery of government services or benefits, and those in which the Court tries to define government actions giving rise to procedural protections under the due process clause of the fourteenth amendment—the Court has developed a highly formalistic jurisprudence. It applies constitutional protections on the basis of whether the government withholds a service or benefit awarded to others or effectively takes away something from a citizen that belonged to him to begin with. This distinction means little in the real world; it now means everything in constitutional terms. How did we arrive at this paradox?

I. Unconstitutional Conditions

A. Historical Evolution of the Problem

At the turn of the century, prevailing doctrine held that access to government benefit programs was a privilege which the state could grant or withhold on virtually any terms it chose. In *McAuliffe v. Mayor of New Bedford* in 1892,[19] Justice Holmes, while still on the Massachusetts Supreme Judicial Court, rejected a policeman's challenge to his dismissal for violation of a regulation limiting his political activities.[20] Said Holmes, "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[21] In one sense, Holmes's analysis was stunningly unresponsive. McAuliffe had not contended that he had a constitutional right to be a policeman. His claim was that his constitutional right to freedom of speech was infringed by his dismissal. Holmes's rationale makes sense only if we accept a second, unspoken, premise: that an unconstitutional infringement of speech occurs only if the sanction for exercising free speech is the deprivation of some other right, such as the right to liberty or property, rather than just the denial of a government benefit.

In *Hamilton v. Regents of the University of California*,[22] forty-two years later, the Supreme Court echoed the same view. In that case, male students challenged on religious grounds the university's requirement that they complete a course in military science and tactics. "California," the Court held, "has not drafted or called them to attend the university. They are seeking education offered by the State and at the same time insisting that they be excluded from the prescribed course solely upon grounds of their religious beliefs and conscientious objections to war."[23] In the Court's view, California had satisfied the Constitution's requirements by affording its citizens a choice between adherence to religious beliefs and access to higher public education.

B. The Midcentury Shift

Yet, in 1958, less than twenty-five years later, the Supreme Court had acknowledged that constitutional difficulties may inhere in the selective provision or withdrawal of government largesse. In *Speiser v. Randall*,[24] the Court upheld a challenge to the state's denial of veterans' tax exemptions because the claimants refused to take an oath that they did not advocate the overthrow of the government by violent means. Rejecting the state's