Exam 2 Additional Study Notes

3. The Constitution, Race, and Civil Rights: From the Framing to the Jim Crow Era

Slavery and the Constitution's Origins

- Pre- as well as post-Revolution slave codes: slavery regarded as completely legitimate
- Constitution embodies many slavery compromises, so as to perpetuate it.
- In the North, abolition laws follow the Revolution: 1777-1804 (gradual)
- Other slavery limitations: NW Ordinance (1787); Missouri Compromise (1820)
- (imbalance of free states; Kansas-Nebraska Act supersedes MO Compromise)

(Following this are the events, Civil War and Early Reconstruction, that we already covered from *WTP2: Transformations* on Exam 1. Then…)

In many southern states, 15-20 years of competitive politics followed Redemption (from Klinkner), and then the serious movement to disfranchisement and segregation:

- "Redemption" 1869-78; the end of Reconstruction (that is, removal of the last federal troops from the South) 1877
- Post-redemption politics: Populists vs. Bourbons
- Disfranchisement and segregation laws, a few in 1870s, but mostly 1890-1910
    - Series of Court decisions limiting the Civil Rights Act of 1875 and the Enforcement Acts of 1871-72, and narrowly interpreting the 14th-15th Amendments
- Jim-Crow era civil rights politics
    - "scientific racism"
    - NAACP
    - A few Court decisions applying 14th Amendment positively
    - Unsuccessful attempts to pass a federal anti-lynching bill
- Limited New Deal attention to civil rights
- Truman executive actions: Commission on Civil Rights report, To Secure These Rights; desegregation of armed forces

The Constitution, Race, and Civil Rights: The Civil Rights Revolution

Important new ideas from Ackerman, "The Living Constitution"

- Ackerman's list of eight "cycles of popular sovereignty" in American political history
- Superprecedents and landmark legislation
- The constitutional canon
- Specifics on the civil rights revolution, below. Seen as informal higher lawmaking:
    - Signal: *Brown*
    - Proposal: stronger federal enforcement of civil rights
    - Triggering: Civil Rights Act of 1964; 1964 triggering election LBJ vs. Goldwater

- Ratification and consolidation: passage of additional laws for federal enforcement (VRA 1965, CRA 1968); Court decisions upholding these; Nixon administration implementation.

The Civil Rights Revolution

Precursor cases to Brown

- *McCabe v. AT&SF* (1914) requires access to facilities regardless of low demand
- Cases regarding state-run professional schools: if a state provides law school (*Gaines* 1938*, Sipuel* 1948, *Sweatt* 1950,) or other professional education (*McLaurin* 1950) for its white residents, it must provide training of equal quality within state to all residents.

Brown v. Board of Ed. 1954

- Immediate application of Brown to segregation of public facilities other than schools, all in per curiam opinions upholding lower federal courts (1954-58): municipal theaters, public beaches and bathhouses, municipal golf courses, municipal buses, parks.

Civil Rights Act of 1964

- upheld as an exercise of the Commerce power in *Heart of Atlanta Motel* (1964), *McClung* (1964)

Voting Rights Act of 1965

- including "preclearance requirement": certain jurisdiction identified as having a history of racially discriminatory voting laws would be required to submit any changes in election law to DoJ in advance.
- upheld in *Katzenbach v. Morgan* (1966) under enforcement clause of the 14th A.: Congress can extend the rights implied by "equal protection" as seen by previous Court decisions, overturning *Lassiter* (1959) (which had upheld literacy tests).

Civil Rights Act of 1968, including (Title VIII) Fair Housing Act

Subsequent cases narrowed these civil rights decisions.

- Many cases interpreting Brown in a narrow sense of "anti-discrimination" or "color-blindness", as opposed to "anti-subordination" (see Snyder, "How the Conservatives Canonized Brown")

Most recently:

- Parents Involved in *Community Schools v. Seattle School District No. 1* (2007) overruling Seattle & Louisville voluntary school integration programs due to their use of individual racial classifications.
    - From Roberts's plurality opinion: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."
- *Shelby County v. Holder* (2013) overruling VRA Sec. 5 preclearance requirements.

4. Gradual Development of Institutions: Political Parties and Presidential Elections
The system for electing presidents emerged from a single constitutional amendment (the 12th) and, mostly, many informal acts. Parties and their processes turned out to play a critical role.

Framer expectations vs. rapid emergence of parties:

- VP candidates
- pledged winner-take-all electors
- democratic ideal
- party nomination process → conventions
- 2-party system; justifications for party system in maintaining democracy
- 1972: the Party Game becomes the Primary Game
- the invisible primary?
- A new articulation of party role in democracy: gatekeeper role (Levitsky & Ziblatt)
- polarization and the temptation to exacerbate it (Gingrich; birtherism)
- the authoritarian threat to liberal democracy (cf. Framers' fear of democracy)

(See also extensive earlier notes linked to website: "Notes on parties and elections")

Gradual Development of Institutions: The Administrative State

The Constitution and the Administrative State
The constitutional issue: what is our constitutional understanding concerning the rules of the administrative state? How did that understanding develop? How can the administrative state maintain democratic legitimacy?

- Framer expectations: A relatively small executive branch; Congress may impose administrative restrictions on executive branch agencies if it chooses. The example of the Treasury. (Lessig & Sunstein)
    - Contrast the modern theory of the "unitary executive"
- Development of "semi-powered" bureaucracy → stability of democratic state (Riggs)
    - spoils system "rotationism" → support for the Pendleton Act, civil service
    - Morrill Act → diverse, externally-oriented professionals
- Administrative procedures (Pierce):
    - expansion of bureaucratic role in New Deal; piecemeal adjudication of "cases"
    - APA: a system of accountable rulemaking → democratic responsiveness and rule-of-law values
    - "hard-look" judicial review of agencies' justifications of their rules → outsize interest-group influence and disuse of rulemaking processes
    - enhancement of oversight by elected officials
        - executive branch review, esp. since 1981: EO 12291 Regulatory Cost Benefit Analysis reviewed by White House Office of Information and Regulatory Affairs (OIRA)
        - 1996 Congressional Review Act (extensive use 2017-18)

- Intra-executive branch checks and balances? (Katyal; Adair & Simmons, Davidson)
    - Since New Deal, executive power increased relative to Congress, courts; need to protect & enhance devices for internal exec branch constraint.
    - The bureaucracy can draw on two sources of legitimacy: expertise, plus democratic support inasmuch as they implement the policies of the President.
    - inter-agency reporting requirements
    - encouraging professional careers in bureaucracy (based on Foreign Service); more leadership by upper-level civil service rather than political appointees
    - "Dissent Channel" (also from Foreign Service)
    - "internal adjudication" processes: ultimately, checks rely on publicity
        - replace Assistant Attorney General for OLC with an administrative-judge-type position
        - another model: ethics officers under Ethics in Govt Act, informing officials and potentially publicizing violations
        - another good model: DoJ special prosecutor rules, protecting SP from direct presidential firing and from day-to-day control, although AG retains a veto over major decisions
        - in these and other such laws, overriding or removal is possible but triggers reporting to Congress
    - Inspectors General
        - development
            - auditors (Treasury Dept.)
            - Budget & Accounting Act of 1921: GAO
            - Inspectors General Act of 1978
        - partial independence
            - presidential nomination with Senate confirmation
            - firing requires notice to Congress
            - other congressional reporting requirements for IG findings
            - agency head may not interfere with audits/investigations
        - Publicity as key to IG effectiveness
            - note role of Congress in this

5. Informal institutions, watchdogs, and playing hardball
(see above for "watchdogs")

Constitutional hardball

- constitutional norms or conventions and their importance; their claimed violation characterizes hardball:
    - actions that defy constitutional conventions for partisan ends; or
    - aggressive attempts at self-entrenching, informal, relatively sudden constitutional change
- judicial nomination politics: Bork; filibustering of nominees; Garland; "nuclear option"
    - previous constitutional norms against ideological opposition, filibustering, etc.?
- other possible examples of hardball
    - New Deal actions
    - government shutdown/debt default as budget negotiation tactics
    - pro forma sessions to prevent recess appointments
    - aggressive executive actions, such as DACA
    - (the problem: it's always good politics to <u>accuse</u> the other side of hardball)
- Asymmetry? Does constitutional "restorationism" dispose Repubs toward lower regard for constitutional conventions?
- the logic of escalation, leading to instability of constitution