Why Supreme Court Opinions Are Not The "Law Of The Land", And How To Put Federal Judges In Their Place

Central to the silly arguments made by the "Convention of States Project" (**COSP**) is their claim that 200 years of Supreme Court opinions have increased the powers of the federal government (as well as legalized practices such as abortion); that all these opinions are "the Law of the Land"; and we need an Article V convention so we can get amendments to the Constitution which take away all these powers the Supreme Court gave the federal government.

But the text of Article V contradicts COSP's claim. Article V shows that our Constitution can be amended only when three fourths *of the States* ratify proposed amendments. The Supreme Court has no power to amend our Constitution. And it's impossible for an amendment to take away powers our Constitution doesn't grant.

1. **First Principles**

Let's analyze COSP's silly argument. We begin by looking at First Principles.

- The Judicial Branch was *created* by Art. III, §1, US Constitution. Accordingly, it is a "creature" of the Constitution.[1]
- The federal government came into existence *when* the States, acting through special ratifying conventions held in each of the States, ratified the Constitution.[2]

Since the Judicial Branch is merely a "creature" of the

Constitution, it follows that *it is subordinate to the Constitution*, and is completely subject to its terms. It may not annul the superior authority of the States which *created* the Judicial Branch when they ratified the Constitution;[3] and as a mere "creature" of the Constitution, it may NOT change the Constitution under which it holds its existence![4]

2. **Supreme Court Opinions are *not* "the Law of the Land"**

Article VI, cl.2, US Constit., the "supremacy clause", defines "supreme Law of the Land" as the Constitution, and acts of Congress and Treaties which are authorized by the Constitution. Supreme Court opinions aren't included!

Furthermore, Art. I, §1, US Constit., vests all law-making powers granted by the Constitution *in Congress*. Our Constitution doesn't grant any lawmaking powers to the Judicial Branch.

So why does everybody say, as we heard during the Kavanagh confirmation hearings, that *Roe v. Wade* is "the Law of the Land"? Because Americans have been *conditioned* to believe that the Supreme Court is superior to our Constitution; that their opinions about our Constitution are "law", and we are bound by them unless and until they issue new opinions which release us from their previous opinions.

3. **Organic & statutory law and the totally different "common law" precedent followed in courts**

Americans have been conditioned to ignore the huge distinctions between organic and statutory law, on the one hand; and *the common law* which is embodied in the *precedents* followed by judges in litigation.

Organic Law

Black's Law Dictionary defines "organic law" as

"The fundamental law, or constitution, of a state or nation,

written or unwritten;[5] that law or system of laws or principles which defines and establishes the organization of its government."

The organic laws of the United States are

- The Declaration of Independence – 1776
- Articles of Confederation – 1777
- Ordinance of 1787: The Northwest Territorial Government
- Constitution of the United States – 1787

The Articles of Confederation was our first Constitution. It was replaced by our Constitution of 1787 when it was ratified June 21, 1788. The Northwest Ordinance was superseded by the transformation of the area covered by the Ordinance into States [pursuant to Art. IV, §3, cl. 2, US Constit.].

Do you see how absurd is the claim that the Supreme Court, a mere "creature" of the Constitution of 1787, has the power to change *the Organic Law of the United States*?

Statute Law

Black's Law Dictionary defines "statute law" as the

"Body of written laws that have been adopted by the legislative body."

As we saw above, all legislative Powers *granted by our Constitution* are vested in Congress (Art. I, §1). Acts of Congress qualify as part of the "supreme Law of the Land" only when they are made *pursuant to Authority granted to Congress by the Constitution* (Art.VI, cl. 2). When Acts of Congress are not authorized by the Constitution, they are mere usurpations and must be treated as such.[6]

Common Law

The "common law" applied in courts in the English-speaking countries *came from the Bible*.[7] The Bible has much to say

about our relations with each other: don't murder people, don't maim them, don't steal, don't bear false witness, don't tell lies about people, don't be negligent, don't cheat or defraud people, and such. The Bible provides for Judges to decide disputes between people and empowers Judges to require the person who has violated these precepts to pay restitution to the person whom he harmed. So, e.g., the Biblical prohibitions against bearing false witness and slandering people became our modern day concepts of slander, libel, and defamation. These principles were applied in the English courts from time immemorial, and are applied in American Courts. Modern day American attorneys litigate these common law concepts all the time. So if I am representing a client in an action for say, fraud, I look at the previous court opinions in the jurisdiction on fraud, and see how the courts in that jurisdiction have defined fraud – i.e., I look for "precedents" – the courts' previous opinions on the subject – *and I expect the Judge on my case to obey that precedent*.[8]

THIS is the "common law". It is "law" in the sense that it originated with God's Word; and from "time immemorial" has been applied *in the Courts* of English speaking countries. **But this precedent is binding or persuasive *only* on courts.[9]** As precedent *for judges to follow*, it is never "the law of the land"!

So, keep these three categories – *organic, statutory, and common law* – separate, and do not confuse *court precedent* with the "Law of the Land". The latter is restricted to the Organic Law, and statutes and treaties authorized by the Organic Law.

Now let's look at the constitutional jurisdiction of the federal courts.

4. **What kinds of cases do federal courts have constitutional authority to hear?**

The ten categories of cases the Judicial Branch has authority to hear are enumerated at Art. III, §2, cl. 1, US Constit.[10]

The first category is cases "arising under this Constitution". In Federalist No. 80 (2nd para), Hamilton shows these cases concern "*provisions expressly contained*" in the Constitution. He then points to the restrictions on the authority of the State Legislatures [listed at Art. I, §10], and shows that if a State exercises any of those prohibited powers, and the federal government sues the State, the federal courts would have authority to hear the case (3rd & 13th paras).

So if a State enters into a Treaty, or grants Letters of Marque & Reprisal, or issues paper money, or does any of the other things prohibited by Art. I, §10, the controversy would "arise under the Constitution" and the federal courts have constitutional authority to hear the case.

Likewise, if a State passed a law which violated the Constitution – say one requiring candidates in their State for US Senate to be 40 years of age – instead of the 30 years prescribed at Art. I, §3, cl. 3 – the federal courts have constitutional authority to hear the case.

So *the purpose of this category is to authorize the Judicial Branch to* ***enforce*** *the Constitution* – not re-write it!! [11]

Now let's look at one way the Supreme Court butchered our Constitution in order to strike down State Laws they didn't like.

5. **How the Supreme Court violated the "arising under" clause to hear cases *they have no constitutional authority to hear***

Let's use "abortion" to illustrate the usurpation. Obviously, "abortion" is not "expressly contained" in the Constitution. So abortion doesn't "arise under" the Constitution; and the

constitutionality of State Statutes prohibiting abortion doesn't fit into any of the other nine categories of cases federal courts have authority to hear. Accordingly, federal courts have no judicial power over it. *The Supreme Court had to butcher words in our Constitution in order to usurp power to legalize abortion.* This is what they did:

The original intent of §1 of the 14th Amendment was to extend citizenship to freed slaves and to provide constitutional authority for the federal Civil Rights Act of 1866. That Act protected freed slaves from Southern Black Codes which denied them God-given rights.[12]

Now look at §1 where it says, "nor shall any state deprive any person of life, liberty, or property, without due process of law;"

That's the "due process" clause. As Professor Berger points out [ibid.], it has a precise meaning which goes back to the Magna Charta: it means that a person's life, liberty or property can't be taken away from him except by the judgment of his peers pursuant to a fair trial.

But this is how the Supreme Court perverted the genuine meaning of that clause: In *Roe v. Wade* (1973), they looked at the word, "liberty" in the due process clause and said, "liberty" means "privacy", and "privacy" means "a woman can kill her unborn baby".[13]

And they claimed they had jurisdiction to overturn State Laws criminalizing abortion because the issue *arises under* the Constitution at §1 of the 14th Amendment! [ibid.]

The Supreme Court redefined words *in Our Constitution* to justify the result *they* wanted in the case before them.

The Supreme Court didn't "enforce" the Constitution – they butchered it to fabricate a "constitutional right" to kill

unborn babies.

And the lawyers said, “It’s the Law of the Land”; the People yawned; and the clergy said, “the Bible says we have to obey civil government – besides, we don’t want to lose our 501 (c) (3) tax exemption!”

6. **What are the remedies when the Supreme Court violates the Constitution?**

The opinions of which the convention lobby complains constitute *violations* of our Constitution.[14] The three remedies our Framers provided or advised for judicial violations of our Constitution are:

1. In Federalist No. 81 (8th para), Hamilton shows Congress can impeach and remove from office federal judges who violate the Constitution. *Congress is competent to decide whether federal judges have violated the Constitution!* Impeachment is their “check” on the Judicial Branch.
2. In Federalist No. 78 (6th para), Hamilton shows the Judicial Branch must rely on the Executive Branch to enforce its judgments. If the President, in the exercise of his independent judgment and mindful of his Oath to “preserve, protect and defend the Constitution”, determines that an opinion of a federal court is unconstitutional; *his Duty* is to refuse to enforce it. *The President is also competent to decide whether federal judges have violated the Constitution!* Refusing to enforce their unconstitutional judgments is his “check” on the Judicial Branch.
3. On the Right & Duty of the States – *who created the federal government when they ratified the Constitution* – to smack down their “creature” when their “creature” violates the Constitutional Compact the States made with each other, see Nullification: The Original Right of

Self-Defense.

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Endnotes:

[1] "*Creature*" is the word our Founders used – e.g., Federalist No. 33 (5th para) & Jefferson's draft of The Kentucky Resolutions of 1798 (8th Resolution).

[2] Art. VII, cl. 1, US Constit., sets forth ratification procedures for our Constitution.

[3] Madison's Virginia Report of 1799-1800 (pp 190-**196**).

[4] Madison's Journal of the Federal Convention of 1787 shows that on July 23, 1787, the Delegates discussed who was competent to ratify the proposed new Constitution. Col. Mason said it is "the basis of free Government" that only the people are competent to ratify the new Constitution, and

"…The [State] Legislatures have no power to ratify it. They are the mere creatures of the State Constitutions, and cannot be greater than their creators…"

Madison agreed that State Legislatures were incompetent to ratify the proposed Constitution – it would make essential inroads on the existing State Constitutions, and

"…it would be a novel & dangerous doctrine that a Legislature could change the constitution under which it held its existence…."

It's equally novel & dangerous to say that the Supreme Court may change the Constitution under which it holds *its* existence.

[5] It is said England doesn't have a written constitution.

[6] Acts of Congress which are not authorized by the enumerated powers are *void.* They are not made "in Pursuance" of the Constitution and have supremacy over nothing. Federalist No. 27 (last para) says:

"…the laws of the Confederacy [the federal government], as to the ENUMERATED and LEGITIMATE objects of its jurisdiction, will become the SUPREME LAW of the land; to the observance of which all officers, legislative, executive, and judicial, in each State, will be bound by the sanctity of an oath. Thus the legislatures, courts, and magistrates, of the respective members [the States], will be incorporated into the operations of the national government AS FAR AS ITS JUST AND CONSTITUTIONAL AUTHORITY EXTENDS…" [capitals are Hamilton's]

See also Federalist No. 33 (last 2 paras) and Federalist No. 78 (10th para).

[7] John Whitehead mentions the Biblical origin of the common law in The Second American Revolution.

[8] Art. III, §2, cl.1 delegates to federal courts power to hear "Controversies between Citizens of different States." Much of the litigation conducted in federal courts falls into this category. These lawsuits aren't about the Constitution. Instead, they involve the range of issues people fight about in State Courts: personal injury, breach of contract, business disputes, fighting over property, slander & libel, etc. In deciding these cases, federal judges are expected to follow the "common law" precedents.

[9] In Federalist No. 78 (next to last para), Hamilton discusses how judges are bound by "precedents" which define and point out their duty in the particular cases which come before them.

[10] In Federalist No. 83 (8th para), Hamilton says:

"…the…authority of the federal …[courts]…is declared by the Constitution to comprehend certain cases particularly specified. The expression of those cases marks the precise limits, beyond which the federal courts cannot extend their jurisdiction…"

[11] James Madison agreed that the purpose of the "arising under this Constitution" clause is to enable federal courts to enforce the Constitution. At the Virginia Ratifying convention on June 20, 1788, he explained the categories of cases federal courts have authority to hear. As to "cases arising under this Constitution", he said:

"…That causes of a federal nature will arise, will be obvious to every gentleman, who will recollect that the states are laid under restrictions; and that the rights of the union are secured by these restrictions. They may involve equitable as well as legal controversies…"

[12] This is proved in Harvard Professor Raoul Berger's meticulously documented book, **Government by Judiciary: The Transformation of the Fourteenth Amendment**.

[13] In **Roe v. Wade (1973)**, the Supreme Court said under Part VIII of their opinion:

"…This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is … is broad enough to encompass a woman's decision whether or not to terminate her pregnancy…"

[14] Many Supreme Court opinions violate our Constitution. Wickard v. Filburn (1942), discussed HERE, is another of the most notorious. But we elect to Congress people who don't know our Constitution or The Federalist Papers; and they are unaware of their Duty – imposed by their Oath of office – to function as a "check" on the Judicial Branch by impeaching federal judges who violate our Constitution.