The BEACON SpotLight

A Study of Constitutional Issues by Topic

Issue 18: Assessing Claims of Unconstitutional Government Behavior

If conservatives had a vote for every time one of us asserted that some federal activity that had already passed the muster of the Supreme Court was nonetheless "unconstitutional," surely we'd never lose another election.

But, not only does this practice of asserting unconstitutional government behavior ultimately amount to sticking one's head in the sand, its utter ineffectiveness also tragically plays right into our opponents' all-too-winning hands.

Now, openly stating that we need to stop making powerless assertions doesn't have anything to do with accepting the Court's self-appointed power of Judicial Review. Nor does it relate to any false belief that the Court has the power to ignore the Constitution's constraints throughout the Union.

It simply means that we conservatives, libertarians, strict-constructionists and patriots must discover how our political opponents win, when—by any rational reading of the Constitution—they should lose. In other words, we need to discover the critical piece of the puzzle that we are currently missing, that keeps us from winning—that keeps us from restoring limited government and individual liberty.

In our grand quest, we must realize that our opponents will never willingly share with us the secrets of their amazing success, that have given them spectacular results for decades and even centuries.

Thus, it is up to us to figure it out. Do not listen to them. Do not believe them. Quit buying into their false explanations which only lead us further astray.

To regain our freedom, we cannot continue to do in the future what we've unsuccessfully done in our past.

We must come up with something better—a clear break from past efforts which failed us.

To start off on the right foot, it is best to simply admit that we do not yet understand how federal actions which appear to be unconstitutional are able to pass constitutional muster. Not only is this more honest, but importantly it puts us in the proper frame of mind to discover what we do not yet know.

After all, our opponents have pulled off a seemingly-impossible political coup—their actions, which by every appearance cannot be constitutional, are yet approved. We must learn their secrets if we are ever to stop them and correct past transgressions.

Thankfully, nothing any federal official—including Supreme Court justices—can do, can ever change the Constitution. Indeed, only ratified amendments change the Constitution and only States may ratify amendments.

The necessary consequence of this simple truth is that nothing the Court has ever done has actually changed the powers allowed Congress and the U.S. Government.

Since members of Congress and federal officials must swear an oath to support the Constitution, we know that they are subservient to it. The servant cannot become the master, in the Union.

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The long and short of it is that our political opponents have simply discovered a hidden means to exercise a power that is yet expressly delegated to them, in a way that we conservatives have so far failed to comprehend.

Either the Constitution as originally ratified—or as amended—gives members of Congress and federal officials the authority to exercise vast powers that conservatives do not yet understand.

And, to cut short a largely-unproductive search, the author will answer that the power exploited has always been a part of the original Constitution, even as it took a great amount of time to incrementally exploit so as to best avoid detection (after all, correctly-diagnosed problems are easiest to cure).

Conservatives must change tactics—instead of claiming various court-sanctioned actions are unconstitutional, patriots must seek to do the opposite—we must now prove how various actions are constitutional, in order to explain what is actually happening.

In this quest, we don't care if 999 ways to a given end would be unauthorized—we are searching for the one way that can be allowed. Only by explaining how our opponents can actually succeed can we ever cure that single political problem facing us—that of members of Congress and federal officials being able to bypass their constitutional constraints, with impunity.

Indeed, the important first step to correct our errant ways is to learn the fundamental difference between something always being unconstitutional—"facially" unconstitutional ("on its face"), and something being unconstitutional only "as applied" to the specific person and matter before the court.

After all, "facially unconstitutional" means that government can *never* perform the action in question, while unconstitutional "as applied" to a particular case acknowledges that, under the right circumstances, a given action can yet be lawfully performed (but we are arguing that it can't be allowed in our case).

In other words, if government can carry out an action, even if only in a very special case, then the action can never be facially unconstitutional. It may yet be unconstitutional in 999 cases out of 1,000, but that in one special case, *it can be lawfully performed*.

Thus, it is up to us conservatives, first and foremost, to quit being so sloppy, ignorant, arrogant and wrong. We must stop asserting too much. We also need to stop confusing irrelevant symptoms with our single political problem. We must prove how our opposition succeeds, cleverly, where we know they must fail.

Therefore, our goal must be to search out the highly-unusual set of circumstances that would allow the government to perform actions that are otherwise prohibited (in the normal case).

This difference in strategy starts us down the correct path to rediscovering liberty and limited government.

It is best to simplify the principles involved, to ensure one understands the true objective.

Let's examine a hypothetical case—let's say an experienced magician makes the outrageous claim that he has the real power to perform his spectacular feats.

In this case, the magician claims he can 1) saw a woman in half and then put her back together, 2) levitate off the ground, 3) make large objects disappear and 4) escape from an inescapable enclosure.

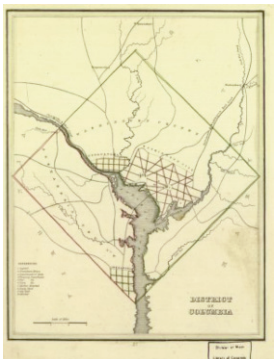
Now, in our gut, we know that no human being can do any of these things. We know that he tricks us with illusions. But, to actually prove his claim false, we need to show how he pulls off his tricks. We must expose to the bright light of day his clever sleights of hand, his hidden wires, his trap doors, his false stands, and his secret compartments.

Indeed, could we really ever prove our case merely by asserting that his magic is "unbelievable"? Certainly not, even when no one believes that the magician is truly magical. Sadly, however, that is not necessarily the case with federal servants, who are now commonly thought to be able to exercise powers directly throughout the Union which the U.S. Constitution does not enumerate and otherwise prohibits.

Similarly, it is up to conservatives to prove the legal sleights of hand used by the Supreme Court to allow otherwise disallowable federal actions.

To Restore Our American Republic, we need only show how one clause of the Constitution—strictly construed—can actually support the action that is normally beyond allowable government action.

And, one finds the U.S. Constitution's highly-unusual exception to all of its normal rules in Article I, Section 8, Clause 17—the clause for the District Seat.



While all of the Constitution's normal rules are given to Congress and the U.S. Government by all the States of the Union—by their ratification of the U.S. Constitution (under the Article VII ratification process)—the seventeenth clause of the eighth section of the first article is an anomaly.

Indeed, this clause is *conditional*, meaning ratification of the Constitution, did not, by itself, allow the exercise of the special powers therein detailed.

Only after the mechanism described in said Clause 17 was accomplished could the powers of the clause be exercised. In other words, ratification of the Constitution merely "cocked the hammer" regarding said Clause 17. While all of the States bought off on this arrangement, they were not all involved in the pulling of the trigger accomplished by completing the mechanism described in said Clause 17.

And, the condition that later pulls the trigger (for Congress to be later able to "exercise exclusive Legislation, in all Cases whatsoever"), is the "*Cession* of particular States, and the *Acceptance* of Congress" of the land and governing power over the ceded parcel.

Thus, once "particular" States—"by Cession"—cede to Congress a given parcel or parcels of land, and once Congress accepts, then and only then may members of Congress finally exercise their exclusive legislation powers "in all Cases whatsoever" in and over that land.

And, the "particular" States which ended up later ceding the area that, in time, became the District of Columbia, were only Maryland and Virginia.

But, because the lands of Virginia—Alexandria—weren't ultimately needed, they were later retroceded back to Virginia, in 1846. Today, only the former lands of Maryland make up the District Seat.

The exclusive power exercised in D.C. today doesn't directly come from action of all the States, *only one*.

That only the particular State of Maryland individually ceded to Congress a parcel of land—and the ability to govern locally that parcel—shows that members of Congress may here exercise powers *unlike those enumerated elsewhere in the Constitution*.

Indeed, since Maryland had already ratified the U.S. Constitution years earlier—transferring to Congress and the U.S. Government the powers enumerated in the Constitution—it was not *and could not be* those powers that said Clause 17 could be discussing.

Therefore, study of the U.S. Constitution beyond Article I, Section 8, Clause 17 does nothing to help understand the powers discussed in this unique clause.

That members of Congress may exercise "*exclusive*" legislation "in all Cases whatsoever" shows that in the ceded parcel, with its 1791 cession for D.C., Maryland reserved unto itself *none* of its former powers (that had remained with it after its ratification of the U.S. Constitution, in 1788).

Members of Congress must necessarily make all their own rules in D.C., as they go along, for no other parameters are anywhere given them for this area.

Indeed, no State, State-like, or District constitution exists to guide and direct federal servants operating exclusively in the District of Columbia. Said Clause 17 combines, with the enumerated federal powers, *the powers that are elsewhere exercised by States* (but, with none of the limitations ever imposed on States).

Thus, imagine the powers a State legislature could exercise, if no State Constitution guided and directed their action. Well, this is precisely the condition of Congress in D.C., except that neither is the District a "State" that is expressly prohibited from exercising powers found in Article I, Section 10 of the U.S. Constitution.

In the District Seat, the otherwise-local legislation that is elsewhere enacted by States, in conformance to their State Constitution and the U.S. Constitution, is, in the District Seat, *up to members' inherent discretion.*

But, their real "magic" has been how to extend this unique but permitted power beyond the District's geographic borders, since those borders cannot exceed ten miles square (100 square miles).

The Supreme Court, in its 1821 case of *Cohens v. Virginia*, provided that *magic*, saying:

> "The clause which gives exclusive legislation is, unquestionably, a part of the Constitution, and, as such, binds all the United States."[1]

This ruling directly upholds the extending of the laws enacted by Congress in pursuance of the exclusive power of Article I, Section 8, Clause 17, *beyond* the District's borders, thereby "binding" the States.

The quoted Court reference gives away its legal sleight of hand, by referring to the words of Article VI, Clause 2 of the U.S. Constitution, which say:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof…shall be the supreme Law of the Land."

Article VI next goes on to specifically detail the implications of those laws enacted in pursuance of the Constitution—that they bind the States through their judges.

The long and short of this understandable reasoning is that since even Article I, Section 8, Clause 17 is "part" of "This Constitution," then the letter [the strictest words] of Article VI mandates that even laws of Congress enacted in pursuance of said Clause 17 also "bind" the States.

Therefore, by the 1821 *Cohens* opinion, these otherwise-local laws of Congress enacted under said Clause 17 *may be enforced beyond the District's boundaries!*

Of course, the trick which ultimately allows this extension is to realize the very limited extent to which those laws may actually ever "bind" the States.

That it would allow federal marshals pursuing an alleged criminal who is suspected of breaking (within the geographic borders of D.C.) a D.C. congressional law, to pursue their suspect as he flees into neighboring States, cannot be questioned.

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1. *Cohens v. Virginia*. 19 U.S. 264 @ 424. 1821.

However, the "binding" of States doesn't mean these D.C.-based congressional laws *directly* bind the States in other matters—that exclusive laws directly apply throughout the Union, on people who never step foot in D.C. or who never "volunteer" to fall under its laws.

Of course, this is not how alleged federal suspects ever seek to defend their innocence in court. Do not expect to win your federal case when you and your attorney do not even know what is going on and thus fail to bring up the correct points of law and instead argue a wrong set of facts.

The seemingly-magical power of Congress and the Court is simply the legal sleight of hand involved in taking the highly-unusual exception to all the Constitution's normal powers and extending it beyond its proper geographic constraints (while keeping one's cards well-hidden).

All of federal legislation apart from strict construction of the U.S. Constitution follows this same path—for it is the only route that offers servants a means to exercise their inherent discretion (that is allowed in D.C. [and allowed in "like Authority" areas—"Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings"]).

Like the clever man claiming to be an all-powerful magician, federal servants who claim unlimited federal power throughout the Union only deceive us. They seek to extend an allowed power far beyond its rightful confines, over people not following what is going on.

Conservatives may close this clever loophole, by learning all about it and responding accordingly.

While the current contradiction found in the U.S. Constitution allows the letter of the Constitution to overrule its spirit, we can remove that contradiction by amending the Constitution. We can finally provide the needed exception to the current rule that all of the Constitution is part of the supreme Law of the Land that binds all the States.

Truth is the enemy of the oppressive state—expose the lie and regain our freedom!

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